Bilateral Promise of Sale

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AS our Civil Code deals expressly with unilateral promise of sale in Section 1407 (1) and omits to mention bilateral promises of sale, it may not be out of place to examine the real position of the latter in our law. Such bilateral promise is in common use and it is essential to establish its real nature so that one can deduce its true effects. The utility of such investigation is all the more felt when one considers that bilateral promises of sale are more common than unilateral promises.

A promise to sell is to be kept clearly distinct from a mere *offer*, which creates no obligation. To the *offer* must be added an *acceptance* so that an obligation might be said to exist. Thus if A promises to sell a thing to B, who accepts such promise, a unilateral promise is contracted; if B, besides accepting the promise of A, promises on his part to buy the thing, then there is a bilateral promise of sale. Hence, while in a unilateral promise only the promisee may ask for its execution, in a bilateral promise any party may compel the other to fulfil the agreement.

Section 1589 (1) of the French Civil Code lays down that a promise of sale is equivalent to a sale when both parties are agreed on the price and the thing. In French law the nature of such agreement is quite clear. It amounts to a definitive sale for, as French commentators say, once there is a bilateral agreement as to price and thing the requisites of sale concur and the transaction is to be so considered notwithstanding that the parties have termed it a *promise* of sale. The Italian Civil Code is completely silent on promises of sale, so that Italian Courts and commentators are free to settle the nature of such agreement in accordance with the general principles of civil law. A great number of Italian writers have followed the French School; others hold that under no circumstances whatever should a bilateral promise of sale be considered as equivalent to a sale.

Prior to examining the reasons which the latter group of Italian commentators adduce to prove that a bilateral promise of sale cannot be equivalent to a sale, we shall see whether there

is any practical utility in considering promises of sale as something different from sale.

In terms of Sec. 1422 (Civil Code) the sale of a *res aliena* is nuil. But it is quite legal for the parties to contract a bilateral promise of sale, wherein it is agreed that the sale of a *res aliena* shall take place at a future date, when such thing shall have been acquired from its owner. If we were to hold that there were no difference between a bilateral promise of sale and a definitive sale it would be impossible to effect such a transaction.

In the sale of immovables it is common practice in Malta to conclude a bilateral promise of sale as a preliminary act, so that the buyer might investigate the seller's financial position. Every diligent buyer conducts such investigation, for if the property to be sold is hypothecated, he might be evicted. It is true that the law requires the seller to warrant the peaceful possession, but if after the eviction the seller is found to be insolvent, such warranty would not avail the evicted buyer, who would have to bear the loss. Hence the practice of concluding the preliminary agreement, so that if any of the parties finds any reasonable objection to the conclusion of the definitive sale, the latter will not take place and the promise of sale is dissolved without any of the parties having run any risk at all.

There are various other cases wherein the promise of sale is found of practical benefit. As a public notary is not always found at hand, the parties find it quite convenient to enter into this preliminary contract by means of a private writing. It is even of great use in sales of property which require, prior to their being carried out, the authorization of the court of voluntary jurisdiction.

One may safely conclude that in practice there is a place for bilateral promise of sale, since it performs a very useful function. Besides, it is a principle of civil law that the parties may enter into any agreement so long as it is not prohibited by law or contrary to morality or public policy. As in our law there is no express provision on the matter, it would be too arbitrary for the Court to hold that a bilateral promise of sale is equivalent to a sale, notwithstanding that the parties have expressed their intention to contract only a *promise* of sale.

Our case-law, though rich in the matter of bilateral promise of sale, does not contain any single pronouncement on

the *nature* of such agreement. In all judgments its nature has been presumed to be that of an agreement made up of two unilateral promises; never has a judge adopted the French view. We have already seen the practical basis of the view followed by our Courts; now we shall inquire into its theoretical juridical foundation.

C. F. Gabba (1) writes: "Promessa bilaterale di contratto è obbligo convenzionale di porre in essere un contratto. È quindi la promessa bilaterale di contratto, come dice Coviello (Dei contratti preliminari nel diritto moderno italiano, 1896, p. 18) un contratto essa stessa; è un contratto che ha per oggetto un contratto futuro. Due persone o parti cioè, le quali intendono porre in essere fra di loro un dato contratto definitivo, ma attualmente, per qualunque motivo non vogliono o non possono porlo in essere, si obbligano però reciprocamente a porlo in essere più tardi."

The object of the bilateral promise is, therefore, the *conclusion of a future definitive contract*, and not the *thing* forming the object of the future contract. The necessity of mentioning in the bilateral promise the thing and the price arises from the fact that otherwise the future definitive contract would not be sufficiently specified if mention of thing and price were omitted. Surely, a mere promise to conclude a future sale, without specifying the object and price of such future sale, would be too vague and hence no serious promise at all. It is therefore essential that in the promise of a sale mention should be made of all the necessary elements of a definitive sale. If such elements are not expressly specified their determination should not depend on the mere will of any of the parties. As our Courts have always considered a bilateral promise of sale to consist of two unilateral promises, one may safely apply the provisions of our Code relating to unilateral promise. The fixing of the price may therefore be left to one or more persons mentioned by the parties (Sec. 1403 (2), or to one or more experts not mentioned (Sec. 1404) or it may simply be agreed that the price is to be the fair price (Sec. 1408). In all such cases the fixing of the price is not left to the arbitrary will of any of the parties.

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(1) "Contributo alla dottrina della promessa bilaterale di contratto", Nuove Questioni di Diritto Civile Vol. I. (1912).

The two other requisites of contracts in general—capacity and consent—must also concur. The parties to the promise of sale are to be capable of contracting at the time of such agreement. A married woman without her husband's consent or Court's authorization, a minor, an interdicted person, may not conclude a promise to sell, in accordance with the general principles of civil law. A very interesting point was decided by the Court of Appeal in *Debono et* vs. *Falzon*, 21. 5. 1947. *Inter alia* the Court had to decide whether a promise to sell property belonging to minors entered into by their father who had forfeited his paternal authority was valid at law. One of the parties contended that since the father lacked paternal authority he could not represent his children on the act. The Court applying Sec. 1042 (2) held that the father bound himself in favour of another person to the performance of an obligation by a third party (in this case the minors). The father was personally bound to see that the children did actually transfer the property to the other party. If he failed he would be liable for the payment of an indemnity, but no specific performance of the promise of sale could be ordered. In order that the promise of sale could produce its full and usual effects the ratification of their father's action by the children was required. In this particular case, the Court held that such ratification was afforded by the decree of the Court of voluntary jurisdiction reinstating the father in his paternal authority and authorizing the sale.

The consent of the parties to enter into a bilateral promise of sale must also result clearly. There should be no doubt as to the intention of the parties to conclude merely a preliminary contract and not a definitive sale. As Gabba says : "E questa certezza può tanto desumersi dalle parole del contratto, quanto dalle circostanze nelle quali il contratto è stato fatto. È una questione di fatto codesta, che tocca al giudice decidere" (2).

A promise of sale must in some cases comply with certain formalities in order that it may be valid. Sec. 1277 (a) lays down: "Any agreement implying a promise to transfer or acquire, under whatsoever title, the ownership of immovable property, or any other right over such property" shall on pain of nullity be expressed in a public deed or private writing. Thus, in the pro-

(2) op. cit. p. 138.

mise to sell immovables or transfer rights over immovables a private writing at least is essential, and as the First Hall held in *S. Micallef* vs. *E. Micallef et*, 1921 (3), "fino alla redazione della scrittura, non vi sono che mere trattative non aventi alcun valore obbligatorio per alcuna delle parti." Promises of sale of property other than immovable require no formalities and may be concluded even verbally.

Before passing to the effects of such agreement, it is important to establish the nature of the obligation which arises from it. All writers agree that the obligation is personal and not real. If the promisor disposes of an immovable promised to another, the promisee cannot recover it from such third party; he has no real right over the thing pomised. This personal obligation is an obligation *to do*, for as Gabba writes: "L'obbligazione assunta in virtù della promessa bilaterale di contratto è il *contrahere*. Ora questo *contrahere* è un *facere*" (4).

What happens if any of the parties unjustly refuses to abide by the promise? Can one compel the other to perform his part of the obligation, or may he sue him only for damages? Text-writers do not agree as to the correct solution of this question. Cuturi (5) and Tartufari (6) opine that as it is a personal obligation *to do*, a judgment of a Court cannot enjoin its specific performance, since a Court's order cannot replace the will of the party, which is the essential element of a contract. Gabba (7) expresses the same opinion: "In virtù del canone *nemo potest praecise cogi ad factum*, comune al diritto romano ed al diritto odierno, l'azione per far valere una promessa di contratto, sia unilaterale, sia bilaterale, come ogni azione avente per oggetto un *fare*, non può mirare ad una coazione giudiziale del promittente, che non la mantenne spontaneamente. Quale effetto giuridico può conseguire contro la volontà del promittente restìo, l'altro promittente che agisce in virtù della promessa di contratto? Non potrà certamente l'attore valersi del diritto datogli dagli articoli 1220, 1239 (Sec. 1770, 1192 (2) of our Civil Code) di fare adempiere la pro-

(3) Coll. Vol. XXIV, II, 484.
(4) op. cit. p. 154.
(5) Della vendita, della cessione e della permuta, Napoli, 1891, p. 61.
(6) Il Codice di commercio commentato, Bolaffio e Vivante, Vol. II n. 41.
(7) op. cit. pp. 165, 166.

messa di altri, a spese del promittente resti0. Imperocchè il *contrahere* è una manifestazione di volontà, che di sua natura non può essere fatta se non da chi l'ha promessa, e dallo erede suo, non mai da una estranea persona in vece e nome di quello."

Other writers, however, hold that the promissor may be compelled to perform specifically his obligation, if he is in a position to do so. Pothier (8) writes: "Dall'altra parte si dirà che la regola *nemo potest cogi ad factum* e quella pure che le obbligazioni *quae in faciendo consistunt* si risolvono necessariamente nei danni ed interessi, non ricevono applicazione che rispetto alle obbligazioni dei fatti esteriori e corporali, i quali fatti non possono supplirsi che in una condanna dei danni ed interessi. Ma il fatto il quale è l'oggetto di una promessa di vendere non è un fatto esteriore e corporale della persona del debitore; può questo supplirsi mediante una sentenza, come l'abbiamo esposto, la quale ordinerà che non volendo il debitore eseguire il contratto di vendita, la sentenza terrà luogo del contratto. Questa opinione pare addottata nella pratica, siccome quella la quale è più conforme alla fedeltà che deve regnare tra gli uomini per l'adempimento delle loro promesse." Such also is the opinion of Baudry Lacantinerie et L. Segnat (9) and of Giorgi (10).

Our legislator followed the latter view. Sec. 1407 (1) reads: "A promise to sell a thing..... if accepted, shall create an obligation on the part of the promisor to carry out the sale, or if the sale can no longer be carried out, to make good the damages to the promisee." Our law is in this matter quite definite. The payment of damages is subsidiary, for it may be resorted to only if the specific performance is impossible, either because the thing no longer exists or because it has been disposed of. The responsibility for the performance of the obligation or for the payment of damages rests on the persons who are parties to the agreement and on their respective heirs.

Specific performance or payment of damages may only be demanded if a party fails unjustly to perform the obligation. In *Portanier* vs. *Grima*, 24. 3. 1939, the Court of Appeal held that in order to be exempted from complying with the obligation it is permissible for the buyer to prove the existence of any fact which

(8) Vendita, II, n. 479.
(9) Trattato Teorico-Pratico Di Diritto Civile, XIX, n. 66.
(10) Teoria delle obbligazioni, III, p. 169.

may be a sufficient ground for the rescission of a definitive sale, in view of the fact that the preliminary contract would finally lead to the contract of sale.

All judgments agree that a just cause frees the parties from complying with the obligation. An example of just cause is afforded by well-grounded fear of being in future molested in the peaceful possession of a thing (11). The principle enunciated in *Sciberras* vs. *Scicluna*, 1898, (12) : "Niuno è tenuto a devenire alla esecuzione della promessa di comprare un fondo, del quale non può avere il pacifico godimento per cause imputabile a chi ne ha promesso la vendita", has been reaffirmed in many subsequent judgments (13).

Not any kind of fear of molestation amounts to a just cause. "Il timore ragionevole di molestia non può avere per causa che un *diritto di proprietà o altro diritto reale sulla cosa* a cui un terzo pretende o per effetto del quale il compratore potrebbe in tutto o in parte essere evitto dalla medesima" (11). In this case, *Testaferrata Olivier* vs. *Bartolo*, the Court of Appeal did not deem to be a just cause for non-performance of a promise of sale the fact that the seller did not possess other property free from hypothecs so as to serve as sufficient security for the buyer against eviction. The Court observed that the warranty of peaceful possession requires only a general hypothec and not a special hypothec over a particular immovable, so that for the purposes of law a general hypothec over present and future property is considered to be sufficient warranty. Indeed, in order to effect a sale one need not prove that he has other property free from hypothecs, the value of which amounts to that of the property being sold (14). The parties may, however, validly stipulate in the promise of sale a condition that the seller is to possess property not hypothecated to serve as security; such condition must be expressly laid down.

What is the position if the property which is being sold itself is subjected to hypothecs? May one refuse to buy because of

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(11) Testaferrata Olivier vs. Bartolo, C.A. 1923, Coll. Vol. XXV, I, 435.

(12) Coll. Vol. XVI, II, 344.

(13) Vide also Scifo vs. Zammit, Vol. XVIII, II, 129; Portelli vs. Tabone, XXV, I, 773; Vassallo vs. Galea Testaferrata, XXVI, I, 801.

(14) Vide also Col. Gordon vs. Sac. Zammit Falzon, C.A. 16. 12. 1921.

such burden? In *Vassallo* vs. *Galea Testaferrata* (15), the Court of Appeal held that "ipoteche accese per garanzia di stabili venduti o posti in divisione, o per sbanchi effettuati, non sono per regola generale e salvo l'apprezzamento dei fatti e delle circostanze particolari, bastanti per dare diritto al debitore del prezzo di beni di ricusarne il pagamento. Tali ipoteche, però, sono sempre da prendersi in calcolo, quando si tratta di difesa consentita da uno che acquista immobili e li rivende, facendone commercio, molto più quando vi ricorrono altre cause da far giustamente temere il pericolo di evizione o molestia." The Court further pointed out that this principle was applied by our Courts to promise of sale in the judgments reported in Coll. Vol. XIII, pp. 455, 509, and in *Ebejer* vs. *Grima*, F.H. 11. 3. 1914.

The prospective buyer has a right to refuse to abide by his promise if he learns that the property is heavily hypothecated *after* the conclusion of the promise. Such right pertains to him also if, *at the time* of the conclusion of the promise, he is aware of such hypothecs, which have for their cause an act of the seller himself; for indeed, if the hypothecs are due to an act beyond the control of the seller, the promise must be fulfilled once that the buyer knew of their existence. Troplong (16), who makes this distinction, states that the knowledge of such hypothec on the part of the buyer "non basta a provare che egli abbia voluto assumerne i rischi comprando ed incaricarsi degli oneri, imperocchè egli ha potuto pensare ed eziandio deve avere naturalmente supposto che il venditore avrebbe pagato i suoi debiti e così fatto cessare le cause della ipoteca" (17).

In the above quoted case *Portanier* vs. *Grima*, the Court of Appeal discussed whether the allegation that a house was haunted amounted to a just cause for not performing the promise of sale. The judgment of the Court of first instance, confirmed by the Court of Appeal, quoted two authors holding opposite views on the matter. Troplong (18) is of the opinion that it is ridiculous in these days to assert that a house is haunted. Other writers however hold that if from the evidence it results that a house is really haunted and as a consequence the peaceful possession may

(15) Coll. Vol. XXVI, I, 801.
(16) Vendita, n. 418.
(17) Vassallo vs. Galea Testaferrata, XXVI, I, 801.
(18) Vendita, n. 548.

be disturbed, the prospective buyer is justified not to abide by his obligation to buy. The Court of Naples in re *Colombo* vs. *Scotto*, 12. 10. 1915, held : "Non costituisce turbativa del pacifico godimento della casa locata l'asserzione che la causa stessa è abitata dagli spiriti, a meno che non si dia la prova che il godimento sia realmente turbato dall'avverarsi di fatti obiettivi rilevati e controllati da più persone senza prevenzione e passione" (19).

It is common practice in these Islands in the case of a promise of sale of immovable property to give to the person who promises to buy the faculty of briefing a lawyer to examine whether there be any just cause for fearing molestation. Surely the prospective buyer may avail himself of this opportunity, but may he refuse to perform his obligation just because the lawyer advises him not to carry it out? In other words, is the advice of the lawyer conclusive? A distinction must be made : If in the agreement both parties agreed to subject the performance to the condition of a favourable decision of a lawyer named in the deed, then the opinion of the lawyer is conclusive. (20). If, on the other hand, the condition of consulting a lawyer is reserved by one party only, then the opinion of the lawyer is merely consultative and does not bind the other party; in such case only the Court's decision that there is a just motive relieves the party from the performance of its duty (21).

May a person be compelled to buy a tenement forming the object of a promise of sale, if it is destroyed while he is in delay? In *Calleja et* vs. *Vella*, the plaintiff asked the Court to order defendant to pass to the contract of sale of a tenement in terms of a bilateral promise of sale between them. While the action was still pending before the Commercial Court the house was partially destroyed by enemy action and the defendant *inter alia* pleaded that he could not perform the final contract since there was a change in the subject-matter. Both the Commercial Court and the Court of Appeal, 13. 7. 1942, upheld defendant's plea on the strength of Sec. 1425 (Civil Code) which reads : "(1) If at the time the contract of sale is made, the thing has totally perished, the contract is void. (2) If the thing has perished only in part, the buyer may elect either to repudiate the contract or to de-

(19) Fadda: Giurisprudenza sul Cod. Civ., IX, n. 219.
(20) Dr. Pisani vs. Xuereb, IX, 53.
(21) Testaferrata Olivier vs. Bartolo, Coll. Vol. XXV. I, 435.

mand the remaining part at a price to be fixed proportionately by means of a valuation." In this case the house was partially destroyed and the buyer elected not to buy; a matter which he was free to do since the law granted him an absolute option. Both Courts however observed that plaintiff could sue defendant for damages if it could be proved that defendant was in delay.

A matter decided by our Courts on various occasions relates to the fee due to a broker if after the conclusion of a promise of sale the definitive sale does not take place. Sec. 1412 provides: "In the absence of an agreement, brokerage shall be regulated at the rate of one per centum in the case of sale of movables, and two per centum in the case of sale of immovables." This section deals only with the brokerage fee due in the case of sale, and as a promise of sale is not equivalent to a sale the Court of Appeal, in *Schembri Bugeja* vs. *Darmanin* (22), held that the rates fixed in Sec. 1412 did not apply to a promise of sale. In such case the fee is fixed by the Court, if it is not settled by agreement beforehand (23).

An agreement of promise of sale is not binding indefinitely on the parties. The law in Sec. 1407 (2) fixes the period in which it retains its binding effect: "The effect of such promise shall cease, if the promisee within three months from the day on which the sale could be carried out, fails to call upon the promisor, by means of a judicial intimation, to carry out the same, unless the parties shall have fixed a longer time." It is to be noted that the three months begin to pass from the day on which the sale can be carried out. Thus in the case of a promise to sell entailed property, the Court of Appeal held that the three months began to run from the day of the disentailment (24).

The three months mentioned in this section constitute a term of prescription subject to interruption. As the Court of Appeal stated in *Pace Balzan* vs. *Ellul* (25), "quella limitazione di tempo, entro cui si può constringere il promittente ad eseguire la sua promessa, ha secondo la legge gli effetti di una prescrizione

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(22) Coll. Vol. XVI, I, 115.

(23) Cesareo vs. Cardona, C.A., Coll. Vol. XII, 125; Curmi vs. Saccone F.H., Coll. Vol. XVII, II, 19; Buhagiar vs. Colombo, C.A., Coll. Vol. XXI, I, 251.

(24) Sciberras D'Amico vs. Cilia, Coll. Vol. XXVI, I, 270.

(25) 20. 8. 1879.

per la quale si ha da intendersi stabilito il termine di tre mesi, che può essere soltanto interrotto per altri tre mesi mediante atto giudiziario, e così via; altrimenti l'effetto della promessa viene a cessare'' (26). In *Mifsud et* vs. *Strickland* (26), the Court of Appeal pointed out further: ''La promessa reciproca di vendere e di comprare deve riputarsi come una convenzione unica e completa, e basta per mantenerla in vigore, l'interpellazione fatta da una sola delle parti per atto giudiziario entro il trimestre.''

Sec. 1407 (2) further implies that the parties themselves may, in the agreement, fix the period of time during which such promise is to remain operative. It is important to note that such period is considered to be of a different nature from that of the term fixed by law. Here it is not considered as a term of prescription, but according to a judgment given by the Court of Appeal in *Portelli* vs. *Tabone* (27), the lapse of the agreed period produces a *forfeiture of rights*. As the Court stated in this judgment, the term ''non può essere modificato o prolungato senza che intervenga un nuovo consenso dai contendenti a differenza dei termini legali o processuali, che se non perentori, sono per disposizione espressa della legge prorogabili per giusta causa. (Art. 103 delle leggi di Org. e Proc. Civ.). Si deve infatti assumere, nell'ipotesi del termine contrattuale, che ciascuno degli stipulanti abbia subordinato il suo consenso alla professione di quel termine, per modo che non possa essere lecito all'altro contraente di allontanarsi da quel patto senza il previo consentimento dell'altra parte.'' In such case a judicial intimation to perform the obligation made within the period agreed upon does not prorogue the term. The only remedy for the aggrieved party is to demand judicially the performance of the obligation after that the term has expired. Such action, however, must be started soon after the lapse of the term.

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(26) Vide also: Mifsud et vs. Strickland et. C.A. Coll. Vol. XXVIII, I, 8; Azzopardi vs. Mallia, F.H. Cell. Vol. XIV, 57.

(27) Coll. Vol. XXV, I, 773.