

# THE REMEDY OF REVINDICATION IN LATIN-AMERICAN BANKRUPTCY LAWS

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THIS article is an attempt to give a comparative outline of the laws of various Latin-American countries concerning a peculiar remedy of bankruptcy law called revindication, which corresponds both to our remedies of reclamation and stoppage in transitu. With the daily increase of business intercourse between the United States and Latin-America, it becomes more than a matter of abstract interest for a domestic lawyer to be acquainted with the laws and institutions of these countries. For this reason, irrespective of its possible value as a theoretical study of a rather interesting question of foreign law, this article may be of some practical use to the legal profession as a reference in foreign bankruptcy cases involving the problem of whether or not a domestic client may claim the benefit revindication. Furthermore, in view of the increasing criticism and approaching revision of our own bankruptcy laws it may be both interesting and profitable to compare the laws of our foreign neighbors determining the scope of application as well as the contingencies of this very important but also dangerous and double edged remedy.

Although the main purpose of this article is to give a general outline of Latin-American laws on the subject, it includes rather copious reference to French statutes, decisions and text books—and this for two reasons. First, because French law applies, directly or by adaptation, in French Guiana, the French West Indies, the Dominican Republic and Haiti; and, second, because the principles of French law influence all Latin-American legal systems to the extent that even in Argentina, Brazil and Mexico French textbooks predominate and are considered as books of authority, not only being used in legal research and the teaching of law, but even being freely cited in court decisions.<sup>1</sup>

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<sup>1</sup> References in this article to statutes with the word "Civ." preceding the number of the section indicate civil codes; references without any qualification before the number of the section indicate commercial codes. Thus CHIL. CIV. 2234 means "CHILEAN CIVIL CODE, Section 2234" and CHIL. 1515 means "CHILEAN CODE OF COMMERCE, Section 1515." References to the decisions of French courts are taken from the RECUEIL PERIODIQUE DALLOZ, quoted briefly as "DALLOZ." Figures after this word signify year, part and page number. Decisions of the Court de Cassation are printed in Part I; decisions of the Courts of Appeal are printed in Part II.

I. REVINDICATION IN GENERAL, ITS SCOPE AND PURPOSE  
IN BANKRUPTCY

Revindication, in the strict sense of the word, is a remedy in civil law whereby an owner can assert his exclusive right of ownership against anyone who may be in possession of his property without legal title. This remedy, closely akin to the ejectment and replevin of Anglo-Saxon common law, applies both to real and personal property. As regards the latter, however, its scope is considerably limited by the well known principle of civil law (accepted by the great majority of Latin-American codes) that title acquired in good faith from one having possession is valid even though the grantor himself had no title.<sup>2</sup>

Under the name "*rei vindicatio*" (from *vindicta*, a small symbolical rod used by the parties in ancient Roman proceedings) this remedy was already known by the dawn days of Roman legal history as a universal action (*ubi rem meam invenio ibi vindico*) of a dispossessed owner against a possessing non-owner to compel the restitution of the property. In the early Roman proceedings (the so-called *legis actiones*) this action was in substance a challenge, supported by the wager of a sum of money (*sacramentum*), to the possessor to prove his title as against that claimed by the plaintiff. Thus it presupposed the conflict of two claimants each alleging ownership, the "res" in litigation remaining with the party who could prove his title, and the loser forfeiting his *sacramentum* to the state.<sup>3</sup> In the later formular type

<sup>2</sup> "E fait de meubles possession vaut titre" (in regard to personal property, possession is equivalent to title). FRENCH CIV. 2279. Cf. BOL. CIV. 1559; ARG. CIV. 2446; CHIL. CIV. 1490; ECU. CIV. 1480; COL. CIV. 1547; EL SALV. CIV. 1361; NIC. CIV. 1768; PAN. CIV. 450; CUB. CIV. 464; MEX. CIV. 1352—all containing rules which, though less drastic than the French code, still afford sufficient protection to the *bona fide* purchaser. *Contra*: BRAZIL. CIV. 622; HOND. CIV. 869; VENEZ. CIV. 1777 (if the seller does not act in good faith).

<sup>3</sup> A vivid description of oral pleadings before a magistrate in a "*legis actio per sacramentum*" is given by Gaius in the fourth commentary of his *Institutiones*, §§ 15 and 16. The parties to the litigation first had to appear before the magistrate (originally *consul*, *duumvir*, later *praetor*). Then the plaintiff, touching the object of litigation with a small rod (*festuca* or *vindicta*), pronounced the solemn words of complaint: "I declare that this man (thing, etc.) is mine under the law of the Quirites with all advantages, and in accordance with my words I have imposed my *vindicta* against thee." If the defendant did not want to confess the judgment he had also to put his *festuca* on the thing in dispute and pronounce exactly the same words, alleging that he, the defendant, had title (*contravindicatio*). (A mere allegation that the plaintiff had no title, not supported by positive allegation of having title, would be a bad plea and the defendant would immediately lose his case). Thereupon the magistrate ordered both parties to release the *res* in litigation: "Both of you leave the man (thing) alone." The plaintiff then challenged the defendant to produce his proof of title in the following words: "Pray, maybe thou wilt say

of proceedings the element of bilateral fight for ownership disappeared and the revindication was broadened by the *practor* to become simply a demand by the alleged owner against the unlawful possessor to surrender the property. With certain modifications this is the same universal remedy which, under the names of *révendication* (French law), *reivindicación* (Spanish law), *reivendiçao* (Portuguese law), the modern civil law offers to the owner against the unlawful holder of his property.

In addition to the use of the term in its strict or proper meaning, however, "revindication" is employed in modern codes to describe a specific remedy in bankruptcy, the purpose of which is to exclude certain assets (tangible as well as to a certain extent intangible) from that part of the bankrupt's estate available to the creditors for ultimate liquidation, and to have them surrendered to claimants in preference to all creditors, general as well as privileged. This remedy is considerably more extensive than its name would indicate. It applies not only to claims of owners for recovery of their property, but also to many other somewhat similar but not at all identical claims which could not logically be based on ownership and its exclusive nature.

Broadly speaking revindication in bankruptcy comprises the following specific claims:

(1) Reclamation by the owner of property held by the bankrupt in bailment (revindication proper).

(2) Claims for the recovery of funds held by the bankrupt in trust for a special purpose (not recognized in some jurisdictions).

(3) Claims of the owner for the unpaid value of his property which has been sold by the bankrupt.

(4) Claims of the unpaid seller, under certain circumstances, for the recoupment of merchandise sold by him to the bankrupt.

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for what reason thou claimest vindication," and the defendant answered: "I imposed *vindicta* in the exercise of my right." Thereupon the plaintiff pledged the "*sacramentum*," saying: "Since thou claimest vindication unjustly, I challenge thee in the sum of 500 asses as *sacramentum*." The defendant answered: "And I do likewise too." This having closed the pleadings before the magistrate, the issue was solemnly joined before witnesses and the case sent for decision to a *judex* (a layman acting as an arbitrator). The property in litigation remained in the custody of one of the parties under bond, the *sacramentum* being deposited with the *practor*.

Gaius thinks that the *festuca* or *vindicta* in these proceedings symbolized a spear—in its turn a symbol of ownership. The whole proceedings probably dramatized the abolition of private feuds over civil wrongs and their replacement by compulsory arbitration ordered by the state in the case of controversies. A good outline of the early legisactionary proceedings may be found in KUHLENBECK, ENTWICKELUNGSGESCHICHTE DES RÖMISCHEN RECHTS (1913) 174 *et seq.*

(5) The resulting right of the seller to rescind the sale on the basis of "*in integrum restitutionis*," if the receiver or trustee in bankruptcy should not elect to perform the contract by paying or guaranteeing the payment of the full price.

(6) Claims of the unpaid seller entitled to revindication for the purchase price of merchandise from a third party to whom it may have been sold by the bankrupt.

The common principle upon which these six particular forms of revindication are based may be stated briefly, thus: The creditors in bankruptcy cannot enrich themselves by retaining in the bankrupt estate items which, outside of bankruptcy and in the ordinary course of business, could not be considered as assets of the merchant available to his creditors for the satisfaction of their claims, and, therefore, determining the extent of his credit capacity—be it because he held these assets (or their equivalent where identifiable) in trust for a third party or because he had not yet acquired physical possession of them. From this standpoint, and for the purpose of the better systematization of the subject matter of this article, the various types of revindication claims in bankruptcy may be classified as follows:

(1) Claims of owners for recovery of property held by the bankrupt in bailment.

(2) Claims for recovery of funds (negotiable paper, securities and even moneys in some countries) held by the bankrupt in trust for specific purposes.

(3) Claims of the unpaid seller for return of the merchandise with rescission of the sale (our stoppage in transitu).

(4) In case of sale by the bankrupt of reclaimable property, claims for its unpaid price against the buyer.

There are several other somewhat irregular cases of revindication which will be discussed in a special section outside of this general classification.

## II. REVINDICATION BY OWNERS OF PROPERTY HELD IN BAILMENT

Theoretically speaking, claims of owners for recovery of their property held by the bankrupt in bailment without title transferring ownership do not require a special statute for their recognition in bankruptcy. The right to reclaim such property is an attribute of ownership enforceable against any holder of the owner's property whether solvent or bankrupt; and if all laws of bankruptcy contain more or less detailed rules concern-

ing revindication by the owner, their actual purpose is not so much to establish or confirm the right of revindication as to determine its limits and prescribe the formalities upon which the practical exercise of the right depends.

### A. In General

A few codes<sup>4</sup> contain no general rules concerning the revindication of property held in bailment, but limit themselves to mentioning the most important and frequent cases of such revindication—consignment, deposit and revindication by wives. These statutes, however, have never been interpreted strictly. On the contrary, they have always been construed to be mere illustrations of the general principle that the unrestricted right of revindication belongs as a matter of common law to every person who can qualify as owner of a thing held by the bankrupt in bailment. As the French courts have repeatedly stated, regardless of the restrictive wording of Section 575 of the Commercial Code, French jurisprudence has never hesitated to extend the scope of the rule to give the remedy of revindication of merchandise or of its price to every person on behalf of whom the bankrupt holds personal property—whether by mandate, loan, lease or pledge—provided the claimant can prove the identity of the property.<sup>5</sup>

The great majority of the Latin-American codes, however, contain more or less general rules confirming the right of the owner to reclaim his property from the bankrupt's estate. Thus the codes of Argentina,<sup>6</sup> Chile,<sup>7</sup> Bolivia,<sup>8</sup> and Ecuador<sup>9</sup> consider as "creditor-owners" (*acreedores de dominio*), and so entitled to revindication, all whose property is held by a bankrupt to whom title has not passed.<sup>10</sup> The codes of Costa Rica,<sup>11</sup>

<sup>4</sup> French, Haitian, Dominican, Venezuelan.

<sup>5</sup> See BOISTEL, COURS DE DROIT COMMERCIAL (1890) 766; DALLOZ, DICTIONNAIRE PRATIQUE DU DROIT (12th ed.) 628, No. 240; 8 LYON-CAEN et RENAULT, TRAITÉ DU DROIT COMMERCIAL (1899) § 816; THALLER, TRAITÉ ÉLÉMENTAIRE DU DROIT COMMERCIAL (1922) § 1939; DALLOZ, 1900, 2.113 (Court of Appeal of Montpellier, Dec. 12, 1899); DALLOZ, 1907, 1.25 (Court of Cassation (req.), July 24, 1906. Cf. GUINAZÚ, LA QUIEBRA EN EL DERECHO COMMERCIAL ARGENTINO (1826) 280, 282.

<sup>6</sup> ARG. LAW OF BANKRUPTCY, No. 4156, § 91.

<sup>7</sup> CHIL. 1509-1510.

<sup>8</sup> BOL. 650, 651, 653, 654.

<sup>9</sup> ECU. 996.2.

<sup>10</sup> The term "*acreedores de dominio*" is, of course entirely erroneous; an owner cannot be a creditor or vice versa. See GUINAZÚ, *op. cit. supra* note 5, at 260; 9 MALAGARRIGA, CODICO DE COMERCIO COMMENTADO (1925) 364 The sense of these provisions, however, is entirely clear: they put into a special category those who claim ownership, and grant them the right to recover possession of the property from the bankrupt's estate.

<sup>11</sup> COSTA RIC., LEI DE QUIEBRA 30.

Guatemala,<sup>12</sup> Nicaragua,<sup>13</sup> El Salvador,<sup>14</sup> Honduras,<sup>15</sup> Mexico,<sup>16</sup> Cuba,<sup>17</sup> and Peru<sup>18</sup> provide that property may be revindicated when the ownership has not been transferred to the bankrupt by a legal and irrevocable title. The Colombian Civil Code<sup>19</sup> refers to property belonging to other persons "by reason of ownership" (*por razon de dominio*) and the Brazilian law of bankruptcy<sup>20</sup> speaks of revindication of "*objectos alheios*"—things not belonging to the bankrupt.

Besides these general rules, which are sufficiently broad to cover any particular case of owner's revindication, all codes contain a more detailed enumeration of special cases where merchandise or other property may be revindicated from a bankrupt holding it without title (deposits, commissions for sale, transportation or delivery, leases, pledges, loans, the possession of property for administration or for its usufruct, etc.).<sup>21</sup> As a special case of revindication by owners, many Latin-American codes provide also for revindication by wives of property held by bankrupt husbands.<sup>22</sup> A specific reference to this case of revindication would seem particularly appropriate in codes adopting, in whole or in part, the French law of domestic relations, which gives husbands extensive control and use of the property of the wife. Under such codes, in the absence of a special rule, the right of a wife to revindicate property affected by her husband's right of possession and use might well be questioned. In the jurisdictions where a husband does not, as a matter of law, have any special rights over his wife's property, whether brought into the marriage or acquired during the married life, any special reference to the right of a wife to revindicate her property from the estate of a bankrupt husband would seem superfluous, inasmuch as such property could be recovered as her own under the general rules of revindication. Nevertheless, many Latin-American codes admitting the independent economic status of wives

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<sup>12</sup> GUAT. 1258.

<sup>13</sup> NIC. 1109.

<sup>14</sup> EL SALV. 803.

<sup>15</sup> HOND. 896.

<sup>16</sup> MEX. 998.

<sup>17</sup> CUB. 908.

<sup>18</sup> PERUV. 920.

<sup>19</sup> COL. CIV. 2484.

<sup>20</sup> BRAZIL., LAW OF BANKRUPTCY 138.

<sup>21</sup> ARG., LEI No. 4156, § 92; BOL. 653, 1 & 3; CHIL. 1510; COL. 1490; ECU. 996,2; COSTA RICA 31,1; GUAT. 1259,2; NIC. 1110, 2 & 3; VENEZ. 996,2; EL SALV. 804,2; HOND. 897,1; PERU 921, 3 & 4; URUG. 1725; BRAZIL 138,1; MEX. 999, 4 & 5; CUBA 909, 4 & 5.

<sup>22</sup> ARG. 92,5; BOL. 653,2; GUAT. 1259,1; PERUV. 921,1; MEX. 999, 1 & 2; CUB. 909, 1 & 2. In Chile, Colombia, Ecuador, Venezuela, Uruguay and Brazil the codes do not specifically refer to the wife's right of revindication, but it remains available to her as a matter of common law.

still expressly confer on them the right to revindicate "*bienes propios*" from their husbands in bankruptcy.<sup>23</sup>

A few codes refer also to revindication by children of property in the hands of their fathers, by wards of property in the possession of their guardians, by heirs or legatees of property belonging to the estate or legacy.<sup>24</sup> Of course, as stated above, the enumeration of particular instances of revindication has no restrictive force, so that any other instance of bailment, even though it has not been referred to specifically in the statutes, will afford a sufficient basis for the remedy of revindication in any jurisdiction.<sup>25</sup>

### *B. Revindication of Property Sold Under a Contract of Conditional Sale*

Of special interest in this connection is the question whether under a conditional sales contract, *i.e.*, a contract of sale with the retention of title by the seller until payment of the price, the seller is protected by revindication when the bankruptcy of the buyer intervenes prior to the payment of the price. The answer to this question in turn depends upon the answer to another—whether or not in French and Latin-American jurisdictions title to personal property may be validly retained under a conditional sales contract. Upon the latter point these countries may be divided into four distinct groups, *viz.*:

- (1) Where statutes forbid conditional sales.
- (2) Where statutes give full recognition and protection to conditional sales on substantially the same basis as in this country.
- (3) Where statutes are silent on the question of conditional sales and their legal effect.
- (4) Where statutes refer to conditional sales but contain no specific rules as to the effect of the bankruptcy of the buyer.

Only one country, Argentina, has a statute expressly forbidding contracts of conditional sale. Section 1410 of the Argentina Civil Code considers sales under the so-called *pactum commissorium* (defeasance clause) as sales made with retention of title until payment, and Section 1408 expressly forbids such clauses in sales of personal property.<sup>26</sup> This prohibition is a logical deduction from the peculiar rule of Argentinian Civil Code under which in the case of the buyer's default, the unpaid seller may demand only performance (payment of the price plus

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<sup>23</sup> EL SALV. 804,1; HOND. 897,1; NIC. 1110,1; COSTA RIC. 33. also Costa Rica and Panama.

<sup>24</sup> ARG. 92,4; MEX. 999,3.

<sup>25</sup> *Supra* note 2.

<sup>26</sup> This rule does not apply to commercial transactions, in which *pactum commissorium* is always presumed. ARG. 216.

interest), not the rescision of the sale and return of the merchandise.<sup>27</sup>

In the second category belong Peru, Chile and Mexico. In these three countries statutes have recently been passed<sup>28</sup> providing for the registration of contracts of sale where the title is retained by the seller until payment of price (in Peru and Mexico) or a chattel mortgage executed on the property sold (in Chile). Under these laws, the rights of a conditional seller are fully protected, not only in case of the bankruptcy of the buyer, but also against innocent purchasers from him.

In the same category must also be placed Brazil. Although there is no law in that country specifically referring to sales on credit secured by the retention of title until payment, the provisions of the civil code concerning the passing of title in general, and those relating to contracts of sale in particular, are such as to protect a conditional seller. Brazilian courts as well as text-writers have held that in the absence of a specific prohibition in the statutes clauses in a sales contract retaining title in the seller (*pacta reservati domini*) are valid.<sup>29</sup> It is also commonly admitted that *pacta commissoria*<sup>30</sup> (defeasance clauses), although they primarily operate as a resolutive condition, may through the consent of the parties have the legal effect of a suspensive condition.<sup>31</sup> Consequently, as between the parties themselves and as against creditors of the bankrupt buyer, the validity of the title retention clauses in sales contracts seems to be beyond any doubt. As to the rights of third parties (more specifically innocent purchasers from the conditional buyer) the Brazilian Civil Code, diametrically opposed to the provision of the French Code declaring that *en fait de meubles possession vaut titre*,<sup>32</sup> sets forth in Section 622 that tradition made by a party who is not the owner does not transfer the title of ownership. The provision is sufficiently clear to preclude any defense of a purchaser from a buyer who has not yet acquired title, even though the purchaser acted in good faith without knowledge of the defects in the title of his grantor.<sup>33</sup> The only legal effect

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<sup>27</sup> ARG. CIV. 1463.

<sup>28</sup> Peruvian Executive Decree of Sept. 29, 1927, effective as of Oct. 15, 1929; CHIL., LEI No. 4702, Dec. 3, 1929; §§ 1312, 1310 of the new Mexican (Federal) Civil Code, promulgated Aug. 30, 1928, but not yet in force.

<sup>29</sup> 6, CARVALHO DE MENDONCA, TRATADO DE DIRETO COMMERCIAL BRAZILIERO (1927) Pt. 2, p. 160.

<sup>30</sup> BRAZIL CIV. 1163.

<sup>31</sup> ALVES, CODIGO CIVIL ANNOTADO (1923) 823.

<sup>32</sup> FRENCH CIV. 2279.

<sup>33</sup> It is advisable to have Brazilian contracts of sale with retention of title registered in the so-called "*registro de titulos, documentos e outros papeis*," in order to make the date of the sale certain and valid against third parties. BRAZIL, LEI No. 973, Jan. 2, 1903; Decree No. 4775, Feb. 16, 1903, §§ 11, 30; LEI, No. 79, Aug. 26, 1892, § 3.



of the good faith of the ultimate purchaser is that the subsequent acquisition of title by the grantor will cure the original defect and vest a good title in the ultimate purchaser.

Among countries belonging to the third category—where the statutes contain no reference to conditional sales—France occupies the foremost position. This is due not only to her political and scientific prestige but also to the fact that in France the question of the legal effect of such sales has been analyzed most thoroughly by text writers and passed on in numerous decisions by the courts. The French law in this regard, therefore, seems to be well settled.

The overwhelming weight of authority in France is without question opposed to the recognition of conditional sales both in regard to third parties and in bankruptcy. The express provision of Section 2279 of the French Civil Code, that *en fait de meubles possession vaut titre*, defeats the conditional seller's right of revindication as against *bona fide* purchasers from the conditional buyer, if the latter had possession of the property and delivered it to the ultimate purchaser. The rule of Section 2279 is so clear and absolute in that respect that the possibility of any other interpretation by the courts seems out of the question. But even as between the parties themselves French courts consistently refuse to recognize the validity of a stipulation for the retention of title until the payment of price, regardless of whether the agreement is made in the form of an outright conditional sales contract or whether it has been dissimulated under the guise of a hire and purchase agreement.

Although French law considers as legal sales made on suspensive (precedent) condition,<sup>34</sup> nevertheless French jurisprudence refuses to recognize sales in which transfer of title is made contingent upon payment of the price as sales made on suspensive condition, the theory being that payment under a sales contract is an actual and irrevocable obligation lacking the element of future uncertainty that must be inherent in a suspensive condition.<sup>35</sup> This holding is uncontrovertibly correct from the viewpoint of civil law. The theory of that law as well as the codes distinguishes two kinds of conditions upon which an obligation may be contingent: (a) an event beyond the control of either party (the so-called "condition casuelle"), *c.g.*, the death or marriage of a third party, the passing of a law, an act of government, a meteorological phenomenon, etc.; (b) an event which depends wholly or partly upon the will of the

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<sup>34</sup> "La vente peut être faite purement et simplement ou sous une condition soit suspensive soit résolutoire." FRENCH CIV. 1584.

<sup>35</sup> Court of Appeals of Bourges (Dec. 26, 1887), REC. PERIOD. SIREY, quoted in 59 PANDECTES FRANÇAISES, NOUV. REPERTOIRE (1905) No. 52., p. 8.

creditor or debtor under a conditional obligation (the so-called "condition potestative").<sup>36</sup> Payment of the price obviously cannot be a casual condition. It might be considered as a potestative condition, but if the obligation to pay in a conditional sales contract were a purely potestative condition, *i.e.*, an act the performance of which depends exclusively on the arbitrary will of the party obligated to pay (the buyer), then the very sale would be void under Section 1174 of the Civil Code. But of course, although payment of price may be considered as an event depending upon the will of the buyer (in the sense that the buyer may or may not pay), still it is not a potestative condition at all; it is not even a relatively potestative or mixed condition.<sup>37</sup> The conditional buyer has no free election between payment and non-payment with the resulting transfer or non-transfer of title; he must pay unconditionally. The performance is not discretionary but obligatory for a conditional buyer; the conditional sales contract is conditional only for the seller. The conditional seller, instead of voiding the sale and repossessing the property, may at his election affirm the sale and demand performance by the buyer, *i.e.*, payment of the price. Thus payment of the price in a conditional sales contract is not a condition precedent of the sale, but an unconditional obligation of the buyer that is one of the essentials of the transaction, without which there would be no sale.

Having refused to consider sales in which the passing of title is conditioned upon the payment of the price as sales under a suspensive condition, French courts logically regard such contracts as completed sales under a resolutory (subsequent) condition, giving the seller the alternative right to rescind the sale and repossess the property or to claim payment.<sup>38</sup> Consequently,

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<sup>36</sup> FRENCH CIV. 1169, 1170; *Cf.* BOL. CIV. 760, 761; CHIL. CIV. 1477; VENEZ. CIV. 1225; COL. CIV. 1534; MEX. CIV. 1334; CUB. CIV. 1115.

<sup>37</sup> FRENCH CIV. 1171.

<sup>38</sup> DALLOZ 1885, 2,220 (Court of Appeal of Amiens, Mar. 12, 1884); DALLOZ 1903, V.779 (Court of Appeal of Paris, Apr. 3, 1903); see also 1 GAZETTE DE PALAIS (1903) 1,619. This rule holds as well established law only in civil cases. In internal revenue as well as criminal cases French courts are rather inclined to uphold conditional sales contracts. DALLOZ 1887, 1,500 (Court of Cassation (civ.), Feb. 22, 1887); DALLOZ 1905, 1,486 (Court of Cassation (civ.), June 19, 1903). But, of course, these decisions have no bearing on civil and, more specifically, bankruptcy cases. It must be said, however, that a few decisions have been rendered even by the civil courts upholding the title retaining effect of conditional sales contracts made in the form of hire-purchase contracts. Court of Appeal of Paris, Mar. 9, 1904, quoted in 59 PANDECTES FRANÇAISES, No. 56, p. 9. published in JOURNAL DES TRIB. DE COMMERCE, No. 16111, p. 522; Commercial Court of Marseilles, Jan. 31, 1894, quoted in 59 PANDECTES FRANÇAISES, No. 53, p. 8. But these decisions have no weight of generally accepted authority behind them. See also 2 PLANIOL, TRAITÉ ÉLÉMENTAIRE DU DROIT

in case of bankruptcy, property sold under a conditional sales contract, either express or disguised in the form of a hire and purchase agreement,<sup>39</sup> must be considered as rightfully belonging to the bankrupt buyer *ab initio* under a valid title and simply subject to a *pactum commissorium*—a clause providing for rescission in case of non-payment. This latter clause, in fact, it is not even necessary to include in the contract because it is always implied in bilateral contracts in general, and contracts of sale in particular.<sup>40</sup>

Whether express or implied, *pactum commissorium* affords sufficient protection to the unpaid seller as against the buyer himself and his attaching creditors, not innocent third parties.<sup>41</sup> But, unfortunately for the conditional seller, the clause is of no value in the event of the buyer's bankruptcy. In such a case Section 550 of the French Commercial Code expressly deprives the unpaid seller of two remedies granted him by Section 2102(4) of the Civil Code, *viz.*, (a) revindication and (b) *privilege* (lien) for the amount of the unpaid price. This provision, together with Sections 576 and 577 of the Commercial Code, the French courts construe strictly against the seller. For they deny him any of the remedies of the Civil Code against the bankrupt buyer and compel him to be satisfied with only such remedies as are available to him under the bankruptcy law,<sup>42</sup> *viz.*, (a) a special form of revindication identical with our stoppage in transitu,<sup>43</sup> and (b) retention of the merchandise if it has not yet been forwarded<sup>44</sup> with the incident right to rescind the contract if the syndic does not exercise his privilege to demand the performance of the contract against the payment or guarantee of payment.<sup>45</sup> Thus the unpaid seller loses in bankruptcy the right of rescission which Section 1654 of the Civil Code gives him

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CIVIL (1923) § 1526 *bis*; LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 838; THALLER, *op. cit. supra* note 5, at § 1947.

<sup>39</sup> See Court of Algiers, Jan. 28, 1903 (quoted in 59 PANDECTES FRANÇAISES, No. 55, p. 9, holding that a contract under which title was to pass upon payment of all the agreed installments was a sale on installment basis and not a hire-purchase contract, and, although valid between parties it could not be opposed to creditors in bankruptcy. See also DALLOZ 1895, 2,92 (Court of Appeals of Amiens, Apr. 28, 1894), holding that the court has the right to construe a hire-purchase contract as a sale, if it has been made with the purpose of withholding the property from creditors.

<sup>40</sup> FRENCH CIV. 1184, 1654.

<sup>41</sup> FRENCH CIV. 2279.

<sup>42</sup> DALLOZ 1900, 1,161 (Court of Cassation (civ.), Dec. 24, 1889); DALLOZ 1897, 2,464 (Court of Appeal of Douai, July 30, 1896).

<sup>43</sup> FRENCH 576.

<sup>44</sup> FRENCH 577.

<sup>45</sup> FRENCH 578. See LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 861; THALLER, *op. cit. supra* note 5, at § 1947.

against a defaulting buyer. In view of this fact any private transaction intended to give the unpaid seller protection outside of the remedies of the Commercial Code must *a fortiori* be ineffective in case of the buyer's bankruptcy, even though the vendor should call himself only a conditional seller and attempt to retain the title by a clause which in substance is nothing more than a *pactum commissorium*.<sup>46</sup>

Among the Latin-American countries Bolivia, Venezuela, Argentina, Nicaragua, Panama, Costa Rica, Mexico (under the present civil code) and Cuba have, like France, no laws referring to conditional sales. Of these countries, only in Cuba has the question of the legal effect of contracts of conditional sale been considered in its entirety by the courts. Although the Cuban Civil Code does not differ substantially from the French law in the matter of conditional obligations, and although French jurisprudence as a general rule has always been of great influence on the development of Cuban law, the question has been decided in Cuba in a manner quite opposed to the holdings of the French courts.

Under the influence of several rather liberal decisions of Spanish courts, maintaining the validity of title retaining clauses,<sup>47</sup> the Supreme Court of Cuba in a leading decision held that a provision for the reservation of title until payment is a clause not prohibited by law and, therefore, valid against the buyer regardless of any registration or publicity.<sup>48</sup> In another case the Audiencia (Court of Second Instance) of Havana held that retention of title under a conditional sales contract was valid as against the purchaser at an auction sale, and this in spite of the precise rule of Section 464 of the Civil Code expressly protecting purchasers at auction sales.<sup>49</sup> It must be pointed out, however, that this was a holding from which no appeal has been taken so that the principle expressed in that decision has not been passed upon by the Supreme Court of Cuba.<sup>50</sup> Nevertheless,

<sup>46</sup> See LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 838; THALLER, *op. cit. supra* note 5, at § 1947.

<sup>47</sup> Jose Pillado v. Luisa Blanchard, Tribunal Supremo (Feb. 16, Mar. 30, 1894); especially Ignacio Tey v. Sociedad Anglo Espanola de Motores, Tribunal Supremo (Mar. 6, Dec. 9, 1906); also Antonio Puente Crespo v. Sergio Novales, Tribunal Supremo (Dec. 13, 1911, Mar. 11, 1912).

<sup>48</sup> In re Zayas Abren Commercial Co. v. Jaime Galceran S. en C. (Jan. 19, 1926).

<sup>49</sup> "Possession of personal property acquired in good faith is equivalent to title. However, those who have lost personal property, or have been deprived of it illegally, may revindicate it from the possessor. But if the possessor of personal property lost or illegally taken away acquired it in good faith at public sale, the owner will have no right to obtain the restitution without reimbursing the price paid for it." CUB. 464.

<sup>50</sup> Sentencia No. 820 por la sala de lo civil de la Audiencia de la Habana (Dec. 4, 1924). This decision entirely disregards § 464 of the Civil Code

these decisions have been accepted by Cuban courts and the legal profession as binding precedents, the force of which, in the opinion of two eminent Cuban lawyers, Bustamante and Machado, extends even over the case of the sale of the property by the conditional buyer to an innocent third party.<sup>51</sup> As a result, conditional sales with title retention clauses are now becoming frequent in Cuban business life.

These decisions have been obviously dictated by the laudable desire of the Cuban courts to meet the necessities of modern business conditions and to foster local and foreign commerce through the powerful medium of conditional sales contracts. Nevertheless, if these decisions are actually intended to sustain revindication under a conditional sales contract against innocent purchasers from the conditional buyer, then their correctness is more than questionable, both from a legal and a practical point of view. From the theoretical aspect this construction is quite irreconcilable with the express rule of Cuban law giving title to those who acquire personal property in good faith from one having actual possession.<sup>52</sup> Yet in these decisions no attempt was made to explain why this rule, which knows no exception save in the case of lost or stolen property, should not apply to conditional sales. Practically speaking, the novel principle introduced by the decisions in question into Cuban law will, in the final analysis, probably prejudice the real interests of everyday economic life more than it will encourage trade. As there is no provision for the registration of contracts of conditional sale in Cuba, purchasers will never have the assurance that they will not be subject to revindication because of an undisclosed conditional sales contract, and dishonest merchants will have a very effective means of defrauding their creditors by the simple expedient of making in advance a contract of conditional sale with an obliging friend or relative.

In Mexico the courts have not yet definitely adjudicated in its entirety the question of the validity of title-retaining contracts; but the trend of legal thought there leans toward the recognition of these contracts as valid, even under the present civil code.<sup>53</sup> The absence from the Mexican code of a rule

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and is based exclusively on a very questionable principle that in auction sales the judge conducting the sale is no more than a legal agent of the seller, and, therefore, cannot transfer more rights than the latter himself has.

<sup>51</sup> See Dr. Luis Machado's report published by Division of Commercial Laws, Department of Commerce, and Dr. Antonio S. de Bustamante's comment on this report published by the American Chamber of Commerce in Cuba, Comparative Law Series, No. 152, 19.

<sup>52</sup> CUB. CIV. 464.

<sup>53</sup> See especially *In re Wagner & Levine v. Nombela*, Federal Supreme Court, 1st Dep't (Jan. 3, 1907). In this decision the court sustained the

analogous to the French Section 2279, of course facilitates the recognition of conditional sales as valid. On the other hand, the Mexican Civil Code now in force seems to protect the innocent purchaser against claims that are based on a defect in the title of his grantor. In that respect Section 1352 of the Code expressly provides that "in regard to personal property, whether or not there is an express agreement, the resolution of the contract of sale (because of non-payment of the price) can never take place against a third party that may have acquired this property in good faith." In the writer's opinion, this Section should stand in the way of granting to the conditional seller the right to reclaim the property for non-payment of the price from an ultimate purchaser who has acquired the property in good faith from the conditional buyer. As to the legal effect of title-retaining contracts in the case of the buyer's bankruptcy, it seems that the Mexican courts have finally and irrevocably adjudicated that such contracts are fully valid against creditors and that, the conditional seller may revindicate the property from the bankrupt's estate.

In other countries where statutes are silent on the question of conditional sales, there has been no adjudication on the matter. Nevertheless, in view of the fact that in the five years since the Supreme Court of Cuba rendered its famous decision of January 19, 1926, the example of this court has not been followed in other countries or the question of conditional sales even raised for consideration in local courts, it may be concluded that courts, lawyers and business men continue unanimously to adhere to the French theory and practice, and do not encourage conditional sales contracts in their pure form.

Leaving aside the question whether the courts in these countries would construe a sale with transfer of title deferred until payment as a sale under a suspensive or resolutive condition, it is practically beyond doubt that no revindication in bankruptcy would lie in these countries on such contracts. The seller could claim the merchandise already delivered as a "creditor-owner" (*acreedor de dominio*) only if there were a statute or well established adjudication recognizing conditional sales contracts as obligations valid in bankruptcy. In the absence

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validity of contracts of conditional sale on the ground that the law permits sales on a suspensive condition. In support of this theory, the court, referring to the French law as a supreme authority for the legislation of the modern civilized world, cited Section 1584 of the French Civil Code providing that sales may be made on suspensive condition. In quoting this section, however, the Mexican Supreme Court entirely failed to take notice of the unanimous and very definite decisions of French courts interpreting this section in which it was held that payment of the price can never be considered a suspensive condition, but that it is an unconditional obligation of the buyer without which there would be no sale at all.

of such authority there would be no reason not to apply the very express provision of the bankruptcy laws that where there has been a sale on credit terms the seller may reclaim the merchandise sold only if it has not been actually delivered to the buyer (stoppage in transitu).

The fourth category comprises Ecuador, Columbia, Nicaragua, El Salvador, Honduras, and Chile (before the enactment of the Law of November 15, 1929)—countries where codes contain express provisions referring to sales with the retention of title by the seller until the payment of price, without reference, however, to the validity of such sales in case of the buyer's bankruptcy. These provisions, practically identical in all the codes, treat such sales from two different points of view, which at first glance may be misleading.

A sale with retention of title is considered in these codes as a qualified form of "*tradicion*" (actual or symbolical delivery transferring title). In that respect, the codes provide that "tradition may transfer the title of ownership under suspensive or resolutive condition, as may be agreed upon. Upon delivery by the seller, the ownership of the thing sold is transferred, although the price has not been paid, *unless the seller has reserved title until payment*, or until the fulfillment of a condition."<sup>54</sup> This rule seems to establish beyond any doubt the principle that under contracts of conditional sale title does not pass until the payment of the price.

Besides the above quoted rule, however, the same codes, contain in the chapters on sales, the following special provision: "The clause under which the transfer of title is deferred until payment shall produce no other effect than that of the alternative stated in the precedent section (*either demand of payment, or rescission of sale*); and after the seller has paid the price, in any case grants of the property and rights that may be established on it in the meantime shall remain in force."<sup>55</sup> There is an apparently glaring contradiction between these two provisions. Under a clear and express rule of the law of "*tradi-*

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<sup>54</sup> "La tradicion puede transferir el dominio bajo la condicion suspensiva o resolutoria con tal que se exprese. Verificada la entrega por el vendedor se transfiere el dominio de la cosa vendida aunque no se haya pagado el precio, *a menos que el vendedor se haya reservado el dominio hasta el pago o el cumplimiento de una condicion.*" CHIL. CIV. 680; ECU. CIV. 669; COL. CIV. 750; EL SALV. CIV. 661; HOND. CIV. 707.

<sup>55</sup> "La clausula de no transferirse el dominio sino en virtud de la paga del precio no producira otro efecto que el de la demanda alternativa enunciada en el articulo precedente (*exigir el precio o la resolucion de la venta*); y pagando el comprador el precio, subsistiran en todo caso les enajenaciones que hubiere hecho de la cosa o los derechos que hubiere constituido sobre ello en el tiempo intermedio." CHIL. CIV. 1874; COL. CIV. 1931; ECU. CIV. 1865; EL SALV. 1676.

cion," conditional sales are contracts under suspensive condition and transfer no title until payment; under an equally clear and express rule of the sales law, conditional sales are ordinary, perfected sales under a *pactum commissorium*—just as any sale on credit terms, regardless of retention of title, is always presumed to have been made with a tacit recognition of the seller's right to rescind for non-payment.

The key to the proper understanding of this contradiction may be found in another provision of these codes, referring to the effect of retention of title in regard to third persons, which appears in the chapters relating to obligations under condition. Here it is declared that "if anyone owning a movable thing on terms or under a suspensive or resolutive condition alienates it, there will lie no right of revindication against third persons possessing it in good faith."<sup>56</sup> In other words, the retention of title operates as a suspensive condition only between the parties. As against third parties it is no more than a simple resolutive condition and does not vitiate the title of those who acquire rights to the property in good faith. But even as between the parties themselves the conditional seller has no other remedies save either to demand performance or rescind the sale and reclaim the thing sold, *i.e.*, the usual rights belonging to a seller under a *pactum commissorium*.

How may this construction affect the rights of a conditional seller in case of the bankruptcy of the buyer? Inasmuch as the law clearly recognizes the validity of the retention of title under a conditional sales contract, and inasmuch as creditors in bankruptcy can have no greater rights than the bankrupt himself, it must be considered that the conditional seller is "*acreedor de dominio*" and as such is entitled to revindication. The writer, however, must confess that he knows of no decision of a court on this specific question, and, therefore, his opinion rests on no authority other than the logical construction of the provisions of the codes. Moreover, it is possible that due to the overwhelming influence of French law and jurisprudence in Latin-American countries this question may be decided against the seller, despite these provisions of the codes. Such a result might be reached on the theory that in case of the buyer's bankruptcy all remedies of the seller are to be sought exclusively in the commercial codes, which limit the rights of an unpaid seller on credit terms, as to merchandise that has left his possession, strictly to stoppage in transitu. This theory, in fact, seems to have been tacitly accepted by the courts and practicing

<sup>56</sup> "Si el que debe una cosa mueble a plazo o bajo una condicion suspensiva o resolutoria le enajena no habza derecho de reivindicarla contra terceros procedentes de buena fe." CHIL. CIV. 1490; ECU. CIV. 1480; COL. CIV. 1548; EL SALV. CIV. 1351; *cf.* HOND. CIV. 869.



lawyers. (We would not include text writers, because there are only a few textbooks in the countries of this group, and in these few the question has not been discussed at all.) This may be the natural inference from the fact that no attempts appear to have been made to make and test in the courts any undisguised conditional sales contracts. There is, in short, no certainty that such contracts will be recognized by the courts in bankruptcy cases otherwise than through the enactment of special statutes, as has been done in Peru, Chile and Mexico.

Inasmuch as credit sales with retention of title appear to answer a need that is acutely felt in modern economic life, especially in connection with installment sales, a substitute for these tabooed contracts had to be found. Numerous attempts have been made to dissimulate these sales in the more or less transparent disguise of the so-called hire and purchase contracts, deposit receipts with option to buy, irregular forms of pledges (*Prenda agraria* or *industrial* in Argentina, Uruguay, Guatemala and Costa Rica), and loans secured by personal property (*prestamo con garantia mobiliaria* in the Dominican Republic). This again tends to indicate that the lawyers in Latin-American countries are not inclined to believe that in the absence of express statutes the courts may admit the validity of title-retaining contracts in bankruptcy cases. Although in France these dissimulated substitute contracts have been consistently treated by the courts as conditional sales transferring title under resolatory condition and having no effect against third parties, it seems that Latin-American courts have been more liberal in that respect. At least the writer is not aware of any leading decisions upholding the French viewpoint and defeating any of the substitute contracts described above. On the contrary, very recently the Buenos Aires Commercial Court rendered a decision refusing to consider a hire-purchase contract as a dissimulated sale with a "*pactum commissorium*" (and, therefore, invalid under Argentinian law), but allowing it full force against the creditors of the conditional buyer as a lawful title-retaining contract. This decision, however, gave no consideration to the crucial question whether such a contract would be upheld against a *bona fide* purchaser of the merchandise delivered under it to the prospective buyer.<sup>57</sup>

### C. Prerequisites of Revindication

The exercise by the owner of the right of revindication is predicated upon certain formal conditions.

(1) The property must be actually among the bankrupt's

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<sup>57</sup> Matter of the National Paper and Type Co in re Stocker y Cia. v. Guillermo Kupperschmid (Dec. 4, 1929).

assets.<sup>58</sup> If it has been lawfully acquired by a bona fide third party it cannot be revindicated.<sup>59</sup> But a question has arisen as to the effect of an executory contract of sale made by the bankrupt when the bankruptcy intervenes before the delivery of the property to the buyer. In this connection two possibilities must be considered. First the bankrupt could have the right to sell the merchandise as a consignment agent, holder in irregular deposit, or otherwise. Since the bankrupt was privileged to transfer title, he must be deemed to have lawfully alienated the property and the title must be considered to have passed to the purchaser under the contract. Consequently the possibility of obtaining revindication must be eliminated, the remedy of the owner being limited to reclaiming from the purchaser the price of the thing sold if it has not been paid prior to the bankruptcy. A different question arises when the bankrupt had no right to sell the property, this situation including all cases of regular deposit, lease, usufructus, etc. In some jurisdictions the sale of personal property is null and void if the seller is not the owner or is not authorized to sell by the owner—the system of the Code Napoléon.<sup>60</sup> In these jurisdictions the question is easily answered. The sale, being made by a non-owner, can have no legal effect unless it has been accompanied by an actual “tradition” (legal delivery) which would confer title upon the purchaser, not because of the contract of sale but because of the rule protecting title acquired by an innocent purchaser from the actual possessor. Consequently, an innocent purchaser cannot by setting up a mere executory contract made with a non-owner defeat the suit of the owner for the revindication of his property.<sup>61</sup>

But what would be the solution of the problem in jurisdictions which, following the old Roman theory, consider a sales contract simply as a contract to sell, a promise to deliver the property and a warranty of the undisturbed possession thereof?<sup>62</sup> Although in these jurisdictions the sale of another's property is a valid contract, it is valid only in the sense that the buyer may demand

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<sup>58</sup> FRENCH 575, DOM. 575; HAIT. 575; BOL. 653; CHIL. 1509; PERUV. 920; GUAT. 1258; NIC. 1109; EL SALV. 803; COSTA RIC. 30; HOND. 896. See LYON-CAEN et RENAULT, *op. cit. supra* note 5, at § 795; 1 PLANIOL *op. cit. supra* note 38, at § 2717 ff; BOISTEL, *op. cit. supra* note 5, at 767.

<sup>59</sup> See *supra* note 2.

<sup>60</sup> FRENCH CIV. 1582, 1549; BOL. CIV. 1018; EL SALV. 1619; COSTA RICA 1061; MEX. CIV. 1811-1830; URUG. CIV. 1445. Cf. CABARA, LA COMPRAVENTA CIVIL Y MERCANTIL (1926) 106. In connection with non-commercial sales ruled by civil law only, see ARG. CIV. 1363; NIC. CIV. 1530, 1568; VENEZ. CIV. 1525.

<sup>61</sup> See LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 795; 2 BOULAY-PATY, DES FAILLITES ET BANQUEROUTES (1828) 359.

<sup>62</sup> CHIL. CIV. 1815; COL. CIV. 1875; ECU. CIV. 1805; COL. CIV. 1605; PAN. CIV. 1227; URUG. CIV. 1669. In regard to commercial sales only, see ARG. 450, 453; VENEZ. 141; NIC. 843.

performance thereunder from the seller,<sup>63</sup> *i. e.*, the seller must either secure the thing from the owner and legally deliver it to the buyer or pay him damages. The actual owner remains fully protected under all codes adopting the Roman system and does not lose his right of revindication as long as the property has not been delivered to the innocent purchaser.<sup>64</sup>

If the property has been pledged, the revindicating owner will be obliged to compensate the innocent pledgee in full as a condition precedent to the recovery of the property.<sup>65</sup>

(2) The property must remain in substantially the same condition as it was delivered to the bankrupt. If goods have been worked into a different thing (grain into flour, flax into canvas, etc.) the transformation (*specificatio*) will bar the remedy of revindication. Or if the property has been inseparably connected with another thing in such a way as to make a new whole (mirror built into a wall, jewels put into the movement of a watch, etc.), the "*adjunction*" will have the same effect, should the connection be essential and permanent, and the principal thing belong to the bankrupt.

(3) The property must be recognizable. A basic principle of civil law is that only non-fungible property (*corpus certum, corps certain, cuerpo cierto*) can be revindicated. As a general rule, fungible, generic property (money, commodities, etc.) is not revindicable unless, of course, it has been individualized by delivery in sealed containers, bales, cases, or has been otherwise rendered specific and recognizable. The concensus of legal opinion seems to be unanimous upon this point.<sup>66</sup> As will be seen later, however, several codes admit a rather important exception to this strict rule in regard to funds (*caudales*) deposited with the bankrupt in trust to be applied to special purposes, and not to be included in the current account.

Money (as well as other fungible things) cannot be revindicated if it has been accepted by the bankrupt prior to his bankruptcy. But if money belonging to or due a claimant has been paid into the estate after the declaration of bankruptcy, then it will be refunded to the owner, not, of course, by way of revindication, but simply as a preferred claim. It is in fact a debt of the estate itself, not of the bankrupt.

(4) The owner must prove his title. This principle is so self-evident as to require no authority for its support. As to

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<sup>63</sup> See *supra* note 63.

<sup>64</sup> LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 795.

<sup>65</sup> ARG. 1485, 1489; URUG. 1723, 1728.

<sup>66</sup> LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at §§ 796, 800, 817; *cf.* Serna y Reus cited by LOZANO, CODIGO DE COMMERICIO DE LAS E. E. U. M. (1901) 411, 412. See also DALLOZ 1898, 2.172 and 1900, 1.312 (Court of Appeals of Paris, Feb. 5, 1898).

the procedure of proving the revindicant's rights, codes usually provide that the owner may exercise his right of revindication only upon its recognition by the creditors or, if it is disputed by the syndic or the creditors, upon adjudication by the court.<sup>67</sup>

### III. REVINDICATION OF FUNDS AND NEGOTIABLE PAPER

#### A. *Revindication of Funds*

Theoretically speaking, funds or money deposited with the bankrupt, being not a *corpus certum*, but fungible, generic property, are not revindicable unless, of course, they have been in some way physically individualized.<sup>68</sup> The French Commercial Code, and, under its influence, the codes of Haiti, Dominican Republic, Chile, Argentina, Ecuador, Brazil and Venezuela strictly adhere to this rule and do not permit revindication of money received by the bankrupt prior to the declaration of bankruptcy, even though it was not paid to the bankrupt under some agreement, but simply deposited in trust. Other Latin-American codes are more liberal in this respect. These admit revindication of, or more properly speaking, priority of claim for,<sup>69</sup> funds from the bankrupt's estate where these funds have been sent to the bankrupt, apart from the current account, for the payment of obligations incurred by the depositor at the place of residence of the bankrupt, or for delivery to a definite person for the account and on behalf of the creditor—in other words, delivered by the latter to the bankrupt in trust.<sup>70</sup> The Colombian commercial law even goes so far as to admit generally revindication of funds deposited with the bankrupt to the order (*disponibles a la orden*) of the depositor, if no interest has been stipulated on them.<sup>71</sup>

#### B. *Revindication of Negotiable Paper*

Negotiable paper as *corpus certum* is revindicable, even without any specific code provision, provided it can be shown that title thereto has not been passed to the bankrupt, as where drafts, promissory notes, checks, or shares of stock, have been deposited with him simply for safe-keeping on behalf of the owner without any further purpose or stipulation. The necessity of a special provision appears only when, in addition to physical possession, control over the negotiable paper has been transferred to the

<sup>67</sup> FRENCH 579; DOM. 579; HAIT. 579; ECU. 999; NIC. 1109; GUAT. 1258; VENEZ. 998; HOND. 896; EL SALV. 803; PERUV. 920; BRAZIL. 139; MEX. 998; CUB. 908.

<sup>68</sup> See COSTA RIC. 32; ARG. LEI DE QUIEBRA 93.

<sup>69</sup> See Serna y Reus in LOZANO, *op. cit. supra* note 66.

<sup>70</sup> BOL. 653, 4; COL. 165, 3; COSTA RIC. 31, 3; GUAT. 1259, 5; NIC. 1110, 5; HOND. 897, 5; EL SALV. 804, 5; PERUV. 921, 6; MEX. 999, 7; CUB. 909, 6.

<sup>71</sup> Law No. 51 (1918) § 22.

bankrupt. The legal effect in bankruptcy of such a transfer will depend upon whether: (1) the negotiable paper was delivered to the bankrupt for collection only, either by special, limited endorsement or under a separate mandate; or whether (2) the paper was (*prima facie*) unconditionally endorsed to the order of the bankrupt.

The solutions to these two questions in Latin-American codes do not substantially differ. Under practically all of the codes, bills of exchange, notes and other negotiable instruments may be revindicated if they have been delivered to the bankrupt for collection only, without transferring to him title to the paper ("sin endorso o expression que transmitir la propiedad"), the proceeds to be kept in trust at the disposal of the claimant, or to be applied for some definite purpose.<sup>72</sup> In other words, revindication will be available if title to the negotiable paper has not actually passed to the bankrupt. If a draft has not been endorsed at all, but only delivered with a power of attorney to collect, or if it has been endorsed expressly for collection, then the right of the owner to revindicate it is beyond any question.

But what if a draft has been delivered to the bankrupt with a regular endorsement? Here there are two possible situations to be considered. The draft may have been regularly endorsed to the bankrupt as a consideration in some transaction between the endorser and the bankrupt; then it becomes a part of the estate and is not revindicable. But it frequently happens that the draft, although endorsed without qualification, has been in fact delivered to the bankrupt only for collection (or otherwise) without any intention that the title thereto should actually pass to the bankrupt. Such endorsement should not exclude revindication if it can be clearly proved that under the agreement between the parties the bankrupt, despite the unconditional endorsement, was not to acquire title, but was simply to collect on the draft and hold the proceeds in trust for the owner.

This is seemingly contradicted by provisions of several Latin-American codes under which revindication of negotiable paper is permitted only if the paper has been delivered to the bankrupt without endorsement or statement transferring property.<sup>73</sup> Actually, however, these provisions do not preclude the possibility of revindication of endorsed paper; they simply limit it to cases where the title was not intended to pass to the bankrupt. The interpretation of these provisions should not be extended beyond these limits to exclude proof of the actual agreement between

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<sup>72</sup> ARG., LEI DE QUIEBRA 92, 2, 112; BOL. 653, 3; CHIL. 1509; COL. 165, 2; ECU. 996, 1; COSTA RIC. 31, 2; GUAT. 1259, 4; NIC. 1110, 4; VENEZ. 996, 1; HOND. 897, 4; EL SALV. 804, 4; PERUV. 925, 5; BRAZIL. 138, 3.

<sup>73</sup> See *supra* note 72.

the parties; the presumption which the provisions establish against the owner is not *juris et de jure*, but an ordinary presumption *juris tantum* which may be rebutted by proof. Consequently, the only difference between a draft endorsed for collection and a draft endorsed without qualification will be in the distribution of the burden of proof. In the first case, to retain the draft in the bankrupt's estate, the trustees would have to prove that despite the qualified endorsement it belonged to the estate; in the latter case, in order to revindicate it from the estate, the alleged owner would have to prove that it had been delivered to the bankrupt only for collection and that the title did not pass.<sup>74</sup>

If there has been a regular current account kept between the owner and the bankrupt, entries in that account might be considered as conclusive evidence. If a regularly endorsed draft had been credited to the owner's account, this would establish the bankrupt's title and defeat revindication. On the other hand, if a draft, despite the regular endorsement, had been left outside of the current account, this should operate as *prima facie* proof of the retention of title by the owner and make the draft revindicable.

In order to be revindicable, negotiable paper must actually exist in the bankrupt's estate (or be held for him by his agents and bailees). Revindication will not lie if title to these instruments has been transferred by the bankrupt to third persons or the instruments surrendered to the payee against payment. In the latter case, however, revindication of the amount paid may be possible if the local statute admits the revindication of funds and the terms on which the payment was collected by the bankrupt are within the statute (permitting the revindication of funds which are to be kept apart from the current account subject to the claimant's order, or to be applied for special purposes indicated by the latter).

The revindication of negotiable paper payable to the bearer will generally be governed by the same rules. The proof of title may be made more difficult by the fact that the paper is transferable without endorsement, but if the owner can prove that he delivered the paper payable "to the bearer" to the bankrupt for a special purpose without the intention of passing title (as may be very often the case with the deposit of such paper

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<sup>74</sup> LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 810; BOISTEL, *op. cit. supra* note 5, at 520, 766. See DALLOZ 1899, 2.89 (Court of Appeal of Chambéry, June 7, 1886) and note by M. Claro. In that decision the court held that endorsed paper may be revindicated if it is proved that it has been delivered to the bankrupt for a special purpose, such as collection, or for a special negotiation not yet terminated.

with a bank) then revindication will lie.<sup>75</sup>

#### IV. REVINDICATION BY THE UNPAID SELLER

Strictly speaking, revindication can be exercised only by the owner against a holder who retains property unlawfully. Bankruptcy laws in all the jurisdictions under consideration, however, extend this remedy under certain restrictions and conditions to the unpaid seller, regardless of the fact that the latter, having allowed the title to pass to the bankrupt, retains only a claim for the price and should, again strictly speaking, be treated as an ordinary general creditor. In order better to understand how this specific remedy operates in bankruptcy it may be well first to consider the remedies of the unpaid seller in cases which do not involve bankruptcy.

##### A. Remedies of the Unpaid Seller in Civil Codes

The remedies of the unpaid seller under the civil codes are fourfold: (1) retention, (2) resolution (rescission), (3) revindication, and (4) privilege (lien). The first two are common to all jurisdictions; the last two, are peculiar to the French legal system and, of Latin American codes, adopted only by the Bolivian Code.

(1) The right of retention belongs to one who sells for cash in all cases where the price has not been paid. The seller is not obligated to deliver the property except upon payment, and, therefore, may retain it until he is paid. The remedy is, of course, ordinarily not available to the seller on credit terms, the very substance of a credit sale being the delivery of the property before payment. But if between the time of sale and the delivery of the property the economic condition of the buyer becomes so precarious as obviously to jeopardize the recovery of the price by the seller, then the latter also may exercise the right of retention and refuse delivery unless the buyer pays or gives a guaranty of payment.

The codes differ somewhat as to the contingency upon which the right of retention by a seller on credit terms is predicated. Under French law the buyer must be declared bankrupt or found civilly insolvent (*en faillite ou état de déconfiture*); the same rule prevails in the Bolivian and Venezuelan codes. Under the laws of Nicaragua, Panama, Honduras, Costa Rica, Argentina, Mexico, Cuba and Brazil, formal bankruptcy is not mentioned as a condition precedent to retention, and the buyer must be simply

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<sup>75</sup> Cf. DALLOZ 1889, 1.207 (Court of Cassation (req.), Jan. 9, 1888). See also DALLOZ 1902, 1.473 (Court of Cassation (Civ.), Nov. 27, 1900), in which case a paper payable to the bearer was found among the assets of a bankrupt with an inscription that it belonged to a third person. In the absence of evidence of fraud, this was found to be a good proof of title and the revindication was allowed.

found in "*estado del insolvencia*." The codes of Chile, Peru, Ecuador, Colombia and El Salvador go further and admit retention merely if the buyer's economic condition (*fortuna*) has become weakened to such an extent that there is danger of the seller losing the price.<sup>76</sup>

(2) Resolution (*résolution, resolucion, rescissao*), or the right to rescind a sale for non-payment of the price, is a remedy which the civil law extends to an unpaid seller regardless of whether he has sold for cash or on credit and regardless of whether the property still remains in his hands or has been delivered to the buyer. It is not a remedy peculiar to sales alone, but is generally available to every creditor in a bilateral contract, who, in the event of non-performance by the debtor, has the implied right either to demand performance or to rescind the contract and claim damages. In addition to the general rule of rescission of bilateral contracts for non-performance, however, all the codes under consideration contain specific provisions for the rescission of sales upon non-payment by the buyer.<sup>77</sup> Some of these predicate the right of resolution upon a short period of notice to the buyer, but in most of the civil law jurisdictions an unpaid seller may exercise the right immediately upon default.

Upon resolution of a sale, the parties to the contract are restored to their original status and title to the property reverts to the seller. If the property has not been delivered to the buyer the remedy is perfect; it requires no further process of law, and title remains absolute against everybody including third parties who, in the interim, may have acquired rights through the buyer. If the property has been delivered to the buyer, however, the seller, having exercised his right of resolution, will have to revindicate it as his own from the hands of the buyer or a grantee who took it knowing of the non-payment of

<sup>76</sup> FRENCH CIV. 1612, 1613; DOM. CIV. 1612, 1613; HAIT. CIV. 1397, 1398; BOL. CIV. 1031, 1032; VENEZ. CIV. 1534; NIC. CIV. 2594; PAÑ. CIV. 1236, 1237; HOND. CIV. 1623, 1624; COSTA RIC. CIV. 1072, 1073; ARG. CIV. 1452, 1453; MEX. CIV. 2856, 2857 (new 2286, 2287); CUB. CIV. 1466, 1467; BRAZIL. CIV. 1130, 1131; CHIL. CIV. 1286; PERUV. CIV. 1378, 1379, 1381; ECU. CIV. 1817; COL. CIV. 1882; EL SALV. CIV. 1629; PLANIOL, *op. cit. supra* note 38, at § 1538; THALLER, *op. cit. supra* note 5, at § 1943.

<sup>77</sup> FRENCH CIV. 1184, 1654; DOM. CIV. 1184, 1654; HAIT. CIV. 973, 1439; BOL. CIV. 775, 1067; VENEZ. CIV. 1231, 1573; CHIL. CIV. 1873, 1877, 1879; PERUV. CIV. 1388, 1389, 1390; ECU. CIV. 1479, 1864; NIC. CIV. 1885, 2262; COL. CIV. 1346, 1930, 1935; PAN. CIV. 1009, 1275; HOND. CIV. 1386, 1664; EL SALV. CIV. 1300, 1675; COSTA RIC. CIV. 1085; CUB. CIV. 1124, 1505; MEX. CIV. 1349, 1350, 2900 (new Civil Code 1949, 2300; *cf.* 2310, 2312, 2313); BRAZ. CIV. 1092, 1163. As has been stated above, the Argentinian Civil Code does not admit rescission of sales contracts except in case of sales for cash; even *pacta commissoria* in contracts of sale are forbidden. ARG. CIV. 1408, 1410. The Commercial Code of Argentina, on the contrary, always presumes a rescissory clause in a bilateral contract. ARG. 216.



the price. But if the property has been transferred by the buyer to a bona fide purchaser, revindication will be denied and the resolution will remain ineffective.

(3) and (4) Revindication for non-payment and privilege are remedies known only to French law.<sup>78</sup> Under the name "revindication for non-payment" Section 2102, 4 of the French Civil Code gives the unpaid seller the right to repossess from the buyer the property sold, provided this property still remains (a) in its original condition, (b) in the possession of the buyer, and provided that (c) revindication is exercised within eight days after delivery. Theoretically this right stands in open contradiction to the theory of sales adopted by the Code Napoléon, *viz.*, that the sale is perfected and title passes as soon as the parties have agreed upon the thing sold and the price.<sup>79</sup> It was retained in the Code as a survival of the old French law<sup>80</sup> which was based upon an entirely different theory of ancient Roman law whereby the sale was not perfected until delivery and, in the case of sale without credit, payment of the price. According to this theory, if the price were not paid the seller who had not granted credit could revindicate the thing sold as his property<sup>81</sup>—hence the improper use of the term "revindication" in Section 2102, 4 of the French Civil Code. In the present system of French law this remedy is not revindication at all in the proper sense of the word, but is simply a peculiar action whereby the

<sup>78</sup> FRENCH CIV. 2102,4; DOM. CIV. 2102,4; HAIT. CIV. 1869; BOL. CIV. 1488.

<sup>79</sup> FRENCH CIV. 1583.

<sup>80</sup> "Qui vend aucune chose mobilière sans jour and sans terme esperant estre payé promptement il peut la chose poursuivre, en quelque lieu qu'elle soit transportée, pour estre payé du prix qu'il l'a vendue." COUTUME DE PARIS, art. 176. A seventeenth century French writer, Julien Brodeau, in his comments on this rule refers to early decisions holding that the unpaid seller may revindicate the property from innocent purchasers (Prevost de Paris, Nov. 9, 1604) even if it has been resold many times (Chambre de Requêtes, July 24, 1587). 2 BRODEAU, COUSTUME DE PREVOSTÉ ET VICOMTÉ DE PARIS (1669) 426.

<sup>81</sup> "Traditionibus et usucapionibus non nudis pactis dominia transferuntur." COD. II., 3, 1. 20. "Venditae vera res et traditae non aliter emptori adquiruntur quam si is pretium solverit vel alio modo ei satisfecerit . . . sed si is qui vendidit fidem emptoris sequutus fuerit dicendum est statim rem emptoris fieri." INST. JUST. II., I., § 41. The famous French text-writer of the eighteenth century, Pothier, says that certain scholars had been of the opinion that tradition of a thing, the price of which had not been paid, carried a presumption that the seller "followed the faith of the buyer" (*fidem emptoris secutus fuerit*), and that, therefore, title had passed, but that this opinion had been well refuted by Fabianus de Monte as contradicting the rule of Justinian. Pothier himself, however, thinks that the rule of Justinian does not hold if the seller permits a considerable period of time to elapse without demanding payment; in this case he must be considered as having given credit to the buyer and passed title to him. POTHIER, TRAITÉ DU CONTRAT DE VENTE (1768) §§ 318, 324.

unpaid seller may regain possession of the thing sold, so that he can exercise his rights of retention and resolution.<sup>82</sup> Privilege, or lien for the unpaid price of the property sold, belongs to one who sells either for cash or on credit, as long as the thing sold remains in the buyer's possession.

Among Latin-American codes, only the Bolivian Civil Code has adopted the French law of revindication and privilege; all others restrict the remedies of the unpaid seller exclusively to retention and resolution.

### B. Remedies of the Unpaid Seller in Bankruptcy

The bankruptcy of the buyer intervening before the seller has resorted to any of these remedies will, under certain circumstances, materially affect the rights of the unpaid seller. In this connection the three following contingencies must be considered: (1) the property may still be in the hands of the seller at the time of the declaration of bankruptcy; (2) the property may have been delivered to the bankrupt; (3) the property may have been shipped by the seller but not yet physically delivered to the buyer (en route or in transitu).

(1) If the property still remains in the hands of the unpaid seller, all remedies which would have been available to him under common or civil law before the bankruptcy of the buyer remain intact. If he has sold for cash, he cannot be compelled to deliver the property until he has been paid, nor can he be deprived of his right to rescind the sale for non-payment of the price.<sup>83</sup> Likewise, if the sale was on credit, all codes, as has already been explained, expressly grant the seller the right to retain the property and subsequently rescind the sale, unless he has been given sufficient security for payment.

(2) If the property has been actually delivered to the bankrupt, then, according to French law, the seller loses all his civil law remedies. Section 550 of the Commercial Code expressly takes away the right of retention and lien; likewise the French courts have consistently held that the remedy of resolution cannot survive bankruptcy and that the rights of an unpaid seller after the buyer's bankruptcy are to be determined exclusively by the Commercial Code, which does not grant this right to the seller.<sup>84</sup>

<sup>82</sup> 8 LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 832; THALLER, *op. cit. supra* note 5, at § 1943.

<sup>83</sup> FRENCH 577; HAIT. 570; DOM. 577; 8 LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 858; THALLER, *op. cit. supra* note 5, at §§ 1956, 1957.

<sup>84</sup> 8 LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 834; see also decision of Court of Appeal of Douai, July 30, 1896, DALLOZ 1897, 2. 464, and Court of Cassation (civ.), Dec. 24, 1889, DALLOZ 1890, 1. 161. The Court of Douai very properly remarks that resolution is excluded in bank-

In this respect, French law makes no distinction between sales for cash and on credit; delivery is the only determining factor. The seller thus retains only his claim for the price, protected by no privilege and subject to pro rata satisfaction from the proceeds of the liquidation of the bankrupt's estate.

Latin-American codes are not unanimous on this question. A few (Argentinian, Chilean, Ecuadorian, El Salvadorian, Nicaraguan and Venezuelan), following the French system, deprive the unpaid seller of all specific remedies when the merchandise has been delivered. Others distinguish between sales for cash and on credit terms and, under the influence of old French and Roman law (which granted the unpaid seller for cash revindication of the property sold), authorize an unpaid seller for cash to revindicate the property as long as it remains in a clearly recognizable and identifiable condition, unmixed with other property belonging to the bankrupt.<sup>85</sup> But all are unanimous in depriving the seller on credit of all civil law remedies after delivery of the goods, thus reducing him to the status of an ordinary general creditor. The mere passing of title, however, or even constructive "tradition," will not amount to a delivery so as to come within the rule; as will be seen later the property must be physically delivered to the buyer or placed within his control.

The seller who has parted with possession may preserve his civil law remedy if he undertakes to exercise it before the declaration of bankruptcy. The property need not be actually retaken, however, it sufficing if the seller merely commences the action of resolution or revindication before the declaration of bankruptcy.<sup>86</sup> The moment of filing the suit determines the rights of the parties; the sale having been declared void by the plaintiff as of the date of the commencement of the action, subsequent events can no longer affect the remedy.<sup>87</sup>

(3) But if the property, although shipped by the seller, has not been actually delivered, so that it is technically en route or "in transitu" at the time of the declaration of bankruptcy, the seller, while still losing his rights under the common or civil law, is sufficiently protected by a special remedy of the commercial laws of bankruptcy—called "revindication"—whereby he

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ruptcy cases because to admit resolution would mean to permit repossession, *i.e.*, revindication against the express sense of Article 550.

<sup>85</sup> BOL. 654; COL. 1655; COSTA RIC. 31; GUAT. 1260, 1261; HOND. 897,7; PERUV. 921,8; MEX. 999,9; CUB. 909,9; BRAZIL. 1385; *cf.* LOZANO, *op. cit. supra* note 66, at 414.

<sup>86</sup> Court of Cassation (civ.), Dec. 24, 1889, Dalloz 1890, 1. 161.

<sup>87</sup> THALLER, *op. cit. supra* note 5, at § 1948; 8 LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 935; BOISTEL, *op. cit. supra* note 5, at 770 ff. The remedy may be defeated only by subsequent payment. See 2 PLANIOL, *op. cit. supra* note 38, at § 1319.

may stay the delivery and reclaim the property.<sup>88</sup> The exercise of this remedy is dependent on certain conditions, *viz.*: (1) the price of the property must not have been paid or the buyer's obligation to pay otherwise discharged (novated, compensated, cancelled, etc.); (2) the property must be identifiable—only a *corpus certum* can be reclaimed; (3) the property must not have been delivered to the buyer's warehouse, or other place under his control agreed upon between the seller and the buyer; (4) the property must not have been resold by the buyer to a third person, in good faith, upon invoices and bills of lading signed by the seller. The first two conditions seem so self-evident as to require no further comment. The last two deserve more detailed consideration.

Delivery of the property will preclude revindication only if it is an actual physical delivery to the warehouses (*magazins, almacenes*) of the bankrupt, or to similar places under his control where he conducts his business and where the property delivered will become a part of his assets visible to his creditors.<sup>89</sup> The passing of title, or tradition, if not accompanied by delivery, will not destroy the seller's remedy. Thus, segregating and exhibiting property to the buyer, delivering it to a carrier for shipment, giving to the buyer the keys of the containers, allowing the buyer to affix his marks to the property, even sending a negotiable bill of lading to the buyer at the latter's risk and for

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<sup>88</sup> FRENCH 576; DOM. 576; HAIT. 570-573; ARG. LEI DE QUIEBRA 98 ff; URUG. 1688, 1689; BOL. 654, 2; COL. 165, 6; ECU. 996, 3; COSTA RIC. 31, 6; GUAT. 1263; NIC. 1110, 7; EL. SALV. 804, 6; HOND. 897, 8; VENEZ. 996, 3; PERUV. 921, 9; MEX. 999, 10; CUB. 909, 9; BRAZIL, 138, 4, 5, 6; *cf.* also 8 LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 840; Court of Appeals of Dijon, July 21, 1890, DALLOZ 1892, 2.1.

The term "revindication" applied to this remedy is, of course, quite incorrect. The remedy here belongs to a seller who has parted with title and has only a personal claim for the price; therefore, strictly speaking, he cannot revindicate. Actually the remedy is nothing else than a special case of resolution (rescission), allowed because of the anticipated inability of the bankrupt to pay.

The Brazilian law of bankruptcy is the most liberal of all codes in the protection of a seller on credit in case of the buyer's bankruptcy. In addition to the usual revindication of merchandise not paid for in full, which has not come into the actual possession of the bankrupt, this law permits the seller to revindicate (a) merchandise sold fifteen days before the demand for a preventive concordata or declaration of bankruptcy, even though the merchandise has been delivered to the debtor, and (b) merchandise sold within forty days prior to the preventive concordata if the seller was induced to sell by fraud of the debtor.

<sup>89</sup> *Cf.* Court of Appeals of Caen, July 13, 1892, DALLOZ 1893, 2.422. In this decision the court held, among other things, that the delivery, in order to eliminate revindication, must be made to a special place (*local*) where the buyer may have the goods at his free disposal and be able to persuade third parties that he is actually the owner.

his account, will not preclude revindication.<sup>90</sup> On the other hand, the loading of merchandise on a ship belonging to or used by the buyer, delivery to a public warehouse subject to the orders of the buyer, delivery to places especially agreed upon for that purpose between the parties (particularly in the case of bulky goods)—in other words, any act of physical transfer of possession or control—will be considered equivalent to delivery of the merchandise to the warehouses of the buyer. Delivery to the agent of the buyer, provided he is authorized to sell merchandise of the buyer, is viewed in a similar light.<sup>91</sup> But unless it has been customary for him to store merchandise and hold it for the buyer, so that his warehouse can be considered the buyer's habitual warehouse, delivery to a forwarding agent will not exclude revindication.<sup>92</sup> Merchandise put into the hands of a carrier or forwarding agent cannot be regarded as being in the physical possession of the consignee and taken into consideration by his creditors as a part of his assets.<sup>93</sup>

To defeat revindication, the delivery of the property into the bankrupt's actual possession must be effected before the declaration of bankruptcy. If the goods do not reach the bankrupt's warehouse until after such declaration the seller will not be deprived of his right<sup>94</sup> for the reason that, delivered at this late date, the merchandise could have no tendency to increase the assets and, therefore, the credit of the bankrupt.

The French code and, in its wake, several Latin-American codes contain rather detailed provisions concerning conditions under which the resale of merchandise en route will defeat revindication by the unpaid seller<sup>95</sup>: (1) the merchandise must be resold or generally title thereto must be lawfully transferred to

<sup>90</sup> See above citations and also 8 LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 845.

<sup>91</sup> Only two codes contain express provisions in this respect, *viz.*, the Venezuelan (996, 3) and Ecuadorian (996, 3).

<sup>92</sup> Court of Cassation (civ.), July 29, 1875, DALLOZ 1876, 1. 113.

<sup>93</sup> 8 LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 842.

<sup>94</sup> 8 LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 848; BOISTEL, *op. cit. supra* note 5, at 773; *cf.* THALLER, *op. cit. supra* note 5, at § 1946.

<sup>95</sup> FRENCH 576; DOM. 576; HAIT. 572; CHIL. 1514, ECU. 996, 3; GUAT. 1260; VENEZ. 996, 3; BRAZIL. 138, 4. See 8 LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at §§ 849, 850. Boistel, on the contrary, holds that Section 576 of the French Commercial Code refers to the regular endorsement of negotiable bills of lading. In his opinion, the sense of this rule is that in its absence the mere endorsement of a bill of lading, not accompanied by actual tradition, would not be sufficient to prevent revindication. BOISTEL, *op. cit. supra* note 5, at 774-775. This is a rather weak argument, especially in view of the fact that the negotiable copy of bill of lading carries to the holder in due course title to the merchandise and its endorsement by the consignee to the ultimate purchaser irrevocably transfers title to the latter.

a third party (by barter, *datio in solutum*, pledge etc.);<sup>96</sup> (2) the transfer must be made in good faith; and (3) the merchandise must be resold on an invoice *and* bill of lading signed by the original seller.

The reason for the first two conditions is obvious; the last condition, however, appears at the first glance somewhat incongruous. It is not customary for the seller to sign invoices; usually only bills of lading are endorsed for delivery to the buyer upon acceptance of drafts or payment. But it must be clearly understood that this rule does not refer to the endorsement of the negotiable copy of a bill of lading which carries with it title to the merchandise. If such a bill of lading has been delivered to the consignee and subsequently endorsed by him to a third party, the original seller's revindication is irretrievably lost under any circumstances. The rule under consideration refers to the case where the consignee has no negotiable bill of lading in his hands and is in possession only of an ordinary non-negotiable duplicate set of shipping documents. In such a situation, if copies of invoice and bill of lading have been signed by the seller he will lose revindication if the merchandise en route has been purchased in good faith by a third party on the strength of such signed documents. It is essential that both the invoice and bill of lading be signed by the consignor and delivered to the consignee. It is essential also that both these instruments be exhibited by the latter to the buyer so that it will be clear that he is buying merchandise on the strength of documents which carry the consignor's consent to relinquish revindication in the event of resale, even though the negotiable copy of the bill of lading has not yet been delivered to the consignee.<sup>97</sup> But the actual assignment of these documents to the ultimate buyer is not required by law, nor can it be considered as essential in any respect. The codes speak only of resale *on (sur)* signed copies of invoices and bills of lading. The Brazilian law is especially clear in this respect, providing that the sale should be made in view (*en vista*) of these documents.

This rule is obviously intended as a compromise which will recognize the interests both of the original seller and the ultimate buyer in case the middle-man consignee goes into bankruptcy. In the present highly developed system of exchange and distribution of goods a shipment may change hands several times while it is still in transit. This turn-over serves a legitimate

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<sup>96</sup> Court of Cassation, July 29, 1875, DALLOZ 1876, 1. 113. See also 8 LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 852; GUINAZÚ, *op. cit. supra* note 5, at 271.

<sup>97</sup> This condition becomes immaterial if the merchandise was shipped with the seller's knowledge that it would be resold en route. Cf. Court of Appeal of Caen, July 13, 1892, DALLOZ 1893, 2. 422.

purpose and the law must protect those who acquire such goods in good faith. On the other hand, the law seeks also to protect the seller. It does so by depriving him of revindication only if he has signed the invoices and bills of lading—an unusual practice and therefore one which can fairly carry the presumption that the seller in doing as he did well understood the consequences. Theoretically, this limitation of the revindication of the unpaid seller may seem broad and substantial. Practically, however, its scope is considerably restricted, for it is not customary to furnish the buyer on credit with signed copies of invoices and bills of lading. If the seller trusts the buyer and wishes to confer upon him the power to dispose of the merchandise before its arrival, he will simply send him an ordinary negotiable copy of the bill of lading.

Somewhat different rules are found in the Argentinian and Uruguayan codes.<sup>98</sup> Under the Argentinian law merchandise that has not yet been received by the bankrupt buyer cannot be revindicated if it has been resold to a third party in good faith while the invoice or bill of lading (ocean or inland) was still en route. Under Uruguayan law merchandise that has been resold to a third party in good faith while still in transitu on invoice or bill of lading is not revindicable. These read as much broader rules indeed than the provisions of the French code. They are supplemented in both codes, however, by an exception which reduces them to quite inoffensive limits, *viz.*, if the parties agree that the risk for the merchandise shall remain with the seller until delivery, then the subsequent sale before delivery does not affect revindication. By this means a seller who prefers to retain the right of revindication may fully protect himself against any contingency. Of course, he will obtain the protection at the cost of carrying the risk of loss of the merchandise while it is in transitu. But the availability of marine insurance, together with the fact that Latin-American buyers usually pay but scant attention to the provisions of law governing the passing of title to merchandise and generally refuse to pay for shipments lost or damaged in transitu unless they themselves receive compensation from the insurance company, would seem to render this price not altogether out of proportion to the advantages gained.

Other Latin-American codes contain no rules concerning the resale of merchandise in transitu. In those jurisdictions, in view of the very precise law authorizing the unpaid seller to revindicate the merchandise until it has been delivered to the original buyer, the purchaser of merchandise in transitu would be unable to oppose the revindication and would have to go for the price paid to the "*concurso*" as a simple general creditor.

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<sup>98</sup> ARG. LEI DE QUIEBRA 104, 106; URUG. 1720, 1722.

### C. *Performance of Sales Contract by Syndics*

The right of revindication belongs to the unpaid seller not because of the mere fact of the buyer's bankruptcy, but because the bankruptcy creates a reasonable presumption of his inability to perform his obligation under the sales contract; in other words, it may be considered as a presumptive anticipatory breach of the contract. But this presumption is not incontrovertible and bankruptcy in itself does not invalidate the sales contract as a matter of law. On the contrary, the creditors of the bankrupt assembled in the "*concurso*" and represented (as *masa* or estate) by the syndic, curator, liquidator, etc., may demand from the seller the performance of the sales contract, provided they themselves are willing to perform the bankrupt buyer's obligation under the contract. In the case of a sale for cash, this requires a payment of the price at once; if the sale is on credit, full payment at maturity must be guaranteed by a bond or otherwise. The seller then has no right to revindicate the merchandise.<sup>99</sup> Moreover, as explained above, if the goods are still unshipped he will also lose the right of retention and will be obligated to perform the sales contract as though the bankruptcy had not occurred.

By affirming an unexecuted contract and paying or guaranteeing the payment of the price in full, the syndic of the estate in fact incurs a new obligation binding upon the estate and novating the old contract under which the estate was responsible only pro rata. As authority to obligate the estate is not ordinarily within the power of a syndic, whose functions are limited simply to preserving and liquidating the bankrupt's assets, the decision to demand from the seller the performance of the contract of sale against full payment must be approved by the court. A few codes contain express provisions to this effect;<sup>100</sup> in others the rule is derived from the general provisions of the law governing the rights and duties of syndics.

## V. REVINDICATION OF THE PRICE OF RECLAIMABLE PROPERTY SOLD BY THE BANKRUPT

### A. *Property Held in Bailment*

We have already seen that property held by the bankrupt in bailment can be revindicated by the owner from the bankrupt's estate insofar as it remains there physically and is in a recogniz-

<sup>99</sup> FRENCH 578; DOM. 578; HAIT. 576; ARG. LEI DE QUIEBRA 108; URUG. 1724; BOL. 654; CHIL. 1519; COL. 165; EL SALV. 998; COSTA RIC. 31, 6; GUAT. 1266; NIC. 1110, 7; VENEZ. 997; HOND. 897; EL SALV. 804; PERUV. 921; MEX. 998; CUB. 908, 909.

<sup>100</sup> VENEZ. 999; COSTA RIC. 31, 6; NIC. 1109; EL SALV. 801; ECU. 998.



able condition. But what are remedies of the owner if it appears that the property has been sold by the bankrupt? Here various contingencies must be considered; first of all, the question arises whether the buyer has or has not paid the price to the bankrupt.

(1) If the price has been paid in cash, then on the strength of the principle that revindication will lie only for specific non-fungible property (*corpus certum*), the owner will generally have no remedy except a claim for a dividend as a general creditor. This rule, however, is not absolute. As has already appeared, in jurisdictions where funds are revindicable money paid by the buyer to the bankrupt will be subject to revindication (or rather to a preferential claim), provided it has been understood between the owner and the bankrupt that the latter would have no right to charge the price to the current account or use it generally, but would hold it in trust for the owner.<sup>101</sup> Of course, this test will be required only in regard to the price paid for property *consigned* to the bankrupt for sale. If the bankrupt has unlawfully sold property simply *deposited* with him without authority to sell in other words, converted it, its price will be always revindicable, in jurisdictions where funds are revindicable, because the sale was illicit and the price could not be subject to compensation between the owner and the bankrupt. Furthermore, if the price of merchandise sold by the bankrupt bailee has been paid after the declaration of bankruptcy, the owner will have the right to claim this price in preference to other creditors under any circumstances. This follows from the theory that after the declaration of bankruptcy the bankrupt can no longer lawfully collect money from the buyer for the principal's account; so if the price is collected by the syndic, the latter cannot receive it for the estate, but only as a de facto agent (*negotiorum gestor*) of the owner.<sup>102</sup>

(2) When the price of the property sold has not been paid there are again two possibilities to consider. The buyer may simply owe the price on open account, or he may have delivered negotiable paper to the bankrupt, which still remains among the latter's assets.

In the former case French and Latin-American codes expressly give the owner of the merchandise the right to recover from the buyer the price, or any portion of it remaining unpaid, provided, however, the buyer's obligation has not been "compensated" (set-off) by entering it as a debit item in his current account with the bankrupt.<sup>103</sup> The issue is clear if, after debiting

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<sup>101</sup> *Supra* note 69.

<sup>102</sup> BOISTEL, *op. cit. supra* note 5, at 769 *in fine*; 8 LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 800; GUINAZÚ, *op. cit. supra* note 5, at 279.

<sup>103</sup> ARG. LEI DE QUIEBRA 109; URUG. 1726; BOL. 655; COL. 165, 4; ECU.

the price, the current account still shows a balance in favor of the buyer. In this case, the latter owes nothing to the bankrupt's estate, and is obviously as immune from any claims of the owner as from claims of the general creditors. But the question is less clear if the balance is against the buyer. May the original owner then revindicate the balance to the extent that it does not exceed the value of the merchandise?

This question has been discussed in detail by the French text writers. Section 575 of the French Code authorizes revindication only if the price has not been compensated through the current account between the bankrupt and the buyer.<sup>104</sup> In commenting upon this section, the greatest of all French authorities on commercial law, Lyon-Caen,<sup>105</sup> gives the owner the right of revindication if the current account consists of only one entry—the price of the merchandise—without any entries to the buyer's credit, on the theory that in such a case there could be no "compensation through the current account." If there are entries to the buyer's credit, then, in Lyon-Caen's opinion, there will be compensation (full or partial) through the current account; the case being outside of Section 575, there is nothing to eliminate the novating effect of the current account and revindication will not lie for the price, even though the buyer still owes a sum equivalent to the whole or part of the price. The balance will be recoverable by the estate, but the owner will participate in it only pro rata as a general creditor. Boistel and, among the latest writers, Thaller, on the other hand, are inclined to admit revindication, regardless of whether or not there are entries in the current account to the buyer's credit, provided the balance is in favor of the bankrupt.<sup>106</sup>

Lyon-Caen's opinion is undoubtedly correct from the viewpoint of the French theory of current account (novatory effect, indivisibility of the balance after the entry has been made); but it seems to stand in contradiction to the wording of Section 575 of the Commercial Code, which expressly states that the price of merchandise *and any portion thereof* may be revindicated if it has not been paid, settled in negotiable paper, or compensated

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996, 2; CHIL. 1510; GUAT. 1259, 3; NIC. 1110, 5; VENEZ. 996, 2; HOND. 896, 6; EL SALV. 804, 6; GUAT. 1259, 3; PERUV. 821, 7; MEX. 998, 8; CUB. 908, 8; FRENCH 575; DOM. 575; HAIT. 575. Brazilian law further facilitates revindication of the price, excluding it only when the price has been entered in the current account *upon consent of the owner*. BRAZIL, 133, 2.

<sup>104</sup> "Pourra même être revendiqué le prix ou la partie de prix des dites marchandises qui n'aura été ni payé ni réglé en valeur, ni compensé en compte courant entre le failli et l'acheteur." FRENCH 575.

<sup>105</sup> 8 LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § 802.

<sup>106</sup> THALLER, *op. cit. supra* note 5, at § 1134; BOISTEL, *op. cit. supra* note 5, at 769.

through the current account.<sup>107</sup> Under the rules of grammatical interpretation the words "or any portion thereof" apply to all of the three contingencies mentioned in the subsequent part the owner of the property to revindicate negotiable paper re- of the section. There seems to be no reason whatever to read the section in such a way as to apply these qualifying words only to payment or settlement in paper and deny revindication of that portion of price which remains uncompensated on the account.

(3) There is less unanimity in the codes as to the right of the owner of the property to revindicate negotiable paper, received in payment from the buyer and still in the bankrupt's estate. The letter of the French Commercial Code seems to exclude revindication altogether if the merchandise has been paid for by the buyer in negotiable paper (*reglé en valeur*).<sup>108</sup> This rule is rather liberally construed by the French courts, however, to mean that revindication is not permissible if the buyer settled by endorsing negotiable paper made by a third party to his or another's order. But if the buyer himself signs a promissory note or accepts a draft payable to the bankrupt such paper may be revindicated by the owner of the merchandise, inasmuch as it is not considered a settlement in paper.<sup>109</sup>

Among Latin-American laws, the Ecuadorian and Venezuelan codes contain an exceedingly harsh rule permitting the revindication of negotiable paper given in payment of price only if the paper is made or endorsed to the order of the owner himself.<sup>110</sup> In other words, in these jurisdictions, if the price is paid in paper made or endorsed to the order of the bankrupt, or to bearer, the owner will have no right to revindicate it, even though it still remains among the bankrupt's assets and its origin and destination can be clearly proven. Other more liberal codes expressly admit the revindication of negotiable paper given in payment for property sold by the bankrupt, regardless of whether it has been made or endorsed by the buyer, or whether it has been made or endorsed to the order of the owner or the bankrupt—provided it still remains in the estate and has not been compensated through the current account between the owner and the bankrupt.<sup>111</sup> As Lozano says in his annotations to the Mexi-

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<sup>107</sup> *Supra* note 104.

<sup>108</sup> French 575.

<sup>109</sup> Court of Cassation (req.) Feb. 27, 1908, DALLOZ 1909, 1. 51. See 8 LYON-CAEN ET RENAULT, *op. cit. supra* note 5 at § 801. *Contra*: THALLER, *op. cit. supra* note 5, at § 1133.

<sup>110</sup> ECU. 996,2; VENEZ. 996, 2.

<sup>111</sup> ARG. LEI DE QUIEBRA 103; URUG. 1719; BOL. 655; COL. 165, 4; CHIL. 1510; GUAT. 1259, 3; NIC. 110, 6; HOND. 897, 6; EL SALV. 804, 6; PERUV. 921, 7; BRAZIL 133, 2; MEX. 999, 8; CUB. 909, 8. In this group must be included the Haitian Commercial Code which, following the old French rule, omits reference to the "*reglement en valeurs*" existing in the present French

can Commercial Code, "drafts and notes that are in the possession of the bankrupt as payment for sales made for account of another person . . . are not a completed payment (*paga ya realizada*) but a promise to pay, which must be considered as an amount due (*cantidad debida*)."<sup>112</sup>

(4) Within the limits allowed in individual codes, the right to revindicate the price of property sold by a commission agent will belong to the principal-owner, regardless of whether or not the commission agent when selling the merchandise disclosed the principal. In this connection the right of revindication appears as a rather important exception to the general rule of French and Latin-American codes concerning the status of an undisclosed principal.

Unlike Anglo-American law these codes do not consider the actual principal as a party to the transaction made on his behalf by an agent if the latter did not disclose the principal's identity. All remedies of an undisclosed principal are against the agent, and he has no right to demand performance directly from the other party to the contract, nor can the other party have any direct claim against the undisclosed principal. In such transactions the agent appears as the actual party to the entire exclusion of the undisclosed principal.<sup>113</sup>

The rigidity of this rule is considerably, though onesidedly, mitigated, however, in case the agent goes into bankruptcy before the sales contract has been fully performed. Bankruptcy will not influence the rights of the buyer who still will have no recourse except against the agent and, therefore, will have to file his claim in bankruptcy as a general creditor; but the seller-principal, as the owner of the property sold, will have the right to revindicate its price, in accordance with the above explained rules, even though his name was not disclosed at the time when the sale was made by the agent.<sup>114</sup>

#### B. *If Property Was Sold in Transitu by Bankrupt Buyer*

We have already seen that, in many jurisdictions, if the merchandise has been sold to an innocent purchaser on signed invoices and bills of lading and the price paid to the bankrupt before

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Code and, therefore, excludes revindication only if the price was paid or compensated through a current account between the bankrupt and the buyer, and a *contrario* permits it if the price has been paid in negotiable paper.

<sup>112</sup> 2 LOZANO, *op. cit. supra* note 66, at 414.

<sup>113</sup> FRENCH 94. Cf. DALLOZ, *DICTIONAIRE PRATIQUE DU DROIT* (12th ed.) Vol. I, p. 245, No. 9, 16; HAIT. 91; COL. 360; ECU. 365; HOND. 159; CHIL. 257; PERUV. 239; ARG. 233; BRAZIL. 166; COSTA RIC. 66; GUAT. 64; NIC. 409; EL SALV. 157; MEX. 284; CUB. 246.

<sup>114</sup> See *supra* note 103; ARG. 110; URUG. 1727.

bankruptcy, the original seller will have no recourse except against the estate as a general creditor. But if the price has not been paid before the consignee's bankruptcy, will not the unpaid seller have the right to revindicate the price from the ultimate buyer?

Only the codes of Chile and Argentina<sup>115</sup> expressly confer this right upon the seller. All other Latin-American codes,<sup>116</sup> as well as the French code, are silent upon the question. In the absence of special provisions, however, there is no reason to deny this right to the seller. The law expressly gives him the right to repossess merchandise until it has been delivered to the consignee. If the consignee sells the merchandise before delivery and the price remains unpaid, there has been substituted for the merchandise a claim for the price which cannot be physically or symbolically commingled with other assets of the bankrupt, but which, on the contrary, preserves its identity until payment. In other words, although not physical property, it has all the requisites of a "*corpus certum*" and, therefore can be revindicated. Likewise, by analogy with the revindication of the price of the merchandise consigned and deposited, the seller has the right to revindicate the price of the merchandise from the buyer.<sup>117</sup>

If the buyer of the goods in transitu at the time of the declaration of bankruptcy has paid the estate after such declaration, what will be the remedy of the original unpaid seller? This is a much disputed question upon which there is very little authority. A decision of the Commercial Tribunal of Buenos Aires in 1911, quoted by Malagarriga in his *Codigo de Comercio Annotado*,<sup>118</sup> upholds the right of the seller to claim the price in preference to other creditors. The decision rests on the theory that the right of revindication is fixed at the date of the declaration of bankruptcy and that further acts of the syndic (resale and collection of the price) are of no effect, the intention of the law being not to allow the estate to be enriched by assets which could not have influenced the dealings of third parties with the bankrupt. Less than six years later, however, the Commercial Tribunal reversed itself on this point<sup>119</sup> and in a very detailed opinion denied the right of the seller to revindicate or to claim any preference for the amount paid into the estate for merchandise resold by the

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<sup>115</sup> CHIL. 1514; ARG. 1482.

<sup>116</sup> This refers, of course, only to the codes which deny physical revindication in the case of the resale of merchandise in transitu. See *supra* note 95.

<sup>117</sup> Cf. 8 LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at 851 *bis*.

<sup>118</sup> 9 MALAGARRIGA, *op. cit. supra* note 10, at 366; Font Valles v. Concurso de Urizar y Casanuova, *Juris. Trib. Cam. Com.* (April 1911) 233-234.

<sup>119</sup> 9 MALAGARRIGA, *op. cit. supra* note 10, at 366-368; Surs Frères c. Grenovich Hnos, in concurso, *Decision of Cam. Com. Nov. 30, 1916.*

syndic after the declaration of bankruptcy. This decision was based on the rule that three conditions must be coincident in order to give the seller the right of revindication, *viz.*, (1) non-payment of the price to the seller, (2) non-delivery of the merchandise into the possession of the debtor before bankruptcy, (3) recognizable status of the property (*que la cosa pueda ser individualizada*).<sup>120</sup> If the first two conditions are present but the third is not, the revindication will not lie. Thus in the case under consideration the court held that when the syndic took the merchandise out of the custom house and sold it with other merchandise before the seller had filed his demand for revindication, the third condition was not fulfilled and revindication was impossible. The court raised the question whether the seller, instead of revindicating, could simply claim the price of the property as indemnity. This was decided in the negative on the theory that the syndic sold the merchandise in the fulfillment of his duties without violating any rights of the seller.

At first glance, it would seem that, if by analogy to the recovery of the unpaid price of merchandise deposited or consigned the unpaid seller may have a preferential claim for the unpaid price of merchandise resold by the bankrupt buyer in transitu, then by the same analogy the seller must have a similar claim to the price of the merchandise resold if the price is paid into the estate *after* the declaration of bankruptcy. A more detailed analysis of the question, however, leads to the conclusion that the analogy does not extend so far. If merchandise, which was not delivered to the buyer before his bankruptcy, was either sold by the bankrupt on bills of lading and invoices while in transitu, or subsequently taken out and sold by the syndic, and the price paid into the estate after the declaration of bankruptcy but prior to the demand for revindication by the unpaid seller, then the latter could not claim either the merchandise or its price but would have to make his claim as a general creditor.

In this regard it must be kept in mind that the intervention of the buyer's bankruptcy while the merchandise is still en route does not of itself vitiate the sale as a matter of law, but simply gives the seller the right to stop the delivery, reclaim the merchandise and retain it until either the syndic performs the contract or he, the seller, rescinds the sale for non-performance. This is a discretionary right which the seller may or may not use, and as long as he does not exercise it the sale remains in full force and the merchandise can be lawfully sold by the syndic, subject, of course, to the right of the seller to revindicate it while it remains in the estate in an identifiable condition.

If the merchandise is resold by the buyer or the syndic and

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<sup>120</sup> Cf. ARG. LEI de QUIEBRA 99.

the price not yet paid by the ultimate purchaser, revindication against the merchandise is lost, but the seller will have an owner's claim for the unpaid price, which, as a chose in action, is a clearly distinguishable asset (*corpus certum*) that has been substituted for the merchandise sold. But when the price has been paid into the estate the transaction has been fully completed and there is nothing at that time in the estate which can be identified as the merchandise or its specific substitute. Therefore neither the merchandise nor its price can be claimed by the unpaid seller, any more than an owner may claim property consigned to an agent after it has been in some way transformed beyond recognition (as grain mixed with grain from other sources and ground into flour).

It is true that in the case of consignment the price of merchandise sold by the bankrupt, if paid by the buyer into the estate after the declaration of bankruptcy, is reclaimable. But no analogy can be drawn between the case of sale by a commission agent and sale by a buyer on credit terms. A commission agent is supposed to sell for the account of the principal, and in the case of the agent's bankruptcy it is reasonable and equitable to hold that the syndic cannot collect the price of the consigned merchandise otherwise than as the agent of the owner. The price which was paid to the syndic thus becomes a debt of the estate, not of the bankrupt, to the principal. But in the Argentinian case under consideration the court had before it a bankrupt buyer who had acquired merchandise on credit terms under a contract that was not invalidated by the bankruptcy but still remained in force, simply subject to discretionary cancellation by the seller. As long as this contract was not cancelled, the bankrupt before the declaration of bankruptcy, and the syndic after it, had the right lawfully to sell the merchandise. If it was so sold and the price paid into the estate, it was lawfully received by the syndic, not on behalf of the unpaid seller but on behalf of the estate. Consequently, after the price had been paid and commingled with other funds the seller lost his preferential remedy and became an ordinary general creditor.

#### VI. PARTICULAR CASES OF REVINDICATION

In addition to the normal or regular forms of revindication thus far considered there may be found in some of the Latin-American codes special rules concerning various particular cases of revindication. Upon closer consideration, however, these instances of revindication, appear, in fact, nothing more than preferential rights of certain creditors in bankruptcy proceedings. Their inclusion in chapters of codes dealing with revindication is probably due to the fact that no better place could be found for them.

(1) As a protection to the holders of banknotes, a few codes<sup>121</sup> specifically provide that in the case of insolvency of an emitting bank, the total amount (*importo*) of banknotes issued by it is subject to revindication. This is obviously not a case of revindication in the proper sense of the term, but simply the granting of a preferential claim to the holders of banknotes as a matter of public policy, just as in this country bonds deposited by a national bank with the Treasurer of the United States preferentially protect holders of banknotes to the full extent of their face value.

(2) Several codes<sup>122</sup> specifically provide that in the case of the pledgor's bankruptcy the pledgee may exercise revindication in regard to property in his possession, subject to the right of the creditors to redeem the property pledged and, if it is sold, subject to the obligation of the pledgee to surrender to the estate the surplus proceeds after full satisfaction of the debt. This right of the pledgee, of course, is not a case of revindication. A pledgee has nothing to revindicate; he simply retains the property pledged. The provision in the bankruptcy laws seems entirely superfluous, since in the case of bankruptcy the respective interests of the pledgor, the pledgee, and the pledgor's creditors are fully protected by the general provisions of civil codes governing pledges. For that reason most codes make no special mention of a pledgee's "revindication."

(3) The Commercial Codes of Chile and Guatemala provide that a commission agent who has bought merchandise for his principal and paid for it out of his own funds may use the same remedies against the principal that the latter could use in the case of the agent's bankruptcy.<sup>123</sup> Again this remedy is not revindication but rather a logical attribute of the lien on merchandise which commission agents in practically all jurisdictions are allowed for disbursements made by them in behalf of the principal.<sup>124</sup>

#### VII. PROCEDURE—ADJUSTMENTS BETWEEN REVINDICANT AND ESTATE

The revindicant is not permitted simply to take possession of his property without due process. The bankrupt estate in its entirety is affected with the rights of all creditors and nothing

<sup>121</sup> MEX. 999, 12; CUB. 910; NIC. 1110, 9; HOND. 898.

<sup>122</sup> MEX. 999, 11; CUB. 909, 11; NIC. 1110, 8.

<sup>123</sup> CHIL. 1516; GUAT. 1264, 1265.

<sup>124</sup> FRENCH 95; DOM. 95; HAIT. 92; COL. 388; ECU. 382, 383; BOL. 143; VENEZ. 398; CHIL. 184, 300; PERUV. 270; ARG. 279; URUG. 384; BRAZIL. 189; COSTA RIC. 168; NIC. 432; EL SALV. 136; GUAT. 111; HOND. 189-191; MEX. 305; CUB. 276.



can be withdrawn from the assets which composed the estate on the date of the declaration of bankruptcy, except by consent of the creditors, or, if the claim is contested, upon final adjudication by the court. Although this rule seems too self-evident to require statutory confirmation, several codes contain special provisions to this effect.<sup>125</sup>

Prior to actual repossession, the revindicant must reimburse the estate for all expenses which the bankrupt may have incurred in connection with the property reclaimed, as well as refund all advances received from the bankrupt on account of it.<sup>126</sup> In regard to the property held by the bankrupt in bailment, this is no more than the application to the special case of bankruptcy of a general law common to all jurisdictions which grants to commission agents and deposites a lien for expenses and disbursements incurred in connection with the property consigned.<sup>127</sup> As to property revindicated by the unpaid seller, his obligation to refund the advances and expenses is also merely the necessary legal effect of the "*in integrum restitutionis*," which takes place actually when the property, the price of which has not been paid before the bankruptcy, is taken back by the revindicating seller.

The rights of the repossessing unpaid seller suffer very materially from the buyer's bankruptcy. Ordinarily an unpaid seller who uses his right of resolution (rescission) for non-payment of the price has, under all civil codes, the right to claim damages from the defaulting buyer for breach of the contract (chiefly the difference between the contract and the resale price). Theoretically, there would seem to be no reason why the unpaid seller should not have the same right against a bankrupt buyer. But, although only three codes<sup>128</sup> contain express rules on this question, the provisions of all commercial codes<sup>129</sup> concerning the revindication of goods in transitu are so worded as to exclude any doubt that the seller has no right to claim damages from the bankrupt estate. As has been repeatedly stated above, the

<sup>125</sup> FRENCH 578; DOM. 578; HAIT. 579; VENEZ. 999; CHIL. 1512; PERUV. 920; COSTA RIC. 30; NIC. 1109; HOND. 896; EL SALV. 803; GUAT. 1258.

<sup>126</sup> FRENCH 576; DOM. 576; HAIT. 573; ARG. LEI DE QUIEBRA 102; URUG. 1716; 1718; CHIL. 1515; ECU. 996, 3; NIC. 1109; VENEZ. 996, 3; GUAT. 1262; HOND. 896; EL SALV. 803; PERUV. 920; BRAZIL. 143, 1.

<sup>127</sup> FRENCH 95, CIV. 1948; DOM. 95, CIV. 1948; HAIT. 92, CIV. 1714, 1715; COL. 388, CIV. 2253, 2259; ECU. 382, CIV. 2221, 2222; BOL. 143, CIV. 1305, 1306; VENEZ. 398, CIV. 1848, 1849; CHIL. 184, 300, CIV. 2234, 2235, 1576; PERUV. 270, CIV. 1856; ARG. 279, CIV. 2252, 2258; BRAZIL. 185, CIV. 1279; COSTA RIC. 116, CIV. 1357; GUAT. 111; NIC. 432, 3487; HOND. 189-191, CIV. 1961, 1932; PAN. CIV. 1472, 1473; EL SALV. 136, CIV. 1991, 1992; MEX. 305, CIV. 2585, 2586, (new) 2532, 2533; CUB. 276, CIV. 1779, 1780.

<sup>128</sup> ARG. 1480; PERUV. 1718; FRENCH 576, since March 20, 1928.

<sup>129</sup> Except the FRENCH, since 1928, *supra* note 126.

intervening bankruptcy defeats the seller's right under the civil codes to rescind the sale; his right to revindicate goods in transitu is a special remedy given him by special laws, the commercial codes. Therefore, the scope of this right is to be determined exclusively on the basis of these special laws. The commercial codes expressly provide that the seller must refund all advances paid and expenses sustained by the bankrupt buyer but do not contain provisions conferring upon the seller the concomitant right to make a counterclaim for damages—clauses which would have been necessary had the law intended to give this right to the seller. Consequently, there appears only one correct construction of the statutes in that respect, namely, that the special remedy of resolution, which is in fact the revindication of merchandise in transitu, does not carry with it the right to claim damages inherent in this remedy in common civil law. This theory was forcibly expressed, until very recently, in leading decisions of the French courts,<sup>130</sup> and seems to be well settled at present in all Latin-American courts.

There has been no such unanimity, however, among the writers. Such eminent authorities as Lyon-Caen and Renault wholly disagree with the interpretation of the earlier French decisions and emphatically insist that the unpaid seller must be entitled, in addition to revindication, to claim damages in case of the buyer's bankruptcy. This conclusion is based on the theory that, as a general rule of civil law cannot be repudiated by implication merely because it has not been reproduced in the commercial code, a special statute would be required to deny this right to the seller; that if the syndic has the right to profit from the unperformed sale, demanding performance in case the price of the merchandise goes up, the seller must also have the right to protect himself against loss if the price goes down; and especially that if the buyer can claim damages from the bankrupt seller it is only natural that the seller must also have the right to claim damages from the bankrupt buyer.<sup>131</sup> Another well-known writer, Thaller, is of the opinion that damages can be claimed when the seller has not yet parted with the possession of goods but that the theory of the courts is correct as to merchandise in transitu.<sup>132</sup>

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<sup>130</sup> Court of Cassation (civ.) Feb. 16, 1887, DALLOZ 1887, 1. 201; Court of Cassation (req.) Apr. 8, 1895, DALLOZ 1895, 1. 481 (Held that the buyer has no right to claim damages even if local usage gives him that right); Chambre des Requetes, April 24, 1903, DALLOZ 1904, 1. 229.

<sup>131</sup> LYON-CAEN ET RENAULT, *op. cit. supra* note 5, at § § 861, 862; *cf.* Court of Appeal of Paris, March 9, 1904, quoted in 59 PANDECTES FRANÇAISES 9, No. 56, and confirmed by the Court of Cassation, June 15, 1900, DALLOZ 1901, 1. 25.

<sup>132</sup> THALLER, *op. cit. supra* note 5, at § 1957.

The arguments advanced by Lyon-Caen and Renault seem very convincing, but only insofar as they may be considered a very good plea for enacting a new statute which will authorize the seller to claim damages. As to the law as it was written in the French code before 1928 and as it is still written in all other codes, these arguments hardly can defeat the strict logic of the French decisions of that time, which were based on the express words of the statute and the universally adopted rules of interpretation.

These decisions of the French courts, however, are no longer in force. Yielding to the arguments of textwriters and to the well justified demands of commercial and financial interests, a statute was recently passed in France<sup>133</sup> which entirely reversed the law developed in these decisions. Section 526 of the Commercial Code was supplemented by a provision giving the seller the right, as against his duty, to restore whatever he may have received on account of the transaction, to claim damages for breach of contract if the syndic does not exercise his privilege of adopting the contract and paying the price. Considering the far-reaching influence that French law and jurisprudence has always exercised over all Latin-American countries, it is rather probable that similar statutes will be enacted in those countries; or, even in the absence of express statutory provision, the local courts may try to introduce the same rule by judicial interpretation.

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<sup>133</sup> March 20, 1928.