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SKILLED BOOKS

INDIA

A Digest of the Law of Contract:

CONTAINING

The outlines of the English Law on the Subject,

The outlines of the Roman-Dutch Law,

A collection of illustrative English and Ceylon Cases,

A summary of the Chief Ceylon Statutes relating to Contracts,

Notes on some Maxims relating to Contracts.

And Case-notes on the Labour-laws of Ceylon.

BY
ISAAC TAMBYAH.

Colombo:—H. W. CAVE & CO., FORT.

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MDCCCXCVII.

"IN OUTLINE AND NO MORE."

—*Tennyson.*

WITH PERMISSION

TO

THE HONOURABLE

Sir John Winfield Bonser, Knight.,

CHIEF JUSTICE OF THE ISLAND OF CEYLON,

WHO HAS DONE MUCH

TO REVIVE

THE LEARNING OF THE LAW IN CEYLON,

THIS BOOK

IS DEDICATED

BY THE AUTHOR

AS A TRIBUTE, HOWEVER HUMBLE, OF ESTEEM

AND THANKFULNESS.

Colombo, Dec. 11th, 1896.

Advertisement.

THIS, like Perera's *Armour*, is a student's work, and the modest sentiments of the preface to that book are echoed by the compiler of this. No originality is claimed for this digest, but no pains have been spared to make it as complete as time and materials could permit. Consistent with the general plan of the work—to deal only in outline with the Law of Contract as learned (and practised) in Ceylon—the temptation to treat somewhat exhaustively of any particular topic, however strong it may have been, especially in the Roman-Dutch Law division, has been successfully resisted throughout, with the single exception, perhaps, of lengthy extracts from opinions bearing on the Law of Master and Servant. In endeavouring to study brevity in these outlines nothing has been wilfully done, or knowingly omitted, to detract from the usefulness aimed at by the author. This digest is the outcome of very careful and painstaking research, covering a period of more than two years, and nothing has been left undone to ensure accuracy of statements, and this has not been found very easy in summarising the opinions, at times conflicting, of the writers on the Roman-Dutch Law.

The portion of the book devoted to the outlines of English Law contains an Analysis (kindly permitted by the publishers) of Pollock's *Principles of Contract* with references to Anson's *Law of Contract*, followed by select maxims and illustrative cases. The revival of Law-learning by the present Chief Justice of Ceylon has rendered it necessary, as regards the Roman-Dutch Law, to go beyond the narrow limits of Van Der Linden to Voet, Grotius, Van Der Keessel, and Van Leeuwen. Evans' translation of Pothier on Obligations is made use of largely. A summary of the chief Ceylon Ordinances relating to contracts is given followed by a collection of illustrative Ceylon Cases. The rulings cited to explain and illustrate the Labour-Laws of Ceylon contain the most principal cases on the subject of the relation of Master and Servant in that country, and no decision of any importance has been left out. From the scope of this book it has been thought desirable to exclude all but incidental mention of Negotiable Instruments and Partnership.

An index kindly compiled by a friend is added. Much credit is due, and the author's thanks are, to the Manager of the *Ceylon Observer* printing works for the clearness and despatch of workmanship in the printing of these pages. There are a few misprints, but they are not of such a nature as to necessitate a sheet of *errata*. The author's thanks are due also to Mr. Brodie, the proprietor of the Clifton Press (where the first eight forms of the book were printed) for kind facilities in the arrangements regarding the printing of the book,

The author cannot conclude this advertisement without gratefully acknowledging his thanks to His Lordship the Chief Justice, Sir John Winfield Bonser, for kind permission to dedicate this Digest to him; and his thanks are due also to those who (notably Mr. J. T, Blazé of the Colombo Bar) by valuable suggestions and assistance have encouraged the publication of this book.

The author humbly hopes that, with all its shortcomings. this Digest will be received favourably by those for whom it is meant.

Colombo, June 21st. 1897. I. T.

OPINIONS.

The "Ceylon Examiner," August 23rd, 1897.

(*Edited by J. T. Blazè, Esq., Barrister-at-law; Advocate, Colombo.*)

We owe an apology to the author for the delay to notice this book of which it is now some time since he was good enough to send us an advance copy. But when we state that the delay was mainly due to our desire to examine the book carefully, we are sure he will both forgive the lateness of this notice, and better appreciate the verdict he did us the honour to seek at our hands. For we may say at once that the book, small as it is, contains a very large amount of important and interesting matter, judiciously selected, carefully arranged, and expressed with a clearness that makes it difficult to misapprehend, and often with a pointed brevity that goes far to ensure a ready recollection. The plan is admirable, and it has been admirably executed. Of the making of law books, even locally, there would seem to be no end, if we may judge by certain advertisements attached to this publication. But hitherto, if we except the Institutes of Justice Thomson and the translation of portions of Voet by Mr. Berwick, they have for the most part taken the form of Reports. And they were adapted rather to the convenience of practitioners than to the needs of the student. The special feature of this book, however, is that it has in view, primarily at least, the interest of professed students rather than of those who are occupied with the practice of the law. It is, in short, a book compiled by a student for the use of students; and from its completeness and accuracy and its lucid arrangement is calculated to be of excellent service to those who would use it as it should be used; that is to say as a guide and auxiliary to, and not as a substitute for, larger works. No one will suppose—nor does the author pretend—that the reading of this book will confer a mastery of such a large and difficult subject as that of contracts. But it is safe to say that its judicious use will help the student to obtain an accurate outline of the leading principles, and a very fair knowledge of the leading cases, and in especial will help him so to digest his knowledge that it shall be of service not only at an examination, but even in the exigencies of actual practice.

The book is dedicated to Chief Justice Bonser—a very appropriate acknowledgement of the impulse he has given to the study of the law in those Roman Dutch writers who, once regarded with a sort of superstitious veneration, came in later days to be the victims of an equally indiscriminating neglect. The first part of the book contains an outline of the English Law of contracts, mainly in the form of an analysis of Pollock's well-known book on the subject. Pollock is a book that offers difficulties by which students, and even others than local students, are often repelled. It presupposes a familiarity with legal terms and legal conceptions, and also with legal history, so to say, which the majority of those who approach it for the first time seldom bring to its study.

The analysis presented by Mr. Tambyah will do much to help the young student to find his way amid a variety of statements and facts and references and quotation, the bearing, and very often even the meaning, of which he finds it hard to discover. It was a

good idea to enrich this analysis with references to the more popular work of Anson; and it is safe to say that any one who has taken the pains to read through Pollock with the help of these 92 pages of analysis will not be far to seek as respects the main features of the law of contracts or the leading decisions on the subject. There follows a very useful summary of cases illustrative of the principles analysed in the previous section and a selection of maxims relating to contracts. This seems to us a very useful section, and we could even wish it were longer. Next comes a very serviceable outline of the Roman-Dutch Law of contracts. It is in this part of his studies that the student is most often in need of help. It is mere mockery to send him to Voet, who is as a rule inaccessible, partly by reason of the language he writes in, and partly by the difficulty of searching in so large a space for the exact thing wanted. Even Grotius and Vander Keesel are hard to come by; while Berwick's translation often presents difficulties that fairly keep the original in countenance. In these circumstances, it was a happy idea of the author to pick out the most important topics, arrange them in methodical fashion, and give brief references to book or title or chapter or page where the subject is discussed or referred to. Next comes a summary of such Ceylon ordinances as relate to the subject of contracts, followed immediately by some illustrative rulings of our courts. Here the author has been greatly helped by, and has made very good use of, the various local Reports—from Marshall and Morgan down to the New Law Reports. The book closes with a section on a subject, that one would scarcely have expected to find dealt with in a work such as this. The author has, however, both shown good judgment and proved his desire to be useful by dealing with it, though ever so briefly. The Contract between master and servant is a subject of every day interest to many, and, we need scarcely add, a subject bristling with difficulties. But here is one more aid. Even one of the latest cases, the "Orwell Cooly Case," is we see referred to. We would commend this part of the book to the attention of those it chiefly concerns. Not, of course, that we recommend it as an armoury whence either master or servant may obtain all the equipment needed to fight out a court case. That would be to make a very hazardous experiment, and by no means to put the book to the use it was intended for. But a reference, for example, to such statements as: "A master has no right to stop any portion of his servant's wages for misconduct" and "A master has no right to transfer to another his servant's contract of service without the servant's consent" might be of very great use in saving much disappointment and vexation and preventing many ludicrous and expensive mistakes. On the whole, we have nothing but praise for this volume. It is full; it is clear; it is sound; it is exceedingly helpful. We have said that it was designed for students. We will add that it will be found very useful even by busy practitioners whenever they have need to refresh their memory upon some point or principle. In a word, the book is a happy idea, very happily carried out. Might we say that we have noted a few errors? Most of them are mere disfigurements and in no way injure the sense. But at page 145 (the 10th line from the bottom) there is an omission which readers would do well at once to supply—the omission of *not* before *liable* in regard to wife's immovables.

The "Ceylon Observer," July 31st, 1897.

It seems to us laymen, to be a handy digest, concisely and clearly arranged and of great use to law-students. It is also useful in regard to the local Labour Laws and cases decided under them, a matter that should interest planters.

The "Times of Ceylon," July 28th, 1897.

Mr. Tambyah has done well in having selected the *Law of Contract*, for it is a subject most likely to interest every individual of the community. He informs the public that he lays no claim to originality but there is no doubt he has succeeded in putting together, on a very important subject, a large amount of valuable information, which he hopes will be of some use to the members of the Legal Profession and to the public, and particularly to the planters of Ceylon.

The compiler divides his subject into seven parts, and his treatment of it is very creditable to him. In his first part he gives us the *Outlines of English Law* on the subject, with references to cases illustrative of that Law. This is followed by a chapter containing some of those maxims relating to contracts, with which every lawyer is supposed to be familiar.

The compiler then proceeds to state the outlines of *Roman-Dutch Law*; on the nature of Obligations and Contracts with references to the great Jurists Van der Linden, Grotius, Voet, Van Der Keesel, and Pothier. The subject treated in this chapter is well summarised, and the law student, in particular, will find all that he needs to know in a concise form without being obliged to dive into those ponderous tomes which are monuments of the learning and industry of the jurists referred to.

The next part contains a summary of the chief *Ceylon Ordinances* relating to Contracts. This is a very useful chapter. It deals with simple Contracts in writing, and notarially executed Contracts, and as to what establishes an interest in land, &c. It also informs the reader in what matters the English law and English Commercial law are in force in Ceylon, and also contains a few valuable notes as regards a married woman's property and prescription in the matter of Contracts.

The compiler follows up the above with a select collection of cases or rulings bearing on the subject of Contracts; and the last portion of the compilation closes with a collection and arangement of the most important rulings of the Supreme Court on the Law of *Master* and *Servant* in Ceylon. In other words, this collection, with two exceptions, relates to the *Labour Laws of Ceylon* affecting planters who will no doubt, find in this compilation all they need to know in respect of their rights, obligations and liabilities, and the obligations and liabilities of those employed under them. In view of the uncertainty connected with the construction of the Labour Laws at present in force, and the want of a Book of Reference in which the planter can find *all* the information he needs for his guidance in dealing with the labour force at his disposal, it would certainly be to his interest to secure a copy of this useful little book so carefully compiled by Mr. Isaac Tambyah.

We have only now to congratulate the compiler on the success he has achieved by his industry and diligent research in being able to offer to the profession and the public a neat little work on the Law of Contracts.

The "Ceylon Patriot," August, 27th, 1897.

The book is handy and convenient in form and compresses a large amount of useful matter in a small compass. It is dedicated with permission to the Hon Sir J. W. Bonser, Chief Justice of the Island who has done much to revive the learning of the Law in Ceylon. Mr. Tambyah's object has been as he tells us in his advertisement to give the student a fair outline of the scope and extent of the English and Roman-Dutch Law on the subject, along with a collection of illustrative Ceylon and English cases with notes on some maxims relating to contracts, a summary of the chief Ceylon statutes relating to contracts and case notes on the labour laws of Ceylon. We think the book well realises its professions. We mighty safely say that an intelligent perusal

of the volume would educate a student better than the reading of much substantial law and it might be safely viewed as a practitioner's text book just as much as a student's manual. It is a truism that a good piece of work would always create a demand and without slighting similar existing literature upon the law of contracts we think the care and industry bestowed on this volume entitles it to a recognition at the hands of the profession. Under the head of Master and Servant all the most important decisions relating to the labour laws as affecting planters have been cited together with references to the labour ordinances. This book therefore must find a place in the Library of every planter along with Ferguson's Ceylon Hand Book and Directory.

From the Hon. Mr. Justice Lawrie, Supreme Court, Ceylon.

It seems very carefully prepared .... and is the result of much reading and study.

From Sir Harry Dias, Retired Judge of the Supreme Court, Ceylon.

You have, I think, correctly dealt with the English and the Dutch Law on the subject of contract as identical. The Roman Law as you know, is the foundation of the Civil Law of the civilized world. What we call the Roman-Dutch Law is nothing more than the Roman Law with such modifications as are called for by local circumstances. The American Jurists, sent as Kent and Story, have largely used the Roman Law pure and simple. The English Law of Contracts is full of Roman maxims which are founded on natural equity which may be expected to pervade the laws of all civilized nations. Your book will be of great service to lawyers, particularly law-students who will have before them in a small compass a short account of the written and the unwritten law of contracts.

From F. Dornhorst, Esq., Advocate: the Unofficial Leader of the Bar, Colombo.

I have more than cursorily examined your work and have been struck with the careful study of English and Roman-Dutch Law text-books and authorities which its pages bear testimony to. The arrangement is all that can be desired, and as a book of reference it cannot fail to be of much service not only to the student but also to the practitioner and pleader. You have placed within their reach valuable and useful information to secure which would require time, labour and research. Your grouping is excellent. It enables one to at once grasp the main principles of the Law of Contract under the two systems and to note the points of difference and similarity. The book is a speaking record of patience, industry, perseverance, attention to detail, and careful and critical study.

From H. L. Wendt, Esq., Acting Solicitor-General, Ceylon.

I think your work, which I have now had an opportunity of looking through, will greatly aid the student in acquiring a methodical grasp of that branch of the law, and even the practitioner will find it useful as an index by reason of the reference to authority. The Roman-Dutch Law portion is well done, difficult as the task was . . . Your notes on the Labour Laws are a necessary supplement to Lewis's and Crawford's book.

From T. E. D. Sampayo, Esq., Barrister-at-Law; Advocate and Law Lecturer, Colombo.

The cursory glance I have had into it convinces me that it will be of use to law-students, for whom as you inform me it is intended. It will serve as a valuable *aids de memoire*.

From E. C. Dumbleton, Esq., Barrister-at-Law., Crown Counsel; Law-Lecturer, Colombo.

My impression on perusal was that the book did you infinite credit. There are some clerical errors which do not, as I think, detract from the value of the book, which I regard as an augury of higher successes.

From J. R. Weinman, Esq., Advocate, Colombo.

I was unwilling to commit myself to an opinion before carefully going through the book. I have done so and am now in a position to congratulate you on the success of your enterprise. It will prove a useful guide not only to law-students but even to examiners of law-students. You very properly disclaim originality in your publication; you have read and digested excellently the best books bearing on the subject.

From Walter Pereira, Esq.,Barrister-at-Law; Advocate, Colombo.

It will prove a useful little book not only to students but to practitioners as well. Often in the course of practice counsel have to ascertain the exact words in which certain definitions, principles etc., are couched by authors of text-books and by judges. In such cases "Tambyah's Digest" will hereafter come handy as fas as the Law of Contract is concerned.

From B. W. Bawa, Esq., Barrister-at-Law; Advocate, Colombo.

It is evident that you have given much time and thought to its preparation. The arrangement and classification are excellent. I have no doubt the work will be of great service to lawyers and students.

From Felix R. Dias, Esq., Barrister-at-Law; Crown Counsel, Colombo.

I have no doubt it will be a valuable addition to every student's library. You seem to have devoted much time and trouble to its production

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From C. M. Fernando, Esq., Barrister-at-Law : Advocate, Colombo.

It has been carefully compiled and judging from the variety and mass of the information it contains, I feel sure it will be of much assistance to the student and the practitioer.

From F. M. De Saram, Esq., Barrister-at-Law; Advocate, Colombo.

Your Digest is admirably got up, and will, I am sure, be of great help to students and also to the judges of our Courts. It is a book which every lawyer ought to have in his library.

From Walter Drieberg, Esq., Barrister-at-Law; Advocate; Law-Lecturer, Colombo.

It is a very good epitome of the law of obligations and it will be of great assistance to students preparing for the law examinations.

From Herman A. Loos, Esq., Barrister-at-Law; Advocate, Colombo.

A great deal of trouble and care has evidently been expended by you in the compilation of the digest which should be of use to students.

From James Van Langenberg, Esq., Barrister-at-Law; Advocate, Colombo.

I have little doubt that it will be of assistance to law-students : as regards the chapter headed " Master and servent," you have brought together with accuracy all the chief judgments on the question, so far as I can see.

From Thomas De Alwis, Esq., Advocate; Law-Lecturer, Colombo.

It is an excellent work and will be useful both to law-students and practitioners.

(Opinions received since printing the above are not given here.)

CONTENTS.

WORKS CONSULTED.

Addison's Law of Contracts, 3rd Edition

Blackstone, Kerr's edition for students.

Anson's Law of Contract, 8th Edition

Cunningham on the Indian Evidence Act, 9th Edition.

Introduction to Dutch Jurisprudence by Grotius, Herbert's translation, 1844.

Justinian's Institues edited by Sandars, 8th Edition.

Pollock's Principles of contract, 6th Edition.

Pothier on Obligations, Evans' translation.

Roman Law, Hunter's Exposition of, 2nd Edition.

Van Der Linden's Institutes, Henry's edition.

Van Der Keessel's select theses, Lorenz's translation, 1855.

Van Leeuwens Commentaries, Ceylon translation, and *Censura Forensis*

Voet's Commentaries on the Pandects, 2 Vols, Venetian Edition, 1827

Voet, (Select Titles) Berwick's translation, 1876; also Juta's translation (of select titles,) also De Vos's translation (select titles)

Note.—The English Law Reports are referred to as in the English text-books and the Ceylon Reports made use of are named at p. 147. For the sake of convenience the usual way of citing Voet has been departed from Thus, instead of Voet. Lib. xlvi. Tit. iii sec. 27, or again Voet 46. 3. 27 will be found in the following pages, 46 Voet iii 27, the first Arabi. numerals showing the Book, the Roman the title, and the last Arabic numerals the section. So with Justinian's Institutes, Grotius and Van Leeuwen. Van Derlinden is cited by the page of Henry's edition, Van Der Keessel by the number of the thesis, Potheir by the number of the paragraph and Pollock and Anson by the pages.

Besides the list of works above named incidental reference has been made to others as will be seen.

A Digest of the Law of Contract.

Outlines of English Law.

1. Agreement, Proposal, Acceptance.

1. Preliminary General Notions.

(1) A promise or set of promises that the law will enforce may be described as a contract.

Preliminary notions.

(2) The specific mark of a contract is the creation of a right *not to a thing* but *to another man's conduct in the future.*

(3) Binding nature of a promise arises not merely because of the existence or expression of an intention, but because one party *so* expressed himself as to entitle the other party to rely on his acting in a certain way.

(4) The conception of contract leads to a conception of the following notions:

(a) Agreement
(b) Declaration of consent .
(c) Promise and offer
(d) Void agreement
(e) Voidable contract.

2. Nature and scope of Consent: Elements of Agreement.

(1) The most essential element of agreement is the consent of parties.

Elements of agreement.

(2) A legally valid agreement must be an act in the law *i.e* on the face of the matter capable of having legal effects.

(3) It must be the intention of the parties that the matter in hand shall be such as can be dealt with by a Court of Justice, or at least there must not be the contrary intention.

(4) There must be an act in the law determining the rights and duties of the parties.

(a) A consent or declaration of several persons is not an agreement if it affects only *other* people's rights.

(b) *e. g.* the verdict of a jury is a concurrent declaration of several persons affecting legal rights—but it is not an agreement since the rights affected are not those of the jurymen.

(c) Again *e. g.* trustees, holding a fund to be paid over to testator's daughter on her marrying with their consent, give her their consent to marry A. B. This declaration of consent, determining their duty to pay over the fund affects the duties of the trustees but it is not an agreement *as there is no mutual obligation.*

3. An agreement contemplates something to be done or forborne by one or more of the parties for the "use" of the others or other.

(1) An agreement might be defined as purporting to create an obligation

Intention.

(2) True intent of parties is such intent as a Court of Justice can take notice of.

(3) Intent has to be proved according to the general rules of evidence.

(4) The Law does not allow a party to show that his intention was not in truth such as he made or suffered it to appear, but in the common and regular course of things the law gives effect to real as well as apparent consent.

4. Proposal and acceptance.

(1) Agreement can be analysed into proposal and acceptance.

Agreement analysed.

(a) As in Roman Stipulatio
(b) As in the Indian Contract Act.

(2) Is the analysis universally applicable? No. It is best to let the formal or declaratory process of establishing a contract stand on its own footing.

(3) The analysis is inapplicable to a case of executing a deed or signing a written agreement:

(a) There is no proposal or acceptance in the transaction of executing the deed.

(b) Though the terms of the document must have been settled by a process reducible to the acceptance of a proposal, yet,

(c) the formal instrument has a force apart from and beyond that of the negotiation which fixed its terms.

(4) The analysis inapplicable to the case of a lease:

(a) Though there is generally an enforceable agreement, constituted by letters or memos before the lease is executed, yet the *lease itself* is a new contract or series of contracts.

(b) It is difficult to say who proposes and who accepts. The lessor may be (or may not be) taken as the proposer because he executes the lease before the lessee executes the counterpart

(c) It may be (or may not be) that the covenants are to be taken severally and that in each one the party with whom it is made is the proposer and the party bound is acceptor.

(5) The analysis inapplicable to a case where two parties differ as to terms of a contract and accept what a third party suggests :

(a) Is the first acceptor the proposer of terms to the other ?

(b) What if both accept at the same moment ?

(6) In English Law promise may exist and bind as contract before acceptance.

(a) Promise may be made in writing before there is any acceptance.

(b) Promise made by deed, though before acceptance, is binding and irrevocable.

(c) Here the operation of a deed in matters of property have been anomalously extended to matters of obligation.

5. Void and Voidable acts.

Void. Voidable.

(1) An act is void when it has from the beginning no legal effect at all, save in so far as any party to it incurs penal consequences.

(a) What is laid down in the Indian Contract Act is not of universal application that, "Every agreement not enforceable by law is said to to void," for

(b) in English Law there are agreements that cannot be sued upon but recognised by law as having legal effect. (See Pollock ch. xiii.)

(2) A voidable act takes its full and proper legal effect unless and until it is disputed and set aside by some person entitled to do so.

(a) The Indian Act defines to the effect that a voidable contract is an agreement such that one of the parties is entitled at his option to treat it as never having been binding on him.

(b) But in English Law cases occur where there is a contract enforceable by one party alone, *e. g.* an agreement required by St. of Frauds to be in writing, signed by one party and not by the other.

6. Consideration. Things to be known to test a contract.

Consideration.

(1) Consideration is an act or forbearance or the promise thereof which is offered by one party to an agreement and accepted by the other as an inducement to that other's act or promise.

Tests of a contract.

(2) To test a contract after proposal and acceptance it is essential to know :

(a) Whether the offer of a contract was made.

(b) What the terms of that offer were.

(c) Whether there was any acceptance of it.

(d) Whether acceptor was party to whom offer was made.

7. Express, Tacit and Fictitious promises.

(1) In so far as a proposal or acceptance is conveyed by words it is said to be express,

(2) In so far as it is conveyed by conduct it is said to be tacit. *e. g.* the passenger who steps into the ferryboat thereby requests the ferryman to take him over for the usual fare and the ferryman accepts this proposal by putting off.

(3) A tacit promise may be

Tacit promises.

(a) Real: where a relation exists between two parties which involves the performance of certain duties by one of them and the payment of reward to him by the other, the *jury may infer* a promise.

Fictitious.

(b) Fictitious: where a relation exists etc., the *law will imply* a promise. *e. g.*

(α) An innkeeper promises in this sense to keep his guest's goods safely.

(β) Case of carrier is analogous.

(4) In English Law cases of duties *quasi ex contra tu* are dealt with by the fiction of an implied previous contract.

(a) Implied previous request is often supplemented by an equally fictitious promise.

(b) Promise actual or fictitious, supposed to relate back to fictitious request. So that

(c) the transaction which was the real foundation of the matter is treated as forming the consideration in a fictitious contract of the regular type.

(d) An obligation analogous to contract is imposed.

(e) Pollock suggests name "Constructive Contract" to obligations of the nature here mentioned. cf. "Constructive possession," and "constructive notice."

8. Promises by advertisement and general offer.

(1) An advertisement is a proposal which is accepted by performance of the conditions.

General offers.

(a) It is an offer to become liable to any person who happens to fulfil the contract of which it is the offer.

(b) Until some person has done this it is a proposal and no more.

(c) It ripens into a promise when its conditions are fully satisfied.

(2) Likewise each bidding at a sale by auction is a proposal and when a particular bid is accepted by the fall of the hammer (not before) there is a complete contract with the particular bidder to whom the lot is knocked down.

(3) Offer must be distinguished from invitation of offers and mere declarations of intention may not be treated as binding contracts. But *contra* cf.

(a) *Denton* v. *G. N. Railway Co.* Railway timetable, though not publicly revoked, is a proposal or part of a proposal addressed to all intending passengers and sufficiently accepted by the

tender of the fare at the station in time for the advertised train.

(b) *Warlow* v. *Harrison* Every bid in a sale without reserve is not a mere proposal but a conditional acceptance.

(4) Later decisions have held *contra* and maintained the principle that expressions of willingness to consider offers must not be confounded with offers to be bound.

(5) Difficulties of *Denton* v. *G. N. R. Co.* and *Warlow* v. *Harrison*.

Denton v. G. N. R. Co.

(a) If offers to negotiate are offers to be bound then the manager of a theatre contracts with every play-goer that the announced piece will be performed; and conveners of a meeting contract with all who come that the meeting will be held.

(b) Supposing the traveller in *Denton* v. *G. N. R. Co.* (25 L.J.C.B. 129.) had seen the new time-table just as he offered to take his ticket, then, though no contract could arise yet his grievance would be the same.

Warlow v. Harrison.

(c) Similarly if in the sale in *Warlow* v. *Harrison* (1 E. & E. 295) the auctioneer expressly retracted the statement of the sale being without reserve, there could be no contract as supposed in the judgment but the bidder's grievance would be the same.

(d) It is difficult to determine what the contents and consideration are of the contract supposed to be made.

(α) In *Denton* v. *G. N. R. Co.* the alleged contract cannot be the ordinary contract to carry. What then?

(β) In *Warlow* v. *Harrison* a contract is alleged to be complete not on the acceptance but on the making of a bid.

(e) Another difficulty is raised by the suggestion that in these cases the first offer or announcement is not a mere proposal but constitutes a floating contract with the unascertained person, if any, who shall fulfil the prescribed condition.

Savigny.

(α) Savigny (Obl. 2.90) says that on this theory no action could be supported.

Williams v. Carwardine

(β) The notion of a Floating Obligation is supported to a certain extent by the decisions above referred to and also in *Williams* v. *Carwardine* (4 C. & Ad. 621)

(γ) But the decision in *Williams* v. *Carwardine* seems to set up a contract without any real *animus contrahendi* and without any real consideration.

(δ) It may be added *re. Williams* v. *Carwardine* that there cannot be an acceptance constituting a contract without any communication of the proposal to the acceptor or of the acceptance to the proposer.

(6) An American judgment (*Shuey* v. *U. S. A.* 92 U. S. 73) holds that a general proposal is treated as subject to a tacit condition that it may be revoked as publicly as it was made.

Other general offers.

(7) Other kinds of general proposals (besides those already noticed) have been dealt with as capable of acceptance by any one to whose hands they might come.

(a) In *Ex parte Asiatic Banking Corporation* (22 Ch. 39) it was held that from an open letter of credit there may be inferred a proposal or request by the author of the letter to the mercantile public to advance money on the faith of the undertaking expressed in that letter.

(8) In *Williams* v. *Byrnes* (1 Moo. P.C.C.N.S. 154) *dicta* that evidence required by the Statute of Frauds would not be complete without some further writing to show who *in particular* had accepted the proposal.

9. Revocations. Conditions of offer. Limits of acceptance and revocation.

When to revoke.

(1) An offer may be revoked at any time before acceptance but not afterwards.

(a) Proposer is free to withdraw proposal before time given has elapsed

(b) He is not bound to keep it open unless there is a distinct contract to that effect founded on a distinct consideration.

(c) Effect of naming definite time in the proposal operates as a warning that an acceptance will not be received after the lapse of the given time, not as an undertaking that if given sooner it shall be.

(2) Conditions of offer.

Conditions of offer.

(a) Proposer may prescribe time, manner and form: if no time or manner or form is prescribed, acceptance must be communicated within reasonable time in any reasonable or usual manner or form.

(b) In neither case acceptor is answerable for delay through proposer's default.

(c) Proposer may prescribe a form or time of *acceptance* but not a form or time of *refusal*.

(d) Particular place for acceptance may be prescribed.

(e) Acceptance not communicated to the proposer or agent does not make a contract: but proposer may dispense with this rule to the extent of taking action upon the proposal as equivalent to acceptance.

(3) Limits of revocation.

(a) Revocation of proposal must be communicated expressly or tacitly before acceptance.

Revocation too late.

(b) Revocation after acceptance is too late, though determined upon before date of acceptance (*Byrne* v. *Van Tienhoven* 5 C. P. D. 344.)

Uncommunicated.

(c) An uncommunicated revocation is no revocation at all.

Tacit.

(d) Tacit revocation held valid. *Dickinson* v. *Dodds* (2 Ch. D. 463. See Pollock 28-30) questioned by Pollock on the strength of other decisions. It is possible to understand *Cooke* v. *Oxley* (1 R. R. 783) as laying down that a tacit revocation need not be communicated.

(4) Limits of acceptance and of its revocation—

(a) Acceptance or its revocation must be communicated like proposal provided that means authorized by proposer and in particular despatch of answer by post, are deemed sufficient.

Acceptance by post.

(b) Acceptance despatched by post or telegraph or similar means

(α) is complete as against the proposer from the time of its despatch out of the sender's control,

(β) is effectual notwithstanding any miscarriage or delay in its transmission happening after such despatch.

10. Contracts by Correspondence.

(1) An uncommunicated mental assent cannot make a contract. But

Acceptance to be signified.

(a) If offer contains request express or implied that acceptance must be signified by doing something, then as soon as that thing is done there is a complete contract.

(b) And the most important application of this exception is where posting of acceptance, though letter be never delivered, is sufficient.

(2) Proposer is bound from date of acceptance: *i. e.* from the time when acceptor has done all he can to accept by putting his affirmative answer in a determinate course of transmission to the proposer.

(a) At this point the contract is absolute and irrevocable.

(b) Acceptor free to act on the contract as valid and disregard any revocation reaching him afterwards.

(3) Proposer is bound though, without any default of his own, the acceptance never reach him.

Where acceptance never reaches proposer.

(a) The man who requests or authorizes an acceptance of his offer to be sent in a particular way must take the risks of the mode of transmission so authorized.

(b) In the common course of affairs the sending of a written offer by post amounts to an authority to send the answer in the same manner.

(c) Persons not in the immediate neighbourhood contemplate the post-office as the ordinary and reasonable means of communication.

(d) Even an offer delivered by hand may contemplate an acceptance by post. (*Henthorn* v. *Fraser* 2 Ch. 27.)

(4) Acceptance and revocation.

(a) A complete contract is made at the time when the letter of acceptance is posted, though there be delay in its delivery. (*Household F. I. Co.* v. *Grant* 4 Ex. Div. 216.)

(b) Even a revocation despatched after the acceptance and arriving before it would be inoperative.

(c) An unqualified acceptance once posted cannot be revoked even by a telegram or special messenger outstripping its arrival.

(d) Though acc. be in form an acknowledgment of an existing agreement yet this will not make the contract relate back to the date of the proposal, at all events not so as to affect the rights of third persons.

Death of proposer.

(e) Death of proposer is an absolute revocation though not known to the other party, in case death takes place before prop. is accepted.

(α) Death of the proposer is in itself a revocation since it makes the agreement impossible by removing one of the persons whose consent would make it. (*cf Dickinson* v. *Dodds.*)

(β) No case authority *re* notice to other party being material or not.

Roman Law and Indian C. Act.

(γ) Death of principal puts an end *ipso facto* [not in Roman Law] to agent's authority, irrespective of time of knowledge of fact to agent or third parties. (*Blades* v. *Free* 9 B. & C. 167)

(δ) The Indian Act follows Roman Law *re* agent's authority, and generally makes knowledge of death necessary

Insanity of proposer.

(f) Insanity [except in the Indian Act] is no revocation, but if a man become so insane as to have no mind he ought to be deemed dead for the purpose of contracting. (*Drew* v. *Nunn* 48 L. J. Q. B. 591.)

11. Certainty of acceptance and of terms.

(1) In order to convert a proposal into a promise the acceptance must be absolute and unqualified.

(a) For instances of insufficient acceptance see cases collected in Pollock 39-40.

Grumbling assent.

(b) An acceptance may be complete though it expresses dissatisfaction at some of the terms if the dissatisfaction stops short of dissent, so that the whole thing may be described as a "grumbling assent". (*Joyce* v. *Swann* 27 C. B. N. S. 84.)

(2) Parties may postpone conclusion of contract, though agreed on the terms, till it is embodied in a more formal instrument.

(a) If to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation. (*Chinnock* v. *Marchioness of Ely* 4 D. J. S. 638.)

(b) The circumstance that parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement. (*Winn* v. *Bull* 7 Ch. D. 29)

(c) A contract may be made by letters and the mere reference in them to a future formal contract will not prevent their constituting a binding bargain. (*Bonnewell* v. *Jenkins* 8 Ch. D. 70-73.)

(3) An agreement is not a contract unless its terms are certain or capable of being made certain.

(a) The expressions of intention of parties must convey their meaning with reasonable certainty to a reasonable man conversant with affairs of the kind in which the contract is made.

(b) For instances of uncertainty of terms see Pollock 43.

(4) Illusory Promises: dependent on conditions which in fact reserve an unlimited option to the promisor.

Illusory promises.

(a) *Nulla promissio consistere potest quae ex voluntate promittentis statum capit* e. g. When a Committee had resolved to pay for certain services "such remuneration as shall be deemed right" the person who had performed the services had no right of action, for the committee alone were to judge whether any or what recompense was right. (*Taylor* v. *Brewer* 1 M. & S. 290.)

(b) An illusory promise, though it creates no enforceable contract, is so far effectual as to exclude the promisee from falling back on any contract to pay a reasonable remuneration which would be inferred from the transaction if there were no express agreement at all. (*Roberts* v. *Smith* 4 H. & N. 325. *Moorhouse* v. *Colvin* 25 Beav. 342.)

(c) It would not be safe, (says Pollock) to infer generally that under no circumstances whatever can a promise to give what the promisor shall think reasonable amount to a promise to give a reasonable reward, or at all events something which can be found as a fact not to be illusory.

(5) Promise to make a contract with a third person depends for its performance on the will of that person.

(a) It affords cause of action as between parties.

(b) Consent of a third person is not more certain than many other things which parties may and do take on themselves to warrant. (*Foster* v. *Wheeler* 38 Ch. D. 230.)

(6) Acceptance by Conduct. Conduct relied on as constituting the acceptance of a contract must be unamabiguous and unconditional.

Acceptance by conduct.

(a) In cases of special conditions on tickets the earlier judgments hold such conditions as bind-

ing, but in *Henderson* v. *Stevenson* (L. R. 2 Sc. D. 470) it was decided that in the case of a passenger travelling by sea with his luggage an indorsement on his ticket that the shipowners will not be liable for loss does not prevent him from recovering from loss caused by their negligence unless

(α) He knew and assented to the special terms, or
(β) Knowing that there were special terms was content to accept them without examination. (cf. *Richardson & Co.* v. *Rowntree* [1894] A. C.)

(b) It is a question of fact whether the notice given in each case was reasonably sufficient to inform the party receiving it at the time of making the contract that the party giving it intended to contract only on special terms.

(7) The ordinary rules of proposal and acceptance do not apply to promises by deed.

Promises by deed.

(a) Promise by deed creates an obligation which whenever it comes to the other party's knowledge affords a cause of action without any other signification of his assent and in the meanwhile it is irrevocable. (*Xenos* v. *Wickham*, L.R. 2 H. L. 296)

(b) If the promisee refuses his assent when the promise comes to his knowledge the contract is avoided. (cf. *Butler & Baker's case* 3 Co. Re.)

II Capacity of Parties : Infants.

1. General Statement of the law: An infant is not absolutely incapable of binding himself, but is, generally speaking, incapable of absolutely binding himself by contract.

Common Law

(1) At common law an infant's contract is voidable at infant's option before majority or within a reasonable time afterwards.

(2) When the obligation is incident to benefical interest in property it cannot be avoided while that interest is retained.

(3) An infant's contract is valid if it appears to the court to be beneficial to the infant and in particular if it is for necessaries.

Infants' Relief Act.

(4) By the Infants' Relief Act, 1874.

(a) Loans of money to infants are void.
(b) Contracts for sale to them of goods other than necessaries void.
(c) Accounts stated with them void.
(d) No action possible on ratification of any contract made during infancy.

2. Contracts of infants in general at common law and as affected by the Act of 1874.

Old Law

(1) Once commonly held that an infant's agreement, if not to his benefit, is voidable and void, though in general his contracts are voidable at option.

(a) But the distinction is not supported by modern authorities.

(b) And it is even assumed in modern practice that an infant's sale or gift of personal chattels with actual delivery is good. (*Taylor* v. *Johnston* 19 ch. D. 603, 608)

(2) Examination of authorities.

Bonds.

(a) Infant's bond with a penalty has been supposed to be wholly void. (*Baylis* v. *Dineley* 3. M. & S. 477)

(α) But nothing more is decided than that the ratification of the bond must be by an act of equal solemnity as the orignal.

(β) In the case referred to one of the judges simply follows Coke's ruling that an infant's bond with a penalty, even for necessaries, shall not bind him.

(b) Infant's contract to buy goods for the purposes of trade is absolutely void, not voidable only. (*Thornton* v. *Illingworth* 2 B. & C. 824)

Buying goods for trade.

(α) But the point to be decided was that a ratification after action brought was no answer to the defence of infancy.

(β) And the dicta are inconsistent (Benjamin on Sale, 29) with a former case, not cited, where an infant was allowed to sue on a trading contract for the purpose of chattels, part price being paid and enforcement of contract would be to his benefit. But

(γ) Dampier J. held (*contra* Lord Ellenborough) that an infant's contracts clearly for his benefit bind him; and those not to his benefit are voidable at option.

(δ) And the Court of Exchequer Chamber affirmed the judgment holding that the general law is that the contract of an infant may be avoided or not at his option. (*Warwick* v. *Bruce* 2 M. & S. 205)

Serving for wages.

(c). An agreement to serve for wages may be for the infant's benefit (*Wood* v. *Fenwick* 10 M. & W. 195; *Leslie* v. *Fitzpatrick* 3 Q. B. D. 229) but an agreement compelling service always during term but giving master freedom to stop work and wages at option is inequitable and void. (*Reg* v. *Lord* 12 Q. B. 757 " void *against the infant* ")

(α) But this decision simply states that the agreement was not enforceable against the infant.

(β) And not that the infant could not sue on agreement if wages were arbitrarily withheld.

Leases

(d) It is said that a lease made by an infant without reservation of any (not even the best) rent is absolutely void.

(α) But this opinion was disapproved by Lord Mansfield whose judgment Lord S. Leonards adopted as good law (*Allen* v. *Allen* 2 Dr. & W. 307, 340. *Zouch* v. *Parsons* 3 Burr. 1794)

(β) And a lease made by an infant reserving substantial rent (best or not) is only voidable, and it is not well avoided by another lease of same property to another person by infant on attaining full age (*Slator* v. *Brady* 14 Ir. C. L. 81)

(γ) Again, infant cannot avoid at all lease, beneficial to him, made by him (*Maddox* v. *White* 3 T. R. 159)

Sale

(e) Sale, purchase, exchange of land by infant merely voidable at option both as to contract and conveyance (Co. Lit. 2. *b.* 51 *b.*)

Shares.

(f) Infant, if not objected to, may be a partner or a shareholder: though not liable for partnership debts during infancy he is bound by the partnership accounts as between himself and his partners and cannot claim to share profits without contributing to losses. (Lindley 811. 828)

Partnership.

(α) Infant, not disclaiming partnership on coming of age, contracts a "continual obligation" which makes him liable for losses contracted by firm since his majority (Lindley on Partnership 74. *Goode* v. *Harrison* 5 B & Ald 147. 259)

(β) When winding up infant will be a contributory if he does not repudiate his shares either while he is an infant or within reasonable time after majority (*Lumsden's case* 4 Ch 32.)

(γ) Validity of transfer to an infant cannot be disputed after the infant has transferred to a person *sui juris* (Lindley 82-84. *Gooch's case* 8 Ch. 266)

(δ) Transfer of shares to an infant and the obligations incident to his holding the shares are not void but only voidable (*Lumsden's case*)

(g) Marriage of minors not absolutely void if on arriving at the age of consent both parties agree to it.

Marriage of infants.

(α) 4 Geo 4 c 76 ss 8. 22 makes it very difficult, though not impossible, for a minor to contract a valid marriage without consent of parents or guardians.

(β) Infant may sue for a breach of promise of marriage but not be sued. (*Warwick* v. *Heney*)

(γ) Infant's marriage settlement not binding on the infant unless made under statute and the Court of Chancery has no power to make it binding in the case of a ward (*Field* v. *Moore* 7. D. M. G. 692. 724)

(δ) Settlement of female infant's general personal property, intended husband being of full age and a party, can be enforced as husband's not wife's contract. (3 Davidson's Conveyancing Part ii 728)

(ε) Particular covenants in an infant's settlement may be valid (*Isaacs* v. *Carter* A. C. 360)

(ζ) Settlement not void but voidable may be confirmed by subsquent conduct of party when of full age and *sui juris* (*Davies* v. *Davies* 39 L. J. Ch. 340 *Duncan* v. *Dixon* 29 L. J. Ch. 437)

(η) Settlement may be repudiated within reasonable time after majority (*Carter's case* A. C. 360. But cf. *Re Jones* 62 L. J. Ch. 998)

(θ) A woman married under age is not disabled by the coverture from confirming an antenuptial settlement on majority (*Re Hodson's Settlement* 8 R. 274)

(h) Negotiable Instruments, Accounts etc.,

Negotiable instruments.

(α) Infant's contract on a Bill of Exchange or Pro. Note only voidable (*Harris* v. *Wall* 26 L. J. Ex. 370)

(β) On majority party may ratify and so make himself liable on contracts made during infancy (*Williams* v. *Moor* 22 L. J. Ex. 223)

(j) In conclusion.—

(α) There is no reason for holding any contracts of infants void at common law. But

(β) Specific performance is not allowed at the suit of an infant, because the remedy is not mutual, the infant not being bound (*Flight* v. *Holland* 4 Russ 298)

(γ) An Infant may avoid voidable contracts, if they are matters *in fait*, within age or at full age; if matters of record within age only. (Co. Lit: 380 b. *Newry & Enniskillen Railway Co.* v. *Coombe* 28 L. J. Ex. 325)

(δ) Subject to the rule that voidable transactions are not invalid unless ratified, but valid until rescinded (*Per* Lord Colonsay L. R. 2 H. L. 878) an infant cannot deprive himself of the right to elect at full age and only then can his election be conclusively determined. (*L. N. W. R.* v. *M. Michael* 20 L. J. Ex. 97)

(ϵ) If an infant pays a sum of money under a contract, in consideration of which the contract is wholly or partly performed by the other party, he can acquire the right to recover the money back by rescinding the contract when he comes of age (*Holmes* v. *Blogg* 8 Taunt 32,108. *Ex parte Taylor* 8 C. M. G. 224. 226)

(3) Infants' Relief Act, 1874 affecting contracts of infants.

(a) Section 1. Contracts of infants void, specialty or simple contracts for "repayment of money lent or to be lent, or for goods supplied or to be supplied and all accounts stated," except

(α) Contracts for necessaries although they take the form of a loan of money or supply of goods.

(β) Contracts into which an infant may enter "by any existing or future statute, or by rules of Common Law or Equity" and which were not voidable at the date of enactment.

(b) Section 2. A man of full age cannot make himself liable upon a contract formed during his infancy, even though fresh consideration be given for his ratification of such liability.

(c) Decisions on Section 1.

Decisions under I. R. Act.

(α) Transactions which resulted in debts were void under the I. R. Act (*R.* v. *Wilson* Q. B. 22.)

(β) Infant who has paid for goods and *received* and *used* them cannot recover the money paid (*Valentini* v. *Canali* 24 Q. B. D. 206)

(γ) When a particular class of contracts is simply declared to be unlawful, this does not prevent property from passing by an act competent in itself though done in pursuance or execution of the forbidden contract (*Ayres* v. *South Australian Banking Co.* L. R. 3 P. C. 148. 229)

(δ) An infant may be guilty of larceny as a bailee though the goods were delivered to him on an agreement void under the Act (*R.* v. *MacDonald* 15 Q. B. D. 323)

(d) Decisions on Section 2.

(α) Where the consideration was a contract entered into during infancy and the judgment (by default) was ratification of the contract it was held that such ratification (*since* the Act) was invalid as against the infant though the contract ratified was made *before* the Act (*Ex parte Kibble* 20 Ch. 373)

(β) It is immaterial to section 2 whether an agreement is or is not one of those included in section 1 (*Coxhead* v. *Mullis* 3 C. P. D. 439)

(δ) In a case which before the Act would have been one of ratification it may be left to the jury to say whether the conduct of the parties amounts to a new promise (*Dickman* v. *Worrall* 5. C. P. D. 210)

(γ) Ratification cannot be available by way of a set-off. (*Rowley* v. *Rowley* 2 Q. B. D. 460)

(ϵ) Mere maintenance of marriage engagement since promisor's majority is ratification but can be avoided by the Act and insufficient for an action (*Coxhead* v. *Mullis.*)

(ε) When mutual promises of infancy are conditional on promisor's parents' consent and promise is renewed since his majority he is liable (*Northcote* v. *Doughty* 4 C. P. D. 385)

(η) Continuous contracts, re property of permanent nature, would seem to be enforceable against a party, who having entered into the contract during infancy, has taken benefit under it after majority (*Whittingham* v. *Murdy* 60 L. J. 956)

(c) Pollock and Anson on some points of I. R. Act.

(α) Ratification is not deprived of all effect, for it may have other effects than giving a right of action or a set-off and these are not touched by the Act. *Pollock* 68.

(β) The operation of the Act seems to be to reduce all voidable contracts of infants ratified at full age, whether the ratification be formal or not, to the position of agreements of imperfect obligation, that is which cannot be directly enforced but are valid for all other purposes. *Poll.* 61.

(γ) If an infant has received goods and paid their price, can the tradesman recover the goods or the infant his money on the ground that the transaction was wholly void? *Anson* 113. (8th Edition)

Goods paid for and used: *Valentini* v. *Canali*

Goods paid for and not used. Goods actually delivered can be returned and the price recovered only so far and so long as complete restitution is possible. *Poll.* 63.

The transaction might stand as a delivery of goods on the one side with the intention to pass the property, and a payment of money on the other with a full knowledge of facts. *Anson* 120. (8th Edition)

Goods paid for and not received: If infant pay the price or any part of it before delivery of goods he may recover it back as indeed he might have done before the Act, for the contract was voidable. *Poll.* 62.

But it does not follow that if the goods are delivered no property passes or that if they are paid for the money may be recovered back. *Poll.* 62.

If an infant pays for goods not delivered he could probably recover the money, not under the contract, for that is void, but as money received to his use. *Anson* 220. (6th Edition)

3. On the liability of an infant when the contract is for his benefit and especially for necessaries.

(1) Infant Apprentices' contracts.

Apprenticed infants.

(a) If a contract be for the benefit of the infant at the time it shall bind him (*Maddon* v. *White* 2 T. R. 159) unless manifestly to infant's prejudice (*Cooper* v. *Simmons* H. & N. 707. 721)

(b) An infant's contract of apprenticeship or an ordinary contract to work for wages, if reasonable, is binding on infant to the extent of making him liable to statutory penalties, as an adult, for unlawfully absenting himself from his master's service (*Wood* v. *Tenant* M. & W. 195. *Leslie* v. *Fitzpatrick* 3 Q. B. D. 229)

(c) No civil proceedings can be taken against an infant on an apprenticeship deed (*1 De Francesco* v. *Barnum* 43 Ch. D. 165)

(d) Terms being unreasonable agreement is void so that an action will not lie against a stranger for enticing away the apprentice. (*2 De Francesco* v. *Barnum* 45 ch. D. 430)

(2) Other contracts of Infants.

(a) A minor may buy goods on credit for re-sale in a rising market, yet such contract would at Common Law be voidable at his option.

(b) An Infant agreeing with a railway company, in consideration of special travelling terms, to waive all claims for accident to himself or property is not bound by such a disadvantageous contract (*Flower* v. *L. & N. W. R. Co.* 9. R. 246 C. A.)

(c) In an action brought by an infant an undertaking given by next friend is not binding if circumstances are such that it cannot be for infant's benefit (*Rhodes* v. *Swithenbank* 22 Q. B. D. 577)

(3) Contracts for necessaries.

(a) The word necessaries is not confined in its strict sense to such articles as are necessary to the support of life, but extend to articles fit to maintain the particular person in the state, degree and station in life in which he is. (*Ryder* v. *Wombwell* L. R. 4. ex. 32. 38, and *Peters* v. *Fleming* 6 M. & W. 46)

Necessaries.

(b) The court says if things are *prima facie* necessary.

Province of Judge.

(α) Articles of diet which are prima facie mere luxuries may become necessaries if prescribed by medical advice (*Wharton* v. *Walker* 9 Q. B. 606)

(β) Though the test of necessity may be usefulness a useful thing may be of costly fashion or material.

(γ) The question for the court is not whether the things are such that a person of the defendant's means may reasonably buy and pay for, but whether they are so necessary to him, an infant, as to justify his getting them on credit rather than go without them.

(δ) For the purpose of deciding this question the court will take judicial notice of the ordinary customs and usages of society (L. R. 4 Ex. 40.)

(c) If the court does not hold that here is no evidence to think the supplies in question necessaries, the jury says if they are in fact necessaries—Pollock 67. If the court thinks that the supplies cannot be considered necessaries the case may not even be submitted to the jury—Anson 116. (8th Ed.)

Province of Judge.

(α) Evidence may be admitted to shew whether the defendant was or was not already sufficiently supplied with commodities of the particular description (*Brayshaw* v. *Eaton* 7 Scott 183; *Foster* v. *Redgrave* L. R 4 Ex. 32 Note; *Barnes* v. *Toye* 23 Q. B. D. 229; *Johnstone* v. *Marks* 29 Q. B. D. 229. But see *Ryder* v. *Wombwell* and L. R. 4 Ex. 42.)

(β) The question of necessaries depends, among other conditions, on the extent to which the party is supplied with similar goods. Though a tradesman makes no inquiries as to existing supplies he can recover for fresh supplies of necessaries, but if existing supplies are so sufficient so to make fresh supplies superfluous the fresh supplier may not recover (cf *Brayshaw* v. *Eaton*.)

(γ) Having a large income does not prevent infant from contracting for necessaries on credit. (*Burghart* v. *Hall* 5. M. & W. 727. *But* see *Mostyn* v. *Hall* 6. Sim. 496)

(δ) In *Delton* v. *Gib* (7 Scott 117) the *apparent* rank and circumstances of the infant buyer were held to be test to the seller of the necessary character of the supplies asked for. Pollock. 69 says, "The knowledge or belief of the tradesman has nothing to do with the question whether the goods are necessary or not."

Judge & Jury to decide.

(d) It may be said as a rule [for an Exception cf *Ryder* v. *Wombwell*] that the Court has to say whether the articles of the general class or description were necessaries for the defendant, and the Jury to say whether the particular items, being of a class allowed by the Court as necessary, were of a kind and quality necessary for defendant in his straitened circumstances.

(e) What the term necessaries includes.

What are necessaries?

(α) Meat, drink, apparel, physic, doctoring costs and instruction for profit. (Bacon Abr. Infancy and Age i. 4. 335)

(β) So, learning a trade is a necessary (*Chapple* v. *Cooper* 3 M. & W. 252; *Walter* v. *Everard* 2 Q. B. 369 *Cooper* v. *Simmons* 7 H. & N. 707)

(γ) The preparation of a settlement containing proper provisions for her benefit is a necessary for which a minor about to be married may make a valid contract, apart from any question as to the validity of the settlement itself (*Helps* v. *Clayton* 17 C. B. N. S. 553)

(δ) In *Chapple* v. *Cooper* an infant widow was held liable to pay for her husband's funeral expenses.

(f) The liability is on simple contract only.

Liability on Simple Contract only.

(α) If he bind himself in an obligation or other writing with a penalty for payment that obligation shall not bind him (Coke Litt. 172 & 4 T. R. 338)

(β) Infant's deed to secure repayment of money advanced for necessaries is voidable (*Martin* v. *Gale* 4 Q. B. D. 428)

(γ) In these and similar cases infant's liability on simple contract is not affected (*Walter* v. *Everard*)

(δ) In no circumstances is infant liable on a bill of exchange or pro. note (*Re Soltykoff ex parte Margarett* 1. Q. B. 443)

(4) Contracts Infant may make by Custom and by Statute.

Contracts allowed by custom.

(a) By Custom.

(α) Infant of fifteen may sell his gavelkind tenure land but conveyance must be by feoffment.

(β) Infant, unmarried, between 14 and 21 years may bindingly apprentice himself to a London freeman by indenture with proper convenants.

(b) By Statute.

By statute

(α) *Supra*, Infants' Relief Act.

(β) Infants may grant renewal of leases, make leases under direction of Chancery Court, surrender leases and accept new leases (11 G. 4 & 1 W. 4 c. 65. cf *Re Clark* 1 Ch. 292; *Re Letchford* 2 ch. D. 719.

(γ) Infants may with the sanction of the court make valid marriage settlements of real and personal property (18 & 19 Vict c 43. cf *Seaton* v. *Seaton* 57 L. J. 661)
(δ) This Act (18. & 19. Vict.) applies to covenants to settle after-acquired property (*Moore* v. *Johnson* 3 Ch. 48)

4. Infant's immunity as to wrongs connected with contract.

(1.) An Infant is not liable for wrong where the claim is in substance *ex contractu* or is so directly connected with the contract that the action would be an indirect way of enforcing the contract.

(a) An infant innkeeper was not held liable in an action on the case for the loss of his guest's goods (Rolle's Abridgement 1, 2, D. 3.)

Tort.

(b) An action of deceit will not lie upon an assertion by a minor that he is of full age (*Johnson* v. *Pie* 1 Keble 913; cited in *Stikeman* v. *Dawson* 1 De G. & Sm. 110—113.)

(c) An Infant cannot be made liable upon contract by framing action in tort for negligence (*Jennings* v. *Rundall* 8 T. R. 338) for the wrong must be more than a misfeasance in the performance of the contract and must be separate from and independent of it (Anson 117.)

(d) An Infant cannot be made liable for goods sold and delivered by charging him in trover and conversion (*Manby* v. *Scott* 1 Sid. 129) and yet (says Anson) the Infants' Relief Act makes a sale of goods to an infant absolutely void and so would appear to prevent any property from passing to him.

Manby v. Scott.

(2.) An Infant is liable for wrong though touching the subjects matter of contract.

(a) Though but for the contract the tort would not have been committed yet it is independent of the contract in the sense of not being an act contemplated by the contract.

(b) In *Burnard* v. *Haggis* (14 C. B. N. S. 45) infant held liable for tort not by abuse of contract (hiring a horse for riding) but doing an act expressly forbidden (jumping the horse and consequently killing it.)

(c) In *re Seager* (60 L. J. 668) a butcher boy sold some of the meat meant for his master's customers and kept the money. On detection he admitted the amount due thus and when he came of age he gave a pro-note for the money. In his defence it was said

In re Seager.

(α) That the liability arose on an account stated which was void under Sec 1 of I. R. Act.
(β) that it arose on a ratification void under sec 1 of the Act, but

the court held that he was liable to an action *ex delicto* and that his promise to pay when he came of age was a compromise of a suit, for which, being of age, he was competent to contract.

5. Liability in equity on representation of full age.

(1) An Infant is liable and bound in equity if he represents himself as of full age but only to the extent of any advantage thereby gained.

(a) He incurs an obligation which, in the case of a contract, is not an obligation to perform the contract (*Acc. Bartlett* v. *Wells* 1 B. & S. 836)

Clarke v. Cobley.

(b) In *Clarke* v. *Cobley* (2 Cox. 173) minor, evidently falsely representing himself as of full age, gave bond to plaintiff for the amount of two pro. notes. Plaintiff discovering the debt on defendant's majority, filed his bill for execution of a new bond, payment of the money or delivery of the notes. The court ordered delivery of the notes but refused to decree payment of the money holding that it could do no more than restore parties to the same situation in which they were at the date of the bond.

(c) Infant who had obtained lease of a furnished house on representation of full age could not be held liable for use and occupation (*Lempriere* v. *Lange* 12. Ch. D. 675)

Overton v. Banister.

(d) Infant on representation of full age inducing trustees to pay over a fund to him cannot charge them afterwards with breach of trust or make them pay again, nor can his representative. (*Cory* v. *Gertcken* 2 Madd. 40; *Overton* v. *Banister* 3 Ha. 503)

(*a*) The release of an infant *cestui que trust* in such a case is binding on him only to the extent of the sum actually received by him (*Overton* v. *Banister*)

Wright v. Snowe.

(β) *Wright* v. *Snowe* (2 De G. & Sm. 32.) seems not to agree with this. Legatee on representation of full age gave release to executrix: afterwards sued for an account alleging his infancy at date of release. Infancy not sufficiently proved; and no inquiry ordered by court, considering that in any event the release could not be disturbed.

"This appears to go the length of holding the doctrine of estoppel applicable to the class of representations in question, and if that be the effect of the decision its correctness may perhaps be doubted" —Pollock 75.

(2) There must be positive misrepresentation and the other party must be in fact misled.

Stikeman v. Dawson.

(a) To establish equitable liability here must be actual representation of full age; it is not enough that the other party did not know of his minority (*Stikeman* v. *Dawson*)

(b) No relief can be given if the party was not in fact deceived but knew the truth at the time: it makes no difference whether the business was actually conducted by a solicitor or agent who did not know (*Nelson* v. *Stocker* 4 De G. & J. 158)

(3) Minor trading. Minor not adjudicated bankrupt without express representation of full age to creditor.

Minor trading.

(a) Mere fact of trading is no constructive representation (*Ex parte Jones* 18 Ch. D. 209 overruling *ex parte Lynch* 2 Ch. D. 227)

(b) Minor trading as adult, alleging full age, cannot plead infancy to have bankruptcy annulled (*Ex parte Watson* 16 Ves. 261; *Ex parte Bates* 2 Mont. D. & D. 337)

(c) Loan obtained on the faith of express representation of full age is a claim in bankruptcy (*Ex parte Unity Bank* 3 De G. & J. 63; cf 18 Ch. D. 121)

(d) A transaction of this kind cannot stand in the way of a subsequent valid contract after full age with another person. (*Inman* v. *Inman* 18 Eq. 160)

(α) A prior voidable agreement is clearly avoided by a subsequent contract on majority inconsistent with the first. (*Inman* v *Inman*)

(β) Not so in the case of a lease (*Slator* v *Brady*.)

III. Capacity of Parties: Married Women.

1. At Common Law and before Jan. 1. 1883.

(1) Old Common Law Rule: A married woman cannot bind herself by contract at all.

Old common law rule.

(a) A married woman's contract is altogether void and no action will lie against her or her husband for the breach of it (*Fairhurst* v. *Liverpool Adelphi Loan Association* 9 Ex. 422, 429)

(b) She may be sued for torts and frauds during coverture alone if widow or jointly with husband, but not for a fraud where it is directly connected with a contract made with her (*Fairhurst* v. *L. A. C. Ass.* But see *Wright* v. *Leonard* 22 C. B. N. S. 258)

(c) A married woman is not estopped from pleading coverture by having described herself *sui juris* (*Cannam* v. *Farmer* 3 Ex. 698)

(d) Living and trading apart from husband is no reason to contract so as to give a writ of action against herself alone (*Clayton* v. *Adams* 6 T. R. 602)

(e) The same though living apart from husband under an express agreement (*Marshall* v. *Rutton* 8 T. R. 542; cf 3 M. & R. 222)

(f) She may acquire contractual rights for her husband's benefit if he exercise them during the coverture, otherwise for her own if she survive.

Wife's separate rights.

(α) She might (M. W. P. Act.) buy Railway Stock and sue for dividends jointly with husband (*Dalton* v. *Midland R. Co.*, 13 C. B. 474.)

(β) If third party holds sum of money at wife's disposal but does not pay it over she has a chose in action (*Fleet* v. *Perrins* L. R. 3 Q. B. 536.)

(γ) Husband receives any sum thus due; wife dying before husband takes out administration to wife. He dying without doing so administration should be taken to wife's estate, but wife's administrator is only a trustee to husband's representative (*Per L. Westbury* in *Partington* v. *Att. General* L. R. 4 H. L. 100, 119.)

(δ) So the Court of Probate cannot dispense with the double administration, even though when the same person is proper representative of both husband and wife, and is also beneficially entitled (*In the Goods of Harding* L. R. 2 P. & D. 394.)

(g) She cannot during coverture renew debt barred by Statute of Limitation. If wife, before marriage, was joint debtor with another person, that person's acknowledgment after marriage is also ineffectual, since to bind one's joint-debtor acknowledgment must be such as not have bound him if made by himself (*Pittam* v. *Foster* 1 B. & C. 248)

(2) Exceptions at common Law.

(a) Queen consort may sue and be sued as feme sole (Co. Lit. 133)

Wife of a person civilly dead.

(b) Wife of a person civilly dead may sue and be sued alone (Co. Lit. 132)

(α) Persons convicted of felony and not lawfully at large under any license are civilly dead.

(β) Transporation or abjuration of the realm determinable on return after sentence. (*Carrol* v. *Blencow* 4 Esp. 27)

(γ) "Civil death arises from outlawry; it seems doubtful whether there are any other circumstances to which the phrase is now applicable" (Anson 122 note, and cf. *Ex parte Franks* 7 Bing. 762)

(δ) Bracton (426. 301) speaks of outlawry as well as religious profession as *mors civilis* (cf. Student's Blackstone p. 16)

Alien's wife

(c) Wife of an alien non-resident in England may bind herself by contract if she purports to do so as a feme sole (*Barden* v. *Keverberg* 2 M. & W. 61)

(α) Alien enemy, though disabled from suing, is not civilly dead, and his wife cannot sue alone on a contract made with her before or during coverture (*De Wahl* v. *Braune* 1 H. & N. 178)

(β) This decision practically over-rules *Derry* v. *Duchess of Mazarine* (1 Ld. Rayon 147) that she may be sued alone—Poll. 80.

(d) By custom of City of London a married woman trading alone can sue and be sued as feme sole, husband named only for conformity and she only liable.

(e) Contracts with husband as to separation etc., may be good.

(α) Wife instituting divorce suit and she and husband agree to refer matter to arbitration, her next friend not party to agreement, she is considered feme sole and the agreement and award valid (*Bateman* v. *Countess of Ross* 1 Dow. 235)

Wife as Feme Sole.

(β) Court would not refuse to confirm agreement to execute arbitration deed though made between husband and wife without trustee's intervention (*Vansittart* v. *Vansittart* 4 K. & J. 62)

(γ) In the case of agreement to live apart, with provisions for maintenance, trustee's intervention not needed, and wife can sue husband for arrears of maintenance (*McGregor* v. *McGregor* 21 Q. B. D. 424)

(δ) She can compromise suit with husband (*Bowley* v. *Bowley* L. R. 2 Sc. & D. 48) but not bind that estate without complying with Fines and Recoveries Act (*Cahill* v. *Cahill* 8 App. Cases 420)

Pollock 81.

"It does not follow that in such transactions a married woman has all the powers of a feme sole"—*Poll. 81.*

(3) Statutory exceptions before M. W. P. Act.

(a) Judicial separation makes wife feme sole (20 & 21 Vict. C. 85)

(b) On dissolution of marriage she is feme sole (*Williamson* v. *Gibson* 4 Eq. 162; cf. *Wells* v. *Malbon* 31 Beav. 48)

Statutory exceptions before M. W. P. Act.

(c) Wife deserted and under protection order is feme sole during desertion (20 & 21 Vict. C. 85)

(α) It does not enable wife to maintain action begun by her alone before date of order (*Midland R. Co.* v. *Cye* 19 C. P. N. S. 179)

(β) Her feme sole powers apply only to property acquired after separation decree or desertion order (*Waite* v. *Moorland* 36 Ch. Div. 158)

(d) A wife made feme sole can sue and be sued not merely as regards contract and property only; she may sue in her own name for a libel (*Ramsden* v. *Brearley* L. R. 10 Q. B. 147) and can give a valid receipt for a legacy not reduced into possession before date of order (*Re Coward & Adam's Purchase.* 20 Eq. 179)

2. Married Woman's Property Act, 1882 amended in 1893.

(1) Separate property is

(a) Property acquired by any married woman after Jan. 1. 1883, including earnings. Property falling into possession since the Act under a title acquired before it, is not herein included (*Reid* v. *Reid* 31 Ch. Div. 402)

What separate estate is.

(b) Property belonging at the time of marriage to a woman marrying after Jan. 1, 1883.

(2) A Contract made by a married woman

(a) Is held to be made with respect to and bind her separate property and, if made since Dec. 5. 1893, whether or not she has any separate property at date of contract (56 & 57 Vict. C. 63)

Wife's contracts.

(b) If so made and binding, binds her after-acquired separate property (56 & 57 Vict. c. 63) provided, as to contracts of earlier date than Dec. 5. 1893, that there was some separate property at date of contract (*Stogdon* v. *Lee* 1 Q. B. 661)

(3) Separate property and married woman's liabilities and obligations.

(a) Subject to any settlement a married woman can bind herself by contract in respect of and to the extent of her separate property, and can sue and be sued alone.

Liabilities on separate estate.

(b) Damages and costs recovered by her are her separate property; sustained by her, must be paid out of separate property.

(c) Woman trading alone can be made bankrupt in respect of her separate property.

(α) An unexecuted general power of appointment is not separate property, and the married woman cannot be compelled to execute such a power for the benefit of her creditors (*Gilchrist's case* 17 Q. B. D. 521)

(β) Property she is entitled to under a settlement without restraint on anticipation, can pass to trustee in Bankruptcy (*Boyd's case* 21 Q. B. D. 284)

(d) The property liable for her antenuptial debts and

(α) Liability not avoided by settling property on herself without power of anticipation.

(β) Liability applies only to separate property acquired under the Act by women married before Jan. 1. 1883.

Harrison v. Harrison.

(e) Married woman's debts contracted during coverture with respect to her separate property are her personal debts on termination of coverture (*Harrison* v. *Harrison* 13 P. Div. 180; 56 & 57 Vict. C. 63 Sect. 1 (c))

(4) Separate Estate and Husband.

(a) When surviving husband takes wife's separate estate *jure mariti* he is her legal representative and liable to creditors to extent of that estate (Act Sec. 23 and *Surman* v. *Wharton* 7 Q. B. 491)

(b) Wife trading apart can be sued by husband for advances made during coverture *re* the business (*Butler* v. *Butler* 16 Q. B. Div. 374)

(c) Husband's liability for wife's antenuptial debts distinct and not merely a joint liability with wife's separate estate; but for purposes of St. of Limitation, there is not a distinct cause of action accruing against husband at date of marriage (*Beck* v. *Pierce* 22 Q. B. Div. 316)

3. Equitable doctrine of separate estate.

(1) Original purpose in settling property to the separate use of married women was merely to exclude the husband's marital right so as to secure an independent income to the wife, and doctrine of equitable ownership was but gradually developed.

(a) Recognizing this separate use, Chancery Court in effect created a new kind of ownership with all the incidents of ordinary ownership.

(b) Powers of disposition including alienation by way of mortgage or specific charge as well as absolutely were admitted (*Taylor* v. *Meads* 4 D. J. S. 597)

(c) Further development from mortgage or specific charge on property to a formal contract under seal; and instruments of such contract by a married woman came to be regarded as in some way binding on any separate property she might have.

Johnson v. Gallagher.

(2) *Johnson* v. *Gallagher* 3 D. F. J. 494, 509. *et. Sqq.* "General engagement" may bind separate estate without special form, but with proved or presumed intention.

(a) Bonds, bills, pro. notes, also general engagements may effect separate estate. (514)

(b) Property settled to a woman's separate use for her life with power to dispose of it by deed or will is for this purpose her separate estate (*Mayd* v. *Field* 3 Ch. D. 587.)

(c) General engagement not binding on separate estate unless made with reference to and upon faith on credit of that estate (3 D. F. J. 515)

(α) There is enough to show that married woman intended to contract so as to make herself—her separate property [illegible] *London Ch. Bank of Australia* v. *Lempriere* L. R. 4 P. C. 572)

(β) Such intention presumed in case of debts of a married woman living apart from husband (3 D. F. J. 521)

(γ) Like intention inferred when transaction would be otherwise unmeaning as where a M. W. gives a guarantee for husband's debt (*Morrel* v *Cowan* 6 Ch. D. 166) or joins him in a pro. note (*Davies* v. *Jenkins* 6 Ch. D. 728)

Separate estate sort of artificial person.

(3) Separate estate may be regarded as a sort of artificial person created by courts of Equity and represented by the beneficial owner as an agent with full powers, somewhat in the same way as a corporation sole is represented by the person constituting it for the time being (Poll. 671 on *London Ch. Bank of Australia* v. *Lempriere* L. R. 4 P. C. 597)

(4) On cessation of coverture wife's debts of her separate estate do not become legal debts.

(5) Extent of liability of separate estate for debts before marriage cannot be definitely decided—(cf. *Poll. 672*)

(a) It has been held (*Chubb* v. *Stretch* 9 Eq. 555) that after husband's bankruptcy wife's separate estate is liable in equity for her debts before marriage, But

Pike v. Fitzgibbon.

(b) The decision of the *C. A. in Pike* v. *Fitzgibbon* throws great doubt on this (17 Ch. Div. 454)

(c) By Sec. 5 cf. Debtors' Act, 1889, order for payment cannot be made on a married woman, and the existence of sufficient separate estate would justify commitment in default (*Dillon* v. *Cunningham* L. R. D. 22, 23)

(6) Extent to which a married woman's engagement is bound by the ordinary forms of contract.

(a) No instrument or transaction can take effect as an engagement binding separate estate which could not take effect as a contract if the party were *sui juris*.

(b) Married woman's engagement concerning separate interest in real estate must satisfy the conditions of Statute of Frauds (*Johnson* v. *Gallagher* Poll. 673)

(c) *McHenry* v. *Davies* (10 Eq. D. D.) is not law on this point. (*Poll. 673*)

(7) Separate estate and liability on quasi-contracts.

Separate Estate and quasi-contracts.

(a) Position of making a married woman feme sole must be carried to the full extent short of making her personally liable (*V. C. Kindersley in Wright* v. *Chard* 4 Drew. 673, 685)

(b) The test of liability would seem on principle to be whether the transaction out of which the demand arises had reference to or was for the benefit of the separate estate (*Poll. 674*)

(c) Tendency of modern authority and legislation is in the direction of holding that a married woman's engagement differs from an ordinary contract only in the remedy being limited to her separate property (*Poll. 670-674*)

(8) Separate estate and restraint upon anticipation.

(a) In case of restraint upon anticipation married woman could use the income but never touch the corpus of the property nor create future rights over the income. (*Anson 123.*)

Restraint on anticipation

(b) Property subject to restraint on anticipation cannot in any case be bound (*Pike* v. *Fitzgibbon*).

(c) M. W. P. Act 1882 does not remove effects of a restraint on anticipation.

(α) Creditor cannot have execution or any incidental remedies against property subject to such restraint (*Draycott* v. *Harrison* 17 Q. B. D. 147)

(β) Though this affected only the remedy, not cause of action (*Whittaker* v *Kershaw* 45 Ch. D. 320-327)

(γ) Act of 1893 gives power to order payment of costs out of such property, but does not make it liable to satisfy a contract (C. 43 Secs. 1, 2)

(δ) Restraint on anticipation can exist only as incidental to a trust for separate use, but such a trust cannot be supplied in order to give effect to a restraint (*Stogdon* v *Lee* 1 Q. B. 661.)—*Poll. 668*, Note *K*.

Pollock, 668.

(d) "The device of restraint on anticipation is as curious an example as any that English law presents of an anomaly grafted on an anomaly" (*Poll. 668*)

IV Capacity of Parties: Lunatics and Drunken Persons.

1. Lunatics' Contracts.

Lunatics.

(1) Lunatic's marriage is void (*Hancock* v. *Peaty* L. R. 1 P & D. 335)

(2) Lunatic so found by inquisition and while the commission is in force cannot contract (*Beverley's case* 4 Co. Rep. 123)

(3) Not so found he may validly contract in lucid interval (*Beerly's case, & Hall* v *Warren* 9 Ves. 605)

(4) Lunatic or his estate liable *quasi ex contractu* for necessaries supplied to him in good faith (*Bagster* v. *Earl of Portsmouth* 5 B. & C. 170)

Lunatics and Necessaries.

(a) Necessaries include even cost of proceedings in lunacy (*Williams* v. *Wentworth* 5 Beav. 325)

(b) Supplier can have action against lunatic if expenses were incurred with the intention of repayment (*Re Rhodes* 44 Ch. Div. 94)

(c) Husband liable for necessaries supplied to his wife while he is lunatic (*Read* v. *Legard* 6 Ex. 636)

(d) Lunacy (or drunkenness) no *Plea* against action for account of money or goods supplied to lunatic (or drunken person) and kept by him after regaining reason; keeping goods would prove new contract to pay for them (*Gore* v. *Gibson* 13 M; & W. 623)

(5) Contracts made by a sound man who afterwards became lunatic are not invalidated by lunacy (*Owen* v. *Davies* 7 Ves. Senr. 82)

(6) Principal's insanity determines agency except as to persons who deal in good faith with agent in ignorance of his insanity (*Drew* v. *Nunn* 4. Q. B. D. 661)

(7) Insanity of partner does not of itself operate as a dissolution of partnership, but only a ground for dissolution by Court (*Poll. 91*)

(8) Partial delusions compatible with capacity for contracting (*Jenkins* v. *Morris* 14 Ch. Div. 674)

(9) Lunatic's (or drunken man's) contract voidable if lunacy (or drunkenness) was known to the other party.

Lunacy.

(a) Lunacy (or drunkenness) if unknown to other party and no advantage taken of is no *plea* against liability on a contract especially if an executed one (*Molton* v. *Camroux* 2 Ex. 487)

(b) *Matthews* v. *Baxter*, see below 2, (2) (b)

(c) In *Imperial Loan Co.* v. *Stone* (1 Q. B. 599) defendant sued on a pro-note set up defence of insanity at time of signing the note. Jury convinced but could not agree as to other party's knowledge of his insanity. This was held no verdict for defendant and new trial ordered.

Contract not void *per se* ; liable to be sued upon can be avoided if possible.

2. Contracts of drunken persons.

(1) Old theories now untenable.

Drunken persons.

(a) Drunkenness no *plea* or privilege but an aggrevating circumstance, (Coke Litt. 247 *a*) Based on doubtful authority.—*Poll. 88.*

(b) Contract of a man so drunk as to have no consenting mind void. Considerably supported in the first half of the present century (*Cooke* v. *Clayworth* ; *Gore* v. *Gibson.*) "but involves a distinction too fine and doubtful to be convenient in practice."—*Poll. 88-89.*

(2) Present Law ; (See 1 (9)) Contract voidable if drunkenness was known to the other party.

(a) See above 1 (9) (a).—*Molton* v. *Camroux.*

(b) Contract made when drunk is binding if affirmed or ratified when sobered (*Matthews* v. *Baxter* L. R., 8 Ex. 132)

(c) See above 1 (4) (d).

V. Capacity of Parties: Agency.

1. What Agency is and how it may arise.

(1) Agency is a contract of employment for the purpose of bringing the employer into legal relations with a third party (*Anson 331-332*)

How agency arises.

(2) Agency may arise

(a) Through consideration executed upon request, that is, by offer of a promise for an act.

(α) Contract of this nature comes into existence on rendering of service demanded (*Lampleigh* v. *Braithwait* 1 Sm. L. C. 147)

(β) Contract of gratuitous employment based on mutual promises is actionable when service is entered upon (*Wilkinson* v. *Coverdale* 1 Esp. 75)

(b) By the acceptance of an executed consideration *i. e.* by offer of an act for a promise, as by ratification.

(c) By offer of a promise for a promise.

(3) Authority to agent to bind principal within the scope of that authority may be given by writing, words or conduct.

(a) Writing or words have same effect and are subject to same interpretation as in case of offer and acceptance.

(b) Formal grant of authority (*Power of Attorney*) is made to agent only to enable him to make binding contract under seal.

(c) As regards formation contract of agency by conduct, inference of intention may be affected by the relation in which parties stand to one another.

(α) Servant habitually gets things on credit from X for his master. X expects master to pay for them. (1 Shower 95)

(β) Wife dealing with a tradesman for household supplies is husband's agent. Marriage does not *per se create* agency. (*Debenham* v. *Mellon* 5 Q. B. D. 401) cf *Anson 332.*

(γ) Partnership *per se* confers powers of agency on each partner (*Hawken* v. *Bourne* 8 M. & W. 710)

(δ) To these and similar cases (excepting partnership) when mere conduct of parties, apart from conduct arising out of established relationship, creates presumption of authority the term *Agency by estoppel* may be applied (*Anson 333*)

(4) Necessity may create an agency *quasi ex contractu*, agency from necessity *e. g.* wife not maintained by husband becomes an agent of necessity to supply her wants upon his credit (*Eastland* v. *Burchell* 3 Q. B. D. 436)

2. Ratification: Act of agent, done without authority, if ratified by principal binds him for his detriment or advantage in tort or in contract (*Wilson* v. *Tumman* 6 M. & G. *242*) Rules, *Anson 334-336.*

(1) Agent must contract as agent: not incur a liability on his own account and then assign to some one else under colour of ratification.

(2) Agent must act for a principal who is in contemplation: not make a contract as agent with a vague expectation that parties of whom he is not cognisant will relieve him of its liabilities. (*Wilson* v. *Tumman*)

(3) Principal must be in existence (*Kelner* v. *Baxter* L. R. 2 C. P. 174) either actually or in contemplation of Law.

(4) Agent must contract for such things as the principal can and lawfully may do.

(5) Ratification relates back as against everybody to date of the act done by the agent (*Poll, 94. Bolton Partners* v. *Lambert* 14 Ch. Div. 295)

3. Person who contracts or professes to contract for a principal may be:

(1) Agent having authority, whether at the time or by subsequent ratification, to bind his principal.

(a) Known to be an agent
(α) For a principal named.
(β) For a principal not named.

(b) Not known to be an agent.

(2) Holding himself out as agent but not having authority to bind his principal.

(a) Where a principal is named.

(α) Who might be bound but does not in fact authorise or ratify the contract.

(β) Who in law cannot be bound.

(b) Where the alleged principal is not named.

4. Authorised agent, known to be an agent, for a principal named.

(1) Agent drops out of the transaction as soon as the contract is made whether authority is general or special.

(2) Principal is liable (*Maddick* v. *Marshall* 16 C. B. N. S. 393)

(a) When the agent acts within the limits of his authority.

(b) Where transgressing actual limits agent acts within apparent limits sanctioned by principal

(3) Authority of certain kinds of agents:

Auctioneer.

(a) Auctioneer (*Woodfe* v. *Hoone* 2 Q. B. D. 355)

(α) Is Agent for seller but becomes buyer's too.
(β) Has not merely authority to sell but actual possession of them and a lien on them for charges.
(γ) May sue purchaser in his own name.

Factor.

(b) Factor (52 & 53 Vict. c. 45; *Pickering* v. *Busk* 15 East, 38)

(α) Has general discretion as to sale of goods, and may sell in his own name.
(β) Has lien upon goods and an insurable interest in them.
(γ) His authority cannot be restricted by principal, as against third parties, by private instructions.

Broker.

(c) Broker. (*Anson 344, 345*)

(α) Primarily to establish privity of contract between two parties.
(β) Has not possession of goods for sale.
(γ) Cannot sue in his own name on contracts made by him.

Commission agent.

(d) Commission Agent. Merely a person employed to buy or sell goods for employer on the best possible terms (*Ireland* v. *Livingston* L. R. 5 H. L. 407)

(e) A *del credere* agent is an agent for sale and gives his employer a promise of indemnity against his inadvertence or ill-fortune.

5. Principal not named: Agent contracts in person.

(1) Agent personally liable if he undertakes to be so. (Sm. Mer. Law. 158)

Fairlie v. Fenton.

(a) Such undertaking inferable from general construction of a contract in writing and when the agent contracts in his own name without qualification (*Fairlie* v. *Fenton* L. R. 5 Ex. 169)

(b) Principal not less liable whether named at the time or not (*Higgins* v. *Senior* 8 M. & W. 834)

(c) If agent has interest in subject-matter of contract, agent liable.

Agent for foreign principal.

(2) Agent dealing in goods for a merchant resident abroad is held to contract in person (*Armstrong* v. *Stokes* L. R. 7 Q. B. 598)

(a) Foreign principal cannot sue on the contract (*Case against Claye* L. R. 8 Q. B. 313)

(b) Doctrine not applicable where both agent and principal were foreign (*Hermano* v. *Mildred* 9 Q. B. Div. 530)

(3) Deed etc. of agent.

(a) On a deed executed by agent principal cannot sue or be sued at Law (*Lord Southampton* v. *Brown* 6 B. & C. 718)

(b) Party taking deed under seal from agent in agent's name elects to charge agent alone (*Pickering's claim* 6 Ch. 525)

(c) When agent is in a position to accept bills so as to bind principal, principal liable though agent signs in his own name (*Edmunds* v. *Bushell* L. R. 1 Q. B. 97)

(4) Exemptions from and limitations of liability.

Pollock, 96.

(a) Agent signing himself as such in the contract and describing himself as such is not liable unless credit be given to him or usage make him liable (*Pollock 96, Notes and Anson 349*)

(b) Agent may limit liability by special stipulations (*Oglesby* v. *Yglesias* E. B. & E. 930)

Agent and Government contract.

(c) Though made in agent's name contract made by him for a Government does not bind him (*Gidley* v. *Lord Palmerston* 2 Brod. & Bing. 275; Story on Agency, 302)

6. Agent not known to be an agent: Generally there is a contract with the undisclosed principal.

(1) Undisclosed principal is generally bound, as well as agent with whom contract is made at first (*Bekham* v. *Drake* 9 M. & W. 91)

(2) Undisclosed principal liable as a disclosed one for contracts made by agents within general apparent authority of agents in that business (*Watteau* v. *Fenwick* 1 Q. B. 346)

(3) Exceptions to the Rule.

Humble v. Hunter.

(a) Where an agent for an undisclosed principal contracts in such terms as import that he is

the real and only principal, the principal cannot afterwards sue on the contract (*Humble* v. *Hunter* 12 Q. B. 310)

(b) He cannot too, if nature of the contract (*e. g. partnership*) were inconsistent with the idea of a principal at the time unknown taking the place of the apparent contracting party.

(c) If principal represents agent or third party as principal he is bound by that representation (*Ferraud* v. *Bischoffscheim* 4 C. B. N. S. 710-716)

(4) Limitations to the application of the General Rule.

(a) Principal must take the contract subject to all equities in the same way as if the agent were the sole principal (Story on Agency, 420)

(b) Contract made by agent for undisclosed principal may be enforced if the person who deals with the agent is allowed to be in the same position as if he had been dealing with the real principal (*Dresser* v. *Norwood* 14 C. B. N. S. 574. Per J. Wiles)

(c) Third party must actually believe that he was dealing with a principal in that particular transaction (*Booke* v. *Eshelby* 12 App. Cases 271)

(d) Principal is discharged as against third party by payment to his own agent only if that other party has, by his conduct, led the principal to believe that he has settled with the agent, or perhaps, if the principal has in good faith paid agent at a time when the other party still gave credit to agent alone and would naturally, from some peculiar character of the business or otherwise, be supposed by principal to do so (*Irine* v. *Watson* 5 Q. B. Div. 414)

(e) After discovering principal if other party gives credit to agent or directly or indirectly makes principal think that agent will be held liable principal is free. (Story on Agency 279-288; *Horsfall* v. *Fauntleroy* 10 B. & C. 755)

(f) *But* principal is not discharged unless he has actually dealt with the agent on the faith of the other party's conduct so as to change his position (*Wyatt* v. *Hertford* 3 East 147)

(g) Action must be taken within reasonable time after discovering principal (*Smethurst* v. *Mitchell* 1 E. & E. 622). Party may sue principal or agent or both, but only *one* may be sued to judgment, and judgment against one is bar to action against the other (*Priestley* v. *Fernie* 3 H. & C. 977).

7. Professed Agent not having authority.

(1) Principal named who might be responsible: Professed agent cannot sue on the contract.

(a) Where a man assigns himself as agent to a person named the law will not allow him to

shift his position (*Bickerton* v. *Burrell* 5 M. & S. 383)

Pollock, 102.

(b) *Fellowes* v. *Lord Gwdyr* (1 Sim. 63) "is not law" (*Poll. 102*).

(c) In all executory contracts, wholly unperformed or partly performed without the knowledge of who the real principal is, agent cannot shew himself as real principal and sue in his own name (*Rayner* v. *Grote* 15 M. & W. 359)

(2) Professed agent cannot be sued on the contract (*Lewis* v. *Nicholson* 18 Q. B. 503)

Rule in Richardson v. Williamson.

(a) He is liable on an implied warranty of his authority to bind principal (*Collen* v. *Wright* 7 E. & B. 301; *Richardson* v. *Williamson* L. R. 6 Q. B. 276). "A grotesque legal fiction." (*Anson 347-348*)

(b) Representation of authority by agent must be a representation of matter of fact and not of law (*Beattie* v. *Lord Ebury* L. R. 7 Ch. 777)

(3) Where alleged principal is one who could not be responsible, professed agent is treated as principal.

Kelner v. Baxter.

(a) Where principal named or described is one incapable of authorizing contract so as to be bound by it at the time there can be no binding ratification (*Kelner* v. *Baxter* L. R. 2 C. P 174-185)

(α) Where ratification is admitted the original contract is imputed by fiction of law to the person ratifying.

(β) The fiction is not allowed to be extended beyond the bounds of possibility. (*Poll. 104 Note u*)

Kelner v. Baxter.

(b) Alleged incapable principal not bound but professed agent (*Kelner* v. *Baxter*; *Furnival* v. *Combes* 5 M. & Gr. 736)

(c) Proper course for other contracting party is to sue agent as principal on the contract itself and he need not resort to the doctrine of implied warranty (*Kelner* v. *Baxter*; cf *West London Comm. Bank* v. *Kitson* 12 Q. B. D. 157)

(4) Professed agent being his own unnamed principal.

Agent being his own unnamed principal.

(a) *Prima facie* personally liable in his character as agent.

(b) He may repudiate character of agent and adopt that of principal (*Schmaltz* v. *Avery* 16 Q. B. 655)

(c) A man who has contracted in this form may be sued on the contract as his own undisclosed principal if the other party can shew that he is in truth the principal but not otherwise (*Carr* v. *Jackson* 7 Ex. 382)

(d) It is open to one of several persons with whom a contract was nominally made to shew that he alone was the real principal and to sue alone upon the contract accordingly (*Spurr* v. *Cass* L. R. 5 Q. B. 656)

8. Liability of Principal for fraud of agent

(*Anson 352-354.*)

Agent's fraud.

(1) Liability is that of employer for fraud of servant (*Barwick* v. *Eng. Joint Stock Bank* L. R. 2 Ex. 259)

Udell v. Atherton.

(2) But if the person act beyond scope of his employment he no longer represents employer to make him liable in tort or contract (*Udell* v. *Atherton* 7 H. & N. 172)

(3) If he commit fraud outside scope of authority he is liable and not principal.

(4) Knowledge of agent is knowledge of principal only if it is imparted to principal or if transaction to which knowledge is material is carried out by agent (12 App Ca. 531 *in re* Vigors. *Anson 354*)—See further *Fraud.*

9. Duties of Principal and Agent

(1) Duties of principal.

Duties of principal.

(a) To reward agent.

(b) To indemenify agent for acts lawfully done and liabilities incurred in the execution of his authority.

(2) Duties of agent.

Duties of agent.

(a) To use diligence, be faithful etc., (*Jenkins* v. *Betham* 15 C. B. 168)

(b) To make no profit other than commission.

(α) Cannot recover reward promised for disloyalty to his employer (*Harrington* v. *Vict. Graving Dock Co.* 3 Q. B. D. 549)

(β) Agent is principal's debtor, not his trustee, for money received as reward from others (*Lister & Co.* v. *Stubbs* 45 Ch. D. 15; cf *Morison* v. *Thompson* L. R. 9 C. P. 480)

(γ) May not become principal as against his employer (*Story on agency 210-211*)

(c) To make a contract must remain as agent (*McPherson* v. *Watt* 3 App. Ca. 254)

(d) To delegate his authority to no one as a general rule. *Delegatus non potest delegare.* (*De Blussche* v. *Alt* 8 Ch. D. 310)

10. Determination of agent's authority (*Poll. 33, Anson 355-360*)

(1) By agreement.

End of agency.

(a) Principal may not privately limit or revoke an authority which he has allowed his agent publicly to assume (*Debenham* v. *Mellon* 6 App. Ca. 24)

(b) Authority coupled with an interest, conferring some benefit on the donee of that authority is irrevocable (*Smart* v. *Sandars* 5 C. B. 917)

(2) By change of status.

(a) By bankruptcy (*Minett* v. *Forester* 4 Taunt 541)

(b) By Insanity (*Drew* v. *Nunn; above* iv 1. (6); *See Anson* 359)

(3) By death of principal (Story on Agency 474, Anson 360)

(a) Termination of agent's authority takes effect only when it is known to agent and, as regards third parties, to them (*Freeman* v. *Loder* 11 A. & E 589; Indian Contract Act 208.)

(b) "It is held in England (*Blades* v. *Free* 9 B. & C. 167) but anomalously that this rule does not apply on revocation by death of the principal" (*Poll* 93 *and Note* U.)

VI. Capacity of Parties: Corporations.

1. Capacities of Corporations are limited

(1) By natural possibility.

(2) By legal possibility.

2. Limitations and liabilities by natural possibility.

Seal

(1) The requirement of a common seal

(a) Pollock 110 thinks this is a positive rule of English law.

(b) Anson 119 holds this a natural requirement.

(2) A corporation can do no act except by an agent.

(3) Cannot do or be answerable for anything of a strictly personal nature.

(a) Cannot commit any crime in the strict sense (*R. v. G. N. of Eng. R. Co.* 9 Q. B. 315 326)

(b) There is individual liability of members. (*Mayor of Manchester* v. *Williams* 1 Q. B. 94; *Mill* v. *Hawker* 1 R. 9 Ex. 309)

(4) Cannot enter into any strictly personal contract or relation.

(a) It cannot be excommunicated (10 Co. Rep. 32)

(b) Cannot do homage (60 *ditt.* 66)

(c) Cannot be subject to jurisdiction of a customary court whose process is exclusively personal (*London Joint Stock Bank* v. *Mayor of London* 1 C. P. D. 1)

(5) Liable, (*as in Agency*) for acts of agents; and conversely it may sue in its natural capacity for a libel reflecting on its business management (*South Hetton Coal Co.* v. *N. E.* "*News Assoc.*" (1 Q.B. 133)

Corporation Indictable

(6) Indictable in some cases.

(a) For a nuisance (*R. v. G. N. of Eng. R. Co.*)

(b) For not doing an obligation in its charter, and may be even liable by prescription (*Grant* 277, 283)

(c) For breach of Statutes regulating its business. (*Ph. Society* v. *L. and Prov. Supply Ass.* 5 *App.* 857; *King of Two Sicilies* v. *Wilcox* 1 Sim. N. S. 335)

(d) A Corporation may be relieved against fraud to the same extent as a natural person.

(7) But it cannot be bound by acts of even all its members when those acts are of a non-corporate character *(Mill v. Hawker.)*

3. Limitations, liabilities etc., by legal possibility.

Doctrine of Special Capacities.

(1) Doctrine of special capacities. A corporation is created for a special purpose and in the case of a particular transaction it is to be considered whether the corporation is *empowered* to bind itself to that transaction.

(a) Doctrine long popular.

(b) Basis of Modern Statutes on corporations.

(c) Refuted *Poll* 117.

Doctrine of General Capacity.

(2) Doctrine of general capacity. Powers of corporation are general, and with reference to a transacton it is to be considered whether the corporation is *forbidden* to bind itself to the transacton.

(a) Accepted doctrine. *Poll*, 117 *Anson*. 118-120.

(b) As interpreted in *Ashbury Railway carriage Co.* v *Riche* (L. R. 7 H. L. 653): "Where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that purpose, what it does not expressly or impliedly authorize is to be taken as prohibited.

(c) Reasons for the above qualification.

Reasons From Partnership Law.

(α) No majority of partners can bind a dissenting minority however small; similar right to members of a corporation.

(β) Partner is firm's Agent with extensive authority but limited if restricted by agreement; so in public companies limits of directors' authority presumed to be known.

(γ) As a matter of mixed patnership and corporation Law (not of pure corporation Law strictly) unanimous assent of members will remove objections raised on partnership principles, speaking generally.

Reasons on Grounds of Public Policy.

(δ) Powers must not be used to defeat purposes of incorporation. *See Poll* 120-121 and cases cited in notes.

(ε) Interest of the public as investors must be safeguarded e.g. Buyers of shares and lenders of money to company have a right to assume that company's proposed objects are adhered to.

4. Corporations and Negotiable Instruments.

(1) As a General Rule a corporation cannot bind itself by Negotiable Instruments. (See *Chalmers' Digest* pp. 63-65.)

(a) Since corporation contracts must be under common seal it follows that corporation cannot be bound by Negotiable Instruments in the ordinary form; and by Law Merchant instruments under seal are not negotiable.

Corporations and Negotiable Instruments.

(b) Ordinary rules of Partnership Agency do not apply to corporations.

(α) Extensive implied authority of a partner to bind his fellows cannot be applied to the case of a numerous association.

(β) Managers cannot bind company by Negotiable Instruments unless so empowered by Act of incorporation etc.

(c) Power of even a trading corporation to contract without seal is limited to things incidental to the usual conduct of its business.

(d) Negotiable Instrument is not merely evidence of contract but creates a new contract and a distinct cause of action and it would be contrary to Law of Negotiable Instruments, that they should be valid or not as the consideration between parties was good or bad, and it would be inconvenient to inquire always if such consideration was connected with corporation purposes.

(2) Corporation cannot be bound by Negotiable Instrument *except*,

(a) when Negotiation of bills etc. is one of the purpose of incorporation.

(b) When instrument is accepted for the corporation by an agent expressly or impliedly empowered by constitution to accept such bills.

5. Estoppel and part performance apply to corporations.

(1) Even when corporate seal was improperly affixed corporation is bound by conduct of governing body.

(2) Estoppel etc., not binding in case of an act expressly forbidden to the corporation.

(See Pollock, pp. 142-153.)

VII. Form of Contract.

1. Classification of contracts known to English Law (*Anson* 49.)

Formal.

(1) Formal *i.e.* dependent for their validity upon their form.

(a) Contracts of Record.

(b) Contracts under seal.

Simple.

(2) Simple *i.e.* dependent for their validity upon the presence of consideration.

(a) Contracts required by Law to be in some form other than under seal.

(b) Contracts for which no form is required.

2. Certain contracts which Anson (p. 59.) classifies under Simple contracts "required to be in writing" are given as "contracts subject to special forms" in Pollock :—

(1) They are (Poll 142.)

Contracts Subject to formal restrictions.

(a) Contracts of corporations.
(b) Peculiar contract expressed in negotiable instruments.
(c) Contract within Statute of Frauds.
(d) Marine Insurances.
(e) Transfer of shares in Companies.
(f) Acknowledgment of debt barted by St. of Limitations.
(g) Marriage.

(2) The two classifications considered.

(a) Pollock says: "Contracts under seal are *not the only* formal contracts known to English Law ; there are certain so-called contracts of record which are of a yet higher nature than deed" (Poll 141.) Anson, of course recognising "in deference to established authority" Contracts of Record as Formal says (p. 49.), "There is but one Formal Contract in English Law: the Deed or contract under seal: all others are simple contracts," "only true formal contract" (p. 52.)

(b) Pollock's classification given above is of "kinds of contract subject to restrictions of form" (Poll 142.) and the same are under *simple contracts* in Anson (p. 59.) "but form is here needed not as giving efficacy to the contract, but *as evidence of its existence*" (Anson 59.)

(α) Certain contracts require Form for their *Validity*.

(β) Other contracts require Form for *evidence* merely, their validity depending on consideration.

3. Contracts of Record, include.

(1) Judgment that is final.

(a) It may originate.

(α) As final result of litigation, or.

(β) By parties agreeing to enter Judgment in favour of one; and this right to enter Judgment results from a contract which is either

Warrant of Attorney : by which one party gives authority to other to enter judgment on terms settled, or *Cognovit actionem* : (Leake 157) by which one party recognises others' right *re* pending dispute and gives authority.

(b) Its characteristics.

(α) Production of Record conclusive proof of terms.

(β) It causes existing rights to be merged or extinguished in it.

(γ) Judgment creditor can take out execution for debt and also bring in case for non-fulfilment of obligation.

(2) Recognizance. Contract entered into with the Crown in its Judicial capacity. (*Poll* 141) *E. G.* to keep the peace or to appear at assizes.

(3) Statutory forms of security known as Statutes Merchant, Statutes Staple and recognizances in the nature of a Statute Staple . out of use. (*Poll* 141. 142. *Anson* 51.)

2. Contract under Seal. (*Anson* 52-58. *Pollock* 133, 140)

(1) Contract under seal, called also a Deed and sometimes Specialty, is the only true *Formal Contract.*

Deeds

(2) Deed must be in writing or printed on paper or parchment. It must be

(a) Signed (cf. *Gooch* v *Goodman* 2. Q.B. 597.)

(b) Sealed: That which identifies a party to a deed with the execution of it is his seal.

(c) Delivered: That which makes the deed operative so far as he is concerned is the delivery by him.

(3) Deed subject to a condition is called, until the condition is performed, an *Escrow.*

(4) Characteristics of contract under seal.

(a) *Estoppel.* Statements in a deed cannot be allowed to be denied ever and the party who cannot so deny is said to be estopped.

(b) *Merger.* A simple contract is merged and becomes extinct in an identical contract by deed.

(c) Deed creates greater privilge *re* limitation of actions than does a simple contract.

(d) Specialty creditor can claim against the heir though not named in the deed or against the devisee of real estate without the intervention of chancery, unlike creditor by simple contract,

(e) Gratuitous promise under seal e. g. a Bond is binding but Court will not grant Specific Performance.

(5) When it is essential to employ contract under seal.

(a) In cases statutorily provided for, e. g.

(α) Sale of sculpture with copyright. 54 G iii c. 56.
(β) Transfer of shares in Companies governed by Companies Clauses Act. 8 & 9 *Vict* C. 16.
(γ) Transfer of a British ship. 17&18 *Vict.* C. 104.

(b) In case of a gratuitous promise.

(c) In case of contracts with Corporations. [*See above* vi. 6.]

(α) In the absence of Enabling or Restrictive statutory provisions, a trading corporation may make without seal any contract incidental to the ordinary contract of its business.

(β) A non-trading corporation, if expressly created for special purposes, may without seal make any contract incidental to those purposes. If not so created it cannot contract without seal, except in cases of immediate necessity, constant recurrence or trifling importance.

(γ) Where an agreement has been completely executed on the part of a corporation it becomes a contract on which the corporation may sue.

(δ) Rights and obligations arising from tenancy or occupation apply to corporations as to natural persons.

(ε) Corporation is bound by an obligation implied in law whenever under like circumstances a natural person would be so found.

5. Contracts under Statute of Frauds.

29 Carl ii C. 3 S. 4.

(1) Form requirements by 29 Carl ii C. 3. S. 4. "Agreement, or memorandum or note shall in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." (cf Sec 21 of Ord. No. 7 of 1840, Ceylon).

(a) Form merely evidentiary. Contract exists but no action possible until formal requirements are complied with.

(b) Parties must appear.

(c) Terms may be collected from various documents but they must be

(α) Connected (*Reuss* v. *Picksley* L. R. 1 Exch 342)
(β) Consistent (*Buxton* v. *Rust* L. R. 7 Exch 279)
(γ) Complete. (*Greaves* v. *Ashlin* 3 Camp. 426)

(d) Where contract does not fall within the Statute parties may,

(α) Put their contract in writing or
(β) Contract only by parol, or
(γ) Put some terms in writing and arrange others in parol.

(e) Consideration must appear in writing, except in the case of promise to answer for debt, default or miscarriage of another under 19 & 20 Vict C. 97 Sec. 3

(f) Signature of party or agent necessary.

(2) Contracts implied in 29 Carl. ii C. 3 S. 4.

(a) Special promise by an executor or administrator to answer damages out of his own estate although his liabilities are limited by assets of deceased.

(b) Any promise to answer for debt, default or miscarriage of another person.

(α) Different from indemnity (*Crippo* v. *Hartnoll* 4 B. & S. 414.) (*Reader* v. *Kingham* 13 C. B. N. S. 344.)
(β) There must be primary liability actual or prospective of a third party and a real liability (*Mountstephen* v *Lakeman*. L. R. 7 B. 196) and *continuous*.
(γ) Promise must be made to principal creditor existent or prospective (*Eastwood* v. *Kenyon* 11 A. & E. 438)
(δ) Debt etc., may arise from wrong (*Kirkham* v. *Master* 2 B. & Ald 613)

(c) Agreement made in consideration of marriage.

(d) Contract or sale of lands or hereditaments or any interests in or concerning them.

Interest in Land. See *Poll.* 157, *Anson* 63, 64.

(α) *Fructus Industriales* (*e.g.* crops) do not under any circumstances constitute an interest in land.
(β) *Fructus Naturales* (*e.g.* grass, timber, fruits) do if sale contemplates passing of the property in them before severance from soil.
(γ) Leases may be made by deed (8 & 9 Vict C. 106) but an informal lease though void as a lease may be good as an agreement for a lease.

(e) Agreement that "is not to be" (*Poll 158*) performed within the space of one year from making.

(α) This means an agreement that on the face of it *cannot* be performed within a year (*Poll 158.*)

(β) Agreement capable of being performed within a year and not showing any intention to put off performance till after a year is not within this clause (*Smith* v. *Neale* 2 C. B. N. S. 67

Peter v. Compton

(γ) Agreement completely performed by one party within the year is not under the Statute (*Peter* v. *Compton* 1 Sm. L. Cases 3 5. 569)

(δ) Agreement determinable by a contingency likely to happen within the year is not under the Statute (*McGregor* v. *McGregor* 21 Q. B. Div 424 Overruling *Darcy* v. *Shannon* quoted *Anson* 645).

(3) Non-compliance with provisions does not make contract void or voidable but only unenforceable because incapable of proof.

(4) Form under 29 carl. ii C. 3. S. 97. Same as under S. 4 but consideration for sale need not appear in writing unless price is fixed by parties.

(5) "Note or memorandum" in Sec. 4 and sec 17.

Note or Memorandum.

(a) *Agreement* of Sec. 4 includes "consideration" but *bargain* of Sec. 17 includes price of goods as a material term only where it has been specifically agreed upon (*Hoadly* v. *Mclaine* 10 Bing 462)

(b) Party's name inserted by authority in the body or at the head of memorandum may suffice for actual signature (*Evans* v. *Hoare* 1 Q. B. 593)

(c) Written and duly signed proposal accepted even orally is sufficient memorandum (*Smith* v. *Neale*)

(d) Signature to a document given altered and *assented* to as altered is signature of altered document too (Poll 160. *Stewart* v. *Eddowes* L. R. 9 C. P. 311)

(e) Memorandum must exist at time of action brought (*Lucas* v. *Dixon* 22 Q. B. Div. 357)

(6) Nature of contract of sale. In addition to St. of Frauds see Bills of Sale Acts 1878, 1882, 1890 and 1891 and *Anson* 70-74 with authorities there cited and referred to.

VIII.—Consideration.

Definition.

1. Consideration is something done, forborne or suffered or promised to be done, forborne or suffered by the promisee in respect of the promise. (*Anson 74 see supra ; 6*)

Currie v. Misa.

(1) A valuable consideration, in the sence of the Law may consist either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment loss or responsibility given suffered or undertaken by the other (*Currie* v *Misa* L. R. 10 Ex. 162)

(2) A consideration properly speaking, can be given only for a promise, and where performance on both sides is simultaneous there may be *agreement* in the wider sense but there is no obligation and no contract. (*Poll.* 164)

(3) Consideration is that which is actually given and accepted in return for the promise, irrespective of the presence of ulterior motives, purposes or expectations

(4) History of consideration. See Pollock (*Appendix E.*) pages 693–701.

(a) The English "consideration" and some of its analogies.

Pothier Obl. 42, 54, 55, 60.

(α) *Cause* in modern French Law (cf. Pothier sec. 42) is in one way wider and in another narrower than "consideration." The existence of a natural obligation or even of a real or supposed duty in point of honour only may be enough. The promisee, however, must have an interest in the subject matter which is apparent and capable of estimation (*cf. Pothier* Secs. 54, 55, 60)

(β) *Causa* in Roman Law. "If the Roman Lawyers or the Civilians in modern times had ever fairly asked themselves what were the common elements in the various sets of facts which under the name of *Causa* made various kinds of contract actionable they could scarcely have failed to extract something equivalent to our consideration" (*Poll 695*)

(γ) Consideration synonym for *Cause* in Civil Code of Lower French Canada.

(b) History of the English conception.

(α) Latter part of fifteenth century *nudum pactum* lost its ancient meaning.

(β) In the early writers *considerare*, *consideratio* always mean judgment of a court.

(γ) *Quid pro quo*, appropriate in Debt., not in assumpsit, is earlier than consideration. (*Poll 696*)

(δ) In the *Doctor and Student* (1530) word "consideration" is used but it is doubtful in what sense.

(ε) First and full discussion of consideration by that name is in a report of *Sharington* v *Strotton* (Plowden 298-302) when the question was whether natural love and affection was a good consideration to support a covenant to stand seised to uses.

(ζ) Both the general conception and the name of consideration might have had their origin in the court of Chancery and the doctrine of uses, and have been thence imported into the Law of Contracts rather than developed by the common law Courts. (*Poll.* 697.)

Holmes Theory.

(c) Judge O. W. Holmes' Theory of the origin of consideration. Witnesses could only swear to facts within their knowledge; these were not used in transactions which might create a debt, except the delivery of property; this delivery was *quid pro quo*—all this amounting to the rule that when a debt was proved by witnesses there must be *quid pro quo*. "These debts proved by witnesses instead of by deed are what we call simple contract debts, and thus beginning with debt, and subsequently extending itself to other contracts, is established our peculiar and most important doctrine that every simple contract must have a consideration" (*Apud Pollock* 699.)

(d) *Pollock* (p. 701) says: "Judge Hare (in his *Contracts*) and Mr. Ames (in the *Harvard Law Review*) have been the first to make out an organic connection between the tortious character of *Assumpsit* and the doctrine of *consideration* in its early form. On the whole it would appear that the *quid pro quo* of debt remained, in strictness, what it was before but for all practical purposes was merged in the wider generalization derived from *Assumpsit*; and the 'detriment to the

promisee' which is essential to *Assumpsit* was independently developed as the criterion of a duty arising, in its original conception, not from a promise at all.

2. Some General Rules as to Consideration.

(1) It is necessary to the validity of every promise, not under seal.

(2) It need not be adequate to the promise, but must be of some value in the eye of the Law.

(3) It must be legal.

(4) It must be either present or future, but must not be past.

3. Consideration is necessary to the validity of every simple contract.

Pillans v. Van Mierop.

(1) In *Pillans* v. *Van Mierop* (3 Burr 1664) it was held that consideration was for evidence of intention and that where such evidence was effectually supplied in any other way the want of consideration would not affect the validity of a parol promise. Overruled by *Rann* v. *Hughes*.

Rann v. Hughes.

(2) In *Rann* v. *Hughes* (7 T.R. 350) it was laid down that all contracts are by the Law of England divided into agreements by specialty and agreements by parol; nor is there any such third class...as contracts in writing. If they are merely written and not specialties, *they are parol and consideration must be proved.*

(3) Exceptions to General Rule No. 1.

Gratuitous Service.

(a) Promise of a gratuitous service, although not enforceable as a promise, involves a liability to use ordinary care and skill in performance. "It is idle to say that the trust reposed in the person employed is the consideration for his promise to use reasonable care; for the promise becomes binding, *not when it is made*, but when performance has begun" *(Anson* 85.)

(b) In dealings arising out of Negotiable Instruments it is possible that a promise to pay money may be enforced though promisor gets nothing and promisee gives nothing in respect of the promise.

4. Consideration need not be adequate to the promise, but must be of some value in the eye of the law.

(1) Consideration may be :

(a) Benefit to the promiser.
(b) Benefit to the third party.
(c) No apparent benefit to anybody.
(d) Merely a detriment to promisee.

(2) Adequacy of consideration is for parties to consider at time of making agreement and not for the court when it is sought to be enforced. (*In Bolton* v. *Madden* L.R. 9 A.B. SS.)

(3) When a thing is to be done by the plaintiff, *be it never so small*, this is a sufficient consideration to ground an action

(*Sturlyn* v. *Albany*, Croke, Elizabeth 67); provided he gets all that he bargained for *e.g.*

Instances of consideration.

(a) *Bainbridge* v. *Firmston* (8 A & E 743): Consideration is that plaintiff, at defendant's request, had consented to allow the defendant to weigh the boilers . . . there is detriment to plaintiff from his parting with his possession for ever so that a time.

(b) *Haigh* v. *Brooks* (10 A & E 309): Parting with document subsequently found worthless. Plaintiffs induced by defendant's promise to part with something they might have kept and the defendant obtained what he desired by means of that promise.

(c) *Hart* v. *Miles* (4 C B N S 371). Letting promisor retain possession of a document to which promisee is entitled is good consideration.

(d) Bailor's delivery of possession is the consideration for the bailee's promise to keep or carry safely.

(e) Determination of a legally indifferent option in a particular way is legal "detriment" enough to be a good consideration (*Bolton* v. *Madden*).

(f) *Cheale* v. *Kenward* (3 De G & J 27). Transfer of railway shares on which nothing has been paid is good consideration.

(g) *Graneley* v. *Barnard* (18 Eq 518). Agreement not to determine immediately an existing service terminable at will is good consideration.

(4) Inadequacy of consideration may after be evidence of fraud but (*Coles* v. *Trecothick* 9 Ves 234) cannot of itself be a ground on which specific performance of a contract will be refused.

Tests of reality.

(5) Tests of reality.

(a) Did the promisee do, forbear, suffer or promise anything in respect of his promise?

(b) Was his act, forbearance, sufferance or promise of any ascertainable value?

(c) Was it more than he was already legally bound to do, forbear, or suffer?

(α) Motive must be distinguished from consideration *e.g.* Desire on the part of an executor to carry out wishes of the deceased would not amount to consideration (*Thomas* v. *Thomas* 2 Q. B. 851).

Tweddle v. Atkinson.

(β) Consideration must move from the promisee. It is now established that no stranger to the consideration can take advantage of a contract though made for his benefit (*Tweddle* v. *Atkinson* 1 B & S 393).

(6) Condsideration of no ascertainable value (5) (*b*)

(a) Impossibility, physical or legal, and obvious upon the face of the contract, as well as vagueness or uncertainty of terms, make consideration void.

Forbearance to sue.

(b) Forbearance to sue is a good consideration.

(α) Forbearance must be for a definite or ascertainable time

Alliance Bank v. Broom.

(β) Promise to forbear suing for a reasonable time may be inferred from the request to give security (*Alliance Bank* v. *Broom* 2 Dr & S 289.) "Some degree of forbearance, *not indeed for any definite time*, but at all events some degree of forbearance." Questioned by Pollock 179 Note *k*.

(γ) That which is forborne must be the exercise or enforcement of some legal or equitable right which is honestly believed to exist.

(c) If an intending litigant *bonafide* forbears a right to litigate a question of Law or fact which it is not vexatious or frivolous to litigate he gives up something of value. (*Miles* v. *New Zeland Alford Estate Co.* 32 ch. Div. 266. 291.)

(d) Real consideration and motive of a compromise is not the sacrifice of a right but the abandonment of a claim (*Trigge* v. *Lavalee* 15 Moore's P.C. cases 271 292)

(e) In contracts *re* gratuitous bailment or gratuitous employment (cf. *Supra* 3. (3) (a) consideration is not obvious. *Anson* 83.

(7) Does promisee do, forbear, suffer, or promise more than that which he is legally bound? See *Supra* 4 (5.) (*c*.)

(a) Neither the promise to do a thing nor the actual doing of it will be a good consideration if it is a thing which the party is already bound to do legally or by a subsisting contract with the other party. cf. Leake 538.

(α) But the doing or undertaking of anything beyond what one is already bound to do, though of the same kind and in the same transaction, is a good consideration. (*England* v. *Davidson*, 11 A. & E. 856)

England v. Davidson.

(β) Examples. Promise to pay money to witness subpoenaed to appear at trial has no consideration. See Pollock 174 & Anson 86 for more.

(γ) Consideration enough if an existing right is altered or increased remedies given *e. g.* an agreement with debtor to give time or accept reduced interest in consideration if having some new security would be good and binding.

(b) Promise to perform contract with third party.

(α) Consideration is unreal if it consist in a promise given to perform a duty or a contract made with the promisor.

(β) Performance of an existing obligation as distinct form a new promise to a stranger to perform it, cannot involve any legal detriment, and therefore cannot be a consideration. (Langdell sec. 84 *apud* Pollock 176.)

Pollock 175-177 Anson 91, 92 Shadwell v. Shadwell.

(γ) *Shadwell v. Shadwell* and *Scotson v. Pegg* Discussed in Anson 91-92. and Pollock 175-177. *Re* these cases Anson (p 92) says: In principle the performance or promise to perform an outstanding contract with a third party is not of itself consideration for a promise and the practical result of the cases is not inconsistent with this rule.

(c) Some applications of the rule that the actual performance of that which a man is legally bound to do stands on the same footing as his promise to do that which he is legally compellable to do; (Anson 88-89. Pollock 177. 178.)

(α) Payment of smaller sum in satisfaction of larger is not a good discharge of a debt; but

Pinnel's case.

(β) Giving a negotiable instrument for a less sum, or a gift in satisfaction is good. (*Pinnel's case*, 5 Coke's Rep. 117 and *Foakes v. Beer* 9 App. cases 605)

(γ) Contract wholly executory, liabilities unfulfilled, acquittance of each from the other's claims is consideration for promise of each to waive his own.

(δ) Contract broken and promise made to forego right arising from breach, when the amount is uncertain, payment of a liquidated or certain sum would be consideration for foregoing claim.

(ε) Consideration for promise to forego must be executed.

Composition with creditors.

(ζ) Composition with creditors is not under the rule here. (Poll 176) Consideration upon which creditor renounces residue is not either promise to pay or part payment. (*Fitch v. Sutton*, 5 East 230). The consideration is "the substitution of a new agreement with different parties for a previous debt." (*Slater v. Jones* L. R. 8 Ex. 143. *Good v. Cheesman* 2 B & Ad. 335)

5. Consideration must be legel. (*Vide infra Sub* Legality)

6. Consideration must be executory or executed, it must not be past.

(1) Promise for a promise is *executory* consideration. "It is counter-promise and not the performance that makes the consideration." (Hobart in *Lampleigh v. Braithwait*)

2) Consideration which consists in performance is *executed*. A contract arises upon executed consideration when one of two parties has either in the act which constitutes an offer or the act which constitutes an acceptance done all that he is bound to do under the contract, leaving an outstanding liability on one side only.

(a) Offer of an act for a promise *e.g.* labour or goods with expectation to be paid for them obviously.

(α) If I take up wares from a tradesman without any agreement of price the law concludes a that I contracted to pay their real value. (In *Hoadley v. McLaine*)

Hart v. Mills.

(β) Deft. orders two doz. of each wine and you send four: then he had a right to send back all; he sends back part: *what is it but are new contract as to part he keeps*! (*Hart v. Mills* 15 M & W. 87)

(γ) Offer not possible to be accepted or rejected is not binding (*Taylor v. Laird* 25 L. J. Ex. 329)

(b) Offer of promise for an act.

(α) Consideration executed upon request (Leake 46), or contract arising on the acceptance by act of the offer of a promise *e.g.* acceptance of advertised offer.

Brittain v. Lloyd.

(β) This often amounts to "implication of a promise in a request." *e.g.* where a man is asked to do some service which will entail certain liabilities and expenses (*Brittain v. Lloyd* 14 M. & W. 762)

"Past consideration.

(3) The so-called "past consideration." A past consideration is in effect no consideration at all... A past consideration is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability" (*Anson 95*)

(a) Promise based upon past benefit is gratuitous; it is based upon motive and not upon consideration.

(b) As a *general rule* a consideration past and executed will support no other promise than such as would be implied by law. (*Roscorla* v. *Thomas* 3 Q B 234)

(4) Exceptions to general rule *re* past consideration.

(a) *Exc.* i. Consideration moved by previous request will support subsequent promise.

(α) *Lampleigh* v. *Braithwait* (1 Sm. L. C. 153): a mere voluntary courtesy will not have consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit it will bind."

(β) *Bradford* v. *Roulston* (8 Ir. C. L. 488); "where there is a past consideration consisting of a previous act done at the request of the defendant it will support a subsequent promise."

See Anson, 95-105. Lampleigh v. Braithwait.

(b) Anson and Pollock on *Lampleigh* v. *Braithwait.*

(α) Anson quotes (pp. 97 98) contrary decisions in *Kaye* v. *Duttan*; *Elderton* v. *Emmens*; *Kennedy* v. *Broun*; *Wilkinson* v. *Oliveira*;

(β) "It would perhaps now be held that the subsequent promise is only evidence of what the parties thought the service worth" (*Pollock* 167)

(γ) "Subsequent promise is only binding when the *request*, the *consideration*, and the *promise* form substantially one transaction (*Anson* 99 *after suggesting practical difficulties re Rule.*)

(δ) "Probably on the principle of Implication of a promise in a request, the case of *Lampleigh* v. *Braithwait* is capable of explanation." (*Anson* 95. *See above* 6 (2) (*b* β)

(ε) "Unless the *request* is virtually an offer of a promise the precise extent of which is hereafter to be ascertained; or unless it so clearly contemplates a subsequent promise to be given by the maker of the request that such a promise may be regarded as part of the same transaction the rule in *Lampleigh* v. *Braithwait* has no application." (*Anson* 100.)

(c) *Exception* ii. Voluntary doing by one party of something which the other was legally bound to do is a good consideration for a subsequent promise of recompense (1 Sm. L. C. 148) Authorities "Scanty and unsatisfactory." (*Anson* 100—102. *Pollock* 168)

See Anson 102-105.

(d) *Exception* iii. *Re* a debt barred by Statute of Limitations, the legal remedy is lost but the debt is not destroyed and the debt subsisting in this dormant condition is a good consideration for a new promise to pay it.

(α) "This is not logically satisfying.....The consideration for the new promise is wholly past and therefore insufficient according to modern doctrine. The only theory tenable on principle seems to be that the statute is a law merely of procedure, giving the debtor a defence which he may wavie if he think fit" (*Pollock* 168-633)

(β) Acknowledgment operates as evidence of a new promise and is therefore ineffectual unless made before action brought (*Bateman* v. *Pinder* 3 Q. B. 574)

(5) Promises founded on moral duty supposed to be valid and binding tell *Eastwood* v. *Kenyon* (11 A. & E. 438 446 460) when it was held that

Eastwood v. Kenyon.

(a) Moral obligation arising from a past benefit not conferred at request of defendant is not a good consideration.

(b) "The doctrine (*of Moral obligation*) would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."

Equity.

7. Consideration in Equity.

(1) Doctrine of consideration mainly applicable to informal contracts is extended to restrain, not to amplify the validity of Formal contracts too.

(2) A merely gratuitous contract under seal is enforceable at common law unless it can be shewn that behind the apparently gratuitous obligation there is in fact an unlawful or immoral consideration.

(3) Court of Equity will not grant specific performance of a gratuitous contract.

(4) An incomplete voluntary gift creates no right which can be enforced.

IX. Reality of Consent: Mistake.

1. Preliminary Notions.

(1) For a contract to be enforceable not only must there be consent but the consent must be true, full and free.

(2) Reality and completeness of consent may be affected, by ignorance, fear, dependence excluding action, etc.,

Savigny.

(a) It is wrong to say that a consent determined by mistake, fraud, or coercion is *no* consent (*Savigny's system, etc.*, 114-118)

(b) Consent of one or both parties may be so given as to make it no real expression of intention (*Anson* 127.)

(3) Various causes for unreality of consent.

(a) *Mistake.* Parties may not have meant the same thing; or one or both, meaning same thing, may have formed untrue conclusion *re* subject matter of agreement.

(b) *Misrepresentation.* One forming untrue conclusions *re* matter of contract by statements innocently made or innocently withheld by other.

(c) *Fraud.* One forms untrue conclusions owing to representations by other made with knowledge of untruth and intention to deceive.

(d) *Duress.* Consent of one of the parties may have been extorted from him by the other by actual or threatened personal violence.

(e) *Undue influence.* Circumstances may render one of the parties morally incapable of resisting the will of the other so that his consent is no real expression of intention.

ollock's classification of mistakes, etc.,

(4) Classification of mistake, etc., (*Pollock*, 421 *et sqq.*)

(a) Ignorance

(α) *Not* caused by act of other party is refered in Law to Mistake.
(β) Caused by act of other party *without* wrongful intention is referred to head of Misrepresentation.
(γ) Caused by act of other party *with* wrongful intention is referred to head of Fraud.

(b) Fear, or dependence excluding freedom of action

(α) Not caused by act of other party or relation between parties is immaterial.
(β) Caused by such acts referred to head of Duress.
(γ) Caused by such relation..... Undue Influence.

(5) Gene al legal consequences of mistake, etc.,

(a) Mistake does not of itself affect validity of contracts.

(α) Mistake may prevent real agreement from being formed.
(β) If mistake occurs in expression of real agreement it can be rectified.

(b) Contracts induced by mis-representation are not void; in many cases they are voidable at option of misled party.

(c) Contracts induced by fraud not void but voidable at option of deceived party.

(d) Contracts induced by coercion or undue influence not void but voidable at option of party coerced or unduly influenced.

(6) In the consideration of mistake the following must be avoided:

rors to avoided consider- subject.

(a) Confusion of proximate with remote causes of legal consequences *i.e.* of cases where mistake has legal results of its own with cases where it determines the presence or absence of some other condition or is absolutely irrelevant.

(b) Assertion of propositions as general rules which ought to be taken with reference only to particular effects of mistake in particular classes of cases, *e.g.* maxim, "*Non Videntur qui errant consentire.*"

norantia iris haud xcusat.

(c) Vagueness as to meaning of "ignorance of law" which is (*Cooper* v. *Phibbs* L. R. 2 H. L. 170) ignorance of a *general rule* of law, not ignorance of a right depending on questions of mixed fact and law or on the true construction of a particular instrument.

And the following are deemed (*Anson 129, 128*) irrelevant to the consideration of mistake as invalidating contract.

(d) Mistake of expression distinguished from mistake of intention.

(e) Want of Mutuality.

(f) False statement inducing assent.

(g) Failure of consideration (*Contra* Pollock 465.)

2. Mistake in general is inoperative as to the lega position or liability of the party doing an act except where by the special nature of th case knowledge is a condition precedent of lega consequences.

(1) If the act is done *without knowledge*, offence or wrong i not committed and no liability arises.

Ignorance no excuse.

(2) Ignorance is as a rule no excuse as regards either statutor quasi-criminal or purely civil liabilities *e.g.*

(a) Ignorance of real ownership of property is no defenc to an action for its recovery except in the case o carriers and other privileged people (*Fowler* v. *Hollin* Ex. Ch. L. R. 7 Q. B. 616.)

(b) Railway companies and other employers liable fo servants' acts in the course of regular employmen and without any unlawful intention but in trut unlawful by reason of servant's mistake (*Bayley* v *Manchester Ry. Co.* Ex. Ch. L. R. 8 CP. 148).

(α) Mistake does not give rise to employer's liability.
(β) It is not that mistake has any special effect but th knowledge. where it exists, takes the thing done out o the class of authorized acts.

(3) Exceptions to rule.

(a) In cases of Judicial process *e.g.*; quasi-judicial office of a court, as a trustee in bankruptcy, not pe sonally answerable for money paid by him und an excuseable misapprehension of the law (*Expar Ogle* L. R. 8 Ch. 711.)

(b) In cases where mistake, or at any rate ignorance is the condition of acquiring legal or equitabl rights *i.e.* (See. *Poll 427. 428*) the scope of equi able claims is extended against purchasers wh are not innocent, and knowledge is a condition o being laden with duties which, in equity languag affect the conscience of the party.

Mistake inoperative.

(4) Instances of mistake inoperative in matters of contract.

(a) Infant above age, mistaken as under, is take free by rail; mistake does not exclude usual duty o company's part to carry him safely (*Austin* v. *G. W.I Co.* L.R. 2 Q.B. 442.)

(b) Mistaken repudiation of ownership does not prevet true owner of goods from recovering damages afte wards for injury done by negligence of bailee who duty it was to hold them for the true owner i all events (*Mitchell* v. *Lancashire and Yorkshire R.* C L. R. 10 Q. B. 256 261)

(5) Mistake does not in general alter existing rights. Th presence of mistake will not make an act effectual whic is otherwise ineffectual. *e.g.*

(a) Trustee's payment of rents to wrong person, whether wilfully and fraudulently or ignorantly and in good faith cannot alter character of trustee's possession (*Lister* v. *Pickford* 34 *Beav.* 576 582).

Lister v. Pickford.

(b) When carrier of goods after notice from unpaid vendor to stop them nevertheless delivers them by mistake to buyer the vendor's rights are not defeated.

(6) *Subsequent* conduct of parties founded on mistaken construction does not alter the contract unless such that apart from mistake it would amount to variation by mutual consent. *e.g.*

(a) Man who acts on a wrong construction of his own duties under a contract he has entered into does not thereby entitle himself, though acts done be for benefit of other party, to have contract performed by other according to same construction. (*M. G. W. R. Co. of Ireland* v. *Johnson* 6 H. L. C. 798).

(b) Party to a contract cannot resist performance merely on ground of his having misconstrued its legal effect at the time (*Powell* v. *Smith* 14 Eq. 85)

(7) Mistake operative.

Mistake Operative.

(a) Where it excludes real consent. Agreement void.

(b) Occurring in expression of terms of real consent. Remediable in equity.

(c) Money paid under a mistake of fact. Recoverable.

(8) Circumstances under which mistake invalidates contract arise:

(a) By act of third party, or

(b) By dishonesty of one party, or

(c) By mistake of identity or existence of subject.

(9) Mistake considered below under the following heads:

(A) Mistake of fact and law.

(B) Mistake as to nature or existence of contract.

(C) Mistake as to identity of person with whom the contract is made.

(D) Mistake as to subject-matter.

3. Mistakes of Fact and Law. (A)

(1) That relief is given against mistake of fact but not against mistake of law is subject to limitation and explanation.

(a) In cases where mistake is inoperative and in those where knowledge or notice is a condition precedent to legal consequences the subject matter of such knowledge or ignorance is a matter of fact and not of law.

(b) Where common mistake excludes real agreement ignorance of private rights at all events is ignorance of fact (*Bingham* v. *Bingham* 1 Ves. Sr. 126.)

Bingham v. Bingham.

(c) Renunciation of rights under a mistake as to particular applications of law is not always conclusive but remediable, though deliberate renunciation of doubtful rights is binding.

Money paid by mistake.

(2) Money paid by mistake recoverable only when mistake is one of fact.

(a) Money paid under a mistake of law is in no case recoverable.

(b) Defence of want of consideration is available between parties to a negot. inst. whether obtained by misrepresentation of fact or of Law (*Southall* v. *Rigg*, (*Forman* v. *Wright* 11 C. B. 481-492).

(c) Covenant to pay a debt for which covenantor wrongly supposes himself liable is valid in Law, nor will equity give any relief against it if the party's ignorance of facts negativing liablity is due to his own negligence (*Wason* v. *Wareing* 15 Beav. 151).

(d) Court of Bankruptcy orders repayment of money paid to a trustee in bankruptcy under a mistake of Law.

(e) Voluntary payment made will full knowledge of facts cannot be recovered *e. g.*

(α) Party submitting to pay money under an award cannot afterwards impeach award on ground of irregularities known to him at first (*Goodman* v. *Sayers* 2 Jac. & W. 249. 263.)

(β) Legatee or tenant for life cannot be made to refund over payments voluntarily made by executor or testator. (*Bate* v. *Hooper* 8. D. M. G. 338.)

4. Mistake as to nature or existence of contract . . (B)

(1) Contract void when entered into by party mistaken as to nature of transaction without being negligent, *e. g.*

Thoroughgood's case.

(a) In *Thoroughgood's case* (2 Co. Rep. 9) an illiterate man executed a deed described as a release of arrears of rent but in fact release of all claims. Deed void.

Foster v. Mackinnon.

(b) In *Foster* v. *Mackinnon* (L. R. 4 C. P. 704) a very old man was induced to endorse a Bill for £3,000 being told it was a guarantee. Contract held void "not merely on ground of fraud where fraud exists but on the ground that the mind of the signer did not follow signature."

(c) Instrument executed by a man who meant to execute not any such instrument but something of a different kind is in itself a mere nullity.

(2) Questions of error as to nature or existence of transaction generally complicated in equity with circumstances of fraud (cf. *Poll* 446-447.)

(3) In cases like those in (1) it then falls to the court to say which of two innocent parties has to suffer for fraud or officiousness of third party (Anson 131.)

Hunter v. Walters.

(4) When a man knows he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told that it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then a deed so executed, though voidable on ground of fraud, is not a void deed" (*Hunter* v. *Walters* L. R. 7 ch. 75.)

(5) Contract would not be void on ground of mistake but voidable for fraud or misrepresentation *unless*

(a) Mistake be mutual and

(b) It arise from some deceit or accident which ordinary diligence could not penetrate or avert, and

(c) It be through a third party (Anson 132).

(6) In case of error as to legal character of transaction it may be laid down that:

(a) If parties contemplate wholly different legal effects there is no agreement, but

(b) This will not prevent act done by either party from having any other effect which it can have by itself and which it is intended to have by party doing it *e. g.* If A gives money to B as a gift and B takes it as a loan, B does not thereby become A's debtor but the money is not the less effectually delivered to B. But

(α) If B informs A of intention to treat gift as loan and A assents it is a good contract of loan (*Hill* v *Wilson* L.R. 8. Ch. 888.)

Paulus, Digest 44 7. 3.

(β) *Si quis pecuniam suam donandi causa dederit mihi, quamquam et donantis fuerit et mea fiat tamen non obligabor ei, quia non hoc inter nos actum est* (*Dig* 44. 7. 3. sec 1; cf *Savigny. Syst.* 3. 269.

5. Mistake as to identity of person with whom contract is made. (C)

Pothier Obl. 19. Savigny 3. 269.

(1) Where it is material for one party to know who the other is an error *in persona* prevents any real agreement from being formed (*Pothier. Obl.* 19; *Savig. Syst.* 3. 269; *Dig.* 12. 1.)

(2) Such knowledge immaterial

(a) When goods are sold for ready money.

(b) When a railway traveller takes his ticket.

(c) In cases of general offers, etc., etc.

(3) Some cases and their applications.

(a) *Boulton* v. *Jones* (2 H. & N. 564.) Defendants ordered goods from a trader who, without their knowledge, had transfered business to plaintiff, and he without notice of change, supplied goods. Being asked for payment defendants said they knew nothing of plaintiff. It was held that there was no contract with plaintiff.

(b) *Mitchell* v. *Lapage* (Holt N.P. 253.) Action for assumpsit for not accepting goods. Change in seller's firm, and broker had by mistake given old name for new. It was held that if owing to broker defendant had been prejudiced or excluded from a set-off it would be a good defence.

Humble v. Hunter.

(c) *Robson* v *Drummond* (2 B. & Ad. 303) and *Humble* v. *Hunter* (12 .Q.B 310-317.) Man contracts with one of his partners, not aware of partnership, and that partner retires; then the continuing and previously undisclosed partner cannot insist on further performance of contract even with original contractor as co-plaintiff, for the deft. has a right to the benefit he contemplated from the character, credit and substance of party be contracts with.

Cundy v. Lindsay.

(d) *Cundy* v. *Lindsay* (3 App. cases 465.) Man forging signature of a firm induced A B to supply him with goods which he afterwards sold to X. It was held that an innocent purchaser could acquire no right to the goods, because as between A B and fraudulent third party there was no contract.

(4) Principle proba'ly not extended to deeds. But if A personating B executes a deed in B's name purporting to convey B's property, no right or interest possibly passes by such an instrument. It is not a deed (*Cooper* v. *Vesey* 20 Ch. div. 611-623. But cf. *Hunter* v. *Walters*.)

(5) Party to whom anything is due under a contract is not bound to accept satisfaction from any one except other contracting party in person or otherwise. (*Robinson* v. *Davidson* L.R. 6 each 269.)

(a) Satisfaction must be made in debtors' name in first instance and capable of being ratified by him *James* v. *Isaacs* 12 C.B. 791.)

(b) If not made with his authority at the time there must be subsequent ratification which need not be made before action (*Simpson* v. *Eggington* 10 Exch. 845).

Pollock, 453.

(c) *But* "these refinements have not been received without doubt and it is submitted that the law cannot depart in substance from the old maxim 'If I be satisfied it is not reason that I be again satisfied'" (*Pollock* 453.)

(d) Wiles J. in *Cook* v. *Lister* (13 B. C. N. N. S. 594) considered the doctrine laid down in *Jones* v. *Broadhurst* (9. C. B. 173) that payment by a stranger is no payment till assent, as contrary to a well-known principle of law: the civil law being the other way expressly, and mercantile law by analogy: at the least assent ought to be presumed. (*Pollock* 453. *Note* i).

(6) Assingment of contracts (*Pollock* 453. *Anson* 233: *See below*

6. Mistake as to subject matter. (D).

Error in Corpore.

(1) *Error in corpore*: Ambiguous name. In *Raffles* v. *Wichelhaus* (2 H. & C. 906) defendant was to buy from plaintiff cotton to Arrive *ex Peerless* from Bombay. Plaintiff meant a *Peerless* to arrive in December, and defendant a *Peerless* to arrive in October. No contract; misuuderstanding of an offer made by

word of mouth might conceivably have a like effect, but obviously is and ought to be difficult to prove (*Phillips* v. *Bistolli* 2 B. & C. 511)

(2) Parcels included by mistake.

(a) Specific Performance refused to purchaser who had bid for and bought a lot different from what he intended to buy, (*Malins* v. *Freeman* 2 Kee 25) but question was not settled.

(b) In *Calverly* v. *Williams* (1 R. R. 118) description of an estate sold by auction included a piece not contemplated by parties and purchaser was held not entitled to a conveyance of this part.

Harris v. Pepperell.

(c) In *Harris* v. *Pepperell* (5 Eq. 1) vendor had actually executed a conveyance including a piece which he had not intended to sell but which defendant said he had intended to buy. Defendant given option of annulling whole contract or taking it as plaintiff meant it.

(d) Court will not hold plaintiff bound by defendant's acceptance of an offer which did not express plaintiff's real intention and which the defendant could not in the circumstances have reasonably supposed to express it; nor yet require defendant to accept the real offer which was never effectually communicated to him and which perhaps he could not have consented to accept; but parties are put in a position as if offer were still open. (Poll. 460.)

(e) When purchaser erroneously but not unreasonably supposes a portion of property to be included which is of no considerable value but as enhancing value of whole, contract will not be enforced (*Denny* v. *Hancock* L. R. 6 ch. 1-12.)

(α) Simple misunderstandiug of buyer of description of property sold (such as a reasonable and reasonably diligent man may fall into relieves him from specifically performing contract but not from liability in damages *Tamplin* v. *James*. 15. Ch Div. 215.)

(β) Vendor in same position if agent by ignorance or neglect included in a contract for sale property not meant to be sold. (*Alvanley* v. *Kinnaird* 2 Mac. & G. 1.8.)

(3) As to shares, etc. Error makes contracts voidable not void,

Kennedy v. Panama Co.

(a) Shares applied for different in substance from those alloted—difference in substance complete—contract voidable and shares could be returned, quite independently of fraud (*Kennedy* v. *Panama Mail Co.* L. R. 2. Q. B. 580. 586.)

(b) Persons who have taken shares in a company are bound to make themselves acquainted with the articles of association.

(c) Error in distinguishing numbers of shares not material.

(d) Person applying for shares in a company not described as limited cannot afterwards urge that he did not mean to take shares in an unlimited company (*Perret's* case 15. Eq. 250.)

Thornton v. Kempster.

(4) As to kind: In *Thornton* v. *Kempster* (5. Taunt. 786.) bro gave defendant a sale note for *Rigo Rhine hemp* a plaintiff for *S. Petersburg clean hemp*. No contract, " the contract must be on the one side to sell and the other to buy one and the same thing."

(5) As to quantity. When goods ordered are sent togeth with goods not ordered, buyer may refuse to accept a at all events if there is any danger or trouble attendi the severance of the two. (*Levy* v. *Green* 8. E. & B. 57

(6) As to price, of. Digest 19. 2. locati. 52. apud Pollock 464 note

(a) Where there has been no misrepresentation, and whe there is no ambiguity in the terms of the contrac the defendant cannot be allowed wade perform ance by the simple statement that he has made mistake (*Tamplin* v. *James* 15. ch. Div. 215. 217.)

Tamplin v. James.

(b) Proposal by accident wrongly expressed, propos must show acceptor could not reasonably have sup posed it in his actual form to convey proposer real intention. (*Webster* v. *Cecil* 30. Beav. 62.)

(7) Material attribute.

(a) Error re material attribute vitiates transaction i

(α) Difference made by absence of quality wrongly sup posed to exist amounts, in clear language to a differ ence in kind. (*Savigny, System*, etc. Sec. 137)

(β) The error is common to both parties.

(b) Contractee must take care to secure his interests but in two cases the law will protect one of the parties to a contract:

(α) When a man buys goods which he has no opportu nity of inspecting, the Law introduces into the contrac of sale implied warrantees that the goods supplied shal correspond in description to goods promised and shal be of a marketable value. (*Jones* v. *Just* L. R. 3 Q. B. 203

(β) In contracts *uberrimae fidei* the Law requires every material fact to be disclosed.

(c) Party not bound to accept and pay for chattels, unless they are really such as the vendor proposed to sell and the vendee intended to buy (*Hall* v. *Conder* 2. C. B. N. S. 22. 41.) Where error is not common transaction is valid:

Anson 138, 139. Savigny Sections 138 138.

(α) Mistake of buyer as to quality not known to seller inoperative unless there is warranty as to particular quality. (*Smith* v. *Hughes*.)

(β) Mistake of buyer as to quality known to seller inoperative unless for fraud of vendor and there is no legal obligation on vendor to inform buyer that he is under a mistake not induced by vendor's act. (*Smith* v. *Hughes* L. R. 6. Q. B. 6-7) "It seems, however, that sale would be voidable on ground of fraud, if seller knew of buyer's ignorance, but that such knowledge should be distinctly and carefully alleged." (*Poll.* 471)

On *Smith* v. *Hughes* see Pollock, 467 note u.

(γ) Mistake of buyer as to *quality promised* not known to seller is inoperative, (*Scott* v. *Littledale* 8 E. (B 815)

(δ) Mistake of buyer as to quality promised known to seller deprives plaintiff of right to insist that defendant shall be bound by that which was the apparent and not the real bargain. (*Smith* v. *Hughes*.)

(8) As to existence of subject matter.

(a) Topic really belongs to Impossibility of Performance *(Anson* 135.)

(b) Non-existence of subject-matter vitiates contract.

(α) In *Coturier* v. *Hastie* (5 H. L. C. 673) neither party aware of destruction of subject-matter. No contract.

Coturier v. Hastie.

(β) In the case of mistake as to existence of a right same rule applies (*Bingham* v. *Bingham* 1 *Ves. Sen.* 126)

(c) In like manner a sale of shares will not be enforced if at the date of the sale a petition for winding up has been presented of which neither vendor nor purchaser knew (*Emmerson's Case* L. R. 1 Ch. 433.)

(d) In *Strickland* v. *Turner* (7 Ex. 208) at date when sale of a life annuity was completed, the life had dropped unknown to both vendor and purchaser; held that purchase money could be recovered as on a total failure of consideration.

(e) A stipulation to purchase one's own property is "*naturali ratione inutilis*" as much as if the thing was destroyed or not capable of being private property. (*Dgest* 44. 7....also *Stewart* v. *Stewart* 6 Cl. & F. 968 *Cochrane.* v. *Willes.* L. R. 1 Ch. 58 35, *Contra Story's Eq. Jurisp. Sec* 124)

See Story on Equity 124.

(f) Agreement to pay rent for one's own property is void. In *Cooper* v. *Phibbs* (L. R 2 & L. 149) A agreed to take a lease of a fishery from B on the assumption that A had no estate and B was tenant in fee. Both parties were mistaken, for A was tenant for life and B had no estate at all. Agreement was invalid.

(g) In *Broughton* v. *Hutt* (2 De. G. & J. 501) heir-at-law of a shareholder in a company joined with several other shareholders in giving a deed of indemnity to directors believing that shares had descended to him as real estate whereas they were personal estate. Deed void in equity, and probably at law. Plaintiff never intended to be bound and defendants never intended him to be bound unless he was shareholder.

(α) Mistake plainly of fact.

(β) "An erroneous fundamental assumption made by both parties *even as to a general rule of Law* might well prevent any valid agreement from being formed." (*Poll* 478.

Pollock, 475.

(h) Agreement to assign a lease for lives would be inoperative if all the lives had dropped unknown to the parties.

(9) Mistakes in sales by sample.

(a) If a manufacturer agrees to furnish goods according to sample, sample is to be considered as if free from any secret defect of manufacture not discoverable on inspection and unknown to both parties (*Heilbutt* v. *Hickson* L. R. 7 C. P. 438. *Benjamin on Sale.* 646)

Mistake in sale sample.

(b) Reference to a sample does not exclude general duty of seller to furnish merchantable goods answering description in contract (*Drummond* v) *Van Ingen* 12 App. Cases 284.

(c) Mistake in sample exhibited on sale, in the sense of its being taken from a bulk different from that which is intended and expressed to be sold, may wholly prevent formation of contract (*Megaw* v. *Molloy* 2 Ir. L. R. 530.)

7. Rights and remedies of party to a void agreement.

(1) Party may assert nullity of transaction by way of defence, or may seek by counterclaim to have instrument sued on set aside (*Storey* v. *Waddle* 4 Q.B. Div, 289 *overruling* 1 C. P. D. 145 *Mostyn* v. *Mostyn Coal Co.*

(2) Party may right himself by coming forward as plaintiff.

(3) Money paid recoverable (*Kelly* v. *Solari* 9 M. & W. 54.)

(4) He may elect to adopt originally void agreement *i.e.* he may carry into execution by the light of correct knowledge the former intention which was frustrated by want of the elements necessary to the formation of any valid agreement (Poll 480.)

X.—Reality of Consent: Misrepresentation.

1. Distinctions and definitions.

(1) Misrepresentation distinguished from fraud,

(a) Misrepresentation is a misstatement of facts not known to be false or a non-disclosure of facts not intended to deceive: fraud consists in representations known to be false, or made in reckless ignorance of their truth or falsehood, and entitles injured party to action of deceit . . (See Anson 142.)

Anson, 136, 142.

(b) Misrepresentation merely vitiates a contract; fraud besides being a vitating element gives rise to an action *ex delicto*.

(2) Statements which are promises and statements which are not representations affecting formation of contract distinguished from representations affecting performance of contract,

(a) Representation forming an integral part of a contract becomes a promise: if false its untruthfulness operates to give discharge of contract,

Behn v. Burness Son-147, 148

(b) Distinctions in *Behn* v. *Burness* 3 B. & S. 75,

(α) Representation is a statement or assertion of one party to the other before or at time of contract *re* some matter relating to it.

(β) Untruth of representation, except in policies, is no cause of action unless for fraud.

(γ) Insertions of representations in instrument of contract cannot alter their nature.

(δ) Whether descriptive statement is mere representation or substantive part of contract is a question of construction for Court.

Condition precedent

(ε) Representation forming part of contract may be a condition precedent or an independent agreement a breach of which will not justify repudiation of contract, but the cause of action for compensation in damages.

(ζ) Descriptive statement if substantive part of contract is warranty i.e. condition on non-performance or failure of which either party may repudiate if contract not already partially executed.

(c) If to the ordinary description of the thing contracted for the parties add any other terms they please so as to make that an essential part of the contract, a term so added is a *condition*.

Condition.

(α) It means a statement that a thing is or a promise that a thing shall be.

(β) Whether a term is condition or not is a matter of construction.

(γ) Breach or untruth of condition discharges party to whom it is made from liabilities.

Warranty.

(d) Warranty: an agreement which refers to the subject matter of a contract, but, not being an essential part of the contract either by the nature of the case or by the agreement of the partner, is collateral to the main purpose of such contract.

(α) Often convertible with a condition.

(β) Independent subsidiary promise: damages only.

(γ) Warranty also means a condition the breach of which might have discharged the contract had it not been so far acquiesced in as to lose its effect for that purpose. Damages. (See Poll 510-511.)

2. Misrepresentation and non-disclosure.

Rule of disclosure.

(1) No general positive duty of disclosure: and even if one party asks a question which the other is not bound to answer, and it is not answered, he is not entitled to treat the other's silence as a representation (*Laidlaw* v. *Organ*. 2 WHEAT 178.)

(2) Duty of disclosure implied in contracts *uberrimae fidei*, not only that all information given shall be true but also that all material information shall be fully as well as truly given. Such contracts are:

(a) Insurance.

(b) Suretyship.

(c) Sales of Land.

(d) Family Settlements.

(e) Partnership, Shares, etc.,

(3) Law of disclosure in Insurance.

Insurance and rule of disclosure.

(a) Marine,

(α) Misrepresentation, or concealment of a material fact though made without any fraudulent intention vitiates the policy (*Jonides* v. *Pender* 9 T.R. Q.B. 587) that is, makes it voidable at the underwriter's election.

(β) All should be disclosed which would affect the judgment of a rational underwriter,—But.

(γ) Insured is not bound to communicate anything which he is entitled to assume the underwriter knows already (*Morrison* v. *Union M. I. Co.* L.R. 8 Ex. 40-49.)

(δ) Policy will be vitiated by concealment of fact material to guide underwriter's judgement, though not material to risk insured against in itself (*Rivaz* v. *Gerussi* 6 Q.B. Div. 222.)

(b) Life.

(α) Assured is bound to disclose all material facts within his knowledge affecting life on which insurance is made (*London Assurance* v. *Mansel* 11 Ch. D. 363.)

(β) Declaration of the assured shall be the basis of the contract.

(c) Fire—

(α) Description of premises appears to form a representation on the truth of which the validity of the contract depends.

(β) Description is warranty that at date of policy premises have not been altered so as to increase risk.

(γ) Description guarantees against future alteration.

Suretyship.

(4) Law of disclosure in Suretyship. (Partnership and suretyship not *uberrimae fidei* until contract is made. *Anson* 157 161)

(a) No universal obligation to make disclosure (*Railton* v. *Matthews* 10 Cl. & F. 934.)

(b) Surety released from obligation by creditor's misrepresentation or concealment (*Davies* v. *London and Provincial M. Ins. Co.* 8 ch. D. 475.)

(c) Surety entitled to know real nature of transaction he guarantees.

(d) Creditor not bound to volunteer information as to general credit of debtor or on anything not relating to transaction (*Pledge* v. *Buss* Johns, 663.)

(e) Creditor not bound to tell surety that proposed guaranty is to be substituted for a previous one given by another person. (*N. Brit. Ins. Co.* v. *Lloyd*, 10 Ex. 523.)

(f) Surety not liable if there is a secret agreement or arrangement which substantially varies the nature of the transaction on liability to be undertaken (See *Poll* 516 517.)

(g) Concealment from the surety of previous defaults of principal debtor, when there is a continuing guaranty of conduct or solvency, is in itself evidence of fraud (*Lee* v. *Jones* 17 C. B. N.S. 482.)

Sales of land.

(5) Law of disclosure in Sales of Land.

(a) Misdescription materially affecting value, title or character of property sold makes contract voidable at purchaser's option (*Flight* v. *Booth*, 1 Bing. N.C. 370 377 ; *Fawcett* v. *Holmes* 42 ch. Div. 150.)

(b) In cases where description of property sold varies from what was stated in contract,

(α) Where variance not substantial contract enforceable but with compensation at suit of either party.

(β) Where variance substantial and capable of pecuniary estimation, party misled may rescind contract, or enforce it with compensation.

(i) That a vendor who has less than he undertook to sell is bound to give so much as he can give with an abatement of the price, applies only where he has contracted to give purchaser something which he professed to be, and the purchaser thought him to be, capable of giving.

(ii) The Court will not order vendors who sell as trustees to perform their contract with compensation (*White* v. *Cuddon* 8 Cl. & F. 766.)

(iii) Purchaser otherwise entitled to compensation can recover it after he has taken a conveyance and paid purchase money in full (*Palmer* v. *Johnson* 13 Q. B. D. 351.)

(γ) Where variance not capable of estimation, option to rescind simply, without compensation *e.g.* if a man sells freehold land and it turns out to be copyhold or long leasehold, no compensation.

(i) In all cases of variance the real question is whether deficiency is such as to be capable of money valuation (*Dyer* v. *Hargrave* 10 Ves. 507.)

(ii) When it is in vendor's power to make good his representation he can enforce contract on condition of doing so but not otherwise. (cf. *Baskcomb* v. *Beckwith* 38 L. J. Ch. 536.)

(iii) Deposit recoverable in equity as well as at Law.

Duty of vendor.

(c) It is the duty of vendor to give a fair and unambiguous description of his property and title.

(α) If the vendor does not intend to offer for sale an unqualified estate, the qualification should appear on the face of the particulars (*Hughes* v. *Jones* 3. D. F J. 307. 314.)

(β) Concealment in particulars not excused by correct statement in conditions only read out at the sale (*Torrance* v. *Bolton* 8 Ch. 118.)

(γ) Mere silence as to facts capable of influencing a buyer's judgement, but not such as the seller professes or undertakes to communicate, is not of itself any breach of duty (*Coaks* v. *Boswell* 11 App. cases 239-235.)

Misleading items.

(d) A misleading description may be treated as a misrepresentation even if it is in terms accurate (*Cabellero* v. *Henly* 9 Ch. D. 447.)

(e) Misleading statement or ommission made by mere heedlessness or accident may deprive vendor of his right to specific performance, even if such that a more careful buyer might not have been misled (*Jones* v. *Rimmer* 14 Ch. Div. 588.)

(f) Duty of purchaser in special cases.

(α) Buyer knowing more of property than seller. Buyer's material misrepresentation makes contract, and even an executed conveyance pursuant to it, voidable at option of vendor. (*Haygarth* v. *Wearing* 12 Eq. 320)

(β) On a sale under direction of court a person offering to buy is not under duty of disclosure.

(g) On sales of real property it is the duty of party acquainted with property to give substantially correct information, at all events to extent of his own actual knowledge.

(α) Conditions as to title, etc. must not be misleading as to any matter within the vendor's knowledge. (*Heywood* v. *Mallalieu* 25 Ch Div. 357).

(β) There may be a want of diligence on the purchaser's part precluding him from having the sale set aside after conveyance, though not depriving of right of revision after completion. (*M'cullock* v. *Gregory* 1 K & J 286)

(6) Law of disclosure in Family Settlements.

Gordon v Gordon.

(a) Full and complete communication of all material circumstances is what the Court must insist on. (*Gordon* v. *Gordon* 3 Sw. 400. 473.)

(b) It makes no difference if non-disclosure is due to an honest but mistaken opinion as to the materiality or accuracy of the information withheld (*Gordon* v. *Gordon.*)

Disclosure in partnership matter.

(7) Law of disclosure in Partnership, contracts to take shares, and contracts of promoters.

(a) An intending partner must not make a private profit out of a dealing undertaken by him on behalf of the future firm (*Lindley* 325)

(b) Prospectus inviting to take shares must be positively and negatively correct.

(α) Contract can be rescinded and shares repudiated if untrue and misleading representations are made.

(β) Mere communication to the company is not a sufficient repudiation; the shareholder must do something to alter his status as a member (*Lindley* L. J. in *Re Scotch Petroleum Co.* 23 Ch. Div. 485.)

(c) Duty of full disclosure of all particulars is on promoters.

(d) Promoters who form a company to buy their property not entitled to deal with that company as a stranger (*Erlanger* v. *New Sombrero Phosphate Co.* 3 App. cases 1268.)

(e) Shareholder entitled to rescind contract with company for material representation in a preliminary prospectus issued by promoter before company was formed (*Karberg's Case* 3 Ch. 1)

Duty of disclosure in marriage contracts.

(8) Contract to marry.

(a) No obligation of disclosure except so far as the woman's chastity is an implied condition.

(b) Non-disclosure of previous engagement to another person and party's own previous insanity no answer to an action on the promise (*Beachey* v. *Brown* E. B. & E. 796; *Baker* v. *Cartwright* 10 C. B. N. S. 124)

(c) Marriage settlement not rendered voidable by wife's non-disclosure of previous misconduct, but non-disclosure of adultery may avoid separation deed (*Evans* v. *Corrington* 2 D. F. J. 481)

3. Effects of Misrepresentation. (*Anson* 150—156)

(1) Before the Judicature Act (36 & 37 *Victoria*)

(a) In Common Law a representation was of no effect unless it was either fraudulent or a term in the contract. (cf. *Behn* v. *Burness.*)

Anson on Bannerman v. white.

(b) Such representation held a condition in *Bannermann* v. *White.* But "what really happened was that Bannerman made a statement to White, and then the two made a contract which did not include

the statement, though, but for the statement, the parties would never have entered on a discussion of terms. It would have been simpler to hold that the consent of the buyer was obtained by a misrepresentation of a material fact and was therefore unreal" (*Anson* 152)

Redgrave v. Hurd. Equity Rule

(c) Misrepresentation a ground for refusing specific performance and for rescinding contract (*Lamare's Case* L. R. 6 H. L. 414; (*Redgrave* v. *Hurd* 20 Ch. D. 1) Equity Rule.

(2) Since the Judicature Act.

(a) Common Law Rule is obsolete and Equity Rule prevails that, in order to set aside a contract, obtained by material false representation it is not necessary to prove that the party who obtained it knew at the time when the representation was made it was false. (*Redgrave* v. *Hurd.*)

son 155, 156.

(b) In *Bannerman* v. *White*: Representation a vital condition; in *Kennedy* v. *Panama Co*: Representation *not* a vital condition. In *Derry* v. *Peek* (14 App. Ca. 347) the rule of equity was emphasised: a material representation, though not fraudulent, may give a right to rescind or avoid a contract where capable of such recission. (*Anson* 155-156.)

(3) Innocent misrepresentation, if a material inducement to the making of a contract, is a ground for resisting specific performance or avoiding contract; this relief is of general application and not peculiar to contracts *Uberrimae fidei.*

4. Expressions of opinion do not amount to representation. (*Anderson* v. *Pacific Insurance Co.* L. R. 7 C. P. 65) nor do commendatory expressions (*Dimmock* v. *Hallett* 6 R. 2 Ch. 27.) See *simplex commendatio*, Poll 524.

Simplex Commendatio.

XI. Reality of Consent: Fraud.

1. Fraud generally includes Misrepresentation, but not always, as when a contract is made with a collateral wrongful or unlawful purpose, or without intention of performing it:

(1) Fraud to enter into a contract to use it as an instrument of wrong or deceit against other party.

(2) Fraud to make contract not meaning to keep it.

Udell v. Atherton.

2. Fraud in all courts and at all stages of the transaction has been held to vitiate all to which it attaches (*Udell* v. *Atherton* 7 H. & N. 181.)

3. Elements of Fraud.

What constitutes fraud.

(1) Fraud is a false representation.

(2) Representation must be a representation of fact.

(3) Representation must be made with knowledge of its falsehood or without belief in its truth.

(4) Representation must be made with the intention that it should be acted upon by the injured party.

(5) Representation must actually deceive.

4. Fraud is a false representation.

(1) Representation may be of specific facts *e.g.* where a person is induced to acquire or become a partner in a business by false accounts of its position and profits (*Rawlins* v. *Wickham* 3 De G & J. 304.)

(2) It may be of a general state of things *e.g.* to induce a person to enter into a particular arrangement by an incorrect and unwarrantable assertion that such is the usual mode of conducting the kind of business in hand. (*Reynell* v. *Sprye* 1 D.M.G. 680.)

(3) "Active" or fraudulent concealment is a false representation:—

(a) Taking means to prevent one party from knowing a material fact *e.g.* to hide defects of good sold (*Benjamin on sale* 470.)

Peek v. Gurney.

(b) "Partial or fragmentary statement of fact that the withholding of that which is not stated makes that which is stated absolutely false" (*Peek* v. *Gurney* L.R. 6. H.L. 403.)

(c) Knowingly to assist in inducing another to enter into a contract by leading him to believe that which was known to be false (per Blackburn in *Lee* v. *Jones*).

(d) Not to rectify (where possible) error contributed in excusable ignorance is continuing the representation with knowledge of its falsity.

(e) There is no duty to disclose even latent defects in thing contracted for unless by act or implication such defects are represented not to exist.

(α) Hobbs suffering from typhoid fever sent, (*against penal statute,*) pigs to market; Ward bought pigs, no representation made as to condition. Pigs found infected. Held that the exposure against statute was no representation (*Ward* v. *Hobbs* 4 App. Ca, 29.)

(β) A let to B for immediate occupation house in a ruinous condition. B sued A for deceit. Held that in the absence of any misrepresentation by it there was no deceit. (*Keates* v. *Lord Cadogan* 10 C. B. 591.)

5. Representation must be one of fact.

(1) Mere expression of opinion, which turns out to be unfounded will not invalidate contract (*Harvey* v. *Young* I Yelv. 20.)

(a) That a thing is worth so much is an opinion.

(b) That seller paid so much for it is fraudulent if false to knowledge of seller.

(2) Expression of intention is no statement of fact, nor is a promise (*Burrell's case* 1 Ch. D. 552.)

(a) Representation that a thing is is different from a promise that a thing shall be.

(b) Where promisor intends to break promise there is fraudulent misrepresentation. (*Anson* 168.)

Misrepresentation of Law.

(3) It is said that misrepresentation of *Law* does not give rise to action of deceit nor makes contract voidable against misrepresentation, but fraudulent representation of effect of a deed can be relied upon as defence in an action upon deed. (*Anson* 168. See *Pollock* 474. 475.)

Derry v. Peek.

(4) Unwarranted statement, however honest, of mere expectation as present fact is fraudulent, but in *Derry* v. *Peek* ("which has thrown the whole subject into confusion." *Poll* 539) it was held that directors of a tramway company may say they have statutory authority to use steam power when they only expect to get consent registered by statute.

6. Untrue representation must be made with knowledge of its falsehood ("not necessarily with positive knowledge of its falsehood," Poll 537) or without belief in its truth.

(1) Fraud is proved when a false representation has been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false (Herschell L. J. in *Derry* v. *Peek*.)

Moral fraud.

(2) To make a man liable for fraud, *moral fraud* must be proved; there is no such thing as legal fraud (Bramwell L. J. in *Weir* v. *Bell* 3 Ex. D. 242)

(3) Absence of reasonable ground for belief not a cause of action but may suggest dishonest motive; in an assertion it is evidence, but only evidence, that it was uttered without any real belief (*Derry* v. *Peek*)

(4) Dishonest motive need not be present if statement is known to be false (*Pothill* v. *Walter* 3 B. Ad. 114.)

7. Representation to be false must be made with the intention that it should be acted on by the injured party.

(1) It is not necessary that representation should have been made to the very party injured (*Langridge* v. *Levy* 2 M. & W. 519)

(2) Every man is liable for consequences of false representation made by him to another upon which a third person acts if such representation was meant to be acted upon and the injury is not remote. (*Barry* v. *Croskey* 2 J & H. 1)

8. False representation must actually deceive.

Actual deception necessary.

(1) Plaintiff must shew that he was deceived by the statement and acted upon it to his prejudice (Cotton L. J. in *Arkwright* v. *Newbold* 17 Ch. D. 324)

(2) Deceit which does not deceive is not fraud (*Horsfall* v. *Thomas*, 1 H & C. 90)

9. Consent of third parties; marriage.

(1) Consent of third party required to give complete effect to transaction between others voidable if obtained by fraud.

(2) Unless the party imposed upon has been deceived as to the person and thus has given no consent at all there is no degree of deception which can avail to set aside a contract of marriage knowingly made (*Swift* v. *Kelly* 3 Knap. 257)

10. Effects of fraud upon rights *EX CONTRACTU.*

Remedies ex contractu.

(1) There are remedies *ex delicto* at Common Law and in Equity.

(2) There are remedies *ex contractu.*

(a) Injured party may affirm the contract and ask for a fulfilment of its terms or damages for such loss as he has sustained by their non-fulfilment. *Moore and De la Torre's case* L R 18 Eq. 661)

(α) Person deceived into buying chattel may retain it and sue for loss.

(β) Person cannot be shareholder and sue directors for fraud in inducing him to buy shares, nor sue as a non-shareholder after company's liquidation. (*Houldsworth* v. *City of Glasgow Bank* 5 App. Ca. 317)

(b) Injured party may avoid the contract

(α) By trying to get it cancelled in Chancery for fraud.

(β) By resisting suit for specific performance.

(γ) By resisting action for damages, but when aware of fraud party does not notify intention to avoid contract he has only an action for deceit.

(3) Right of rescission is forfeited:

When right of rescission is forfeited.

(a) If injured party affirms or takes benefit under contract.

(b) If parties can no longer be replaced in their former position.

(c) If third parties *bona fide* and for value acquire property or possessory rights in goods obtained by fraud. Third parties cannot so acquire rights.

(α) If fraud takes the form of personation (*Cundy* v. *Lindsay*. *Hollins* v. *Fowler* L. R. 7. H. L. 75)

(β) If in case of goods by false pretences title of defrauded owner revests in him upon conviction of swindler and he may recover goods from innocent purchaser for value (*Bently* v. *Vilmont* 12 App. Ca. A. 471)

1. What constitutes duress.

What is duress.

(1) Duress consists in actual or threatened violence to, or imprisonment of, contracting party, wife, parent or child by the other party or one acting with his knowledge and for his advantage.

(a) Threatening to destroy or detain, or actually detaining property, does not amount to duress. (Shepp. *Touchstone* 61)

(b) And this applies to agreements not under seal as well as to deeds (*Allen* v. *Backhouse* 3 M. & W. 633; *Skeate* v. *Beale* 11 A. & E. 983)

(2) Coercion to amount to duress must affect promisor and be personal.

(3) In a case of menace the threat must be of something unlawful

Cumming v. Ince.

(a) In *Cumming* v. *Ince* (11. Q. B 12; See *Poll* 577) an agreement was obtained by fear of a merely unlawful imprisonment and therefore voidable on the ground of duress; and it made no difference that the plaintiff's counsel was party to arrangement. His assent must be considered as enforced by the same duress; for as plaintiff's agent he might well have feared for her the same evils she feared for herself.

(b) In *Biffin* v. *Bignell* (7 H. & N. 877. *Poll* 578) defendant was sued for necessaries supplied to wife who had been in a lunatic asylum. On her discharge hubsand got her to live separately on promise of a weekly allowance. Held, that her consent was *not* obtained by duress, for under these circumstances "the threat, if any, was not of anything contrary to law, at best not to be so understood; and consequently presumption of authority to pledge husband's credit was effectually excluded and plaintiff could not bear."

2. Money paid under circumstances of Compulsion.

(1) Recoverable.

Compulsion.

(a) When payment is made to obtain possession of property wrongfully detained (*Wakefield* v. *Newbon* 6 A B. 278-280)

(b) Where excessive fees are taken under colour of office, though it be usual to pay them (*Shaw* v. *Woodcock* 7 B. & C. 73)

(c) Where an excessive charge for the performance of a duty is paid under protest (*Parker* v. *G. W. R. & Co.* 7 M & Gr. 253. 292)

(d) Person who actually receives money may be sued, though he receives it only as an agent (*Steele* v. *Williams* 8 Ex. 625)

(2) But not on the ground of coercion in itself but of failure of consideration.

XIII. Reality of Consent: Undue Influence.

1. Undue influence means an influence in the nature of compulsion or fraud, the exercise of which in the particular instance to determine the will of the one party to the advantage of the other, is not specifically proved, but is inferred from an existing relation of dominion on the one part and submission on the other.

Explanation.

(1) In each case of application for (equitable) relief on the score of undue influence the question to be decided is whether the party was a free and voluntary agent (*Williams* v. *Bayley* L. R. I. & H. L. 200-210)

(2) The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed (*Smith* v. *Kay* 7 H. L. C. 779)

(a) Where the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose.

(b) Where undue influence is presumable from relations of the parties.

(3) Undue influence arises from a course of conduct, or circumstances, or the relations of the parties; not from definite statement.

(a) In equity persons standing in certain relations to one another, such as

Fiduciary relations.

(α) Parent and child.
(β) Man and wife.
(γ) Doctor and patient.
(δ) Solicitor and client.
(ε) Confessor and penitent.
(ζ) Guardian and ward

are subject to certain presumptions when transactions between them are brought in question (*Parfitt* v. *Lawless* L. R. 2 P. & D. 462)

(b) It is incumbent on persons so situated to rebut presumption of fraud; they must take upon themselves the whole proof that the thing is righteous (*Gibson* v. *Jeyes* 6 Ves. 266-276.)

(c) As regards wills.

Wills.

(α) Burden of rebutting presumption of undue influence is cast on those who take benefit under a will which they have been instrumental in preparing or obtaining (*Fulton* v. *Andrew* L. R. 7 H. L. 448-472.)
(β) Undue influence is never *presumed* (*Boyse* v. *Rossborough* 6 H. L. C. 9-49.)
(γ) A disposition by will may be set aside as well as an act *inter vivos* when undue influence is actually proved, but then it seems, the influence must be such as to "overpower the volition without convincing the judgment" (*Hall* v. *Hall* L. R. 1 P. & D. 482.)

(d) Whoever obtains any advantage at the expense of a confiding party will not be allowed to retain the advantage (*Tate* v. *Williamson*, L.R. 2 Ch. 55-61) but

there is no general presumption against the validity of gifts as such (see Pollock 584 note. (*o*)

(4) "As no court has ever attempted to define fraud so no court has ever attempted to define undue influence, which includes one of its many varieties" (Lindley L. J. in *Allcard* v. *Skinner* 36 Ch. Div. 183.)

(5) In the absence of any special relation from which influence is presumed, the burden of proof is on the party impeaching the transaction (*Blackie* v. *Clark* 15 Beav. 595)

2. Auxiliary rules and doctrines on special points.

(1) As to voluntary dispositions in general.

(a) A voluntary settlement which deprives settlor of immediate control of property, though made for settlor's children's benefit and not for any particular donee's benefit and though above suspicion, is liable to be set aside.

(b) Absence of power of revocation is not conclusive proof of improvidence but only mark of evidence.

Presumption from special relations.

(2) As to influence presumed from special relations.

(a) Age or capacity of person conferring benefit or nature of benefit conferred immaterial. (*Rhodes* v. *Bate* 1 Ch. 252-257-260.)

(b) Relation of confidence determined by some positive act or complete case of abandonment; otherwise it is presumed to confirm so long as influence can be reasonably supposed to remain (*Rhodes* v. *Bate.*)

(c) Influence of parental relation presumed to continue for sometime after termination of legal authority, till there is complete emancipation (*Archer* v. *Hudson* 7 Beav 551. 560.)

(α) A year is generally the time.
(β) This does not exclude actual proof of undue influence at any subsquent time.

(d) To rebut presumption of undue influence on son recently of age father must show:

(α) That son was really a free agent.
(β) That he had adequate independent advice.
(γ) That he perfectly understood nature and extent of sacrifice he was making.
(δ) That he was desirous of making it (cf. *Savery* v. *King* 5 H. L. C. 656.)

(e) Solicitor purchasing or obtaining benefit from client "must give all reasonable advice against himself that he would have given against a third person" (*Gibson* v. *Jeyes.*) He must show that (*Savery* v. *King*)

(α) He has taken no advantage of his position.
(β) Client was free from influence.
(γ) Solicitor has disinterestedly tried to protect client's interest as if client were dealing with a stranger.
Solicitor must not deal with client on his own account as an undisclosed principal.
Solicitor is not bound to communicate to client any speculative and consequential possibility." (*Poll* 590)

It is allowed to a solicitor to purchase from his client, but the transaction may be called in question and the *onus* of rebutting presumption of undue influence rests on him (*Pisani* v. *A. G. for Gibraltar* L. R. 5 P. C. 516)

(f) Contract between persons standing in fiduciary relations is treated as being *Uberrimae fidei* and may be vitiated by silence as to matters which one of two independent parties making a contract would be in no way bound to communicate to the other (*Wood* V. C. in *Tate* v. *Williamson* 1 Eq. 536) and it does not matter whether the omission is deliberate or proceeds from error of judgment or mere inadvertence (*Molony* v. *Kernan* 2 Dr. & W. 39)

(α) In *Grosvenor* v. *Sherratt* (28 Beav. 659 663) a lease granted by a young lady to her father's executor's son and another was set aside "for the lessees ought not only to have shewn that the terms were fair, but also that no better terms could have been obtained"—"This is an extreme case." (Poll 589)

(β) Same rule applies to contractual transaction between principal and agent (*Dally* v. *Wonham* 33 Beav. 154)

(γ) Same in the case of executor who purchase part of testator's estate (*Baker* v. *Read* 18 Beav. 398)

(δ) See above (ε) (α)

(g) Family arrangements exceptionally favoured in Equity.

(α) Transactions of a purely family nature between parent and child unimpeached by any consideration, even ignorance of rights, if equal on both sides; but a transaction of the nature of a bounty from child to parent on child's majority is questionable (*Baker* v. *Bradley* 7 D. M. G. 597 620)

(β) No presumption against vatidity of gift from an ancestor to decendant, for it may be made in discharge of necessary duty of providing for descendants (*Beanland* v. *Bradley* 2 Sm. & G. 339

(γ) Sale by nephew to his [graet] uncle of his reversionary interest in an estate in which the uncle is tenant for life is not a family arrangement (*Talbot* v. *Staniforth* 1 J. & H. 484 501)

(3) As to relations between parties from which influences has been presumed. "Suspected Relations."

I. RELATIONS IN WHICH THERE IS A POWER ANALOGOUS TO THAT OF PARENT OR GUARDIAN. (*Poll* 591. 592)

"Suspected Relations."

(a) Uncle *in loco parentis* and niece.

(b) Step-father *in loco parentis* and step-daughter.

(c) Executor and testator's daughter.

(d) Husband of a minor's sister and minor living with him for sometime before majority: but mere fact of minor living with relation of full age raises no presumption of undue influence, or presumption is rebuttable by proof of business-like habits and capacity of donor.

(e) Of two sisters living together one is head of the house and so *in loco parentis* to the other.

(f) Brother and sister, where sister at 46 executed voluntary settlement under brother's advice and for his benefit.

(g) Husband and wife on one part, and aged and in firm stunt of wife on the other.

(h) Keeper of lunatic asylum and recovered patient.

(i) Servant and master of weak understanding.

II. Positions analogous to that of Solicitor.

(a) Certificated conveyancer acting as professional adviser.

(b) Counsel and confidential adviser.

(c) Confidential agent substituted for solicitor in general management of affairs.

(d) Doctor and patient.

(e) Person deputed by an elder relative (to whom a young man applied for help) to ascertain his pecuniary affairs and advise him.

III. Spiritual Influence.

(a) Clergyman and parishioner in terms of confidence.

Allcard v. Skinner.

(b) *Allcard* v. *Skinner*. Lady joined a sisterhood which made it binding not to communicate with or consult any "externs"; she made over sums of money to the Superior and when she left the sisterhood claimed refund after six years. Held by majority of Court that though rule, *re* "externs" was check on her freedom yet subsequent conduct was confirmation.

(c) In *Morley* v. *Loughnan* (1893. 1 Ch. 736) a weak sick man was imposed upon by an amateur spiritual director.

(4) Circumstances held to amount to proof of undue influence apart from any continuing relation.

Williams v. Bayley. Ellis v. Barker. Smith v. Kay.

(a) Where father gave securities for amount of certain notes forged by his son, led to think that son would else be prosecuted, it was held that father was coerced to give security (*Williams* v. *Bayley* L. 2. 1 H. L. 200)

(b) In *Ellis* v. *Barker* (7 ch. 104) it was to plaintiff's benefit under a will to be accepted tenant of a farm of which testator was yearly tenant. One of the trustees, landlord's steward, pursuaded landlord not to accept plaintiff as tenant till certain arrangements were agreed upon. Coercion.

(c) In *Smith* v. *Kay* (7 H. L. C. 750) securities executed by a young man under another's influence and without any independant legal advice set aside.

(d) Undue influence may be inferred when the benefit is such as the father has no right to demand and the grantor no rational motive to give (*Purcell* v. *M'Namara* 14 Ves. 91. 115.)

3. Undervalue has of itself no effect, but coupled with other circumstances may be material as evidence that consent or freedom of consent was wanting.

(1) Undervalue is evidence of fraud but, standing alone, not conclusive (*Cockell* v. *Taylor* 15 Beav 105) but even when coupled with incorrect statement of consideration it will not alone vitiate sale in the absence of any fiduciancy relation between parties (*Harrison* v. *Guest* 6 D. M. G. 424)

Rule as to undervalue.

(2) Undervalue taken with other circumstances material : *e.g.*

(a) Property bought at inadequate price from uneducated person of weak mind (*Longmate* v. *Ledger* 4 D. F. J. 402)

(b) When property is from man in his last illness (*Clark* v. *Malpas* 31 Bear 80)

(c) When vendor is infirm and illiterate and has no separate solicitor, purchaser must show that what he gave is the price. (*Baker* v. *Monk* 33 Bearv. 419)

(d) If the solicitor and mortgagee gets conveyance of untaxed property from mortgagor in humble circumstances and who is without legal advice, mortgagee must justify transaction (*Prees* v. *Coke* 6 Ch. 645. 649)

(e) Burden of proof is on buyer when seller of reversionary interest is poor and ignorant though not inferior in mind or body (*Fry* v. *Lane* 40 Ch. D. 312)

(e) Advantage must not be taken of vendors in distress (*Wood* v. *Abrey* 3 Mad. 417. 424.)

(3) To sustain a contract of sale in equity a reasonable degree of equality between contracting parties is required.

(a) Then must be no promiscuous inequality.

(b) Inadequacy of consideration is taken into account by the court to determine whether consent was freely given.

Specific performance for undervalue. *Pollock*, 600-602.

(4) Specific performance on ground of undervalue: general rule is that the court has a discretion not to direct a specific performance in cases when it would be highly unreasonable to do so (*Watson* v. *Marston* 4. D. M. G. 230. 239. 240). Pollock (600-602) gives a parallel list of conflicting authorities on th s subject and expresses himself in favour of the ruling in *Coles* v. *Trecothick* (9 Ves. 234-246) per Lord Eldon followed by Lord St. Leonards in *Abbott* v. *Sworder* (4 De G & Sm. 448 461) that: "*unless the inadequacy of price be such as shocks the conscience and amounts in itself to conclusive and deceisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance.*"

4. "Imposition" (*Pollock 602*) presumed from the circumstances and conditions of contracting parties in certain exceptional cases.

"Imposition." Poll. 602.

(1) Expectant heirs, remaindermen, reversioners.

(a) Old rule of law that vendor might avoid sale for undervalue alone modified by 31 Vict c. 4 to mean that no purchase made *bona, fide* and without fraud or unfair

dealing of any reversionary interest in real or personal estate should be opened or set aside merely on ground of undervalue. (Poll 604-606).

(b) Lord Selborne's Act (31 Vict.) leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. General rule of equity as to "Catching bargains" remains unaffected (*O'Rorke* v. *Bolingbroke* 2 App. Ca. 814. See Snell's *Equity* 571-574)

Snell's *Equity* 571-574.

(2) "Catching Bargains" *i.e.* bargains made in substance by expectant heirs, remaindermen or reversioners on the credit of their expectations whether the property in expectancy or reversion be ostensibly the subjectmatter of the transaction or not.

(a) In exception to the ordinary rules of evidence burden of proving righteousness of bargain is on the party who claims benefit of it.

"Catchnig bargains."

(b) Elements of "Catching bargains."

(α) Borrower must have little or no property immediately available ,but credit is given on a general expectation even of his status in society.

(β) Terms must be *prima facie* oppressive and extortionate.

(γ) Considerable excess in the nominal amount of sums advanced over sum *actually* given to borrower.

(δ) Absence of any real bargaining between parties or of any inquiry by lender into borrower's expectations.

(c) All elements need not be present.

(d) Where lender is unable to lead evidence to justify the transaction the court must decide whether it was a hard bargain (*Nevill* v. *Snelling* 15 Ch. D. 703)

(e) To obtain relief borrower must pay back with interest moneys actually received, he bearing the expenses; the *general rule* is to give no costs on either side.

(f) Where lender sues on the contract.

(α) If contract, embodied in negotiable instrument or not be proved a "catching bargain" lender must justify transaction. *Prima facie* this is a question of fact but on the analogy of cases on restraint of trade it may be taken as a matter of law (*Pollock* 611 *Note, b.*)

(β) Lender failing to justify he can recover principal and reasonable interest only as on a common count for money lent.

(3) These principles are applicable to sales of reversionary interests by persons of independent position *e.g.* sale by a man just of age following terms settled when an infant (*O'Rorke* v. *Bolingbroke*, Poll 612.)

(a) Burden is on purchaser to show fairness of transaction.

(b) Purchaser bound to show that price was such as, upon facts known then to him, he might reasonably have thought adequate.

(c) Purchaser ought to see that seller has independent legal advice.

Evans v. Llewellyn

(4) "Surprise" and "Improvidence" (*Poll.* 613-616.) *alleged* ground of relief on notion of inequality. In *Evans* v. *Llewellyn* (1 Cox. 333) defendant offered to buy from plaintiff his (plaintiff's) interest in a property: for a substantial but not adequate consideration: suggested to plaintiff to consult friend but plaintiff did not do so; three days after defendant concluded

bargain. Transaction set aside as the plaintiff was taken by surprise *Pollock ad. loc.* has the following objections:

Pollock on Evans v. Bicwellyn.

(a) There is no intelligible reason for treating *surprise or improvidence* as a substantive cause for setting aside contracts much less for attempting to give these words a technical signification.

(b) *Surprise and improvidence* are matters from which to infer in particular cases want of consent or coerced consent, but it is not to be affirmed as a general principle of law that *haste* or *imprudence* can of itself be a sufficient cause to set aside a contract, nor even that there is any particular degree of haste or imprudence from which fundamental error, fraud or undue influence may be invariably presumed.

(c) *Surprise* or *improvidence* represents but an opinion of the general character of a transaction, founded on a precarious estimate of average human conduct and cannot well have a greater legal effect than inadequacy of consideration, which generally admits of being determined by referrence to market value of the object at the date of contract.

XIV.—Right of Rescission.

1. Representation relied on to rescind a contract must be of matter of fact, not of Law.

What representation is necessary to give rise to rescission.

(1) No independent liability can arise from a misrepresentation of what is purely matter of Law (*Rashdall* v. *Ford* 35 L. J. Ch. 769) but this probably does not apply to a deliberately fraudulent misstatement of the Law (*Hirschfield* v. *London B. & S. C. Ry. Co.* 2 Q. B. D. 1)

(2) False representation of motive or intention not amounting to or including an assertion of existing facts is inoperative. (See *Vernon* v. *Keys* 12 East 632)

(3) Collateral fraud practised by or against a third person does not avoid a contract.

(4) Statement of mere matter of opinion is not binding on person making it. It is said (*Haycroft* v. *Creasy* 2 East 92) that a man is not answerable for what he asserts as a matter of fact within his knowledge about what is only a matter of probable repute and opinion. Doubted by *Pollock*, 545.

(5) Party misled by an ambiguous statement must prove to court that he understood and acted on the statement in the sense in which it was false. (*Smith* v. *Chadwick* 9 App. Ca. 187)

2. Representation must be such as to induce the contract.

(1) No relief to a party who has acted on his own judgment (See *Farrar* v. *Churchill* 135 U. S. 609)

(2) That the misled party had means of knowledge is no excuse for active misrepresentatin (*Dobell* v. *Stevens* 3 B & C. 623) but a plea that the other party knew the true state of affairs

or did not rely on the facts as represented would be valid (*Redgrave* v. *Hurd* 20 Ch. D. 1-21)

(3) In case of mere non-disclosure party cannot complain if he omits to avail himself of the means of knowledge he may have (*N. B. Co.* v. *Conybeare* 9 H. L. C. 711-742), also in case of mere assertion of title by vendor of land (*Hume* v. *Pocock* 1 Ch. 379.385)

(4) A material representation may be presumed to have in fact induced the contract. This is a rebuttable presumption of fact.

(5) Contract incidental to fraudulent transaction is itself fraudulent *e.g.* a contract arising directly out of a previous transaction between the same parties voidable on the ground of fraud is itself in like manner voidable (*Barry* v. *Croskey* 2 J. & H. 1)

3. Representation must be made by a party to the contract (See *Sturge* v. *Starr* 2 My & K. 195)

Agents, promoters, shareholders.

(1) As to representations by agents the only question is whether the representation was within agent's authority. This is so even in a case of fraud (*Barwick* v. *English Joint Stock Bank* L. R. 2 Ex 259)

(2) Companies are bound by acts of directors, promoters, etc.

(3) Where agent of directors commits fraud, remedy is against company as ultimate principal, and not against the directors who are considered agents themselves, (*Weir* v. *Barnett* 3 Ex. Div. 32)

(4.) Statements in prospectus of promoters before the company is in existence is not considered as made by agents for the company.

(5) If A makes an assertion to B who repeats it to C in an unqualified manner intending C to act on it, and C acts on it, B makes that assertion his own and is answerable for the consequences (*Smith's case* 2 Ch. 604.611.)

(6) Agent always liable for his own personal fraud (cf. *Cullen* v. *Thomson's Trustees and Kerr* 4 Macq. 424.432.)

4. Representation must be made as part of the same transaction.

(1) Untruth of a representation made to a third person, or even to the party himself on a former occasion, in the course of a different transaction and for a different purpose, cannot be relied on as a ground either for rescinding a contract or for maintaining an action of deceit (See *Western Bank of Scotland* v. *Addie* L. R. 1 Sc. & D. 145.)

Peek v. Gurney.

(2) Sole office of a prospectus is to invite the public to take shares in the company in the *first* instance: future purchasers of shares in the market cannot complain of being deceived by propectus. (*Peek* v. *Gurney* L. R. 6 H. L. 377.)

5. Generally, when a contract is voidable for fraud or on any other ground the party misled may

(1) Either affirm the contract and insist, if possible, on being put in the same position as if the representation had been true.

(2) On at his option rescind the contract and claim to be restored, as far as possible, to his former position.

On affirmation and rescission generally.

6. As regards affirmation or rescission in general.

(1) A contract induced by fraud is not void but voidable at the option of injured party,—is valid until rescinded (*Oakes* v. *Turquand* L. R. 2 H. L. 346-375-376.)

(2) It is for the party defrauded to elect whether he will be bound (*Rawlins* v. *Wickham*) but if he affirms he must affirm it in all its terms.

(3) When the contract is once affirmed, the election is completely determined.

(a) Unequivocal treatment of contract as subsisting determines election (*Clough* v. *L. & N. W. Ry. Co.* L. R. 7 Ex. 34.)

(b) Taking steps to enforce contract is conclusive election not to rescind (*Gray* v. *Fowler* 42 L. J. Ex. 161.)

(c) Party voluntarily acting upon a contract voidable at option, with knowledge of all the facts, cannot afterwards repudiate it if it turns out to his disadvantage (*Ormes* v. *Beadel* 2 D. F. J. 332-336.)

(d) Shareholder cannot repudiate share on the ground of being misled by prospectus, if

(α) He has paid a call without protest or received a dividend with all the means to correct inquiry (*Scholey* v. *Central R. Co. of Venezuela* 9 Eq. 266 n.)

(β) He has taken an active part in the affairs of the company after discovering true state of things (*Sharpley* v. *Louth and E. C. Ry. Co.* 2 Ch. Div. 663.)

(γ) He has affirmed his ownership of shares by trying to sell them (*ex parte Briggs* 1 Eq. 483.)

Communication of election to rescind.

(4) Election to rescind must be communicated to other party.

(a) Instituting proceedings to have contract judicially set aside is communication, and judicial rescission relates back to date of commencement of proceedings (*Reese River Silver Mining Co.* v. *Smith* L. R. 4. H. L. 73-75)

(b) Setting up rescission as defence by party if sued on contract is sufficient act of rescission without prior declaration of intention to rescind.

(c) Communication need not be formal but distinct and positive rejection of contract, not a mere request or inquiry (See *Ashley's case* 9 Eq. 263.)

(d) Repudiating shareholder must not only repudiate but also get his name removed, or begin proceedings to have it removed, before winding up. Other shareholders take benefit of such proceedings if they and the company agree that they shall stand

or fall by the result of those proceedings (*Lindley* 23 Ch. D. 437.)

(8) Original contract made with agent for other party communication of rescission before principal and disclosed to agent is sufficient (*Maynard* v. *Eaton* 9 Ch. 414.)

(5) Right of rescission is exerciseable by and against representation.

Rescission when impossible.

7. No rescission possible when parties cannot be restored to their original position:

(1) When party responsible for misrepresentation may have so acted on faith of contract being valid that rescission would cause him imparable injury. He must have so acted to the knowledge of party misled and without protest that his conduct may be said to be induced by the other's delay in repudiating the contract.

(2) When the interest taken under the contract by the party misled may have been so dealt with that he cannot give back the same thing received.

(a) Sharholder cannot repudiate shares if character and constitution of company have altered (*Clarke* v. *Dickson* E. B. & E. 148.)

(b) In the case of goods or security delivered under a contract voidable by buyer on ground of depreciation not due to fraud in value of goods, etc., makes restitution impossible in law (*Waddell* v. *Blockey* 4 Q. B. Div. 678. 683.)

(3) When party misled has himself chosen to deal with subject matter of contract by exercising acts of ownership or the like in such a manner as to make restitution impossible.

(a) Purchaser cannot take possession and claim to recover his deposit (*Blackburn* v. *Smith* 2 Ex. 783.)

(b) So also a party cannot recover back excessive payments after his own dealings have made it impossible to ascertain what was really due. (*Freeman* v. *Jeffries* L. R. 4 Ex. 189. 197.)

(c) Lessee of mines cannot get relief if he works out the mines after full knowledge of circumstances entitling him to set aside the lease (*Vigers* v. *Pike* 8 Cl. & F. 562. 650)

(4) Shareholder cannot repudiate after winding up (*Oakes* v. *Turner* L. R. 2 H. L. 325. See *Pollock* 568. 569)

8. No rescission possible against innocent purchasers for value.

(1) Purchaser in good faith from the fraudulent buyer acquires indefeasible title (*Sale of Goods* Act. Sec. 24)

(2) When there is no contract but goods are merely obtained by fraudulent pretences the fraudulent possessor cannot give

a better title that he himself has, even to an innocent purchaser.

(4) Persons taking gratuitous benefit under a fraudulent transaction, though ignorant of the fraud, are in no better position than original contriver of it (*Scholefield* v. *Templer* 4 De. G. & J. 429)

Lapse of time.

9. Rescission must be within reasonable time *i. e.* **before a lapse of time, after the truth is known, so long that other party may infer waiver of right of rescission.**

(1) Length of time is evidence of acquiescence, only if there is knowledge of facts constituting title to relief (*Lindsay Petroleum Co.* v. *Hurd* L. R. 5 P. C. 241)

(2) Knowledge must be actual, and the wrong-doer cannot make extreme vigilance and promptitude conditions of rescission (*Pence* v. *Langdon* 99 U. S. 581)

(3) Acquiescence need not be shewn by any positive act.

(4) When party in his life time has by acquiescence or his act not disputed transaction his representatives cannot (*Skottowe* v. *Williams* 3 D. F. J. 535)

(5) In the case of a shareholder's contract lapse of time without repudiation is of greater importance as evidence of assent than in most other cases (*Clough* v. *L. N. W. R. Co.*)

See Snell's *Equity* 728-731.

10. Courts of Equity have independent Jurisdiction to cancel instruments for fraud. (See *Snell's Equity* 728-731)

XV. Illegal Contracts.

What contracts are unlawful.

1. Contracts are unlawful and void when they are:

(1) Contrary to positive law.

(2) Contrary to positive morality recognized as such by law.

(3) Contrary to public policy.

2. Contrary to positive law.

(1) Agreement to commit a crime or indictable offence.

(a) If one bind himself to kill a man, burn a house, maintain a suit, or the like it is void (*Shepp. Touchstone* 370)

(b) Often doubtful if any offence is contemplated (See *Mayor of Norwich* v. *Norfolk Ry. Co.* 4 E. & B. 397. *Poll.* 262-264)

(c) Contract void if ulterior object is an offence.

(2) Agreement contemplating civil injury to third persons.

(a) Agreements in fraud of creditors *i. e.* against the principle of equality among creditors are void. (*McKewan* v. *Sanderson* 16 Eq. 234)

(b) Creditors entering into agreement ignorant of the fraud are not bound by any release they give (*Dauglish* v. *Tennent* L. R. 2 Q. B. 49)

(c) Debtor giving fraudulent preference can have no benefit under composition even as against creditor preferred (*Higgins* v. *Pitt* 4 Ex. 312)

(d) Creditor, in fraud of agreement to accept composition, stifulating for a preference to himself can take no advantage from it and loses benefit of composition (*Mallalieu* v. *Hodgson* 16 Q. B. 689)

(e) Secret agreement by creditor to withdraw his opposition to a bankrupt's discharge or to a composition is void (*Higgins* v. *Pitt*)

(3) Cases analogous to fraud on third persons.

(a) Dealings between principal debtor and creditor *to the prejudice of surety.* (*See Indian Contract Act.* 134, 135, 139, 141)

(b) Dealings by agent in the matter of the agency *on his own account* (See *Indian Contract Act.* 215. 216)

(α) Agent for sale cannot become purchaser unless he clearly gave his employer all knowledge he had (*Whichcote* v. *Lawrence* 3 Ves. 740)

(β) Without notice to principal broker for sale cannot become buyer.

(γ) Contract for sale by agent remaining executory, he cannot re-purchase from his buyer except for principal's benefit (*Parker* v. *Mackenna* 10 Ch. 96.)

(δ) Profits, etc. made by agent in the business beyond his ordinary compensation are employer's.

(c) Settlements in fraud of marital rights.

(4) Marriages within prohibited degrees are void contracts.

(5) Agreements statutorily prohibited. As regards Statutes :

(a) When a transaction is forbidden the grounds of the prohibition are immaterial.

(b) Penalty *prima facie* imports prohibition (See *Bensley* v. *Bignold* 5 B. & Ald. 335)

(c) But absence of penalty does not alter express prohibition. (*Sussex Peerage Case* 11 Cl. & F. 148)

(d) What the law forbids to be done directly cannot be made lawful by being done indirectly (*Booth* v. *B. of England* 7 Ch. & F. 509. 540)

(e) Non-observasion of conditions prescribed for the conduct of particular trade avoids agreements if conditions are for general public purposes, but not if for merely adminstrative purposes, (*See Pollock*, 282, 283)

(f) Agreement forbidden, but provided as valid if made is enforceable.

(g) Agreement may be simply *not enforceable*, but not otherwise *unlawful.*

(α) *Void*—destitute of legal effect,

(β) *Voidable*—capable of being affirmed or rejected at the option of parties.

(γ) *Unenforceable*—valid, but incapable of proof pending the fulfilment of certain conditions (*See Anson* 231-232)

As regards wagers. (See *Anson* 186-195)

Wagers. See Anson, 186-195.

(a) A wager is a promise to give money or money's worth upon the determination or ascertainment of an uncertain event.

(b) Wagers void (8 & 9 Vict. c. 109. Sec 18) and money won upon a wager cannot be recovered either from the lower or from a stake-holder, but wagers are not absolutely illegal.

(c) A man may make a wager without violating any law and, if he loses it, pay the money or give a note for the amount.

(d) Consideration for a note so given is in point of law not an illegal consideration, but *no consideration at all*, (*Poll.* 235, cf. *Anson* 192)

(e) Money lent to loser in a wager to repay it is recoverable at common law but irrecoverable by Gaming Act 1892.

(f) Securities for gaining money treated as given for illegal considerations (5 & 6 Will. iv. c. 41. Sec 1)

(g) Lotteries are forbidden by penal statutes.

(h) See *Anson* on the following points:

(α) Marine insurance is a wager.
(β) Life insurance is a wager.
(γ) Stock exchange transactions.
(δ) History of common law as to wager.

Contrary to possitive morality.

(1) Sexual immorality which formerly was, and in theory still is, one of the chief subjects of ecclesiastical jurisdiction is the only, or almost the only kind of immorality of which the common law takes notice as such.

Immoral consideration

(a) Illicit cohabitation, if future, is an illegal consideration (*Ayerst* v. *Jenkins* 16 Eq. 275)

(b) Illicit cohabitation, if past, is no consideration at all but is a mere gratuitous promise binding if made under seal, void if made by parol (*Gray* v. *Matthias* 5 Ves. 286)

(c) Any agreement, innocent in itself, to further an immoral purpose and intended by parties as such is void (*Pearce* v. *Brooks* L. R. 1 Ex. 213)

(2) Separation Deeds.

(a) Covenant by man with woman, with whom he has been illicitly living, to pay her an annuity should she live apart and the annuity to cease otherwise, is valid as a simple voluntary covenant to pay an annuity *but promise is void.*

(b) At common law contract providing for and fixing terms of immediate separation valid, and the wife is allowed to be party to such contract without the usual intervention of a trustee (*McGregor* v. *McGregor* 21 Q. B. D. 424)

Separation deeds.

(c) Covenant not to sue for restitution of conjugal rights cannot be implied, and in the absence of such a covenant the institution of such a suit does not discharge other party's obligations under the separation deed (*Jee* v. *Thurlow* 2 B. & C. 547

(d) Subsequent adultery (unless so expressly provided) does not avoid separation deed (See *Jee* v. *Thurlow*)

(e) Covenant by husband to pay an annuity to wife's trustees so long as they live apart is binding even after dissolution of marriage for adultery (*Charlesworth* v. *Holt* L. R. 9 Ex. 38) unless adultery were contemplated at the time (*Fearon* v. *Earl of Aylesford* 14 Q. B. D. 792)

(f) Subsequent reconciliation and cohabitation avoids separation deed. (See *Westmeath* v. *Salisbury* 5 Bli. N. S. 339)

(g) Separation or terms of separation between husband and wife cannot lawfully be subject of agreement between husband and third person (*Poll* 294) but the husband's execution of a separation deed already drawn up in pursuance of an existing agreement is good and lawful consideration for a promise by a third person (*Jones* v. *Waite* 1 Bing. N. C. 656)

(h) All agreements and provisions for a *future* separation, are void

(α) Whether post-nuptial (*Westmeath* v. *Westmeath* 1 Dow. & Cl. 519)

(β) Or ante-nuptial (*Carteright* v. *Carteright* 3 D. M. G. 982)

(γ) And whether preceding from parties themselves or from another person (*Carteright* v. *Carteright.*)

(i) Deed for immediate separation void if separation does not in fact take place. (*Hindley* v. *Westmeath* 6 C. & C. 200.)

(3) Immoral publications being criminally punishable are not for civil cases to take notice of. The civil Law is determined by and is co-extensive with the criminal law.

4 Contrary to public policy. (See discussion on *public policy* generally, Poll. 297-303)

See Pollock 297 303.

(1) Public policy as touching external relations of the State.

(a) No domiciled (not abroad, *Bell* v. *Reid* 1 M. & S. 726) British subject may contract to do anything detrimental to his country.

International Law.

(b) Trading with enemy without crown license illegal (*Potts* v. *Bell* 8. R. R. 452)

(c) Hostilities against friendly nation cannot be subject of lawful contract (*De Wutz* v. *Hendricks* 2 Bing 314.)

(d) Neutral trade with belligerents is at risk of capture, not unlawful.

(2) Public policy in internal Government.

(a) Agreement for corrupt or improper influence on public officers or legislature void.

(b) Sales of offices void at Common law.

"Trade of felony."

(c) Contract to stifle prosecutions, "make a trade of felony" void (*Keir* v. *Leeman* 6. Q. B. 308)

(d) Maintenance and champerty void (Poll 319-330)

(3) Public policy as to legal duties of individuals.

(a) Father cannot by contract deprive himself of the right to the custody of his children. (*Re Andrew* L. R. 8 A. B. 153)

(b) Custody of children cannot be made a mere matter of bargain in separation deeds; not that the husband can in no circumstances bind himself not to set up his paternal rights (*Swift* v. *Swift* 4. D. F. J. 710

(c) Agreements against social duty void.

(4) Public policy as to freedom of individual action.

Marriage brocage.

(a) Marriage brocage contracts void, also agreements in general restraint of marriage, but particular restraint if not tending to be general, valid.

(b) Agreement to use influence with a testator in favour of a particular person or object is void (*Debenham* v. *Ox.* 1 Ves. Sen. 276)

(c) As regards restraint of trade the general rule is that a man ought not to be allowed to restrain himself by contract from exercising any lawful craft or business at his own discretion and his own way. (*Hilton* v. *Eckersley* 0. E. & B. 47)

(d) Contracts in partial restraint allowable: *e.g.*

(α) Seller of business not to compete with buyer.

(β) Retiring partner not to compete with firm.

(γ) Retiring servant or agent not to compete with master

(e) Partial restraint contracts

(α) Must be founded on a valuable consideration.

(β) Must not enforce universal restriction.

(γ) Must not go as to subject matter or extent in space, etc., beyond what is reasonably necessary for other party's protection.

(f) Contract to serve for life not invalid, but contract for exclusive service must be mutual. (See *Pollock* 345-347)

5. Unlawful agreements generally.

Pigot's case.

(1) Where there are independent promises in the same instrument some lawful and some unlawful, the lawful ones can be enforced. (*Pigots case* 11 Co. Rep. 27)

(2) Part or whole of consideration unlawful avoids whole agreement (*Leake* 409)

(3) Agreement for immediate unlawful object is void.

(4) Where the immediate object is not unlawful, but unlawful intention is known to either party or both, it avoids contract; contract voidable at option where intention is not known (*Poll.* 352-357)

(5) Agreement to pay money under an unlawful agreement is itself void (*Geere* v. *Mare* 2 H. & C. 339) and bond with unlawful condition is wholly void.

(6) Unlawful intention must be proved, even by subsequent conduct, to have existed at date of agreement.

Money paid under unlawful agreement

(7) Money paid or property delivered under an unlawful agreement is irrecoverable and the agreement not set aside at the suit of either party (*Poll.* 361-369)

(a) Unless nothing beyond payment or delivery has been done, or

(b) Unless the agreement was made under such circumstances as, between the parties, if otherwise lawful would make it voidable at option of party seeking relief, or

(c) Unless interests of third persons require it to be set aside.

(8) Where a difference of local laws is in question the lawfulness of a contract is to be determined by the law governing the substance of the contract (*Poll* 369-376)

(9) Where the performance of a contract lawful in its inception is made unlawful by any subsequent event, the contract is thereby dissolved; otherwise, the law at the date of contract prevails.

XVI. Impossible Agreements.

1. Agreement impossible in itself or by Law is void.

(1) That an agreement impossible in itself is void is practically a rule of construction or a presumption only.

(a) The impossibility must be so to a reasonable man.

(b) A thing is *not impossible* because it is *not known to be possible*, at least if it be reasonably conceivable that it should turn out possible.

(2) Inconsistent or repugnant promises contained in the same instrument cannot be enforced. Clerical errors amendable.

Savigny.

(3) Promisor is not excused by relative impossibility *i. e.* not having means of performance. (*Savigny* Obl. i. 384.) He is not excused even when he warrants the acts of third persons not under his control, or of a natural event in itself possible. (*Canham* v. *Barry* 15 C. B. 619) (Would not such a contract be a mere wager? *Poll* 386 Note. *q.*)

(4) When the performance of a contract becomes wholly or in part impossible by law, the contract is to that extent discharged (*Bailey* v. *De Crespigny* L. R. 4 Q. B. 180)

(a) Promise by a servant to discharge a debt due to

his master is void and therefore no consideration for a reciprocal promise. (*Harvey* v. *Gibbons* 2 Lev. 161)

(b) Contract to buy one's own property is void not only for impossibility but for want of consideration.

Atkinson v. Ritchie.

2. Where performance of an agreement is not impossible in its own nature but in fact by reason of the particular circumstances, such impossibility is in itself no excuse for the failure to perform an unconditional contract, whether it exists at the date of the contract or arises from after events. (*Atkinson* v. *Ritchie* 10 East. 530)

(1) Unexpected difficulty or inconvenience short of impossibility is no excuse. (*Jones* v. *S. John's College, Oxford* L.R. 6. Q.B. 115)

(2) Contract impossible of performance by prohibition of a *foreign law* is deemed impossible *in fact*, not in law (*Barker* v. *Hodgson* 3 M. & S. 267) but when the effect of a foreign law is to prevent both parties from performing their respective parts they are excused (*Cunningham* v. *Dunn* 3 C. P. Div. 443)

(3) As regards supervening accident and accidents not contemplated by contract:

Res peritdomino. Story's *Equity* (10 Ed). sec. 102.

(a) Accidental destruction of a leasehold building, or the tenant's occupation being otherwise interrupted by inevitable accident does not determine or suspend obligation to pay rent (*Paradine* v. *Jane* Aleyn 26.)

(b) Such obligation is not affected by the landlord having protected himself by an insurance, which is a purely collateral contract of indemnity (*Leeds* v. *Cheetham* 1 Sim. 146)

(c) Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens (*Bailey* v. *De Crespigny.*)

Bailey v. De Crespigny.

(α) *Vis Major* is often the same as Act of God. It is sometimes the only appropriate term as when the idea is applied to acts of a human sovereign power. (cf. 3 *Justinian* xiv. 2.)

(β) Act of God: "such a direct and violent and sudden and irresistible act of nature" as could not be foreseen, or, if foreseen, prevented by any reasonable precaution under the circumstance (*Nugent* v. *Smith* 1. C. P. D. 423)

"Act of God."

(γ) Act of God: the event must be not merely accidental but overwhelming. So, contrary winds are not Act of God in a charter party.

(δ) Not confined to unusual events: death is an Act of God as regards contracts of personal service, because in the particular case it is not calculable.

(ε) Act of God: an event which, as between parties and for the purpose of the matter in hand, cannot be definitely foreseen or controlled (*Poll* 397)

(4) Specific classess of exceptional cases.

Taylor v. Caldwell

(a) Where the performance of the contract depends on the existence of a specific thing, in the absence of any express or implied warranty that the thing shall exist, the contract is not a positive contract, but subject to the implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor (*Taylor* v. *Caldwell* 3 B. & S. 826.)

(b) Similar excuse for non-performance attaches to contract for personal services of which the performance depends on the life or health of the party promising (*Robinson* v. *Davison* L. R, 6 Ex. 269.)

(α) Rights already acquired under the contract remain intact.

(β) Substituted contract becoming impossible, parties will be remitted to the original contract if their intention can thereby be substantially carried out.

3. Where the impossibility is due to the default of either party (*Roberts* v. *Bury Commissioners* L. R. 5 C. P. 310.):

(1) Default of promisor is no excuse but amounts to a breach of contract.

(2) Default of promisee discharges promisor and may be treated as breach or makes the contract voidable at his option.

See *Lough er's Case* Poll. 413. 414.

(3) Where a contract is in the alternative to do one of two things and one of them is impossible the promisor is bound to perform the possible. (*Da Costa* v. *Davis* 4 R. R. 795) but, when one *becomes subsequently impossible* it is a matter of construction whether the other should be performed.

4. Conditions in Contracts.

(1) Positive or negative—that a thing shall or shall not happen. (*Poll.* 414. 415.)

(2) Conditions may be

(a) Necessary.

(α) By affirmation of a necessity, *e. g.* "If the sun shall rise tomorrow."

(β) By negation of an impossibility, *e. g.* "If he does *not* climb to the moon."

(b) Impossible.

(α) By affirmation of an impossibility *e. g.* "If he shall climb to the moon."

(β) By negation of a necessity. *e. g.* "If the sun shall *not* rise tomorrow."

(3) As regards bonds.

(a) According to the technical *form* a bond is a contract dependent on a negative condition; if *the condition be not fulfilled* the obligation remains. But the real object is to secure the performance of the condition,

and the real meaning of the parties is that the obligor contracts to perform it under the conventional sanction of a penal sum.

Bonds.

(b) A bond with a condition impossible at any time should therefore be treated as a direct covenant to perform what is and, or what subsequently becomes impossible.

(c) When condition is immediately impossible, the obligation is absolute, according to the purely formal construction, but as regards subsequent impossibility the strictly formal view is abandoned and the rule is that when, before performance, "the condition becomes impossible by the Act of God, or of the law, or of the obligee: the obligation and the condition both are void." "The peculiar law thus laid down is recognised by modern authorities" (*Poll.* 418)

XVII. Persons Affected by Contract.

1. **Original parties to a contract must be persons ascertained at the time of the contract.** *Apparent* **exceptions are contracts by advertisements and at sales by auction.**

2. **Creditor can demand performance from the debtor or his representatives; but the creditor cannot demand, nor can the debtor require him to accept, performance from any third person.**

(1) Agency is an *apparent* exception, for even the authority or ratification is nothing else than assent of the principal to be bound, and the contract which binds him is his own contract.

Pollock, 190. 191.

(2) Articles of association and promoters' representations, etc., are *apparent* exceptions. Such cases proceed partly on the ground of a distinct obligation having either been imposed on the company in its original constitution, or assumed by it after its formation; partly on a ground independent of contract and analogous to estoppel, namely, that when any person has on certain terms assisted or abstained from hindering the promoters of a company in obtaining the constitution and the powers sought by them, the company when constituted exercise its powers to the prejudice of that person and in violation of those terms (*Poll.* 190. 191)

(3) With the creditor's consent a debtor may be allowed to substitute another person's liability for his own. This is Novation.

(a) Creditor's consent must be distinct and unambiguous and not inferable from conduct (*Conquest's case* 1 Ch. Div. 334)

(b) See below, *Outlines of Roman Dutch-Law*, summary of *Pothier* on Novation. (cf. *Addison* Vol ii, Ch. xxiii. Sec. 2.)

3. A third person cannot become entitled by the contract itself to demand the performance of any duty under the contract.

(1) Contracts by agents form an *apparent* exception; though the principal acquires rights he did not make in person, yet the agent is only the principal's instrument.

Pothier's *Obligations* 89.

(2) The case of a surety being discharged by dealings between the principal debtor and the sureties is an *apparent* exception (*contra* Pothier, 89) the discharge being the result of a condition annexed by law to the surety's original contract.

(3) Trusts form a *real* exception, if a trust is regarded as a contract between the trustee and the author of the trust.

(a) By the creation of a trust duties are imposed on, and undertaken by, the trustee which persons not parties to the transaction, or even not in existence at its date, may afterwards enforce.

(b) But, although every trust may be said to include a contract, yet it includes so much more, and the purposes for which the machinery of trusts is employed are of so different a kind, that trusts are distinct in a marked way not merely from every other species of contract but from all other contracts as a genus. Hence it is that in English Law trusts form a separate branch of law.

Pollock 195-197, paragraph C.

(4) In a marriage settlement the children of the contemplated marriage are said to be "within the consideration of marriage" and may enforce any covenant for their benefit contained in the settlement.

4. The rule in 3, above, may be thus stated: The agreement of contracting parties cannot confer on a third person any right to enforce the contract.

(1) A third person cannot sue on a contract made by others for his benefit, even if the contracting parties have agreed that he may, and near relationship makes no difference as regards any common law right of action (*Tweddle* v. *Atkinson* 1 B. & S. 393). Much less can a stranger to a contract who has suffered damage by the non-performance of it sue the defaulting party as on the contract (*Playford* v. *United Kingdom Electric Telegraph Co.* L. R. 4 Q. B. 706)

(2) In equity, when two persons, for valuable consideration as between themselves, contract to do some act for a non-party third person's benefit:

(a) That person cannot (except probably *re* provisions for children in marriage settlements) enforce the contract against either contracting party, at all events if not nearly and legitimately related to one of them (*Colyear* v. *Mulgrave* 2 Kee. 81)

(b) But either contracting party may enforce it against the other although the person to be benefited had nothing to do with the consideration (*Davenport* v. *Bishopp* 2 Y. & C. 481)

(3) Apparent exceptions to *Tweddle* v. *Atkinson*.

Gregory v. Williams Page v. Cox.

(a) *Gregory* v. *Williams* (3 Mer. 582): A third person for whose benefit a contract is made may join as co-plaintiff with one of the contracting parties against the other for the enforcement of the arrangement agreed upon.

(b) *Page* v. *Cox* (10 Ha. 163): A provision in partnership articles that a partner's widow should be entitled to his share of the business might be enforced by the widow.

Regarding these cases Pollock (page 201) suggests that in each instance there was an underlying trust, and "that there is no real and allowed authority for holding that rights can in general be acquired by third parties under a contract, unless by the creation of a trust."

(4) Right to sue vested in third person for the sake of convenience.

(a) *e. g.* Where partners create by stipulation penalties to be paid by any partner who breaks a particular stipulation they may empower one partner alone to sue for the penalty (*Radenhurst* v. *Bates* 3 Bing. 463. 470) the penalty being payable of course to the members of the firm *minus* the offender.

(b) But contracting parties cannot confer any right of action on the contract on a person who is not a party (cf. *Gray* v. *Pearson* L. R. 5 C. P. 568)

5. The subject of assignment of contract is here noticed under the following heads (As in *Anson*, 233-254)

(1) Assignment by act of the parties.

Classification.

(a) Assignment of liabilities.

(b) Assignment of rights.

(α) At common Law.
(β) In Equity.
(γ) By Statute.

(2) Assignment of rights and liabilities by operation of Law.

(a) Assignment of obligations upon the transfer of interests in land.

(α) Covenants affecting leasehold interests.
(β) Covenants affecting freehold interests.

(b) Assignment of obligation upon marriage.

(c) Assignment of obligation by death.

(d) Assignment of obligation by bankruptcy.

6. Assignment by act of the parties: liabilities.

(1) Liability on a contract cannot be transferred so as to discharge the person or estate of the original contractor, (*Robson and Sharpe* v. *Drummond* 2 B. & Ad. 303) unless the creditor agrees to accept a substituted debtor.

(2) Rights under a contract cannot be transferred if they are coupled with liabilities or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised *by him only in whom he actually confided* (*Pollock* 454. Above case).

7. Assignment of rights: at common Law.

Common Law.

(1) Benefit of a contract cannot be assigned (except by the Crown) at Common Law so as to enable the assignee to sue in his own name. He must sue in the name of the assignor or his representatives (*Powles* v. *Innes* 11 M. & W. 10).

(2) Benefit of contract is assignable, in cases of debt, by a substituted agreement validly entered into (*Fairlie* v. *Denton* 8 B. & C. 400).

(3) Assignee can sue in his own name in the case of a negotiable instrument (*Liversidge* v. *Broadbent* 4 H. & N. 603)

8. Assignment of rights: in Equity.

Protection of Debtor.

(1) Title by assignment is not complete as against the debtor without notice to him, and a debtor who performs his contract to the original creditor without notice of assignment is thereby discharged (*Stocks* v. *Dobson* 4 D. M. & G. 15). (*Williams* v. *Sorrell* 4 Ves. 389.) Protection of debtor is the principle of the rule.

Notice

(a) Notice is not necessary to complete the assignee's equitable right as against the original creditor himself or as against his representatives including assignees in bankruptcy (*Burn* v. *Carvalho* 4 M. & Cr. 690)

(b) Equitable titles have priority according to priority of notice (*Stocks* v. *Dobson*) i.e. claims of competing assignees or incumbrancers rank as between themselves not according to order in date of assignments, but according to dates at which they have respectively given notice to debtor (*Dearle* v. *Hall*, *Loveridge* v. *Cooper* 3 Russ. 1, 38, 48)

(c) Doctrine of notice applies to rights created by interest as well as to those created by contract, but not to interest in land,

(2) "Assignee of an equity is bound by all the equities affecting it," *i. e.* he takes subject to all defences as might have prevailed against the assignor. (*Mangles* v. *Dixon* 3 H L. C. 702)

(a) The rule may be excluded by agreement of original contracting parties (*Exparte Asiatic Banking Corporation* 2 Ch. 391).

Poll. 214-215.

(b) It is questionable whether such a stipulation would be applicable when the original contract is not merely subject to a cross claim but voidable (*Pollock* 214-215.)

9. Assignment of rights: By statute.

(1) Assignee of any debt or legal *chose in action* has all legal rights and remedies (36 & 37 Vict. C. 66)

(2) Policies of life insurance an assignable (30 & 31 Vict. C. 144)

(3) Policies of marine insurance an assignable. No notice required (31 & 32 Vict. 86)

(4) Shares in companies are assignable (8 & 9 Vict. C. 16 ; 25 & 26 Vict. C. 89)

(5) Mortgage debentures are assignable (28 & 29 Vict. C. 78)

(BILLS OF EXCHANGE & BILLS OF LADING ARE NOTICED AT THE END OF THIS CHAPTER.)

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10. Assignment of rights and liabilities by operation of law.

Transfer of Shares.

(1) Shares in ordinary partnerships and unincorporated companies may be made transferable at common Law. But this is no anomaly since "the transfer of a share in a partnership at common law is strictly not the transfer of the outgoing partner's contract to the incoming partner but the formation of a new contract" (*Pollock*, 221)

(2) Covenants affecting (See *Pollock* 223-226) leasehold run with the land and not with the reversion—if they concern the thing demised *e.g.*, covenants to repair but not if purely personal.

Pollock on Keppel v. Baily.

(3) As regards freehold interests the common law view is (See *Keppel* v. *Baily* 2 M. & K. 535) that incidents of a novel kind in the form of easements or of obligations cannot be devised and attached to property at the arbitrary discretion of private owners. Burden of restrictive covenants is not to run with the land. On *Keppel* v. *Baily* Pollock observes, "Lord Brougham fell into the mistake of supposing that the covenant must be operative in Equity, if at all, by way of giving effect to an intention to impose permanent burdens unknown to the law. Equity does not trouble itself to assist intentions which have no legal merits.....The decision of *Keppel* v. *Baily* was erroneous on this point." p. 230

Tulk v. Moxhay.

(4) But in equity some restrictive covenants are enforced, *e.g.* "Only such a covenant as can be complied with without expenditure of money will be enforced against assignee on the ground of notice" (*Haywood* v. *Brunswick Building Co.* 8 Q. B. D. 410) In *Tulk* v. *Moxhay* (2 Ph. 777) it is laid down that "the question is not whether the covenant runs with the land, but whether a party shall be permitted to use his land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased" (See *Pollock*, 228-230).

(5) Representatives of deceased acquire all contractual rights which affect personal estate, if not dependant on personal skill or service. (*Anson*, 253)

11. Bills of Exchange (See *Chalmers' Digest*) and Bills of Lading.

(1) Assignability distinguished from Negotiability.

Assignability and negotiability distinguished.

(a) Assignee of a contract may be met with any defence which would have been good against his assignor: not so in the case of negotiable instruments.

(b) Assignee of a contract must prove his own title and that of the intermediate assignees, if any, and for this purpose must inquire into the title of his immediate assignor: but in the case of negotiable instruments the holder is not prejudiced by defects in his assignor's title.

(c) The essential features of negotiability are:

(α) Absolute benefit of contract is attached to ownership of document, which according to ordinary rules would be only evidence of contract.

(β) Proof of ownership is facilitated by mode of transfer by endorsements.

(γ) *Bona fide* possessor of instrument is presumed to be true owner.

(d) In the case of negotiable instruments, further consideration is presumed, and the doctrine of consideration does not apply to them as to contracts (See *Anson* 240-247.)

(e) Notice of assignment is not required.

Bills of Lading.

(2) A bill of Lading is a receipt by the master of a ship for goods bailed to him for delivery to a party or his assigns; of this receipt three copies are made, each signed by the master, one is kept by the consignor, one by the master, and one by the other party, the consignee, who thereby acquires a property in the goods which can only be defeated by the unpaid vendor's right of stoppage *in transitu* (*Anson* 247)

On stoppage in transitu see English *Sale of Goods Act*.

(a) Consignor assigning bill of lading by indorsement to a holder for value, such holder has a better right than what consignee possessed. Holder's right overrides stoppage *in transitu*.

(b) By Law Merchant holder's rights are proprietary only and by statute (18-19 Vict. C. 111) are contractual also, but not (*Gurney* v. *Behrend* 3, E. & B. 634) independent of assignor's title.

(c) Bills of lading transfer by assignment rights *in rem*: bills of exchange rights *in personam* (*Anson* 248)

XVIII. Evidence and Construction.

Chief duty of interpretation.

1. The Chief duty of interpretation is to find out the legal effect of the promise *i.e.* **the reasonable expectation to which the promisor entitled the promisee.**

(1) Measure of the contents of the promise usually coincides both with the actual expectation of the promisor and with the actual expectation of the promisee.

(2) But this being not a constant or a necessary coincidence the rule of judicial interpretation has always been. that "every

assertion or promise or declaration of whatever kind is to be interpreted on the principle, that the right meaning of any expression is that which may be fairly presumed to be understood by it" (Whately on Paley *apud* Pollock, 233)

2. "For the purposes of evidence the most important distinction is not between express and tacit significations of intention but between writing and all other modes of manifesting one's intent" *(Pollock,* 334)

(1) The Law prohibits generally, if not universally, the introduction of parol evidence to add to a written agreement, or to vary it (*Martin* v. *Pycroft* 2 D. M. G. 785-795)

Extrinsic oral evidence admissible when.

(2) But extrinsic oral evidence is admissible in relation to written contracts and contracts under seal, as regards :—

(a) *Existence of document.* Parol evidence, in simple contracts, is necessary to establish identity of party, and to supplement the writing where it only constitutes a part of the contract (*Harris* v. *Rickett* 4 H. & N. 1) or where the connexion of parts does not appear from documents (*Long* v. *Millar* 4 C, P. D. 456)

(b) *Fact of agreement.* Though evidence to vary the terms of an agreement in writing is *not* admissible, yet *evidence to show that there is not an agreement at all is admissible e.g.* fact of a condition interfering with operation of the contract (*Pym* v. *Campbell* 6 E. & B. 374)

(c) *Terms of the contract.*

Jervis v. Berridge.

(α) Evidence of supplementary terms previously omitted is admissible, not to vary but to complete the written contract (*Jervis* v. *Berridge* 8 Ch. 351)

(β) Evidence may be given of a verbal agreement collateral to a contract proved and consistent with tenor of written agreement (*Erskine* v. *Adeane* 8 Ch. 756)

(γ) Evidence may be given of explanation of terms, to clear mistakes of identity, (*Wake* v. *Harrop*, 6 H. & N. 768) subject matter (*Macdonald* v. *Longbottom* 1 E. & E. 977) and meaning and application of phrases (*Burges* v. *Wickham* 3 B. & S. 669)

(δ) Usage of a trade or of a place may be proved, and by such evidene new terms, consistent with general tenor incorporated into the contract (*Hutton* v. *Warren* 5 M. & W. 466. See cases cited in *Pollock* 240-241 and *Anson* 264-265)

(ε) In the application of equitable remedies, the granting or refusal of specific performance, the rectification of documents or their concellation, extrinsic evidence is admissible (*Pollock* 491-501 and *Anson* 266-267)

2. It is a general rule of construction that effect is to be given to the intention of the parties collected from their expression of it as a whole.

(1) Words are to be understood in their plain and literal meaning, unless, from the whole tenor of the instrument, a definite meaning can be collected which gives a broader interpretation to specific words than their literal meaning would bear.

(a) Court corrects mistakes obvious on the face of the document,

(b) Verbal blunders may be so corrected. *Mala gramt matica non vitiat chartam.*

Pollock, 243.

(2) "Words are to be a taken, in case of doubt against the person using them." This maxim though lightly treated in *Taylar* v. *Corporation of S. Helens* 6 Ch. 264. 270 is (*says Pollock*, p. 243) in substance classical and seems reasonable, and on the whole, stands approved on condition of being used to turn the scale when there is real doubt, not to force a less natural meaning on words which have a more natural one.

(3) As regards time and penalties the following are the rules of law and equity (*Pollock* 484-491. *Anson* 269-271

Time and penalties.

(a) The common law rule was, that "time is of the essence of the contract" but the rule of equity, "which is now the general rule of English jurisprudence, is to look at the whole scope of the transaction to see if the parties really meant the time named to be of the essence of the contract or only contemplated a reasonable time" (*Pollock*, 486) and the Judicature Act provides that time stipulations "shall receive in all courts the same construction and effect as they would have heretobefore received in equity."

(α) The act applies mostly to purchase and sale of lands.

(β) In mercantile contracts time stipulations are still "of the essence of the contract (*Reuter* v. *Sala* 4 C. P. D. 249).

(b) Penal provisions inserted in instruments to secure the payment of money or the performance of contracts will not be literally enforced, if the substantial performance of that which was really contemplated can be otherwise secured. Hence, equity compels a mortgagee to reconvey on being repaid his principal, interest and costs. (*Parkin* v. *Thorold* 16 Beav. 59. 68)

Liquidated damages.

(c) Where the terms of a contract specify a sum payable for non-performance, it is a question of construction whether this sum is to be treated as a *penalty* or as *liquidated damages*. (The amount recoverable in case of a penalty is not the sum named, but the damage actually incurred; in liquidated damages it is the sum so named. *Anson*, 270.)

(α) In the case of a bond there is no difficulty of construction.

(β) If a contract is for a matter of *uncertain* value, and a fixed sum is to be paid for breach of one or more of its provisions, this sum may be recovered as liquidated damages. (*Law* v. *Redditch Local Board* 1 Q. B. 127)

(γ) If a contract is for a matter of *certain* value, and on breach of it a sum is to be paid in excess of that value, this is a penalty and not liquidated damages (*Astley* v. *Weldon* 2 B. & P. 245)

(δ) If a contract contains a number of terms some of which are of certain and some of uncertain value, and a fixed sum is to be paid for the breach of them, this is a penalty (*Kemble* v. *Farren* 6 Bing. 147)

XIX. Discharge of Contract.

[The excellent exposition of the subject in *Anson* 272-327 is largely made use of in this chapter.]

1. A contract is discharged.

Modes of discharge.

(1) By mutual agreement, which includes.

- (a) Waiver.
- (b) Substituted agreement.
- (c) Condition subsequent.

(2) By performance, which includes.

- (a) Payment.
- (b) Tender.

(3) By breach.

- (a) By renunciation of liabilities.
- (b) By impossibility through party's act.
- (c) By failure of performance.

(4) By impossibility of performance. (See *Pollock* 380-419, and above Ch. xvi. of these *Outlines*)

(5) By operation of Law, such as.

- (a) Merger.
- (b) Loss or alteration of instrument.
- (c) Bankruptcy.

2. Discharge by mutual agreement.

(1) A waiver or rescission of the contract is formed of mutual promises, and *the consideration for the promise of each party is the abandonment by the other of his rights under the contract.*

Rules of waiver.

- (a) Where contract is *executory* it may be waived before breach without a deed.
- (b) But an *executed* contract cannot be discharged by parol waiver. *Foster* v. *Dawber* 6 Exch. 851)
- (c) Holder of a bill of exchange can waive and discharge his rights by a written renunciation or by delivery of bill to acceptor (See *Chalmers' Digest* pp. 212. 213)

(2) An alteration of parties or of terms substitutes a new contract, but the substituted contract, as implying a discharge, must not be a postponement of performance. (On *Novation* See *Pollock*, 191 and *Addison*. [3rd Edition is here referred to] Ch. xxiii. § 2, also *Pothier* below).

(3) Parties may agree in the contract to dissolve it on the occurrence of a specified event. This is a *condition subsequent e. g.* condition in a bond, Charterparty risks, etc., (See *Pollock*, 416-419; and above Ch. xvi.)

3. Discharge of contract by performance.

(1) Payment may be by performance (*Anson*, 283)

(a) Of an original contract.

(b) Of a substituted contract.

(c) Of a contract in which payment is the consideration for the renunciation of a right of action.

Tender.

(2) Tender is attempted performance of a promise to do something or of a promise to pay something. Goods may be tendered (on a contract of sale) and money.

(a) Tender does not discharge debt but may form a good defence to an action. Debtor must continue, when tender is not accepted, ready and willing to pay.

(b) Tender must be.

(α) Legal tender *e.g.* coinage of the mint or currency note as provided for by statute.

(β) Exact as to time, place and mode of payment.

(γ) Offer of money produced and accessible to the creditor, not necessarily the exact sum but such sum as the creditor can take without having to give change (*Anson*, 285)

(δ) Not clogged with conditions (*Addison* 1284-1291)

(3) Appropriation of payments. See below under *Illustrative Ceylon cases.*

4. Discharge of contract by breach has the effect of conferring a right of action on the party injured and (unless the injured party chooses not to regard the breach as one, but to continue to carry out the contract) of discharging injured party from such performance as may still be due from him. (*Anson* 286)

(1) Rights of party discharged are

(a) To consider himself exonrated from any further performance due from him (*Behn* v. *Burness*)

(b) To sue at once on contract for damages, (*Cort* v. *Ambergate Railway Co.* 17 Q. B. 127)

(c) To treat claim to money payment for performance under contract as due upon a new contract (*Planchè* v. *Colburn* 8 Bing. 14)

Hochster v. Delatour

(2) Renunciaton of contract by one party, however long before time for performance, discharges other, if he so choose, and entitles him at once to sue for breach (*Hochster* v. *Delatour* 2 E. & B. 678)

(a) But the renunciation must deal with the entire performance (*Johnston* v. *Milling* 16. Q. B. 460)

(b) And where promisee rejects renunciation, the contract remains in force for the benefit, and at the risk, of both parties, and if anything occur to discharge it from other causes, promisor may take advantage of such discharge (*Avery* v. *Bowden* 5 E. & B. 714)

(3) If, before time for performance, promisor places himself in a situation in which he cannot fulfil the contract, promisee may sue as for breach without waiting for the stipulated time (*Lovelock* v. *Franklyn* 8 Q. B. 371; *Synge* v. *Synge* 1 Q. B. 466)

(4) Renunciation during performance exonerates injured party forthwith from further obligations and entitles him at once to sue (*Cort* v. *Ambergate R. Co.*)

(a) Impossibility during performance has a similar effect (See *Anson*, 294)

(b) When a special contract is in existence and open, plaintiff cannot sue on a *quantum meruit* for work done. (In *Planché* v. *Colburn*; see *Anson*, 288 and *Pollock*, 252 on *quantum meruit*)

Failure of performance.

(5) Discharge of contract by failure of performance may be:

(a) Discharge by failure of *concurrent condition i.e.* a condition that the performance of both parties' promises shall be simultaneous or that each party shall be ready and willing to perform his promise at the same time (*Pollock*, 247 *Anson*, 295).

(b) By virtual failure of consideration.

(c) By breach of *condition precedent i.e.* not suspending fulfilment but vital to effect discharge, (*Pollock*, 249-251 and *Anson* 296 on *condition precedent*. See a lengthy and lucid treatment of *conditions* in this connection in *Anson* 303-308)

Divisible promises.

(6) Divisible promises, order, discontinuous performance.

(a) Contract fulfillable *only* as whole is said to be entire: contract of which the performance can be so separated, so that failure in one part affects the parties' right as to *that part* only, is said to be divisible (*Pollock*, 248)

(b) But as a general rule all agreements must be considered *entire*, though it is not impossible for parties so to frame an agreement that there may be a specific performance of a part (*Wilkinson* v. *Clements* 8 Ch. 96. *Pollock* 251-252)

(c) It is not yet settled whether failure to deliver the first or any subsequent instalments is or is not presumed, in the absence of any special indication of the parties' intention, to go to the whole of the consideration and entitle the buyer to refuse acceptance of any further deliveries (*Pollock* 253)

Conflicting Cases.

(d) There are conflicting cases (*Pollock* 253-258 and *Anson* 299-302)

(α) *Freeth* v. *Burr* (L. R. C. P. 208.) *Failure to pay* for an instalment held to create right to repudiate contract.

(β) *Hoare* v. *Rennie* (5 H. & N. 19.) *Failure to deliver* a complete monthly instalment held to discharge, buyer.

(γ) *Honck* v. *Muller* (7. Q. B. D. 92.) *Failure to accept* one of three monthly instalments held to discharge seller.

The question whether failure of performance is a renunciation on defaulter's part, or whether the other party considers default as going to the root of the contract, must be answered by the circumstance of each case (*Anson*, 300.)

Pollock on Freeth v. Burr.

(e) "As a positive test the rule of *Freeth* v. *Burr* is doubtless correct; that is, a party who, by declaration of conduct, evinces an intention no longer to be bound by the contract, entitles the other to rescind, and this whether he has or has not, apart from this, committed a breach of the contract going to the whole consideration. But it seems doubtful whether the test will hold negatively." (*Pollock*, 255-256.)

(f) The tenor of the authorities seems to be that "non-payment will not as a rule justify refusal to perform on the other side, unless there be something more in the circumstances by which it is shown to amount to repudiation" (*Pollock*, 256)

(7) Right of action arising from breach of contract may be discharged:

(a) By release, under seal.

Accord and Satisfaction.

(b) By Accord and Satisfaction *i. e.* an agreement not necessarily under seal, the effect of which is to discharge the right of action possessed by one of the parties to the agreement. There must be consideration for the promise of the party entitled to sue and also it must be executed in his favour (*Anson* 315. *Pollock*, 177. *Addison* 1209 *et sqq*)

(c) By the judgment of a court of competent jurisdiction.

(d) By lapse of time. (The subject of *Prescription* affecting remedy is dealt with at length in *Pollock* 622-628)

5. Impossibilities arising subsequently to formation of a contract excuses performance, if the promisor makes the performance of his promise conditional upon its continued possibility. (*Anson* 322. The subject is exhaustively dealt with in *Pollock*: See Ch. XVI of these *Outlines*)

6. Rules of Law affect the operation of Contract.

Merger.

(1) By merger, *e. g.* the contents of a simple contract are merged in a deed to the same effect, between the same parties.

(2) By alteration or loss of a written instrument, (*Anson* 327-328.)

(a) The alteration must be material.

Alteration and loss of Document.

(b) It must be made by a party to the contract or by a stranger while the document is in possession of such party, and for his benefit.

(c) It must be made without the other party's consent.

(d) Loss affects rights of parties in so far as it may occasion difficulty of proof.

(3) A bankrupt's order of discharge releases him from all debts provable under the bankruptcy.

ILLUSTRATIVE ENGLISH CASES.

Note—The cases summarised here are some of those quoted in *Pollock* or in *Anson* or both. References to reports, being mostly given in the preceding pages, are omitted here and, instead, the places where the cases merely occur or are discussed in *Pollock* or *Anson* or in both are indicated. The arrangement is according to subjectmatter. The names of the cases are in the margin.

Offer and Acceptance.

Townson v. Tickel. (1) Assent to an offer is needed to make it a contract; a man cannot be forced to accept a benefit. (*Anson*, 13.)

Williams v. Carwardine. (2) An advertisement is an offer accepted by performance of the conditions, and motive of compliance is immaterial. The principle of the case is questioned in *Anson*, 16-37. and *Pollock*, 20. "The decision seems to set up a contract without any *animus contrahendi*, and without any real consideration. Such a decision cannot now be received" (*Poll.* 20)

Gibbons v. Proctor. (3) This supports *Williams* v. *Carwardine*, but appears "to be wrongly decided" (*Anson*, 17 *note*). An Ameican case *Fitch* v. *Snedaker* (*Anson*, 16) lays down that a reward cannot be claimed by one who was in ignorance of the offer.

Felthouse v. Bindley. (4) Mental acceptance ineffectual. (*Anson*, 21.) Acceptance will not relate back though retrospective in form. (*Poll.* 73)

Carbolic Smoke Ball Case. (5) Performance of a condition is a sufficient acceptance without notification. (*Anson*, 22)

Denton v. G. N. R Co. Warlow v. Harrison. (6) Instances of contract made by acceptance of a general offer, such acceptance being signified by performance of its terms, (See *Outlines of English Law* above Ch. i. 8.) The cases are discussed in *Pollock* 15-19.

Household Fire Ins. Co. v. Grant. (7) An offer made by post invites an answer by post; a complete contract is made at the time when the letter of acceptance is posted, though there be delay in delivery. (*Poll.* 35-37)

Adams v. Lindsell. (8) Offer is open for acceptance during time prescribed by offeror, or reasonable time; an acceptance in the mode indicated concludes offer (*Anson*, 24)

Henthorn v. Fraser. (9) A written offer delivered by hand was accepted by post; the contract was held concluded from the moment of such acceptance (*Poll* 36-37 *Anson* 26)

*Xenos v. Wickham. (10) A deed, to make which the obligee had consented, is binding on obligor before it comes into obligee's custody, even before he knows of it. (*Anson*, 32.) The ordinary rules of proposal and acceptance do not apply to deeds (*Pollock* 47-48.)

Byrne v. Van Tien Hoven. (11) Revocation after acceptance is too late. An uncommunicated revocation is practically no revocation at all. (*Pollock*, 27-28. *Anson*, 32-33)

Dickinson v. Dodds. (12) Tacit revocation disscussed in *Pollock* 28-30. *Anson* 34-36. Proposer's conduct was held a sufficient revocation. The case "is no authority now for the validity of an uncommunicated revocation, but it riases the question, as yet unanswered by judicial decision, as to the source whence notice of revocation must come" (*Anson*, 36)

Consideration. Above, *Outlines*, Ch. viii.

Currie v. Misa. (1) Consideration defined, (*Anson*, 74. *Poll*, 164)

Rann v. Hughes overruling Pillans v. VanMerop. (2) English law affords no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration (*Pollock*, 166. *Anson*, 76-77)

Tweddle v. Atkinson. (3) No stranger to the consideration can take advantage of a contract, though made for his benefit (*Anson*, 80. *Pollock*, 199)

Wade v. Simeon. (4) A promise not to do what a man legally cannot do is an unreal consideration. (*Anson* 85)

Pinnel's Case. (Cumber v. Wane.) (5) The payment of a smaller sum in satisfaction of a larger is *not* a good discharge of a debt; what is done must be different. (*Poll.* 177. *Anson*, 86-87.) "It is strange that this rule should still be spoken of as the rule in *Cumber* v. *Wane*" (*Anson*, 86. *note* 1)

Fitch v. Sutton, Good v. Cheesman. (6) In composition with creditors the consideration is not the promise to pay or the payment of a portion of the debt, but the substitution of a new agreement with different parties for a previous debt. (*Pollock*, 178. *Anson* 89-90.)

Shadwell v. Shadwell. Scotson v. Pegg. (7) The question is discussed "that on principle the performance or promise to perform an outstanding contract with a third party is not of itself a consideration for a promise." (*Anson* 90-93. *Pollock* 175-177).

Lampleigh v. Braithwait ("Past consideration" (8) Consideration moved by previous request is discussed in *Pollock* 167-168. *Anson* 95-105 (See above, *Outlines* Chap. viii.)

Eastwood v Kennyon. overruling Lee v. Muggeridge and other cases. (9) "A mere moral obligation not conferred at the request of defendant" is not a good consideration. "A question still not free from uncertainty is whether a past benefit is in any case a good consideration for a subsequent promise. On our modern principles it should not be, and it is admitted that it generally is not." (*Pollock*, 167. *Anson*. 105.)

Capacity of Parties.

Williams v Moor. (1) At Common Law party on attaining majority may ratify contracts of infancy, including contracts arising on accounts stated (*Poll.* 58. *Anson*, 108.)

Valentini v. Canali. (2) An infant who has paid money and taken benefit under the contract cannot recover the money so paid (*Anson*, 113.)

Ryder v. Wombwell. (3) An infant may bind himself by contract for necessaries. (*Poll*, 66; *Anson*, 116-117. See above *Outlines*, Ch. ii. 3)

Jennings v. Randall. Burnard v. Haggis. (4) An infant is not liable for wrong where the claim is in substance *ex contractu*; but is liable for wrong apart from contract though touching the subject matter of a contract. (*Poll*, 72-73. *Anson*, 117-118.)

(Molton v. Camroux.) (Mathews v. Baxter.) Imperial Loan Co. v. Stone. (5) Contract of lunatic or drunken person is voidable, if at the time of contracting the other party knew of the insanity or inebriety and the promisor was not aware of what he was agreeing to. (*Poll* 89-91 *Anson* 121.)

Bickerton v Burrell. Rayner v. Grote. (6) Pretended agent connot sue, as principal, on the contract. The contrary decision in *Fellowes* v. *Gwydyr* "is not law" (*Poll.* 101-103)

Schmaltz v. Avery. (7) Where a man professes to contract as agent without naming principal he may declare himself as principal and sue as such (*Poll.* 105-107.)

Ashbury Railway Carriage Co. v. Riche. (8) Powers of statutory corporations are limited to purposes of incorporation (*Anson*, 119 *Poll* 117.)

Mistake.

Foster v. Mackinnon. Thorough-good's Case. (1) Deed "where mind of the signer did not accompany signature" void (*Poll*, 443-445 *Anson*, 130-131.)

Boulton v. Jones. Mitchell v. Lapage. Cundy v. Lindsay. (2) A party has the right to insist on the contract being with a *certain* person and no one else in his place. (*Pol.* 450-452. *Anson*, 133.)

Kennedy v. Panama Mail Co. (3) Identity of subject-matter of contract must be maintained (*Pollock*, 457.)

Smith v. Hughes. (4) Mistakes of buyer and seller discussed under the case in *Pollock*, 467-468 *Anson* 137-140.

Bingham v. Bingham. (5) Purchasing one's own property by mistake (*Poll* 473-474.)

Cooper v. Phibbs. (6) The rule as to *ignorantia juris*. (*Pollock*, 474-475.)

Misrepresentation.

Behn v. Burness. (1) At common law representation was of no effect unless it was fraudulent or a part of the contract (*Anson*, 146-150 *Poll*, 511.)

Bannerman v. White. (2) Breach of a representation which amounts to a preliminary condition discharges the contract (*Anson* 150-152.)

Wilde v. Gibson. (3) *Re* non-disclosure of defeet of title not known to vendor (*Poll*, 527-528.)

Redgrave v. Hurd. (4) See above, *Outlines*, Ch. X. and *Anson*, 154-155.

Fraud.

Derry v. Peek. (1) A statement made with an honest belief in its truth cannot render the maker liable for deceit by agent's misrepresentation, which is a ground for rescinding a contract, distinguished from fraudulent misrepresentation, which is a ground of an action for deceit (*Anson* 171-172.) In *Derry* v. *Peek* were decided also that :—

(a) There is no general duty to use any degree whatever of diligence in ascertaining facts, as distinct from bare belief. in making positive statements intended for other people to act upon (*Poll.* 504.)

(b) See above, *Outlines* Ch. xi 6. (3)

(c) False representation believed to be true by the party making it will not give rise to the action of deceit (*Anson* 145.)

Peek v. Gurney. (2) Mere non-disclosure is not fraud, there must be active misstatement of fact (*Anson*, 166-174.) and representation must be made with intention of being acted upon.

Polhill v. Walter. (3) Where representation is untrue to maker's knowledge he is liable for deceit. (*Anson* 174. 175. 348.)

Duress and Undue Influence.

Cumming v. Ince. (1) In a case of menace threat must be of something unlawful. (*Poll.* 577. 578.)

Smith v. Kay. (2) Where there is no presumption of undue influence in matter of gifts, absence of fair dealing may be proved by party suing. (*Poll.* 595 *Anson.* 181. 182.)

Allcard v. Skinner. (3) Gift affirmed by subsequent conduct cannot be recalled on grounds of undue influence (*Poll.* 593. 594 *Anson* 182. 183)

Moxon v. Payne. (4) Such affirmation not valid until cessation of influence that induced the gift. (*Anson*, 183 *Poll.* 618)

O'Rorke v. Bolingbroke. (5) Impeached transaction with expectant heir upheld (*Poll* 612. See *Evans* v. *Llewellyn* in *Poll.* 613.)

Unlawful Agreements.

Mayor of Warwick v. Norfolk R. Co. (1) Given at length in *Pollock* 262-264.

Hunt v. Hunt. (2) On marriage separation deeds. See also *Wilson* v. *Wilson* in *Pollock*, 290-294.

Egerton v. Earl Brownlow. (3) Limitations of life-interest by a will are void as being against public policy. (*Pollock* 300-303.)

Pots v. Bell. (4) Trading with enemy without license from Crown is illegal. (*Poll.* 304.)

Williams v. Bayley. Keir v. Leeman. (5) "You shall not make a trade of felony" (See *Pollock* 314. 315)

Mitchell v. Reynolds. Maxim Nordenfelt Co. v. Nordenfelt. (6) The law discountenances agreements of unlimited or general restraint of trade. (*Poll* 339. 340.) The case of the *Nordenfelt* gun trade is given in *Anson* 204-205

Atkinson v. Denby. (7) Though parties be *in pari delicto*, money is recoverable if paid under circumstances of coercion (*Poll* 307 *Anson* 217)

Waugh v. Morris. (8) Intention of parties to an unlawful contract is as a rule immaterial unless the contract can be and is performed in a legal way. (*Anson* 211-212 *Poll* 360. 361)

Kearly v. Thompson. Taylor v. Bowers. Barclay v. Pearson. (9) Question of money or goods paid under a partly performed illegal contract being recoverable is discursed in *Anson* 218. 219

Parties and Assignment.

Lumley v. Gye. Bowen v. Hall. (1) A man who induces one of the parties to a contract to break it, intending thereby to injure the other, or to obtain a benefit for himself, does that other an actionable wrong. (*Anson* 226. 227)

Tweddle v. Atkinson. (2) Contract cannot confer rights on a third party (*Anson* 228 *Poll*, 199. 200)

Gregory v. Williams. Page v. Cox (3) Apparent exceptions to *Tweddle* v. *Atkinson* (*Pollock*, 200 203)

Tulk v. Moxhay. (4) Rule of equitable enforcement of restrictive covenants (*Anson* 251-252. See above, *Outlines* Ch. xvii)

Liversidge v. Broadbent. (5) *Anson* 235-236

Evidence and Interpretation.

Pym W. Campbell. (1) Evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible. (*Anson*, 260-261)

Jerrin v. Berridge. (2) Evidence of supplementary terms is admissible to complete contracts. (See above, *Outlines* Ch. xviii. *Poll* 236-237. *Anson* 251-252)

Burgess v. Wickham. (3) Admissibility of evidence *re* application of phrases. (*Anson* 263 264)

Kemble v. Farren. (4) *Anson* 271-272

Discharge of Contract.

Foster v. Dawber. (1) Executed contract connot be discharged except under seal or by performance (*Anson*, 275)

Nugent v. Smith. (2) Definition of "Act of God." (*Anson*, 279 *Poll.* 396)

Hull v. Heightman. (3) Rule about *Quantum meruit* (*Anson*, 288)

Hochster v. Delatour. (4) Renunciation before performance is a discharge (*Anson* 290 291)

Gloholm v. Hays. Bettini v. Gye (5) Vital conditon.
Warranty. (*Anson* 304 305)

Paradine v. Jane. (6) Illustrating impossibility of performance. (*Poll.* 393-395 *Anson* 322-323)

Taylor v. Caldwell. (7) When the performance of a contract depends on the continued existence of a specific thing, its destruction, from no default of either party, operates as a discharge. (*Anson*, 324 *Pollock*, 397—399. 405. 409. 417. 419.)

Robinson v Davison. (8) Incapacity for personal service discharges contract which has for its object such personal service. (*Pollock* 406. *Anson* 325)

Hall v. Wright. (9) Illness unfitting for marriage is no excuse. The case is discussed with reference to *Geipel* v. *Smith* in *Pollock* 407-409.

Laughter's case. (10) Alternative contracts. *Pollock* 413-414.

Select Maxims Relating to Contracts.

—— :C: ——

1. **Modus et conventio vincunt legem:** The form of agreement and the convention of parties overrule the Law. The conditions annexed to a grant or devise, the covenants inserted in a conveyance or lease, and the agreements whether written or verbal, entered into between parties, have, when duly executed and perfected, but subject to certain restrictions, the force of law over those who are parties to such instruments or agreements.

But. (1) *Pactis privatorum juri publico non derogatur.* Agreements against public policy, law, morals, etc. are not binding.

(2) *Nulla pactione effici potest ut dolus praestetur. e.g.* a man cannot effectually contract that he shall be irresponsible for fraud.

(3) *Privatis pactionibus non dubium est non laedi jus caeterorum.* Rights of third parties ought not to be affected.

(4) There are cases where the law overrides the will of the individual, *fortior et potentior est dispositio legis quam hominis.*

2. **Quilibet potest renunciare juri pro se introducto.**

A man may renounce benefits introduced in his favour.

But. (1) A renunciation of a right cannot in general he made to the injury of a third party.

(2) Renunciation is impossible in the face of express statutory directions of compliance.

3. **Qui sentit commodum sentire debet et onus.**

He who derives the advantage ought to sustain the burdent

(1) Applicable in the case of covenants running with the land whenever *transit terra cum onere.*

(2) Where a party adopts a contract, which was entered into without his authority, he cannot ratify that which is beneficial to himself and reject the remainder. He must take the benefit *cum onere.*

(3) Assignee of a chose in action takes it subject to all the equities.

(4) Burden of partnership debts is on the partnership estate but the converse of the maxim holds good with regard to the partnership creditor.

4. **In aequali jure melior est conditio possidentis.**

Where the right is equal the claim of the party in actual possession shall prevail. For purposes of contract the maxim occurs in the form, *In pari delicto potior est conditio defendentis.* A party to an illegal contract cannot ask to have his illegal objects carried out, nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. "If the plaintiff and defendant were to

change sides, or the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it for, where both are equally in fault, *potior est conditio defendentis.*" (See *Pollock*, 361-367. *Anson*, 216-219.)

5. **Ex dolo malo non oritur actio**: A right of action cannot arise out of fraud. This is a principle of public policy and "no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act" (Lord Mansfield in *Holman* v. *Johnson*, Cowp. 343) Similar to this is the maxim, *ex maleficio non oritur contractus.* The principle of the 4th and 5th maxims is in equity, "He who comes into equity must come with clean hands" and all three are contained in the more general principle, that a man shall not be permitted to take advantage of his own wrong.

6. **Ex nudo pacto non oritur actio.** No cause of action arises from a bare promise. This emphasises consideration.

7. **Caveat emptor**: Let a purchaser beware. Fully the maxim is, *Caveat emptor qui ignorare non debuit quod jus alienum emit.* This refers to the responsibilities of the vendee and, impliedly, to the duties of the vendor. (See above, *Outlines of English Law* p. 58. *Pollock* 518-528 on warranty and representation.) In this connection must be mentioned the maxim, *simplex commendatio non obligat.*

8. **Quidquid solvitur, solvitur secundum modum solventis; quidquid recipitur, recipitur secundum modum recipientis**: Money paid is to be applied according to the intention of the party paying it, and money received according to that of the recipient. Appropriation of payments is referred to here. "According to the Law of England, the debtor may, in the first instance, appropriate the payment, *solvitur in modum solventis*; if not, the creditor may make the appropriation, *recipitur in modum recipientis*; but if neither make any appropriation, the law appropriates the payment to the earlier debt." (*Mills* v. *Fowkes* 5 Bing. 461)

   (1) Where a creditor receives, without objection, what is offered by his debtor, *solvitur in modum solventis.*

   (2) When the recipient receives money with an intention different from that of the payer, payer must be given an opportunity to retract.

9. **Qui facit per alium facit per se (Qui per alium facit, per seipsum facere videtur)**: He who has anything done through another does it himself. This is a maxim of agency and deals with the question, "How far is a principal responsible for his agent's acts, a master for his servant's? (*Outlines of English Law* Ch. v.; *Anson* 331-354; *Pollock* 92-106) Also the agency of wife for husband comes under this maxim. To illustrate the application of the maxim the instances may be taken of:—

   (1) Principal and agent.

   (2) Master and servant.

   (3) Husband and wife.

(4) Owner of a ship and the master.

(5) Co-partnership

(6) Sheriff and bailiff.

10. Delegatus non potest delegare: A deputy cannot depute his powers. This maxim limits the operation of No. 9. *e. g.* one agent cannot lawfully nominate or appoint another to perform the subject-matter of his agency. The sense of this maxim is also otherwise expressed as, *Vicarius non habet vicarium*, and *Delegata potestas non potest delegari*.

11. Respondeat Superior: Let the principal be held responsible. This is a maxim of agency and almost identical with No. 9, but its application is usually confined to obligations *ex delicto*. It deals with the question, "How far is a principal liable for his agent's tort, or a master for his servant's?" (*Pollock on Torts* 67-95)

12. Omnis ratihabitio retrotrahitur et mandato priori aequiparatur: A subsequent ratification has a retrospective effect and is equivalent to a prior command. For instances of ratification

(1) Of infant's contract See *Pollock*, 59-62.

(2) Of agent's acts, See *Pollock*, 94.
In the case of torts 'the party ratifying a trespass, is a trespasser by estoppel" but, says Coke *apud* Broom "he that receiveth a trespasser and agreeth to a trespass after it is done, is no trespasser, *unless the trespass was done to his use or for his benefit*, and then his agreement subsequent amounteth to a commandment, for in that case, *omnis*, etc.."

13. Nihil tam conveniens est naturali aequitati quam unumquodque dissolvi eo ligamine quo ligatum est: It is just that every contract should be dissolved by the same means which rendered it binding. At Common Law a discharge must be:

(1) Of record by a record.

(2) Of a deed by a deed,

(3) Of a parol promise by a parol promise.

(4) Of an Act of Parliament by an Act of Parliament.

See above, *Outlines* Ch. xix, and *Anson*, 273-281

14. Vigilantibus, non dormientibus, jura subveniunt:

The Law assists those who are vigilant and not those who sleep over their rights.
This is applicable in the case of parties applying to have contracts rescinded "within a reasonable time on grounds of mistake, etc." Debts should be recovered within a set time. See *Pollock* 622-628 on debts barred by statute.

15. Actio personalis moritur cum persona: A personal right of action dies with the person. This applies to actions by executors or administrators. See *Walker on Administration*. As regards the application of this maxim to Torts, See *Pollock on Torts* 55-60.

16. Non videntur, qui errant, consentire.

Nulla voluntas errantis est: Error is deemed t vitiate consent. The error referred to here must be suc as prevents the contrac ing parties from agreeing upon th same thing in the same sense. See Hunter's *Exposition of Roman Law* 581, and *Pollock* 429.

17. Expressio unius est exclusio alterius.

Expressum facit cessare tacitum: The expres mention of one thing implies the exclusion of another. This is chiefly a maxim of interpretation. It operates ordinarily to exclude evidence, offered with the view o annexing incidents to writt n contracts, in matters with respect to which they are silent The effect of a written contract cannot, as a rule, be altered or varied by parol proof (See above *Outlines* Ch. xviii) for *vox emissa volat* and *litera scripta manet*. Under this rule an implied covenant is to be controlled within the limits of an express covenant. (See *Pollock* 484 note, *c*; also Story's *Equity*, Sec. 102 (of the 10th edition.)

18. Res inter alios acta aliis neque nocere neque prodesse potest: Strangers to a contract cannot be affected by it. cf. *Alteri Stipulari nemo potest.* See Sandars' *Justinian*, 345.

OUTLINES OF ROMAN-DUTCH LAW.

References to VanDerLinden, Grotius, Voet, VanDerKeessel and Pothier.

I. ON OBLIGATIONS IN GENERAL.

1. General nature of obligations.

ligations Natural w and in Positive Law.

(1) Liability in this place means such a one as entitles us to compel the other party by legal proceedings to fulfil his obligations, as distinguished from the imperfect liabilities of Ethics *e.g.* duties of love, gratitude, etc.

(2) Obligation, in position Law, is an act of one man whereon a *Jus in Personam* is founded in favour of another (3 Grot i. 24) Obligation in natural Law creates no right "in point of law" though it does "in point of consicence" (Pothier i. 1)

(3) It is of the essence of obligations that there should be

(a) A lawful source (*cause, causa*) from which they spring.

(b) Persons capable of binding themselves.

(c) Something which is the object of the obligations.

44 Voet vii. 4.

(4) Causes of obligations are (See 44 Voet. vii. 4)

(a) Contracts, the most general source.

(b) Engagements in the nature of contracts (*quasi-contracts.*)

(c) Injuries (*Delicts.*)

(d) Acts in the nature of injuries *quasi-delicts.*

2. Contracts are invalid.

Contracts when invalid.

(1) When the parties are under a mistake.

(a) As to subject of the agreement.

(b) As to actual (not *accidental*) quality of the thing.

(c) As to person.

(2) When consent is extorted by undue influence or fear. By fear is meant a serious apprehension, as of death, dishonour, great suffering, illegal imprisonment of self or family (3 Grot. xlvii 6)

(a) Consent obtained by compulsion is nevertheless consent. (Grot. *Supra*)

(b) *Ut tamen pro ratione aetatis, ac sexus, conditionisve personarum aestimandum sit, qui satis gravis metus dici debeat; unde et hujus rei quis nempe metus sufficiens sit, disquisitio ac arbitrium Judicis est.* (4 Voet ii. 11)

(3) When a person has been induced to enter into a contract by the fraud of another.

(a) Manifest violation of *bona fides* is actual fraud sufficie to rescind contract.

(b) Remedy for fraud is not applicable when the obligati is contracted through fraud on both sides, for th the transaction is void from the beginning. (3 Gr xlviii 7)

(4) Whenever party has been prejudiced to an enormous exte (exceeding *half* fair value) in respect of price agreed upon the contract.

(a) *The half*, that is, the value at the time of the contr (3 Grot. Lii. 3.)

Enormis laesio (3 Grot. Lii. 4.)

(b) Grotius says (Lii. 4) that relief on the ground enormous wrong (*enormis laesio*) cannot be avail of by minors, but VanDerKeessel has that a minor well as a major may be relieved on this ground at a time within thirty years (Thesis 959.)

(5) Contracts are void when made without any *causa* or on a fal *causa* or on a *causa* contrary to justice, *bona fides* or *bo mores*.

(6) All contracts are void which are entired into by bankrup *in fraudem creditorum* (3 Grot. i. 27.)

3. Capacity of parties.

(1) Minors, lunatics, etc., cannot contract except by guardia or curators.

Minors.

(a) Obligations of minors void, except in case of n feasance or in so far as they may be profit thereby (3 Grot. i. 26.)

(b) Voet (Lib. xiv. Tit 5. 4) holds that children aft puberty may be made civilly liable on their ow contracts, and be sued after they have attained majorit or after the death of the parent. VanDerKeess (Thesis 474) asserts to the contrary.

Drunkards.

(2) Drunkards are incapable of contracting. Contracts mad in a state of intoxication are considered of no validity if on or either of the dealing parties, within twenty-four hou after its completion, should annual the same (3 Grot. xiv. 5

Wife.

(3) A wife is not competent to bind herself to others b any contract. *Nec contrahendo uxor sine mariti sui auctorita in Hollandia et Frisia semet ipsam aut virum obligare pote* (23 Voet. ii. 42.)

Prodigals.

(4) Prodigals under curacy cannot contract. *Sine curato neque bona alienare prodigi possunt, neque se obligare ; ad ut ne fidejussor quidem pro talibus interveniens devinct efficiatur, non magis quam si pro furioso intercessiss* (27 Voet. x. 7.)

(5) Only that which one of the contracting parties stipulate *for himself*, and only that which the other party promise *for himself* can constitute the subject of a contract (VanDe Linden. 191.)

Voet and Grotius Differing.

(a) Voet lays down that a person can stipulate and promise for another as well as for himself. *Etsi vero negari nequit, quin stipulandi verbum commune sit tam ei, qui rogat, quam ei, qui promittit* (45 Voet. i. 3)

(b) Grotius (3 Grot. iii. 58) *contra* :—A simple stipulation or acceptance for a third person is of no validity unless

(α) The same be for sacred purposes, or

(β) The same be for the poor, or

(γ) The acceptor were interested therein, or

(δ) A penalty be fixed in case of promisor's non-performance.

A third person could, in point of equity, be able to accept a promise and thereby acquire a right, unless the party promising had, before acceptance, revoked the same.

VanDerKeessel upholds Grotius.

(c) VanDerKeessel (*Thesis* 510) upholds the view of Grotius against Voet :—On a promise made to a third party which such third party has accepted without authority, the party really interested would acquire the right, if he afterwards accepts the promise; or if such third party, who has assented without authority, be a public functionary.

(d) This principle, stated above, must not prevent.

(α) One's arranging for payment to a third party instead of to himself.

(β) Stipulating for one's heirs or other legal successors *e.g.* a vendee.

(γ) Contracting by an agent, etc.

4. Subject of obligations.

(1) Subject of obligation may be a thing (*Res*.) The *Jus in personam* extending to the acquiring of a *res* contains no *dominium* or possession but a right to claim from a person the *dominium* or free possession. This claim is *obligatio ad dandum* (3 Grot. i. 13)

Obligatio ad dandum.

(a) Every *res* not *extra commercium* may form subject of obligation ; defined and undefined things.

(b) Things whose quantity is actually defined or has to be defined *e. g.* if a person promises indemnity from damage.

(c) Things present or future.

(2) An act (*factium*) may be subject of obligation ; *obligatio ad faciendum* (3 Grot. i. 13)

Obligatio ad faciendum.

(a) Possible act.

(b) A definite act.

(c) Act not *contra bonos mores*.

(d) Interest of person for whose benefit obligation is entered into must be capable of being valued at a fixed sum.

5. Divisions of obligations. Various:—

Natural and Civil.

(1) *Natural obligations* (*pudoris et aequitatis causa*, Pothier. 17 binding in the forum of the conscience; where, howeve a debtor has voluntarily made payment it is valid an not subject to be repaid. *Civil obligations, vinculæ jur* (Pothier. 173) giving rise to an action at Law.

(2) *Pure or Simple* and *conditional.* Pure obligations are, in strict sense, those contracted without any modification

(3) *Quaedam in dando, quaedam in faciendo* (Pothier. 176.

(a) Party obliged *to give* may be legally constraine to give it.

(b) Party obliged *to do* cannot be precisely constraine to do so, but to pay damages in default. A regards specific performance VanDerKeessel say (Thesis 512) that it properly follows, from a correct interpretation of the Civil Law, that a person who has promised *to do* an act, may be condemned and compelled to perform the same. (Neosta *Supr. Cur. Decis* 50, *apud.* V. D. Keessel p. 162.)

Liquidated and unliquidated.

(4) *Liquidated*, (*obligatio rei certae*), consisting in a certain thing; *Unliquidated*, (*ubi non apparet, quid, quale, quantumque est in stipulatione*) (Poth. 179.)

(a) When an obligation contains an undertaking no yet liquidated, no execution can issue upon it until it has become liquidated either by mutual consent or by judgment of court (V. D. Linden 202.)

(b) Credit of a liquidated sum may be opposed in compensation to another liquidated debt: a credit not yet liquidated cannot be opposed in compensation (Poth. 179.)

Definite and indefinite.

(5) *Definite or Indefinite* obligation of an indeterminate thing, of a certain kind, is *obligatio generis*: the other is specific (Pothier, 180). Pothier further has:

(a) When a thing of a certain kind is due indeterminately, creditor has no right to demand, determinately, any particular thing of that kind; he may demand one of such things, generally and indeterminately.

(b) Loss of any individual thing of that kind, subsequent to the obligation, does not fall upon the creditor, for the things which are lost are not such as were specifically due; the obligation subsists while there is any one thing remaining, by which it can be discharged. (Pothier 284.)

Alternative.

(6) Closely allied to the former class is the class of *single or alternative* obligations. Several things are promised in such a manner that the performance of the one is a satisfaction of the whole. (Pothier. 245.)

(7) Obligations *in solido.* When a person contracts about one and the same thing in favour of different persons or when

In Solida

different persons bind themselves in favour of one person *each is creditor or debtor for his share.* An obligation may also be contracted for the benefit of *one for all,* or so as to charge *one for all* in such a manner that payment made *to* or *by* one of them discharges all. (Pothier. 258. V. D. Linden 203-204.)

(a) This obligation does not arise unless stipulated expressly, except.

(α) When partners of a mercantile firm contract in the name of the firm. This is a disputed point, Grotius holding that partners are not liable each *in solidum.* (V. D. Kessel, 703)

(β) When different guardians are burdened with one and the same guardianship. *Si omnes tutores tutelam gesserint .....pro indiviso singuli in solidum arbitrio pupilli conveniri summo jure possunt.* (27 Voet. viii. 6)

(γ) When several persons have jointly worked together to commit a crime and are sued for damages. [When many are concerned, all liable unless offender is found. 3 Grot. xxxiv, 6]

(b) Debtors *in solidum* liable for whole debt, only as regards creditors, but debt is divided among themselves—They have *beneficium divisionis* against creditor. (For *beneficium divisionis* See 46 Voet. i. 21-26.)

(c) Debtor *in solidum* paying whole debt has right of having creditor's actions against co-debtors ceded to him for the difference between that portion due by him and whole debt.

(α) Creditor cannot refuse cession.

(β) If he cannot give cession he cannot demand payment *in solidum.*

(d) In case of debtor *in solidum* paying without asking for cession of action he cannot afterwards demand it, as entire right of action of creditor ceases by payment. But each co-debtor must pay such debtor the due share (See Pothier, 258-282.)

(8) Divisible and Indivisible (See Pothier, 287-336.)

Divisible and Indivisible Pothier 287-336

(a) Obligation divisible when the thing which is the object and matter of it is susceptible of division and parts by which it may be paid; obligation indivisible and cannot be divided when the thing is not susceptible of division and parts and can only be paid altogether.

(α) Division *civil* is not *in solutione continuitatis.*

(β) *Civil* division may be into *real* parts, as divisions of an acre of land; or undivided parts *in jure et intellectu e. g.* two heirs having an undivided moiety in an acre of land.

(b) Thing or act itself which constitutes object of the obligation ought to be considered and not the utility to the creditor nor the detriment to the debtor *e. g.* if two proprietors of a house subject it to a servitude in a third man's favour the obligation is indivisible because the servitude, object of obligation, is indivisible.

Kinds of Indivisibility.

(c) Three kinds of indivisibility:

(α) Absolute, *individuum contractu*, when a thing is naturally incapable of being stipulated in parts *e.g.* right of servitude, right of passage.

(β) *Individuum obligatione e.g.* though the construction of a house be not indivisible *contractu*, yet it is generally indivisible *obligatione* for the *construction* of the house, the object of the obligation, is an indivisible act *et quod nullam recipit partium praestationem.*

(γ) *Individuum solutione*, indivisible if payment, when the thing due though susceptible of parts and may be due in parts, cannot be paid in parts.

(d) Each heir of debtor is only liable in respect of the part of the debt for which he is heir. *Except.*

(α) As regards hypothecatory debts,—where heirs may be pursued hypothecatorily for whole debt as possessors of goods hypothecated.

(β) As regards debts of a specific thing,—when there are heirs of different kinds, the heirs of that portion of the property of which the specific thing constitutes a part, are alone liable for the debts of *that* specific thing.

(γ) As regards simple restitution of a thing,—though creditor is proprietor, and debtor has only mere detention, yet particular heir of debtor, who is in possession, is liable for the restitution of the whole.

(δ) As regards thing lost through fault of heirs—any one of the heirs by whose act or fault the thing has perished is liable for the whole of the debt.

(ε) As regards obligation by will or judgment—one of the heirs may be bound for the whole debt, by will or other arrangement, without the others ceasing to be bound for their respective parts.

Partial Payment.

(e) Cases in which partial payment of a debt is not valid though the debt is divisible:—

(α) When there are alternative debts or indeterminate debts *e.g.* (i) where debtor of a house or of ten thousand pounds leaves two heirs one of them will not be admitted to pay the half of one of these things until the other likewise pays remaining half of the *same thing*. (ii) where deceased owned an acre of land indiscriminately, one of his heirs is not entitled to offer creditor moiety of a certain acre, until the other gives also in payment the other moiety of the same acre.

(β) When it is so agreed in contracting the obligation or afterwards. (See Pothier, 313)

(γ) When, without any agreement, it appears from the nature of the engagement, or of the object of it, or from the end proposed in the contract that the intention of parties really was that debt should not be acquitted in parts.

Disputed Points from *Pothier.*

(f) Examples of disputed points.

(α) *Fundum tradi*, obligation to deliver a piece of land, is a *divisible* obligation; but it is *indivisible* if circumstances render the obligation of it indivisible *e.g.* when A agrees to give me a piece of ground to build a house on it, he can give it to me only entire, otherwise I cannot build the house. (See Pothier 296 and authorities cited there.)

(β) A day's work. Obligation indivisible. The indivisibility is *obligation* not *contractu*. Though service of a day's work is not in itself indivisible yet the obligation is contracted as it were so (Pothier. 296)

(γ) Obligation resulting from a legacy to build an hospital or for some other purpose is divisible, the adding in the will "to build a hospital" is merely *ratio legandi* which *non cohaeret legato*. If hospital were specified as to be in a certain place and at a certain cost, the obligation is *indivisible*.

Solidity distinguished from indivisibility.

(g) Indivisibility and Solidity.

(α) Indivisibility is a real quality of the obligation, which passes with this quality to the heirs, and makes each of the debtor's heirs a debtor for the whole: Solidity is a personal quality arising from act of persons of whom each is obliged for whole. The obligation *in solido* may be divided amongst the heirs of each of the debtors *in solido* and amongst heirs of creditor.

(β) Co-debtors *in solido* contracting entire obligation are debtors of whole thing and so *totaliter*; not *totaliter* where obligation indivisible. (Pothier 322-325).

(γ) Heir in part of an indivisible debt though creditor of whole thing, is not so *totaliter*; he cannot make an entire release of debt which creditor *in solido* might. (Pothier 327)

(h) Debt indivisible,—each heir of creditor being creditor of whole thing may demand whole thing from debtor; but in case of non-execution converting obligation into one of damages, heir can claim no greater share then what is of damages proportional to part he is heir for (Pothier 326)

(i) Debt indivisible,—creditor may demand whole thing from *each* heir of debtor, but such heir can claim to have co-heirs joined in the cause, and ought not to be condemned alone except in default of so claiming. (Pothier, 330)

(10) Principal and accessory or collateral *e. g.* guarantees. Primary and secondary *e.g Penal obligations* (Pothier 337-365. 45 Voet. i. 12-13)

(a) Stipulation of a penalty in order to assure the execution of a primary engagement is a penal obligation.

(b) Nature of penal obligations.

Penal obligations.

(α) If primary obligation is void, penal is void; but penal obligation added to an agreement by which any one has promised for act of third person is *valid*.

(β) Nullity of penal obligation does not induce that of the primary.

(γ) Creditor may, instead of enforcing penalty, proceed upon the principal obligation.

(δ) Both penalty and principal obligation cannot be demanded. Where penalty is insufficient, creditor may ask for more damages.

(ε) Penalty may, when excessive, be reduced and moderated by the judge: same with penalty stipulated in lieu of damages. Regard must be had to the legal date of interest (VanDerKeessel, Thesis 481)

(c) Penal obligation attaches:

(α) As soon as person obliged under penalty violates his terms. Whether the fact upon which the penal obligation depends should have taken effect depends on intention of parties.

(β) When the obligation is not done within a fixed time. But

(γ) No penalty attaches when failure of obligation is through creditor's fault.

(d) Where debtor discharges part of his obligation the penalty is only due in proportion to the part for which the principal obligation has not been executed (*Pothier*. 354)

(e) In indivisible obligations contravention of primary obligation by one of the heirs of debtor entitles creditor to whole penalty against such heir and co-heirs.

(f) When contravention is made by several heirs, each of them is liable for penalty *in solido*.

(g) Heir who contravenes divisible obligation only incurs penalty as to part for which he is heir.

(h) Voet ad. loc. (45 Voet. i. 12-13)

6. Guarantees. (*Pothier* 365-445. V. D. Linden 206 212 3 Grot. iii. 12-32. and 46 Voet; *De Fidejussoribus et mandatoribus* and ii. iii)

Definition of Guarantee.

(1) Guarantee is a contract by which a person binds himself for a debtor, for creditor's benefit, to pay creditor whole or part of what debtor owes him.

(a) The person who binds himself thus is a surety *Qui aleinam obligatione mediante stipulatione in se recipit reo principali manente obligato* (46 Voet. i. 1)

(b) When surety engages with consent of debtor, an engagement is said to be formed between surety and debtor. The surety is then *Mandator* not *fidejussor*

Pothier's Six Corollaries.

(2) Six corollaries from *Pothier*, 366-385

(a) There should be a valid obligation of a principal debtor.

(b) Surety does not discharge obligation of principal debtor, but contracts a collateral obligation, and differs thus from *expromissor* who takes on him the debt. *Differt autem fidejussor a mandatore necnon expromissore utpote qui non modo pro alio sed et pro se expromittere potest, et si pro alio alienam obligationem mediante stipulatione in se recepit seu refert, reo principali liberato*, etc. (40 Voet. i. 1. See also 46 Voet. i. 40)

(c) Surety can only bind himself to part or whole of the same thing as principal debtor, *e.g.* surety cannot bind himself for 100 measures of corn when debtor owed 100 pounds, but surety may engage in a sum of money in lieu of another thing. (See. 46 Voet. i. 3)

(d) Surety cannot bind himself to more than the principal not only in respect of quantity, but also *die, loco, conditione, modo.*

(a) Surety obliged in a larger sum is bound without distinction for the principal, and even for such larger sum, if *reus principalis* has subsequently become indebted therein (V. D. K. 499).

(β) With respect to the *quality* of the *lien* surety may be strictly obliged (Pothier, 476.)

(γ) There are two cases (says Voet. Lib. 46, Tit. 1. 4.) in which surety could be obliged in a larger sum than the principal; in the case of a debtor owing *ten*, the surety, being asked for the ten, may promise *twenty*; or in the case of a debtor owing *ten*, the surety may be asked for twenty *as if they were due* (*rogetur de viginti tanquam debitis*) and he may rightly think *viginti sua fide esse.*

When surety is discharged.

(e) Extinction of principal obligation necessarily induces that of the surety, except (Pothier, 382.) in the case where the thing due has perished by the act or default of the surety. The surety is discharged:

(α) By actual payment, compensation, release.

(β) By the novation of the debt.

(γ) When principal becomes sole heir purely and simply of creditor, or *via-versa*, or when the same person becomes successively heir of one and the other.

(δ) When creditor succeeds to his debtor by the title of universal donatory or universal legatee, he is bound for debt so far as the value of goods to which he succeeds; the confusion (Merger) takes place to the extent of this concurrence, to the extent of which too the surety is discharged.

Grounds of defence which surety may have against creditor as principal debtor may have:

Grounds of defence against creditor.

(α) Exception of fraud or violence.

(β) Exception of a judgment or of the decisory oath.

(γ) When the principal debtor, by a transaction with the creditor upon the legitimacy of the debt, has agreed to pay it, but with an allowance of three years, this exception founded upon a doubt of the legitimacy of the debt may be urged by surety.

(δ) Restitution obtained by principal debtor against his obligation by letters of rescission induces the guarantee when restitution is based on some real defects of obligation, but not on reasons personal to principal debtor, as his minority.

But exceptions *in personam* cannot be availed of by the surety:

(α) Exceptions based on insolvency of principal debtor and on the personal privilege of his property being exempt from seizure so far as it is necessary to his subsistence.

(β) Exception resulting from *cessio bonorum*; when principal debtor has made a cession of his goods and they are not sufficient to discharge him from his debt he is not liberated from the remainder, nor is his surety.

(γ) Exception arising from contract; by which a discharge is granted to debtor of part of his debt and certain terms are agreed upon for payment of remainder cannot be availed of by surety as it may be by debtor against creditor.

(f) Guarantee is extinguished when the two characters of principal debtor and surety become merged in one and the same person, as when one becomes heir to the other or when a third person becomes heir to both the one and the other.

(α) When the surety becomes heir to co-surety there is no merger, and the two obligations subsist although united in one and the same person.

(β) Obligation is not extinguished when principal debtor leaves no heirs, for, by a legal fiction, *hereditas jacens personae defuncti vicem sustinet.*

(γ) So obligation is not extinguished when creditor dies leaving succession vacant.

(δ) When the engagement has been entered into in favour of the creditor in a certain quality, the engagement subsists in favour of the person succeeding to this quality.

Capacity of parties.

(3) Who may or may not be sureties.

(a) All parties capable of making a promise may also become sureties. *Fidejubere possunt omnes qui efficaciter obligantur et intercedere pro aliis prohibiti non sunt* (46 Voet. i. 5.)

Minors

(b) Minor with consent of guardian may be surety. (3 Grot. iii. 13) *minores auctore tutore vel curatore fidejubere possunt et ex fidejussione efficaciter obligantur quoties restituti non sunt* (46 Voet. i. 5) The person to whom minor is granted as surety *ex legis aut conventionis necessitate* may disapprove of the same, but minors once admitted as sureties *pro alieno debito efficaciter obligati intelliguntur* if *restitutio* is asked for or is not obtained (Voet *ibid*; See also 4 Voet i.)

Women.

(c) According to the *senatus-consultum Vallejanum* women cannot be sureties. *Non recte fidejubet mulier vallejani exceptione tuta* (46 Voet i 5) This privilege is urged not only by a woman, but also *heredes*, as *fidejussores sive ex mandato mulieris pro ea fidejusserint, sive sine mandato ejus, is qui, cum debitor mulieris non esset, a muliere delegatus fuit et qui ex mulieris mandato pro aliis intercesssit* (16 Voet i. 2.) in good faith and ignorant of any fraud.

Women may be sureties (3 Grot. iii. 15-78.) if :

(α) They defraud another.

(β) They are principal debtors.

(γ) They have acquired anything by reason of the transaction.

(δ) They had been security for one to whom they were indebted.

(ε) They had confirmed their security after two years by a new promise or security.

(ζ) They desire in their wills their heirs to pay what they owe in respect of suretyship (V. D. Keessel, 491.)

(η) They had expressly and advisedly renounced the Beneficium S. C. Vallejani

The renunciation of the privilege must be made by a public instrument (V. D. Keessel, 496.) Voet says that the renunciation may be *tum in judicis, tum extra judicium*, and *parum refert apud nos an publico an privato instrumento mulieris intercessio, renunciatione munita, comprehensa sit*; but adds *quamvis Jus Romanum quo adhuc Frisia utitur publicum instrumentum requirat* (16 Voet i. 9) The suretyship is void otherwise (V. D. Keessel *supra*).

POSITION OF THE WIFE AS REGARDS SURETYSHIP :

(α) What is said above of women generally applies to wives too.

(β) A wife is forbidden to be surety for any money lent to her husband unless the obligation is to her benefit (2 Grot. iii. 19.)

(γ) Wife cannot without husband's authority bind herself or him (23 Voet. ii. 42.)

(ε) Wife trading with husband's consent can bind herself. *Uxor absque viro contrahens, se maritumque efficaciter obligatum reddit si publica mercatrix sit, marito permittente, aut jubendo, aut non contradicendo*, (23 Voet. ii. 44.) In the passages referred to here and above *dictum est quid vero juris sit si uxor sine viro fide jusserit*, etc. says Voet. (Lib. xlvi. i. 5.)

Soldiers.

(d) A soldier may not be surety in matters *in judicio* nor in hiring of lands (3 Grot. iii. 20) but, says VanDerKeessel (Thesis. 497.), it should be laid down that soldiers may not be made sureties against the consent of the creditor. Voet has, (46 Voet. i. 5.) *non recte fidejubet miles pro conductionibus alienarum rerum aut pro reo de sistendo ; tamen in suam rem fidejubere non est prohibitus.*

(e) As regards *clerici, prodigi, furiosi, muti, surdi* See Voet, title already referred to.

(4) How guarantees are entered into.

Kinds of sureties.

(a) By virtue of contract. Sureties here are *conventional.*

(b) By operation of law *e. g.* that which a usupactuary enters into for the re-delivery of the property. *Legal* surety.

(c) By order of the Court *e. g.* provisionally some person—*Judiciary* surety—is ordered to receive a a sum of money giving security (if necessary) to refund it.

(5) Qualifications of a Surety.

(a) In case of legal and judiciary engagements, but not conventional, (V. D. Linden, 119 ; Pothier, 390 makes this necessary in *all* sureties) surety must be a person who can be *justified i. e.* solvent and can be sued.

(b) Surety must have domicil in the place where engagement is required to be given (Pothier, 390, Cf. 46. Voet. i. 40 *Fidejussor non nisi praesens intervenit mediante stipulatione secundum jus civile.*)

(c) *Judiciary* sureties must be persons subject to arrest (Pothier, 390.)

(6) Debtor bound to find new surety : (Pothier, 391, 392.)

(a) If original surety is insolvent. Pothier says (391) that this is if surety is legal or judiciary.

(b) If debtor's original surety was one he was obliged to find *indeterminately*, he is obliged to find new one on insolvency of the original.

(c) If at first debtor was obliged to find a particula, person as surety and that surety becomes insolvent debtor is not bound to finud a sbstitute.

(d) Some say that a pledge cannot be given for a surety, urging *aliud pro alio invito creditore solvi non potest*, but Pothier is inclined to the view *cum plus cautionis sit in re quam in persona, et tutius sit pignoris incumbere quam in personam agere.* As regards a pledge given *by sureties*, a surety cannot be sued upon unless the immovable property specially mortgaged, though alienated to and in the possession of a third party, has previously been discussed. (3 Grot. iii. 32. V. D. Keessel *Thesis* 50. 46 Voet. i. 15 end.)

(7) Privileges to Sureties—*Licet autem subinde fidejussores in rem suam propriumque commodum interveniant, veluti pro procuratore suo, tamen frequentius alienam utilitatem : eaque de causa potissimum tria ipsis beneficia comparata sunt, puta, ordinis seu excussionis, divisionis et cedendarum actionum.* 46 Voet. i. 14.)

See 46 Voet i. 15 end.

(a) *Beneficium ordinis seu excussionis.* The surety on demand of payment may request creditor to discuss in the first place the goods of the principal debtor—this is the exception of discussion or of order (Pothier, 407) *Ordinis seu excussionis beneficium est exceptio qua opposita, fidejusore, ante principalem debitorem convenius, petit, ut prius excutiatur reus principalis* (46 Voet. i. 14.)

Privilege of discussion.

(α) This *beneficium* ceases in the case of surety to satisfy Judgment as stated in *2 Voet.* viii. *16* (46 Voet. i. 16)

(β) The benefits or privileges of sureties may be renounced not only specially but also generally, whether the person, being acquainted with the law, has renounced them in express terms or, being ignorant of the law, has in general terms declared that they were made known to him. (V. DerKeessel *Thesis*, 502.)

Voet, Pothier, and V. D. Keessel on Renunciation.

(γ) According to 46 Voet. i. 16 (*Contra* V. D. K.) the renunciation must be *special : cessat beneficium ordinis .... si ei a fidejussore renunciatum sit specialiter, cum generalis omnium exceptionum renunciatio neque hanc neque alias tollat.* Pothier (408) is of the same opinion : Vague and indeterminate term, *renouncing* without expressing what the parties renounce, can only be regarded as a mere formality, as a mere word of course, *ea quae sunt styli non operantur.* Throughout a great part of this section (46 Voet. i. 16) Voet discusses the question of special and general renunciations.

Tacit renunciation.

(δ) Voet next speaks of tacit renunciation : *cum renunciatione autem generali, nihil operante, confundi non debet tacita renunciatio.* From the analgy of other "tacit" things being valid he argues, *ratio non est cur non fidejussoribus quoque suum ordinis beneficium ex tacita periret renunciatione* as in the case of a man who, *se pro debito obligaverit tanquam principalem*, became surety as principal (46 Voet. i. 16. V. D. Linden, 211.)

(ε) This is of the class of dilatory exceptions, since it only tends to put off the action of the creditor against the surety and not to exclude it ; so it ought to be urged before the *litis contestatio* (Pothier 410.) This is to delay not to exclude Judgment *ut excusso principali debitore, iterum adversus fidejussorem regressus deinde detur in id quod ex debitoris excussi facultatibus servari non potuit, hinc ante litem contestatam eandem opponi necesse est* (46 Voet. i. 15 ; 3 Grot. iii 27.)

See 46 Voet. i. 15 end. *Hoc benefícium ex eorum est ad casum vel hypothecæ creditori cautum fuit.*

(ζ) Surety cannot urge this privilege if the debtor is a pauper, has made over his property, and it is clear *nihil apud debtorem esse in quo executo fiat.* Nor can he urge it if the creditor effects a compromise with him when he sues creditor on some debt (46 Voet. i. 17.)

(η) Creditor who has failed to make the discussion is not to suffer through debtor's insolvency but may proceed against surety who (See above 3) cannot plead any privilege (Pothier 414.)

Privilege of division.

(b) *Beneficiam divisionis*, exception of division. Surety on being demanded payment asks that the creditor shall be bound to divide and apportion his demand between him and his co-sureties, they being solvent (Pothier 415). *Unus ex pluribus fidejussoribus in solidum obligatus ac conventus petit, ne ultra virilem debiti portionem condemnetur, si modo confidejussores, quorum intuitu hoc remediam adhibet, tempore litis contestatae solvendo sint* (46 Voet. i. 21; 3. Grot. iii. 28.)

(α) Privilege may be renounced, *si ei specialiter renunciatum* (46 Voet. i. 24.)

(β) Privilege ceases when surety denies, *per mendaciam*, that he was ever bound. *Si plures pro uno tutore fidejusserint rem pupilli salvam fore; si quis fidejusserit una cum muliere quae Vallejani exceptione tuta erat*; (46 Voet. i. 23.)

(γ) As to privilege ceasing when a minor is co-surety see 46 Voet. i. 23.

(δ) Those who bind themselves one for all or each in particular, are held as renouncing this privilege (3 Grot. iii. 29) V. D. Keessel 503.) *Tacito renunciatio est si fidejussor promiserit se solidum soliturum vel se in solidum obligaverit et principalem et unus pro omnibus* (46 Voet. i. 24.)

(ε) Heirs of sureties, certificator of a surety (*fidejussor fidejussoris*) may urge this exception (Pothier 417.)

(ζ) If two debtors *in solido* of the same debt had each given a surety, the surety of one of them could not demand that the action should be divided between himself and the surety, of the other, for they are not co-sureties (Pothier 419.)

(η) *Beneficium ordinis* is dilatory, only delaying creditor's action against surety till after discussion of debtor's goods: *beneficium divisionis* is a peremptory exception entirely destroying creditor's action against surety who urged exception, for the part of his co-sureties with whom the division is allowed, and the creditor can no longer come upon him even if the co-sureties should afterward become insolvent (Pothier 420.) *Peremptoriae vel perpetuae exceptionis sunt quae judicium perimunt et semel objectae semper agentibus impedimento sunt* (44 Voet. i. 4.), Voet places *beneficium divisonis* among peremptory exceptions (See 44 Voet. i. 4, 5.)

Cession of action.

(c) *Beneficium cedendarum actionum.* Surety may demand, *before payment* (46 Voet. i. 30.) from the creditor a cession of the the claim or action which the creditor holds against the co-sureties (3 Grot. iii. 31.) *B. c. a. est, quo opposito, unus ex pluribus, solidum solvere paratus, dum vel noluit vel non potuit se tueri exceptione divisionis, petit, sibi a creditore cedi seu vendi actiones contra reliquos confidejussores ac reum prin-*

cipalem, ut contra possessores pignorum, casu quo fidejussoribus simul et pignoribus cautum fuit (46 Voet. i. 27.)

(α) If cession of action has been made after some time to a surety who had paid in his own name, he may legally avail himself of it; but if he had paid in the name of the debtor, cession would be useless, at least as against a co-surety or third party holding a mortgage (V. D. Keessel 506.)

(β) Voet differs from the above in 46 Voet i. 30.

(γ) After surety has paid, and if he has obtained this privilege he might use it against the debtor as the creditor might have done (Pothier 429 : V. D. Linden 212.)

(δ) If surety has neglected to obtain cession, he has still in his own right action against the principal debtor to re-imburse him what he has paid, called *actio mandati contraria*, if engagement was made with consent and knowledge of principal debtor; if otherwise, *actio contraria negotiorum gestorum* (Pothier 429.) Ei contra debitorem principalem datur in id omne, quod fidejussorio nomine solvere coactus fuit, accommodata eum in finem actione mandati, si ex mandato debitoris principalis fidejusserit, vel actione negotiorum gestorum (3 Voet. v. 2.) si sin mandati interveniens utiliter negotium debitoris gessisse probetur (46 Voet. i. 31.)

(ε) Surety who has paid whole debt may, without cession of actions, recover a proportion of the debt from each of the co-sureties (Pothier 445; V. D. Linden 212.)

Pothier, 432-442.

(8) Payment by surety entitles him to an action against principal debtor (Pothier 432-438.) :

(a) If he has not neglected to urge an exception.

(b) If the payment made by surety be valid.

(c) If principal debtor shall not have paid a second time through fault of surety.

(9) Surety has action against principal debtor even before he has paid (Pothier 441, 442.) :

(a) When surety has been condemned to pay.

(b) When principal debtor is in failing circumstances.

(c) When debtor has obliged himself, to procure surety discharge of engagement within set time, and that time is up.

(10) A guarantee may be entered into in any of the following ways if the intention of becoming surety is clearly manifest (Pothier 400-403.)

(a) Judicially.

(b) Notarially. Creditor may demand it to be so (Pothier 432.)

(c) Under private signatures.

(d) Verbally, by promise and acceptance (3 Grot. iii. 25) without any solemon form of word (V. D. Keessel 501.)

(α) Simple assertion that any one is a substantial person is not a guarantee (17 Voet. i. 4; V. D. K. 501.)

(β) Paying part of a debt, even for a son by a father, is no guarantee for payment of remainder (Pothier 401.)

(γ) That an obligation was made in a person's presence and that he had subscribed to it is not absolute proof of that person being surety (Pothier 401.)

(δ) Surety may be bound at the same time as, before or afterwards, principal (Pothier 402 ; 3 Grot. iii. 324.)

7. Consequences of obligations. (V. D. Linden 196-198 ; Pothier 141-172.)

Pothier, 141-172.

(1) Person bound to *give* anything must give it, at a suitable time and place, to the creditor or some one authorised in his behalf.

(a) In the case of a specific thing debtor must take proper care of thing due until payment thereof is made.

(b) Debtor not answerable for accidents and cases of inevitable necessity, until he is guilty of improper delay.

(c) Debtor of specific thing liable in damages if he improperly delays.

(d) Debtor must pay for fruits and interest from date of default.

(2) Person bound *to do* anything must pay damages and interest in case of non-performance. So also in the case of obligation to forbear from doing an act.

(3) Effects of obligation with respect to creditor :

Damages and interest.

(a) Right to proceed against debtor or his heirs in the course of justice. Not a right in the thing itself but against *the person* of the debtor or heirs. If the obligation consits in doing something, the creditor can compel debtor to perform the act or to pay damages and interest (V. D. L. 198.) but Pothier lays down that creditor can only sue for damages (*See* Pothier 157 and Note) for *Nemo potest praecise cogi ad factum.*

(b) Where the obligation is of a liquidated sum, it gives creditor right of opposing it to his debtor by way of compensation or set-off against any money arising from him to his debtor. (Pothier 587-604.)

(c) The obligation serves the creditor as a foundation for other obligations which persons may contract with him as sureties.

(d) It may serve as the subject of a novation (or substituted contract) where any such intervenes (See Pothier 546-569.)

(4) Damages and interest. Loss which a person has sustained or the gain which he has missed. *Id Est quantum mihi abest quantumque lucravi potui.*

(a) In the absence of fraud, if debtor is unable to fulfil his obligation which he had indiscretely entered into he is liable for damages and interest which might have been contemplated at the time of the contract.

(b) Debtor is liable only for such damage and interest as are in respect to the particular object of the obligation and not incidentally occasioned thereby in respect to his other affairs.

(c) In *casibus certis*, when damages and interest relate only to the thing which is the object of the obligation, they cannot be taxed at more than *double* the value of the thing (See 45 Voet. i. 10)

(d) In the case of fraud (Pothier 167) we ought not to include those damages which are not only a remote consequence, but are not even necessarily a consequence of it and may arise from other causes.

II. Gift or Donation.

1. General nature of a Donation.

Donation defined.

(1) It is a promise whereby a person, through liberality, irrevocably parts with something, (without receiving anything in return or stipulating for any advantage) for the benefit of another who accepts it.

(a) Donor must be a person who is not bound (3 Grot. ii. 2-3)

(b) Voet distinguishing between *dona* and *munera* says *dona proprie dicuntur quae nulla necessitate juris aut officii sponte praestantur.* (39 Voet. v. 1.)

(c) Donation must be out of liberality (3 Grot. ii. 4)

(d) Donation must be of donor's own property, and the donor is not bound to guarantee the property which is the object of donation (3 Grot. ii. 5 ; See 39 Voet. v. 10.)

(e) If anything is received or stipulated for, the transaction is not a gift but a case of *do ut des.* (3 Grot. ii. 6)

(2) Reward and gratitude often the basis of a donation. *Propter nullam aliam causam dat, quam ut liberalitatem et munificentiam exerceat, beneficio praecedente accepto invitatus* (39 Voet. v. 3.)

(3) Classification (39 Voet. v. 3-4 ; vi.)

Propria, and impropria.

(a) *Propria. Cum quis dat ea mente, ut statim velit accipientis fieri, et nullo casu ad se revesti ac propter nullam aliam causam facit quam ut liberalitatem exerceat.*

(b) *Impropria.* All others; to which class belong *donatio mortis causa, propter nuptias, et sponsalitia largita* To the previous class belongs, then, *donatio inter vivos.*

2. Capacity of parties. (39 Voet. v. 5-9 ; 3 Grot. ii. 7-10.)

(1) Every person who has the free administration of his property can make a gift to every person not prohibited from accepting gifts.

(2) Parent cannot make a gift to minor son under tutelage. But (V. D. Keessel 485) there is nothing to affect the validity of a donation by a father to son *in potestate*, accepted by son on attaining puberty or, if below infancy, by some public person.

(3) Husband and wife cannot make gifts to each other except in so far as they are confirmed by death.

(4) Minors cannot make gifts (3 Grot. ii. 7) and a minor engaged or married without consent cannot give gifts to the betrothed or the spouse, nor can such gifts be confirmed (3 Grot. ii. 10)

(5) Married woman cannot make gifts without husband's consent but husband may, apart from wife, unless to prejudice her. (See 23 Voet. ii. 41. 54. 55)

(6) Persons in certain fiduciary relations are forbidden to give gifts or receive. (See 39 Voet. v. 9.)

3 Subject of donation.

(1) Everything saleable may be subject of a donation, not only a portion but an entirety. *Donantur res omnes quae sunt in commercio, quaeque adeo et vendi et oppignorari et legari possunt* (39 Voet. v. 10.)

Gift of all one's property.

(2) A gift of all one's property is invalid because donor thus cannot make a last will. (3 Grot. ii. 11)

(a) V. D. Keessel (Thesis, 487) says that "according to the more correct opinion" donation of all one's property is *not* prohibited by Roman-Law, but that the opposite opinion has been adopted in practice.

(b) Such donation invalid even if confirmed on oath, or made in favour of the son or of hospitals (3 Grot. ii. 11)

(c) The subject is discussed by Voet who concludes, *Non satis justa ratione magis sed erronea veterum Interpretum opinione niti quod ab Hugone Grotio et aliis traditum, donationem omnium bonorum praesentium et futurorum ne pauperibus quidem fieri posse, utcunque jurejurando firmaretur* (39 Voet. v. 10)

4. Acceptance of the gift is essential to its validity. Non aliter tamen donationes ratae sunt, quam si ab eo cui fiunt acceptentur, adeoque ejus assensum habeant: non enim nolenti tribuuntur beneficia aut liberalitates acquiruntur (39 Voet, v. 11)

(1) Acceptance may be made in the instruement itself, by letter or otherwise only it must be clear.

(2) It may be (3 Grot. ii. 12; See 39 Voet. v. 12)

Modes of acceptance

(a) By words or other suitable tokens if parties are present,

(b) By letter.

(c) By attorneys, agents, guardians, etc.

(3) No obligation attaches to donor or party promising, in case he should revoke it or die before it is accepted, unless a notary had accepted the promise for another with his approbation. (3 Grot. ii. 12)

Prodigality

(4) Roman Law provision against prodigality to have donations above 500 aurei registered, not binding in Roman-Dutch Law and "unheard of in Holland" (3 Grot. ii. 15), but Van Der Keessel (Theses 18. 489) would seem to suggest that that provision is binding under Roman-Dutch Law if the following requirements are not fulfilled:

(a) In the case of immovables, making a solemn cession in court.

(b) In the case of movables making a declaration before a notary and witnesses.

5. Effect of a valid donation. (See 39 Voet. v. 19-21)

Delivery necessary.

(1) Donor is bound to make delivery of possession; the acceptor acquires first a *right to claim* dominion, and then the *dominion* itself (3 Grot. ii. 14)

(2) Ownership passes by delivery and (21 Voet. ii. 13) donor is not bound to warrant the property *Plane in donationibus simplicibus ob res donatas evictas donatorem non teneri, verius est, sive a datione sive a promissione donatio initium habuerit.*

(3) If donation be made on condition that donor should receive aliment from donee, an action is maintainable on non-fulfilment of condition (V. D. Keessel 488, 3 Grot. ii. 13)

(4) Donation once made is binding and irrevocable (3 Grot. ii. 16) *except* in the following cases:

When donation is revocable

(a) See above 4 (3)

(b) Of gross ingratitude (3 Grot. ii. 17. See 39 Voet. v. 22-27.

(c) Donee attempting the life of donor or inflicting on personal violence (Grotius *ibid*)

(d) Donee contemplating making all the property of no value (Grotius *ibid*)

(e) Slander or reproach except to mothers who have married a second time (Grotius *ibid*)

(f) Donee refusing to support donor *in casu extremæ necessitatis* (Grotius *ibid* and Voet. *ad. loc.*)

(g) If donation of donor's entire property, or principal part, or part of remarkably great value, be made *when donor had no children and did not probably contemplate having any*, and afterwards begets legitimate children (3 Grot. ii. 18.) On this point V. D. Keessel (Thesis, 490) suggests that this right of revocation belongs solely to the donor and not to his children or heirs.

(h) If a donation prejudices any of the children in their legitimate portion. (3 Grot. iii. 19.)

(α) Whole donation would be set aside *if made to a stranger* to defraud children. (Grot. *ibid.*)

(β) But not when made in favour of a son entitled to a filial portion (V. D. Keessel 491.)

(γ) When deprived of *only part* of the legitimate portion children have personal action for deficiency to get *pars inofficiosa* annulled (39 Voet. V. 36-37; V. D. Keessel 491)

Mortis causa.

6. Donatio mortis causa: Gift in contemplation of death. The person actually delivers something or effects it without delivery (3 Grot. ii. 22) in the presence of five witnesses, or a notary and two witnesses (V. D .Keessel 492.)

(1) Those who may make a testament may also make a *donatio mortis causa* (V. D. K. 493) and those who could not

alienate property by act *inter vivos* may not make these donations (3 Grot. ii. 23.) As regards a wife Voet. *ad loc.* says *licet moribus nostris uxor sine marite consensum neque contrahere neque donare inter vivos possit, mortis causa donationem nihilominus absque ejusdem auctoritate facere non prohibeatur illis saltem in locis, in quibus suo arbitrio sine viro testamenta condendi jus habet.*

(2) This donation is subject to same rules as those about legacies by last will and is subject to a deduction of fourth part (3 Grot. ii. 23; 39 Voet. vi. 4)

(3) How void and revoked: (3 Grot. ii. 23; 39 Voet. vi. 7)

Donatio mortis causa how evoked.

(a) Revoked by donor by act *inter vivos* even after delivery.

(b) Void of itself if acceptor dies before donor even after delivery (Grotius *ad loc.* 39 Voet. vi. 7)

(c) When any one in *articulo mortis* gives something to another without delivery and afterwards recovers, such donation is considered tacitly revoked (Grotius)

(d) *Cessante periculo propter quod donatum fuerat* (Voet)

(e) *Revocatione donantis.* (Voet)

(4) Unlike a legacy, donation valid even if unaccepted (3 Grot. ii. 23

III. Mutuum, Commodatum.

VanDerLinden pp. 216-22; 3 Grotius ix; x.; 12 Voet. i.; 13 Voet. vi.; VanDerKeessel 541—549.

Loan defined.

1. "Mutuum" is an agreement by which one person delivers something belonging to himself, which consists in measure, number or weight, to another, so that it becomes the property of the receiver, and whereby the receiver is afterwards bound to return as much of the same species and of the like quality. (3 Grot x. 1)

2. It is essential to make the contract valid (3 Grot. x. 2-7)

(1) That the thing be something consumed in use, must be "measure, number or weight." It must be lender's own.

Constructive Delivery.

(2) That the thing be *delivered*, unless it were already in borrower's possession. Constructive delivery sufficient. *Ita accipiendum ut non praecise veram interventre necesse sit sed et ficta sufficiat, sic ut unus vel etiam duplex actus traditionis quasi occultetur, ambagum evitandarum causa, non modo secundum juris civilis placita sed et juxta hodiernos mores* (12 Voet. i. 4)

(3) That the ownership he vested in the receiver.

(a) Those who cannot alienate cannot lend, and so

(b) Whatever has been delivered by minors is reclaimable, also whatever lent to madmen, thieves, prodigals (12 Voet i. 8; 3 Grot. x. 14)

(4) That the borrower he bound to return of the same species and the like quality and the same quantity.

(a) Even if the price of the thing has altered (12 Voet. i. 24 the question is discussed)

(b) Money if borrowed may be returned in another species of the same value (3 Grot. x, 7)

Interest.

3. Interest is often stipulated for in cases of money lent:

(1) A rate of six *per cent*, generally; among merchants twelve is allowed (3 Grot. x. 10 end) on bonds for a year or less time (V. D. K. 547)

(2) The borrower may not, without lender's consent, pay back the sum borrowed before the stipulated time, so as not to pay interest. (V. D. Keessel 542)

(3) For default interest runs from date of default.

(4) The accumulated interest may not exceed the principal and no compound interest is allowed.

Whether interest is lawful or not is discussed by Grotius in 3 Grot. x. 9. 10 (cf V. D. Keessel 544-547) under the title, "whether an agreement for additional consideration accords with natural law."

4. Exceptio non numeratæ pecuniæ. (12 Voet i. 31-35)

Non numeratæ pecuniæ.

If any one is sued on his written acknowledgment of a loan not made, he can defend himself by a plea of non numeratæ pecuniae.

(1) Where no money or less than alleged has been advanced; *sive nullo modo numeratio subsecuta sit, sive cum minor quantitas numerata esset, de majore fuerit cautio data* (12 Voet. i. 31)

See 12 Voet. 1. (De Vos's translation.)

(2) Under Roman Law, action arising on a *literarum obligatio* is barred within two years by the exception *non numeratæ pecuniae* pleaded by the debtor, unless the creditor can prove receipt of consideration by other evidence (3 Grot. v. 3; V. D. Keessel, 523; 12 Voet. i 31; *Contra* VanLeeuwen.)

(3) Exception *non numeratae pecuniae* may be renounced in the same instrument by which the *literarum obligatio* is contracted. By this renunciation the benefit of the exception is only considered to have been dispensed with in the same way, as if the two years had already elapsed...but the debtor is still permitted to prove the non-receipt of the consideration (V. D. Keessel, 524.)

(4) Burden of proof is on him who denies the advance. Voet says that Roman-Dutch Law practice is as laid down by many jurists, *onus probandi incumbere neganti numerationem factum esse, quotia chirographo ac numerationis confessioni subjecit exceptionis hujus renunciationem; cui tamen ad probationem faciendam succursum hactenus, ut ante et post bienii lapsum, aliis destitutus probandi modis ad jurisjurandi delationem admittatur* (12 Voet i. 35)

Commodatum

"Commodatum" is an Agreement whereby a person places something in the hand of another in order that the receiver may use the same "gratis" in a certain manner, and, after use, restore the same. (3 Grot. ix. 1)

(1) Chiefly non-consumable movables form the object of this contract; sometimes immovables are lent: *e. g.* a room in a house.

(2) The property must be lent for a certain fixed time.

(3) The use must be *gratis*, or else it is *Hire*.

(4) The same thing lent must be returned in the same condition, with all profits and fruits.

6. Actions from Commodatum.

(1) *Actio commodati directa*, Lender v. Borrower and Heirs, (13 Voet. vi. 2-7)

(a) For re-delivery of property, or for value.

(b) For damages due though injury or delay.

(c) For profits and fruits.

(2) *Actio commodati contraria*, Borrower v. Lender (13 Voet. vi. 8; 3 Grot. ix. 10)

(a) For indemnity due to damages by defect in property.

(b) If lender or others have obstructed borrower in the use of the property

(c) For necessary expenses.

7. Commodatum distinguished from similar contracts

In precario quidem et locatione et usufructu et usu et pignore cum pacto antichresios rem etiam ad usum concedi palam est; sed diversimode, dum in locatione et antichresi non gratis, in precario non ad certum tempus, in usufructio non per contractum tantum sed et per ultimam voluntatem et legis dispositionem alteri tribuitur utendi jus. (13 Voet. vi. 1.).

IV. Depositum.

(VanDerLinden 222-223. 3 Grotius vii. VanDerKessel 531-535. 16 Voet' iii.)

Depositum.

1. "Depositum" is a contract whereby any one gives over to another any movable property to keep without reward, to be reclaimed at his pleasure (3 Grot. vii. 1)

(1) If there are more than one depositor and the thing is indivisible, all of them must go together to claim restoration; and if only *one* claims he must guarantee as regards others.

(2) By stipulation the deposit may be restored to a third person who thereby acquires a title.

Grot vii 5 16 Voet iii.3.

(3) Property must be *movable* (3 Grot. vii. 5.) Voet is of a contrary opinion, *Deponi possunt res omnes sive fungibiles, sive non fungibiles, sive mobiles sive immobiles*.....(16 Voet. iii. 3)

(a) One's own or another's property may be deposited.

(b) If any one who has received a deposit should be found to be himself the owner thereof, he would not be bound by the deposit.

(4) No reward should be taken.

(5) The person depositing may demand restoration even immediately but the acceptor may not restore it *unasked* unless from urgent motives.

2. Actions. (3 Grot. vii. 9-11. 16. Voet. iii. 4-10)

(1) The person depositing may sue the other for re-delivery and for damages due to depositary's fault or neglect.

(a) The loss must have been (3 Grot. vii. 9) caused by acceptor's bad faith or gross inattention; and if he has not taken care of the deposit in the same manner as he has been wont to do of his own property, he must make good the full extent of the loss.

(b) *But* (V. D. Keessel, 531) since a depositary is liable in respect only of *lata culpa* the doctrine of Grotius is very exacting and cannot be supported by the Roman-Law (Digest xvi. 3)

(c) A paid depositary is not liable for accident, nor of *culpa levissima* but only *culpa levis* (V. D. K. 232)

(2) The depositary may sue depositor for an indemnity on account of necessary expenses.

(a) A depositary who volunteers is bound for all kinds of neglect (3 Grot. vii. 10)

(b) A depositary may retain the deposit on account of expenses; and even a third person may, to secure a debt due to him, arrest the deposit in the hands of the depositary (V. D. Keessel 533)

Sequestration, consignation. See below chapter on Extinction of obligations.

3. Like Depositum are Sequestration and Consignation.

(1) *Sequestration* is depositing disputed property with a third person appointed by court, or by agreement, to be duly handed over to the party entiled, *e. g.* an inheritance of which the heir is unknown.

(2) *Consignation* is the acceptance and care of moneys of which the true legal owner is uncertain *e.g.* when a debtor is unwilling to remain charged with money which his creditor will not accept or is unable to accept, because a third person has attached it.

(3) If the money deposited in a public office cannot be recovered from the actuary, the magistrates who have conferred the office on him without taking due security are from the reason of law bound to make good the deficiency (V. D. K. 535. Voet *contra*)

(4) Deposit and consignation to effectually release the debtor must be made before witnesses but (V. Leeuwen *contra*) the creditor need not be cited (V. D. Keessel 824.)

V. Pledge: Contractus Pignoris.

(V. D. Linden pp 132-133. 3 Grotius viii. V. D. Keessel 225-226. 13 Voet. vii.)

1. The Contract of "pledge" distinguished from the right.

Pledge as a contract distinguished from pledge as a right.

(1) The word *pignus* sometimes expresses the *right* created (*Jus constitutum*), sometimes the *thing* mortgaged (*rem obligatam*) and frequently the *contract* itself (*conventionem*) by which such right is created (20 Voet. i. 1)

(2) There are five kinds of "*pignus.*" *Quod traditione perficitur est contractus bonae fidei re constans, quo creditori res traditur in securitatem credili, ea lege, ut soluto debito, vel alia satisfactione interveinnte eadem in specie restituatur* (13 Voet. vii. 1) "Pledge" effected by delivery is the *contractus pignoris.*

See Berwick's Voet. pp. 259-281.

(3) The *contract* is often veiled by the parties under the title of "purchase" or *datio in solutum. Qualis contractus pignoris licet subinde per contrahentes veletur* "Emtionis" *titulo vel* "dationis in solutum,' *non tamen ideo minus* "*pignus*" *manet, quoties circumstantiae concurrentes id suadent* (13 Voet. vii. 1)

(4) The contract of pledge is not a pledge in so far as the same is the consequence of another obligation, but a contract of itself *as distinguished from those pledges which are effected without delivery of possession* (3 Grot. viii. 2)

(5) Although the contract of pledge is a *real* one *(constans in re)* yet it induces *personal* obligations and actions, as distinguished from the actions *in rem* available to a creditor *ad persecutionem hypothecae vel pignoris* (20 Voet. i. 1. and Berwick *ad loc.)* But both forms of the *actio pignoratitia* have also place in hypothecs when the creditor has acquired, by the *actio hypothecaria*, possession of the thing hypothecated (13 Voet. vii. 11.)

2 Contractus pignoris or placing in pawn is a contract whereby a person places any property in the hands of another as security for his debt

Placing in pawn.

(3 Grot. viii. 1)

(1) Property may be movable or immovable. In the case of immovables there must be (V. D. K. 537) a solemn cession in law and the payment of the duty of two-and-a-half *per cent.*

(2) A contract of pledge as respects the property of a third person is valid *even without the owner's consent*; not, however, so as to create a right of pledge to the prejudice of the owner, unless the pledge has been effected in his own name by one whom the owner has authorized to pledge or alienate the thing on his behalf (V. D. Keessel 539, 3 Grot. viii. 3.)

3. Two personal actions arise from this contract.

(1) *Actio pignoratita directa*, Debtor v. Creditor (13 Voet. vii. 2-9)

(a) For re-delivery of pledged property, or

(b) For its value if property be lost (3 Grot. viii. 5) through *neglect* of creditor but *not through accident*, and the burden of proving accident is on creditor unless the accident be of an extraordinary nature (V. D. K. 540)

(c) For damages for injuries caused through creditor's fault.

Fruits and profits 13 Voet. vii. 4.

(d) For an account and delivery of all the fruits and profits of the article pawned. Profits must either be carried to account in reduction of the capital debt or, by an agreement called *pactum antichresios*, be taken in lieu of interest (3 Grot. viii. 5.) Profits include (13 Voet. vii. 4)

(α) Accessions of thing pleged *e.g. alluvium, usufruct.*

(β) All that has come to the creditor by occassion of the pledge *e.g.* treasure, trove (half.)

(e) For an account of sale, if property be sold; for surplus of proceeds of sale after paying off debt (13 Voet. vii.)

(α) The sale referred to here is in *default of payment.* (V. D. Linden, 228.)

(β) Voet cites the Civil Law to the effect that the debtor may sue for damages he may have sustained through the creditor's fraud, in selling the property pawned, *creditor pignus jam distraxerit etiam in id haec actio comparata est*, ut si vendendo fraudem fecerit, *id quod interest debitori praestetur* (13 Voet. vii. 4)

(2) *Acto pignoratitia contraria*, Creditor v. Debtor (13 Vot, vii. 10)

(a) For necessary expenses (3 Grot. viii. 7) where expenses are not paid, the pledge may be retained *debit of principali jam soluto pignoris permissa est* (13 Voet. vii. 10.)

(b) For losses sustained through defect in the thing pledged (*ibid.*)

(c) For damages owing to.

Damages.

(α) Pledging the property of another (3 Grot. viii. 8

(β) Representing the pledge to be something different from that which it really was (*ib.*)

(γ) Rendering the pledge of no value to creditor through fraud (*ib.*)

(δ) General *mala fides* (*ib.*)

4. Heir is bound by this obligation even if the pledge had not been the property of his ancestor (the pawner,) but had belonged to the heir himself at the time of the placing in pledge (3 Grot. viii. 9)

VI. Purchase and Sale.

VanDerLinden 226-236. 3 Grot. xiv.—xvii. V. D. Keessel 639-666. 18 Voet. i-vi. 19 Voet. i. iii. 21 Voet. i, iii.

Sale defined.

1. Selling or buying is a contract whereby one person binds himself for the transfer or warranty of anything, and the other for payment of a certain price in money. (3 Grot. xiv. 1.)

(1) There must be the subjectmatter of the contract.

(a) Otherwise there is no sale.

Spei emptio.

(b) But there may be a sale of things *in futuro* and a sale of expectancy, or *spei Emptio*. Though crop fails yet money is due. (V. D. Linden 227; 18 Voet. i. 13)

(c) What is already one's own cannot be bought by him (3 Grot. xiv 9; V. D. Linden 227.)

(d) Grotius gives following as saleable : (3 Grot. xiv. 973)

(α) Anything, freehold, feudal or emphyteusis, corporeal or incorporeal, present or future.

(β) Inheritance.

(γ) *Jura in personam.*

(δ) Rents and annuities.

(ε) *Res litigosae*, saving (V. D. Keessel, 630) the rights of the third party litigant.

Price must be *certum, justum, verum, for money.*

(2) The price must be real and defined (V. D. Linden 227-228 3 Grot. xiv. 23-25)

(a) The price must be *money*, otherwise the transaction is *barter.*

(b) The price must be *real*, otherwise the transaction is a donation.

(c) The price must be definitely ascertained.

(α) By the declaration of contracting parties.
(β) But not left exclusively to the discretion of contracting parties.

(γ) By the award of a referee. If referee is unwilling to fix the price, the purchase is void for uncertainty. *Inutilis futura sit emptio tanquam ab arbitrii condicione dependens, si tertius ille noluerit vel non potuerit arbitrari.* (18 Voet. i. 23.)

(d) Price must be *certum, justum, verum, for money.* (Berwick's Voet. p. 27. note.)

(3) There must be mutual consent (V. D. Linden 228. 3 Grot. xiv. 1-4; 18 Voet. i. 3-7)

(a) Fraud, error, fear, etc., vitiate consent.

Error.

(b) No one can be *compelled* to sell his property, even if on has advertised (18 Voet. i. 3)

(c) Error does not vitiate contract if it is not *error in toto corpore* (in the entire identity of the thing) or *in substantia* (in the material of the thing) or as regards *qualitas* (legal status of the thing); and *accidental error* does not affect consent (18 Voet. i. 5-6)

(d) Contract not affected by error as to quantity. *Si quantitate erratum fuerit, valet quidem venditio, ullo in casu ipso jure nulla est.* (18 Voet. i. 7)

Completion contract.

Consensu determinato ad mercem et pretium interposito, nihil ultra ad emptionis perfectionem desideratur, adeoque neque verba, neque traditio, neque scriptura. (18 Voet. i. 3. V. D. Linden 230)

(1) A writing may be necessary if so agreed upon.

(2) A conditional sale is not perfect until the condition takes place (V. D. Linden 230.)

(a) Till fulfilment of condition sale is in abeyance (3 Grot. xiv. 29)

(b) On fulfilment of condition matter will have a retrospective effect (*Ibid*).

(c) When purchase is stipulated to take effect on particular day, it is *de facto* completed, but execution suspended (*Ibid*).

(d) Immoral conditions vitiate transaction (*Ibid*).

3. **Consequence of the Contract. "The consequences of a sale are fulfilment, delivery and rescission"** (3 Grot. xv. 1).

(1) Purchaser bound to pay purchase-money and to make good all costs incurred on his behalf. (3 Grot. xv. V. D. Linden 231.232).

Risk of the thing sold.

(2) The risk of the thing sold is with the purchaser on the completion of sale (See 18 Voet. vi. 1. and the pithy notes of *Berwick's* translation of Voet.)

(3) The risk is the puchaser's before delivery though vendor is then owner and *res perit domino.* (Voet. *ad loc.*)

(4) *Before delivery* buyer and seller have against each other only a personal action (V. D. Linden 230.)

(5) Seller bound to transfer property to buyer, by delivery and admission into possession (V. D. Linden 231. 3 Grot. xv. 4.)

(6) The thing sold must be free of all incumbrances (3 Grot. xv. 6)

(7) Fruits and profits accruing after purchase must be delivered to purchaser if only he has paid purchase-money (3 Grot. xv. 6)

(8) On warranty see notes to *Berwick's* Voet, (Bk. xxi. Title 21 Voet. i. 11. enumerates respects in which Roman Law of warranty differs from Roman-Dutch.

4. **Rescission of Sale** (V. D. Linden 234-236; 18 Voet. v. 3; Grot xvii) takes place.

(1) By mutual release.

(2) When property perishes *before* completion of purchase.

(3) For seller's fraud. A sale founded on fraud on the part of the vendor, may be rescinded or rather declared void, even without *restitutio in integrum*, in the ordinary action founded on the contract itself (V. D. Keessel, 666).

(4) By seller's concealment of material defects.

(4) When the buyer or seller is prejudiced in more than half in respect of purchase money. Parties are allowed to increase or diminish price to real level.

(6) When anything is sold for ready money and payment does no follow.

VII. Letting and Hiring.

V. D. Linden 236-242. 19 Voet. ii. 3 Grot. xix. V. D. K. 670-680.

1. Letting is an agreement, whereby one party binds himself to suffer another to have the use of a certain thing, during a fixed and limited time, in consideration of a certain term of money which the other binds himself to pay.

Definition.

(1) The object of the agreement must be something capable of being let on hire, movable or immovable, corporeal or incorporeal.

(a) Labour may be let. (3 Grot. xix. 4.)

(b) Usufruct may be let. (3 Grot. xix. 5.)

Letting the property of another.

(c) Even what is altogether the property of another may be let. (3 Grot. xix. 5. See 19 Voet. ii. 3-5)

(α) The lessor not being able to confer the use is liable for damages. (Grotius)

(β) The contract whereby any one hires what belongs to the lessee either in absolute or qualified property, is null and void. (Grotius)

(2) The hirer or lessee must be assured of use or enjoyment. (V. D. Linden, 236).

(3) There must be a definite rent or hire, payable generally in money. Payment may also be made in other things capable of measure, number or weight. (3 Grot. xix. 6)

(4) There must be mutual consent,

(a) The agreement may be in express words; and also tacitly made, as in the case of the lessee remaining in the enjoyment of a house after the expiration of the lease. (3 Grot. xix. 2. 19 Voet. ii. 9). So Van DerKeessel says that the letting and hiring of property *in town* may be effected (*Thesis*, 670) even without a writing and the lease of a house may be continued (*Thesis*, 672) even by tacit consent.

Tacit and express consent.

(b) Tacit and express consent are discussed in 19 Voet. ii, 1. 2. 9-12. The summary of 19 Voet. ii. 11. is, *apud nos nunc non ultra probatae sunt* tacitae locationum conductiones *in praediis rusticis et urbanis.*

(c) The letting of lands cannot be accomplished in Holland, except *coram lege loci*, or by a writing signed by the proprietor. (3 Grot. xix. 2). See 19 Voet ii. 2, wherein the ruling of a Dutch edict of April 3rd. 1677 is cited as final, *ne sine scriptura ac charta*

sigillata praediorum aut rerum quarumcumque immobilium *locatio fiat.* But, says VanDerKeessel, the common opinion of the interpreters of Dutch-Law, that a lease of "country-property" is not valid without a written instrument, cannot be supported (*Thesis*, 672)

19 Voet. ii. 2, V. D. K. 72.

(d) A lease of lands *in longum tempus*, even for more than ten years, (but under 25), may be effected by private agreement (V. D. Keessel 673; 4 Van Leeuwen xxi. 9. See 19 Voet. ii. 1)

2. The contract is completed when the parties are agreed as to the subject of the contract and the consideration. (3 Grot. xix. 7)

Completion of contract.

3. Lessor's obligations.

(1) To give the lessee possession of the thing let, at the time fixed

(2) To maintain and keep the thing let in a proper state.

(3) To indemnify the lessee for all damages, occasioned by any material defect in the thing let.

(4) To indemnify lessee against "Act of God" by reducing rent proportional to loss and time of non-user (3 Grot. xix. 12).

(5) To perform any particular covenant in the lease.

4. Lessee's obligations.

Ejectment of lessee for default.

(1) To pay rents duly. The lessor may eject the lessee from the house or land *even within the time*, in case the lessee remains above two years in default (3 Grot. xix. 11.) For rents the lessor has a *lien* on the crops and on the movables on the premises. This is a legal and preferent mortgage (V. D. Linden, 239)

(2) To use the thing let for no other purpose than for which it was agreed upon. A lessee cannot convert pasture into arable land, though in the first years of a long lease he may do so (V. D. K. 680)

(3) To make good all losses caused by any other cause than inevitable accident. (3 Grot. xix. 11)

(4) To perform all covenants in the lease.

Ejectment in consequence of necessity.

(5) To return the thing let to the lessor at the expiration of the time. But the lessor may eject the lessee if he required his property in consequence of any unforeseen necessity. (3 Grot. xix. 11. V. D. Keessel, 675. *dubit.*)

5. The contract is extinguished (V. D. Linden, 240)

(1) When the thing let is, by unforeseen misfortune, distroyed. (cf. above 3. (4)

(2) By merger.

(3) When lessee is ejected. (See above 4. (5)

(4) When the term of the lease expires. A lease is not void by sale, for *lease goes before sale.* A lease does not necessarily expire on the death of the lessee; but in the case of insolvency (V. D. K. 676) it expires after a short delay, at the usual term for removal.

Lease goes before sale.

6. The hiring of servants comes under this contract. Whoever dismisses his servant without lawful cause, within the time, must allow him full wages (3 Grot. xix. 13.) See below for *Ceylon Labour Laws.*

Master and servant

VIII. MANDATE.

(V. D. Linden 242-245, V. D. Keessel 580-583, 17 Voet i, 3 Grot. xii)

1. Mandate or commission is a contract whereby one confides to another some matter which is lawful, either to transact the same for him or for another, and the other accepts the same gratis, (3 Grot. xii. 2.

Definition.

(1) The thing must not be something *past* (3 Grot. xii 3)

(2) There must be the intention of the parties to bind each other reciprocally, in whatever manner the agreement is made (V. D. Linden, 243)

(a) *Mandate* must be distinguished form simple recommendation or advice. (V. D. Linden, 243. Voet. i. 1)

(b) The latter creation no obligation unless coupled with fraud. (V. D. Linden, 243)

(3) The business must be undertaken to be done *gratuitously*. A mandatory, however, may receive some recompense or honorary remuneration. VanDerKeessel says (*Thesis*, 570): as remuneration is not repugnant to the nature of mandate (in Roman Law,) so by the customs of Holland remuneration may be legally recovered, not, only where it has been promised, but even when it has not been promised, provided the act or service done be such as it is usual to give remuneration for.

On remuneration. V.D.K. 570.

2. Obligations of mandatory:

(1) To accomplish his business.

(2) To use all possible care in so doing.

(3) To duly account with mandator.

(a) If the mandatory should buy for less than for the sum of money he was charged with, it comes to the profit of the mandator (3 Grot. xii. 10)

3, Grot. xii. 10, V. D.K. 573.

(b) If he should purchase for more, then he has redress only in proportion to the extent of his mandate (3 Grot. xii. 10) VanDerKeessel, however, says that a mandatory, who has exceeded the limits of his mandate in respect of a purchase, has no action for excess, not even *actio negotiorum gestorum*. (V. D. K. 573)

3. Obligations of mandator:

(1) To save the mandatory harmless.

(2) To reimburse costs incurred only in connection with the commission and reasonably so incurred

(3) To guarantee mandatory against all obligations and engagements necessitated by the charge.

4. Mandate is extinguished :

(1) By the death of either party.

(2) By such alteration in the mandator's condition as deprives him of his status in law.

(3) By revocation of the mandate, (See 17 Voet. i. 17 as to when revocation is impossible).

[*Partnership*, V. D. Linden 570-580, here omited.]

XI. Extinction of obligations.

See above, *Outlines of English Law*, Chapter on *Discharge*; V. D. Linden, 264—277; 3 Grot. xxxix—lii: V. D. Keessel 822-901; 46 Voet. iii. iv.

1. Payment is good discharge by whomsoever made.

Rules of payment.

(1) Party paying must be debtor or on his behalf.

(2) Party paying must be entitled to transfer property in the thing so paid.

(3) Payment must be to creditor, or to someone authorised by him to receive, or to heirs. When there are several heirs payment to one is not full payment, unless that one has been empowered by his co-heirs to receive the whole.

(4) Where a debt is assigned payment must be made to assignee and not to original creditor.

(5) Where payment is made to a person not previously agreed about, such payment is not valid,

(a) Unless creditor afterwards confirms it.

(b) Unless the money paid is applied to creditor's use.

(c) Unless payee becomes creditor's heir.

(6) No creditor is bound to accept partial payment against his will, unless payment by instalments was agreed upon; (3 Grot. xxxix. 9. V. D. Linden 266.) part payment extinguishes the debt *pro tanto*.

(7) Appropriation of payments. (See, above, page 102)

(a) Debtor is at liberty to specify account.

Appropriation of payments.

(b) Otherwise, creditor specifies by his receipt.

(c) If neither specifies, payment is then, according to law, considered as having been made upon the debt which bears most heavily. (3 Grot. xxxix. 15)

(d) If debts are of same nature and of same date ("of equal burden." 3 Grot. xxxix. 15) payment is to be placed to account of each *pro rata*.

(e) In debts which bear interest payment must be applied to reduce interest in the first place and afterwards to the principal.

2. When payment tendered is not accepted, the money is deposited in court. This is consignation.

Consignation

(1) Consignation is equal to actual payment (3 Grot. xl. 3)

(2) For consignation to operate as a release the tender should have been made before witnesses (V. D. Keessel, 824)

(3) Grotius says that notice of deposit in court must be given to creditor (3 Grot. xl. 2) It is not necessary to cite the creditor (V. D. Keessel, 824; *contra*, VanLeeuwen, 4 *Censura Forensis* part i, xxxv. 1, 2)

3. Novation. (See below, x.)

4. Compensation or set-off.

(1) To constitute a right set-off

Rules of set-off.

(a) The debts must be of equal value, of the same kind.

(b) The debt urged in set-off must have become due and payable.

(c) The debt must be of a liquid nature.

(d) The debt must be due to the same person who claims set-off.

(e) The debt must be due by the very person against whom set-off is claimed.

Consequences of set-off. V. D. Linden, 272.

(2) Consequences of set-off.

(a) When a debtor gives security to a creditor, and that creditor afterwards becomes his debtor, such security may be got back on payment of any balance due.

(b) When a debt carries interest, and the debt urged as set-off bears no interest, then the debt bearing interest is extinguished to that amount, and the interest in the same proportion.

(c) When a debtor's creditor becomes his debtor for a less sum than was due to such former creditor, that creditor who becomes debtor, though not bound to accept partial payments, is obliged to abate *his* demand *pro tanto*.

(d) Money paid towards a debt already extinguished by set-off may be recovered, unless such payment be made in satisfaction of a judgment.

5. Merger, or confusion of claims, takes place when the title of creditor and debtor with respect to the same debt are united in one and the same person.

Merger.

(1) The party must be creditor of debtor for the entire debt. If he is for part, the merger extends to that part only.

Heres purus.

(2) The heir must be *heres purus*, that is, not under benefit of inventory, for whoever is *heres purus* acquires all the profits and incumbrances of the deceased and is therefore

understood to pay himself and to receive payment from himself (3 Grot. xl. 5). If party is heir to part only, the debt, with respect to his co-heirs, continues to exist as to their portions (V. D. Linden, 273)

(3) By merger the obligation of the surety also becomes extinguished, the accessory following the principal. But when the *creditor* becomes heir to the surety, or *vice versa*, the principal obligation does not thereby cease to exist.

6. Release by consent of creditor takes place by express words or tacitly.

(1) The creditor or persons empowered by him can release. Power of release is not given to attorney under a general power, gurdian, curator or administrator.

(2) Modes of Release.

Release by donation.

(a) Acceptilation (V. D. K. 828) or release by donation, that is, when the creditor, without any equivalent, releases the debtor. (3 Grot. xli, 5.)

(α) Return of binding documents to debtor is release by donation (3 Grot. xli. 10)

(β) In Roman Law special words of release were used for release by donation, not so under Roman-Dutch Law (3 Grot. xli. 7)

(γ) Return of things pledged releases the pledge but *not* the debt (V. D. Linden, 270)

(δ) No release for immoral consideration is valid (3 Grot. xli. 11)

Release by agreement of non-claim.

(b) By agreement of non-claim. "By the *pactum de non petendo* or agreement of non-claim, an obligation is from the reason of our law *ipso jure* released" (V. D. Keessel, 828)

(3) The two modes distinguished. (3 Grot. xli. 9. V. D. Keessel, 828)

(a) Release by donation is a present and absolute remission of the debt: release by agreement of non-claim is a promise *in futuro*.

(b) The former may not be limited by conditions: the latter may be.

(c) The former releases a co-promiser also, and affects a co-stipulator: the latter neither benefits a co debtor, nor affects a co-creditor.

(4) Effect of release.

(a) Sometimes the entire debt is condsidered released and *all* the co-debtors freed (V. D. Linden, 270)

(b) Sometimes the release only extends to one only of the debtors and the co-debtors remain bound. (*Ibid.*)

Effect of release on joint and several debtors.

(c) In the case of two persons being each a debtor, *in solidum*, for the same debt, or bound jointly and severally, the release to one frees him only, and not his co-debtor or co-obligor, (*Ibid.*)

(d) Where an obligation of non-claim is personal, that is, that the debt should not be claimed of a particular, person, it would not release his heirs or co-obligors (3. Grot. xli. 9)

(α) But so long as the principal debtor could not be called upon, the security would be released (*Ibid.*)

(β) Release of surety does not release principal.

(e) V. D. Keessel 829-832 relate to insolvency. (See Ordinance No. 7 of 1853, Ceylon.)

7 Extinction of subject matter discharges obligation.

(1) Destruction must be entire.

(2) It must be before time of debtor's making default in payment (3 Grot. xlvii. 3)

(3) It must not be by the act or neglect of debtor.

(a) Otherwise he is liable

(b) Also his heirs and sureties.

8 Fulfilment of conditions of time and place, etc., effects release in the case of obligations so conditioned (V. D. Linden, 274)

Prescription.

9 Prescription extinguishes obligations, so far that after the lapse of a certain time, limited by law, *the right of action on them is lost.* (V. D. Linden 274.)

(1) Period is *third of a century* (3 Grot. xlvi. 3; V. D. Linden 275) but some hold (*e. g. Bynkershoek*) that a period of thirty years, is sufficient for personal actions.

(2) Grotius has that, unlike under Roman Law, obligations *are* extinguished in Roman-Dutch Law by time (3 Grot. xlvi. 2)

(3) VanDerKeessel doubts the above opinion of Grotius: Although the doctrine of Grotius, that prescription extinguishes a personal action, not by force of the exception taken but, *ipso jure*, seems to be in accord with the express words of certain ancient statutes, yet it is not free from difficulties; for if an action for the principal debt be barred *ipso jure* by a lapse of thirty years, how can the hypothecary action (2 Grot. xlviii. 44) against the same debtor remain for a period of forty years? (V. D. K. 874)

(4) Yearly claims are likewise barred.

(a) Not only so far as concerns the *arrears of rents* but the whole claim itself (3 Grot. xlvi. 5)

(b) But this prescription must not be held to apply to those arrears which have *not* been due thirty years for as many prescriptions are necessary as there are yearly payments (V. DerKeessel 875; V. DerLinden 275.

10. A release without donation is effected by satisfaction or "Rescissio a contractu."

1 The *rescissio* is when the parties mutually release each other and restore what they had received (3 Grot. xlii. 2)

V. DerKeessel, 833.

(a) On this *rescissio* VanDerKeessel says: the dissolution of a contract, effected not by way of gift, but by mutual consent, appears to have a wider effect than—and is different from—the mode in which consensual obligations are annulled by contrary consent,

for it will apply to any kind of contract, and may always be effected by the restoration of the thing given or the withdrawal of the cause or consideration of the contract (*Thesis*, 833)

(b) Open at all times to the parties (3 Grot. xlii. 3)

(2) Satisfaction is the delivery of something, with the consent of the creditor, in the room of that which is due in satisfaction or redemption thereof (3 Grot. xlii. 4)

(a) Not *any* kind of satisfaction, but only giving in payment (V. D. K. 834)

(b) Though the creditor must be paid in the same thing which is due to him...yet he may agree that the debtor shall satisfy him by giving him something else; and this, when completed, is equivalent to payment (3 Grot. xvii. 5)

Restitutio in integrum.

11. Restitutio in integrum. (See 4 Voet. i-iv) **The parties are restored to their original position by a court of law on grounds of fear, fraud, force, minority, absence, excusable error, or prejudice in above half the value.**

(1) Right of relief on ground of fraud or fear endures to 30 years; right to relief on grounds of minority is prescribed after four years from majority (3 Grot. xlviii. 13; V. D. K. 881)

(2) Relief is not granted, on the ground of minority, to a widow under 25 years of age, who has been injured in a contract (4 Voet. iv. 9; V. D. K. 879)

(3) 3 Grot. xlviii. 10, in Herbert's Translation, about relief on minors' contracts is thus amended by Lorenz, in his translation of VanDerKeessel pp. 296-297, "This is not to be understood of contracts which minors enter into without their guardians, [Herbert's translation: *independently of their guardians*] for these are null: but of those which they enter into *with* their guardians [Herbert's translation: *without their guardians*] or are contracted by the guardians alone."

(4) Voet lays down that relief is not to be granted to a girl under 25 years of age against a promise of excessive dowry or marriage gift, though there is Roman Law to the contrary, *jure Romano restitutionem adversus immodicam largitatem sponsalitiam potuiss impetrari colligi potest* (4 Voet. iv. 19) VanDerKeessel differs from Voet (*Thesis*, 880)

(5) Prejudice above half. (See above, page 106.) Grotius lays down that a compromise may be rescinded on the ground of *enormis laesio*, but this is doubted by VanDerKeessel (*Thesis*, 896) who cites authority to the effect that a compromise confirmed by voluntary condemnation cannot be rescinded.

Cessio Bonorum.

12. "Cessio Bonorum" is an act of grace, which is obtained from the Soverign, whereby a debtor is released from prison, and also is not bound for the payment of his debts beyond the extent of his means (3 Grot. li. 2)

(1) *Cessio bonorum* is an insolvency privilege, abolished in Ceylon by Ordinance No. 7 of 1853.

(2) See 3 Grotius li, and V. D. Keessel 883-895.

Exceptio rei judicatae. Exceptio jurisjurandi.

13. Grotius classifies (3 Grot lix. l.) **"exceptio rei judicatae" (judgement of a court of competent jurisdiction) and "exceptio jurisjurandi" (suppletory oath in court) as modes of extinguishing obligations.**

(1) VanDerLinden thinks this classification incorrect (V. D. Linden 277),

(2) *Exceptio rei judicatae* is advancing a sentence in Law as an exception against a claim (3 Grot. xlix.). 2.)

(3) *Exceptio jurisjurandi* is making an oath in a court by a party concerning a matter which is referred by his appointment to his oath (3 Grot L. 1)

X. NOVATION.

Pothier 546-569. VanDerLinden.....3 Grot. xliii. xliv. V. D. Keessel 835-837. 46 Voet. ii.

Definition. **1. Novation is the substitution of a new obligation for an old.**

2. A novation takes place:

Kinds of Novation. Pothier. 547-549.

(1) When a debtor contracts a *new engagement* with his creditor in consideration of being liberated from the former. This is novation generally.

(2) Where a *new debtor* intervenes and is accepted by the creditor. This is called *expromissio.*

(3) Where a *new creditor* is substituted with whom the debtor contracts some obligation and is discharged from the obligation with the old.

3 Grot. xliv. 2. Pothier, 564.

(4) When the original debtor, in order to be liberated from his creditor, gives him a third person, who becomes obliged in his stead to the creditor, or to the person appointed by him. This is delegation. *Delegare est vice sua alium reum dare creditori, vel cui jusserit.*

Pothier, 565

(a) A delegation includes a *novation* by the extinction of the debt from the person delegating, and the *obligation* contracted in his stead by the person delegated

Delegation double novation.

(b) Where the person delegated is a debtor of the person delegating, there is a double novation—of the obligation of the person delegating, by giving his creditor a new debtor, and of the person delegated, by the new obligation which be contracts.

Pothier 550-554.

3. The subject of a novation.

(1) There must be two debts to create a novation, one of which is extinguished by the substition of the other.

(2) In case of conditional debt novation takes effect on fulfilment of condition.

(3) Novation fails to take place on failure of condition also on extinction of original debt before fulfilment of condition.

Pothier 556-557

4. Who may make a novation.

(1) Those to whom a valid payment may be made can make a novation of a debt. *Cui recte solvitur, is etiam novare potest.*

3 Grot. xliii. 2.

All parties who are able to contract may make novations (3 Grot. xliii 2)

(2) One of several creditors *in solido* may make a novation. A tutor, curator, husband may; but not a minor, ward, wife.

Pothier, 558-562. 3 Grot. xliii. 3. 4. V. D. K. 836-838.

5. How a novation is made.

(1) It is effected by mere agreement in the same manner as an obligation and especially also by process of Law (3 Grot. xliii. 3; Poth. 558)

Intention.

(2) The intention to effect a novation must be clear.

(a) Intention may not be presumed.

(b) Prorogation or postponement of the day of payment is not novation (V. D. K. 836)

Poth. 560. 561.

(3) The act which contains the new engagement must contain something different from the former obligation. New parties is enough of difference.

Poth. 562. consent of old debtor unnecessary.

(6) A new debtor may intervene and be accepted in his place without the assent of the old debtor. *Liberat me is qui quod debeo promittit etiamsi nolim.*

Pothier. 563.

6. Effects of novation. (Pothier, 563)

(1) The former debt is extinguished.

(2) Novation of principal debt extinguishes all accessory obligations.

(a) There may be a condition in the novation that co-debtors and sureties should accede to the new debt.

(b) In default of their so acceding novation fails to take place.

(3) Novation of principal debt extinguishes accessor hypothecation. *Novatione legitime facta liberantur hypothecae.* It may be otherwise conditioned.

XI. References to Voet's Commentaries.

The references given below are to some of the Titles of *Voet Ad Pandectas* relating to the law of contract. The edition of Voet used in the preparation of this book is the *Editio quinta Veneta* bearing date 1827. References here are to that edition, 2 Vols.

N.B. As already explained the first Arabic numeral refers to the Book; the Roman to the Title; and the last Arabic figure to the Paragraph.

Rescission.

4. Voet. I. *De in integrum restitutionibus.*
Relates to the subject of rescission of contract.

4. Voet. II. *Quod metus causa gestum erit.*
Relates to fear as a ground of rescission.

4. Voet. iii *De Dolo malo.* cf. 44 Voet. iv.
Concerning fraud as vitiating contract.

4. Voet. vi. *De minoribus 25 annis.*

Rescission on ground of minority. 4 Voet. iv. 18. 19. is doubted by VanDerKeessel, *Thesis* 880.

Loan. **12. Voet. i.** *De rebus creditis, si certum petatur et de condictione*
On the contract of *Mutuum* specially.

13. Voet. vi. *Commodati vel contra.*

Pledge. **13. Voet. vii.** *De pignoratitia actione.*

16. Voet. iii. *Depositi vel contra.*

17. Voet. i. *Mandati vel contra.*

17. Voet. ii. *Pro socio.* Partnership.

Sale. **18. Voet. i.** *De contrahenda emtione.*
Contract of sale generally.

18. Voet. ii. *De in diem addictione.*
Relating to better offers.

18. Voet. iii. *De lege commissoria.*
Defeasible sales.

18. Voet. iv. *De hereditate vel actione vendita*
Sale of certain incorporeals.

18. Voet. v. *De rescindenda venditione.*
Rescission of sale.

18. Voet. vi. *De periculo et commodo rei venditione.*
Concerning buyer's risk.

19. Voet. i. *De actionibus emti et venditi.*

19. Voet. iii. *De aestimatoria.*
Delivery for sale at a valuation.

21. Voet. i. *De aedilitio edicto et redhibitione et quanti minoris.*
Warranty, etc.,

21. Voet ii. *De evictionibus et duplae stipulatione.*
Evictions, warranty of title, etc.,

21. Voet. iii. *De exceptione rei venditae et traditae.*
Plea of sold and delivered.

Letting. **19. Voet. ii.** *Locati conducti.*
Letting and hiring.

20. Voet. i—v. *De pignoribus et hypothecis.*
Pledges and hypothecs.

22. Voet. vi. *De juris et facte ignorantia.*
Mistakes of Law or Fact.

Wife's contracts. **23. Voet. ii.** *De ritu nuptiarum.*

Wife's capacity to contract discussed. The question of consent of parents, guardians and curators in contracts dealt with.

27. Voet. x. *De curatoribus furioso et aliis extra minores dandis,*

Gift. **39. Voet. v. vi.** *De donationibus.*
See above, page 120.

Concluding Books. **44. Voet. i—v.** *De exceptionibus.*

44. Voet. vii; 45 Voet. i. *De obligationibus.*

46. Voet. i. On sureties.

Extinction of obligations. **46. Voet. ii.** On Novation.

46. Voet. iii. On extinction of obligations generally.

46. Voet. iv. On "release by donation."
See above, chapter *On extinction of obligations.*

SUMMARY OF CHIEF CEYLON ORDINANCES RELATING TO CONTRACTS.

Note—Select illustrative cases are given in small type. For a further collecion of cases see the next following division of the book.

Simple contracts in writing.

Sec. 21 of No. 7 of 1840.

Promise, contract, bargain or agreement must be in writing and signed by party or person lawfully employed if it is to be valid

Suretyship. Anson, 61.

(1) To charge any person with the debt, default or miscarriage of another.

(2) To pledge movables not already delivered to pledgee.

(3) To buy or sell movables, of part or whole of which there has not been delivery to buyer, or part or full price of which has not been paid to seller.

(4) To establish a partnership when the capital exceed one hundred pounds.

Notarially executed contract.

Sec. 2, of No 7 of 1840.

Interest in land.

Contract affecting sale, transfer, assignment, mortgage of, or interest in, immovable must be before a notary and witnesses in writing and signed by party or agent.

Sec 1, of No. 21 of 1887.

Land in Anda.

But contracts for paddy or chena cultivation for a time not over twelve months need not be notarially executed, if the consideration be that the cultivator shall give the owner a share of the crop.

Signature by agent. 8 S. C. C. 128. Dias v. Fernando.

1. The authority to an agent to execute an instrument required by No. 7 of 1840 to be notarial must itself be contained in a notarial instruments.

Cinchona *fructus naturales*. 8S. C. C. 21 Lee Hedges v. Seville

See Sec. 29 of Ord. No, 5 of 1877.

2. Cinchona must be regarded as *fructus naturales* since it draws its nourishment principally from the soil, and accordingly a contract to harvest cinchona establishes an interest in land, and so must be notarial.

Gregoris v. Tillekeratne 1 C. L. R. 191.

3. Money paid under a contract void, under No 7 of 1840 for want of a notarial instrument, but not performed may be recovered by action.

"Planter's share" 1. C. L. R. 6, Jayasuria v. O. L. Marikar.

4. A "Planter's share" is an interest in land and cannot be acquired except by notarial contract or by prescriptive possession.

Fernando v. Themaris 2 C. L. R. 188.

5. An agreement, by which an owner of land lets the cocoanut trees standing thereon for drawing toddy, and which involves a license to enter upon the land for that specified purpose only, is not one affecting interest in land and need not be notarially executed.

Introduction of English Law.

No. 5 of 852. Sec. 1. Maritime matters. ec. 2. Bills f exchange etc.

The Law of England is to be observed in Ceylon in respect of all contracts or questions relating to maritime matters, bills of exchange, cheques, promissory notes and such instruments, unless there is any local ordinance enacting otherwise.

Sec. 3 Rule regarding interest

Interest not to exceed principal. VanDerKeesel, 549.

On any contract or engagement any stipulated interest at the rate of nine per cent may be recovered, or in any case in which interest is payable by law in the absence of specially stipulated rate of interest. But interest or arrears of interest must never exceed the principal.

Sec. 4. contract made abroad.

Local adjudication of questions arising out of contracts made abroad is not affected by the privisions of No. 5 of 1852.

Interest at 18 per cent 4 S. C. C. 22.

1. Interest at 18 per cent, recoverable, and the Roman-Dutch Laws against usury not in force here.

Interest at 12 per cent. 7 S. C. C. 182.

2. There is nothing in the Laws of this colony which restricted the rate of interest recoverable at law to twelve person only.

Roman-Dutch Law of interest. 5 S. C. C. 16.

3. According to the Roman-Dutch Law in force in Ceylon, interest ceases to accumulate when the amount of interest equals the principal. But if a payment or recovery on account of interest be afterwards made, interest will again begin to accumulate until the amount again equals the principal.

Contracts of Registered Companies.

Sec. 53. of No. 4 of 1861.

Contracts required by law to be *in writing* may be made, varied or discharged on behalf of the company "in writing under the common seal of the company." Contracts required by law to be *in writing and signed* by parties concerned may be made, varied, or discharged on behalf of the company in writing, signed by any prson acting under the express or implied authority of the company.

In writing

In writing and signed.

Not reduced to writing

Contracts which would be valid in law, though made by *parol and not reduced into writing*, may be made, varied, or discharged by parol on behalf of the company by any person acting under the express or implied authority of the company.

Contracts by Local Boards.

Sec. 60 of No. 7 of 1876.

A local board may enter into any contract with any person for any work to be done or materials to be furnished for carrying out any of the purposes of ordinance No. 7 of 1876. Such contracts shall be signed by the chairman and one or more members and by the other party contracting; no contract above the value of Rupees five hundred shall be entered into until after 14 days previous public notice inviting tenders for the work concerned.

Chairman and one or more member to sign.

Contracts by Municipal Councils.

Secs. 63-66 of No. 7 of 1887.

Chairman makes contracts Sec. 63.

When consent of standing committee necessary. Sec. 65.

When affixing of common Seal and signing necessary. Sec 64.

The chairman may make contracts, on behalf of the Municipal Council, for works provided for in the budget. Where any contract exceeds Rupees five hundred in amount the chairman must report it to the standing committee within fifteen days *after it is made.* Where contract *exceeds* in amount Rupees one thousand and endures for a longer time than the time elapsing between the making of such contract and the end of the budget year, *previous* consent of standing committee must be obtained. When contract exceeds Rupees one thousand, it must be sealed with the common seal, in the presume of the chairman or Assistant Chairman ("authorized by him in that behalf"); and *one* member of standing committee, and *signed* by them "in token of their presence."

English Commercial Law in force in Ceylon.

No. 22 of 1866. Law of partnership, etc.

English Law is in force in Ceylon in all matters "relating to partnership, joint-stock companies, corporations, banking, principals and agents, carriers, and insurance. See also No. 22 of 1866.

No. 14 of 1865 relates to carriers.

Prescription in the matter of Contracts.

Sec. 7 of No 22 of 1871.

Term, six years. Written Contracts.

To maintain an action upon any partnership deed, bill of exchange, promissory note, written promise, contract, bargain, agreement or other written security (except bonds and hypothecary instruments) it must be brought within six years from time of breach, or from time when bill or note shall be due, or from time of last payment of interest.

Sec. 13, of No. 22 of 1871.

Acknowledgment must be written.

To take the case out of the operation of the prescription enactments no acknowledgment is valid unless it is "made or contained by or in some writing" signed by the party chargeable or by some agent duly authorized in that behalf. Such written acknowledgment is evidence of a new and continuing contract.

Acknowledgment must be coupled with a promise. 1 C.L.R. 60.

1. To take the case out of the statute there must be no only acknowledgment that the debt is due, but an unconditional promise, or a promise on a condition which has been fulfilled, to pay the debt.

See. 5 S. C. C. 62 old theory.

2. The old theory of presumption of payment from lapse of time was abandoned in *Tanner* v. *Smart* (6 B. & C. 603).

Relating to Deeds

Are No. 7 of 1840, about execution of deeds.
No. 2 of 1877, about notaries and deeds.
No. 6 of 1866, about registration of deeds.

See No. 7 of 1853 for deed of composition, and deed of arrangement.

Married Woman's Property

No. 15 of 1876.

There is no community of goods.

Sec. 9. Wife's immovables

Sec. 10 Wife's earnings.

Wife's Jewels etc. Sec. 11.

Wife's immovable property is her separate estate and is liable for husband's debts or engagements unless they are nin connection with such property. To dispose of it *inter vivos* she must have husband's *written consent*, but she may *will* it away *without his consent*; wife's wages and earnings form her separate property, independent of husband's control, debts and engagements. She may dispose of them as if she were a *féme sole*. Wife's jewels, implements of trade and agriculture form part of her separate property, independent of husband's control, debts and engagements. She may dispose of it *inter vivos* with husband's consent, not necessarily written, but she may will it away *without such consent*

Wife's mortgage. Silva v. Dassanayaka. 2 C.L.R. 123.

1. Where a wife mortgages her immovable property without her husband's written consent, the creditor cannot even recover the money due on the bond, inasmuch as the general personal incapacity of a married woman to bind herself by contract renders the instrument inoperative even as a simple money bond.

Per Lawrie, J. 2 C.L.R. 123.

A married woman now, as before the passing of Ordinance No. 15 of 1876, cannot bind herself by executing a money bond.

Thesawalame. Wife's liability for husband's debts. 2 C.L.R. 132.

3. The property acquired during marriage by a husband and wife, who are governed by the *Thesawalame*, remains liable for the debts incurred by the husband during marriage, notwithstanding a subsequent decree of divorce *a mensa et thoro*.

Roman Dutch Law, wife's right to sue alone 2 S. C. R. 204

4. By the Roman-Dutch Law, a married woman trading openly with her husband's consent can sue for the price of goods sold and delivered without joining the husband in the suit.

Wife's share common estate liable for husband's obligations *ex contractu*.

5. Where a husband incurred an obligation *ex contractu*, notwithstanding that he might have been criminally prosecuted for embezzlement, it was held that the wife's *share* of the *common estate* was liable to be sold in satisfaction of such obligation. *Felsinger's case* in Ramanathan's Reports (1861) p. 94. doubted.

S. S. C. C. 24.

Felsinger's case doubted.

Civil Procedure Code. Sec. 604.

Wife's separate estate liable for costs in a divorce action.

Civil Procedure Code. Sec. 609, 610.

A separated wife is considered *fême sole* as regards her property, contracts, torts and right to sue, and being sued.

On the subject of:—

Lotteries, see No. 8 of 1844.
Gaming, see No. 17 of 1889.
Brokers, see No. 15 of 1889, part 2.
Pawnbrokers. see No. 8 of 1893.)

Evidence in matters of contract, under the Evidence Ordinance.

Sec. 91 of No. 14 of 1895.

Where a contract is reduced to the form of a document or required by law to be reduced to the form of a document evidence of it must be the document itself or secondary evidence of its contents.

See Taylor 405, 406.

Reduced to the form of a document: See *Taylor* section 406 (Seventh Edition), and *Cunningham* on the Indian Evidence Act pp. 240-242.

In sections 92-99. of the Evidence Ordinance the following subjects are dealt with:

Sec. 92. 1. Exclusion of oral Evidence to contradict, vary, etc. a proved documentary contract.

Sec. 93. 2. Exclusion of evidence to explain or amend ambiguous document.

Sec. 94. 3. Exclusion of evidence against application of document to existing facts.

Sec. 95. 4. Evidence as to document unmeaning in reference to existing facts.

Sec. 90 5. Evidence as to application of language which can apply to one only of several persons.

Sec. 6. Evidence as to application of language to one set of facts, to neither which the whole correctly applies.

Sec. 93. 7. Evidence as to meaning of illegible characters.

8. Parties able to give evidence against varying terms of document.

See *Taylor on Evidence*, sections 391-435, 1038, 1109, 1154, 1163.

See *Cunningham*, pp. 236-280, and above, *Outlines of English Law*, Ch. xviii.

SELECT ILLUSTRATIVE CEYLON RULINGS.

Note.—For a further collection of cases reference may be made to Mr. Tiruvilangam's new "Digest" now being published in parts. The following is not an exhaustive collection of cases bearing on the subject of Contracts, but the summary of a select few rulings. Cases relating to Gifts, Leases, Partnership, Agency and Negotiable Instruments are not included here. In the belief that the reader will no doubt consult the original reports, the cases are cited by reference to the page and not to the case-name. The following Law Reports are referred to:—

Ramanathan's Reports, 1820-33.
Marshall's Judgments, 1833-36.
Morgan's Digest, 1833-47.
Austin's Reports, 1833-59.
Ramanathan's Reports, 1843-55.
Lorenz's Reports, 1856-59.
Ramanathan's Reports, 1860-62, 1863-68.
Vanderstraaten's Reports, 1869-71.
Grenier's Reports, 1872-74.
Ramanathan's Reports, 1872, 1875-76, 1877.
The Supreme Court Circular, 9 vols.
The Ceylon Law Reports, 3 vols.
Wendt's Reports, 1882-83.
The Supreme Court Reports, 3 vols.
The New Law Reports.

Accord and Satisfaction.

Morgan, 280. (1) Although satisfaction and payment as well as set-off may be pleaded and proved in discharge of a bond or other specialty, still the payments must be notified specifically and must be of a liquid nature.

Morgan, 287 (2) A plaintiff cannot sue out execution after taking the defendant's bond for a part of the judgment in satisfaction of the whole.

Agreement.

Morgan, 127 (1) Mutuality in an agreement may be presumed though the defendant has not signed it.

Morgan, 240 (2) In an action for work and labour when the defendant pleaded a written agreement, and that one of the conditions thereof had been broken by the plaintiff but refused to produce the agreement, judgment was given for the plaintiff.

Lor., 30. (3) An agreement to change one's religion in consideration of marriage is void.

Lor., 273. (4) An agreement whereby several persons agreed to sell and deliver all the arrack distilled in their respective distilleries, for payment to be made to each for the quantity delivered by him held to be a joint-agreement, so that the vendor cannot sue any one of the vendors for non-delivery of the arrack distilled by him.

Ram.,(1877,) 286. (5) An agreement made by defendant, in consideration of plaintiff's agreeing to forego taking criminal proceedings against defendant's child is illegal.

Ram.,(1877.) 265. (6) An agreement between A and B to divide in certain proportions the fish to be caught by them, though legal, was held unenforceable, because, as there was no period of its endurance fixed, its duration depended on the mere will of the parties, and any of them was able to retire from it at pleasure.

S.C.R. 51. (7) A agreed to marry B's daughter in consideration of B's consent to the marriage, but B subsequently proposed that daughter in marriage to C. It was held that the last fact did not amount to a breach of B's contract with A.

Appropriation of Payments.

Austin, 5. (1) The general rule is that, in the absence of special agreement, the creditor may apply the money to any account.

Ram., (1872-78,) 317. (2) When a person, indebted on two accounts, made a payment, it was held that to constitute a legal appropriation under the Roman-Dutch Law, either by creditor or by debtor, the appropriation must be made at the time of payment and not after. When evidence was doubtful as to such appropriation, and when defendant was indebted on two notes, on one as maker and on the other as endorser, it was held that payment should be appropriated to the former as the debt most burdensome to the debtor.

(3) See above under *Maxims*, p. 102, and under *Outlines of Roman-Dutch Law*, p. 134.

Bailment.

Morgan, 241. (1) A bailee who is not to receive any remuneration for the custody of the property is not bound to take that scrupulous care of it which would otherwise be required of him.

3 Lorens, 250. (2) A pawnee is bound to use ordinary diligence in the care and safeguard of the pawn; and if the same be stolen from him or lost without his default, he cannot be held liable.

2 Lor., 114. (3) A pawnee is not liable for the value of the goods pawned to him without his default. Though not able to recover goods, he may yet recover amount lent on them.

2 Lor., 146. (4) Where an animal left with the bailee had fallen into his well and died, it was held that the burden of proving that the well was properly fenced round lay on the bailee to support due diligence and care on his part.

Ram., (1872-75,-76,) 187. (5) The person to whom anything is lent gratuitously is bound to return it in the same original state, unless prevented (burden of proof is on borrower) by irresistible violence or unavoidable misfortune.

Ram., (1872-75,-76,) 9. (6) Where goods are deposited with another for safe keeping, whether the bailment is gratuitous (*depositum*) or for reward (*locatio operis faciendi*), the bailee is discharged from liability, if the goods be lost by house-breaking and robbery and not through any want of reasonable care on his part.

Bonds. (See Tiruvilangam's new "Digest," part iii.)

Mor., 103. (1) A bond, though not executed before a notary, is valid as a personal security from the debtor, though it passes no interest in, or does not act as incubrance on, land.

Mor., 238. (2) Where the plaintiff sues on a bond with a penalty, the Court may decree interest (which is nothing more than a legal penalty) though not claimed in the libel.

Mor., 287. (3) Constructive delivery of bond is sufficient.

3 Lor., 303. (4) Judicial bonds need not be notarially attested.

Ram., (1843-55,) 161. (5) Bonds in Ceylon stand on the same footing as simple contracts in England, and want or failure of consideration may be proved by other evidence. Parol evidence is not admissible to *contradict* the instrument, but may be to shew circumstances under which it was entred into. (See above, Outlines of Roman-Dutch Law, *exceptio non numeratae pecuniae.*)

4 S. C. C., 85 2 Lor., 6. (6) The rule of Roman-Dutch Law requiring the plaintiff to prove payment of consideration in an action on a bond less than two years old is not in force in Ceylon.

3 Lor., 73. (7) To an action on a bond the defendant may plead that it was granted in consideration of advances to be made, but which have not been made.

3 Lor., 257. (8) Burden of proof of consideration is on the defendant.

3 Lor., 148. (9) There is no rule of law which prevents the attesting witness to a bond from being called to state, and being credited in the statement, that he saw no consideration pass.

Composition.

3 Grenier, (1873), 31. Under the Roman-Dutch Law a creditor may make a release of the whole debt without consideration, and the release will be operative unless obtained by foul means. One creditor may give up part of his claim on consideration that another should do the same.

Consideration.

Morgan, 140. (1) Mutual consent of two parties is sufficient to render an agreement obligatory on both.

Ram. (1843-55,) 20. (2) Where a deed of sale expressed clearly the receipt of consideration, the plaintiff was not allowed to shew non-payment of consideration in contradiction of the deed.

2 Lor., 106. (3) A contract to teach devil-dancing is not *contra bonos mores*, and the reward stipulated for may be recovered by action.

1 Lor., 123. (4) Withdrawing a complaint for assault is not an illegal consideration for a promise to pay money.

Wendt, 276. (5) Forbearing to take criminal proceedings against a thief is illegal consideration.

Vand., 192. (6) A past marriage is no consideration for a contract.

Ram., (1862-68,) 46. (7) Contract based on an agreement that one of the parties should break his promise of marriage with a third party is illegal.

Ram., (1872-75-76,) 129. (8) Where a Sinhalese woman sued a Mahommedan man on a contract which was for future cohabitation, it was held that, though by section 101 of the Mahommedan rules of 1806, a contract of concubinage is legal, yet where the party suing was a Sinhalese, the contract came under the Roman-Dutch Law by which a contract of concubinage is void.

2 Gren, (1873), 42. (9) A contract by which one person agrees to improve and cultivate land, in consideration of a promise by another to give him a lease thereof, requires to be notarial.

5 S.C.C. 71 following *Cook v. Wright* 1 B and S. 590. (10) An agreement to compromise a claim about which the parties differed is based on the good consideration of such compromise.

8 S. C.C.182. (11) The acceptance of a promissory note for a smaller sum than the judgment debt is a valid consideration for the assignment of the judgment.

1 S. C.C., 89. (12) Where land was conveyed "out of free will and affection" by A. on his son's marriage, and latterly B. claimed the land on a subsequent conveyance by A. purporting to be made "for money value," it was held that the son and his wife were not estopped from shewing that the first conveyance was made "for the valuable consideration of their marriage."

1 S.C.C.,102. (13) Parts of the contract being void for impossibility of performance the whole contract is incapable of supporting a suit.

1 C.L.R., 10. (14) An agreement in the nature of a compromise, but not a bare agreement without consideration, to take a lesser sum in full satisfaction of the debt is binding and debars the recovery of a greater sum than the one so agreed upon.

English and Roman-Dutch Principles.

Ram., (1820-33,) 81. (1) The laws of contract, except in a few unimportant points, are the same in principle in both the English and Roman-Dutch Laws, and as all property in Ceylon falls under one description, nearly the same law of contract or of possession applies equally to a bale of goods or to property in land.

Wendt, 297. (2) The English Law distinction between contracts under seal and promises not under seal has no place in the Law of Ceylon.

Morgan, 218. (3) The distinction between penalty and liquidated damages, peculiar to the Law of England, does not obtain in Ceylon.

5 S. C. C., p. 72.

(4) Under the Roman-Dutch Law (as held in *Wickremesekara v. Tatham*, 3 Grenier, 1873, 31) a gratuitous agreement to release a debt or part of it is a good defence to an action for the debt. The general rule of English Law, as settled by *Cumber v. Wane* and other cases is to the contrary. We must take it now as settled English Law that a bare agreement to release a debt on payment down, or by instalment, of a lesser sum (the case not being one of compositon with a common debtor) is not binding in law. In *Foster v. Dawber* (see above *Illustrative English cases*) it was ruled that the obligation on a bill of exchange or a promissory note may be discharged by express waiver, and in *Wickremesekera v. Tatham* Sir Edward Creasy seems to have regarded this as ruling that no consideration was necessary.

Clarance, A. C. J. in 1. C. L. R. 11.

2. C. L. R., 191.

(5) *Per* Withers, J.—I was certainly under the impression that payment made by a person under a contract with which he could not be charged for want of evidence to satisfy our statute of frauds should be regarded as a voluntary payment, and therefore not recoverable in a court of law. Such I understand to be the tenor of English decisions. However, it has been ruled otherwise by this Court in 2 Grenier (1873-74), p. 34. Sitting alone I follow that decision.

Implied Contract.

Marshall, 454-457.

(1) If an express agreement be proved to have been entered into, a party cannot, on failing to show performance of it on his part, give up such express contract and have recourse to the obligation which the law would have implied in the absence of any express agreement.

Marsh., 457.

(2) In order to defeat a claim on an implied contract for the value of services by setting up an express contract, such contract must be shown to have been entered into by both parties and must not be left to mere presumption or inference.

Morg., 39.

(3) The law implies a contract where there is no agreement in express terms.

2 Gren., (1874) 10.

(4) An implied contract may be gathered from conduct of, and correspondence between, parties.

1 S.C.R. 290. 1 C.L.R. 73. 2 C.L.R. 120.

(5) Where one person is compelled to pay money which another is compellable to pay, the law implies a promise that the latter will repay it. Such implied promise is independent entirely of any express contract of the parties by way of guarantee, indemnity, contribution or otherwise.

Interest.

Vand., 57.

(1) Compound interest on a bond is not allowed.

Ram., (1872-75-76,) 189.

(2) Compound interest is illegal and cannot be recovered even though expressly stipulated for.

Held by two Judges against one.

The usury laws of Holland, being in their nature merely local enactments and unsuited to the condition of affairs in Ceylon, were not introduced by the Dutch, and were not in force during their rule in Ceylon, and therefore any rate of interest stipulated for could be recovered

(3) See above, p. 144.

Joint Obligation.

3 C.L.R. 90 N.L.R. 350. (1) Upon a joint contract where there is no partnership between the co-contractors, and one of them is dead, the liability to be sued survives to the surviving co-contractors alone, and not to them together with the legal representative of the deceased co-contractor.

7 S. C. 127. (2) Where several creditors joined together in suing upon a joint contract all are bound by the act of one; and, therefore, payment to one of several joint plaintiffs of a joint debt in respect of which such action is brought constitutes a payment to all.

Minor Party.

Ram. (1863-68,) 240. (1) When an adult and a minor were defendants in an action on a contract, and the original Court considered the contract bad as a whole, being bad in part owing to the minor, the Supreme Court ordered the action to be proceeded with against the adult defendant.

2 Gren., (1873), 10. (2) Where a father ratifies or directs a contract entered into by his minor son as the father's agent, the father may sue for a breach thereof. If the son, however, acts independently, he may sue by guardian.

1 N.L.R., 358. (3) Under the Roman-Dutch Law a minor could not bind himself without the consent of his father, except with regard to certain kinds of property. If he contracted, his contracts would not bind him, although, if they were beneficial to the minor, the other party would be bound (1 *Censura Forensis* ix. 5). A contract entered into with the authority of his father would bind the unemancipated minor, subject, however, to his right, in certain cases, if the contract was a detrimental one, to the remedy of *restitutio in integrum*. This remedy is not available in cases where a minor practising a trade or profession incurred liabilities in the course thereof. (*Semble*, per Bonser, C. J. Trading is not of itself sufficient to emancipate a *filius familias* so long as he lived under the father's roof). Where a minor and his father, trading together, had granted a joint and several note, it was held that the plea of minority was not open to the minor, as the note must be presumed to have been made with the father's consent.

Bonser, C.J.

3 C.L.R., 67 (4) In an action on a contract of lease between minor's curatrix and promiser it was held that the minor could not sue having been no party to the contract but the curatrix should.

Notice to Municipality.

8 S. C.C., 138. A Municipality is entitled neither to the notice of action nor the limitation of time within which section may be brought in an action on an obligation *ex contractu*.

Payment under a void Agreement.

2 Gren, (1873) 34. 2 C.L.R.191. Money paid in pursuance of a contract, which is void under Ord. No. 7 of 1840 for want of notarial execution, but which is not performed, is recoverable by action.

Pawn.

1 C.C., 81. (1) The period of limitation does not run against the right of action to redeem a pledge so long as any debt remains due upon a pledge.

8 C.C., 123. (2) Where A. borrowed B.'s jewellery and fraudulently pawned them with C. without notice to C. of the loan, the Supreme Court, finding the Roman-Dutch law on the point uncertain, followed the rule of the English law, and held that the owner of the jewellery could recover them without paying the debt due on the pawn.

Quantum Meruit.

C.C., 45. A. executed a mortgage bond in favour of B., and assigned it to C. By a collateral agreement between A. and B. the bond was not to take effect until the completion of a certain work by B. B. failed to complete the work. *Held*, that the assignee could not recover upon the mortgage even to the extent of a *quantum meruit* for work done.

Rescission, Restitution.

C.C., 75 (1) One side alone could not rescind a contract, nor would a mere breach by one party give a right to the other to rescind it. When a breach of contract was accompanied with an intimation of an intention of not proceeding further with it, it was held to be at the option of the person with whom the contract was made to elect to rescind it.

C.R., 1. (2) The remedy of *restitutio in integrum* is available in all cases where the contract can be shewn to have proceeded in total misconception. The *actio redhibilio et quanti minoris* for the rescission of contracts of sale cannot be applied to letting and hiring.

21 Voet i-ii. oet ii-26. Voet 1-7.

Sale.

1 C.C., 119. (1) Where goods inferior to or different from those contracted for were delivered—and the buyers, though it was agreed that they should have facilities to inspect the preparation of the goods, were unable to inspect *all*,—it was held that *caveat emptor* was inapplicable, and the sellers must pay damage.

C.C., 86. (2) When a firm in India supplied a firm in Ceylon with a particular description of goods at a fixed price as ordered, it was held that the Ceylon firm could not repudiate the contract or refuse to accept delivery on the ground that they had intended to order a different description of goods.

1 C., 60. (3) To say that a horse "has never been tried in harness but is a good saddle horse" is not a warranty that he will go in harness; but if wilfully false within the knowledge of the person so stating, it is such a misrepresentation as entitles the buyer to avoid the sale.

. L. R 165. (4) By the Roman-Dutch Law there is implied in every contract of sale of goods a warranty by the vendor that the purchaser shall have the absolute and dominant enjoyment of the goods. But before the purchaser can recover damages for the breach of such warranty, or claim back the price, he must suffer eviction by the judgment of a compe-

tent Court that the goods were the property of some third party. Such judgment is not binding on the vendor unless he is called upon to warrant and defend the purchaser's title.

1 S.C.R., 201

(5) Where a purchaser of land sues the vendor on a breach of express warranty of title, and fails to establish such express warranty, he cannot avail himself of the warranty *implied* by the Roman-Dutch Law.

Per Withers, J. 2 N. L. R. at pp 101-102.

(6) The contract of purchase and sale is completed as soon as the contracting parties are agreed upon the thing to be sold and the price to be paid (4 *Censura Forensis* xix 1). This contract—I am speaking of the Roman-Dutch Law—need not be in writing ... ... Our local laws have, however, modified the Roman-Dutch Law relating to the sale of moveables. (See section 21 of Ordinance No. 7 of 1840.) A contract complying with that requirement becomes complete, but the *nexus* of the contracting parties is not dissolved until both the article has been delivered and the price paid or satisfied: It is true that the risk of the article sold is with the purchaser as soon as the contract is complete, but the article does not become the purchaser's own till he has secured the *vacua possessio* of it by delivery, and has paid the price, or, if the contract is in writing, has granted the payment of the price. It is clear that unless the buyer has the *vacua possessio* of the article he has not the full *dominium* over it (see *Berwick's Voet*, pp. 19, 30, 112, 136, 174, 179, notes). Tradition is the effective way of giving *vacua possessio*, and that may be literal or symbolical and fictitious. It is literal if the thing is given into the hand of the purchaser. It is symbolical if the key of the room in which the articles is sold is handed to the purchaser; if the purchaser puts his mark on things very heavy of draught; if the things are pointed out to the purchaser in his sight (*traditio longae manus*); or if the purchaser has the things in his custody and control at the time of the completion of the contract by leave or authority of the vendor (2 *Censura Forensis*, vii. 1; 4 *C. Forensis* xix. 1; 41 Voet i. 34; *Berwick's Voet*, p. 141, note). There must, however, be a delivery which transfers the *vacua possessio*, if the purchaser is to acquire a better right to the thing than a pledgee of the same article under a registered contract in writing without possession. A contract of pledge creates a *jus in re* which a contract of purchase and sale does not.

Vacua possessio.

Traditio.

Purchase and pledge.

Specific Performance.

D.C. Colombo. C. 5507. S. C., Minutes, Jan. 21, 1896.

Both by the Roman-Dutch Law and by a long series of decisions in our Courts the doctrine of specific performance of contract had been recognised as part of our Law. *Per* Lawrie, J.—Our Courts in Ceylon are Courts of Equity, and I do not doubt that they have power to interfere and decree specific performance of agreements. I for one may say that for many years I have regarded the chapter on specific performance in *Story's Equity Jurisprudence* as applicable, and as of authority, in Ceylon. The right specifically to compel a person to give something which he has promised to give, or to do something which he has promised to do, has been frequently recognised in our Courts. If the thing cannot be given or done, then its equivalent, *id quod creditoris*

Per Withers, J.

interest praestationem fieri, is exacted. The principle of compelling the specific performance of a covenant to sell a piece of land has been distinctly recognised in D. C. Negombo, 14,007, (S.C. Minutes, Nov. 19, 1886). The Civil Procedure Code. sections 331 *et seq.*, takes this law for granted. See Herbert's *Grotius* p. 300 ; *Morgan and Beling* (1837), p. 145 ; and *Grenier* (1873), p. 39.

Suretyship.

or., 254. (1) A surety may compel the creditor to discuss the principal debtor's property, whether specially or generally mortgaged, even when the creditor has purchased it for valuable consideration from the debtor.

r., 235. (2) A creditor paying a mortgagee is entitled to stand in his place without cession of action.

r., 319. (3) A surety to the Crown, paying principal's debts, is entitled to the rights of the Crown, without there being cession of action.

L, 243. (4) A cession of action can be granted *pendente lite*.

r., 223. (5) A co-obligor, pending his action for contribution, having obtained a cession of action, is entitled to the creditor's rights, on proof of payment of debt.

.C.,167. (6) It is essential to the validity of a guarantee that the consideration for it should appear expressly or by any necessary implication from its terms.

.C.,147. (7) Undue, though not wilful or intentional, concealment of material facts discharges the surety from his obligation.

.C.,196. (8) Writ of execution against a surety may be moved for in the enier, case in which judgment was obtained on the debt without a new action.

MASTER AND SERVANT IN CEYLON.

This division of the book is devoted to a collection and arrangement of the most important rulings of the Supreme Court on the Law of Master and Servant in Ceylon. With two exceptions all the decisions herein collected relate to the Labour Laws as affecting planters. There is only one reference to Ord. No. 28 of 1871, and all the other references are to the three Labour Ordinances No. 11 of 1865, No. 13 of 1889, and No. 7 of 1890. The usual abbreviations are used in referring to Reports. In the treatment of the *Orwell Cooly Case* lengthy quotations are made from opinions which, however important in other respects, have not the binding force of law, but no apology is needed for those quotations. The arrangement is under the following heads alphabetically:—

Index to main headings.

Over against each such main heading is given, as far as it is possible, the exact section of the Ordinance bearing on the subject. The marginal notes are not meant so much to be summaries as help towards easy reference.

Breach of Contract by Employer (Sec. 4 of Ord. No. 11 of 1865)

Tirimale v *Denison.* 2 S.C.C., 148.

The offence created by section 14 of Ord. No. 11 of 1865 springs from breach of contract on the part of the employer *with an individual servant*; the case of each servant is the matter of a separate offence, depending each on its own circumstances, involving the ascertainment from the servant the wages due to him, and so on. So a charge by T against D. with refusing to paying T. (the kangani) the wages of himself and of 170 coolies, not named, of his gang, was held to be limited to the case of the *kangani only*. *Semble* that an employer cannot refuse to pay the wages of a cooly to a kangani *authorized by the cooly to ask for them*, merely on the ground that the kangani owes him (the employer) money.

Refusing to pay coolies' wages to Kangani.

"Character" in Servant's Register (Ord. No. 28 of 1871).

Prior v. *Neate.* 6 S.C.C., 4.

Privileged communications. Servant cannot bring action of defamation against master for the "character" given.

(1) When a servant was dismissed from his master's service for repeated drunkenness, and the master transcribed, in the face of the servant's previous "characters," the reason of his discharge from service, and the date; and it was found that the master did not so transcribe *in malice*, and the transcriptions were true in fact. *Held*, that the master's transcriptions were privileged communications to persons to whom the servant would, in ordinary course, shew the characters, and that an action of defamation was not sustainable thereon.

Fernando v. *Walton.* 3S C.R., 140.

(2) Entry in a pocket-register as to a servant's character or a letter to the Registrar of Servants as to the cause of discharge of a servant is a privileged communication.

Anthony v. *Maclean.* 3 S.C.R., 142

Servant must prove malice. *Bona fides.* presumed. English cases followed: *Jenour* v. *Delmege* (L.R. A.C., 73) and *Royal Aquarium* v. *Parkinson* (L.R. 1 Q.B. 431.)

(3) The occasion of a master entering in the pocket-register of a servant the cause of discharge of the servant and the servant's character is a privileged occasion. When the occasion is privileged, *bona fides* must always be presumed, and the onus of proving *malice* and absence of *bona fides* rests on the plaintiff.

Employer's right to Punish.

Appoo Singho v. *Coutts.* 1 C.L.R., 32.

(1) A master has no right to stop any portion of his servant's wages for misconduct.

Fyler v. *Rayappen.* P.C. Hatton, 18130. S.C., Minutes, Oct. 11, 1895. "No name." "Half-pay."

(2) For a superintendent to mark coolies "no name" or "half pay" as punishment for alleged want of care in their work is to arbitrarily fine them. This is illegal.

Mitchell v. *Vembem.* P.C., Hatton, 18988. *Dictum* of Lawrie, J.

Lawrie, J. does not condemn the custom of marking sick, though he thinks it is not legal.

(3) Arbitrary deprival of pay is illegal. By the custom of the Planting districts the punishment of marking "sick" or giving only half a day's name has been adopted as the best means of preserving discipline and of ensuring a fair day's work. (This is instead of the severe punishment of dismissal allowed by the law.) "I do not say this is strictly legal, but I hesitate to condemn it because it may be so universal and well-known a custom that it now forms an understood condition of the contract of service of Tamil coolies."

Journeyman Artificer.

Samuel Appu v. *Gabriel* 6 S.C.C., 149.

(1) Where the complainant entrusted the defendant with a watch to be repaired, and the defendant, who was a clock repairer by trade, took the watch to his own house of business for repairs, but failed to complete the repairs or to return the watch, *Held*, that those facts did not constitute the defendant a "journeyman artificer" so as to render him liable to a criminal prosecution under Sec. 11 of Ord. No. 11 of 1865. A "journeyman artificer" means an artificer in the regular employ of an employer.

Meaning.

Cave v. William. 3 C.L.R., 47.

(2) "Journeyman artificers" in Ord. No. 11 of 1865 means all skilled workmen in the regular employment of an employer, not being in-door servants nor out-door labourers, who are by law presumed to work by the day for day's wages, including those who legally contract to work and serve for a longer time. A machine ruler in a printing office, who has entered into a contract of monthly service, is a journeyman artificer within the meaning of the Ordinance.

1 Grenier 1873), p. 98.

In P.C. Gampola, 25,204, Creasy, C.J., held that a man was a journeyman artificer, although he had contracted to serve for an indefinite period, namely, until he had repaid an advance. If an artificer who enters into such an indefinite contract is liable to punishment imposed on "journeyman artificer" by Sec. 11, much more is an artificer liable who enters into a definite contract of monthly service.

Liability of Estate Owners etc. (From Siebel's collection of cases.*)

Ambrose v. Strachan, D.C.Kandy, 40,446 Dec. 1, 1865.

(1) Where the owner of the estate supplies superintendent with funds, and the latter has no right to pledge the owner's credit, the *owner is not liable.*

Supramanian v. Blackett. D.C. Kegalle, 2,632, June11 1875.

(2) Where the owner keeps superintendent supplied with funds and gives no authority, express or implied, to superintendent to take goods on credit, *the owner is not liable.*

Sinnya v. Gibson. D.C. Kandy, 65,704. Nov. 17, 1876.

(3) Where the owuer does not keep superintendent supplied with funds, but is himself settling accounts, the *superintendent is not liable.*

Blackett v. Milne. D.C. Kandy 64,566 Nov.12,1875.

(4) Where coast advances have been made *bona fide*, though not very wisely, by the superintendent, the loss should fall on the estate and *not on the superintendent.*

Elphinstone v. Bonstead. D.C.Kandy, 64,643. June 22,1876

(5) Estate proprietor setting fire to a clearing is responsible for consequences. Negligence is presumed.

N.B.—The above are all rulings of the Appeal Court.

Liability for Servants' Acts.

Malkami's case. 4 S.C.C. 136.

(1) A. had control over an estate and over B., who was employed under him. A. gave B. orders to shoot trespassing cattle, provided he could not catch them. B. shot C.'s buffalo without lawful excuse for doing so. *Held*, that C. was entitled to recover damages from A. as B.'s act was within the scope of the employment, and an employer is responsible for the tortuous acts of his servant even though done contrary to his duty to his employer.

Herft v. Northway. 1 C.L.R., 27.

(2) A man may be civilly liable for a *misfeasance* of his servant done in the course of his employment, but *to render him criminally liable* you must show the *mens rea* on his part, unless the legislature has thought it proper to enact that the master shall be criminally liable even without the *mens rea*; and, as the Judges pointed out *Christolm* v. *Doulton* (L.R. 22, Q.B.D. 736) it lies on those who assert that the legis-

Master not liable criminally for servants' acts unless the acts of

* Siebel's *Liability of Estate Owners*, pp. 48, A. M. & J. Ferguson, 1877.

servants are master's or unless there is express legal enactments making him liable.

English cases. *Christolm* v. *Doulton.* *Roberts* v. *Woodward*, cited.

lature has enacted such a departure from the general principle to make that out convincingly by the language employed. As Baron Pollock put the matter tersely in *Roberts* v. *Woodward* (L.R. 25 Q.B.D. 412) "We know of no instance in which a master is criminally responsible for the act of his servant, unless he is made so by statute, or unless the act of the servant is, from its very nature, the act of the master."

Misconduct, as Desertion, Insolence, etc. (Sec. 11 of Ord. No. 11 of 1865.)

Hunt v. *Muthan* 4 S.C.C., 3 Conviction for desertion does not necessarily end service.

(1) The conviction and imprisonment of a servant under Sec. 11 of Ord. No. 11 of 1865 for unlawfully quitting his master's service *does not of itself terminate the service*, nor does it effect a dissolution of the contract so as to be a bar to a fresh prosecution for a subsequent breach of the *same contract.*

Ross v. *Munasami* 4 S.C.C., 16. Want of signature does not invalidate notice.

(2) Defendant charged with quitting complainant's service. Defendant had sent complainant a registered letter, giving him notice of intention to quit service but *had not signed the notice. Held*, that the notice was sufficient to determine the contract of service though it was not signed. Notice may be verbal, or in writing; no particular form is needed; may be given personally or by authorized agent, all that is required is that the servant should communicate to his employer an unconditional intention to quit service at the expiration of the warning. The mere fact that the defendant did not come for his wages at the expiration of the notice cannot be regarded either as a waiver of the notice or an implied renewal of the contract to serve.

Non-demand of wages no waiver of notice.

Newman v. *Vetanayagam* 7 S.C.C. 40. Reasonable cause.

(3) Grave injustice done to coolies serving under a head kangani would give the kangani *reasonable cause* to leave the service without notice.

Scorcroft v. *Muttusamy.* 8 S.C.C., 86. Who is 'employer.'

(4) The fact that a person, as superintendent, has the control of the labour force on another's estate is not of itself sufficient to make such superintendent the "employer" of the labourers on that estate. To prove a charge of deserting against a labourer there must be proof of a verbal contract of service between such labourer and such superintendent.

Power v. *Rengasami.* 9 S.C.C., 149. Who can give orders?

Orders by assistant superintendent.

(5) In a prosecution under Sec. 11 of Ord. No. 11 of 1865 it must be proved that the order was given by a person whom the servant was bound to obey. Where an order was given by the assistant superintendent and disobeyed, it was held by two judges against one, that the prosecution could not be sustained as there was no evidence to show the nature and extent of the assistant superintendent's authority over the coolies. *Clarence J.* (dissenting) held it to be a "notorious fact, within common knowledge and not requiring proof, that tea estates are cultivated by the aid of coolies working under paid 'superintendents' to whom is entrusted the responsibility of dealing out to the coolies all usual and lawful orders necessary to the cultivation of tea estates; and any such paid 'superintendent' or 'assistant superintendent' has *prima facie* authority to give such orders, and disobedience of such orders is *prima facie* disobedience of orders in the service of the employer."

Alagamma. 9 S.C.C., 156. Leave of absence terminates service. Sections 11, 24 of Ord. No. 11 of 1865. Sec. 5 of Ord. No. 13 of 1889.

(6) Monthly servant obtained leave for whole of October, 1890, promising to return to service at the end of that month, and failed to keep the promise. Master prosecuted servant for unlawfully quitting service in February, 1891. *Held*, that the defendant was not in the complainant's service at the date of the alleged desertion, on the ground (by Burnside, C.J.) that the contract of service was *suspended* during the month of October by reason of the leave, and was therefore not renewed by operation of law at the end of that month; and on the ground (by Clarence and Dias, J.J.) that the granting of leave of absence for a whole month *terminated* the service, being irreconcilable with the subsistence of a contract for monthly service.

Dumphy v. *O'Brien.* 1 C.L.R., 22. Quitting service for want of rice advances.

(7) An employer of coolies bound by the ordinary contract of monthly service is under *no legal obligation to make rice advances*, and the coolies are not entitled to quit service merely because such advances are not made.

Doray Samy v. *Meenatchy.* 1 S.C.R., 246 Liability of minor to be punished for desertion.

Burnside C.J., in *Alagan* v. *Alagy.* 1 S.C.R., 42.

(8) The liability of a minor to punishment for desertion under Ord. No. 11 of 1865 depends on the age or mental and bodily capacity of the minor. The mere fact of minority will not relieve minor from responsibility. In the case of *Alagan* v. *Alagy* the Chief Justice (Sir Bruce Burnside) referred to a case (in *Ramanathan's Reports*) in which the *dictum* of Clarence, J. was to the effect that "undoubtedly a minor may enter into a contract of service so as to render himself liable to statutory punishment for desertion; but this assumes that the minor is old enough fairly to comprehend the situation and its circumstances." The *decision* of Clarence, J., however, acquitted the minor in that case, because he was "a minor and sickly." Taking the *dictum* and decision together, it would seem that the question in each case would be one of *fact* and not of *law*.

Alwis v. *Carpen.* 2 N.L.R., 3. Work by the job.

8 S.C.C., 53 distinguished.

(9) A cooly employed by the P.W.D. to break metal, whose pay depended on the quantity of metal he broke, is liable to punishment for desertion under Ord. No. 11 of 1865. The case distinguished from *Suppiah* v. *Veerappen* (8 S.C.C., 53) when Burnside, C.J. held that a cooly employed on a weeding contract was on job work, and that because that cooly was not paid monthly wages at a daily rate, but was paid monthly at any daily wage he might earn, he was free to work or not as he chose.

Maclean v. *Appan.* 2 N.L.R., 54 Breach of recognized duties only punishable.

(10) A tea estate kangany who refuses to obey an order to perform manual labour in the reasonable belief, *founded on the previous course of business* on the estate, that it is no part of his duty to perform such labour, is not guilty of wilful disobedience under Sec. 11 of Ord. No. 11 of 1865.

Maclean v. *Appan.* 2 N.L.R., 54. Insolence. Legal custody suspends service. Judgment of Bonser, C.J.

(11) When a servant is in the custody of the law *his service is suspended*, and he cannot be then said to be in the service of his employer. That being so he cannot be found guilty of insolence under Sec. 11 of Ord. No. 11 of 1865, for the use by him, *when in custody*, of abusive language towards his master. "To constitute the offence (of insolence) it is essential that it should be committed in the service of the employer. I am of opinion that when a man is in the

Wrongly in Custody.

custody of the law his service is suspended; he cannot during that time be said to be in the service of his employer. Rightly or wrongly—in this case wrongly—the man was in the custody of the law; one might illustrate it by the case of a servant, while in a court of justice being tried for an offence, pouring forth a volume of abuse against his master; that would be an undoubted contempt of Court, but no one could imagine it was an offence committed while in the master's service, even although he and all the coolies of the estate were in Court."

Orwell Cooly Case. March 31, 1896. Facts.

(12) March 1, 1896.—Mr. Taylor, Superintendent, Orwell estate, gave his kangany *tundu* at his own request. March 7, 1896.—Mr T. received notice from 65 coolies of intention to quit unless arrears of wages were paid. March 8, 1896.—Mr. T. *proclaimed by beat of tom-tom* that the coolies would be paid that day, and when payment was made as announced *the 65 coolies who had given notice* (Mr. Taylor says) "*refused to come for their money, although they were in the lines at the time.*" March 9, 1896.—The defaulters did not turn out to work, and when asked "to come *at once* to the store to receive their wages, they refused to do so." March 10, 1896.—The defaulters left the estate, and Mr. T. instituted case for desertion. March 31, 1896.—The Police Magistrate of Gampola acquitted them.

Grounds of the P.M's judgment.

"The men appear to have been on the estate at all events the whole of Monday (March 9, 1896). Considering all the circumtances, and following the opinion expressed by the Supreme Court in P.C. Kandy, 24,581, *Dickson* v. *Perera*, I am not prepared to hold that *the tender of wages by Mr. Taylor as described by him was tantamount to payment;* in other words, the defendants cannot be considered not to have properly exercised the liberty given to them under sec. 21 of Ord. No. 11 of 1895. The case of *Sinclair* v. *Ramasamy*, if I judge aright the judgment in that case, supports the view I have taken in this case."

Dickson v. *Perera.*

Insufficient tender.

Sinclair v. *Ramasamy.*

Mr. Taylor's application for appeal refused.

Revision denied.

Point sought to be determined.

The Attorney-General refused to allow appeal chiefly on the ground, *that notice by tom-tom* was not sufficient evidence of legal tender of payment. The Chief Justice refused revision, although Mr. Taylor's counsel stated that there was a point to be determined, viz., *whether it is legal for a man to demand his pay within a given time, and then purposely absent himself to put it completely out of one's power to comply with his demand.*

Mr. F. Dornhorst, Advocate, Leader of the Unofficial Bar, on cooly desertion. Opinion obtained by the *Times of Ceylon* of May 18, 1896, in connection with the Orwell cooly case.

"The question of what is criminally punishable desertion is governed by section 21 of Ordinance 11 of 1865, and sections 6 and 7 of Ordinance 13 of 1889 as modified by sections 1 and 2 of Ordinance 7 of 1890.

According to the first enactment, section 21, a servant cannot be punished for desertion, if at the date of the alleged desertion his wages were unpaid for a period longer than a month, and if 48 hours before desertion he demanded the wages so due, and the master refused or failed to pay them. This enactment pre-supposed that wages were not only due, but payable at the end of the month.

Resumé of the sections.

Section 6 of Ordinance 13 of 1889, recognising that a month's wages became due at the end of the month, made them payable within the first three days of the ensuing month, in the case of a labourer,

i.e., an Indian cooly employed in other than domestic service. In thus fixing the time when the wages were payable, this section in my opinion may be read as amending section 4 of Ordinance 11 of 1865 (so far as that section referred to an Indian cooly), which merely enacted that the wages of such servants shall be paid monthly. Section 6 of Ordinance 13 of 1889 does not expressly refer to section 4 of Ordinance 11 of 1865, but I take it that this intention to amend or add to the section of the first Ordinance in this respect, may be fairly inferred from the words of the preamble of Ordinance 13 of 1889: "Whereas it is expedient to amend in the particulars hereafter mentioned Ordinance 11 of 1865," and of the 2nd section, "This Ordinance shall so far as is consistent with the terms thereof, be read and construed as one with the Ordinance 11 of 1865." Section 7 of 13 of 1889 re-enacted the proviso of section 21 of Ordinance 11 of 1865, requiring 48 hours' prior demand of wages by the servant, and a refusal or failure by the master, to justify desertion, the intention no doubt having been to substitute for section 21 of 11 of 1865, the proviso in the later Ordinance, so far as an Indian cooly was concerned. But this intention has to be implied.

Two inconsistent enactments on desertion.

Section 1 of Ordinance 7 of 1890 made the month's wages payable "60 days from the expiration of the month during which such wages shall have been earned," and section 7 made desertion not criminally punishable only in the case where a month's wages had not been paid in full within sixty days from the expiration of the month during which such wages shall have been earned. It will be seen from the above resumé of the different sections of our Labour Ordinances that there are two inconsistent enactments relating to desertion—Section 21 of 11 of 1865, and section 7 of 13 of 1889 as amended by section 2 of Ordinance 7 of 1890. By the former, which has not been expressly repealed, and which appears in the last revised edition of the Ordinances published by authority, a servant, which by the definition clause includes "labourer," can, if a month's wages be due to him, leave service without criminal liability for desertion, if 48 hours before leaving he demanded them, and his master refused to pay them. By the latter the wages are not payable until within 60 days from the expiration of the month during which such wages shall have been earned, and a servant could avoid criminal liability for desertion only by shewing that his wages earned for a month had not been paid within sixty days after the expiration of the month during which such wages shall have been earned. This anomaly has arisen from the omission of the legislature to expressly declare in section 7 of Ordinance 13 of 1889, that the proviso therein contained was substituted for the proviso in section 21 of Ordinance 11 of 1865, so far as the latter related to Indian coolies or labourers.

Construction.

That no doubt was the intention when the proviso was re-enacted, but *quod voluit non dixit.* The result is that the planter is liable to be deprived of the privilege intended to be conferred on him of making a month's wages payable within 60 days after the expiration of the month during which such wages shall have been earned by a demand for wages due before the same are payable. If the matter was *res nova*, I should have given it as my opinion that inasmuch as 13 of 1889 and 11 of 1865 were to be read together, and the former professed to amend the latter, that when the legislature amended section 7 of 13 of 1889 by omitting the proviso, it intended thereby to deprive the cooly of availing himself of the like proviso in section 21 of Ordinance 11 of 1865. Criminal statutes are no

doubt to be construed to the advantage of those prejudicially affected, but would it be a too far-fetched intendment, and would it be an infringement of this beneficial rule of construction to say that the proviso in section 21 relating to 48 hours' prior demand for wages, no longer applies to Indian coolies? In my humble opinion it would not. It is a recognised rule of construction that the language of every enactment must be so construed, as far as possible, as to be consistent with every other which it does not in express terms modify or repeal; but when two passages are irreconcilable, the earlier stands impliedly repealed by the latter. But I am concluded by authority. In *Henly vs. Wellayan* 1 Supreme Court Reports page 136 *et seq.*, it was held that an Indian cooly when charged with desertion, has two defences open to him, founded on non-payment of wages; he has the old defence under the Ordinance of 1865 in respect of wages left unpaid for more than a month; but to avail himself of this he must have made the demand 48 hours before leaving, and he has also the new defence under Ordinances of 1889 and 1890. For the latter defence no 'demand' is necessary, but the period during which wages must have been unpaid is 60 days. If the legislature intended such inconsistent provisions to co-exist then *cadit questio.* But I venture to doubt that any legislature could seriously have intended to relieve the master by enacting that he has 60 days' time to pay a month's wages, and at the same time enable the cooly to nullify this privilege by enforcing a demand of wages not payable though due.

Repeal by implication.

Henly v. Wellayan. 1 S.C.R., 136.

Place the provisions in parallel columns and their inconsistency is apparent.

The inconsistency of the enactments shewn by parallel arrangement of the sections in question.

Ordinance 11 of 1865, section 4 :—

Wages shall be paid monthly.

Ordinance No. 13 of 1889, section 6, as amended by Ordinance No. 7 of 1890, section 1 :—

Wages shall be payable monthly within 60 days from the expiration of the month during which such wages shall have been earned

(Whatever this may mean.)

Ordinance No. 11 of 1865, section 21 :—

No servant shall be liable to punishment for.....desertion ....if at the time of such alleged offence his wages shall have been unpaid for any period longer than a month, provided .....that the fact of such wages being due shall not affect the liability of such servant to punishment under the Ordinance, unless he shall at least 48 hours previously to the time of such alleged offence have demanded from his employer the payment of his wages so due, and the employer shall have refused or failed to pay the same.

Ordinance No. 13 of 1889, section 7, as amended by section 2 of Ordinance 7 of 1890 :—

No labourer shall be liable to punishment for neglecting or refusing to work or for quitting service without leave or reasonable cause or for disobedience or neglect of duty, if at the time of such alleged offence the monthly wages earned by him shall not have been paid in full within the period specified in sub-section (1) of section 6, (sixty days from the expiration of the month during which such wages shall have been earned.)

In my opinion these are *contrariæ leges* and the maxim *ubi duæ contrariæ leges sunt semper antiquas abrogat nova* applies. However, this is the present condition of the law in Ceylon of Planter and Indian cooly in regard to the offence of desertion."

Clarence, J., on *Henly* v. *Wellayan*. 1 S.C.R., 126, referred to by Mr. Dornhorst.

"Indian coolies."

Sec. 21 of Ord. No. 11 of 1865.

Not repealed.

Secs. 6 and 7 of Ord. No. 13 of 1889.

Two defences to "Indian" coolies when charged with desertion.

Ms. Justice Clarence would seem to suggest a distinction between "Indian coolies" and other labourers.

The enactments affecting estate coolies have undergone some patching. First, the Ordinance of 1865 was amended by Ordinance No. 16 of 1884, which again was repealed by Ord. No. 13 of 1889, which purports to deal with the labourers and kanganies "commonly known as Indian coolies"; Ord. No. 13 of 1889 has been altered by Ord. No. 7 of 1890. The 21st section of Ord. No. 11 of 1865 provides in effect that no cooly shall be punishable for desertion, if his wages have, at the time of leaving, been unpaid for any period longer than a month, and if, forty-eight hours before leaving, he shall have unsucessfully demanded his wages. *This section is not expressly repealed by the Ordinances of 1889 and 1890, nor can we suppose that there was any intention to repeal it impliedly*, the latter two Ordinances relating only to Indian coolies and being *not inconsistent with themselves.* We must take it, therefore, that sec. 21 of Ord. No. 11 of 1865 subsists in force side by side with secs. 6 and 7 of Ord. No. 13 of 1889, as amended by Ord. No. 7 of 1890. The effect of these two latter sections as so amended is, that no cooly shall be punishable for desertion, if the monthly wages earned by him shall not have been paid in full within sixty days from the expiration of the month during which such wages shall have been earned. The result is that a cooly falling under the category of "Indian Coolies" has, when charged with desertion, two defences open to him founded on non-payment of wages—he has the old defence under Ord. No. 11 of 1865 in respect of wages left unpaid for more than a month, but to avail himself of this he must have made the demand 48 hours before leaving; and he has also the new defence under the Ordinances of 1889 and 1890, for the latter defence no "demand" being necessary but the period during which wages must have been paid is sixty days.

Comments of the *Times of Ceylon* on Labour Laws after Mr. Dornhorst's opinion. May 18, 1896.

May 21, 1896.

"Reading between the lines of Mr. Dornhorst's very clear and able opinion, it is not difficult to see that, but for the ruling of the Supreme Court in *Henly* v. *Wellayan*, Mr. Dornhorst would have decided that the earlier enactment was repealed by the later and that, therefore, coolies could not demand their wages within 48 hours and walk off the estate at the expiration of that period if they had been paid up to within 60 days of the expiration of the month for which they claimed wages * * * It only requires a short Ordinance declaring that any provision in any previous Ordinance (especially Ord. No. 11 of 1865) inconsistent with Ord. Nos. 13 of 1889 and 7 of 1890 shall be repealed * * * Inasmuch as secs. 6 and 7 of Ord. No. 13 of 1889 are decidedly inconsistent with sec. 21 of the principal Ordinance, we cannot understand how an experienced Judge of the Supreme Court Bench could maintain that the latter has still force concurrently with the other * * * That the Legislature *did* intend to repeal sec. 21 of Ord. No. 11 of 1865 admits of no possible doubt."

The *Ceylon Examiner* on the question. May ..1896.

"There are two inconsistent enacments relating to desertion * * * The anomaly has arisen from the omission of the Legislature to declare expressly in sec. 7 of Ord. No. 13 of 1889 that the provision therein contained was substituted for the provision in sec. 21 of Ord. No. 11 of 1865."

The *Ceylon Observer* interprets the Law. May 22, 1896.

"The following are the propositions we deduce from the several (Labour) enactments, and we should wish to know whether they are inconsistent with the language of any of the sections :—

(1) The labourer is a monthly servant, entitled to be paid his wages monthly, and to leave on a month's notice.

(2) Failing notice at the end of the month, there is an implied contract to serve the following month; but the renewal of the engagement is no bar to the enforcement of a claim for wages the following month by law.

(3) If January's wages which are due on 1st February are unpaid for a month at the end of February, the labourer may demand payment within 48 hours; and, failing payment, he is free to leave.

(4) If January's wages are unpaid on 1st April, that is, within 60 days of the expiration of the month in which they were earned, the labourer is entitled to leave without any demand or any notice. We venture to think that, if the above propositions represent the Law, there is no inconsistency in them, and that in *Henly* v. *Wellayan* the Supreme Court upheld the intention of the Legislature. There is reciprocity in the extension of time for payment of wages by the Ordinance of 1890. Where master or cooly agrees that the wages shall remain in arrear for more than a month, the cooly becomes entitled at the end of the second month to leave without notice. Our evening contemporary (the *Times*) and some of our planting friends are mistaken, we submit, in thinking that a labourer may not claim his wages (subject, of course, to deductions) at the end of every month; but his service continues for the month on which he has entered. If the wages be unpaid that month too, then he may make a peremptory demand, non-compliance with which within 48 hours frees him from service. If the wages be in arrear 60 days, *ipso facto* the contract of service ends if the cooly desires it. This is our understanding of the law.

Observer of May 26, 1896. Alternatives consistent.

"We adhere to the view that the alternatives of quitting after demand of wages when they are one month in arrear, and of quitting without notice or demand when wages are two months in arrear, do not carry any contradiction or inconsistency.

Observer, May, 1896, on inconsistency in act and in law.

"As a matter of law we are quite willing to accept the *dictum* that the Ordinance of 1865 is inconsistent with that of 1890. But we hold *there is no inconsistency or contrariety as a matter of fact*, in the provisions that a man must allow his master 48 hours to pay up when *two* months' wages are due to him, while, where *three* months' wages are due, he is free to leave without any demand. We would look upon such provisions as consistent because they are graduated :—

Consistent provisions.

(1) A month's notice, if a month's wages, or no wages, are due.

(2) A demand of payment within 48 hours, if one month's wages are due.

(3) Neither notice nor demand if three months' wages are due."

The *Ceylon Independent* on the subject. May 26, 1896.

"The law on the subject of desertion, stripped of legal quibbles is simply this. An estate cooly is a monthly servant, that is, his engagement is for a month's service, and there is an implied contract to serve the following month, so that, if he is desirous of leaving he must give a month's notice to his employer. His wages become due on the 1st of the month following the month on which he worked on the estate. If his employer refuses payment of his wages he can sue his employer for them; but if the wages earned by him, or the debt for wages, remained *unpaid at least for a month after it ought to have been paid*, the labourer is not liable to punishment for desertion, if 48 hours before such desertion he had demanded the payment of his wages. By the amending Ordinances of 1889 and 1890, if the wages of the labourer are left unpaid for sixty days from the expiration of the month during which such wages shall have been earned, he can leave the estate without giving the 48 hours' notice required by the old Ordinance (No. 11 of 1865). Where is the difficulty* in understanding the simple matter? Where is the anomaly, where the inconsistency, where the contradictoriness?"

Tucker v. Bareed. (4 S.C.C., 44)

Month's notice to Clerk.

Wijeyasinghe v. Ryan. 2 C.L.R., 93.

A clerk as such is not "a domestic servant," and is not entitled, before dismissal, to a month's notice or a month's wages, unless the terms of his engagement were on the footing of the custom as to the month's notice or the month's wages usually governing the contracts of domestic employees with their employers.

Monthly Service. (Sec. 3 of Ord. No. 11 of 1865.)

Colvills v. Ramasamy. 2 S.C.C., 94. Master's obligation to find work.

(1) In a contract of service from month to month made between employer and labourer *by parol*, which contains a term that the servant is to be paid at a specified rate only for every day that he works, a corresponding term will be implied on the part of the employer, unless the contrary is expressed, *to furnish the servant with work*, or to *give him the opportunity to work*, on all usual working days during the period of the service.

Campbell v. Malayan. 5 S.C.C., 148. Month in Sec. 3 is not month of days of work.

(2) An estate cooly after giving, on March 21st, a month's notice to leave, did not work for thirty days and left on April 30th. The Magistrate held that the month contemplated in sec. 3 was a "month of days of work." The Supreme Court in appeal ruled *that it was not so*, and that the cooly was right in leaving after April 21st.

Seowcroft v. Muttusamy. 8 S.C.C., 86. Monthly servant.

(3) Where there was no fixed number of working days *per mensem* on which the superintendent was bound to find work for the labourers. *Held*, that the monthly payment of wages, at a daily rate, for the number of days only on which the superintendent gave out work, does not make a cooly a monthly servant within the meaning of sec. 3 of Ord. No. 11 of 1865.

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* It is noticeable that in none of the comments quoted above, the point (see page 161) which Mr. Taylor wished to see determined by the Supreme Court is dealt with at all.

Not Servants under Ord. No. 11 of 1865.

Rodrigo v. De Mel. 1 N.L.R., 91.

(1) A person who, by a written contract, undertakes for wages to attend at certain places for and in the work of dragging nets cast into the sea is not a servant within the meaning of Ord. No. 11 of 1865, and not being a servant he cannot contract himself into the criminal provisions of that Ordinance.

Young v. Rodrigo. 3 S.C.C., 117.

(2) A dhoby is not a menial, domestic or other like servant within the meaning of Ord. No. 11 of 1865.

Period of Absence. (Sec. 24 of Ord. No. 11 of 1865.)

Clarence, J. on Clause 24 of Ord. No. 11 of 1865. 4 S.C.C., 6.

(1) The clause, so far as it purports to deal with what is styled "the period of imprisonment" is to me unintelligible. If any interpretation can be put upon that clause, it seems to me to favour the supposition that the Legislature when passing this Ordinance did not understand a conviction of "quitting service" as discharging the contract.

Cayley, C.J. on the same 4 S.C.C., 5.

(2) The section merely requires the Court to award, if the employer shall so select, that no part of the imprisonment shall be counted as part of the period of service, which would otherwise have to be done in the case of a servant who had contracted to serve for any specified time. But there is *nothing in that section to show that in cases, where there was no such award, the imprisonment of itself puts an end to the service.*

Prosecutor.

Kandasamy v. Muthamma. 2 N.L.R., 71. *Semble*, by Bonser, C.J. Employer must be described as complainant.

In my opinion the employer is the only person who can properly prosecute for offences under the Labour Ordinance, because he is the only person injured. It is not like an assault or breach of the Queen's peace, nor is it an offence which concerns any one but the parties themselves ... ... No doubt a kangany is not a complete stranger, and, if he stated and proved that he was instructed by the joint employer to set the law in motion, possibly a Magistrate might be justified in issuing process on his complaint; but in that case the employer should be described as the complainant and thus made responsible for the proceedings.

Re-engaging.

Dick Lauder v. Ramen. P.C., Hatton, 17,955. S.C. Minutes, Oct. 16, 1895. Acceptance of withdrawal of notice to quit must be properly conveyed to party withdrawing.

(1) Where a kangany gave due notice of his intention to leave the manager's service on a certain date, and before that date came to the manager and retracted his notice, but yet left the service on the day specified in the notice. *Held*, that it was necessary, before the kangany could be convicted criminally for quitting the manager's service, that the manager should shew *that the Kangany knew the Manager had accepted his withdrawal*, and that the acceptance of the withdrawal had been communicated to him.

Anderson v. Sinnasamy. Reported in the *Times of Ceylon* of Jan. 31, 1896.

(2) Accused belonged to a gang, to the kangany of which the complainant had given a "tundu," that the kangany and his gang would be paid off on settlement of a certain outstanding debt. The debt was paid by an estate proprietor who was desirous of engaging the kangany and his force. Five days before the rest of the gang to which the accused belonged left, the complainant, hearing that the

Notice of discharge unrevoked, cooly re-engaged, contract of re-engagement void.

Notice of discharge supersedes service.

accused did not intend to go with them, *re-engaged him placed him on the check-roll and gave him an advance in the usual way.* But the accused, after such re-engagement, left the estate with the others. This act was complained of as desertion on the part of the accused. On the acquittal of the accused in the Police Court an appeal was filed at the instance of the Attorney-General. In affirming the acquittal, Withers J. said, "Mr. Anderson avers that he entered into a new contract of service with the accused, placed him on the month's check-roll and advanced him rice in the usual way. I think this was an *unconscionable agreement* to make with a man while this paper was unrecalled. However it may have bound him to the cooly, I cannot hold for a moment . . that he could bind the cooly to him within the criminal provisions of the Labour Ordinance." Again, "On and from that day [of issuing the *tundu*] the men, including the defendant ceased to be Mr. Anderson's servants, at all events their service was suspended." Again, "The cooly [the accused] I take was acting as he thought it proper to act, and indeed as the *unrevoked paper intended he should act.* I question very much if all the circumstances of the case were fully explained to the cooly before he re-engaged himself . . and in that view *his new contract was of no force or effect.*"

Rescission of the Contract.

Cayley, C.J. on the rescission of the contract under Ord. No. 11, 1865. 4 S.C.C., 3. *Hunt* v. *Huttan.*

The Ordinance does not alter the usual rules of the rescission of contracts.

(1) So far as regards civil liability, it is not competent to one party by his own act to rescind a contract. As observed by Mr. Justice Blackburn in *Unwin* v. *Clarke* (35 L. J. M. C., 193), a breach of a contract accompanied by a declaration of an intention not to complete it may give an option to the person injured, if he pleases, to rescind, *but gives no rights to the wrong-doer.* Nor do I see that any distinction is to be drawn between civil and criminal responsibility in cases of this kind. The Ordinance renders penal certain breaches of contracts between masters and servants, which would otherwise give rise to a civil liability only, but (the Ordinance) *does not make any alteration in the law relating to the rescission of contracts.* The quitting of the complainant's service by the defendants, for which they have been punished, assuming such quitting to have been *animo non revertendi*, may perhaps be regarded as a renunciation of the contract on their part, but *such renunciation being unilateral could not operate as a rescission* of the contract of service, unless adopted by the complainant; and I cannot consider the exercise by the complainant of his legal right to have the defendants punished such an adoption of this renunciation as to operate as a dissolution of the contract. To hold this would be in effect to hold that a servant may put an end to his contract of service by a wrongful act against the wish of the employer, unless the employer is willing to forego his right under the Ordinance of having the servant punished for his misconduct.

One party only cannot rescind.

Conviction for breach of contract of service does not terminate service.

Clarence J. on the rescission of contract under the Labour Ordinance, 4 S.C.C., 6.

(2) This is an Ordinance imposing criminal punishment upon certain breaches of contract, which, but for the Ordinance, would be the subject-matter of civil actions only as between the master and servant. So long as the contract of service subsists, *every successive breach of it may form the subject of a civil action;* and so, I apprehend, may every breach, criminally punishable under the Ordinance, form the subject of a criminal prosecution. When a servant who has bound himself to serve a master for a term deserts from his master's service during the term without lawful excuse for so leaving his work, he does not put an end to the contract. It takes both parties to rescind the contract. The master may, if he chooses, adopt the servant's act and treat the contract as rescinded, *but he is not obliged to do so.* When the Ordinance speaks of a servant as "quitting the service of his employer without leave or reasonable cause," the Ordinance, I take it, contemplates the departure of the servant from the master's work in a manner which would be lawful were the contract at an end, but which, *the contract not being at an end,* is unlawful; and the Ordinance goes on to say that that breach of contract shall be punishable in a certain manner. There is nothing which leads me to think that the Ordinance intended that such punishment should have the effect of clothing the servant's unlawful departure with the effect of determining the contract. When the Ordinance speaks of the servant as "quitting his employer's service," it cannot mean that he thereby ceases to be subject to his contract of service. I cannot see that the employer who prosecutes the servant criminally for attempting by unlawful means to evade all future fulfilment of the contract, is to be on that account regarded as having accepted a rescission. Quitting an employer's service without reasonable cause is an *unlawful attempt to rescind* the contract of service. The legislature has made it criminally punishable, that is, has constituted it an offence. It seems to me an offence which may be committed several times during the duration of the contract, and may on each occasion be made the subject of a fresh criminal prosecution.

Liability both civil and criminal.

Quitting service unlawfully does not terminate the contract.

Master may, but not bound to, adopt servant's act as rescission.

Meaning of "quitting service."

Punishment for desertion does not terminate contract.

Prosecution by employer is not taking servant's act as rescision.

Unlawful quitting service is an attempt to rescind contract, and every such attempt is punishable.

English cases cited in *Hunt* v. *Mutton.* Difference of opinion.

Baker's case.

Chief Baron Pollock's opinion.

Youle v. *Mappin.*

Unwin v. *Clarke.* Two judges against one uphold second conviction under the contract.

(3) In *Baker's* case (26 L.J.M.C., 193) it was held that the first conviction of a servant for "absenting himself unlawfully" did not put an end to the contract, and that the servant's refusal to return after the imprisonment was punishable as a new "absenting himself." In the Court of Exchequer the Judges were divided in opinion. Chief Baron Pollock expressed a decided opinion that if the first conviction was for a remuneration of service, accompanied by a notice to quit, the contract was thereby determined, and the servant having been punished for that could not again be convicted. In *Youle* v. *Mappin* (30 L.J.M.C., 234) two Judges out of three held that where a servant went away *animo non revertendi* he could be convicted only once, and not again for refusing to go back after imprisonment. In *Unwin* v. *Clarke* (35 L.J. M.C., 193) a servant having been refused an advance of wages, absented himself from work, *saying he would not return* but would go to prison and break his agreement. On refusal to return after imprisonment he was charged again. In the Queen's Bench Court two judges against one held that a *second conviction would be correct.*

Clarence, J. on the bearing of English cases on the ruling in *Hunt* v. *Muttan*.

(4) Holding as I do decidedly upon principle, and independently of authority, that a servant who has been convicted and imprisoned under Ord. No. 11 of 1865 for unlawfully quitting his master's service may be a second time convicted of unlawfully absenting himself from his master's service, if he refuse to resume work at the end of the imprisonment, I do not find the authority of the English decisions *in pari materia* to be to the contrary.

Seducing from Service. (Sec. 19 of Ord. No. 11 of 1865.)

Brabazon v. *Mahmud*. 2 S.C.C., 190. Seducing from employ.

(1) The defendant claimed a right to detain the coolies until coast advances and expenses of transit were paid. *Held*, that though the *detention was unjustifiable*, yet the fact of seducing from employ within the meaning of Sec. 19 of, Ord. No. 11 of 1865 was not established.

Suppiah v. *Virappen*. 8 S.C.C., 53. To prove seducing contract must be monthly. What is not monthly wages.

(2) To support a conviction of seducing a cooly from employ in breach of Sec. 19 of Ord. No. 11 of 1865, it is necessary to *show that the contract of service was a monthly and not a job contract*. The mere payment monthly of wages for days that the cooly actually worked was not a payment of monthly wages at a daily rate, so as to raise the presumption of service under section 3.

Stone v. *Veerasamy*. 8 S.C.C., 181. What is not seducing.

(3) Inducing a monthly servant to quit his master's service *in a lawful manner* is not "seduction" within the meaning of Sec. 19 of Ord. No. 11 of 1865.

Dumphy v. *O'Brien*. 1 C.L.R., 22. Detaining coolies for money due.

(4) When coolies are engaged for a particular work, the service, within the meaning of the penal clause of the Labour Ordinances, ceases when the work is over or given up; and the employer cannot detain them till money due to him for advances be paid, nor can he pass them on to some other employer who would pay him their debts.

Case against *Weerasamy* of Densworth estate reported in *Times of Ceylon* of March 3, 1896.

Taking a cooly beyond the lines, not in itself seducing from service.

(5) A man named Weerasamy was found one night, five miles away from the lines of Densworth estate, with a cooly named Ponnamma. The man was charged under Sec. 19 of Ord. No. 11 of 1865. He appealed. In appeal it was observed by Bonser, C.J: "It is not stated that they were bound to be in the lines during the night. They were found at no very considerable distance from the estate; the hour and the distance were quite consonant with the woman's having an intention to return to the estate, and her desertion cannot be assumed without some evidence. Even a yard away from the estate if they were found, with two passage tickets for India, it may be evidence that they were going on to India, and may be sufficient to presume desertion. However that may be, in the present case there is no evidence to presume guilt on the part of the accused."

Transferring Service.

Bonsen v. *Pannum*. 18 C.R., 94.

(1) A master has no right to transfer to another his servant's contract of service with him without the servant's consent.

Dumphy v. *O'Brien*, 1 C.L.R., 22.

(2) See under seducing from service under Ord. No. 11 of 1865 the case of *Dumphy* v. *O'Brien*.

Wages Unpaid. (Sec. 21 of Ord. No. 11 of 1865. Secs. 6, 7, of Ord. No. 13 of 1889.)

Tucker v. Barsad. S.C.C., 44. Excuse for desertion.

(1) For the servant to be excused for desertion, his due wages must have been left unpaid for a month; that is, the debt for wages must have remained unpaid for at least *a month after it ought to have been paid.*

Maitland v. Harpen. S.C.C., 47. Rule for calculating month's wages due.

(2) In defence to a charge of desertion it was contended that more than one month's wages were due to defendants, and that they had given the 48 hours' notice under Sec. 21 of Ord. No. 11 of 1865. *Held*, that the correct rule was for calculating whether anything remains due to the cooly for the last day of the month immediately preceding the last month of his stay on the estate, after deducting the value of the rice supplied and advances made to him.

MacMahon v. Muttusamy. S.C.C., 48. Insolence.

(3) A charge of insolence, under Section 11 of Ord. No. 11 of 1865, is not within the purview of Sec. 21, and consequently a servant may be convicted and punished under such a charge, although it appears that wages had remained unpaid for forty-eight hours after a demand.

Hendy v. Vellayan. S.C.R., 136. Burden of proof of non-payment of wages on whom.

(4) When a labourer charged with desertion seeks to justify his act on the ground that his wages have not been paid within the prescribed period, the burden of proving such non-payment is on the accused; but, as in the case of an estate cooly and his master the accounts are usually with the latter, the Court will call on him (the master) to produce them so as to place the Court in a position to strike the balance between the parties.

Jackson v. Perian. C. Kandy, 24581. S.C. minutes, Nov. 6, 1895. Promise of wages is not payment.

(5) *Semble*, a mere promise or a mere offer by an employer, without actual tender of money, coupled with servant's declining to accept it, would not be tantamount to the payment of wages, and so would excuse the quitting of service.

Ilford v. Sanarisuttu. Hatton, 37750. S.C. minutes, Dec. 6, 1896.

Whether Sec. 7 of Ord. No. 13 of 1889 does not apply.

(6) Where a kangani pleaded, under Sec. 7 of Ord. No. 13 of 1889, non-payment of his wages as a plea against his conviction, under Sec. 11 of Ord. No. 11 of 1865, for misconduct in the service of his employer, in that he interfered with the coolies in their work. *Held*, that the section pleaded did not apply. Bonser, C. J., said: "The section referred to only applies to certain specified cases—neglecting or refusing to work, quitting service without leave or reasonable cause, or neglect of duty. They are all negative acts of misconduct. Positive acts of misconduct, such as drunkenness or insolence, are not excused by reason of the employer being in default in paying wages. The distinction between the two cases is very clear. *A man whose wages are in arrear for the statutory period may refuse to work any longer, but he is not justified in annoying or insulting his employer.*"

Kley v. Ittan. C.R., 109. Inside, J.: as the question whether

(7) The wages of the accused were in arrears for a period of sixty days. Now, under Ord. No. 13 of 1889, before arrears of wages could afford an answer to the cooly charged with desertion, it was necessary that he should have demanded his wages, and that a period of 48 hours should have elapsed after

non-payment of wages (under Sec. 6, of Ord. No. 13 of 1889) does not terminate the contract of service. Point left undecided.

notice and the wages remained unpaid; but by the amending Ordinances (No. 7 of 1890) if the wages are in arrear for the prescribed term, it in itself affords a full answer to any prosecution for desertion, and this raises the very important question, whether *it does not terminate the original contract of service*. . . . . The point seriously affects the Labour Laws.

Sinclair v. *Ramasamy*. 1 N.L.R., 43. What effect on criminal liability under Labour Laws has agreement to set off loans for getting coolies against wages due.

(8) Even if there was an agreement between a labourer and his employer, that loans for procuring coolies should be set off against wages due, it cannot have the effect of making him criminally liable for desertion, if at the time of quitting service the monthly wages earned by him shall not have been paid in full within sixty days from expiration of the month during which such wages have been earned. Lawrie, J. said: "It is not necessary now to decide what the effect of that agreement would be in a civil case for wages. It surely has *no effect in a criminal case*. If this kangani (who entered into that agreement) is not liable to punishment (for desertion) under the Ordinanee, he has not made himself liable by this agreement *criminally*. . . . . His wages for a month were not paid to him; more than sixty days elapsed under the Ordinance; *he was not liable to punishment if he then left*; he did not render himself liable to punishment because he agreed with his employer that he might retain the wages in payment of a debt; that was an advantage to the employer, which I assume the employer might gain by (civilly), but *the agreement cannot bring within the punitive clauses of the Labour Ordinance a man who is not liable to punishment if he had not made the agreement*."

Dixon v. *Myandi* of Oct. 31, 1894, conflicting with *Sinclair* v. *Ramasamy*. 1 N.L.R., 43

(9) A labourer acquiesced in an arrangement that his wages as they became due should at certain intervals of time be passed to the credit of an account with the kangani who owed money to the estate and received an account of his gang; it was held that since he had consented to the agreement he could not plead the privilege of Ord. No. 13 of 1889, that leaving the estate was no offence inasmuch as his wages had not been paid to him for sixty days prior.

Jacob v. *Velaiden*. 1 N.L.R., 42. Sec. 11 of Ord. No. 11 of 1865. Sec. 5 of Ord. No. 13 of 1889.

(10) An estate kangani employed on a monthly contract of hire and service, whose wages for ten consecutive months were due and unpaid at the time of his quitting service after notice of less than one month, is not guilty of an offence under Sec. 11 of Ord. No. 11 of 1865, in the absence of proof that the sums of money alleged to have been advanced to him by his master were *on account of anticipated wages*.

Jacob v. *Velaiden*. 1 N.L.R., 42. What may be set off against wages due.

(11) Only advances by way of anticipated wages can be taken into account in computing what, if anything, is due to a labourer by way of wages earned by him at the date of his committing the offence of quitting service without leave, etc. Just as the value of rice and clothes supplied to a labourer in the course of service, and for his use as a servant, so may money advanced to him for a similar purpose, be deducted in the computation of an account of what wages, if any, are due and unpaid at a certain date and for a certain period.

Sinclair v. *Ramasamy.* 1 N.L.R., 43.

Lawrie, J. on advances.

Loans.

Old advances.

Custom abrogated by the Ordinance

Jacob v. *Velaiden* followed.

(12) "In endeavouring to fix the meaning of the words to "all advances of money" made to a labourer, I hold that an *advance is different from a loan.* It is competent to turn to section 12 (of Ord. No. 13 of 1889) to see what is there meant by an advance; it there means money, food, clothes, or other article which had been advanced or supplied to the labourer *as against the wages* for which he may be suing; and old advances may not be taken into consideration (in computing the amount of wages due), only advances or supplies made within the period for which wages are claimed and the subsequent sixty days. Whatever was formerly the effect of the customary understanding that large loans made to a head kangani were to be repaid out of wages, and that wages could legally be retained in payment of old advances, I think that customary understanding was corrected by the Ordinance I have quoted, which enacts that as a set-off to wages shall be put only advances made against wages, not (as I read the Ordinance) advances for bringing coolies and the like."

Written Contracts. (Sec. 7 of Ord. No. 11 of 1865; Sec. 8 of Ord. No. 13 of 1889.)

Collinson v. *Veeramuttu.* 4 S.C.C., 135.

Contract of service for a term certain.

Civil liability on contracts under the Ordinance.

(1) The contract was one for service for a year certain. It was *held*, that in order to make a servant criminally responsible under Ord. No. 11 of 1865 for breach of such contract, it is necessary that the contract should comply with the requirements of Sec. 7, but it is not necessarily null and void for lack of such compliance. It may be perfectly good as *creating a civil obligation* between the parties, though breach of it will not subject either party to criminal liability.

Soysa v. *Appuhami.* 1 N.L.R., 323. Definite term of service necessary to a written contract of service.

(2) Unless some *definite term of service* is expressed in a written contract of service, it will be obnoxious to Sec. 7 of Ord. No. 11 of 1865, and the servant cannot be criminally punished under that Ordinance.

Pieris v. *Salgado.* P. C. Panadura, 606, Nov. 2, 1896.

(3) *Parol* engagement for two months is obnoxious to Sec. 7 of Ord. No. 11 of 1865, and party to such agreement, on breach of it, is liable under the Ordinance.

Alagan v. *Alagy.* 1 S.C.R., 42. Sec. 8 of Ord. No. 13 of 1889.

Entry in Check-roll.

(4) A labourer who enters into a contract for a year's service, but which contract is invalidated for want of writing as required by Sec. 8 of Ord. No. 13 of 1889, cannot be convicted of acts made penal in respect of monthly servants, merely because his name is on the check-roll, and he works as any other monthly labourer.

☞ *Note.*—In Mr. Panabokke's judgment in the *Orwell case*, p. 161, case No. 24581 is reported as *Dickson* v. *Perera.* The name *Dickson* v. *Perian* p. 171 is from the *Ceylon Examiner's* "Recent decisions."

GENERAL INDEX.

NOTE.—The reference is to the page.

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* Lawrie, A. C. J., in a recent case (in 2 N. L. R.) questions (and overrules) the opinion of Clarence, J., in *Henly* v. *Wellayan*.

† In D. C. Kandy 9915 (unreported and also not a Supreme Court ruling) it was held following an English case that in lieu of month's notice the *Employee* cannot set-off wages of a month.