

# Principles of Civil Law

## Lecture Title: Sale and Prescription

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Diploma in Law (Malta)



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# Sale

The function of sale refers to the transferring of ownership.

However in Roman law, this was limited to the transfer and warranty of possession. Thus, the obligations of the seller were merely to deliver the thing of the purchaser, i.e. to transfer the physical power of disposal and to maintain the purchaser in such possession and therefore to free him from any molestations and to indemnify him in case of eviction. From this notion of sale, doctrine and jurisprudence derived the following consequences:

- It was not necessary that the seller was the owner of the thing sold as there was no transfer of ownership
- He could sell a res aliena (an object belonging to someone else).



In the present system of law, the sale of a res aliena is null because in modern codes the contract of sale has the function by which one of the parties (the seller) transfers or binds himself to **transfer to the other the ownership** of a thing and the other party (i.e. the purchaser) pays or binds himself to pay the price.

The definition of sale in our law is: A sale is a contract whereby one of the contracting parties binds himself to transfer to the other a thing for a price which the latter binds himself to pay to the former.



When is the contract of sale completed?

A sale is complete between the parties, and, as regards the seller, the property of the thing is transferred to the buyer, as soon as the thing and the price have been agreed upon, although the thing has not yet been delivered nor the price paid; and from that moment the thing itself remains at the risk and for the benefit of the buyer.

### Special Requisites for the contract of sale

The special rules on sale refer to:

- The capacity of the parties
- The double object of sale
- The form of the contract



## Types of Sale

- Sale can be of two kinds:
- Voluntary – when the parties enter in the contract spontaneously
- Necessary – when one of the parties is compelled by another person who has a right to do so, whether such other person is State as in the case of expropriation or a private individual as in the case of licitation of common property, or a judicial sale by auction demanded by the creditors



## 1. Capacity of Parties

Besides those provisions dealing with whom is incapable according to the general rules governing all contracts, the following are incapable of contracting sale within certain limits:

- The Spouses between themselves
- The tutors, curators, attorneys with regard to property belonging to those they represent
- The judges and magistrates with regard to sales or assignments of lawsuits or rights of actions which are being disputed



## 2. The double object of Sale i.e. the thing and the Price

### The thing

All things which are not extra commercium may be sold, unless the alienation thereof is prohibited by any special law.

All things, according to the general principles, may be the object of sale, whether they be corporeal or incorporeal, movables or immovables, present and future. When the object of sale is an incorporeal thing, (a right which does not fall immediately on a corporeal thing) then the proper name of this kind of sale is assignment.

(incorporeal ownership is the ownership of a right where as corporeal ownership is the ownership over a physical thing)



In order that a thing may become the object of the sale, it must contain all the conditions which the object of the contracts in general requires, i.e. –

- It must be possible
- Lawful
- *Imcñt t eqhñ* specified or which it may be specified and useful to the creditor
- The object of sale must be the property of the seller i.e. not a res aliena



With regards to the lawfulness of the thing, the Civil Code lays down certain rules,

The sale or assignment of any right to the succession of a living person is also void, although such person shall have given his consent thereto.

The sale or assignment of rights concerning any sum of money or bequest granted or made expressly for maintenance or any pension granted by the Government is also null.



## Price

This is a quantity of money which the purchaser oaths or promises to pay to the seller. If the consideration which the acquirer gives does not consist in money but in a thing in kind, it is not a price, and the contract is not sale but exchange. If besides the price, it is agreed that the purchaser is also to give a thing in kind, the contract may either be sale or exchange according to its principal element, i.e. if the sum of money exceeds the value of the thing given, it is a sale and vice versa.

- (1) The price must be in money.
- (2) Nevertheless, the contract shall not cease to be a contract of sale if, in addition to the sum of money agreed upon, the buyer binds himself to give something in kind by way of a supplement to the price.



## Requisites of Price

- **The price must be true and serious.** True implies not simulated, i.e. there is the intention of paying it. Serious means that it must be more or less proportionate to the value of the thing.
- Two elements must occur in order to give this character to the price:
  - A. Equality – the price must correspond to the thing in the mind of the parties. The equality need not be objective, but subjective. It is not necessary that the price be exactly equal to the value of the thing itself. However, it is important that it is considered as such by the parties. The opposite of serious price is not a low price, but an illusionary price, that which is completely out of proportion with the value of the thing, so that it could not even be considered as an equivalent to the thing by the parties themselves.
  - B. The intention of the parties of claiming and of paying it. It must not have been agreed fictitiously, but the seller must have had the intention of claiming it, and the purchaser of paying it. The opposite of true price is simulation.



18th March 1950, *Edgar Soler v. Beltram Camilleri*:

The Court held that the price cannot be changed by one of the parties because it is argued that the price is unjust. Nor can the seller/vendor ask the court to intervene to fix the unjust price. This is due to the fact that a price can be changed only with the agreement of the two parties. The court can only intervene by appointing experts to establish the price when the parties would have left it entirely to the experts who have not been specified and than the parties fail to agree about the appointment of an expert.



## The Court held:

*l-bejgh mhux perfett jekk ma jsirx ftehim fuq il-przz. U l-prezz ghandu jkun cert, ghalkemm f'certi kazijiet jista' jkun injorat mill-partijiet jew minn xi wahda minnhom fil-mument tal-kontrattazzjoni; izda ghandu jkun dejjem cert, stabbilit u specificat mill-partijiet. B'mod li min jallega lil-prezz ma giex accettat minnu, ma jistax isostni li kien hemm il-bejgh. Il-prezz ma jistax jitbiddel bir-rieda unilaterali ta' wahda mill-partijiet biss ghax din tkun tippretendi li dak il-prezz ma hux gust. Biex jitbiddel il-prezz tal-bejgh jew il-kondizzjonijiet tal-ftehim jehtieg li jkun hemm l-accettazzjoni taz-zewg partijiet.*

*Lanqas jista' l-bejgiegh, li jippretendi li l-prezz ma hux gust, jitlob li l-Qorti tindahal biex tiffissa hija l-prezz gust. Il-Qorti tista' tindahal biss, dejjempero' mea l-prezz ikun gie miftiehem, biex tahtar periti halli jitabilixxi huma l-prezz, meta l-partijiet ikunu hallewh fil-udizzju ta' perit jew periti mhux specificati, umbaghad ma jiftehmux dwar in-nomina ta' dak il-perit jew ta' dawk il-periti imma qatt ma tista' tistabilixxil-prezz indipendentement mill-ftehim tal-partijiet, jew ghaliex ma kienx hemm prezz miftiehem.*

## Obligations of the Seller

The seller has two principal obligations:

- Delivery
- Warranty which is subdivided into warranties –
  - i. Of peaceful possession i.e. against molestations and evictions
  - ii. Against hidden (latent) defects

**1408.** The warranty which the seller owes to the buyer is in respect of the quiet possession of the thing sold and of any latent defect therein.



## Delivery

This is defined as the transfer of possession of the thing sold from the seller to the purchaser.

In case of **immovables** delivery is effected “ipso jure” by the publication of the contract. It is supposed that the sale had been made by means of a contract which is published by reading it in front of the witnesses.

The delivery of **movable** property takes place either by handing the property to the buyer, or by handing to him the key of the place in which the property is lying, or by handing to him the documents of title the delivery of which operates, according to law, the transfer of the property to which such documents refer, or by causing the buyer to be acknowledged by the persons in whose possession the property exists.



## Warranty of Peaceful Possession

The warranty of peaceful possession and against eviction and molestation: this takes place in case the purchaser is molested in his possession of the thing by a third party who claims certain rights over it, because peaceful possession is tantamount to possession free from any molestation.

Peaceful possession implies that the possession is free from any molestations both by the vendor himself and by third parties.

The seller who has bound himself to transfer ownership to the purchaser must abstain from any act which would cause molestation, which prevents the purchaser from enjoying it from making use of a thing, as ownership consists exactly in this. If the seller were to act otherwise, he would be violating the contract which must be executed in good faith.

Similarly if a third party, manages to evict the purchaser, in whole or in part, this is evident sign that the seller did not perform his obligation of transferring ownership and consequently, he is responsible for the damages.





Therefore the warranty of peaceful possession has a double effect: it refers both to acts done by the seller, and the acts done by third parties.

- Acts done by the seller
- The seller must abstain from any act which deprives the purchaser, in whole or in part of the thing or of any rights over it, or which prevents him from exercising all the rights of ownership, or forbids him the exercise of such rights or disturbs him or molests him in such exercise. In a contract of sale, the seller has transferred all the rights which he had over the thing to the purchaser.
- Acts done by a third party
- It has therefore for its essential object the obligation of the seller to defend the purchaser in the action instituted against him by the third party.



## What does the warranty of peaceful possession guarantee?

- Eviction (total or partial)
- Easements – loss of an active servitude
- Burdens: this is problematic since it is vague. This for sure covers instances where there is a real right, and what about personal rights? (For instance, a property subject to lease?) Thus, the individual must seek to eliminate this by including a clause in the contract regarding vacant possession of the thing.

## In cases of eviction:

Where there is a promise of warranty or where no stipulation has been made in regard thereto, the buyer shall upon eviction be entitled to claim from the seller –

- the return of the price;
- the return of the fruits, if the buyer has been obliged to return them to the owner who has recovered the thing;
- all judicial costs, including those for giving notice of the suit to the person from whom he derives his title;
- damages, including the lawful expenses of the contract and any other lawful expense incurred in connection with the sale.



## Loss of an active servitude

The case is omitted by our law but doctrine and jurisprudence regard it as equivalent to partial eviction and the same rules are applicable because under our law active servitudes are part of ownership.

## Warranty in regard to easements not declared

Where the tenement sold is subject to non-apparent easements whereof no declaration was made and such easements are of such importance that it may be presumed that the buyer would not have bought the tenement if he had been given notice of them, he may demand either the dissolution of the sale or compensation.



## Waranty against Latent Defects

This warranty takes place when the thing bought and delivered is found to be impaired by such vices or defects which render it unsuitable for the use to which it is destined or which reduce its value. When the thing has such defects there is a vice of consent through error on the substantial elements of the thing and that therefore, the rules relative to the nullity of contracts on the ground of vice of consent should apply.

The conditions which are required to give rise to the warranty are:

- The seriousness of the vice
- The vice must be latent
- The vice must exist at the time of the sale



## a. Serious Defect

The defect must be such as either to render the thing unsuitable for the use to which it is destined or to diminish its value to such an extent that the purchaser, had he been aware of it, would not have bought it or would have bought it at a lower price. If the defect is not serious, the purchaser has no legal remedy because insignificant defects are tolerated.

The warranty given does not cover all latent defects but only such defects as would fall under one of the criteria. A defect becomes a latent defect in terms of the law only if it is of some gravity. This was upheld in *Scicluna v. Azzopardi*, “*Jehtieg illi d-difett ikun ta’ certa gravita relattivament ghall-haga mibjugha u ghall-prezz imhallas ghalha.*”



b. The defect must be latent and non-apparent

The seller is not answerable for any apparent defects which the buyer might have discovered for himself.

Nevertheless, he is answerable for latent defects, even though they were not known to him, unless he has stipulated that he shall not in any such case be bound to any warranty.

It is important to note that the wording of this article implies that; the warranty for latent defects can be excluded altogether from the contract.



Whether a defect is apparent or not, depends on the discretion of the court and the circumstances of the case to determine whether a defect was apparent or not. If it is decided that the purchaser did not notice the defect out of his own negligence, the seller cannot be held responsible for latent defects.

The court usually applies the criterion of the average reasonable man. In an objective sense, apparent defects are those defects in the thing which are discoverable after an examination of the thing. Only a reasonable and diligent examination is expected of the buyer.

*Bezzina v. Bonnici* – the defects were not latent if the buyer could notice them by making a careful examination of the items concerned or if he could seek advice from other competent persons to examine the articles to be purchased, even though the defects are not visible and had existed prior to the sale's conclusion.





In the case *Gerada v. Attard*, the court held that the legislator binds the purchaser to verify the state and condition of the thing, with the result that the purchaser would not allowed to obtain a redress in the case of apparent defects.

In this case the court held that a limp in a donkey was not a latent but apparent defect. The court further upheld that if the purchaser is not capable of inspecting the thing himself, he is bound to be assisted by an expert. Failure to do this, would deny him the right to claim a latent defect. Therefore this means that a purchaser is compelled by law to engage the services of an expert every time he intends to buy something of which he has a poor knowledge.



What options are possible to the vendor in case of latent defects?

- Vendor may return the thing and have the price paid back in full. This is the action Redhibitoria.

Alternatively

- Keep the thing and claim back a part of the price equivalent to the defect i.e. the reduction in value of the thing. This is the action Aestimatoria as it establishes at what lower price the purchaser would have purchased the thing, and in order to do so, it is necessary to establish by how much the estimated value of the thing exceeded the real value.

The purchaser has the right to select which action to take.



## Judicial Sales by Auction

The obligation of warranty against hidden defects **does not apply to judicial sales by auction** because in these sales the goods are sold *tale e quali*. No guarantee is offered in the case of a judicial sale by auction, as here the objects are bought *tale quale*.

The *actio redhibitoria* and the *actio aestimatoria* cannot be maintained in case of judicial sales by auction.



## Tale Quale

A very common phrase used in Maltese agreements is the “Tale Quale” clause.

- In *Bonano v. Dimech* the Court explained that the term ‘tale quale’ does not exclude the vendor’s obligation of the warranty of in respect of latent defects. The exclusion of the warranty arises only where this was expressly stated in the contract.
- Benjamin sive Benny Muscat vs Joe Cauchi: *Biex venditur ikun mehlus mill-ghoti ta’ garanzija lix-xerrej għall-vizzji okkulti, tali ftehim ikun irid jirrizulta b’mod cert u univoku tenut kont tac-cirkostanzi u tal-fatti speci partikolari tal-kaz. Certament, is-semplici inkluzjoni tal-frazi tale quale f’kuntratt ta’ bejgh m’huwiex sufficjenti per se biex jehles min-naha l-oħra dan l-effett tal-frazi lanqas jista’ jigi eskluż a priori.*

In *Mario Debono et v. Anthony Portelli et.*, 16th October 1998 the Court held:

Notwithstanding the fact that the phrase *tale quale* is included in a contract of sale of property this does not automatically exempt the seller from obligations imposed upon him as a seller by law, unless such exemption is specifically stated in the contract.

The case dealt with a purchase of flat: A couple of months later the plaintiffs realised that there were various hidden defects in the property they had purchased. Such defects were so serious that had they known about them, they would have purchased the property at a reduced price and not the price they actually paid. Plaintiffs requested the defendant to refund part of the purchase price in view of these latent defects. Defendants claimed that the defects were visible and apparent and they had sold the apartment *tale quale*.



The court noted that such a condition had not been stipulated in the contract, and even if this was stipulated this did not exempt the seller from the guarantees imposed upon him by law. The only way that the seller could exempt himself from the obligations imposed by law was by expressly stating that such exemption was being accepted by the purchaser.

The court concluded that from the facts of the case, the defects were latent and thus this fact gave the plaintiff sufficient grounds to successfully apply the *actio aestimatoria*.

(Case Study: Latent Defects in a contract)



- Obligations of the Purchaser
- **To pay the price:** this is the principal obligation.
- To pay in certain cases, the **interest** on the price: even though there be no agreement to that effect, the buyer is bound to pay interest on the price up to the day of payment at the rate of five per cent per annum, indiscriminately in the following cases:
  - (a) if the thing sold and delivered yields fruits or other profits;
  - (b) if, even though the thing yields no fruits or other profits, he has been called upon by means of a judicial intimation to pay the price;
  - (c) if the delivery of the thing, being movable, has not taken place through the fault of the buyer, and the seller has called upon him, by means of a judicial intimation, to take delivery of the thing
- **To receive the thing bought:** buyer must present himself to receive the thing at the time and place where the delivery is to be effected, at the same time, unless the sale is on credit
- To pay the **expenses** of the sale



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# Prescription

Prescription operates in two manners:

## A. Mode of acquiring

Prescription is a mode of acquiring a right by a continuous, uninterrupted, peaceable, open, and unequivocal possession for a time specified by law.

## B. Mode of releasing

Prescription is also a mode of releasing oneself from an action, when the creditor has failed to exercise his right for a time specified by law



The court cannot of its own motion give effect to prescription, where the plea of prescription has not been set up by the party concerned.

Prescription may be set up at any stage of the proceedings, even on appeal.

- Prescription does not run:
  - (a) as between spouses;
  - (b) as between the parent and the child subject to parental authority;
  - (c) as between the person under tutorship or curatorship and his tutor or curator until the tutorship or curatorship ceases, and the accounts are definitely rendered and approved;
  - (d) as between the heir and the inheritance entered upon inventory



Prescription does not run between children and parents:

Important with respect to maintenance:

190 / 2017 RGM, A E f'isimha propju u *bhala kuratrici ad litem ta' bintha minuri* B D maħtura b'digriet datat 17 ta' Awwissu 2017 vs CD, decided 12<sup>th</sup> December 2018

A case regarding the care and custody of a minor who was 12 years of age, including claims regarding arrears of maintenance.



*Dwar il-manteniment pretiz mill-attriċi għas-snin fejn hija ssostni li l-konvenut ma kienx jikkontribwixxi finanzjarjament, il-konvenut fl-ewwel lok jissottometti li l-pretensjonijiet mill-attriċi huma milqutin mill-preskrizzjoni ta' ħames snin kontemplati fl-artikolu 2156 (f) tal-Kap 12, Ligijiet ta' Malta stante li fil-fehma tiegħu dak li qed titlob hi refuzjoni ta' spejjez. Il-konvenut għaldaqstant jargument li l-manteniment b'lura f'dak il-kaz ikun ekwivalenti għal ħdax-il elf u mitejn Ewro (€11,200) u mhux is-somma pretiza mill-attriċi izda mingħajr preġudizzju għal dan kollu, isostni wkoll li huwa u l-familja tiegħu kellhom rwol fit-trobbija tal-minuri u kienet tkun regolarmet għandhom u li b'hekk hu inverosimili li l-ispejjez kollha tal-minuri kienet tbgħatihom hi weħidha. Għal dan il-għan jissottometti li għaldaqstant għandu jkun hemm tnaqqis ulterjuri ta' 50% fir-rigward ta' l-arretrati*

With respect to arrears of maintenance the Court held:

*Mill-banda l-oħra jirrizulta illi l-konvenut jirrikonoxxi li l-piz finanzjarju dwar il-minuri kien primarjament fuq l-attriċi (kif jirrizulta anki minn messagġ li kien bagħtilha – fol. 33) mentri fis-sottomissjonijiet tiegħu ma jinnegax illi flus qatt ma għadda lill-attriċi izda jirreferi biss għas-sostenn li kien jagħti biex il- minuri torqod għandu meta l-attriċi kienet tkun xogħol. Il-konvenut għalhekk huwa responsabbli sabiex jikkontribwixxi s-sehem tiegħu finanzjarju għat- trobbija tal-minuri. Il-Qorti, wara li kkonsidrat il-fatti kollha rilevanti hija tal- fehma illi l-konvenut għandu jigi kkundannat iħallas bħala manteniment għall- minuri inkluż għall-ispejjeż ta' edukazzjoni u saħħa, is-somma ta' mitejn u ħamsin ewro (€250) fix-xahar għall-perijodu minn Awissu 2012 sa Awissu 2017 u ċioe' s-somma ta' ħmistax-il elf ewro (€15,000) nieqes is-somma ta' mitejn ewro (€800) li l-konvenut jirrizulta li ħallas fil-perijodu imsemmi. Għalhekk il-Qorti qed tikkundannah iħallas lill-attriċi s-somma ta' erbatax-il elf u mitejn ewro (€14,200) rappreżentanti l-arretrati ta' manteniment għall- minuri dovuti mill-konvenut lill-attriċi għall-perijodu minn Awissu 2012 sa Awissu 2017 meta allura giet intavolata l-kawża odjerna.*

## Interruption of Prescription

Prescription is interrupted by any judicial act filed in the name of the owner or of the creditor, served on the party against whom it is sought to prevent the running of prescription, showing clearly that the owner or creditor intends to preserve his right.

The interruption shall be operative even though the demand, protest, or other judicial act is null owing to a defect in its form, or is filed before a court which is not the competent court.

No interruption takes place if the act is not served before the expiration of one month to be reckoned from the last day of the period of prescription.



## Prescription is interrupted by a court case

Prescription is interrupted by a judicial demand, even though such demand has not been notified to the defendant on account of his absence or for any other lawful cause, provided the plaintiff has continued the proceedings against a curator appointed by the court according to the provisions of the Code of Organization and Civil Procedure, and has obtained a judgment on such demand.

The interruption of prescription made by means of a judicial demand shall be deemed inoperative if the plaintiff withdraws the action or if the action is deserted, or dismissed.



## Calculating Prescription

Prescription is reckoned by whole days, and not by hours.

The days are running days: the months are reckoned according to the calendar.

Prescription is completed immediately upon the expiration of the last day of the prescriptive period.

Nevertheless, if the last day is a Saturday or a public holiday, prescription shall be completed upon the expiration of the next following day, not being a Saturday or a public holiday.





## Particular Prescriptive Periods

The following actions are barred by the lapse of **one year**:

- (a) actions of masters and teachers of sciences or arts, for lessons given by the day or by the month;
- (b) actions of keepers of inns, taverns or lodging-houses for lodging and board furnished by them;
- (c) actions of domestic servants or other persons paid by the month, of artificers or day-labourers for the payment of their wages, salaries or the supplies due to them;
- (d) actions of carriers by land or water for the payment of their hire or wage



The following actions are barred by the lapse of **eighteen months**:

- (a) actions of tailors, shoemakers, carpenters, masons, whitewashers, locksmiths, goldsmiths, watch-makers, and other persons exercising any trade or mechanical art, for the price of their work or labour or the materials supplied by them;
- (b) actions of creditors for the price of merchandise, goods or other movable things, sold by retail;
- (c) actions of persons who keep educational or instructional establishments of any kind, for the payment of the fees due to them;
- (d) actions of persons for the payment of their salary;
- (e) actions of brokers for brokerage fees;
- (f) actions of any person for the hire of movable things.



The following actions are barred by the lapse of **two years**:

- (a) actions of builders of ships or other vessels, and of contractors in respect of constructions or other works made of wood, stone or other material, for the works carried out by them or for the materials supplied by them;
- (b) actions of physicians, surgeons, obstetricians and apothecaries for their visits or operations or for medicines supplied by them;
- (c) actions of advocates, legal procurators, notaries, architects and civil engineers, and other person sexercising any other profession or liberal art, for their fees and disbursements;
- (d) actions of procurators ad litem or other attorneys or mandataries, for their remuneration, the expenses incurred by them, indemnities due to them for losses sustained, and for the reimbursement of advances made by them



## Actions for Damages

Not arising from a criminal offence:

Actions for damages not arising from a criminal offence are barred by the lapse of two years.

Actions for damages arising from criminal offence.

With regard to the prescription of civil actions for damages arising from criminal offences, the rules laid down in the Criminal Code relating to the prescription of criminal actions shall be observed



## Actions barred by the prescription of five years

- a) actions for payment of yearly ground-rent, perpetual or life annuities,
- b) actions for payment of maintenance allowances;
- c) actions for payment of rent of urban or rural property;
- d) actions for payment of interest on sums taken on loan
- e) actions for the return of money given on loan, if the loan does not result from a public deed;
- f) actions for the payment of any other debt arising from commercial transactions or other causes, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed



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