A Further Comment on Warranty in Sale

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If Professor Durnford's latest defence of the law of sale in Quebec proves anything it proves his innate conservatism both as a social animal and as a Quebec lawyer. As illustration, two quotations from his "Apparent Defects in Sale Revisited"[1] may serve.

The first, in support of his position that the modern buyer of an object of worthwhile magnitude[2] will protect himself by retaining an expert unless he is able to obtain an express guarantee, is "If I may be permitted to refer, as did Professor Gow, to a principle of Roman law, I would like to cite a maxim that I feel still has relevance even in this twentieth century welfare state of ours: *Vigilantibus non dormientibus juvat lex*".[3]

Without shadow of a doubt Professor Durnford's psyche can resist all the blandishments of the modern salesman. He is fortunate. Even so, perhaps the writer may be permitted to stress that the principle of the Civil (Roman) Law to which he referred, namely *bona fides*, was a principle of the substantive law of sale[4] whereas the adverse maxim is primarily part of the law of prescription.

The second, rejecting the not very hopeful suggestion made by the writer that Canada might look forward to a Uniform Sale of Goods Act, is "it is unthinkable that the Quebec Civil Code provisions on the contract of sale should be replaced by a Uniform Sales Act, as the same would undoubtedly be quite different in its approach. As Quebec already has its own civil law system, why introduce another which would inevitably lead to confusion because of the differences of language and style ?"[5] Assuming by "another" is meant not merely another civil law system, but any other system of law whatever, the French always excepted, then Professor

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1 (1964) 10 McGill L.J. 314.

2 It is not clear from Professor Durnford's text to whom the magnitude refers: what may be insignificant to the inhabitant of a chateau in Outremont may be of considerable magnitude to the cave dweller on the Lakeshore.

3 *Op. cit.* p. 359.

4 10 McGill L.J. at p. 249.

5 *Op. cit.*, p. 360.

Durnford does not stand alone. In the recent decision on sale of *Monsanto Oakville Ltd.* v. *Dominion Textile Co. Ltd.*,[6] Tremblay, C.J. could say, "C'est une question de fait que le premier juge n'a pas déterminée parce qu'il a décidé la cause en se basant sur des autorités américaines et des décisions rendues en vertu de lois en vigueur dans les autres provinces canadiennes. Il me faut donc résoudre cette question sans son aide." The message is clear — in sale there will be no co-operative federalism !

Notwithstanding this Quebec rejection of a plea for co-operation in a sphere of law which affects the country as a whole, the writer dares to submit that this rejection has been far too hasty and without proper consideration being given either to the plea or the evidence supporting it. In this article he hopes to show that co-operation, such as suggested by him, not only in no way threatens any violation of Quebec's "sacred rights" but seems to have been welcomed, in an as yet restricted but not unimportant sphere, by countries whose claims to be inheritors of the Civil Law are no less legitimate than those of Quebec.

Before proceeding to the evidence it may be worthwhile to dwell for a moment on the nature of the plea for co-operation. It was, and is, not as Professor Durnford's language above quoted seems to suggest that the law of sale in Quebec be abandoned and replaced by the law of the English Sale of Goods Act. It was, and is, a plea that the advantages of each system can be incorporated into a Uniform Act. It is true that in many spheres the techniques of the Common Law and of the Civil Law do not permit of worthwhile co-operation. For example, there is no point in seeking to combine cause, as a ground of obligation, with English consideration, although probably each could be eliminated with considerable advantage to the legal systems concerned.[7] On the other hand the

[6] Unreported judgment of the Quebec Court of Queen's Bench, District of Montreal, no. 7469.

[7] In England the substantial abolition of consideration was recommended in 1937 by the Law Revision Committee. Cause as a ground of obligation is almost indigenously French and outwith the main stream of Civil Law thinking — "... if those who framed the Code Civil had appreciated the fundamental principles of the law of contract as clearly as did Grotius, Vinnius and Voet, and indeed their own Molinaeus, they would have saved the world a nightmare of confusion from which it has not even yet recovered. It is satisfactory, however, to note that the German Code ... has returned to the pristine simplicity of the law as it obtained among the foremost nations of the Continent of Europe until the Code Napoleon, under the influence of Domat and of Pothier, who unfortunately was himself influenced by Domat, led them astray" — per Villiers, A.J.A., rejecting both cause and consideration in *Conradie* v. *Rossouw* 1919 A.D. (S. Africa) 279 at p. 323.

respective dogmas of the law of sale both in the Common Law and the Civil Law have for long enough been tending to converge. This tendency has permitted recent co-operation by both systems (although other systems were involved) and the co-operation has resulted in the Conventions relating to a Uniform Law on the International Sale of Goods which opened for signature on July 1, 1964, and to which reference will be made later. Is the law in Quebec so different from all others that on *a priori* grounds co-operation is impossible ?

The most important essentials of a contract of sale are —

(i) the formation of the contract
(ii) the evidentiary requirements
(iii) the conveyance of ownership
(iv) the remedies of the buyer
(v) warranty against eviction.

(i) The Formation of the Contract

Here the Quebec law and the Common Law are scarcely at odds. In Quebec the breakthrough of consent, as the ground of obligation, from the Roman consensual contracts into the innominate contracts has long been recognized. Thus, *la vente synallagmatique* arises out of the interdependent promises.[8] In the Common Law one promise is good consideration for another, therefore an agreement to sell is a valid contract.[9] Neither is, of course, a sale *stricto sensu*, although under certain circumstances each may be, as will be seen.

(ii) The Evidentiary Reqnirements

In Quebec, if the matter is not commercial, as a general rule proof must be made in writing (1233 C.C.), but even if the matter is commercial upon any contract for the sale of goods in which the sum of money or value in question exceeds fifty dollars, no action or exception can be maintained against any party unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain. (1235 C.C.). This restriction is almost indistinguishable from that which, by section 4 of the Sale of Goods Act, 1893, used to apply in England,[10] but which has repealed in 1954.[11] No injurious results to Quebec would flow from the repeal of article 1235 (4) C.C.

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[8] *Cousineau* v. *Gagnon* (1914) 23 B.R. 309.

[9] S.G.A. s.l. ("S.G.A." refers to the U.K. Sale of Goods Act, (1893), which is substantially reproduced in the provinces of Canada outside Quebec).

[10] *Marchand* v. *Dalfen & Sand* [1955] C.S. 462.

[11] Law Reform (Enforcement of Contracts) Act, 1954.

(iii) The Conveyance of Ownership

A distinctive feature of Civil *emptio venditio* was that even where the *emptio* was *perfecta,* that is the parties were agreed upon the thing to be bought and sold and on the price to be paid, there was no conveyance of the ownership to the buyer; that required delivery *traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur.* This simple rule had many advantages; for example, it avoided the need to protect by a fiction [12] third parties who took in good faith from a seller who had already bound himself to sell to another the thing which he delivered to the third party.

For long enough the English rule has been otherwise, namely, that not only the bargain but the *sale* can be effected by agreement.[13] Originally French law agreed with the Civil Law, but *semble* the needs of business required change. This was effected by the *clause de constitut ou de précaire,* and finally, the Codifiers, Pothier notwithstanding, adopted the English rule. Quebec law is no different.[14] The concept of bargain and sale creates difficulties which afflict both Quebec and English law, namely the protection of third parties taking in good faith from the dishonest seller,[15] and the need to postpone the *sale* of an uncertain or indeterminate thing until it has been so individualised that the bargain can fasten upon it. Thus art. 1026 C.C. says "if the thing to be delivered be uncertain or indeterminate the creditor does not become the owner of it until it is made certain and determinate, and he has been legally notified that it is so." English law is almost identical — "where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained", and detailed rules for ascertaining the intention of the parties as to the passing of the property are supplied by the statute.[16]

(iv) Remedies of the Buyer

The other distinctive feature of the Civil Law was the redhibitory remedy of the buyer.[17] It had two features — (i) that if at the time of the contract and unknown to the buyer the thing bought

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[12] Compare art. 1027 C.C. with s. 21 S.G.A.

[13] The history is discussed in *Cochrane* v. *Moore* (1890) 25 Q.B.D. 57.

[14] art. 1025, 1472.

[15] Compare art. 1027 with s. 21 S.G.A.

[16] s.s. 16, 17, 18 S.G.A.

[17] Described in 10 McGill L.J. at pp. 248-250.

suffered from a defect which destroyed or impaired its usefulness for the purpose for which things of that kind were ordinarily intended to be used, then (ii) the buyer could have the contract set aside, and recover the price if paid.[18]

Quebec law has retained the second feature but, under the influence of French law,[19] has so glossed the *actio redhibitoria* as to depart from the Civil Law philosophy *caveat venditor* and approximate to that of the former Common Law *caveat emptor*. Briefly, and according to Professor Durnford, the position in Quebec Law is that, unless the seller is the manufacturer of the thing sold, the buyer, if he wishes to ensure that he will not be deprived of the redhibitory remedy, is under a duty prior to the conclusion of the contract to examine the thing for defects. Should he not possess in himself the competence to make a worthwhile examination he must engage an expert so to do.

The Common Law had nothing analogous to the *actio redhibitoria*. "In the bargain and sale of an existing chattel, by which the property passes, the law does not (in the absence of fraud) imply any warranty of the good quality or condition of the chattel so sold".[20] Then, because of the growth of an industrial society, an exception was made where an order was given for the making or supplying of an article. The manufacturer had to supply an article reasonably fit for the purpose for which it was ordinarily used. Later still the same duty was imposed upon a dealer.[21] Still later there came the development of the doctrine of fundamental obligation based upon the theory of description.[22] The buyer need not make an examination prior to completing the bargain. The Common Law has in spirit approximated to the Civil Law position that a seller acted fraudulently[23] who did not supply a price - and use - worthy commodity. The Common Law is perhaps not so generous in its attitude towards the buyer's right to have the contract set aside. Quite often his remedy may be restricted to damages.[24]

The two systems are not too far apart. What is more important is that no root principle is involved. Were Quebec to modify the application of arts. 1522, -3-4 C.C. Quebec lawyers would still be *maîtres chez eux*.

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[18] He could not, of course, retain the goods.

[19] "*Apparent Defects in Sale Revisited*" — 10 McGill L.J. at pp. 348-356.

[20] Per Parke B. in *Barr* v. *Gibson* 3 M & W. 390.

[21] Compare *Jones* v. *Just* (1868) L.R. 3. Q.B. 197 with s. 14 S.G.A.

[22] See 10 McGill L.J. at p. 251.

[23] This does not mean that the seller was dishonest in fact.

[24] The above is necessarily a grievous over-simplification.

(v) Warranty against Eviction

In the Civil Law the seller was bound to guarantee the buyer undisturbed possession, so that if the thing were recovered from the latter by a third party on the strength of a superior title the seller had to indemnify him. The Quebec law is in the civilian tradition.[25] At Common Law the seller affirms that he is owner, that is he warrants title.[26] The difference in principle, if any, seems insubstantial.[27]

There is nothing in the foregoing description of the two systems to suggest that on *a priori* grounds co-operation is either unthinkable or impossible. Is then co-operation impossible as a matter of applied legal science ? The recent Uniform Law on the International Sale of Goods suggests a negative answer. Some of the Civil Law countries which participated in the Conference which created the Uniform Law were Austria, Belgium, Germany, Italy, Luxembourg, Netherlands, Portugal and Spain, and Quebec lawyers need have no anxiety, France too participated. There are two Conventions, one described as a Convention Relating to a Uniform Law on the Sale of Goods. It refers to the performance of a contract of sale and for convenience is hereinafter referred to as "Uniform Law". The other relates to the Formation of Contracts for the International Sale of Goods and is hereinafter referred to as "Uniform Law" (Formation).

On the essentials already canvassed the Uniform Law and the Uniform Law (Formation) provide —

(i) The Formation of the Contract.

The Uniform Law does not as such concern itself with the formation of the contract (art. 8), but it presupposes a contract entered into by offer and acceptance (art. 1), and elaborate provisions dealing with the mechanics of offer and acceptance are contained in the Uniform Law (Formation).

(ii) The Evidentiary Requirements.

The Uniform Law applies to "sales regardless of the commercial or civil character of the parties or of the contracts" (art. 8). The Uniform Law (Formation) declares that "An offer and ac-

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[25] art. 1508 C.C. *et sequ.*

[26] s. 12 S.G.A.

[27] Compare art. 1519 C.C. with *Butterworth* v. *Kingsway Motors Ltd.* (1954) 1 W.L.R. 1286.

ceptance need not be evidenced in writing and shall not be subject to any other requirement as to form. In particular, they may be proved by means of witnesses". (art. 3). This is the position in the Common Law.

(iii) The Conveyance of Ownership.

The Uniform Law does not, except as otherwise expressly provided therein, concern itself with the effect which the contract may have on the property in the goods sold (art. 7). As shown above the Common Law concept of bargain and sale has been adopted both by French and Quebec law. The existence of this concept is recognized by the Uniform Law which in connection with the passing of the risk where the contract relates to a sale of unascertained goods speaks of appropriation to the contract of the goods by the seller and the giving of notice to the buyer (art. 98 (3)).

(iv) The Remedies of the Buyer.

The Uniform Law contains elaborate provisions in the matter of the obligations of the seller as regards the conformity of the goods with the contract. Only the provisions directly related to the redhibitory remedy are mentioned, although the remedy of lack of conformity embraces much of the law contained in the Sale of Goods Act, and is much more specific and detailed than the provisions of the Quebec Code.

Article 33 (1) provides — "The seller shall not have fulfilled his obligation to deliver the goods where he has handed over... (d) goods which do not possess the qualities necessary for their ordinary or commercial use";

No duty to examine the goods prior to the making of the contract is imposed on the buyer, but the seller is not liable for the consequences of lack of conformity of the kind referred to in subparagraph (d) "if at the time of the conclusion of the contract the buyer knew, or could not have been unaware of, such lack of conformity" (art. 36). The effect of "could not have been unaware of" is that if the buyer *ex proprio motu* does examine the goods prior to the conclusion of the contract there is imputed to him "what should have been known to a reasonable person in the same situation" (c.f. art. 13).[28]

There is a duty on the buyer promptly to examine the goods after they have handed over to him, (art. 38) and this is relevant

[28] Compare the test suggested in 10 McGill L.J. at p. 245.

to his right to rely on a lack of conformity (art. 39). Among the remedies given the buyer for lack of conformity is the right to declare the contract avoided, (art. 41 (b)) and to recover damages equal to the difference between the contract price and the current price at the date of avoidance (art. 84).

(v) **The Warranty against Eviction.**

The Uniform Law does not deal with the whole of this problem, but provides that when the goods are, unknown to the buyer, subject to a right or claim of a third person, and the seller refuses to comply with the request of the buyer to free the goods from such right or claim, the buyer may declare the contract avoided, and claim damages (art. 52); but the rights conferred upon the buyer by article 52 exclude all other remedies based on the fact that the seller has failed to perform his obligation to transfer the property in the goods or that the goods are subject to a right or claim of a third person (art. 53).[29]

The Uniform Law is much more comprehensive in its scope than would appear from the brief excerpts quoted above. "Goods"[30] are not explicitly defined but clearly are in the main corporeal moveables, the Law being declared inapplicable to sales of incorporeal moveables, such as rights of credit, registered ships or aircraft, and of electricity (art. 5). The Law has most elaborate provisions as to remedies and the quantum of damages; *inter alia* it gives the seller a remedy almost indistinguishable from the Common Law right of *stoppage in transitus* (art. 72) but says nothing of a right to revendicate, and its provisions on risk merit carefut scrutiny. There is no scientific reason why it could not form the basis of the preparation of a Uniform Law within Canada. Any fears that such a law might "lead to confusion because of the differences of language and style" may be unreasonable. The International Uniform Laws have been done in the French and English languages, both texts being equally authentic (arts. XV and XIII of the Conventions). What more can one ask for ?

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[29] Compare arts. 1508 to 1521 C.C.

[30] The promulgation of the Uniform Laws confirms the suggestion implied in the writer's plea that the sale of "goods" in modern times has little to do with the sale of immoveables. Professor Durnford's inference that the writer is content with the law in Quebec relating to immoveables is incorrect (10 McGill L.J. at p. 346) — the truth is that the writer has not given a single thought to the law as it affects immoveables: there are some domestic mysteries best left alone by a non-Quebecer.