AN INTRODUCTION
TO
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AN

INTRODUCTION

TO

ROMAN-DUTCH LAW

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THE HON.

SIR JOHN G. KOTZÉ, LL.D.

ONE OF HIS MAJESTY'S JUDGES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE UNION OF SOUTH AFRICA; LATE CHIEF JUSTICE OF THE TRANSVAAL

PREFACE TO THE THIRD EDITION

THE first edition of this book published in 1915 was designed to present a survey of the Roman-Dutch Law as it then existed in South Africa, in Ceylon, and in British Guiana. From January 1, 1917, this system was replaced in British Guiana by the Common Law of England. Consequently in the second edition, published in 1926, British Guiana was omitted from the picture. South Africa and Ceylon remained, the former being without question the predominant partner. In the interval which had elapsed between the first and the second edition, legislation of the Union Parliament and decisions of the Appellate Division of the Supreme Court of South Africa had been active in consolidating the law of the Union. In the last five years these influences have continued to make themselves felt, and to the extent to which they operate the old law fades into the background. Even to-day an immense chasm separates the Roman-Dutch Law of Holland from the modern law of South Africa. In another half-century, or less, recourse to the old authorities, which still form the basis of this book, will seldom be made. The Roman-Dutch Law will have been superseded in South Africa, not *per saltum*, as in British Guiana, but by a gradual process of disintegration and re-statement. This, rather than codification, may confidently be predicted as the future of the Roman-Dutch Law in this part of the world.

Meanwhile, in the Union of South Africa, if not elsewhere in equal degree, many institutions of the old law exhibit a stubborn persistency. The law of marriage, particularly as regards the proprietary rights of the spouses and the contractual capacity of the wife, remains to-day substantially what it was in the time of Grotius; and though a South African judge has lately adverted to 'the unfortunate consequences arising from the application to modern conditions of an archaic system of law affecting the property of married persons', the system thus described seems

too firmly established in popular sentiment to be in immediate danger of change. This statement must be understood to be limited to the Union of South Africa. Southern Rhodesia has lately followed the example of Ceylon in declaring (Married Persons' Property Act, 1928) that 'Community of property and of profit and loss and the marital power or any liabilities or privileges resulting therefrom shall not attach to any marriage solemnised between spouses whose matrimonial domicile is in this Colony entered into after the date of the coming into effect of this Act' (unless such spouses shall by an instrument in writing executed before a magistrate have expressed their wish to be exempt from the provisions of this law). Further, in imitation of the law of Natal, the Act provides that spouses married in community prior to the taking effect of the Act may take advantage of its provisions by post-nuptial deed.

If the established law of marriage may be supposed, at least in the Union, to make a sentimental appeal, there are other institutions of the old law which have nothing to commend them. The process of tying up property through successive generations by what is called 'fideicommissary substitutions' is a case in point. These have been prohibited in France since 1792, and the law is the same, or nearly the same, in other European countries. In South Africa a testator, if he goes the right way about it, may tie up his property for ever (p. 384). Can it be said that such a tyranny of the dead hand has any reason for existing except that it exists?

The South African law of intestate succession is of an immemorial antiquity, a survival, if Professor E. M. Meijers of Leyden is correct, of a prehistoric 'Ligurian' or 'Alpine' Law, which once obtained over a great part of Central and Western Europe. This system assumes that the whole of a dead man's estate came to him by descent from his parents or parent, with the consequence that a surviving parent, having contributed nothing, takes nothing from a son who dies intestate. If the *Octrooi* of 1661

(p. 402) has been more indulgent to a surviving father or mother, the old law is still effectual to exclude a surviving grandparent (p. 404). A wife takes nothing in the event of her husband dying intestate except, by statute, in Natal (p. 400) and Southern Rhodesia (Deceased Estates Succession Act, 1929).

If I touch upon these facts it is with no intention of underrating the Roman-Dutch system of law, but to suggest that it carries a burden of ancient tradition, much of which is out of harmony with the spirit of the age.

The present edition of this book does not differ in essentials from the last. It contains some new matter. Thus the subject of liens has been introduced into the chapter on 'Mortgage or Hypothec', and mortgage of a right (*res incorporalis*) is separately considered; under 'Special Contracts' the section on lease has been enlarged, mainly by transferring to the text details formerly contained in the notes; under 'Succession', the chapter on 'Testamentary Succession' has been remodelled (the subject of mutual wills, in particular, receiving fuller treatment), while the chapter on 'Intestate Succession' has been somewhat simplified and curtailed. The Appendices are the same as before, except that the summary of the (Union) Adoption of Children Act, 1923, has been omitted, as also the topic of 'Liability for Injury by Animals', the ground being here sufficiently covered by recent decisions of the South African courts. It may be noted that while the Appellate Division has denied a dog 'his first bite' it relieves him from the burden, and his master from the benefit, of noxal surrender, a mouldy institution, which has been held to form part of the law of Ceylon (*De Soysa* v. *Punchirala* (1907) 10 N.L.R. 254; *Winter* v. *Mudianse* (1920) 22 N.L.R. 153). In place of this Appendix a note has been substituted in which a number of special cases have been thrown together under the title of 'Compensation for Improvements'.

The history of the Roman-Dutch Law contains many surprises. Perhaps the greatest of these is its persistence

under the British Crown for more than a century after it ceased to function in the land of its origin and for a shorter period after its disappearance from the Colonies still subject to the Kingdom of the Netherlands. It has even been extended to the Mandated Territory of South-West Africa, in abrogation of the much more highly developed system of German law.

A minor surprise is that Roman-Dutch Law, being allowed by the Inns of Court as an alternative to the English Law of Real Property, has come to be studied by candidates for the English Bar, drawn from remote parts of the world, who have no intention of practising law in any jurisdiction where this system is administered. Such students may well be bewildered by its strange complexity and the archaic character of its sources. They would do well to regard it, not, with the late Sir Paul Vinogradoff, as 'a ghost story', 'a second life of Roman Law after the demise of the body in which it first saw the light', but rather as the last surviving specimen of the *jus romanum hodiernum*, which in one form or another constituted for centuries the common law of the greater part of Western Europe, and has been a useful, perhaps necessary, bridge between the Middle Ages and modern times.

For the purpose of this edition the old authorities cited in the notes have undergone a careful revision, with the result that some inaccuracies have been detected and removed. The number of cases cited (nearly twice as many as in the last edition) may seem excessive. In excuse it can be pleaded that, as appears from the Reports, this book has on many occasions been quoted in Court, from which it seems that, though designed primarily for students, it has also proved useful in practice. But the author is sensible of the disadvantage under which he labours in being out of touch with the daily *disputatio fori*. The indulgent reception accorded to this book by practising lawyers is therefore very gratifying.

The reader will remark the occasional use of the terms 'the colonies', 'the Roman-Dutch colonies'. The author

intends no disrespect to 'Dominion Status'; but he can find no better way of designating collectively such various constitutional units as the Union of South Africa, the self-governing Colony of Southern Rhodesia, the Crown Colonies of Ceylon and British Guiana, and the Mandated Territory or Protectorate of South-West Africa.

The author has pleasure in acknowledging the valuable assistance of Mr. Arthur Suzman, LL.B., B.C.L., of the Transvaal Bar, in preparing this work for the press. The task of correcting the proofs and of compiling the Tables of Cases and Statutes has been placed in the very efficient hands of Mr. E. C. Hastings Lawson, M.A., Barrister-at-Law of the Middle Temple, to whom the author expresses his warm acknowledgements.

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17 *March* 1931.

ADDENDUM

p. 325. On 'Liability for non-defamatory statements' see further Prof. R. G. McKerron in *S.A.L.J.*, vol. xlvii (1930), p. 359.

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Buch. A. C.	Buchanan, James & E. J. & D. M. Cases decided in the Court of Appeal of the Cape of Good Hope, 1880–1910.
C. L. J.	Cape Law Journal, 1884–1900.
C. P.	Common Pleas, or Common Pleas Division (England).
C. P. D.	Cases decided in the Cape Provincial Division of the Supreme Court of South Africa, 1910 onwards.
C. T. R.	*Cape Times* Reports, 1891–1910.
Ceylon N. L. R.	Ceylon New Law Reports.
Ch.	Chancery, or Chancery Division (England).
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E. D. C.	Cases decided in the Eastern Districts Court of the Cape of Good Hope, 1880–1909.
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N. P. D.	Cases decided in the Natal Provincial Division of the Supreme Court of South Africa, 1910 onwards.
O. F. S.	Reports of the High Court of the Orange Free State, 1879–83.
O. P. D.	Reports of the Orange Free State Provincial Division, 1910 onwards.
O. R. C.	Orange River Colony, Reports of Cases decided in the High Court, 1903–10.
O. R.	Official Reports of the High Court of the South African Republic, translated into English by W. S. Webber & J. G. Kotzé, 1894–9.
P.	Reports of the Probate, Admiralty, and Divorce Division of the High Court (England).
P. H.	Prentice-Hall, Weekly Legal Service.
Ramanathan	Ramanathan, P. Judgments of the Supreme Court and High Court of Appeal, Ceylon, between 1820–33.
„	Important Cases, Supreme Court, Ceylon, 1843–55.
„	Important Cases, Supreme Court, Ceylon, 1860–8.
„	Important Cases, Supreme Court, Ceylon, 1872, 1875, 1876.
„	Reports of Cases, Supreme Court, Ceylon, 1877.
R.	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861–78.
Searle	Searle, M. W. Cases decided in the Supreme Court of the Cape of Good Hope, 1850–67.
S. A. L. J.	South African Law Journal, 1901 onwards.
S. A. R.	Cases decided in the Supreme Court of the South African Republic.
S. C.	Supreme Court Reports (Cape of Good Hope), 1880–1910.
S. C. C.	Supreme Court Circular (Ceylon).
S. C. R.	Supreme Court Reports (Ceylon).

T. H.	Cases decided in the Witwatersrand High Court (Transvaal), 1902–10.
T. P. D.	Cases decided in the Transvaal Provincial Division of the Supreme Court of South Africa, 1910 onwards.
T. S.	Cases decided in the Transvaal Supreme Court, 1902–10.
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GENERAL INTRODUCTION

CORRIGENDA

P. 71, n. 3, l. 11, *for* effect *read* affect

P. 184, n. 4, l. 5, *for* has a usufruct merely, not property, in the minerals gained. *substitute* must at the termination of his usufruct restore to the *dominus* the value of the minerals taken. *and after* Van Leeuwen, 2. 9. 4. *insert* *Master* v. *African Mines Corp*[n] [1907] T. S. 925.

P. 243, l. 1, *for* inquiry *read* injury
n. 6, *for* Van Leewen *read* Van Leeuwen

P. 247, *in the note* (*continued from* p. 246) l. 2 *after* irrecoverable. *insert* *To pay bets*—'

P. 295, n. 5, l. 3, *for* heir *read* hier

P. 426, *six lines from end between* heeft *and* grond *insert* geen

P. 427, l. 3, *for* p. 302, n. 4. *read* p. 302, n. 2.

GENERAL INTRODUCTION

The Roman-Dutch Law:

THE phrase 'Roman-Dutch Law' was invented by Simon van Leeuwen,[1] who employed it as the sub-title of his work entitled *Paratitula Juris Novissimi*, published at Leyden in 1652. Subsequently his larger and better known treatise on the 'Roman-Dutch Law' was issued under that name in the year 1664.

The system of law thus described is that which obtained in the province of Holland[2] from the middle of the fifteenth to the early years of the nineteenth century. Its main principles were carried by the Dutch into their settlements in the East and West Indies; and when some of these, namely, the Cape of Good Hope, Ceylon, and part of Guiana, at the end of the eighteenth and the beginning of the nineteenth century, passed under the dominion of the Crown of Great Britain, the old law was retained as the common law of the territories which now became British colonies. With the expansion of the British Empire in South Africa, the sphere of the Roman-Dutch Law has extended its boundaries, until the whole of the area comprised within the Union of South Africa, representing the four former colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River, as well as the country formerly administered by the British South Africa Company and now constituting a separate colony, under the name of Southern Rhodesia, has adopted this system as its common law. This is the more remarkable since in Holland itself and in the Dutch colonies of the present day the old law has been replaced by codes; so that the statutes and text-books, which are still consulted and followed in the

[1] See *Journ. Comp. Leg.*, N.S., vol. xii, p. 548.

[2] The student will not fail to remember that Holland was one only of the seven provinces which, having declared their independence of Spain (1581), combined to form the Republic of the United Netherlands. The modern equivalent is the 'Kingdom of the Netherlands', and this is what we commonly mean to-day when we speak of 'Holland'.

above-mentioned British dominions, are no longer of practical interest in the land of their origin.[1]

Its origin, and development.

Though to indicate in general terms the nature of the Roman-Dutch Law is a matter of no great difficulty, precisely to define its extent in time or space is not so easy. Derived from two sources, Germanic Custom and Roman Law, the Roman-Dutch Law may be said to have existed so soon as the former of these incorporated elements derived from the latter. Undoubtedly such a process was at work from very early times. Long before the Corpus Juris of Justinian had been 'received' in Germany, the Codex Theodosianus (A.D. 438) had left its mark upon the tribal customs of the country now comprised within the limits of the kingdoms of Holland and Belgium.[2] Later, the Frankish Monarchy, the Church through the medium of its Canon Law,[3] and the Universities, forged fresh links between Rome and Germany. The general reception of the Roman Law in Germany and Holland in the fifteenth and sixteenth centuries completed a process which in various ways and through various channels had been at work for upwards of a thousand years.[4]

[1] On codification in Holland see a note by Dr. W. R. Bisschop in *Journ. Comp. Leg.*, N.S., vol. iii, p. 109.

[2] Van de Spiegel, *Verhandeling over den Oorsprong en de Historie der Vaderlandsche Rechten*, pp. 73–4.

[3] Ibid. p. 110. For some remarks on the part played by the Canon Law in the formation of the mature system of R.-D. L. see Kotzé, Van Leeuwen [2nd ed.], vol. i, pp. 468 ff.

[4] Mr. Justice Kotzé says (p. 461): 'There is, no doubt, a good deal of truth in this speculation of Van de Spiegel that Germanic and Frankish laws and customs formed the basis or component parts of the law under the early Dutch Counts; but there is a lack of historical evidence to prove that the Roman Law ever had much influence in the Northern Netherlands during the Frankish regime, or that, in the period from the eleventh to the fifteenth century, it was adopted and relied on by the ordinary tribunals throughout those countries.' This very learned writer accepts Bynkershoek's view: Ego vix putem aliquam in Hollandia ejus Juris fuisse auctoritatem ante Carolum Audacem (*Observationes Juris Romani, in praefat.*). And again (p. 463): 'Although the Roman law was known in various ways before the time of Charles the Bold, it is clear that Bynkershoek is correct when he says that, in Holland, it first received authoritative and legislative recognition in 1462 [*Instructie voor den Stadthouder ende Luyden van de Kamer van den*

For many centuries after the dissolution of the Frankish Empire there was no general legislation. Under the rule of the Counts of Holland the law of that province consisted principally in general and local customs supplemented to an uncertain degree by Roman Law. The numerous privileges (*handvesten*) wrung from the Counts by the growing power of the towns only tended to complicate the law by a multiplication of local anomalies.[1] In such a state of things it is not surprising that, when medieval institutions proved inadequate to meet the needs of a fuller and more complex life, resort was made to the Roman Law as to a system logical, coherent, and complete.[2] This was the realization in the Netherlands of the 'momentous process' which scholars have described as 'the reception of the Roman Law' in Northern Europe.[3] Later, under Spanish rule, came an era of constructive legislation; but by that time the victory of the Roman Law was already assured.

The reception of the Roman Law in the Netherlands;

Prominent amongst the causes which stimulated the 'reception' of the Roman Law in this special sense was the establishment of the Great Council at Mechlin[4] in the year 1473 with jurisdiction over the provinces of the Netherlands then subject to the Duke of Burgundy. This Court,

Rade, Art. 42, 3 G. P. B. 635] from that Prince.' On the other hand, Mr. Justice Wessels (*History of the Roman-Dutch Law*) supports the view expressed in the text. Perhaps we shall come nearest to the truth if we distinguish, with some modern writers, the 'infiltration' and the 'reception' of the Roman Law.

[1] This was particularly the case when, as usually happened, the towns enjoyed the privilege of making local regulations (*keuren*). Wessels, p. 210.

[2] Mr. Justice Kotzé in *S. A. L. J.*, vol. xxvi (1909), pp. 407–8, and Kotzé, Van Leeuwen, vol. i, Appendix, pp. 459–60.

[3] Vinogradoff, *Roman Law in Medieval Europe* (2nd ed., 1929), p. 12.

[4] The Great Council (*De Groote Raad*) was instituted in the year 1446 by Philip the Good, Duke of Burgundy and Count of Holland. It was fixed at Mechlin by Charles the Bold in 1473, and again by Philip the Fair in 1503 (Fruin, *Geschiedenis der Staatsinstellingen in Nederland*, p. 140). The Provincial Court of Holland (*Hof van Holland*) also exercised an important influence in the same direction. See Professor Fockema Andreae's edition of Grotius, *Inleidinge tot de Hollandsche Recht-geleerdheid, derde uitgave door* Mr.

which continued to exist until the War of Independence,[1] did much to assimilate the law in the various provinces, and thus exercised a jurisdiction comparable to that of the Judicial Committee of the Privy Council or (in a narrower field) of the Appellate Division of the Supreme Court of South Africa at the present day. Nicolaus Everardus,[2] one of our earliest authorities for the Roman-Dutch Law, was President of this Court in 1528.[3] Perhaps we shall not be wrong if we select the year of the institution of this tribunal as, approximately, the starting-point of the system which we know by the name of the Roman-Dutch Law.[4]

unequal in the various provinces.

The reception of the Roman Law was by no means equally complete in all the provinces of the Dutch Netherlands.[5] It was most far-reaching in Friesland, least so in Overijssel and Drenthe.[6] The other provinces lay at various points between these extremes. It follows that the laws of no two provinces were precisely the same, though no doubt the legal systems of all the provinces exhibited a general resemblance.

When, therefore, we speak of the Roman-Dutch Law we mean not a law common to the whole of the United Netherlands, but specifically the law peculiar to the Province of Holland. The resemblance, however, was in

L. J. Van Apeldoorn, Arnhem, 1926, vol. ii, p. 11. For a short history of these Courts see Kotzé, op. cit., pp. 478 ff.

[1] Fruin, p. 261. Its place was taken, as regards Holland and Zeeland only, by the *Hooge Raad van Holland* (*en Zeeland*), established in the Hague in 1582. Zeeland submitted to its jurisdiction in 1587.

[2] Kotzé, *S. A. L. J.*, vol. xxvii (1910), p. 29.

[3] He had previously been President of the Court of Holland from 1509.

[4] If we adopt Mr. Justice Kotzé's view (*supra*, p. 3, n. 4), we shall date it from 1462. But it was not until perhaps a century later that the Roman Law established itself in the inferior courts (Kotzé, op. cit., p. 464).

[5] Kotzé, op. cit., p. 467.

[6] Drenthe was never admitted to representation in the States-General, but enjoyed full provincial autonomy. Fruin, p. 258. The seven Provinces represented in the States-General were Holland, Zeeland, Friesland, Overijssel, Groningen, Gelderland, and Utrecht.

many respects so close that the law-books of the neighbouring provinces are frequently cited as authority for the law of that province.

The extent of the reception matter of controversy.

If we ask to what extent the Roman Law was received in the Netherlands in general and in the province of Holland in particular, we shall get different answers from the partisans of rival schools.[1] There are those who regard Grotius, Van Leeuwen, Voet, and the other romanists as traitors to the law of their country, which, it is inferred, they enslaved to an alien system. So far as the issue is purely historical an exhaustive investigation of the sources must take place before a confident opinion can be pronounced on the one side or the other. For the lawyer the question, perhaps, is not so much what the law was when the above-mentioned jurists wrote as what it was when they had written. In the history of institutions it is sometimes more important to know what was thought to be true than to know what was true in fact. At all events, no one disputes the fact of the reception of the Roman Law. What is questioned is the degree to which the reception went. For our part, we shall be content to accept the *dictum* of Van der Linden: 'In order to answer the question what is the law in such and such a case we must first inquire whether any general law of the land or local ordinance (*plaatselijke keur*), having the force of law, or any well-established custom, can be found affecting it. The Roman Law as a model of wisdom and equity is, in default of such a law, accepted by us through custom in order to supply this want.'[2] The limits of this acceptance are de-

[1] See, on the whole subject, Modderman, *De Receptie van het Romeinsche Recht* (Groningen, 1874); Kotzé, *S. A. L. J.*, vol. xxvi (1909), pp. 398 ff.; Holdsworth, *A History of English Law*, vol. iv, pp. 217 ff.; Vinogradoff, *Roman Law in Medieval Europe* (2nd ed. by Prof. de Zulueta, Oxford, 1929); Munroe Smith, *The Development of European Law*, edited by Mr. Carl L. W. Meyer of the Library of Congress, New York (Columbia University Press, 1928); A. S. De Blécourt, *Kort Begrip van het Oud-Vaderlandsch Burgerlijk Recht* (tweede druk), pp. 6 ff.

[2] Van der Linden, *Rechtsgeleerd, Practicaal, en Koopmans Handboek* (translated by Sir Henry Juta under the name of *Institutes of Holland*, and by Judge G. T. Morice under the name of *Institutes of*

fined by Van der Keessel in a series of theses[1] which the late Professor Fockema Andreae accepted as substantially correct.[2]

Legislation under Spanish rule.

During the period of Spanish rule, legislation became active. Many useful measures were promulgated by Charles V, such as the Placaat of May 10, 1529,[3] relating to the transfer and hypothecation of immovable property, and the Perpetual Edict of October 4, 1540.[4] In 1570 his son Philip II issued a Code of Criminal Procedure,[5] which regulated the practice of the Dutch Colonies until superseded by the humaner provisions of the English Law.[6] The Political Ordinance of April 1, 1580,[7] must also be mentioned as one of the formative elements of the modern law. The Civil Procedure of all the Courts was regulated by another Ordinance of the same year and day.[8]

The Roman-Dutch Law in Holland.

The history of the Roman-Dutch Law is for our present purpose the history of the authorities from whom we derive our knowledge of it. To these we shall presently refer. In the home of its origin the Roman-Dutch Law as a separate system survived by a few years the dissolution of the Republic of the United Netherlands. In 1809 it was superseded by the Napoleonic Codes, which in turn gave place in 1838 to the existing codes in force in the Kingdom of the Netherlands. Van der Linden, the latest writer on the old law, was also the earliest writer on the new. When

the Laws of Holland), lib. I, cap. i, sec. 4. See also Gr. 1. 2. 22; Van Leeuwen, 1. 1. 11.

[1] V. d. K. *Th.* 6–23.

[2] *Inleidinge tot de Hollandsche Rechts-geleerdheid, beschreven bij Hugo de Groot, met aanteekeningen van Mr. S. J. Fockema Andreæ. Hoogleeraar te Leiden* (derde uitgave), Arnhem, 1926, vol. ii, p. 12; Kotzé, *ubi sup.* at p. 508.

[3] 1 G. P. B. 374.

[4] 1 G. P. B. 311. Wessels (p. 218) summarizes its contents.

[5] 2 G. P. B. 1007; Wessels, p. 373: 'The statute of 1570 regulated the procedure in the lower courts. The same procedure was followed in the Supreme Court of Holland except in so far as it was modified by the rules of that court.'

[6] It remained part of the Law of British Guiana until 1829, when it was superseded by Rules of Criminal Procedure made under the authority of an Order in Council of December 15, 1828.

[7] 1 G. P. B. 330. Wessels (p. 222) summarizes its contents.

[8] 2 G. P. B. 695. See Wessels, *Hist. R.-D. L.*, p. 186.

the old system crumbled beneath his hands he left unfinished his projected Supplement to Voet's Commentary upon the Pandects,[1] and, applying his tireless industry in a new field, became to his countrymen the interpreter of the laws of their conqueror.[2] The existing Dutch Civil Code, however, in many respects reverts from the rules of the French law to the earlier law of Holland.

Having said thus much of the Roman-Dutch Law in general, we go on to speak more particularly of its history in the Roman-Dutch Colonies,[3] for by that name may be conveniently indicated the British possessions in which this system obtains. After that we shall speak of the sources from which our knowledge of the Roman-Dutch Law is derived.

The Roman-Dutch Law in the Dutch Colonies.

The two great trading companies of East and West, the Dutch East India Company incorporated in 1602, and the Dutch West India Company incorporated in 1621, carried the Roman-Dutch Law into their settlements. The Cape was occupied by Van Riebeek in 1652. The maritime districts of Ceylon were won from the Portuguese in 1656. The Dutch settlements upon the 'Wild Coast' of South America, which came to be known as Guiana, date from the early years of the seventeenth century.

How far the Dutch Statute Law was in force.

How far the statutes of the mother country were in force in these Colonies the evidence hardly allows us to say. On principle they would not apply unless expressly declared to be applicable, or at least unless locally promulgated;[4] but some may have been accepted by custom as part of the common law.[5] As regards laws of the *patria*

[1] *Johannis Voet, Commentarii ad Pandectas tomus tertius, continens supplementum auctore Joanne van der Linden.* Sectio prima, a libro I usque ad XII Pandectarum, Trajecti ad Rhenum, 1793.

[2] In his *Beredeneerd register op het wetboek Napoleon, ingericht voor het Koningrijk Holland* (Amsterdam, 1809), and other works.

[3] See an article by the present writer on 'The Fate of the Roman-Dutch Law in the British Colonies', *Journ. Comp. Leg.*, N. S., vol. vii, p. 356, which, by kind permission, is partly reproduced in the text.

[4] As to the necessity of promulgation see Gr. 1. 2. 1, and Groenewegen and Schorer, ad loc.; Van Leeuwen, 1. 3. 14; V. d. K. *Th.* 1.

[5] See Appendix to this Chapter (*infra*, p. 27).

passed subsequently to the date of settlement it may be thought that the burden of proof lies on him who alleges their application.[1] The fact is that the States-General legislated but seldom for the Colonies, having delegated their functions in this regard to the two Chartered Companies of East and West. These acted through their Committees, the Council of XVII and the Council of X respectively; and the East India Company also, through its Governor-General in Batavia, issued rules for the government of the various stations, which, if locally promulgated, had binding force until superseded or forgotten.[2] In addition to these there were the enactments of the local governors. Failing all the above and any colonial custom having the force of law, recourse was had to 'the laws statutes and customs of the United Netherlands' and, where these were silent, in the last resort to the Law of Rome.[3] It may be supposed, since the Dutch Colonies stood in no peculiar relation to the province of Holland more than to any other province of the Union, that even general customs of this province had no preferential claim to acceptance in the Colonies. In theory this is true. In practice the predominant partner carried the day. In South Africa at all events there is a presumption in favour of the admission of a general custom of Holland rather than that of any other province as part of the common law of the country.[4]

[1] *Est. Heinamann* v. *Heinamann* [1919], A. D. at p. 114; *Rex* v. *Harrison and Dryburgh* [1922], A. D. at p. 330.

[2] The collected edition of the Statutes of Batavia of 1642 seems to have been promulgated at the Cape in 1715. Burge, *Colonial and Foreign Laws* (New Edition), vol. i, p. 115. Governor van der Parra's New Statutes of Batavia of 1766 were never recognized by the States-General and had not strictly the force of law. (But see 'The New Statutes of India at the Cape', by J. L. W. Stock, *S. A. L. J.*, vol. xxxii (1915), p. 328.) The law in force in the West Indies was defined by the *Ordre van Regieringe* of October 13, 1629 (2 G. P. B. 1235; Burge, vol. i, p. 119), and later by the resolutions of the States-General of October 4, 1774 (*Laws of Brit. Gui.*, ed. 1905, vol. i, p. 1; Burge, vol. i, pp. 121 ff.).

[3] Burge, vol. i, p. 116.

[4] Per Kotzé J.P., in *Fitzgerald* v. *Green* [1911], E. D. L. at p. 493: 'There is no rule which makes it incumbent upon us, under the

The Roman-Dutch Law under British Rule: (a) At the Cape;

The Dutch settlements of the Cape of Good Hope, Ceylon, and Guiana, passed into the hands of the British at the end of the eighteenth and the beginning of the nineteenth century. The Cape was taken from the Dutch in 1795, given back in 1803, retaken in 1806, since when it has remained part of the British Dominions. It does not appear that any express stipulation was made upon the occasion of either the first or the second cession for the retention of the Roman-Dutch Law.[1] Its continuance is the expression of the settled principle of English law and policy that colonies acquired by cession or by conquest retain their old law, so long and so far as it remains unrepealed. In a system derived from the Roman Law repeal may be effected *tacito consensu* as well as *alia postea lege lata*; so that as regards the Cape Province we may state the presumption to be that, except so far as they have been abrogated by legislation or by the growth of a custom inconsistent therewith, the laws which obtained under the

circumstances, to adopt the law of North Holland in preference to that of South Holland, although in a conflict between the law of the different provinces of the Netherlands the Courts in South Africa, we are told, have generally followed that of the province of Holland.' Dr. Bisschop (Burge, *Colonial and Foreign Laws* (2nd ed.), vol. i, p. 91) directs attention to the preponderating influence in the affairs of the Company of the Chambers of Amsterdam and of Middelburg, and to the fact that the Company was held to be domiciled within the jurisdiction of the Court of Holland. The same writer has observed elsewhere that the colonial courts in most cases got their law, so far as it was not comprised in local statutes and customs, from text-books rather than from the original sources, with the result that 'the local law of the Netherlands—as far as it was not referred to by writers on Roman-Dutch Law—would be ignored. In the Dutch East and West Indies the same method of legal application and interpretation would be followed as in the Low Countries, viz. to apply first the local Statutes and customs and subsidiarily the Roman law, as explained by the learned jurists at home.' *Law Quarterly Review*, vol. xxiv, p. 169. See also 'What has become of Roman-Dutch Law?' by R. W. Lee, *Journ. Comp. Leg.*, 3rd series, vol. xii, pt. 1, p. 33.

[1] But 'The Cape Articles of Capitulation, dated the 18th January, 1806, stipulated that the rights and privileges which the inhabitants had theretofore enjoyed should be preserved to them. Among those privileges the retention of their existing system of law was undoubtedly included.' *Rex* v. *Harrison and Dryburgh* [1922], A.D. at p. 330, per Innes C.J.

Dutch Government remain in force at the present day.[1] Custom, however, has made short work with the pre-British statute law. The earliest collected edition of the local statutes (1862) contains only nine enactments prior to 1806, and the latest edition (1895) only five. The remainder of the Dutch *placaten*, *reglementen*, *advertissementen*, &c. (whether emanating from the home country or from Batavia, or locally enacted) seems to have been abrogated by disuse. We are speaking, of course, of the statute law subsequent to 1652, the date of the Dutch occupation of the Cape. The home legislation prior to that date may, unless inapplicable or abrogated by disuse, be regarded as forming part of the common law of the Colony. An exception, too, must be admitted in favour of the *Octrooi* to the East India Company of January 10, 1661, which, together with the Political Ordinance of 1580 and the Interpretation thereof of 1594, defines the law of intestate succession for the whole of Roman-Dutch South Africa.

(*b*) In Ceylon;

In Ceylon the continuance of the Roman-Dutch Law was guaranteed by the Proclamation of Governor the Honourable Francis North of September 23, 1799, which declared that the administration of justice and police should be henceforth and during His Majesty's pleasure exercised by all courts of judicature, civil and criminal,

[1] Per de Villiers C.J. in *Seaville* v. *Colley* (1891) 9 S. C. at p. 44: 'The conclusion at which I have arrived as to the obligatory nature of the body of laws in force in this Colony at the date of the British occupation in 1806 may be briefly stated. The presumption is that every one of these laws, if not repealed by the local Legislature, is still in force. This presumption will not, however, prevail in regard to any rule of law which is inconsistent with South African usages'. This principle applies alike to the statute law and to the common law of Holland. See *Parker* v. *Reed* (1904) 21 S. C. 496; *McHattie* v. *Filmer* (1894) 1 O. R. 305; *Natal Bank* v. *Kuranda* [1907] T. H. 155; *Green* v. *Fitzgerald* [1914] A. D. 88. In the last-named case Innes J. A. said (at p. 111): 'I do not think, however, that the doctrine of the Roman-Dutch Law can be confined to cases where contrary usage has been established; both in principle and on authority mere desuetude must in certain circumstances be sufficient.' See also *Rex* v. *Detody* [1926] A.D. at p. 223; *O'Callaghan N. O.* v. *Chaplin* [1927] A. D. at p. 328; *Tutt* v. *Tutt* [1929] C. P. D. at p. 53.

'according to the laws and institutions that subsisted under the ancient government of the United Provinces', subject to such deviations and alterations as have been or shall be by lawful authority ordained and published.[1] The central portion of the island did not pass under British rule until 1815, but the Dutch Law was applied to this region also by Ord. No. 5 of 1852.[2] In Guiana the existing laws and usages were expressly retained in the articles of capitulation of Essequibo and Demerara dated September 18, 1803. A similar provision was contained in the Letters Patent of March 4, 1831, by which the three settlements were constituted a single colony under the name of British Guiana.[3]

(c) In British Guiana.

General result.

It results from what has been said that the foundation of the law of Cape Colony was the Dutch law as it existed in that settlement in the year 1806; that the law of Ceylon is based upon the system administered in the island in 1796;[4] and that the law of British Guiana rested until recently upon a substructure of Dutch laws and usages having authority in the settlements of Essequibo, Demerara, and Berbice in the year 1803.

It remains to speak of the geographical extension of the Roman-Dutch Law in South Africa.

[1] It has been doubted whether the Dutch ever applied their law to the native races of the low country. But since the British occupation the low-country Sinhalese have had no distinctive law of their own, and have always been treated as subject to the Roman-Dutch law.

[2] This Ordinance extends to the Kandyan provinces certain specified branches of the law of the Maritime Provinces, and further enacts that if the Kandyan Law is silent on any matter the law of the Maritime Provinces is to be applied. It says nothing as to the general law applicable to Europeans or low-country Sinhalese residing in the Kandyan provinces. The extension to them of the Roman-Dutch Law in general seems to be the work of judicial decisions (see *Williams* v. *Robertson* (1886) 8 S. C. C. 36).

[3] *Laws of B. G.* ed. 1905, vol. i, p. 12. For the history of the Roman-Dutch Law in British Guiana see *Report of the Common Law Commission* (Georgetown, Demerara, 1914) and 'Roman-Dutch Law in British Guiana' (*Journ. Comp. Leg.*, N.S., vol. xiv, p. 11), by the present writer.

[4] The capitulation of Colombo to the British is dated February 15 of that year.

Geographical extension of the Roman-Dutch Law.

So long as the boundaries of Cape Colony enlarged themselves by gradual and inevitable advance, so long the Dutch law extended its sphere by the same natural process of expansion without express enactment. But before the middle of the last century the era of annexation had begun.

Natal.

Natal was annexed to the Cape by Letters Patent of May 31, 1844, and this was followed by Cape Ordinance No. 12 of 1845, establishing the Roman-Dutch Law in and for the district of Natal. This remained the common law of the Colony, which was called into existence as a separate entity by Royal Charter of July 15, 1856; and now the Natal Act No. 39 of 1896 provides (sec. 21) that: 'The system, code, or body of laws commonly called the Roman-Dutch law as accepted and administered by the legal tribunals of the Colony of the Cape of Good Hope up to August 27, 1845,[1] and as modified by the Ordinances, Laws, and Acts now in force, heretofore made or passed in this Colony by the Governor or Legislature thereof, is the law for the time being of the Colony of Natal, and of His Majesty's subjects and all others within the said Colony.'

Zululand.

The law of Natal, with some reservations, obtains also in Zululand, which became part of Natal on December 30, 1897.[2]

Basutoland.

In Basutoland, by Proclamation of the High Commissioner, dated May 29, 1884, the law to be administered (save between natives) is, as nearly as the circumstances of the country permit, the same as the law for the time being in force in the Colony of the Cape of Good Hope; but Acts of the Cape Legislation passed after the date of the Proclamation do not apply.

Bechuanaland Protectorate.

By Proclamation of the High Commissioner, No. 36 of 1909, the law of Cape Colony is to be administered, as far as practicable, in the Bechuanaland Protectorate, to the exclusion, however, of Cape statutes promulgated after June 10, 1891.

[1] This is the date from which the Cape Ordinance took effect.
[2] Natal Act No. 37, 1903.

Southern Rhodesia.

By the Southern Rhodesia Order in Council of October 20, 1898, s. 49 (2), the law of Cape Colony as it stood on June 10, 1891, applies in Southern Rhodesia, except so far as that law had been modified by any Order in Council, Proclamation, Regulation or Ordinance in force at the date of the commencement of the Order.[1]

Transvaal and Orange Free State.

In the Republics the Roman-Dutch law remained in force almost unaltered up to the date of annexation.[2] It is continued in the Orange River Colony (now once more the Free State) by Ordinance No. 3 of 1902, s. 1, and in the Transvaal by Proclamation No. 14 of 1902, s. 17. But in each of the new Colonies extensive alterations were made so as to bring the law into closer harmony with the system obtaining in the adjoining territories.

Swaziland.

By Proclamation of the High Commissioner of February 22, 1907, the Roman-Dutch common law, save in so far as the same has been or shall be modified by statute, is law in Swaziland.[3]

The Union of South Africa.

By the South Africa Act, 1909 (9 Edw. 7, ch. 9), which took effect on May 31, 1910, the four Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony[4] were united in a Legislative Union under one Government under the name of the Union of South Africa (s. 4), and became original provinces of the Union

[1] The territories within the limits of the Southern Rhodesia O. in C., 1898, were by the Southern Rhodesia (Annexation) O. in C., dated July 30, 1923, annexed to the British Crown as from September 12 of that year, and are henceforth known as the Colony of Southern Rhodesia. The Southern Rhodesia Constitution Letters Patent of September 1, 1923, taking effect from October 1, provide for the establishment of Responsible Government, and define the constitution of the Colony.

[2] A resolution of the Volksraad of the South African Republic of September 19, 1859, gave statutory authority to the legal treatise of Van der Linden, which failing, the commentaries of Simon van Leeuwen and the *Introduction* of Hugo de Groot were to be binding. This quaint enactment was repealed by Tr. Procl. No. 34 of 1901.

[3] And Transvaal Statute Law as it existed on October 15, 1904, except so far as amended or altered. Procl. 3 of 1904; Procl. 4 of 1907.

[4] On annexation to the British Crown (May 31, 1902), the Orange Free State became the Orange River Colony.

under the names of Cape of Good Hope, Natal, Transvaal, and Orange Free State respectively. Subject to the provisions of the Act, all laws[1] in force in the several Colonies at the establishment of the Union are continued in force in the respective provinces until repealed or amended by the Parliament of the Union, or by the provincial councils in matters in respect of which the power to make ordinances is reserved or delegated to them (s. 135).

The Protectorate of South West Africa.

The latest extension of Roman-Dutch Law is to the Mandated Territory, known as the Proctectorate of South-West Africa. By the Administration of Justice Proclamation, (No. 21 of) 1919, issued by the Administrator of the Proctectorate by virtue of powers delegated to him by the Governor-General of the Union, the Roman-Dutch Law as existing and applied in the province of the Cape of Good Hope at the date of the coming into effect of this Proclamation (January 1, 1920) shall from the said date be the Common Law of the Protectorate, and all Laws within the Protectorate in conflict therewith shall to the extent of such conflict . . . be repealed.[2]

The sources of the Roman-Dutch Law.

The last portion of this introductory chapter relates to the authentic sources of the Roman-Dutch Law, which are also the primary sources of our knowledge of that system. These are:

1. Treatises.
2. Statute Law.
3. Decisions of the Courts.
4. Opinions of Jurists.
5. Custom.

[1] 'By the word Laws in that section the Legislature meant Statutes, and never intended that the section should apply to Judge-made Law.' *Webster* v. *Ellison* [1911] A. D. at p. 99, per Solomon J.

[2] Off. Gaz. of the Protectorate of S.-W. Africa, 1919, No. 25. See also Union of S. A. Act No. 49 of 1919 and Union Procl. No. 1 of 1921. Act No. 12 of 1920 gives jurisdiction to the Appellate Division to hear appeals from the High Court of the Protectorate. All relevant documents are collected in 'The Laws of South-West Africa, 1915–1922'. The constitutional and international status of the mandated territory raises difficult questions. See *Rex* v. *Christian* [1924] A. D. 101.

I. Treatises.

I. *Treatises.*[1] The numerous works of the Dutch jurists, written in Dutch and Latin at various dates from the sixteenth to the nineteenth centuries, are cited to-day as authoritative statements of the law with which they deal. A modern text-book has no such authority. The rules therein expressed are merely opinions which counsel in addressing the Court may, if he pleases, incorporate in his argument, but which have no independent claim to attention, however eminent their author. The works of the older writers, on the contrary, have a weight comparable to that of the decisions of the Courts, or of the limited number of 'books of authority' in English Law. They are authentic statements of the law itself, and, as such, hold their ground until shown to be wrong. Of course the opinions of these writers are often at variance amongst themselves or bear an archaic stamp. In such event the Courts will adopt the view which is supported by authority or most consonant with reason; or will decline to follow any, if all the competing doctrines seem to be out of harmony with the conditions of modern life; or, again, will take a rule of the old law, and explain or modify it in the sense demanded by convenience.

Writers of the seventeenth century.

The principal writers on the old law and their principal works are the following:

SEVENTEENTH CENTURY

H. DE GROOT. *Inleiding tot de Hollandsche Rechtsgeleertheyd* ('s Gravenhage, 1631); the same with notes by Groenewegen (1644); the same with added and more extensive notes by W. Schorer (1767).[2] This is the best

[1] For a bibliography of Roman-Dutch law books see *The Commercial Laws of the World*, vol. xv—South Africa—pp. 14 ff.

[2] In the early editions of Grotius the paragraphs are not numbered. Van Leeuwen cites Grotius by book, chapter, and the initial words of the paragraphs, e.g. *Grot., Introd., lib.* I, *cap.* 5, *vers. Alle Mondigen.* Voet makes the numeration of Groenewegen's notes do duty for paragraphs. Thus: *Hugo Grotius manuduct. ad Jurisprud. Holl. Libr.* I, *cap.* 5, *num.* 13 (= Gr. I. 5. 9). The division of the chapters into paragraphs was first employed in an edition of the 'Inleydinge' published at Amsterdam by Ian Boom in 1727. I am indebted for this information to Mr. Justice Kotzé.

old edition. The best modern edition is that with historical notes by Fockema Andreae and (3rd ed.) Van Apeldoorn. There are translations by Charles Herbert (1845), Sir A. F. S. Maasdorp (3rd ed. 1903), and R. W. Lee (1926).

ARNOLDUS VINNIUS.[1] *In IV libros Institutionum Imperialium Commentarius* (1642). This well-known work contains copious references to the *jus hodiernum*. The best edition is that with notes by the Prussian jurist Heineccius.

S. VAN GROENEWEGEN VAN DER MADE edited the *Inleiding* of Grotius in 1644. In 1649 he produced his well-known *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus*, in which he goes through the whole of the Corpus Juris by book and title and considers how far it has been received or disused in the modern law.

SIMON VAN LEEUWEN published his *Censura Forensis* in 1662 and his *Roomsch Hollandsch Recht* in 1664.[2] The last-named work was an amplification of a slighter treatise called *Paratitula Juris Novissimi*, published in 1652 and again in 1656. The best edition of the *Censura Forensis* is the edition of 1741, with notes by Gerardus de Haas. The best edition of the *Roomsch Hollandsch Recht* is that with notes by C. W. Decker issued in 1780. This has been translated with additional notes by Mr. Justice Kotzé.[3]

ULRIK HUBER issued the first volume of his *Praelectiones Juris Civilis*, containing his commentary on the Institutes of Justinian, in the year 1678. This was followed after a considerable interval by his commentary on the Digest

[1] Wessels, *Hist.* R.-D. L., p. 294.

[2] The title-pages of this work and of its precursor, the *Paratitula*, afford an interesting indication of the uncertainty of seventeenth-century spelling. The first edition of the *Paratitula* has for its sub-title *Een kort begrip van het Rooms-Hollandts-Reght*. In the second edition this becomes *Een kort begrip van het Rooms-Hollands-Recht*. The first edition of the later work is described as *Het Rooms-Hollands-Regt*. Lastly, in Decker's edition (1780) we have *Roomsch Hollandsch Recht*, and this I have followed.

[3] Second edition, 1921–3.

in two additional volumes. The best edition is that of J. Le Plat of Louvain issued in 1766. The same author published in 1686 his treatise entitled *Heedensdaegse Rechtsgeleertheyt, soo elders als in Frieslandt gebruikelyk*, The last-named work, though principally concerned with the law of Friesland, not of Holland, is a valuable contribution to the study of the Roman-Dutch Law. It was edited after the author's death by his son ZACHARIAS HUBER, who, like his father, was a Judge of the Frisian High Court.

JOHANNES VOET. *Commentarius ad Pandectas.* This work was published at the Hague and at Leyden in 1698 and 1704 in two volumes folio. It has gone through very many editions. The best is the Paris edition of A. Maurice of 1829, which is free from some of the misprints which disfigure the folio editions. The whole of Voet has not been systematically translated into English, but translations varying in merit are procurable of many of the separate titles. In 1793 Van der Linden published, in folio, a Supplement to Voet's Commentary. It extends only to Book xi of the Pandects. Amongst the lesser works of Voet may be mentioned his Compendium of the Pandects, which, though issued before the larger work, serves the purpose of an analysis of it. A little book in Dutch published in the eighteenth century under the name of *De beginselen des rechts* is a translation from the Latin of Voet's analysis of the Institutes (*Elementa Juris*), supplemented with a translation of those passages in Vinnius' Commentary in which reference is made to the modern law.

EIGHTEENTH CENTURY

Writers of the eighteenth century.

CORNELIS VAN BIJNKERSHOEK is beyond controversy the most eminent Dutch jurist of the eighteenth century. He was President of the Supreme Court of Holland, Zeeland, and West Friesland from 1724 to 1743. For our present purpose the most useful of his works is the *Quaestiones Juris Privati*, published in Latin in 1744, and in a Dutch translation in 1747. A collection of his notes on

decided cases entitled *Observationes Tumultuariae* is in course of publication.[1]

Mention has already been made of SCHORER's edition of Grotius (1767) and of DECKER's edition of Van Leeuwen (1780). A Dutch translation of Schorer's notes on Grotius, which contains also additional matter supplied to the translator by the author, appeared from the hand of J. E. AUSTEN in 1784–6. This is the edition referred to in the margin of Professor Fockema Andreae's edition of Grotius.

A useful work was published by Van der Linden and other jurists in 1776 under the name of *Honderd Rechtsgeleerde Observatien, dienende tot opheldering van verscheide duistere, en tot nog toe voor het grootste gedeelte onbewezene passagien uyt de Inleidinge tot de Hollandsche Rechtsgeleerheid van wylen Mr. Hugo de Groot.*

D. G. VAN DER KEESSEL, a Professor at Leyden, issued in the year 1800 his *Theses Selectae juris Hollandici et Zelandici ad supplendam Hugonis Grotii Introductionem ad Jurisprudentiam Hollandicam.* The work was reprinted in 1860. There is a translation by C. A. Lorenz. The *Dictata* in which the author of the *Theses* expanded and supported them still circulate in manuscript, but have not been printed. There is a fine MS. copy in the University Library at Leyden corrected by Van der Keessel, and another with extensive additions from the author's hand in the University Library at Utrecht. A type-script of the Leyden MS. was presented to the Supreme Court Library at Capetown by the late Dr. C. H. van Zyl.

JOANNES VAN DER LINDEN is the last of the old text-writers. In 1781 he published his *Verhandeling over de judicieele practijcq*, which is still consulted. But his best-known work is his introduction to Roman-Dutch Law, issued in 1806 under the name of *Regtsgeleerd, Practicaal, en Koopmans Handboek.* The book is elementary, but has

[1] See *S. A. L. J.*, vol. xxxix (1922), p. 291. The first volume, edited by Professors Meijers and De Blécourt of Leyden and Bodenstein of Stellenbosch, was published in 1926.

enjoyed favour amongst students, particularly in the translations of Sir Henry Juta and Mr. G. T. Morice. There is an older translation by Jabez Henry (1828). Another work by the same author which may be mentioned (besides his supplement to Voet referred to above) is his Dutch translation of POTHIER on *Obligations*, with short notes from his own hand (1804–6).

If the student wishes to supplement the above-mentioned list of books with a handy law dictionary he will find BOEY'S *Woorden-tolk* sometimes useful. KERSTEMAN'S larger work, *Hollandsch Rechtsgeleert Woorden-Boek* 1768, and the supplementary volumes by Lucas Willem Kramp[1] enjoy a reputation which is scarcely merited. The collection of pleadings by WILLEM VAN ALPHEN known by the quaint name of *Papegay* (originally published in 1642) is deservedly famous. If Van der Linden's work on Procedure proves inadequate, reference may be made to PAUL MERULA'S *Manier van Procederen*, the last and best edition of which, under the names of Didericus Lulius and Joannes van der Linden, was issued in the years 1781–3.

II. Statute Law.

II. *Statute Law.* The enactments of the States-General and of the States of Holland and West Friesland are to be found in the ten folio volumes of the *Groot Placaat Boek*. The statutes of Batavia are printed in VAN DER CHIJS, *Nederlandsch-Indisch Plakaat Boek*. The pre-British statutes of the Cape exist but have not been printed.

III. Decisions of the Courts.

III. *Decisions of the Courts.* Many published volumes of Decisions have come down to us and are a valuable source of law. Particular mention may be made of the *Sententien en gewezen Zaken van den Hoogen en Provincialen Raad in Holland, Zeeland en West-Vriesland*, published by JOANNES NAERANUS at Rotterdam in 1662; of the *Utriusque Hollandiae, Zelandiae, Frisiaeque Curiae Decisiones* of CORNELIUS NEOSTADIUS, printed at the Hague in 1667; and of the *Decisiones Frisicae sive rerum in Suprema*

[1] As to the authorship of the Aanhangsel to Kersteman's *Woorden-Boek* see *Journ. Comp. Leg.*, N.S., vol. xii, p. 549.

Frisiorum Curia judicatarum libri V of JOHANNES À SANDE, himself a Judge of the Court whose decisions he reports. The Latin original of this work is dated 1634. There is also a Dutch translation. These three volumes of Reports are often cited by Voet. Van der Keessel frequently refers to a volume entitled *Decisien en Resolutien van den Hove van Holland*, published at the Hague in 1751;[1] but this and Van der Linden's *Verzameling van merkwaardige Gewijsden der Gerechts-hoven in Holland*,[2] published at Leyden in 1803, are rarely obtainable.

IV. Opinions of Jurists.

IV. *Opinions of Jurists.* The numerous volumes of *Consultatien, Advysen*, &c., are a very interesting and characteristic feature of the Roman-Dutch system of jurisprudence. It is enough here to refer more particularly to the well-known collection entitled *Consultatien, Advysen en Advertissementen gegeven ende geschreven by verscheijden treffelijke Rechtsgeleerden in Hollant end elders* (commonly known as the *Hollandsche Consultatien*), originally published by Naeranus in 1645,[3] containing the opinions of Grotius and other eminent lawyers. The opinions of Grotius, in particular, have been translated and edited by the late Mr. D. P. de Bruyn (1894). Other collections designed to supplement the above-named work were issued at various dates during the eighteenth century.

V. Custom.

V. *Custom.* This is in every country a source of law. It is mentioned here more particularly because, as observed above, it is through custom that the Roman Law found its way into Holland, and it is as custom that it continues

[1] The author of this collection has been identified by Professor Meijers as Anthony Duyck, who was successively Registrar of the Court of Holland (1602–16) and Member of the Hooge Raad (1620–1). (*Tijdschrift voor Rechtsgeschiedenis*, vol. i, p. 400.) Many of the decisions had previously been published in Holl. Cons., vol. iii, part 1 (*Amsterdamsche Derde Deel*) and Holl. Cons., vol. vi.

[2] The Introduction to this volume contains some valuable observations by the compiler on the authority of decided cases. In the same connexion reference may be made to Mr. Justice Kotzé's article on 'Judicial Precedent' in *S. A. L. J.*, vol. xxxiv (1917), p. 280, and to Kotzé, Van Leeuwen, vol. i, p. 484.

[3] Wessels, p. 243.

to exist in the Roman-Dutch Colonies. Without attempting a bibliography of the jus civile we may perhaps be allowed to recommend the student to supply himself with the Mommsen-Krüger-Schoell edition of the Corpus Juris. For a law lexicon he will consult the older works of Calvin[1] or Vicat[2] or Heumann's *Handlexicon*,[3] or the exhaustive *Vocabularium Jurisprudentiae* ROMANAE in course of publication under the auspices of the Savigny Foundation.

Sources of the modern law.

Such, then, are the sources of the Roman-Dutch Law, or such were its sources while it still flowed in an undivided stream. They remain to-day the sources of law for the several Roman-Dutch Colonies, supplemented by enactments of the local legislatures, decisions of the local tribunals, and local authoritative custom. The treatises and opinions of modern lawyers do not make law, though they help the inquirer to find out what the law is.

The principal works on the modern law of South Africa are: *The Common Law of South Africa*, in 4 vols., by Dr. MANFRED NATHAN; *The Institutes of Cape Law* (5th ed.; *The Institutes of South African Law*), by Chief Justice Sir A. F. S. MAASDORP; *English and Roman-Dutch Law;* by Mr. GEORGE T. MORICE. There are besides monographs on various branches of the law, such as Sir Henry Juta, *Law of Wills*; Wille, *Landlord and Tenant* and *Mortgage and Pledge*; Mackeurtan, *Sale of Goods*; Norman, *Purchase and Sale*; M. de Villiers, *Roman and Roman-Dutch Law of Injuries*; Nathan, *Law of Torts*; Macintosh, *Negligence in Delict*; Nathan and Schlosberg, *The Law of Damages*, &c.

For the Law of Ceylon the student may refer to *The Laws of Ceylon*, by Mr. Justice PEREIRA (2nd ed., Colombo, 1913); to *A Digest of the Civil Law of Ceylon*, by Sir P. ARUNACHALAM (vol. i, 'Persons Natural and Juristic',

[1] Calvinus J., *Lexicon juridicum juris Caesarei simul et Canonici*, Geneva, 1670.

[2] B. Philip Vicat, *Vocabularium Juris utriusque*, Lausanne, 1759.

[3] Heumanns *Handlexicon zu den Quellen des römischen Rechts* (9th ed.), Jena, 1907, reprinted 1926.

London, 1910); and to the earlier work entitled *Institutes of the Laws of Ceylon*, by HENRY BYERLEY THOMSON, a Puisne Judge of the Supreme Court of Ceylon, published in 1866. Sir CHARLES MARSHALL'S *Judgments, &c., of the Supreme Court of the Island of Ceylon*, published at Paris in 1839, furnishes a conspectus of the law of the Colony as it existed in the first half of the last century.

Reception of the English Law in the Colonies;

The reader who may use this book or one of the older text-books mentioned above as an introduction to his study of the modern law in South Africa or Ceylon must bear in mind that just as the Roman-Dutch law of Holland was a complex system drawn from different sources, so the law of these countries, Roman-Dutch in origin, has been affected in almost every department by the influence of English Law. This has been the result partly of express enactment, partly of judicial decisions, partly of tacit acceptance.

the result of (*a*) express enactment,

As examples of statutory introduction of the law of England, mention may be made of the Ceylon Ordinance No. 5 of 1852, which enacts that the law of England is to be observed in maritime matters and in respect of all contracts and questions relating to bills of exchange, promissory notes, and cheques;[1] and of the Ceylon Ordinance No. 22 of 1866, which makes similar provisions with respect to the law of partnerships, joint-stock companies, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance.

At the Cape the General Law Amendment Act No. 8 of 1879 introduced the English law: (s. 1) in all questions relating to maritime and shipping law; and (s. 2) in all questions of fire, life, and marine assurance, stoppage *in transitu*, and bills of lading. But (s. 3) English statutes passed subsequently to the date of the Act do not apply.

or imitation of

It would occupy too much space to speak of the numer-

[1] But see now Ord. No. 25 of 1927, 'An Ordinance to declare the Law relating to Bills of Exchange, Cheques, and Promissory Notes', which repeals Ord. 5 of 1852 *pro tanto*.

English statute law; ous Statutes which follow more or less closely the language of English Acts of Parliament, and through this channel admit into their own system the rules and principles of the law of England. As examples may be cited the Ceylon Sale of Goods Ordinance No. 11 of 1896 and the South African legislation on Bills of Exchange and Companies. The numerous changes produced by the statutory abolition of institutions of the Roman-Dutch common law will be illustrated in the course of this book.

(b) judicial decisions; Judicial decisions, whether of the Colonial Courts or of the Judicial Committee of the Privy Council, have done much to affect the development of the Roman-Dutch common law. This is another channel through which the English law has made its influence felt—an influence not directed by any deliberate purpose, but none the less profound and far-reaching in its effects.

(c) tacit acceptance. Lastly, much of the English law has found its way in by a process of silent and often unnoticed acceptance. It would be easy to accumulate instances in every branch of the law.[1] But the student may better be left to draw his own conclusions from the pages of the law reports and, in course of time, from the practice of his profession.

The Roman-Dutch Law in the British Empire. In conclusion, a few words will be permitted with regard to the past history, present condition, and future prospects of the Roman-Dutch system within the British Empire. In South Africa, in Ceylon, and in British Guiana its fortunes have been widely different.

Under any circumstances the law of a remote dependency labours under evident disadvantages, and these are greatly accentuated if the dependency is cut off from the mother-country from which its law is derived. Isolated from one another and wholly disconnected from their common source in the Netherlands, the legal systems

[1] Reference may be made to Sir John Wessels, *History of the Roman-Dutch Law*, Part I, chap. xxxv; to Professor H. D. J. Bodenstein, 'English Influences on the Common Law of South Africa,' *S. A. L. J.*, vol. xxxii (1915), p. 337; and to C. Graham Botha, 'Early Influence of the English Law upon the Roman-Dutch Law in South Africa', *S. A. L. J.*, vol. xl (1923), p. 396.

of South Africa, Ceylon, and British Guiana have pursued each its separate course with very different results. In South Africa the old law has maintained an unbroken tradition. If it has been profoundly modified by the influence of English Law, it retains an individual character. Not so in British Guiana. There the Roman-Dutch Law, after languishing for rather more than a century under the British Crown, has, for most purposes, been replaced by the Common Law of England. This is the effect of the *Civil Law of British Guiana Ordinance*, 1916.[1] Ceylon has occupied an intermediate position between the other Roman-Dutch Colonies. Here there are law reports almost continuous since 1821, and the law has been expounded by writers of ability. But the Dutch language is no longer spoken in the island, and the Dutch element in the law has passed almost entirely into oblivion. Voet is the authority most frequently cited. English Law has exercised a preponderating influence even in departments where South African Law has maintained its ground. If the Roman-Dutch Law of Ceylon is in no immediate danger of going the way of the Roman-Dutch Law of British Guiana, it must be admitted that it is not a plant of vigorous growth, and gives no promise of permanent continuance. The future of Roman-Dutch Law lies in South Africa.

The future of the Roman-Dutch system of Law.

What will that future be? At present we get our knowledge of the law of South Africa from the Statute Book, from the decisions of the South African Courts, and from an extensive literature in Dutch and Latin dating from the sixteenth to the early nineteenth century. As the reader will find, use has been made of this last-mentioned source in the following pages. But few people have the leisure or inclination to become familiar with

[1] Edited with notes by Mr. Justice Dalton, of the Supreme Court of British Guiana (Georgetown, 1921). See also 'The Passing of Roman-Dutch Law in British Guiana' by the same writer, *S. A. L. J.*, vol. xxxvi (1919), p. 4; and 'Roman-Dutch Law in British Guiana' by J. E. Ledlie, *Journ. Comp. Leg.*, N.S., vol. xvii, p. 210.

these old books. For the practitioner, who makes an occasional raid upon them for an immediate purpose, they present every disadvantage. It has been said of the Roman-Dutch Law of to-day that its text-books are antiquated and its weapons rusty. The reproach is well founded, and those who recognize the substantial merits of the system would wish to see it removed.

Happily time provides a remedy. The Parliament of the Union of South Africa and the Appellate Division of the Supreme Court, which hears appeals also from Southern Rhodesia and from the Protectorate of South-West Africa, are year by year producing a body of statutory and judge-made law, in which the principles of the Roman-Dutch Law are being expounded and developed. It may be anticipated that under such auspices the Roman-Dutch Law will assume a completeness and a symmetry which it has failed to attain in previous ages. It will be a system in which the best elements of the Roman and the English Law will be welded together in an harmonious and indissoluble union. As the *corpus* of South African Law grows to maturity the old folios and quartos, which some of us have learnt to handle with a feeling almost of affection, will be less and less consulted. Having served their turn they will yield to the fate of all things mortal. But the spirit of justice which inspires them and the rules of law which they express will live embodied in new forms. It may be that codification will come. This has even been urged as the one sure barrier against the all-pervading influence of English Law.[1] But the time is not ripe for it. The Law of South Africa is at present in a fluid condition. It is passing through a period of formation. The way for codification must be prepared by consolidating legislation, by judicial decision, and, perhaps not least, by the activity of our Schools of Law.

[1] Sir John Wessels, 'The future of Roman Dutch Law in South Africa,' *S. A. L. J.*, vol. xxxvii (1920), at p. 284; R. W. Lee, 'Roman-Dutch Law in South Africa,' *L. Q. R.*, vol. xl (1924), p. 61.

APPENDIX

HOW FAR THE STATUTE LAW OF HOLLAND OBTAINS IN SOUTH AFRICA AND CEYLON

In *In re Insolvent Estate of Loudon, Discount Bank* v. *Dawes* (1829), 1 Menz. at p. 388, the Court observed: 'When this Colony was settled by the Dutch, the general principles and rules of the law of Holland were introduced here, but by such introduction of the law of Holland it did not follow that special and local regulations should also be introduced; accordingly the provisions of the Placaat of 5th February, 1665, as to the payment of the 40th penny [3 G. P. B. 1005], have never been part of the law of this Colony, because this tax has never been imposed on the inhabitants of this Colony by any law promulgated by the legislative authorities within this Colony. In like manner until a law had been passed here creating a public register, the provisions of the Placaat of 1st February, 1580 (? 1st April—1 G. P. B. 330), were not in force or observance here.'

In *Herbert* v. *Anderson* (1839), 2 Menz. 166, the following Placaats were said to be merely fiscal and revenue laws of Holland, which had never become or been made law in Cape Colony, viz. Placaats, &c., of June 11, 1452 (3 G. P. B. 586), January 22, 1515 (1 G. P. B. 363), April 1, 1580 (Art. 31, 1 G. P. B. 337), March 29, 1677 (3 G. P. B. 672), April 3, 1667 (3 G. P. B. 1037). This decision was quoted with approval by Kotzé C. J. in *Eckhardt* v. *Nolte* (1885), 2 S. A. R. 48, who added (at p. 52): 'From this it follows that the Placaats of [September 26] 1658 (2 G. P. B. 2515) and [February 24] 1696 (4 G. P. B. 465) and others *in pari materia*, merely renewing the earlier *Placaats*, are likewise of no application at the present day.' On the other hand, in *De Vries* v. *Alexander* (1880), Foord at p. 47, de Villiers C. J., referring to *Herbert* v. *Anderson*, said: 'The Court could only have intended to confine their decision to those portions of the Edicts [of 1515 and 1580] which are of a fiscal or of a purely local nature. So far as they had been incorporated in the general law of Holland, and were not inapplicable here, they were equally incorporated in the law of this Colony.' Applying this principle, the learned Judge

held that the 9th Art. of the Placaat of September 26, 1658 formed part of the law of Cape Colony. In this connexion it should be borne in mind that 'a section or portion of a placaat may, as has often been decided by the Courts, continue to be of force, while another portion may have ceased to have any validity or have become obsolete' (Kotzé, Van Leeuwen, vol. i, p. 497).

Since Union, the Appellate Division has on more than one occasion pronounced against the continued validity of the old Statute Law; notably in *Est. Heinamann* v. *Heinamann* [1919] A. D. 99, in which the Court, by a majority, declared the provisions of sec. 83 of the *Echt-Reglement* of the States-General of March 18, 1656 (2 G. P. B. 2444), and of the *Placaat van de Staten van Hollandt ende West Vrieslandt* of July 18, 1674 (3 G. P. B. 507), prohibiting intermarriage between persons who have committed adultery together, to be no longer in force in South Africa. In *Spencer* v. *Gostelow* [1920] A. D. 617 a like conclusion was come to with regard to the Plakaten of May 1, 1608 (2 G. P. B. 2256), and November 29, 1679 (3 G. P. B. 527), relating to domestic servants; and in *Rex* v. *Harrison and Dryburgh* [1922] A. D. 320 it was held that the Placaat of the States of Holland of March 7, 1754 (*teegen het drukken en divulgeeren van Pasquillen*, &c., 8 G. P. B. 570), was not and never had been Law at the Cape. Reference may also be made to *Muller* v. *Chadwick and Co.* [1906] T.S. at p. 40 (Placaat of December 9, 1661, Art. 51, 2 G. P. B. 2775, held inapplicable); and to the decisions relating to the Placaat of the States of Holland of September 26, 1658 (*infra*, p. 311, n. 3). See also *Ex parte Kerkhof* [1924] T. P. D. 711 as to the question whether sec. 90 of the *Echt-Reglement* forms part of the law of South Africa.

For Ceylon Law see *Karonchihamy* v. *Angohamy* (1904) 8 N. L. R. 1, in which Middleton J. and Sampayo A. J. (Moncreiff A. C. J. dissenting) held that the Placaat of July 18, 1674, was not in force in Ceylon, and that it is for those who assert and rely upon the operation of a law enacted since the date of the Dutch occupation of the island in 1656 to show beyond all question that it operates and applies. See also *Rabot* v. *de Silva* [1909] A. C. 376, and authorities cited; *Silva* v. *Balasuriya* (1911) 14 N. L. R. 452; *Samed* v. *Segutamby* (1924) 25 N. L. R. 481; Pereira, *Laws of Ceylon*, p. 12.

BOOK I

THE LAW OF PERSONS

BOOK I

INTRODUCTION

The Law of Persons: what it includes.

THE law relating to persons occupies the first book of the Institutes of Gaius and Justinian. The scope and meaning of the phrase have been much discussed, with little result save to show that the distribution of topics made in these treatises between the law of persons and the law of things is not logically defensible, or, at least, is not readily understood. In this volume we shall include under the law of persons the allied topics of: (1) the law of status; (2) the law of the consequences of status; and (3) family law. No attempt will be made to keep these topics rigidly distinct. The method adopted will be to trace the legal life-history of human beings from conception to the grave, and to see how their rights and duties are affected by certain conditions or accidents of human life, such as birth, minority, marriage, mental disease. To this will be added some remarks on artificial or juristic persons. For convenience the subject will be treated in chapters dealing with:

1. Birth, Sex, Legitimacy.
2. Parentage.
3. Minority.
4. Marriage.
5. Guardian and Ward.
6. Unsoundness of mind—Prodigality.
7. Corporations and other juristic persons.

I

BIRTH, SEX, LEGITIMACY

Section 1.—Birth

Legal personality, and with it capacity to have rights, and to be subject to duties, begins with the completion of birth,[1] subject however to the qualification that a child in the womb is deemed already born whenever such a fiction is for its advantage. Thus an unborn child may inherit *ab intestato*.[2] Birth.

Section 2.—Sex

Sex, as such, is not a factor of importance in the sphere of private law. There is a difference, however, in the age of puberty, which for males is fixed at fourteen years, for females at twelve.[3] Further, there is a special rule of law by which a woman cannot bind herself as surety unless she expressly renounces the benefits which the law allows her.[4] Sex.

Section 3.—Legitimacy

A child born during marriage is presumed to be legitimate, i.e. the issue of the mother and her husband. This presumption is expressed in the maxim *Pater is est quem nuptiae demonstrant*.[5] It is not a necessary condition of legitimacy that the child should have been *conceived* during marriage. If it is *born* during marriage, no matter how short a time after its celebration, it will be presumed to be the issue of the spouses.[6] The presumption is not in either Legitimacy. Pater is est quem nuptiae demonstrant.

[1] *German Civil Code*, sec. 1; *Ontwerp van het Burgerlijk Wetboek*, Art. 76.

[2] Dig. 1. 5. 7 and 26; Gr. 1. 3. 4; Voet, 1. 5. 5; V. d. K. *Th.* 45.

[3] Inst. 1. 22. pr.; Van Leeuwen, 1. 6. 1; Voet, 4. 4. 1.

[4] Senatus-Consultum Velleianum; Authentica si qua mulier. 3 Maasdorp, p. 375; *infra*, p. 317.

[5] (Paulus) Dig. 2. 4. 5; Voet, 1. 6. 6; *Richter* v. *Wagenaar* (1829), 1 Menz. 262; *Atkin* v. *Est. Bowmer* [1913] C. P. D. 505; *Brauel* v. *Brauel* [1922] W. L. D. 162; (Ceylon) *Amina Umma* v. *Nuhu Lebbe* (1926) 30 N. L. R. 220.

[6] Gr. 1. 12. 3; Van Leeuwen, 1. 7. 2; *Cens. For.* 1. 1. 3. 5; Voet, 1. 6. 5 and 7; V. d. K. *Th.* 169.

case irrebuttable;[1] but if, in the circumstances, conception could have taken place during marriage, it will, both in fact and in law, be more difficult to displace the presumption of legitimacy than when the facts point to conception before marriage. In the first case neither husband nor wife will (unless in exceptional circumstances) be heard to say that the husband was not the father.[2] In the second case the husband's evidence is admissible to prove non-access before marriage.[3] Whether conception took place during marriage or not is decided with a view to all the circumstances of the case, and in particular to the possible, or probable, period of gestation. The old books, following the Roman Law, say that a child will be supposed to have been conceived during marriage if born between the beginning of the seventh month after its celebration (more precisely, the 182nd day, inclusive)[4] and the beginning of the eleventh month after its dissolution by death or divorce.[5] But the tendency of modern cases, at least as regards the maximum period, is to rely mainly upon medical evidence.[6] It must be noted that though birth

[1] The presumption in favour of legitimacy may be rebutted by 'clear and unimpeachable evidence'. *Fitzgerald* v. *Green* [1911] E. D. L. at p. 462; *Williams* v. *Williams* [1925] T. P. D. 538.

[2] *Surmon* v. *Surmon* [1926] A. D. 47 at p. 53. This is what is meant when it is said that neither spouse can bastardize the issue. 'The authorities do not say that non-access cannot be testified to by either the husband or wife *in a suit for divorce* on the ground of the wife's adultery' (ibid.). But the South African Courts have reluctantly followed *Russell* v. *Russell* [1924] A. C. 687 owing to statutory provisions incorporating by reference English rules of evidence: *Surmon* v. *Surmon, ubi sup.*; *Williams* v. *Williams* [1925] T. P. D. 538. Later cases have discriminated, e.g. *Bleeker* v. *Bleeker* [1927] N. P. D. 133; *Fell* v. *Fell* [1928] C. P. D. 292. Evidence of non-access is admissible to meet a plea of condonation, *Jones* v. *Jones* [1929] E. D. L. 8; *Sharneck* v. *Sharneck* [1929] W. L. D. 112. For what may be proved in a petition for judicial separation consult the English case, *Hetherington* v. *Hetherington* 1887) 12 P. D. 112.

[3] Voet, 1. 6. 5. The rule is the same in English law: *The Poulett Peerage Case* [1903] A. C. 395; *Russell* v. *Russell* [1924] A. C. at p. 723.

[4] Dig. 1. 5. 12; 38. 16. 3, 11 and 12; Gr. 1. 12. 3; Van Leeuwen, 1. 7. 2; Voet, 1. 6. 4.

[5] Dig. loc. cit.; V. d. K. *Th.* 170.

[6] *Williams* v. *Williams* [1925] T. P. D. at p. 542, where Tindall J.

during marriage raises a presumption of legitimacy, if the husband can prove sexual relations before marriage unknown to him followed by pregnancy existing at the time of marriage and not condoned by cohabitation, or otherwise, he is entitled to have the marriage declared null and void.[1] To prevent difficult questions as to paternity, the Dutch Law, following the Roman Law,[2] prohibited re-marriage within a certain time after a first husband's death.[3] This was called the widow's 'annus luctus'; in Holland the period of mourning (*treur-tijd*) varied in different places, with a preference for a term of six months.[4] In the Roman Law re-marriage within the year of mourning entailed penal consequences.[5] This was not the case in the Dutch Law,[6]

Annus luctus.

said: 'The notes of *van der Keessel* and *Schorer* [*ad* Grot. 1. 12. 3] show, I think, that there is no definite maximum period determined by law. The question seems to me rather one of fact, depending largely on medical evidence.' The books contain cases in which unusually prolonged gestation was established by evidence. Thus, in a case reported by Sande (*Decis. Fris.* 4. 8. 10), the husband died on August 10, 1631, and the child was born on July 9, 1632, i.e. on the 334th day. Compare the English case of *Gaskill* v. *Gaskill* [1921] P. 425, where the period of gestation was 331 days. For Ceylon, see *Evidence Ord.* No. 14 of 1895, sec. 112. Is evidence admissible to show that a child born within the minimum period was conceived in wedlock? Windscheid, i. 56 (b), note 3. The German code, Art. 1592, admits contrary proof as to the maximum, not as to the minimum, period. It defines the period of conception as extending from the 181st to the 202nd day (inclusive in each case) before the day of birth.

[1] Voet, 24. 2. 15; *Horak* v. *Horak* (1860) 3 Searle 389; *Fietze* v. *Fietze* [1913] E. D. L. 170; *Reyneke* v. *Reyneke* [1927] O. P. D. 130. It is not so in English law. *Moss* v. *Moss* [1897] P. 263. *Stuprum* unaccompanied by pregnancy at the time of marriage is insufficient, *Gabergas* v. *Gabergas* [1921] E. D. L. 279; even if there is illegitimate issue living at the time of the marriage, *Stander* v. *Stander* [1929] A. D. 349.

[2] Cod. 5. 9. 2 (Gratian, Valentinian, and Theodosius, A.D. 381).

[3] Gr. 1. 5. 3, and Schorer's note. Van Leeuwen (1. 14. 14) says that a widow must wait six months after the death of her former husband, unless in the interval she has been delivered of a child.

[4] Fockema Andreae, *Bijdragen*, vol. i, p. 167; V. d. K. *Th.* 67.

[5] Cod. 5. 9. 2.

[6] *Cens. For.* 1. 1. 13. 27; Groenewegen, *de leg. abr.* Cod. ad loc.; Bynkershoek, *Quaestiones Juris Privati*, lib. II, cap. iv; V. d. K. *Th.* 68.

and in the modern law the institution itself has passed out of use.[1] If a widow so far forgets herself as to remarry within the period of mourning and issue is born which may be attributed to either father, it is presumed to be the child of the second husband.[2]

Eene moeder maakt geen bastaard

A bastard has no lawful father and therefore no rights of succession *ex parte paterna*. But with the mother it is different; for 'eene moeder (*aliter* eene wijf) maakt geen bastaard', and therefore her illegitimate issue succeeds to her and to her blood relations.[3] Such was the opinion of Grotius, though, as regards these last, Van der Linden inclines to a contrary view.[4]

Legitimation.

Illegitimate issue may be legitimated: (1) by subsequent marriage; (2) by an act of grace on the part of the Sovereign.[5] The first of these modes alone obtains at the present day.[6] Children born in adultery or incest (which extends

[1] By the Transvaal Marriage Ordinance (No. 3 of 1871), s. 9, no widower might marry within three months after the decease of his wife, and no widow within three hundred days after the decease of her husband; but this is no longer law, having been repealed by Procl. No. 34 of 1901. For the Orange Free State see Law No. 26 of 1899, sec. 13, which enacts that it shall not be lawful to solemnize the marriage of a widower within three months of his wife's death, or of a widow within 180 days of her husband's death. These periods are taken from the Echt-Reglement of 1656, art 52 (2 G. P. B. 2440). The *annus luctus* is unknown in South Africa (1 Maasd. (5th ed.), p. 21) and Ceylon.

[2] Voet, 1. 6. 9; who gives amongst other reasons because 'ipse incertitudinis auctor et causa est'.

[3] Gr. 2. 27. 28; Van Leeuwen, 1. 7. 4; Anton. Matthaeus, *Paroemiae*, no. 1. It is questionable whether the Roman Law made any distinction between simple bastards and adulterine or incestuous bastards (Anton. Matth., *ubi sup.*, sec. 9); nor was any such distinction made by the law of South Holland (V. d. K. *Th.* 345), and since the decision of the Appellate Division in *Green* v. *Fitzgerald* [1914] A. D. 88 this may be taken to be the law of South Africa. See Lord de Villiers C.J. at pp. 100–1.

[4] V. d. L. 1. 10. 3. The question was much debated. See *against* Grotius, Bynkershoek, *Quaest. Jur. Priv.* lib. III, cap. XI; *for* Grotius, Van der Vorm (*Versterfrecht*, ed. Blondeel, pp. 212 ff.), and V. d. K. *Th.* 342–5. See also *Mogamat Jassiem* v. *The Master* (1891) 8 S. C. 259. As to succession *to* bastards see Van der Vorm, *ubi sup.*, p. 237.

[5] Gr. 1. 12. 9; Van Leeuwen, 1. 7. 5; Voet, 25. 7. 6 and 13; V. d. K. *Th.* 171–2.

[6] 1 Maasd., p. 10.

to all the prohibited degrees) are incapable of legitimation by subsequent marriage.[1]

[1] Van Leeuwen, 1. 7. 7; Voet, 25. 7. 8; V. d. L. 1. 4. 2. In the Roman Law legitimation by subsequent marriage was limited to the issue of concubinage. In the Canon Law it assumed a wider scope, and applied to all illegitimate children, other than the issue of adultery or incest. Writers on the modern Civil Law are not agreed in refusing legitimation to the issue of an adulterous union (Windscheid, vol. i, sec. 522; Vangerow, vol. i, sec. 255); and if such an exception exists, the question further arises whether the law requires that marriage between the parents must have been possible at the time of *conception* or at the time of *birth*. The *Ontwerp van het Burgerlijk Wetboek voor het Koningrijk der Nederlanden* of 1820, art. 543, and the Dutch Civil Code (B. W. B. art. 327), adopt the former of these alternatives. Kotzé J., in *Fitzgerald* v. *Green* [1911] E. D. L. at p. 472, and Van Zyl J., in *Hoffman* v. *Mechau* [1922] C. P. D. at p. 185, adopt the latter; and the English Legitimacy Act, 1926, contains the provision (sec. 1, subsec. 2) that 'Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born'. In Ceylon illegitimate children are legitimated by subsequent marriage unless procreated in adultery (Ord. 19 of 1907, s. 22). Incest is not mentioned, no doubt because marriage is out of the question.

II

PARENTAGE

Parentage. BIRTH implies parentage and the reciprocal duties of parent and children. These may be considered under two heads: (A) the reciprocal duty of support; (B) the parental power and its consequences.

A. *The reciprocal duty of support.*

The reciprocal duty of support between parents and children.

A father must support his children,[1] i.e. must supply them with necessary food, clothing, shelter, medicine, and elementary instruction.[2] The duty continues[3] until the children have sufficient means to maintain themselves,[4]

[1] Gr. 1. 9. 9; Van Leeuwen, 1. 13. 7; Voet, 25. 3. 5; and grandchildren too if their parents are dead or indigent. Ibid. sec. 7. According to Van Leeuwen (*ubi sup.*), a man is obliged to support and educate his brother, sister, or brother-in-law, whether of the whole or of the half blood, in case they have become reduced to poverty, and also his natural brother. Cf. Voet, 25. 3. 8 *seq.* Is a husband bound to maintain his wife's indigent parents? *Ford* v. *Allen* [1925] T. P. D. 5—an illegitimate child born to his wife before marriage? *Fitzgerald* v. *Rex* [1926] N. P. D. 445.

[2] Van Leeuwen, 1. 13. 8 (*ad fin.*); Voet, 25. 3. 4.

[3] Without limit of age? A general rule cannot be deduced from Gr. 1. 9. 9. See V. d. K. *Dictat.* ad loc. and *Th.* 152. V. d. K. says 'ad majorem aetatem'. But see *In re Knoop* (1893) 10 S. C. at p. 199, and *Ex parte Jordaan's Curator* [1929] O. P. D. 168.

[4] Voet, 25. 3. 14–15. It seems that the burden of proving (1) that the child cannot support itself, (2) that the parent has sufficient means to support the child lies upon the plaintiff. *Grobler* v. *Union Govt.* [1923] T. P. D. 429. Voet says (25. 3. 18; 23. 2. 82) that the obligation of a father to support his children is personal and ends with the father's death. Groen., *de leg. abr.* ad *Dig.* 34. 1. 15, dissents from this view (alimentandi onus non finitur morte debitoris, sed ad haeredes transmittitur). The South African Courts, particularly the Transvaal Courts, have in several cases followed Groen. in preference to Voet; i.e. they regard the duty of educating and maintaining minor children as 'a debt resting on the estate'. See *Carelse* v. *Est. de Vries* (1906) 23. S. C. at p. 536; *Spies Exors.* v. *Beyers* [1908] T. P. D. at p. 481; *Ritchken's Exors.* v. *Ritchken* [1924] W. L. D. 17; *Davis' Tutor* v. *Est. Davis* [1925] W. L. D. 168. In Ceylon it was held by the full bench in *Lamahamy* v. *Karunaratna* (1921) 22 N. L. R. 289 that an action will not lie against the administratrix of a deceased person's estate for maintenance of such person's illegitimate child.

and extends to illegitimate[1] as well as legitimate children or further descendants.[2] The father does not escape liability by the fact that he has made other provision for a son, which the son has lost or squandered.[3]

The mother likewise is liable, together with the father during his lifetime, and solely after his death.[4] The mother of illegitimate children is liable for their support.[5] In case of divorce, both parents may be required to maintain the children according to their means.[6] The obligation of support ceases if the children are able by their industry or from their own means to support themselves.[7] The duty is reciprocal. Children must maintain their parents,[8] and if they are minors or lunatic the Court may charge the cost of maintenance upon their estate.[9] In every case the proper process to enforce this duty is not an action but petition to the Court.[10]

B. *The parental power and its consequences.*

The parental power and its consequences.

Parental power, or, as it is called, natural guardianship, has little in common with the *patria potestas* of the Roman Law.[11] Van der Linden writes:

'The power of parents over their children differs very much among us from the extensive paternal power among the Romans. It belongs not only to the father, but also to the mother, and

[1] Voet, 25. 3. 5; including incestuous and adulterine issue. *Secus*, jure civili. Nov. 89, cap. XV.

[2] Voet, 25. 3. 7; Kotzé, Van Leeuwen, vol. i, p. 492. The Appellate Division in the recent case of *Motan* v. *Joosub* [1930] A.D. 61 has held that, while a maternal grandfather is liable to support the illegitimate children of his daughter, the paternal grandfather is not liable to maintain the illegitimate children of his son.

[3] Voet, 25. 3. 5.

[4] Voet, 25. 3. 6; *Union Govt.* (*Minister of Railways and Harbours* v. *Warneke* [1911] A.D. at p. 668.

[5] Gr. 3. 35. 8; Van Leeuwen, 1. 13. 7.

[6] Van Leeuwen, 1. 15. 6; Voet, 25. 3. 6; *Farrell* v. *Hankey* [1921] T. P. D. 590.

[7] Voet, 25. 3. 14–15.

[8] Voet, 25. 3. 8; *Holl. Cons.*, vol. ii, no. 279; *Wright* v. *Wright* [1907] T. H. 204; *Riches* v. *Riches* [1910] E. D. L. 247; *Vos* v. *Vos* [1927] W. L. D. 285.

[9] *In re Knoop* (1893) 10 S. C. 198.

[10] Voet, 25. 3. 13.

[11] Gr. 1. 6. 3; Van Leeuwen, 1. 13. 1.

after the death of the father to the mother alone. It consists in a general supervision of the maintenance and education of their children and in the administration of their property. It gives the parents the right of demanding from their children due reverence and obedience to their orders, and also in case of improper behaviour to inflict such moderate chastisement as may tend to improvement. Parents may not be sued by their children without leave of the Court, termed *venia agendi*.[1] No marriage can be contracted by children without the consent of their parents. The parents are entitled on their decease to provide for the guardianship of their children.'[2]

Whatever is here said of children must be understood to refer to minor children, for in the Roman-Dutch Law parental power ceases when the child attains full age.[3]

The incidents of the parental power described by Van der Linden may be developed as follows:

1. Custody and control;

1. *Custody and Control.* The custody, control, and education of children belong to the father, and after his death to the person named in his will.[4] Failing any such disposition the Court will appoint a fit person to act in this behalf, and in the absence of good cause to the contrary the mother will be preferred to remoter relatives or strangers. Re-marriage is not in itself a ground of exclusion.[5]

2. Administration;

2. *Administration.* During the lifetime of both parents, and in the modern law until the father's death,[6] the management of a minor child's property belongs to the

[1] In the Cape Province *venia agendi* is abrogated by disuse. *Mare* v. *Mare* [1910] C. P. D. 437.

[2] V. d. L. 1. 4. 1 (Juta's translation).

[3] V. d. L. 1. 4. 3. Full age is now fixed by law at the twenty-first birthday. *Infra*, p. 43.

[4] Voet, 27. 2. 1; *Van Rooyen* v. *Werner* (1892) 9 S. C. 425 (where de Villiers C.J. reviews the whole subject of paternal and maternal rights); *Woods* v. *Woods* [1922] N. P. D. 367 (conflicting claims of parents). In the modern law a surviving mother is absolutely entitled to the custody unless the Court sees fit to direct otherwise. *In re Dolphin* (1894) 15 N. L. R. 343.

[5] Voet, *ubi sup.*

[6] In the old law the father's natural guardianship did not survive the death of the mother. It was necessary for him to apply to the Court to be appointed guardian along with the guardian, if any, named in the will of his deceased spouse. Except in this capacity

father, except so far as the person from whom such property is derived may have excluded the father from the administration and appointed a curator nominate in his stead.[1] In the event, however, of property coming to the child by inheritance the parents must give notice to the proper authority, who will inquire whether the administration of such property requires a special guardian or not.[2] The father may apply the income of property belonging to the child for his maintenance, education, and other like purposes.[3] He may invest his child's money,[4] and (within limits) contract on his behalf.[5] But an executory contract entered into by the father in the name of his minor son, if prejudicial to him, will not be enforceable against the son unless expressly ratified by him after majority.[6]

A minor child, being unemancipated, is unable to contract without his father's consent.[7] Any contract entered upon by him without such consent is *ipso jure* void, and

the surviving father had no competence either to represent his minor son in Court. or to administer his estate. Gr. 1. 7. 8–9; Voet, 26. 4. 4. Van der Keessel is to the same effect. *Dictat. ad* Gr. 1. 7. 8 (*in fine*). This can no longer be regarded as representing the law in South Africa. See *Van Rooyen* v. *Werner, ubi sup.* at p. 428, where de Villiers C.J. said: 'As to the father, he is the natural guardian of his legitimate children until they attain majority.'

[1] Gr. 1. 6. 1, and Schorer, ad loc.

[2] Gr. *ubi sup.*; V. d. K. *Th.* 103. For S. A. see *Administration of Estates Act*, 1913, sec. 54. The general rule is that an executor shall pay into the hands of the Master any money which has become due from the estate to any minor; but 'The survivor of two spouses shall, in the absence of any provision to the contrary, be entitled as natural guardian to receive from the executor and retain for and on behalf of his minor child any sum of money due to that child from the estate of the deceased spouse: provided that such sum has been secured by bond to the satisfaction of the Master.'

[3] Van Leeuwen, 1. 13. 2; *Van Rooyen* v. *Werner, ubi sup.* at p. 429.

[4] *Van der Byl and Co.* v. *Solomon* [1877] Buch. at p. 27.

[5] Gr. 3. 1. 28; e.g. he may bind him by a contract of service. V. d. K. *Dictat.* ad loc.

[6] *Van der Byl and Co.* v. *Solomon, ubi sup.*

[7] V. d. L. 1. 4. 1. With such consent he can. Groenewegen *de leg. abr.* ad Inst. 3. 20 (19), 10; Voet, 45. 1. 4. By the Roman Law impubes, qui in parentis potestate est, nec auctore quidem patre obligatur. Inst. loc. cit.

will not bind either the child or the father[1] except in so far as either of them has been enriched thereby, and if any payment has been made by the minor under such contract, it is recoverable by the condictio indebiti. If, however, the father, as principal, authorizes or ratifies the minor's contract, the father will be liable, the child being regarded as his agent. So far and so far only may a minor son bind his father by his contracts.[2]

A father may represent his son in Court[3] and sue and defend in his name, but when he does so without leave from the Court he may be held personally answerable for costs, if the suit proves unsuccessful.[4]

3. Consent to marriage of minor children;

3. *Consent to marriage of minor children.* The consent of parents, or of a surviving parent, is necessary to the marriage of minor children,[5] and without it the marriage is null and void.[6] Consent may be either express or implied. It is implied if the father knows that the marriage of the minor is about to take place and does not forbid it.[7] Strictly, the mother's consent is also necessary, but in case of disagreement the father's will prevails.[8] In the absence of fraud, publication of banns is presumptive evidence of consent, and a marriage celebrated after publication of banns without objection by the father is

[1] Gr. 3. 1. 34. Nor is a father liable for his son's delicts unless expressly made so by statute, as is sometimes the case. V. d. K. *Dictat.* ad loc.

[2] Voet, 15. 1. 11. *McCallum* v. *Hallen* [1916] E. D. L. at p. 83; *Marshall* v. *National Wool Industries* [1924] O. P. D. 238. Grotius (3. 1. 38) says that the advantage of the child's contract accrues to the parents. *Sed quaere.*

[3] Gr. 1. 6. 1. 'The right of a father to bring actions on behalf of his minor children has been repeatedly recognized by this Court.' *Van Rooyen* v. *Werner, ubi sup.* at p. 430, per de Villiers C.J.

[4] *Van der Walt* v. *Hudson* (1886) 4 S. C. 327; *Skead* v. *Colonial Banking and Trust Co.* [1924] T. P. D. 497.

[5] Gr. 1. 5. 15, and Schorer, ad loc.; Van Leeuwen, 1. 14. 6.

[6] Voet, 23. 2. 11; V. d. K. *Th.* 75; V. d. L. 1. 3. 6. More precisely it is voidable at the suit of the aggrieved parent. *Infra,* p. 59, n. 3.

[7] Voet, 23. 2. 8.

[8] Voet, 23. 2. 13; Schorer, *ubi sup.* At the Cape: 'He alone can consent to their marriage.' *Van Rooyen* v. *Werner, ubi sup.* at p. 429.

neither void nor voidable.[1] But a marriage celebrated after special licence without the father's consent may be set aside at his instance. The consent of grandparents or remoter ascendants is in no case necessary,[2] nor is consent necessary to a second marriage of widows or widowers who are under the ordinary age of majority.[3]

4. Right to appoint guardians;

4. *Right to provide testamentary guardians.* This has been mentioned above,[4] and will be further considered under the head of Guardianship.

5. Rights in respect of minor children's property.

5. *Rights in respect of minor children's property.* Some Dutch writers, following the Roman Law, distinguish between peculium profecticium and peculium adventicium. *Jure civili* the first of these belonged wholly to the father;[5] of the second, which belonged to the son, the father had the usufruct. Peculium profecticium, according to Voet, includes: (1) gifts made by sponsors at baptism, which are deemed to be made to the father, not to the child;[6] (2) anything acquired by children residing at home and supported by their parents, whether acquired suis operis or ex re patris. Schorer is to the same effect. 'What children acquire by their labour and industry, while supported by their parents, is acquired for their parents,' being set off against the cost of maintenance.[7] Adventicious property, i.e. property coming to the child from sources other than the above, belongs to the child in full ownership, and the father has no usufruct

[1] *Johnson* v. *McIntyre* (1893) 10 S. C. 318, per de Villiers C.J., *infra*, p. 56. *Semble*, the marriage cannot in any case be impeached by the minor spouses themselves. *Willenburg* v. *Willenburg* (1909) 3 Buch. A. C. 409, per de Villiers C.J.

[2] Voet, 23. 2. 15; V. d. L. 1. 3. 6.

[3] Voet, 1. 7. 14; V. d. L. 1. 4. 3.

[4] *Supra*, p. 38.

[5] From which it follows that a father cannot make a valid gift to a son in power. Gr. 3. 2. 8; Voet, 39. 5. 6; but Schorer, following Groenewegen in *notis ad* Grot. loc. cit. and *de leg. abr. ad* Inst. 3. 20. (19). 6, says that this no longer obtains. See also V. d. K. *Th.* 485.

[6] Voet, 15. 1. 4; but see Van Leeuwen, 3. 16. 7; and V. d. K. *Th.* 104.

[7] Gr. 1. 6. 1; and Schorer ad loc.; Van Leeuwen, 2. 7. 7; Voet, 15. 1. 4 and 25. 3. 14; V. d. K. loc. cit.; *Ontwerp of 1820*, art. 501. But see Groen. *de leg. abr.* ad Inst. 2. 9. 2.

therein, unless this has been expressly conferred upon him by the person from whom the property is derived, or unless it is necessary for him to use the property and apply its proceeds about the maintenance and upbringing of the minor child.[1]

Thus far of the incidents of the parental power. It remains to see how it is acquired and lost.

How the parental power is acquired: how lost.

The parental power is acquired[2] by: (1) birth in lawful wedlock; and (2) legitimation by subsequent marriage;[3] but not, as amongst the Romans, by adoption.[4] It is determined by: (1) the death of parent or child;[5] (2) emancipation, which is either (*a*) judicial, i.e. by order of Court made at the father's instance,[6] or (*b*) tacit,[7] as when a son is permitted to live and carry on business by himself;[8] (3) marriage;[9] (4) majority;[10] to which Voet adds (5) public office or priesthood;[11] and Grotius (6) the placing of the father under curatorship.[12]

[1] Van Leeuwen, 1. 13. 2; Voet, 15. 1. 6; V. d. K. *Th.* 105. The distinction between *peculium profecticium* and *peculium adventicium* is recognized in S. A. *Ex parte Est. Gates* [1919] C. P. D. 162.

[2] Voet, 1. 6. 4.

[3] Gr. 1. 12. 9; and Schorer ad loc.; Voet. 25. 7. 6; V. d. L. 1. 4. 2. Legitimation by act of the Sovereign is disused at the Cape (1 Maasd. p. 10), and probably elsewhere.

[4] Gr. 1. 6. 1; Van Leeuwen, 1. 13. 3; Voet, 1. 7. 7; V. d. L. 1. 4. 2; *Robb* v. *Mealey's Exor.* (1899) 16 S. C. 133. But see V. d. K. *Th.* 102, and Union Act, No. 25 of 1923, which permits the adoption of children under the conditions therein stated.

[5] Voet, 1. 7. 9.

[6] Gr. 1. 6. 4; Voet, 1. 7. 11. But see Decker *ad* Van Leeuwen, 1. 13. 5; V. d. L. 1. 4. 3, p. 37 (note 4); V. d. K. *Th.* 107 and 110.

[7] In *Ex parte Keeve* [1929] O. P. D. 19 Botha J. held that the mere fact of tacit emancipation does not deprive the father of his authority as natural guardian. But see below pp. 415–16.

[8] V. d. L. loc. cit.; the two conditions need not always co-exist. V. d. K. *Dictat. ad* Gr. 1. 6. 4. According to Voet (1. 7. 12) the separate establishment must have continued for a year and a day. For S. A. see *Dama* v. *Bera* [1910] T. P. D. 928; *Venter* v. *De Burgersdorp Stores* [1915] C. P. D. 252; *Pleat* v. *Van Staden* [1921] O. P. D. 91.

[9] Gr. 1. 6. 4; Van Leeuwen, 1. 13. 4; Voet, 1. 7. 13.

[10] Van Leeuwen, 1. 13. 6; Voet, 1. 7. 15.

[11] Voet, 1. 7. 10. But see Van Leeuwen, 1. 13. 6.

[12] Gr. 1. 6. 5. To be precise, what Grotius says is that, in such event, the father's guardianship is determined. The child, of course, remains a minor. A sentence of banishment (and in the modern law, no doubt, a long term of imprisonment) puts an end to, or suspends, the parental power. V. d. K. *Th.* 109.

III

MINORITY

A MINOR by Roman-Dutch Law is a person of either sex who has not completed the twenty-fifth year.[1] For this the twenty-first year has been substituted by statute.[2] As to the precise moment at which minority ends Voet makes the following distinction. The last day of minority is regarded as completed at the moment of its inception, where it is to the minor's advantage that it should be so considered;[3] but when the advantage lies the other way, so as, e.g. to prolong the benefit of restitutio in integrum, then, majority is not deemed to be attained until the very minute arrives at which birth took place.[4] Minority.

Majority may be accelerated by: (1) venia aetatis; (2) marriage. Venia aetatis, Grotius says, is obtained when the minor is for special reasons declared of age, before attaining the prescribed years of majority, either by the Sovereign or by the Court.[5] Voet,[6] however, and Van der Linden[7] give the prerogative of conceding it to the Sovereign alone. After some difference of opinion the law has been settled in this sense by the Courts of South Africa.[8] Majority may be accelerated by: (1) Venia aetatis;

[1] Gr. 1. 7. 3; Van Leeuwen, 1. 12. 3; Voet, 4. 4. 1.

[2] Cape, Ord. 62, 1829, sec. 1; Natal, Ord. No. 4 of 1846, sec. 2; Transvaal, Volksraad Resolution of December, 1853, Art. 123; O. F. S. Law Book of 1901, chap. 89, sec. 14; Ceylon, Ord. No. 7 of 1865, sec. 1.

[3] Voet, 4. 4. 1.

[4] Gr. 3. 48. 9; Voet, *ubi sup.* and 44. 3. 1; *Cens. For.* 1. 4. 43. 11, cf. Dig. 4. 4. 3. 3. In English law full age is reached at the beginning of the day before the twenty-first birthday (1 Blackst. *Comm.* 463, and Christian's note). Is the rule the same in R.-D. L.? See Dig. 50. 16. 134 and 28. 1. 5, with Gothofredus' note. As to leap year see Voet, *ubi sup.* As to calculation of time in general and in contracts in particular see *Joubert* v. *Enslin* [1910] A. D. 6; *Tiopaizi* v. *Bulawayo Munic.* [1923] A. D. 317; *infra*, p. 266.

[5] Gr. 1. 10. 3. The language of Grotius limits this privilege to an orphan (*wees*). The institution of venia aetatis is taken from the Roman Law, Cod. 2, tit. 44 (45).

[6] Voet, 4. 4. 4.

[7] V. d. L. 1. 4. 3. See also V. d. K. *Th.* 161.

[8] Maasdorp (vol. i, p. 272) says that venia aetatis is obsolete in

The effect of venia aetatis (which is not given to males under twenty or to females under eighteen years of age)[1] is to put an end to all the incapacities and benefits of minority except as regards the power to alienate or hypothecate immovables, which, unless expressly granted along with venia aetatis, can only be effected after leave obtained from the Court. In this respect alone, persons who have obtained venia aetatis remain on the same footing as other minors.[2]

(2) Marriage.

The effect of marriage is different. In the case of a male this puts an end to minority absolutely,[3] so that it does not revive in the event of the death of the wife while the husband is within the ordinary limits of minority.[4] But in this case, as also in the case of natural majority, the Orphan Chamber might for good cause prolong the period of guardianship beyond its usual legal term.[5]

The legal status and capacity of minors.

The next matter for consideration is the legal status and capacity of a minor. The subject is inadequately

the Cape Province. However, in several cases (*In re Cachet* (1898) 15 S. C. 5; *Ex parte Louw* [1920] C. P. D. 7; *Ex parte Est. Van Schalkwyk* [1927] C. P. D. 268; *Ex parte Smit* C. P. D. (1929) 13 P. H., F. 40) the Court released a minor from tutelage and authorized a payment to him from the Guardians' Fund. For Transvaal see *Ex parte Moolman* [1903] T. S. 159. For forms of venia aetatis still in use see Appendix A (*infra*, pp. 408–9).

[1] Cod. 2. 44 (45). 2; V. d. L., *ubi sup.* But see Van Leeuwen, 1. 16. 11. By O. F. S. Law Book, 1901, chap. lxxxix, sec. 7, 'The Court shall in no case recommend the granting of venia aetatis if the Petitioner is under the age of eighteen years'. As to the circumstances in which the Court will recommend a grant, see *Ex parte Akiki* [1925] O. P. D. 211.

[2] Voet, 4. 4. 5.

[3] Voet, 4. 4. 6.

[4] Voet, 4. 4. 9. The position of a widow not yet twenty-one years old is somewhat anomalous. She has been a minor during marriage *jure maritali*. The death of the husband leaves her still under age. But, on the other hand, she does not revert to the paternal power (Van Leeuwen, 1. 13. 4), or require a guardian (Voet, 1. 7. 14), may contract a second marriage without parental consent (Van Leeuwen, 1. 14. 9), and may be the guardian of her infant child. Van Leeuwen, *Cens. For.* 1. 1. 16. 13; *Holl. Cons.*, vol. v, no. 213. V. d. K. says (*Th.* 879) that she cannot be relieved from her contracts on the ground of minority. Voet, however (4. 4. 9), expresses the opposite view.

[5] Voet, 4. 4. 6; V. d. K. *Th.* 160.

treated in the text-books, but the following rules may be extracted from them.[1]

1. If the child is so young that he does not know what he is about, he is absolutely incapable of contracting at all, with or without assistance, for, as Van Leeuwen says: 'All obligations must arise out of a free and full exercise of the will. It cannot therefore take place where there is a hindrance to the exercise of the will, as in the case of lunatics and madmen, and young children, who are bound neither by a promise nor acceptance.'[2]

2. If the child is old enough to understand the nature of the transaction, he has *intellectus* but is still wanting in *judicium*, and therefore cannot, with some exceptions, contract a valid obligation without his parents'[3] or guardians'[4] consent. 'Municipal law', says Grotius,[5] 'considers all obligations incurred by minors[6] as invalid unless incurred through delict or in so far as they may have been benefited.'

Such obligations are said to be *ipso jure* void, and therefore minors are *ipso jure* secure from any claims in respect of them without the need of invoking the extraordinary remedy of restitutio in integrum.[7] The phrase '*ipso jure* void' must not, however, be taken too literally, for, as will

[1] The subject is developed in Appendix B (*infra*, p. 413). See also L. R. Caney, *Minor's Contracts*, *S. A. L. J.*, vol. xlvii (1930), p. 180.

[2] Van Leeuwen, 4. 2. 2 (Kotzé's Transl., vol. ii, p. 12); Voet, 26. 8. 9.

[3] V. d. L. 1. 4. 1; *Baddeley* v. *Clarke* [1923] N. P. D. 306.

[4] Gr. 1. 8. 5. [5] Gr. 3. 1. 26.

[6] i.e. unassisted. V. d. K. *Th.* 128 and 474; Dig. 4. 4. 16 pr. No distinction can reasonably be drawn between a minor whose parents are alive and one whose parents are dead. As regards contractual capacity, they are in exactly the same position. V. d. K. *Th.* 474; *Dictat. ad* Gr. 3. 1. 26; *Holl. Cons.*, vol. vi, pt. 2, no. 30. Van der Keessel rightly dissents from the view of Groenewegen (*de leg. abr. ad* Cod. 4. 26. 2) and Voet (14. 5. 4) that minors above the age of puberty whose parents are alive are bound by their contracts until relieved by restitutio in integrum.

[7] *Cens. For.* 1. 4. 43. 2; *De Beer* v. *Est. De Beer* [1916] C. P. D. 125. Proof of lesion is not required. *Gantz* v. *Wagenaar* (1828) 1 Menz. 92. For the *Senatus-Consultum Macedonianum* forbidding loans of money to filii familias see below, p. 316, n. 1.

be seen, such obligations are not so much void as voidable at the minor's option.[1]

Cases in which a minor is bound by contract.

3. A minor is bound by contracts duly made with the assistance of his parent or guardian,[2] subject to his right in a fit case to claim relief by way of restitutio in integrum (*infra*, p. 49). Further, a father and guardian, as we have seen or shall see hereafter, may in due course of administration contract in the name of the minor and bind him by such contract, subject however to the same relief.[3]

4. A minor is bound, as mentioned by Grotius in the passage above cited, so far as he has been enriched or benefited by his contract.[4] This means that when a contract has been executed in a minor's favour he cannot evade the corresponding liability, or set up his minority as a defence, provided that in view of all the circumstances of the case the contract was for his benefit.[5] To this head may be referred a minor's liability for necessaries, or for money borrowed and expended on necessaries.[6] The liability is, indeed, rather quasi-contractual than contractual,[7] and rests upon the principle stated by Pomponius: 'Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem.'[8]

5. A contract entered into by a minor is good without the tutor's consent, if the advantage is all on his side, and

[1] For Ceylon law herein see Pereira, *The Laws of Ceylon*, pp. 185 ff., and *Fernando* v. *Fernando* (1916) 19 N. L. R. 193.

[2] *Skead* v. *Colonial Banking Trust Co.* [1924] T. P. D. 497. It makes no difference, says Voet (26. 8. 1 *in fin.*), whether the tutor's authority is not given at all, or is wrongly given, citing Dig. 26. 8. 2, Nulla differentia est non interveniat auctoritas tutoris an perperam adhibeatur. This points to the rule 'in rem suam auctorem tutorem fieri non posse'. Dig. 26. 8. 1. pr. Has it any wider scope? Can a surviving mother authorize her minor child's contract? What is the effect of re-marriage?

[3] Gr. 3. 1. 28; 1. 8. 8; 3. 48. 10; V. A. K. *Th.* 133; *Van der Byl & Co.* v. *Solomon* [1877] Buch. 25.

[4] Gr. 3. 1. 26, and 1. 8. 5.

[5] Gr. 1. 8. 5; 3. 6. 9; 3. 30. 3; Van Leeuwen, 1. 16. 8; Voet, 26. 8. 2; *Nel* v. *Divine, Hall and Co.* (1890) 8 S. C. 16.

[6] Dig. 46. 3. 47, 1, Si necessariam sibi rem emit, quam necessario de suo erat empturus; Van Leeuwen, *ubi sup.*

[7] Gr. 3. 30. 3. [8] Dig. 12. 6. 14, and 50. 17. 206.

there is no corresponding disadvantage or burden.[1] Perhaps in the modern law advantage admits of a more extended application, so as to include contracts which impose a duty upon the minor, if they are very plainly for his benefit.[2]

Are the contracts of an unassisted minor void or voidable?

6. It has been said above that the phrase '*ipso jure* void' must not be taken too literally. This appears from the fact that the other party to the contract is bound, if the minor through his tutor, or the late minor after majority on his own motion, takes steps to enforce the contract.[3] In other words, a contract entered into by a minor, unassisted, may be ratified either during his minority with his tutor's assistance,[4] or after its determination.[5] Voet adds that if a minor seeks to enforce a contract made by him without his tutor's authority, he may do so only on condition that he himself performs his part.[6] He further points out that an unassisted contract of a minor always creates a natural obligation,[7] and therefore supports the collateral undertaking of a surety, provided that the minor be upwards of seven years of age. But, contrary to the rule usually applicable to such obligations, the natural obligation of a minor does not preclude the condictio indebiti.[8] Accordingly, if the minor has made a payment in pursuance of an unauthorized contract he can get the money back. But, if he ratifies after full age, his obligation is no longer merely natural, but civil.[9]

[1] Gr. 1. 8. 5; Voet, 26. 8. 2, necessaria non est [tutoris auctoritas] illis in causis, quibus pupillus meliorem suam fecit conditionem, nec alteri se vicissim obligat, veluti si stipuletur ab alio aut possessionem adipiscatur.

[2] *Infra*, p. 414.

[3] Gr. 3. 6. 9; Voet, 26. 8. 3.

[4] Voet, 26. 8. 1 (*ad fin.*).

[5] Voet, 26. 8. 4 (*ad fin.*) and 4. 4. 44; *Van der Byl* v. *Solomon* [1877] Buch. 25. Ratification may be inferred from conduct. *Stuttaford & Co.* v. *Oberholzer* [1921] C. P. D. 855.

[6] Voet, 26. 8. 3; V. d. K. *Th.* 529. But, says Van der Keessel, 'a minor, who has become a party to a bilateral contract which has been executed, may recover property alienated by him in terms of the contract, but on his side is only bound *quatenus locupletior factus est*.'

[7] Windscheid, vol. 2, § 289; Girard, p. 682.

[8] Dig. 12. 6. 29 and 41.

[9] Voet, 26. 8. 4.

Liability for delicts and crimes.

7. A minor above the age of seven years is liable for his delicts and of course for his crimes.[1] With regard to delicts Voet says that if there is wrongful intention the minor is always liable. If, on the other hand, he has done injury through slight or very slight fault (*levi vel levissima culpa*), without wrongful purpose, he should be excused, or at least relieved from punishment by restitutio in integrum.[2]

Property.

8. In the sphere of property-law there is nothing to prevent a minor from acquiring ownership,[3] but he cannot alienate or charge his property[4] without his parent's or tutor's authority;[5] which in the case of the alienation or hypothecation of immovables is not sufficient without an order of Court.[6]

[1] Gr. 1. 4. 1; 3. 1. 26; 3. 48. 11.

[2] Voet, 4. 4. 45.

[3] Dig. 41. 1. 11.

[4] Gr. 1. 8. 5; 2. 48. 4; Van Leeuwen, 2. 7. 8; nor make a gift *mortis causa* (Gr. 3. 2. 23—from whom Schorer, ad loc., dissents); nor discharge a debt by release (Gr. 3. 41. 8); or by novation (Voet, 46. 2. 8); nor make a valid payment of a debt (Gr. 3. 39. 11); i.e. he may recover the money if possible; if this is impossible the payment holds good (ibid.).

[5] It is not clear that he can do so even with such authority. By the earlier Roman Law he could (Inst. 2. 8. 2; Dig. 26. 8. 9. 1 and 41. 1. 11); but the restrictions imposed by the Oratio Severi and later enactments on alienation by the tutor in the course of administration applied equally to alienation by the pupil with the tutor's authority. Property included within the scope of these laws was inalienable without an order of Court. Vinnius *ad* Inst. 2. 8. 2. *ad init.* After Constantine the statutory restriction extended to all immovables and to valuable movables. Cod. 5. 37. 22. Grotius (1. 8. 5) says, without qualification, that a minor cannot alienate; and Van der Keessel (*Th.* 129) requires the consent of the pupillary magistrates for the alienation even of movables. But this opinion seems to be inferred from local *keuren* (*Dictat.* ad loc.), and does not make common law. Gifts by a minor were prohibited by Roman Law; but in Roman-Dutch Law donations by minors do not seem to be distinguished from their other contracts. *Cens. For.* 1. 4. 12. 3; Voet, 39. 5. 7 (*ad fin.*). See, however, Gr. 3. 2. 7. Van der Linden (1. 15. 1) says that a minor cannot make a donation to his guardian, but lays down no rule that donations by minors made with the authority of their tutors are otherwise invalid. The conclusion to be drawn from the authorities seems to be that in the modern law a minor is not incapable of alienating his movable property with the consent of his guardian even by way of gift.

[6] Voet, 26. 8. 5; 27. 9. 1 and 4; *Breytenbach* v. *Frankel* [1913] A. D. 390. See *Administration of Estates Act*, 1913, sec. 87, which excepts the case of a tutor testamentary or a curator nominate

Minors under the age of puberty are incompetent to make [1] or to witness a will.[2]

Restitutio in integrum.

9. Restitutio in integrum, which has been already mentioned, is an extraordinary remedy, by which the Court relieves a person from the consequences of a transaction into which he has entered and so far as possible restores the *status quo ante*. It is granted to minors when it appears that they have suffered prejudice by reason of the weakness of youth.[3] This remedy is given in respect not only of contracts, but also of alienation of property by donation or otherwise; of compromises; and even of judicial proceedings (e.g. when he has failed to put in his pleadings in time).[4] The benefit of restitution accorded to a minor devolves on death,[5] but does not generally avail persons who have bound themselves as sureties for a minor, therein differing from other cases of restitution.[6] Restitution is refused when a minor has fraudulently misrepresented his age.[7] It is waived by ratification after full age, which may

duly authorized thereto by the will or deed under which he has been appointed. The Master takes the place of the Court, if he is satisfied that the immovable property does not exceed three hundred pounds in value.

[1] Gr. 1. 6. 3; V. d. L. 1. 4. 1.

[2] Gr. 2. 17. 21; V. d. L. 1. 9. 1. By the Roman Law (Inst. 2. 10. 6), and Roman-Dutch Law, the witnesses to a will must be *males* above the age of puberty. By Cape Law, Act No. 22 of 1876, sec. 2: 'Every person, except as hereinafter excepted, above the age of fourteen years, who is or may be competent to give evidence in any Court of law shall be competent and qualified to attest the execution of a will or other instrument.'

[3] Gr. 1. 8. 8; 3. 48. 9–13; Voet, 4. 4. 12 ff. *Skead* v. *Col. Bkg. and Trust Co.* [1924] T. P. D. 497. It must be observed that restitution is granted on the ground of prejudice inherent in the act which it is sought to set aside, not of loss accidentally resulting from it, as when a minor has entered into a contract for the purchase of a horse, which is killed by accident next day. Dig. 4. 4. 11. 4. In Ceylon it is a question whether this remedy has not been impliedly abrogated by the provisions of the Civil Procedure Code, Pereira, p. 811; *Perera* v. *Wijewickreme* (1912) 15 N. L. R. 411.

[4] Voet, 4. 4. 14 ff.

[5] Voet, 4. 4. 38.

[6] *Cens. For.* 1. 4. 43. 10; Voet, 4. 4. 39.

[7] Cod. Lib. II, tit. 42 (43); Voet, 4. 4. 43. See *Johnston* v. *Keiser* (1879) K. 166; *Vogel and Co.* v. *Greentley* (1903) 24 Natal Law Reports, 252; *Pleat* v. *Van Staden* [1921] O. P. D. 91 (but see p. 416 *infra*), and for Ceylon *Wijesooria* v. *Ibrahimsa* (1910) 13 New Law Reports, 195. In this case the Court refused to set

be express or implied.[1] It seems that acquiescence with knowledge or means of knowledge of the true circumstances for four years after full age amounts in law to ratification and excludes restitution, which in other cases is only barred after thirty years.[2] A minor cannot obtain restitution against marriage on the ground of minority alone,[3] nor against his liability for crime or serious delicts.[4] By the Roman Law a minor [5] might exclude the benefit of restitution by oath. This was not allowed in the United Provinces.[6]

aside a sale of immovable property, though made without sanction of the Court. See also *Ahamadu Lebbe* v. *Amina Umma* (1928) 29 N. L. R. 449.

[1] Voet, 4. 4. 44; *Van der Byl* v. *Solomon* [1877] Buch. 25.

[2] Gr. 1. 8. 8; 3. 48. 13; *Cens. For.* 1. 4. 42. 5, and 1. 4. 43. 8–9. Voet speaks on this subject with uncertain voice. See *Compendium* 4. 1. 5, and *Comment. ad Pandect.* 4. 1. 16 and 20. The prescription itself may in turn be annulled by restitution. Schorer, *ad* Gr. 3. 48. 13. Time does not begin to run after full age unless the late minor knew or might have known of the *laesio* which entitles him to relief. *Cens. For.* loc. cit.

[3] Voet, 4. 4. 45; *Haupt* v. *Haupt* (1897) 14 S. C. 39.

[4] Voet, ibid.

[5] Above puberty. Voet, 4. 4. 46.

[6] *Cens. For.* 1. 4. 43. 13–15; Groen. *de leg. abr. ad* Cod. 2. 28. 1.

IV

MARRIAGE

In this chapter we shall consider: (1) the contract to marry; (2) the legal requisites of marriage; (3) the consequences of marriage; (4) ante-nuptial contracts; (5) the dissolution of marriage; (6) some miscellaneous matters relating to marriage.

Section 1.—The Contract to Marry

The promise to marry.

Marriage[1] is commonly preceded by espousals (*sponsalia-trouwbeloften*),[2] which constitute a binding contract between the parties.[3] No form is prescribed for the contract.[4] Any persons competent to intermarry may validly engage themselves.[5] This excludes boys and girls below fourteen and twelve years of age respectively.[6] By the Dutch Law young persons who have passed this limit but not reached the age of twenty-five[7] (if males), of twenty (if females), cannot contract a valid engagement without the consent of father and mother, or of the survivor of them,[8] which consent, however, may be given *ex post facto* at any time before marriage.[9] Failing such consent the engagement is invalid.[10] With it, the engage-

[1] On the whole of this subject Professor L. J. Van Apeldoorn, *Geschiedenis van het Nederlandsche Huwelijksrecht* (Amsterdam 1925) may be usefully consulted, as well as Fockema Andreae *Het Oud-Nederlandsch Burgerlijk Recht*, vol. ii, chap. iv, and *Bijdragen*, Parts 1 and 2; De Blecourt, *Kort Begrip van het Oud-Vaderlandsch Recht*, chap. ii; Wessels, *History of the Roman-Dutch Law*, Part ii, chap. iii.

[2] Van Leeuwen, lib. 4, cap. 25; V. d. L. 1. 3. 2. [3] Voet, 23. 1. 12.

[4] *Cens. For.* 1. 1. 11. 3; Voet, 23. 1. 1. In Ceylon writing is required. Ord. No. 19 of 1907, sec. 21. [5] V. d. L., *ubi sup.*

[6] *Cens. For.* 1. 1. 11. 12; V. d. K. *Th.* 52; but see Voet, 23. 1. 2.

[7] The age is now twenty-one for both sexes. *Duncan* v. *R. M. Mossel Bay* (1905) 22 S. C. 587. *Supra*, p. 43.

[8] Perpetual Edict of Charles V, 4 Oct. 1540, Art. 17 (1 G. P. B. 319); *Greef* v. *Verreaux* (1829) 1 Menz., 151; *infra*, p. 56.

[9] Hoola Van Nooten, vol. i, pp. 309 and 321; V. d. K. *Th.* 50.

[10] Voet, 23. 1. 20; *Holl. Cons.*, vol. iii, part 2 (Rotterdamsche derde deel), no. 86; Bijnk., *O. T.* i. 348.

ment is valid, subject however in this case, as in other contracts of minors, to restitutio in integrum on the ground of lesion;[1] from which it follows that the engagements of minors are in no case finally binding unless and until ratified after full age.[2] By the common law of Holland the consent of tutors was not required, the place of the deceased parents in this matter being taken rather by the relatives of the 'four quarters';[3] but in the later law the want of consent of tutors, no less than of parents, was a sufficient ground for the repudiation of the contract by either party.[4]

An engagement lawfully contracted with the necessary consents cannot be broken off without just cause.[5] Under the Roman-Dutch Law the Courts used to decree specific performance of the marriage contract, and even declare a reluctant party married in absence.[6] This practice is disused in the modern law,[7] but an action lies for damages for breach of the contract to marry.[8]

[1] Voet, 23. 1. 17; V. d. K. *Th.* 61.
[2] *Cens. For.* 1. 1. 11. 13.
[3] Hoola van Nooten, vol. i, p. 304.
[4] Hoola van Nooten, op. cit. p. 328; Loenius, *Decis.* 4; V. d. K. *Th.* 53. Bynkershoek (*Quaest. Jur. Priv.*, lib. II, cap. iii) argues that the engagements of minors who have tutors are governed by the same rules as any other contracts of minors; viz. (1) if made without consent of tutors they are absolutely void (but see above, p. 45); (2) if made with consent, the minor may nevertheless in a fit case obtain relief. This seems sound.
[5] Voet, 23. 1. 12; V. d. K. *Th.* 60; V. d. L. 1. 3. 2.
[6] Voet, 23. 1. 12; V. d. K. *Th.* 57. The Court would appoint a proxy to go through the ceremony. Fockema Andreae, *Oud-Nederlandsch Burgerlijk Recht*, vol. ii, p. 146; this was called 'met de handschoen trouwen'. Hoola van Nooten, vol. i, p. 332; (Cape) *Richter* v. *Wagenaar* (1829) 1 Menz. 262; (Ceylon) *Dormiux* v. *Kriekenbeek* (1821) Ramanathan, 1820–33, p. 23.
[7] (Cape) Marriage Order-in-Council of 7 Sept. 1838, sec. 19, in force in the Colony from Feb. 1, 1839. In Ceylon the action to compel marriage was abolished by Ord. No. 6 of 1847, sec. 30 (re-enacted in sec. 21 of Ord. No. 19 of 1907).
[8] *Radlof* v. *Ralph* [1917] E. D. L. 168; *Smit* v. *Jacobs* [1918] O. P. D. 30. The old books enumerate the grounds which justify a repudiation of a promise to marry. In the modern law the plea of justification for resiling from the contract is not so readily admitted, since performance is no longer decreed. *Schnaar* v. *Jansen* [1924] N. P. D. 218.

Section 2.—The Legal Requisites of Marriage

Assuming the consent of the parties as a necessary condition of marriage, as of other contracts, we may lay down the essentials of a valid marriage as being: Legal conditions of a valid marriage:

A. Capacity to marry and to intermarry.

B. Consent of parents.

C. Due observance of the necessary forms and ceremonies.

We shall deal with these in order.

A. *Capacity to marry and to intermarry.* The following cannot contract a valid marriage: viz. those who are (1) already married;[1] (2) under the age of puberty;[2] (3) impotent;[3] (4) insane.[4] A. Capacity of parties.

Intermarriage is forbidden between persons related to one another within the prohibited degrees as defined by law.[5] By the law of Holland persons who had previously committed adultery together might not inter-

[1] But Van der Keessel says (*Th.* 64), if a second marriage has been contracted in good faith, the first spouse being thought to be dead, the children of the supposed second marriage will be deemed to be legitimate (putative marriage). See *In re Booysen* (1880), Foord at p. 190; *H.* (wrongly called *C.*) v. *C.* [1929] T. P. D. 992; and *Berthiaume* v. *Dastous* [1930] A. C. 79, appealed to the P. C. from the Province of Quebec. The same principle is recognized in other legal systems; e.g. in France, Germany, Holland, Scotland, not in England. Good faith on one side is sufficient. V. d. K. *Th.* 65. In *Ex parte Kerkhof* [1924] T. P. D. 711 a woman, whose husband had disappeared, applied to the Court for leave to re-marry under Echt-Reglement of 1656, sec. 90. *Quaere*, whether this is in force in S. A.? The Courts of S. A. refuse to recognize as valid a foreign polygamous marriage; but the offspring of such a marriage, if legitimate according to the law of the domicil of origin, will be regarded as legitimate. (How to determine the domicil of origin before deciding the question of legitimacy?) *Seedat's Exors.* v. *The Master* (*Natal*) [1917] A. D. 302. 'By a polygamous union I mean one the nature of which is consistent with the husband marrying another wife during its continuance. Whether he exercises his privilege or not is beside the question.' Ibid. at p. 308, per Innes C.J.

[2] But see V. d. K. *Th.* 66.

[3] *Wells* v. *Dean-Willcocks* [1924] C. P. D. at p. 91. In this case the marriage is voidable, not void.

[4] *Vermaak* v. *Vermaak* [1929] O. P. D. 13. For the annus luctus *vid. sup.*, p. 33.

[5] Gr. 1. 5. 5 ff.; Van Leeuwen, 1. 14. 12 ff.; Voet, 23. 2. 29 ff.

marry,[1] but in the modern law this rule is abrogated by disuse.[2]

The books mention other impediments to marriage which scarcely form part of the modern law. For instance, the Roman Law[3] prohibited marriage between a female ward and her tutor or curator, or his son; and this prohibition, though considered to be obsolete by Van Leeuwen,[4] Groenewegen,[4] Voet,[4] and others, was accepted as existing law by Bynkershoek,[5] Van der Keessel,[5] and Van der Linden.[5] In South Africa the marriage of a guardian with his female ward requires the sanction of the Court.[6] By the Roman and Roman-Dutch Law a ravisher might not marry the woman whom he had ravished.[7] The old disqualifications on the ground of differences of religion[8] are obsolete.

[1] V. d. K. *Th.* 70; V. d. L. 1. 3. 6.

[2] (Ceylon) *Rabot* v. *de Silva* [1909] A. C. 376; (South Africa) *Est. Heinamann* v. *Heinamann* [1919] A. D. 99.

[3] Dig. 23. 2. 62 and 64; Cod. lib. 5, tit. 6 (de interdicto matrimonio inter pupillam et tutorem seu curatorem liberosque eorum). But a tutor might give his daughter in marriage to his ward. Dig. 23. 2. 64. 2.

[4] Van Leeuwen, 1. 14. 13 and *Cens. For.* 1. 1. 13. 25; Groen. *de leg. abr. ad* Cod. *ubi sup.*; Voet, 23. 2. 25.

[5] Bynkershoek, *Quaest Jur. Priv.* lib. II, cap. iii, p. 219; V. d. K. *Th.* 74; V. d. L. 1. 3. 6.

[6] 1 Maasdorp, p. 20.

[7] Cod. 9. 13. 1. 2; Voet, 23. 2. 26; Matthaeus, *De crimin. ad* Dig. 48, tit. 4, cap. ii, no. 16; Echt-Reglement van de Staten-Generael, March 18, 1656, art. 85 (2 G. P. B. 2444); Placaat van de Staaten van Holland, Feb. 25, 1751 (8 G. P. B. 535). Groenewegen, whose book first appeared in 1649, i.e. before the Placaats, says (*ad* Cod. 9. 13. 1): Jure Canonico raptae raptori nubere licet, et hoc jure utimur. See also Zypaeus, *Notitia Juris Belgici*, pp. 207–8. This opinion, however, cannot stand against the express language of the Placaat of 1751, which saves the punishments and penalties of 'the written laws' in the matter of abductio violenta (geweldaadige vervoeringen). See V. d. K. *Th.* 71.

Van der Linden mentions further the case of persons of any age who have eloped together. 'There is a strong prohibition,' he says, 'in Holland, against marriages between persons who have eloped' (Placaat of Feb. 25, 1751, *ubi sup.*), 'which has been afterwards considerably relaxed whenever the subsequent consent of parents is obtained'. Resolutie van de Staaten van Holland, June 26, 1783 (9 G. P. B. 375). The case of elopement is in fact covered by the language of the Placaat of 1751. But in this case marriage is not prohibited, only penalized, V. d. K. *Th.* 72.

[8] Voet, 23. 2. 26; V. d. K. *Th.* 73; V. d. L. 1. 3. 6.

Marriage not permitted within the prohibited degrees.

The law of prohibited degrees was defined for Holland by the Political Ordinance of April 1, 1580,[1] which forbids marriage between: (1) ascendants and descendants,[2] whether related by legitimate or illegitimate birth;[3] (2) collaterals of whom either is related to the common ancestor in the first degree of descent, e.g. brother and sister, uncle and niece, uncle and great-niece, nephew and aunt.[4] In the latter class no distinction is made between the whole and the half blood, and in both classes the prohibition extends to relations by marriage as well as to relations by blood and within the same degrees;[5] that is to say, since a man may not marry his sister or sister's daughter, neither may he marry his sister-in-law or sister-in-law's daughter; and so with all the other prohibited degrees of relationship. It must be observed, however, that though relationship by marriage is a disqualification within the prohibited degrees, this rule has no application when more than one marriage intervenes between the intending spouses.[6] Thus by the Dutch law a man might not marry his deceased wife's sister,[7] but there was no reason why

[1] 1 G. P. B. 330. The relevant articles of the P. O. are translated by Maasdorp, Institutes of South African Law, vol. i, Appendix.

[2] Pol. Ord., Art. 5; Gr. 1. 5. 6; Voet, 23. 2. 30.

[3] Groen. *de leg. abr. ad* Dig. 38. 10. 8; V. d. K. *Dictat. ad* Gr. 1. 5. 6.

[4] Pol. Ord., Arts. 6–7; Gr. 1. 5. 7–8; Voet, 23. 2. 31–2.

[5] This is expressly enacted by Pol. Ord., Art. 8, by which 'it is forbidden and interdicted for a man to marry blood relations (Bloedt-verwanten ofte Magen) of his deceased wife or for a woman to marry blood relations of her deceased husband'. But inasmuch as the Ordinance goes on to specify 'namely' the cases enumerated in Arts. 8 to 11 (vide Gr. 1. 5. 10–12), doubt sometimes arose whether the prohibition of the Ord. extended in regard to collateral affinity beyond the cases specifically stated. Grotius (1. 5. 9) and Van der Linden, however (1. 3. 6), say that the same prohibitions apply to affinity as to blood relationship, and, since dispensations are no longer accorded, the modern law may be taken to be settled in this sense, subject to statutory modifications, where they exist. See on the whole subject, Loenius, *Decis.*, Cas. 7, pp. 39–62; *Rechts. Obs.*, pt. 4, no. 3; Hoola van Nooten, vol. i, pp. 383 ff.

[6] In other words, my wife's *affines* are not my *affines* so as to bring them within the prohibited degrees (Van Leeuwen, 1. 14. 13 and *Cens. For.* 1. 1. 13. 23), at all events in the collateral line. Voet, 23. 2. 33.

[7] Pol. Ord., Art. 10.

he should not marry his deceased wife's brother's widow.[1] In South Africa and Ceylon the matter of prohibited degrees has in part or in whole been regulated by statute.[2]

B. Consent of parents.

B. *Consent of parents.* In the oldest Germanic law the consent not alone of parents but also of other near relatives was a necessary, or at all events usual, preliminary of marriage. 'Intersunt parentes et propinqui,' says Tacitus, 'ac munera probant.'[3] In Holland a case is cited as late as the year 1422 in which the parents had incurred a penalty for having given their minor daughter in marriage without the consent of relatives and of the authorities of the town.[4] In the sixteenth century the matter was regulated by two statutory enactments: viz. the Perpetual Edict of Charles V of October 4, 1540, and the Political Ordinance of the States of Holland and West Friesland, of April 1, 1580.

The Perpetual Edict (Art. 17) runs as follows:[5]

The provisions of the Perpetual Edict of October 4, 1540, Art. 17.

'And whereas, daily, many inconveniences are caused in our realm in consequence of secret marriages, which are contracted between young persons without the advice counsel and consent of friends and relatives of both sides, we observing that according to the precepts of the written law such marriages are not in accordance with honour and due obedience, and generally come to a bitter end, Will, Ordain and Decree that in case any one shall take upon himself to solicit or induce any young girl, not exceeding the age of twenty years, by promise or otherwise, contract marriage with her (*sic*), or in fact contract marriage without the consent of the father or mother of the said girl, or of the majority of the friends and relatives,[6] in case she had no father

[1] *Cens. For.* 1. 1. 13. 24; Voet, 23. 2. 33; *Rechts. Obs. ubi sup.*, p. 20. But see Loen. *Decis.* Cas. 7.

[2] See Appendix C (*infra*, p. 417). [3] Tacitus, *Germania*, cap. 18.

[4] Van Mieris, *Groot Charterboek*, vol. iv, p. 660.

[5] 1 G. P. B. 319; 1 Maasdorp, p. 324.

[6] The original text reads 'Van de meeste Vrienden ende Magen'. *Meeste* seems to be a mistake for *naeste*, which occurs lower down. The words 'Vrienden ende Magen' taken together mean 'relatives' (so in English law an infant sues by his 'next friend'). The reference is to the nearest relatives of the 'four quarters' (*infra*, p. 99). The requirement of consent of relatives strikes an archaic note. Even as early as the sixteenth century their place was being taken by tutors testamentary or dative.

or mother, or of the judicial authorities of the place, such man shall at no time be entitled to take or receive any *douarie* or other benefit (whether by way of contract before marriage, by the custom of the country, by testament, gift, transfer, cession, or otherwise in what manner soever) out of the goods which the said girl may leave behind, even though he may, after the marriage has been completed (*na 't houwelijck volbracht zijnde*), obtain the consent of the father and mother, of the aforesaid friends and relatives, or of the Court; of which circumstance we will that no regard should be had in this manner. In like manner if any girl or woman take upon herself to contract marriage with a young man not exceeding the age of twenty-five years, without consent of father or mother, or of the nearest friends and relatives, or of the judicial authorities of the place, such woman shall never be entitled to take or acquire any *douarie* or other benefit out of the goods which such man may leave behind (whether by way of contract of marriage, by the custom of the country, by testament, gift, transfer or cession, in what manner soever), even though she may, after the marriage has been consummated (*na 't huwelijck gheconsommeert*), obtain the consent of father or mother, of the aforesaid friends and relatives, or of the judicial authorities; of which circumstance we will that no regard should be had. Further, we forbid all our subjects to be present, to consent or agree to such marriages, made without the consent of the judicial authorities, or to receive, entertain, or lodge in their houses persons so married, under penalty of one hundred gold Carli or other severe punishment in the discretion of the Court. We forbid also all Notaries to receive any ante-nuptial contract or other promise to effect such marriage under pain of deprivation of office and, moreover, of being punished at discretion. Commanding all our officers and fiscals to take good care to have this ordinance observed and maintained, and to punish the contravenors of the same without favour or dissimulation."

The above enactment, it will be noticed, penalises marriages contracted without the necessary consents, without, however, annulling them. This further step was taken by the Political Ordinance of April 1, 1580, which by Art. 3[2] provides that banns shall not be granted The Provisions of

[1] See V. d. K. Th. 50.
[2] I C. P. P. 331; Gr. I. 5. 14–15; Voet, 23. 2. 11.

the Political Ordinance of April 1, 1580, Arts. 3 & 13.

or proclaimed if those that apply for the same are beneath the proper age, viz. twenty-five for young men, and twenty for young women, unless they produce to the magistrate or minister of religion the consent of their parents or the survivor of them (if they have any); and by Art. 13 declares 'null and void and of no effect marriages not contracted and celebrated' as required by the Ordinance, and adds an express reservation of the provisions of the Perpetual Edict relating to the marriage of minors and the penalties therein contained.[1] With regard to the interpretation of these two enactments and their combined effect very divergent views have been entertained. As regards minors who have parents or parent yet living the law seems plain. Such young persons can neither engage themselves[2] nor contract a valid marriage,[3] without the consent of parents or parent.[4] If both parents are living the consent of both is required, but in case of difference of opinion between them the will of the father, as the head of the family, prevails over that of the mother.[5] If the father is dead the mother's consent is necessary, and sufficient,[6] even though she has contracted a second marriage.[7] Consent may be express or tacit, the latter when a parent knows of the intended marriage and does not forbid it.[8] Such a case might arise if, through fraud or mistake, the publication of banns had taken place without previous proof of parental consent as required by the Political Ordinance, and the parents nevertheless acquiesced in the banns when they came to know of them.[9] Indeed, in the absence of fraud on the part of one or both of the spouses, publication of banns is deemed to be notice to the parents, and a marriage thereafter concluded is valid, even though, through carelessness on the part of the marriage-officer or other person responsible, the

The combined effect of these enactments:

(a) As regards consent of parents;

[1] I G. P. B. 334. [2] Voet, 23. 1. 20; V. d. L. 1. 3. 2.
[3] Van Leeuwen, i. 14. 6; V. d. K. *Th.* 75; *Willenburg* v. *Willenburg* (2) (1908) 25 S. C. at p. 910; (1909) 3 Buch. A. C. 409.
[4] Grandparents are not included. V. d. K. *Th.* 77.
[5] Voet, 23. 2. 13. [6] Ibid. [7] Voet, 23. 2. 14.
[8] *Foy* v. *Morkel* [1929] W. L. D. 174. [9] Voet, 23. 2. 18.

parents may in fact not have consented to the marriage or even have known of it.[1] In any event, ratification by the parents or parent after marriage, so far as concerns the validity of the marriage and the legitimacy of the children, has the same effect as a previous consent; but no ratification after marriage[2] can relieve from the penalties imposed by the Perpetual Edict, this being excluded by the express terms of the Edict itself.[3]

If parents foolishly, frivolously, or in bad faith, withhold their consent, it would seem just that the Court should have power to override their veto. Such is the opinion of Voet,[4] which Van der Keessel accepts.[5] But only very peculiar circumstances would justify overriding the parental authority.[6] An insane parent, so far as concerns consent, is treated as non-existent, and the same

[1] Voet, loc. cit. (*ad fin.*); *Johnson* v. *McIntyre* (1893) 10 S. C. 318. The publication of banns in church raises a presumption, but not an irrebuttable presumption, of notice to the parents. *Secus* when banns have been proclaimed by a magistrate under (Cape) Act. 16 of 1860. *Sikiti* v. *Foley* [1929] E. D. L. 286; *S. A. L. J.*, vol. xxviii (1911), 478.

[2] After consummation of the marriage? *P. E.* Art. 17, *supra*, p. 57.

[3] Voet, 23. 2. 19; V. d. K. *Th.* 75. In the absence of consent or ratification the marriage will be declared void by the Court on the application of an aggrieved parent 'si rigido jure uti velit'. Voet, 23. 2. 11; Van Leeuwen, 1. 14. 6; *Johnson* v. *McIntyre, ubi sup.*; *Solomon & Solomon* v. *Hanna* [1903] T. S. 460 (action by mother as natural guardian, the father being absent from the country); *Willenburg* v. *Willenburg* (1909) 3 Buch. A. C. at p. 423; *Manton* v. *Manton* (1909) 30 N. L. R. 387; *Gerber* v. *Gerber* [1928] W. L. D. 300; *Foy* v. *Morkel* [1929] W. L. D. 174 (action by widowed mother as natural guardian). It follows that marriages contracted without consent of parents are voidable, not void. Further, they are voidable by the parent only, not by the parties or either of them, i.e. not on the ground of minority merely apart from fraud; and by the parent (*semble*) only during the minority of the married child. *S. A. L. J.*, vol. xxviii (1911), 478.

[4] Voet, 23. 2. 22; Schorer *ad* Gr. 1. 5. 16.

[5] V. d. K. *Th.* 76. *Hildebrand* v. *Hildebrand* [1923] W. L. D. 151; *Paton* v. *Paton* [1929] T. P. D. 776; *Mofuken* v. *Mtembu* [1929] W. L. D. 82.

[6] Voet, *ubi sup.* Consent once given may be withdrawn at any time before marriage. If the minor is dissatisfied he can appeal to the Court. *Schoeman* v. *Rafferty* [1918] C. P. D. 485; *Sipondo* v. *Nongauza* [1927] E. D. L. 255.

consent, if any, is required and sufficient as would be sufficient if he or she were already dead.[1]

A minor who has married with consent, and who becomes widowed before reaching the usual limit of full age, may re-marry without consent. Such at least was the law in the province of Holland with regard to females and males alike.[2]

or other relatives.

Thus far we have spoken of the consent of parents or of a surviving parent. But what if both parents are dead? The Political Ordinance (Art. 3) does not require the consent of relatives.[3] Inasmuch, however, as Art. 17 saves the operation of the penal clauses of the Perpetual Edict, it seems that a marriage of minors whose parents are both dead, if contracted without the consent of friends and relatives, or, if these disagree amongst themselves or unreasonably withhold their consent, of the Court, though not void, is nevertheless penalized. This is the view of Grotius, who treats the consent of the nearest relatives as necessary, if the penalty is to be avoided, though he expressly says that the marriage of minors is not void by reason of its being prohibited by their guardians or relatives.[4] In the modern law relatives have no *locus standi* in the matter, except so far as they may happen to be guardians.

(*b*) As regards consent of tutors.

The argument founded upon the language of the Perpetual Edict clearly fails in regard of the consent of guardians, for the Edict does not penalize marriages contracted without such consent. In view of this fact, it seems impossible to say that the common law of Holland made the consent of guardians a necessary condition of a valid

[1] V. d. K. *Th.* 82. Cod. 5. 4. 25 is not followed in R.-D. L. At the Cape any person desirous of marriage to whose marriage consent is necessary, but cannot be given or is withheld, may apply by petition to the Chief Justice. Marr. O. in C. 1838, sec. 17. For Transvaal see *A.* v. *B.* [1906] T. S. 958.

[2] *Cens. For.* 1. 1. 13. 11; Voet, 23. 2. 17; V. d. K. *Dictat.* ad Gr. 1. 5. 15. The Echt-Reglement of March 18, 1656 (2 G. P. B. 2439) contains an express provision to this effect for the Generaliteyts Landen.

[3] Voet, 23. 2. 16; V. d. K. *Th.* 77.

[4] Gr. 1. 8. 3.

marriage of a minor whose parents were dead,[1] nor, apart from general or local legislation, can the penalty of the Edict be extended to a case to which it does not in terms apply.[2] It is plain, however, from Van der Keessel,[3] that the consent of guardians or relatives, and often of both, was very generally required by the local statutes, if not for the validity of the marriage, at all events for the avoidance of the penalty.[4] On the other hand, the law of Zeeland, which penalized and also annulled marriages contracted without such consents, seems to be mentioned as exceptional.[5]

The statutory penalty does not attach to the spouse who is a minor.

With regard, more particularly, to the statutory penalty, it must be noticed that it attaches only to the person of full age of either sex who inveigles a minor of the other sex into marriage. Such person is not allowed to take any benefit from the property of the minor spouse, whether present or future, whether by gift, legacy, inheritance, or in any other way. One effect of this is that the major spouse takes no advantage from the marriage by way of community of property, nor, where this exists, by ante-nuptial contract;[6] and he acquires no

[1] Gr. *ubi sup.* and Schorer ad loc.; Van Leeuwen, 1. 14. 9; Groen. *de leg. abr.* ad Cod. 5. 4. 8; Voet, 23. 2. 16; V. d. L. 1. 3. 6; Bijnk. *O. T.* i. 46.

[2] Van Leeuwen (*ubi sup.*) applies it, but with hesitation. In any event consent of guardians will be easily inferred. Ibid.

[3] V. d. K. *Th.* 125.

[4] This is the law in the Cape Province. *Mostert* v. *The Master* [1878] Buch. 83; *Willenburg* v. *Willenburg* (1) (1909) 26 S. C. at p. 453. Mr. Justice Kotzé says (Van Leeuwen, vol. i, p. 106, note): 'At the Cape of Good Hope the consent of guardians to the minor's marriage is necessary. Marr. O. in C. 1839, secs. 10 and 17.' This does not mean that a marriage celebrated without such consent is void, or voidable at the suit of the guardian. Cf. *Mostert* v. *The Master, ubi sup.* at p. 84. The decision of Connor C.J. in *In re McDuling* (1884) 5 N. L. R. 320 cannot be accepted as authority outside the Province. In the Transvaal, by Law No. 3 of 1871, sec. 8, it is not lawful to solemnize the marriage of a minor, if he or she cannot produce the consent of father or guardian. For Ceylon see Ord. No. 19 of 1907, sec. 23.

[5] V. d. K. *Th.* 126.

[6] 'The husband, whether he knew at the time or did not know the lady to be a minor, can receive no benefit from such a marriage and can have no control over her property.' *Mostert* v. *The Master*

right of control or administration over the property of the wife, who retains the administration in her own hands.[1] But the minor spouse is not penalized,[2] so that the proprietary consequences of the marriage will not be disturbed where they are for the minor spouse's benefit.[3] In the modern law minority in this connexion terminates for the male at twenty-one and for the female, apparently, at the same age.[4]

By the Law of Holland consent of parents was required even when the spouses were of full age, but such consent was easily presumed and might not be unreasonably withheld. If consent was withheld the Court determined whether the grounds of refusal were sufficient.[5] In the modern law the consent of parents is not necessary when the parties to the marriage are of full age.

C. The formal requirements of marriage.

C. *The formal requirements of marriage.* In early times, Grotius tells us, marriages were perfected with little or no ceremony.[6] The blessing of the Church was not always

ubi sup. at p. 85, per de Villiers C.J. But Anton. Matthaeus (*Paroem.* no. 2, sec. 18) says: Igitur scientem, non etiam ignorantem vel errantem, ea constitutio plectit.

[1] *Mostert's Trustee* v. *Mostert* (1885) 4 S. C. 35; *Wessels N. O.* v. *Uys* [1924] O. P. D. 329. But there is old authority to the contrary. See *Sentent. van den Hoog. en Provincial. Raad.*, no. 158, a decision which, as V. d. K. says (*Dictat.* ad Gr. 1. 8. 3), 'well deserves inspection'. It is regrettable that in such cases the Court (it seems) will neither order a settlement of the wife's money (*Mostert* v. *The Master*, at p. 84); nor permit the parties to make a post-nuptial settlement. (*Ex parte Dicks* [1915] T. P. D. 477.) As to the power of the Court to order a settlement, Loenius, *Cas.* 55, pp. 357–60, may be consulted.

[2] Voet, 23. 2. 20.

[3] Groen. *de leg. abr. ubi sup. Mostert* v. *The Master, ubi sup.*

[4] If this is so, it is a singular instance of extensive interpretation of a penal enactment. But perhaps we must regard the law of South Africa as resting rather on custom than on the statute. The pre-British law of the Cape fixed the ages at 21 and 18. J. de V. Roos in *S. A. L. J.*, vol. xxiii (1906), p. 249.

[5] *P. O.* Art. 3, 1 G. P. B. 331; 1 Maasdorp, p. 318, where the footnote is misleading.

[6] Gr. 1. 5. 16; Van Leeuwen, 1. 14. 3; Fockema Andreae, *O. N. B. R.*, vol. ii, p. 135: Na de verloving was tot in de 16e eeuw hier te lande voor de totstandkoming van het huwelijk niet anders noodig dan het begin der samenwoning, de bijslaap. Cf. Wessels, pp. 434 ff.

invoked. To provide against the scandals consequent upon such a state of things the Political Ordinance, by Art. 3,[1] for the first time gave statutory authority to the canonical practice of publication of banns.

'Those who after the publication of these presents shall desire to enter upon marriage shall be bound to appear before the Magistrates or Ministers of Religion of the towns and places of their residence, and there apply for the granting to them of three Sunday or Market-day banns, to be made in the Churches or from the Council-House or other places where justice is administered, on three successive Sundays or Market-days: which banns shall be granted and made to the end that any one who wishes to advance any let or hindrance, whether of blood, affinity or pre-contract of marriage, by reason of which the marriage should not go forward, may do so.'

If no such let or hindrance was alleged, the marriage was shortly afterwards celebrated by a minister of religion or by the magistrate. In the latest Dutch Law the civil marriage was indispensable, a religious ceremony being left to the option of the parties.[2]

With regard to the solemnization of marriage at the present day the reader is referred to the statute law of the several provinces or colonies.[3]

Section 3.—The Legal Consequences of Marriage

The legal consequences of marriage may be considered, first, in relation to the personal status and capacity of the wife; secondly, in respect of the property of the spouses.

The legal consequences of marriage:

A. Effect of marriage as regards the wife's status and capacity.

A. *Effect of marriage on the personal status and capacity of the wife.* This consists principally in the marital power of the husband over the wife,[4] with its consequences, which are as follows:

(1) rank, forum, and domicil;

1. The wife acquires the rank or dignity of the husband, which after the husband's death she retains durante viduitate. She acquires also her husband's forum and domicil.[5]

[1] 1 G. P. B. 331. [2] V. d. K. *Th.* 84; V. d. L. 1. 3. 6 (*ad fin.*).
[3] (South Africa) 1 Maasdorp, chap. iv; (Ceylon) Ord. No. 19 of 1907. [4] V. d. L. 1. 3. 7. [5] Voet, 23. 2. 40.

(2) she becomes a minor on marriage;

2. Though she may have been of full age before marriage, on marriage she is deemed to be a minor under the guardianship of her husband, the paternal power ceasing.[1] Like a minor, she has no independent persona standi in judicio. Therefore, as a general rule, a married woman cannot institute or defend an action in her own name. Whether as plaintiff or defendant she must proceed by, or with the assistance of, her husband.[2]

(3) husband administers wife's property;

3. As administrator of his wife's property the husband may alienate and encumber it as he pleases without her consent.[3] This applies even to property which she has kept out of community. The wife, on the other hand, may not alienate or encumber her property without his consent,[4] unless in due course of trade.[5]

(4) does not render an account;

4. The husband is not compellable to render an account of his marital administration, nor to indemnify the wife or her heirs for his negligence.[6]

(5) contracts in wife's name.

5. The husband may contract in his wife's name, and render her liable[7] or entitled[8] under contracts so made. The wife cannot, without the consent of her husband,

[1] Gr. 1. 5. 19; Van Leeuwen, 1. 6. 7; Voet, 1. 7. 13; 23. 2. 41; V. d. L. 1. 3. 7. V. d. L. says De vrouw wordt door het huwelick *minderjarig*. Grotius more correctly says werd ghehouden voor *onmondig*.

[2] Gr. 1. 5. 22–3; Van Leeuwen, *ubi sup.*; Voet, 5. 1. 14 ff., and 23. 2. 41; V. d. K. *Th.* 95. See Appendix D. (*infra*, p. 419). For the practice in South Africa see 1 Maasdorp, p. 44, Van Zyl, *Judicial Practice* (3rd ed.), p. 79. 'The "assistance" consists in his joining his wife in signing the power to bring or defend the action' (Van Zyl, p. 80). By Ceylon Ord. No. 18 of 1923 a married woman (if included within the scope of the Ord.) may sue or be sued, either in contract or in tort or otherwise in all respects as if she were a feme sole. The Ordinance is modelled upon the English M. W. P. Acts and confers equally extended powers.

[3] Gr. 1. 5. 22; Schorer *ad* Gr. 2. 48. 2; Van Leeuwen, *ubi sup.*; Voet, 23. 2. 58; 23. 5. 7; V. d. K. *Th.* 92; Bijnk. *O. T.* i. 727. This extends to donations to third parties unless fraudulent (Voet, 23. 2. 54; *Davis* v. *Brisley's Trustee* (1901) 18 S. C. 407) and, of course, to leases. Voet, 19. 2. 17.

[4] Gr. 1. 5. 23.

[5] Gr. loc. cit.; Van Leeuwen, 2. 7. 8.

[6] Sande, *Decis. Fris.* 2. 4. 1; V. d. K. *Th.* 91.

[7] Gr. 1. 5. 22; 3. 1. 30; V. d. L. 1. 3. 7.

[8] Gr. 3. 1. 38.

render herself civilly liable by her contracts[1] except in cases in which a minor would be liable.[2] But she does incur a natural obligation, which is a good foundation for a contract of suretyship, and will exclude the condictio indebiti in case she has paid money in pursuance of such obligation after her husband's death.[3] Contracts made without her husband's authority being civilly void, neither wife nor husband can be sued upon them either during the marriage or after its determination. Subsequent ratification by the husband, however, has the same effect as antecedent authority, and so also, it seems, has tacit acquiescence.[4] Though a wife's contract cannot be enforced against her, she may, if she pleases, confirm it after her husband's death and enforce it against the other contracting party.[5]

(6) Wife's contract sometimes operative.

6. The contracts of a wife, as of a minor, are in certain cases legally operative.[6] Thus: (*a*) She may enter into a unilateral contract which is solely to her advantage. Her husband reaps the benefit, and payment must be made to him, and not to the wife without his knowledge.[7]

(*b*) Husband and wife are rendered liable by the wife's contracts, though made without the husband's authority or ratification, to the extent of their enrichment, that is,

[1] Gr. 1. 5. 23; Voet, 23. 2. 42; *Pretorius* v. *Hack* [1925] T. P. D. 643.

[2] Voet, 23. 2. 43. Unlike a minor, who may be relieved by way of restitutio in integrum against contracts made by his tutor or by himself assisted by his tutor (*supra*, p. 49), a wife cannot obtain restitutio in integrum against contracts made by her husband, or against contracts which she has herself concluded with her husband's tacit consent, even though she may be a minor in point of years. V. d. K. *Dictat. ad* Gr. 1. 5. 21, citing Voet, 4. 4. 51.

[3] V. d. K. *Th.* 96. But see Voet, 12. 6. 19.

[4] Voet, 23. 2. 42. A wife may also contract as agent for her husband, but that is another matter.

[5] Voet, 23. 2. 43. Van Leeuwen (1. 6. 7), citing Stockmans, *Decis.* no. 52, says that the wife's contracts do not revive upon the dissolution of the marriage, but this must be understood to mean 'do not revive against her will'.

[6] *Karsten* v. *Forster* [1914] C. P. D. 919 at p. 925 where Kotzé J. summarizes the law in a short judgment. See Appendix D (*infra*, p. 420).

[7] Voet. 23. 2. 44.

to the extent to which he or she has taken a benefit under the contract.[1]

(*c*) A wife who is authorized or permitted by her husband to carry on the business of a public trader binds herself and her husband by her trade contracts.[2] It makes no difference whether she is above or below the normal limit of full age.[3] The wife's authority to bind herself or her husband ceases if the husband has revoked his consent. Such revocation must be communicated to third parties and cannot be made to their prejudice in respect of transactions already begun.[4]

(*d*) A wife may bind herself and her husband by contracts incidental to the household.[5] This authority results from the wife's position as domestic manager and cannot be taken from her except by judicial decree and public notification.[6] Under the designation of 'necessaries' (which does not by any means imply the bare necessities of life) the modern law has enlarged the conception of contracts incidental to the household to cover any reasonable expenses incurred by the wife as such. It is for the judge to say whether a particular contract falls within the permitted class.[7] Much depends upon the customs

[1] Gr. 1. 5. 23 (*ad fin.*); Voet, 23. 2. 43 (*ad fin.*); V. d. L. 1. 3. 7; *Johnston* v. *Powell* (1909) 26 S. C. 35; *Forster* v. *Becker* [1914] E. D. L. 193; *Karsten* v. *Forster*, *ubi sup.*

[2] Gr. 1. 5. 23; Van Leeuwen, 1. 6. 8 and 2. 7. 8; Voet, 23. 2. 44 (*ad init.*); V. d. L. *ubi sup.* As to what constitutes a public trade see *Grobler* v. *Schmilg and Freedman* [1923] A. D. 496.

[3] Voet, loc. cit.

[4] Voet, loc. cit.

[5] Gr. *ubi sup.*; Van Leeuwen, *ubi sup.*; Voet, 23. 2. 46; *Mason* v. *Bernstein* (1897) 14 S. C. 504. See Appendix D (*infra*, p. 422).

[6] Gr. *ubi sup.*: 't welck een man niet en kan beletten, ofte hy most sijn vrouw oock dat bewint rechtelick verbieden, ende 't selve doen afkondighen. The meaning of 'rechtelick' appears from Voet (23. 2. 46), who says: nisi hujuscemodi rei domesticae cura ac circa eam contrahendi licentia ad mariti desiderium uxori publica magistratus auctoritate justas ob causas interdictum sit. Does this hold good to-day?

[7] *Reloomel* v. *Ramsay* [1920] T. P. D. 371. When the trial is by judge and jury it would be for the judge to say whether the contract in question could, in law, come within the permitted class; and this being decided affirmatively, for the jury to say whether in fact it did so.

of the country, the husband's condition and resources, and the previous course of dealing. It is all one whether the wife has purchased goods for domestic use, or borrowed money for the purpose of doing so.[1]

(*e*) If the husband has deserted his wife and is absent from the jurisdiction, she may contract in her own name, and bind herself by the contract.[2]

(*f*) Lastly, as will be seen later, a woman may by apt words in her marriage-contract retain the freedom of contracting which she enjoyed before marriage.[3]

(7) Wife's liability for husband's contracts.

7. As above observed, the wife is bound and entitled by the husband's post-nuptial contracts.[4] She is liable for them to the fullest extent during the continuance of the marriage, and after its determination to the extent of one-half.[5]

B. Effect of marriage as regards the property of the spouses. Community of goods;

B. *Effect of marriage in respect of the property of the spouses.* By the common law of Holland, in the absence of ante-nuptial contract, marriage creates *ipso jure* a community of goods (*communio bonorum—gemeenschap van goederen*) between the parties.[6] This community is often spoken of as statutory, not that it was introduced by any specific statute, but because its existence is recognized by

[1] Voet, *ubi sup.*

[2] Voet, 5. 1. 16; *Kunne* v. *De Beer* [1916] C. P. D. 667.

[3] *Infra*, p. 80.

[4] Gr. 2. 11. 17; 3. 1. 38; V. d. K. *Dictat.* ad loc.; i.e. she is entitled after the dissolution of the marriage to the extent of one-half.

[5] Gr. 1. 5. 22; Voet, 23. 2. 52; V. d. L. 1. 3. 7; unless community of goods and of profit and loss has been excluded. V. d. K. *Th.* 93. Even when community of profit and loss has been excluded, she is liable, after her husband's death, to the extent of one-half for goods applied to the maintenance of the family, retaining, however, a right of recourse against the husband's heirs. *Cens. For.* 2. 1. 11. 7.

[6] Gr. 2. 11. 8; Voet, 23. 4. 1; V. d. K. *Th.* 216; Wessels, *History of the R. D. L.*, pp. 453 ff. Community is one of the results of marriage unless definitely excluded. *Mograbi* v. *Mograbi* [1921] A. D. 274. In this case the marriage was in fact invalid, but the Court inferred an intention to marry in community. The historical origin of community of goods has been much discussed. See Voet, 23. 2. 66, and authors there cited. For the results of modern research see Fock. And., vol. ii, pp. 164 ff., and *Bijdragen*, ii, p. 109, where he says: 'van de invoering der gemeenschap in deze provinciën is ons geen spoor overgebleven. Ze ligt dus stellig in een ver verleden.'

numerous ancient statutes and privileges[1] as forming an integral part of the law of the country. As such it is a purely Germanic institution, and derives nothing from its effects. the law of Rome. The effect of community, where it exists, viz. in South Africa (for in Ceylon[2] it exists no longer), is to create a joint fund under the administration of the husband, consisting (with some exceptions) of all Includes property, the property of both the spouses, as well existing at the time of the conclusion of the marriage as after-acquired.[3] It extends to all property of the spouses,[4] wherever situated,[5] immovable as well as movable, and to jura in personam, or rights arising from obligations, as well as to and liabilities of both spouses; jura in rem. Conversely, the lawful liabilities of the spouses, whether ante-nuptial or post-nuptial, are charged upon the community and go to diminish the joint estate.[6]

[1] Many of these are collected in *Rechts. Obs.*, pt. 2, pp. 90 ff.

[2] Ceylon, Matrimonial Rights and Inheritance Ordinance (No. 15 of 1876), sec. 8: 'There shall be no community of goods between husband and wife, married after the proclamation of this Ordinance, as a consequence of marriage.'

In Natal, by Law No. 22 of 1863, sec. 2, community of goods does not attach to any spouses married elsewhere than in South Africa, unless the spouses by written and registered agreement exempt themselves from this law. For the interpretation of this sec. see *Brown* v. *Brown* [1921] A. D. 478.

[3] Voet, 23. 4. 30; V. d. L. 1. 3. 8. This is expressed in the proverb: Man ende wijf hebben geen verscheyden goet. Anton. Matthaeus, *Paroem.* no. 2. Note, however, that property may be bequeathed or donated to a spouse, married in community, so as to exclude it from the community. *Ex parte Bear & Sack* [1926] W. L. D. 240.

[4] With some exceptions, however: viz. (1) Feuds (in the Dutch Law); (2) Property burdened with a fidei-commissum, except only as regards the profits until the f.-c. takes effect, Gr. 2. 11. 10; Voet, 23. 2. 71 ff.; V. d. K. *Th.* 220–1; *Ex parte Van der Watt* [1924] O. P. D. 9; (3) Jewels, &c., given by the bridegroom to the bride on marriage, Voet, 23. 2. 78; Van Leeuwen, 4. 24. 13; (4) Clothes (wederzijdsche kleederen), Hoola van Nooten, vol. i, p. 411; but no authority is cited except Arntzenius (*Inst. Jur. Civil Belg.*, pt. 2, tit. 4, sec. 18), who refers to local statutes. As to jewels and clothes given by husband to wife *stante matrimonio*, see *Costum. v. Antwerp*, xli. 53–4.

[5] Voet, 23. 2. 85 and 23. 4. 29; unless the *lex situs* requires a more formal mode of transfer, in which case a personal action lies to compel transfer in due and solemn form. *Chiwell* v. *Carlyon* (1897) 14 S. C. at p. 66.

[6] 'Die den man of de vrouw trouwt, trouwt ook de schulden.'

Community begins when marriage begins, i.e. so soon as the necessary rites or ceremonies have been performed;[1] it persists during its continuance and ends upon its dissolution. Thereupon the common fund is divided *ipso jure* into two equal shares, one of which vests in the surviving spouse, without regard to the amount which such spouse may have contributed, the other of which vests in the testamentary or intestate successors of the deceased.[2] On the dissolution of the community outstanding post-nuptial liabilities attach to the extent of one-half to each moiety of the now divided estate.[3] Ante-nuptial liabilities, on the other hand, which have not been discharged during the marriage, revert to the side from which they came.[4]

ends on dissolution of marriage.

Gr. 2. 11. 12; V. d. K. *Th.* 222—so much so that an ante-nuptial stipulation to the contrary is void in law, unless community of goods is also excluded. Voet, 23. 2. 80. A married woman therefore may be utterly ruined by her husband's extravagance, but the remedy is in her own hands, viz. to apply to the Court for a separation of goods (boedelscheiding) and, if necessary, to have the husband interdicted as a prodigal. Gr. 1. 5. 24; Voet, 23. 2. 52; *Rechts. Obs.*, pt. 4, no. 8. Hoola van Nooten, vol. i, p. 417; V. d. L. 1. 3. 7 (*in fin.*). In the event of insanity the marital power is suspended, not determined. V. d. K. *Th.* 101. In such case the wife may permit the husband's curator to administer her property, or apply to the Court for power to administer it herself, or get herself appointed curatrix bonis to her husband. V. d. K. *Dictat. ad* Gr. 1. 5. 27; *In re De Jager* [1876] Buch. 228. She may not be appointed curatrix of the person of her husband. Ibid. and V. d. K. *Th.* 168.

[1] Gr. 1. 5. 17; 2. 12. 5; Neostad., *de pact. antenupt.* Obs. 15–17; Van Leeuwen, 4. 23. 3; V. d. K. *Th.* 87.

[2] Gr. 2. 11. 13. Children who have received advances must bring them into collation for the benefit of the joint estate before division. Gr. ibid; P. O. art. 29 (1 G. P. B. 336); V. d. K. *Th.* 223; *Jooste* v. *Jooste's Exors.* (1891) 8 S. C. 288; 1 Maasdorp, chap. xix; *infra*, p. 348.

[3] Gr. 1. 5. 22; V. d. K. *Th.* 93 and 223. Creditors may sue the husband or his heirs for the whole debt, the wife or her heirs only for half. *Laing* v. *Le Roux* [1921] C. P. D. at p. 748. The husband (or his heirs) has recourse against the wife (or her heirs) to the extent of one-half. Gr. 2. 11. 17; Voet, 23. 2. 52 and 80. If the creditors elect to go against the husband and he is insolvent they may proceed by surrogation against the wife for the recovery of half the debt. Voet, 23. 2. 80.

[4] Gr. 2. 11. 15; Van Leeuwen, 4. 23. 6; Hoola van Nooten, vol. i, p. 415; V. d. K. *Th.* 224. According to Voet (23. 2. 80), if the husband (or his heirs) has discharged the whole of an ante-nuptial debt,

Community presumed.

Community of goods being an institution of the Roman-Dutch common law, all marriages are, in the absence of proof to the contrary, presumed to have been contracted in community,[1] and the legal consequences of community follow, except so far as they are excluded expressly or by necessary implication. They attach not only to a first, but also to a second or subsequent marriage,[2] subject, however, to certain rules and restrictions to be presently mentioned. There are, nevertheless, certain cases to which the rule of community does not apply. These are: (1) when the parties are within the prohibited degrees (But community continues so long as they are innocently ignorant of their relationship; if one party comes to know of it and conceals it from the other, community continues so far only as it is advantageous to the innocent party, i.e. there is community of gains, but not of loss); (2) when a minor has married without the necessary consents;[3] (3) (most important of all) when community is excluded by ante-nuptial contract, of which we are next to speak.[4]

Exceptions.

he (or they) has (have) *regressus* against the wife or her heirs in respect of one-half. Schorer (*ad* Grot. 2. 11. 12) takes the same view. Van der Keessel (*ubi sup.*) dissents. See Neostad. *Observ. de pact antenupt.* nos. 12 and 13; Loenius, *Decis.*, case 99, and Boel's Excursus. For South African Law see *Reis* v. *Gilloway's Exors.* (1834) 1 Menz. 186; *Blatchford* v. *Blatchford's Exors.* (1861) 1 E. D. C. 365 and *Liquidators of Union Bank* v. *Kiver* (1891) 8 S. C. at p. 150.

[1] *Faure* v. *Tulbagh Divisional Council* (1890) 8 S. C. 72.

[2] Van Leeuwen, 4. 23. 5; V. d. K. *Th.* 219.

[3] *Supra*, pp. 56 ff. Van der Linden (1. 3. 8) adds 'when the parties have eloped' (Placaat van de Staaten van Holland, Feb. 25, 1751; 8 G. P. B. 535). In all these cases one or both of the spouses are precluded by way of penalty from taking any benefit under the marriage, whether by community or by ante-nuptial pact. The general opinion is that the Edict of 1540 operates to the disadvantage of the major spouse only. Groen. *ad* Gr. 2. 11. 8; Van Leeuwen, 4. 23. 3; Voet, 23. 2. 20. Van der Keessel (*Th.* 218) dissents.

[4] Community may also be put an end to by boedelscheiding (Gr. 1. 5. 24), which may be decreed on the ground of prodigality (*supra*, p. 68, no. 6), or in the event of judicial separation (V. d. K. *Th.* 231. *Vide infra*, p. 89). The curious custom which allowed the wife to repudiate the community and by consequence the debts by 'going out before the bier' (Gr. 2. 11. 18–19; Loen, *Decis. & Obs.*,

Section 4.—Ante-nuptial Contracts

No persons need marry in community of goods unless they wish to do so. It is always open to the spouses to exclude or modify the common law by ante-nuptial contract.[1] 'Ante-nuptial contracts, being of wide application,' says Van der Keessel, 'can scarcely be otherwise defined than as agreements between future spouses or other interested persons regarding the terms or conditions by which the marriage is to be regulated.'[2] According to Van der Linden, to be valid such a contract must be in writing[3] and contained in a public instrument, although, he adds, 'registration in Court is not required, since the law on this point as enacted by the placaat of July 30, 1624, has never been observed in practice'.[4]

Ante-nuptial contracts:

Is writing necessary to their validity?

In the practice of Cape Colony writing was invariably employed, and by Act 21 of 1875, sec. 2, an ante-nuptial contract, in order to be valid against creditors, had to be executed before a notary and two witnesses (under-hand documents not being entitled to registration) and registered

no. 65; Roseboom, *Keur. v. Amsterdam*, cap. 42, p. 208), is said by V. d. K. (*Th.* 226) to be 'multis statutis concessum', and therefore does not make common law. But see *Brink* v. *Louw* (1842) 1 Menz. 210 and *Horn & Co.* v. *De Beer* [1913] T. P. D. at p. 726.

[1] Gr. 2. 11. 8; V. d. K. *Th.* 227; R. C. Elliott, *Ante-nuptial Contracts*, *S. A. L. J.*, vol. xlv (1928), pp. 181 and 320.

[2] V. d. K. *Th.* 228.

[3] V. d. L. 1. 3. 3. Writing was not necessary by the common law. Gr. 2. 12. 4; *Cens. For.* 1. 1. 12. 9; Voet, 23. 4. 2; V. d. K. *Th.* 229. Van der Linden's opinion that writing was necessary in his day is based upon certain Ordinances requiring ante-nuptial contracts to be sealed. But perhaps merely verbal agreements are not thereby forbidden. The authors of the *Rechts. Obs.* (pt. 2, no. 35) agree with Van der Linden, as also de Haas in his note to *Cens. For.* (*ubi sup.*). Van der Keessel (*ubi sup.*) does not consider writing indispensable. But satisfactory proof, and therefore the presence, at the least, of competent witnesses was necessary, if an ante-nuptial contract was to affect creditors. Voet, 23. 4. 3; V. d. K. *ubi sup.*; *Holl. Cons.*, vol. iv, no. 35; *Fisher* v. *Malherbe & Rigg* [1912] W. L. D. 15.

[4] Groen. *de leg. abr. ad Cod.* 5. 12 *in fine*; Voet, 23. 4. 4 and 50; *Schnaider* v. *Jaffe* [1916] C. P. D. at p. 700. This statute did not, however, require registration in all cases, but only when the ante-nuptial contract created a f.c. or prohibition of alienation of immovable property.

Registration of ante-nuptial contracts.

in the Deeds Registry Office, and a duplicate original or notarial copy of the contract must be left in the Deeds Registry for general information.

This Act and similar legislation in the other Provinces[1] are now superseded by the (Union) Deeds Registries Act (No. 13 of 1918), which provides:

Sec. 28 (1). An ante-nuptial contract executed in the Union after the commencement of this Act (January 1, 1919) shall not be registered in any deeds registry unless it has been executed before a notary public and tendered within one month after the date of its execution for registration in a deeds registry, or within such further period as the Court may on application allow. A signed original for record and another signed original or a grosse,[2] or a notarially certified copy, of the contract shall be tendered for registration.

(3) An ante-nuptial contract executed in the Union and registrable under this section shall be of no force and effect in the Union as against the creditors in insolvency of either spouse unless it is registered in a deeds registry within the time prescribed by or extended under this section.

Sec. 29 relates to the registration of ante-nuptial contracts executed outside the Union.

Sec. 30. Nothing in sections *twenty-eight* and *twenty-nine* contained shall prevent the Court from ordering

[1] In the Transvaal, Law No. 5 of 1882 (sec. 5) required all ante-nuptial contracts to be registered, and signed by the Registrar of Deeds to render them valid. This was repealed by Procl. 10 of 1902 and replaced by Act 25 of 1909, sec. 33, which provided that an ante-nuptial contract executed in the Colony should, unless registered in the Deeds Office within one month after the date of its execution or within such period as the Court might upon application allow, be of no force or effect as against creditors in insolvency.

[2] A grosse is a copy of a notarial instrument signed by the notary before whom the instrument is executed, but omitting the signature of the party executing the same and of the witnesses. It differs from a certified copy in this respect, and because only one grosse may be made, but any number of certified copies. Bell's *South African Legal Dict. sub voce.*

the registration of a contract, the terms whereof were agreed upon between the two intending spouses before the marriage, if the Court is satisfied that good grounds exist for making such an order.[1]

It is to be noted that the absence of registration only affects the validity of an ante-nuptial contract as regards creditors. An unregistered contract cannot operate to their prejudice so as to deprive them of any rights which they would have in the absence of contract by the common law. As regards the parties, however, and persons claiming through them, as well as others taking a benefit under it, the contract holds good in the absence of registration and even (*semble*) though not reduced to writing.[2] In this connexion it should be observed that the parties to an ante-nuptial contract may be not only the spouses but also any relatives or others who may be disposed to exercise any liberality towards them.[3] In fact the contract often serves a double purpose: first, its obvious one, to exclude or modify the incidents of marriage at the common law; and secondly, to regulate the devolution after the death of one or both of the spouses of the property contributed to the marriage. In this latter event the contract plays the part of what in English Law is called a marriage-settlement.

Who may be parties.

Generally speaking, any condition whatever may be introduced into a marriage contract provided that it is not contrary to law or good morals.[4] Some stipulations are disallowed as contrary to the legal nature of marriage. Such are conditions: (1) that the husband shall be under the guardianship of his wife;[5] (2) that a second wife shall take more than a child's portion under the first mar-

What terms may be inserted.

[1] *Ex parte Orford* [1920] C. P. D. 367; *Ex parte Wessels* [1927] W. L. D. 179; *Ex parte Daddy* C. P. D. (1930) 15 P. H., B. 15; *Ex parte Townsend* [1918] S. R. 164; *Ex parte Still* [1922] S. R. 61. Mr. R. C. Elliott discusses the subject in *S. A. L. J.*, vol. xlv (1928), p. 324.

[2] Voet, 23. 4. 2 and 4; 1 Maasdorp, p. 54.

[3] Voet, 23. 4. 10–11.

[4] Voet, 23. 4. 19; V. d. K. *Th.* 228, and 233 ff.; V. d. L. 1. 3. 4.

[5] Voet, 23. 4. 20.

Certain stipulations are not permitted.

riage;[1] (3) that donations shall be permitted or legacies not permitted between the spouses.[2] Provisions to the effect: (4) that the husband shall not change his domicil without his wife's consent;[3] and (5) that the husband shall not represent his wife in Court, but that she shall have a persona standi of her own,[4] though condemned by Voet, are allowed by Van der Kessel.[5] The last of these indeed is so far from being open to objection at the present day, that where there is exclusion of community and of the marital power, the wife has as full capacity to appear in Court, whether as plaintiff or defendant, as if no marriage had taken place.[6]

A stipulation that a wife shall share in profits but not in losses, though condemned by Grotius,[7] is in Van der Keessel's[8] opinion free from objection.

Permitted stipulations fall into certain defined classes,

To undertake a detailed discussion of the various ante-nuptial stipulations which are or may be made is beyond our scope. We shall indicate, however, the principles which govern the interpretation of such agreements, and mention the objects usually aimed at and the effect produced. So far as they are directed to the modification or exclusion of the common law they fall into well-defined groups according as the exclusion is more or less complete; and in this connexion it must be remembered that ante-nuptial contracts are strictly construed, and that the presumption is in favour of the continuance of the common law in all cases where its exclusion is not clearly expressed or implied.[9]

[1] Gr. 2. 12. 6. This only applies where the lex hac edictali is unrepealed. *Infra*, p. 95.

[2] Voet, *ubi sup.*; *Hall* v. *Hall's Trustee and Mitchell* (1884) 3 S. C. 3.

[3] Voet, *ubi sup.* and 5. 1. 101. See *Webber* v. *Webber* [1915] A. D. at p. 241. [4] Voet, *ubi sup.* and 5. 1. 14–15. [5] V. d. K. *Th.* 228.

[6] *Boyes* v. *Versigman* [1879] Buch. 229. The decision in this case is perhaps questionable, but the law is undoubted. *Infra*, p. 80.

[7] Gr. 2. 12. 9; Neostad. *de pact. antenupt.* Obs. 21 (*in notis*).

[8] V. d. K. *Th.* 249; for, as he says: creditoribus etiam nihil nocet, cum lucrum intelligi nequeat, nisi damno prius deducto.

[9] Gr. 2. 12. 11; V. d. K. *Th.* 251. Van der Linden (1. 3. 4) gives the clauses in common use in his time. See Burge, vol. iii, pp. 443 ff. (1st ed. vol. i, pp. 321 ff.).

The consequences of marriage in community have been seen to be mainly two: viz. community of goods (which extends not only to goods brought into the marriage, but also to subsequent acquisitions[1] and profits), and the marital power. Any or all of these consequences may be excluded by ante-nuptial contract. Thus the parties may:

1. Exclude (*a*) community in respect of goods brought into the marriage, leaving it unimpaired as regards (*b*) post-nuptial acquisitions, (*c*) profits and losses, and (*d*) the marital power. Such is the effect of a stipulation which does not exclude community of goods in terms, but provides that 'the goods brought into the marriage shall return to the side whence they came'.[2] Of narrower or wider extent.

2. Exclude community of goods, whether (*a*) brought into the marriage, or (*b*) after-acquired (other than 'profits'), leaving unimpaired (*c*) community of profit and loss, and (*d*) the marital power.

3. Exclude community of goods whether (*a*) brought into the marriage, or (*b*) after-acquired (not being profits), and (*c*) community of profit and loss, leaving only (*d*) the marital power.

4. Exclude all community (*a*), (*b*), and (*c*) and the marital power (*d*) as well.[3]

In speaking of the legal consequences of marriage (p. 67, *supra*) we used the phrase 'community of goods' in the In ante-nuptial contracts

[1] By 'subsequent acquisitions' is here meant 'subsequent acquisitions' not referable to the head of profits. This will be explained below.

[2] Voet, 23. 4. 46; Hoola van Nooten, vol. i, pp. 450–1.

[3] A writer in 29 *S. A. L. J.* (1912) 37 criticizes the phrase 'exclusion of the marital power', and says 'It is certain that the marital power . . . cannot be entirely excluded by an ante-nuptial contract'. The phrase, however, is now statutory (Administration of Estates Act, 1913, sec. 83 (2)), and means, I suppose, 'the marital power which the husband by law possesses over the property and the estate of his wife' (see Precedent of ante-nuptial contract, Appendix A (*infra*, p. 410), clause 5). Hoola van Nooten (vol. i, p. 453) gives a clause of similar import, viz., 'dat gemeenschap van goederen en van winst en verlies uitgesloten zal zijn, en dat de man geen recht zal hebben om de goederen van zijne vrouw te alieneeren, of te bezwaaren.'

what it does not include.

On the other hand, the term 'profits' does not include: (*a*) property which became due to one or other of the spouses before marriage;[1] (*b*) accessions (e.g. by alluvion or increased value or otherwise) to the separate property of husband or wife; (*c*) inheritances, legacies, or gifts accruing after the marriage to either spouse.[2] With regard to this last group considerable difference of opinion existed whether it fell within the definition of 'profits' or not. Most jurists answered the question in the negative.[3] Voet distinguishes according as such acquisitions are derived from strangers or from parents or relatives to whom there is a right of intestate succession. In his view, in the first case they are 'profits', in the second not so.[4] It is with regard, more especially, to such acquisitions as these that it becomes important to determine whether an ante-nuptial contract falls within the first or second of the four classes mentioned above.

Community of profit implies also community of loss, so that if either of these is named the other is taken to be implied.[5] As between themselves, indeed, the spouses may make any terms they please, e.g. to share the profits, but to throw all the losses on the husband's estate.[6] But such a clause will not avail against creditors who, where there is community of profits, are entitled, at all events, to enforce half the amount of their claim against the wife's estate.[7]

his wife. V. d. K. (*Th.* 254). Clothes are a case in point. Van Leeuwen, 4. 24. 14.

[1] Voet, 23. 4. 39; e.g. bought before marriage, delivered after marriage. V. d. K. *Th.* 254. The same rule applies to a *res litigiosa* adjudicated to one of the spouses after marriage, even though proceedings may have commenced after marriage. Voet, 23. 4. 40.

[2] Anton. Matthaeus, *Paroemiae*, no. 3 (Erfnis is geen winste); Van Leeuwen, 4. 24. 6; V. d. K. *Th.* 252.

[3] Gr. 2. 12. 11 (*ad fin.*), and Schorer ad loc.

[4] Voet, 23. 4. 43. Matthaeus (*ubi sup.*, secs. 4–7) is of the same opinion with regard to legacies, but holds that an inheritance never comes under the head of 'profit'.

[5] *Cens. For.* 1. 1. 12. 18; Voet, 23. 4. 48.

[6] Neostad, *de pact. antenupt.* Obs. 21, *in notis*; *Cens. For.* 1. 1. 12. 11; *supra*, p. 74.

[7] Ibid.

What is included under 'losses'.

The word 'losses' is no less wide in its application than the word 'profits'. Without attempting a complete enumeration of possible cases of loss, it is enough to say generally that it includes all post-nuptial donations, unless clearly in fraud of the wife, made by the husband of the common property or of the separate property of either spouse;[1] all commercial losses which do not attach to the separate property of one of the spouses only;[2] all liabilities arising out of the post-nuptial contracts of the husband,[3] and also of the wife so far as she is competent to bind her husband by her contracts.[4] But the term 'losses' does not cover the ante-nuptial debts or liabilities of either spouse,[5] nor (*semble*) liabilities arising ex delicto,[6] nor loss or deterioration of property belonging exclusively to one of the spouses;[7] nor necessary expenses of an unusual character.[8]

Various terms in

The above explanation will enable the reader to dis-

[1] Voet, 23. 2. 54. [2] Voet, 23. 4. 49. [3] V. d. K. *Th.* 93.
[4] Arntzenius, *Inst. Jur. Civ. Belg.* 2. 4. 26. [5] Voet, 23. 4. 50.

[6] In other words, the joint estate is not chargeable, as between the spouses, with pecuniary liabilities arising ex delicto. See Boel *ad* Loen., no. 103, p. 670; V. d. K. *Th.* 94 and 225, and Lorenz *ad* V. d. K. *Th.* 94; Nathan, *Common Law of S. A.*, vol. iii, pp. 1547–8. *Infra*, p. 335, n. 3. See also Sande, *Decis. Fris.* 2. 5. 8; Voet, 23. 2. 56. It is not clear that the exclusion of liability goes beyond fines, forfeitures, &c., of a penal character, and extends to what we now call torts.

[7] Voet, 23. 4. 49; V. d. K. *Th.* 257; *Vervolg op de Holl. Cons.* ii. 19 (*contra*, ibid. 33, in special circumstances); unless the loss or deterioration in question is imputable to the fault of the other spouse. Voet, 24. 3. 21. Useful and voluptuary expenses incurred by one spouse in respect of the other's property must be made good so far as the property is found at the dissolution of the marriage to have been thereby increased in value. Voet, 25. 1. 3–4; V. d. K. *Th.* 257, *non obstante* Gr. 2. 12. 15. Any excess of value over outlay is reckoned as profits and accrues to the joint account of the spouses, if community of profits is not excluded—otherwise to the husband. Voet, ibid.

[8] Impensae necessariae graviores. Voet, 25. 1. 2; V. d. K., *ubi sup.* Necessary expenses are such as are required to preserve property from depreciation. Useful expenses increase the value of the property, though their omission would not render it less valuable. Voluptuary expenses add to its amenity, but do not render it more profitable—speciem ornant non fructum augent. Voet, 25. 1. 1. 3–4; *Lechoana* v. *Cloete* [1925] A. D. at p. 547.

tinguish the effect of a clause excluding community of goods only (class 2, *supra*), and of a clause excluding both community of goods and also community of profit and loss (class 3, *supra*). The effect of a clause excluding community of goods only is that the spouses are not liable to creditors for each other's ante-nuptial debts.[1] On dissolution of marriage each of them is credited as between themselves with what he or she brought into the marriage,[2] plus subsequent acquisitions not being 'profits', plus half the net balance, if any, of profits over losses. Each of them is debited with half the net balance, if any, of losses over profits,[3] and by consequence with half the outstanding post-nuptial debts. All this as between the spouses. The creditors may, if they please, recover the whole of their claim from the husband, in which case he has the right of recourse against his wife to the extent of half. They may also, if they choose, after the husband's death recover one-half,[4] but not more, directly from the wife.

ante-nuptial contracts distinguished as regards their effects. (*a*) Exclusion of 'community of goods' only;

If during the marriage the husband has applied his wife's property in paying his own ante-nuptial debts, the money so applied constitutes as between the spouses a first charge[5] upon the net balance, if any, of profits over losses; that is to say, the wife is first credited with it, and the remainder of such balance is then divided between the spouses. The wife cannot claim repayment until all post-nuptial creditors have been fully satisfied.[6]

[1] Voet, 23. 4. 50 (because post-nuptial debts count as 'damnum', ante-nuptial not); V. d. K. *Th.* 255.

[2] Gr. 2. 12. 14; Voet, 23. 4. 31; V. d. K. *Th.* 256.

[3] Voet, 23. 4. 48.

[4] Gr. 1. 5. 22. In an action against her for such half, the plaintiff must aver and prove that the claim had been duly lodged with the person vested with the administration and distribution of the common estate and had not been satisfied. *Faure* v. *Tulbagh Divisional Council* (1890) 8 S. C. 72; and see *Sichel* v. *De Wet* (1885) 5 E. D. C. 58.

[5] Voet, 23. 4. 50. Voet says that in the absence of provision to the contrary, the wife's property may *stante matrimonio* be taken in execution for the husband's ante-nuptial debts. Van der Keessel (*Th.* 255) dissents. But if done by the husband's direction it seems to be a logical consequence of the marital power.

[6] Voet, 24. 3. 21. But she may resume such of her property as

(*b*) exclusion of community of goods and of profit and loss;

The effect of a clause excluding community both of goods and of profit and loss is that the spouses are not liable to creditors for each other's debts, ante- or post-nuptial.[1] On dissolution of the marriage each of them is credited with what he or she brought into the marriage, plus subsequent acquisitions from all sources whatever.

(*c*) exclusion of community of goods, and of profit and loss and of the marital power.

Lastly, by the exclusion of community of goods and of profit and loss and of the marital power (class 4, *supra*) a wife is, as regards her property, in the same position as if the marriage had not taken place.[2] She may contract, and, according to modern practice, sue and be sued in her own name. If the husband has alienated her property without her consent she may vindicate it from the alienee.[3] But if notwithstanding the ante-nuptial contract the wife

exists *in specie* on the dissolution of the marriage, subject to the obligation of satisfying creditors *pro semisse*. Neostad. *de pact. antenupt.*, Obs. 9, note A; and the husband is not entitled to deduct expenses. Van Leeuwen, 4. 24. 13.

[1] Except that the wife is liable even *soluto matrimonio* to creditors *pro semisse* in respect of debts for household expenses (Voet, 23. 4. 52; Van Leeuwen, 4. 24. 3; Neostad. *de pact. antenupt.*, Obs. 9, note (d)) with a right of *regressus* against the husband. V. d. K. *Th.* 99.

[2] Sometimes this is expressed. So in *Ruperti's Trustees* v. *Ruperti* (1885) 4 S. C. 22, the wife reserved to herself free control over her property 'as fully and effectually as if no marriage had taken place'. In *Salz* v. *Waiggowsky* [1919] W. L. D. 90, the Court dissenting from *Steytler* v. *Dekkers* (1872) 2 Roscoe at p. 108; *ex parte Van Blommestein* [1907] T. H. 2; and *ex parte Kerr* [1911] O. P. D. 12, took the view that such words do not necessarily exclude the marital power. But that it can be excluded by apt words is undoubted.

[3] Voet, 23. 4. 21 and 23. 5. 7. Groenewegen (*de leg. abr. ad* Cod. 5. 12. 30) says that the effect is the same when the ante-nuptial contract excludes all community, reserves to the wife her *dos*, and in addition forbids alienation by the husband. Van Leeuwen, however (4. 24. 4), says that in the absence of judicial interdiction (Gr. 1. 5. 24) the alienation of the wife's property by the husband, notwithstanding the stipulation to the contrary, will hold good as regards third parties, saving to the wife an action against the husband or his heirs. Van der Keessel (*Th.* 97–8) lays down the same rule as regards the alienation of movables or of bonds to bearer, but not as regards immovables. If Van Leeuwen is right, no ante-nuptial pact can exclude the husband's power of administration and of alienation, so far as concerns third parties. *Ontwerp*, art. 349, is to the same effect. But in the modern law it is otherwise. *Mostert's Trustees* v. *Mostert* (1885) 4 S. C. 35.

has suffered her husband to alienate her property, she may sue him in respect of it, and prove against his estate in concurrence with, but not in preference to, other unsecured creditors.[1]

The wife, generally, is not preferred to the husband's creditors;

From what has been said it is evident that, ante-nuptial contracts notwithstanding, a wife, generally, stands in no position of advantage with regard to her husband's creditors, but rather the reverse. In this respect she is not so well situated as she was under the late Roman Law, which gave her a tacit hypothec over all the property of her husband in security of her dos, and a preference over all creditors, ante- and post-nuptial, secured and unsecured, alike.[2] In the Roman-Dutch Law the right of tacit hypothec and preference is as a rule inapplicable.[3] It is competent, however, by express stipulation to provide that the wife 'shall reserve to herself the right of dos, legal hypothec,[4] and preference', but only provided that she shares neither in community of goods nor of profit and loss.[5] The same result follows, without express agreement in that behalf, when, in addition to the exclusion of community, there is either: (*a*) exclusion of profit and loss together with a clause that the wife shall keep her own goods (*dat de vrouw haare goederen zal behouden; ut mulier dotem salvam habeat*);[6] or (*b*) an option left to the wife whether she will share in profit and loss, or have her own goods back,[7]

but in certain cases has right of preference and legal hypothec.

[1] Maasdorp, p. 59. [2] Cod. 8. 17 (18). 12.

[3] Voet, 20. 2. 20.

[4] V. d. L. 1. 3. 4. It seems that in R.-D. L., contrary to the Roman Law, the wife's legal hypothec was in every case postponed to prior tacit or special conventional mortgages. Van Leeuwen, 4. 13. 14; *Cens. For.* 1. 1. 12. 3; Voet, 20. 2. 20 and 23. 4. 52. According to Van Leeuwen (*ubi sup.*), she comes in concurrently with other special and legal hypothecs; by which he means, as the context shows, that she ranks with them in order of time. Qui prior est tempore potior est jure. But V. d. K. (*Th.* 263) insists that she is preferred to all creditors, ante- and post-nuptial alike.

[5] Groen. *de leg. abr. ad* Cod. 5. 12. 30; Van Leeuwen, 4. 13. 14; *Cens. For.* 1. 1. 12. 2; V. d. L. 1. 3. 4.

[6] Voet, 23. 4. 52; V. d. K. *Th.* 247.

[7] Gr. 2. 12. 10; Voet, 23. 4. 53; Neostad, *de pact. antenupt.*, Obs. 9; Groen. *ubi sup.*; V. d. K. *Th.* 250.

which option she has exercised[1] so as to exclude community; or (*c*) a clause prohibiting the husband from alienating property brought into the marriage by the wife, and the husband has nevertheless alienated the property, or part of it, without her knowledge and consent.[2] In the last case she will also, it seems, be able to vindicate her property in the hands of third parties to whom the husband has made it over.[3] But if the wife, having retained and reserved the possession and administration of her own property, knowingly allows her husband to deal with it, she will lose her hypothec and preference over creditors, just as if she had renounced these rights by a contrary stipulation.[4]

Ante-nuptial contracts sometimes serve the purpose of marriage settlements.

The ante-nuptial pacts above described have all been directed to the exclusion or modification of the common law consequences of marriage.[5] It remains to speak of stipulations of another kind, namely, those which may be generically described as 'settlements'. Under this head may be included: (1) gifts made to one or other of the spouses, but more especially to the wife, either by the husband or by some third party, and taking effect immediately upon the conclusion of the marriage; (2) contracts whereby the wife or husband is to receive something by

[1] After the dissolution of the marriage, or even *stante matrimonio*. V. d. K. *Th.* 250.

[2] Van Leeuwen, 4. 13. 14.

[3] Voet, 23. 4. 21 and 50. This consequence does not follow from a clause merely securing the wife's property to herself. De Haas *ad Cens. For.* 1. 1. 12. 5; Groen. *de leg. abr. ad* Cod. 5. 12. 30. But where there is exclusion of profit and loss such a clause gives her a tacit hypothec and preference over post-nuptial creditors. Groen. loc. cit.; V. d. K. *Dictat. ad* Gr. 2. 12. 9. According to Van Leeuwen (4. 24. 4 and *Cens. For.* 1. 1. 12. 6), even a prohibition of alienation by the husband will not entitle the wife to recover the property from third parties unless the prohibition has been publicly proclaimed (openbaarlyk afgekondigt). But to-day registration is equally effectual.

[4] Van Leeuwen, 4. 13. 14; *Mostert's Trustees* v. *Mostert* (1885) 4 S. C. 35.

[5] Before passing to another part of the subject it may be well to warn the reader that every ante-nuptial contract raises its own problem of construction. The rules stated in the text must not be supposed to be inflexible.

way of gift at some future date, usually upon the death of the other spouse; (3) provisions regulating the devolution of the property brought into the marriage (or part of it) upon the dissolution of the marriage by death.

Morgengave.

To gifts of the first kind the old Dutch Law gave the name of 'morgengave', a term applied originally to a gift by the husband to the wife on the morning after marriage.[1] A provision which took effect only on the death of the husband or wife was known as 'douarie'.[2] *Prima facie* there is no legal objection to any such settlement. The ante-nuptial pact which creates it is, at all events, binding upon the spouses. If made by third parties to either spouse, or by the wife to the husband, or by the husband so as to confer rights on the issue of the marriage, it would by the Dutch common law be good against creditors. But when a husband made a gift or promised a douarie to his wife the law was otherwise; for by express statutory enactment her claim in this regard was only allowed to take effect when her husband's creditors had been fully satisfied. The law on this subject was contained in the Perpetual Edict of Charles V of October 4, 1540, Art. 6, which runs as follows:[3]

Provisions of the Perpetual Edict of October 4, 1540, Art. 6.

'*Item*, whereas many merchants take upon themselves to constitute in favour of their wives large dowers and excessive gifts and profit on their goods, as well in order to contract a marriage as to secure their goods with their aforesaid wives and children, and thereafter are found unable to pay and satisfy their creditors, and wish their wives and widows to be preferred before all creditors, to the great injury of the course of commerce: We will and ordain that the aforesaid wives, who henceforth shall contract marriage with merchants shall not pretend to, have, or receive any dowry (*douarie*) or other profit on the goods of their husbands, or take part or portion in the profits made by the said husbands or during their

[1] Wessels, *Hist. R.-D. L.*, p. 463. Boey (*Woordentolk*) says: 'Morgengaav is een gift die de Bruidegom aan de Bruid gewoon is te doen des anderen daags naa 't voltrokke huwelyk als een belooning van haer Maagdom.' V. d. K. *Th.* 258.

[2] V. d. K. *Th.* 259; V. d. L. 1. 3. 4; Wessels, *ubi sup.*

[3] 1 G. P. B. 316.

marriage [*sic*], although they may have been inherited or given in feud,[1] until such time as all the creditors of their aforesaid husbands shall have been paid or satisfied; whom we will in this matter to be preferred before the aforesaid wives and widows, saving to the latter their right of preference, to which they are entitled by reason of their marriage portion brought by them into the marriage or given to them or coming to them by succession from their friends and relatives.'[2]

Its effect.

The effect of the Placaat was: (1) that no ante-nuptial contract could secure to a wife any property of the husband in competition with creditors; but (2) that, if she was content, by ante-nuptial contract, to forgo all advantage from the husband's estate, she might keep her own property secure and unimpaired and further enjoy in respect of it a preference over creditors and a tacit hypothec over her husband's goods. But she could not have it both ways. If she claimed to benefit financially by the marriage, she must also take her full share in its burdens. In order to secure her property against creditors it was necessary that she should be content to keep her estate entirely distinct from that of her husband.

It must be observed that though the Placaat speaks expressly of 'merchants', it was never held to be so limited in its application.[3]

If the practice before the passing of this measure operated in prejudice of creditors, the enactment has in modern times been thought to be unduly oppressive to married women.[4] Accordingly, the law was in some of the colonies altered by legislation in the direction of securing the validity of settlements. Thus in the Cape Colony the sixth article of the Perpetual Edict was repealed by Act 21 of 1875, which substituted other provisions in its place.[5] It is now withdrawn from operation

Legislation on marriage settlements in South Africa.

[1] Al waer 't soo dat sy ghe-erft oft beleent waren.

[2] See *In re Insolvent Estate Chiappini* [1869] Buch. 143, where the Dutch text is given.

[3] V. d. K. *Th.* 262.

[4] Wessels, *Hist. R.-D. L.*, p. 464.

[5] It was repealed in O. F. S. by Law No. 23 of 1899, sec. 4, but remained in force in the Transvaal and Natal. Declared to have no operation in Ceylon by Ord. No. 15 of 1876, sec. 23.

in all the Provinces of the Union by sec. 1 of the Insolvency Act No. 32 of 1936, and the following provisions are substituted:

Sec. 35. No immediate benefit under a duly registered ante-nuptial contract given in good faith by a person to his wife or any child to be born of the marriage shall be liable to be set aside as a disposition without value, unless the sequestration of his estate took place within two years of the registration of that ante-nuptial contract.

An "immediate benefit" shall mean a benefit given by transfer, conveyance, delivery, payment, cession, pledge, or special mortgage of property completed within the three months immediately after the date of the marriage."

Sec. 36 (2) excludes from a man's insolvent estate any policy or policies of life insurance, not being an immediate benefit as above defined, which a person before or during marriage has in good faith effected in favour of or ceded to or for the benefit of his wife or child or both, at any time more than two years before the sequestration of his estate, for not beyond the amount of two thousand pounds, together with any bonus claimable in respect thereof."

Stipulations with regard to rights of succession upon death.

Closely akin with, and sometimes indistinguishable from, the settlements described in the preceding paragraphs are pacts relating to future succession.[1] These, as pointed out by Voet, may relate either: (1) to the succession of the spouses to each other;[2] or (2) to the succession of a third party to the spouses;[3] or (3) to the succession to the children of the marriage (particularly in the event

[1] See Mars, *The Law of Insolvency*, pp. 107 ff.

[2] See also the *Insurance Act, no. 27 of 1923*, secs. 23 ff. and *S. A. L. J.*, vol. xlv (1928), p. 190, where the effect of these statutes is considered.

[3] Voet, 23. 4. 57 (sec. 58 in the Paris ed. In the folio ed. sec. 57 is duplicated).

[4] V. d. K. *Th.* 236–8.

[5] V. d. K. *Th.* 239–40.

of their dying in childhood and therefore intestate);[1] or (4) to the succession to a third person who has become a party to the ante-nuptial contract.[2] Such agreements, though condemned by the policy of the Roman Law, were permitted by the law of Holland, if they formed part of an ante-nuptial settlement,[3] but not of any other act *inter vivos*.[4]

Can ante-nuptial contracts be revoked or modified by the parties?

This brings us to another topic. How far, if at all, can ante-nuptial contracts be revoked or modified by the subsequent act of one or more of the parties? By act *inter vivos* they cannot be altered at all;[5] by testament, within limits, they may, provided such an intention is clearly expressed or implied by the will.[6] Of course, if property has been contributed to the marriage by a parent or other third party with an added provision that it is to revert to the giver or to go over to another specified person, it cannot be affected by the testamentary dispositions of the spouses.[7] When the question relates to property brought into the marriage by the spouses, and the

[1] V. d. K. *Th.* 241–3.
[2] V. d. K. *Th.* 244–6.
[3] Voet, 2. 14. 16.
[4] Voet, 23. 4. 59 (60).
[5] Neostad. *de pact. antenupt.*, Obs. 4 (*in notis*); Voet, *ubi sup.*; V. d. K. *Th.* 264. *Ex parte Smuts* [1914] C. P. D. at p. 1037; *Union Govt.* (*Minister of Finance*) v. *Larkan* [1916] A. D. at p. 224 per Innes C.J. Note, however, that 'the authorities do not lay down that upon good cause being shown the parties cannot obtain an alteration or revocation of their ante-nuptial contract through a judgment of the Court. . . . Ante-nuptial contracts are not so irrevocable that their provisions cannot upon just grounds appearing to the Court be by it annulled or departed from.' *Ex parte Smuts, ubi sup.*; *Ex parte Craggs* [1915] T. P. D. 385; *ex parte De Wet* [1921] C. P. D. 812; *Ex parte Williams* [1924] E. D. L. 325; *Ex parte Baard* [1926] C. P. D. 201; *Ex parte Bennet* [1926] C. P. D. 436; *Ex parte Mouton* [1929] T. P. D. 406; *Ex parte Coetzee* O. P. D. (1930) 15 P. H., B. 5. But see *Ex parte Balsillie* [1928] C. P. D. 218; *Ex parte Sills* [1928] E. D. L. 278.

The Law of Natal, differing herein from that of the other Provinces of the Union, allows the spouses to depart from the community by post-nuptial contract duly executed and registered (Law No. 22 of 1863, sec. 7, as explained and extended by Law 14 of 1882). *Buller N. O.* v. *Linder* [1925] N. P. D. 9.

[6] Voet, 23. 4. 60 (61); *Holl. Cons.* iii (2). 185 (Grotius).
[7] Voet, 23. 4. 61 (62). *Secus* if it is merely to revert 'to the side whence it came'.

ante-nuptial contract has provided for the succession of one to the other, alteration or revocation by will is permitted, but it must be a mutual will of the two spouses. Further, such a will is merely 'ambulatory' in effect, i.e. revocable at any time before death. Therefore, either spouse may by a subsequent will, without the concurrence or even knowledge of the other, revoke so much of the joint will as concerns himself or herself alone and revert to the dispositions contained in the original contract. Indeed, even after the death of the first spouse, the survivor has the same right of repudiating the joint testament, conditionally, however, upon declining all benefit under it.[1] When the spouses have by ante-nuptial contract provided that some third person or persons shall succeed to the several shares on the dissolution of the marriage, both spouses by mutual will or either spouse by his or her separate will may freely depart from this agreement.[2] But the law is otherwise if the intended successor was a party to the ante-nuptial contract and acquired a contractual right under it.[3] When the future succession to children was the subject of the ante-nuptial pact, in Holland not only might the spouses (or the survivor of them) alter the arrangement by testament, but the children, having reached the age of testamentary capacity, might do the like after their parents' death. They might also freely alienate the property by act *inter*

Only by mutual will.

[1] Voet, 23. 4. 62 (63); Van Leeuwen, 4. 24. 12; V. d. K. *Th.* 265; Bijnk. *O. T.* i. 341; *Vervolg op de Holl. Cons.* ii. 80.

[2] Voet, 23. 4. 63 (64). *Infra*, p. 386. Note the distinction between this case, and the case mentioned above, providing for the succession of the spouses *inter se*. This is binding as a contract, revocable only by mutual will. But a clause providing for the succession of a third party has merely the effect of a testamentary disposition, and 'omnis voluntas de successione, qualiscunque tandem sit ambulatoria esse debet usque ad vitae supremum exitum' (Dig. 34. 4. 4), *Holl. Cons. ubi sup.*, 'cum in ordinandis successionibus pacti non sit major vis quam testamenti', Bijnk. *O. T.*, *ubi sup.*

[3] Voet, 23. 4. 64 (65). A tendency has recently developed to regard the intended successors, e.g. children, born or unborn, as acquiring rights as beneficiaries of a *stipulatio alteri*. *Ex parte Balsillie* [1928] C. P. D. 218; *Ex parte Sills* [1928] E. D. C. 278. This is a novel doctrine, which may have far-reaching consequences.

vivos. This must be understood, of course, only where there was no fidei-commissum in favour of ulterior successors.[1] When a third person has become a party to the contract and has undertaken to leave his own property in a particular way, such undertaking has the force of a contract, and can only be revoked with the consent of the other parties to the agreement.[2]

With this we leave the subject of ante-nuptial contracts, referring the reader for fuller information to Voet's title 23. 4 (*de pactis dotalibus*) and to the other works in which this topic is fully considered.[3]

Section 5.—Dissolution of Marriage

Divorce a vinculo matrimonii.

Divorce a vinculo matrimonii is decreed by the Court at the suit of a plaintiff of either sex on the ground of: (1) adultery;[4] or (2) malicious desertion;[5] to which some

[1] Gr. 2. 29. 3; Voet, 23. 4. 66 (67).

[2] Voet, 23. 4. 67 (68).

[3] See particularly Neostadius, *Observationes rerum judicatarum de pactis antenuptialibus*.

[4] Gr. 1. 5. 18; Van Leeuwen, 1. 15. 1; Voet. 24. 2. 5.

[5] Voet, 24. 2. 9; *Webber* v. *Webber* [1915] A. D. 239. The practice is to make an order for restitution of conjugal rights, failing which for a divorce (Cape Rules of Court, 371, Ingram and De Villiers, *Rules of Court*, p. 98). No Court has power to dispense with the preliminary order (*Aldred* v. *Aldred* [1929] A. D. 356); and the order will be made even though defendant is detained in prison or in an inebriate reformatory (*Coningsby* v. *Coningsby* [1923] C. P. D. 443; *Van der Nest* v. *Van der Nest* [1925] W. L. D. 12; *Sauerman* v. *Sauerman* [1928] C. P. D. 20); but will not necessarily be followed by a decree of divorce (*Hayes* v. *Hayes* [1928] T. P. D. 618). A statement by a plaintiff, who asks for an order of restitution that even if the defendant complies with the order he [she] will not receive back, or go back to, the defendant is not in itself a ground for refusing the order. It is a case in which the Court will exercise its discretion. *Mitchell* v. *Mitchell* [1922] C. P. D. 435; *Van Rooyen* v. *Van Rooyen* [1927] C. P. D. 266; *Murchie* v. *Murchie* [1923] S. R. 116. As to malicious desertion in general see *S. A. L. J.*, vol. xli (1924), p. 38. As to what has been termed constructive desertion, i.e. conduct on the part of either spouse compelling the other to go away, see *S. A. L. J.*, vol. xliv (1927), p. 32; *Van Heerden* v. *Van Heerden* [1925] E. D. L. 223; *Whelan* v. *Whelan* [1925] W. L. D. 162; *Solomon* v. *Solomon* [1927] W. L. D. 330; *Pape* v. *Pape* [1928] W. L. D. 140; *Husband* v. *Wife* [1923] N. P. D. 172 (refusal to cohabit). In Natal by Law 13 of 1883, sec. 1, a petition for divorce is not maintainable until desertion has

authorities, by an extensive interpretation, add (3) sodomy;[1] and (4) perpetual imprisonment.[2] Relief, in the discretion of the court, may be, and usually is, refused on the ground of: (*a*) adultery on the part of the plaintiff;[3] (*b*) condonation;[4] (*c*) collusion or connivance.[5]

The guilty party to a divorce is penalized by loss of all the advantages of the marriage, whether arising from community of goods or from ante-nuptial contract.[6] The innocent spouse is as a general rule entitled to the custody of the minor children of the marriage, but the Court has a wide discretion and may grant the custody to the guilty party, if the welfare of the children requires it.[7]

Divorced persons are free to marry again, subject only to statutory restrictions with regard to marriage with a divorced wife's sister and a divorced husband's brother.[8]

Judicial separation a mensa et thoro is decreed by the Separation

continued uninterruptedly for eighteen months. *Breeds* v. *Breeds* [1929] N. L. D. 122; and there are other peculiarities in the Divorce Law of this Province. *Mitchell* v. *Mitchell, ubi sup.* at pp. 443–4.

[1] Schorer *ad* Gr. *ubi sup.*; V. d. K. *Th.* 88; V. d. L. 1. 3. 9; *McGill* v. *McGill* [1926] N. P. D. 398.

[2] V. d. K. *Th.* 89; V. d. L. loc. cit.; *Jooste* v. *Jooste* (1907) 24 S. C. 329; but not on the ground of an indeterminate sentence (*Voeges* v. *Voeges* [1922] T. P. D. 299), or of a sentence of ten years' imprisonment, five years of which had expired. *In re Gibson* [1912] N. P. D. 204, where see comment on *Jooste's* case; not on the ground of incurable insanity. *Ex parte Malan* [1920] C. P. D. 275.

[3] Voet, 24. 2. 6; *Williams* v. *Williams* [1929] E. D. L. 255.

[4] *Rowe* v. *Rowe* [1922] W. L. D. 43.

[5] 1 Maasdorp, p. 90; *Hasler* v. *Hasler* (1896) 13 S. C. 377.

[6] Van Leeuwen, 4. 24. 10; V. d. K. *Th.* 88; including all benefits already derived or to be derived from the marriage by the guilty party. *Wessels* v. *Wessels* (1895) 12 S. C. at p. 470; *Murison* v. *Murison* [1930] A. D. 157. The Court will not deprive the guilty party of the share of the joint estate which he or she may have contributed. *Celliers* v. *Celliers* [1904] T. S. 926. (Ceylon) *De Silva* v. *De Silva* (1925) 27 N. L. R. 289. Is an innocent wife who obtains a decree of divorce entitled to maintenance? *Barnett* v. *Barnett* [1917] E. D. L. 218; *Clausen* v. *Clausen* [1919] C. P. D. 13; *Miller* v. *Miller* [1925] E. D. L. 120; *Schultz* v. *Schultz* [1928] O. P. D. 155; *Taylor* v. *Taylor* [1928] W. L. D. 215.

[7] *Cronje* v. *Cronje* [1907] T. S. 871; *Klass* v. *Klass* [1924] W. L. D. 136.

[8] *Infra*, pp. 417–18. As to custody of children in case of divorce see Van Leeuwen, 1. 15. 6.

a mensa et thoro.

Court on the ground of cruelty or for other cause rendering continued cohabitation dangerous or intolerable.[1] The result is to relieve the parties from the personal consequences of marriage, but not to dissolve the marriage tie. As regards the effect of such a decree upon the proprietary rights of the spouses the Dutch authorities are by no means agreed.[2] In the modern practice the matter is very much in the discretion of the Court. An order is usually made, if asked for, directing a division of the common estate,[3] or a rescission of any ante-nuptial promise which the innocent spouse may have made of a gift to take effect on his or her death, or at some other future date, conditionally, however, on renunciation by the innocent spouse of any corresponding advantage.[4] The effect of such an order is to suspend the community, and to free each spouse from liability for the other's debts subsequently contracted.[5] Further, in the event of the husband's insolvency the wife ranks as a preferred

[1] Gr. 1. 5. 20; Van Leeuwen, 1. 15. 3; Voet, 24. 2. 16; V. d. L. *ubi sup.*; *Wentzel* v. *Wentzel* [1913] A. D. 55; *Theron* v. *Theron* (pre-nuptial misconduct of such a character as to render cohabitation unbearable) [1924] A. D. 244; *Pollock* v. *Pollock* [1928] W. L. D. 16; *Ainsbury* v. *Ainsbury* [1929] A. D. 109. Malicious desertion is a ground for granting judicial separation. Contrary to the practice when divorce is claimed on this ground, the decree may be granted absolutely, without a preliminary order for the restitution of conjugal rights. *Johnstone* v. *Johnstone* [1917] A. D. 292; *Aldred* v. *Aldred* [1929] A. D. 356.

[2] Schorer *ad* Gr. 1. 5. 20; Voet, 24. 2. 17; V. d. K. *Th.* 90; Voet, 24. 2. 18; and for South African Law, 1 Maasdorp, p. 82.

[3] But see *Gerike* v. *Gerike* (1900) 14 E. D. C. 113; *Swart* v. *Swart* [1924] N. P. D. 104.

[4] *Wessels* v. *Wessels* (1895) 12 S. C. at p. 469; 1 Maasdorp, p. 84. The principle is that forfeiture will be decreed of benefits not yet accrued, but not of benefits already accrued, *Muller* v. *Muller* [1929] W. L. D. 161; even though the contract has provided for forfeiture of all benefits in the event of the spouses becoming separated or living apart. *Gordon* v. *Gordon* [1929] W. L. D. 165.

[5] 'A decree [of judicial separation] leaves it open to the parties to be again reconciled and live together as husband and wife, and even where a division of goods owned in community is decreed, the community of goods is not dissolved or intended to be entirely dissolved.' Per de Villiers C.J., *Neale* v. *Neale* (1903) 20 S. C. 198; *Levin* v. *Levin* [1911] C. P. D. 1026; *Vincent* v. *Vincent* [1914] A. D. 379.

creditor for half of the common estate.[1] A decree of alimony to the wife lies in the discretion of the Court.[2]

An order for judicial separation is frequently made in terms of a consent paper, to which the spouses are parties. But a decree will not be granted unless there is some evidence before the Court to satisfy it that there are adequate grounds for the separation.[3] An extra-judicial agreement for separation may be binding upon the spouses and their representatives, but is utterly ineffectual against creditors or other third parties,[4] and will not be valid even between the spouses if it amounts to a donation between them, or is given in circumstances which the Court would not recognize as sufficient to ground a decree in an action for judicial separation.[5]

Decree of nullity of marriage.

A decree of nullity of marriage[6] is granted: (1) when the parties have married within the prohibited degrees; (2) at the suit of a parent when minors have married without the necessary consent; (3) in case of impotency existing antecedently[7] to the marriage; (4) in case of

[1] *Luzmoor* v. *Luzmoor* [1905] T. H. 74. 'To ascertain what this half share amounts to, the debts of the common estate up to the date of the order of the Court must, of course, be first deducted, and she will be entitled to half of what remains.' Per Smith J.

[2] Voet, 24. 4. 18.

[3] *Du Preez* v. *Du Preez* (1901) 18 S. C. 438.

[4] *Ziedeman* v. *Ziedeman* (1838) 1 Menz. 238; R. C. Elliott, *Notarial Deeds of Separation between husband and wife, S. A. L. J.*, vol. xlvi (1929), p. 145.

[5] *Albertus* v. *Albertus' Exors.* (1859) 3 Searle, 202; *Rovatti* v. *Rovatti* (1905) 22 S. C. 583. The second qualification was not admitted in *Pugh* v. *Pugh* [1910] T. S. 792. It is important to note that the *willige boedelscheiding* mentioned by Grotius (3. 21. 11) operates only within the limits stated in the text. Except in Natal (*supra*, p. 86, n. 5) an effective exclusion of community by post-nuptial agreement, unconfirmed by judicial degree, is a legal impossibility. Van der Keessel in his comment on Grotius (loc. cit.) observes: Haec doctrina prudenter intelligenda est, nam procul dubio stante matrimonio non potest a communione statutaria pacto recedi. Si tamen ob justam causam, auctoritate judicis, fiat separatio thori et mensae, potest nunc iniri conventio et a judice confirmari de bonis quoque inter conjuges dividendis et ita etiam docet Bynkershoek, *Quaest. Jur. Priv.* lib. II, cap. ix, p. 275.

[6] Voet, 24. 2. 15.

[7] Van Leeuwen, 1. 15. 5; Voet, 24. 2. 16; *Wells* v. *Dean-Willcocks*

ante-nuptial stuprum followed by pregnancy of the wife, existing at the time of marriage, unknown to the husband at the time of marriage, and not subsequently condoned;[1] (5) in case of insanity;[2] (6) on the ground of mistake as to the nature of the ceremony.[3]

Section 6.—Miscellaneous Matters relating to Marriage

Miscellaneous matters relating to marriage:

In this section we shall deal with various matters relating to marriage, but not specially connected with one another. These are: (A) Donations between the spouses; (B) Boedelhouderschap, and continuation of community after the death of one spouse; (C) Second marriages.

A. Donations between spouses.

(A) *Donations between the spouses.* In the Roman Law such gifts were prohibited by custom,[4] and were regulated by a Senatus Consultum passed on the proposition of Antoninus (Caracalla) in the year A.D. 206.[5] The rule passed into the Roman-Dutch Law.[6] It follows that a spouse donee has no dominium and cannot give a valid title to third parties. But the prohibition must not be

[1924] C. P. D. 89; *Van Rensburg* v. *Van Rensburg* [1929] E. D. L. 284; refusal to consummate; *Burgers* v. *Knight* [1916] N. P. D. 399.

[1] Voet, 24. 2. 15; *Horak* v. *Horak* (1860) 3 Searle 389; *Reyneke* v. *Reyneke* [1927] O. P. D. 130; *Stander* v. *Stander* [1929] A. D. 349. *Supra*, p. 32.

[2] *Prinsloo's Curators bonis* v. *Crafford and Prinsloo* [1905] T. S. 669; *Vermaak* v. *Vermaak* [1929] O. P. D. 13.

[3] *Benjamin* v. *Salkinder* (1908) 25 S. C. 512; *Rubens* v. *Rubens* (1909) 26 S. C. 617.

[4] Dig. 24. 1. 1.

[5] Dig. 24. 1. 32. pr. As to the effect of this S. C. see Roby, *Roman Private Law*, vol. i, pp. 159 ff.

[6] Gr. 3. 2. 9; Van Leeuwen, 4. 24. 14; Voet, 24. 1. 17; V. d. K. *Th.* 486; *Hall* v. *Hall's Trustee & Mitchell* (1884) 3 S. C. 3; *Van der Byl's Assignees* v. *Van der Byl* (1886) 5 S. C. at p. 176; *Coulthard* v. *Coulthard* [1922] W. L. D. 13; *Henley's Trustee* v. *Henley* [1926] N. P. D. 119. But there is no rule of law prohibiting contracts between husband and wife not amounting to donations. *Ziedeman* v. *Ziedeman* (1838) 1 Menz. 238; *Albertus* v. *Albertus' Exors.* (1859) 3 Searle 202. See 'The Validity of pacts between husband and wife' by Prof. H. D. J. Bodenstein, *S. A. L. J.*, vol. xxxiv (1917), p. 11 (commented upon, *S. A. L. J.*, vol. xlvi (1929), p. 149). Donations between spouses are permitted in Ceylon.

harshly and unreasonably construed so as to apply to simple offices of affection;[1] and any gift between spouses, if validly executed, is confirmed by the death of the donor.[2] Once a donation is confirmed, the donee acquires the right to keep the gift if it has been transferred, or to demand it, if it has not. The gift may be revoked, and is *ipso jure* void if the donee predeceases the donor.

B. Boedelhouderschap.

(B) *Boedelhouderschap*. In Holland the community which existed between the spouses (or would have existed if the common law had not been excluded) was, in some cases, continued (or called into existence) between a surviving spouse and the heirs of the deceased. This result might be effected: (1) (under a local custom or statute) by the ante-nuptial contract or mutual testament of the spouses or by the separate will of the deceased spouse,[3] in which the survivor was appointed executor of the will and administrator of the joint estate during the minority of the children (there must be an express direction in the will that the community was to continue, or come into existence); (2) by operation of law. This took place in one case only: viz. 'if the surviving father or mother, being at the same time guardian of the children, fails to draw up an inventory or make them an assignment or buy out their interest (noch aan dezelven bewijs, vertigting of uitkoop[4] doet). The consequence is that the community of goods continues between the survivor and the children, and to the advantage of the latter, who enjoy the half of all the profits that accrue to the estate after the death of their deceased parent, but not to their prejudice, inasmuch as all losses are borne

[1] Dig. 24. 1. 28. 2, non amare nec tanquam inter infestos jus prohibitae donationis tractandum est, sed ut inter conjunctos maximo affectu et solam inopiam timentes; Voet, 24. 1. 11; *Wagenaar* v. *Wagenaar* [1928] W. L. D. 306.

[2] Dig. 24. 1. 32. 2; Cod. 5. 16. 1; Voet, 24. 1. 4; provided that the estate of the donor is not then insolvent. Voet. 24. 1. 6. For exceptions to the rule prohibiting donations between spouses see 1 Maasdorp, p. 35.

[3] Voet, 24. 3. 28; V. d. K. *Th.* 269.

[4] See *Vermaak's Exor.* v. *Vermaak's Heirs* [1909] T. S. 679.

by the surviving parent.' So the law is stated by Van der Linden, who adds: 'At least this rule applies when local statutes have not provided differently on this point'.[1] Van der Keessel, however,[2] regards this penal and one-sided community as resting, in every case where it occurs, on local custom only, and, in accordance with a principle laid down by himself in an earlier Thesis, takes Grotius to task for inferring a rule of common or general law from a number of particular instances of merely local application.[3] However this may be, it appears from the above authors as well as from Grotius, Schorer, and Bynkershoek,[4] that when the community continued at the desire of the parties concerned, viz. by ante-nuptial contract or by will, it continued for all purposes, or at all events for the purpose of profit and loss; and that the one-sided community above described arose not by act of party, but *ipso jure*, i.e. only when the survivor, being under a duty to do so, neglected to make an inventory or to assign to the children their share of the joint estate. Finally, it is to be observed that, where boedelhouderschap existed, it was not determined by the remarriage of the surviving spouse.[5] This gave rise to difficult questions as to the respective shares, when the community eventually determined, of the children of the first marriage, the remarrying parent, and the second wife (or husband). For the resolution of these problems the reader is referred to Van der Keessel, *Theses*, 273–6. In South Africa, however, such difficulties can scarcely arise, in consequence of the statutory provisions to be mentioned presently. In the modern law there is nothing to prevent

[1] V. d. L. 1. 5. 4. See also Van Leeuwen (4. 23. 7), who says that the law 'has been introduced in favour of the innocence of young children, and as a punishment of careless parents'.

[2] Following Voet, 24. 3. 28.

[3] V. d. K. *Th.* 270–1.

[4] Gr. 2. 13. 2–3; and Schorer ad loc.; Bijnkershoek, *Quaest. Jur. Priv.*, lib. III, cap. x; Voet, 24. 3. 36; *Vervolg op de Holl. Cons.* ii. 78. 79; *Natal Bank, Ltd.* v. *Rood* [1910] A. C. 570; [1910] T. S. 1360; in appeal from the Transvaal S. C. [1909] T. S. 243.

[5] Van Leeuwen, 4. 23. 8.

the constitution of a boedelhouderschap by ante-nuptial contract or by will with the consequences which it implied in the old law, but the penal boedelhouderschap of the Dutch Law is unknown.[1] In no event does the continued community extend to acquisitions accruing to the children by gift, legacy, or inheritance.[2]

C. Second marriages.

(C) *Second marriages.* In the Roman Law second marriages entailed numerous penalties, which, says Van der Linden, have not been adopted by us.[3] He excepts from this statement lex 6 of the relevant title in the Code, which is called from its opening words the *Lex hac edictali*.[4] It is an enactment of Leo and Anthemius of the year A.D. 472, and provides that no man or woman who remarries, having children by a former marriage, may by gift *inter vivos* or by will settle on the second spouse more than the amount of the smallest portion bequeathed to any of the children of the former marriage.[5] A gift contrary to this law is void to the extent of the excess, and the excess must be equally divided amongst the children of the prior marriage or marriages alone.

This well-known enactment need not detain us further, since in the Roman-Dutch Colonies it has either never been received or has been repealed by statute.[6]

[1] *Cloete* v. *Cloete's Trustees* (1887) 5 S. C. 59; *Natal Bank Ltd.* v. *Rood's Heirs* [1909] T. S. at pp. 258–9; [1910] A. C. at p. 583, [1910] T. P. D. at p. 1365. For Natal see *Est. N. G. Wilson* v. *Est. L. J. Wilson* (1909) N. P. D. 447.

[2] V. d. K. *Th.* 269. Judge Morice in his translation of Van der Linden, *Institutes of the Laws of Holland* (2nd ed.), p. 49, points out that 'In South Africa *boedelhouding* has come to have a different meaning from that described by Van der Linden. A surviving spouse, whom the first dying spouse has appointed guardian of the children and administrator (or manager) of the joint estate during the minority of the children, is called a *boedelhouder*.' This does not necessarily imply any continuation of community.

[3] V. d. L. 1. 3. 10; and see Bijnk. *O. T.* i. 325.

[4] Cod. 5. 9. 6 (*de secundis nuptiis*).

[5] Van Leeuwen, 4. 24. 8. In the Dutch law the permitted portion was termed *filiale portie* (or *kindsgedeelte*). Boey, *Woordentolk*, *sub voce*.

[6] Repealed in the Cape Province by Act 26 of 1873, sec. 2; in the Transvaal by Procl. 28 of 1902, sec. 127; in the Free State by the Law Book of 1901, chap. xcii, sec. 1; in Natal by Laws No. 22,

Another rule relating to remarriage is that which imposes upon the surviving parent, before contracting another marriage, the duty of paying or securing to the minor children of the first marriage the shares due to them out of the estate of the deceased.[1] By the Roman Law the penalty for remarrying in breach of this rule was the forfeiture by the defaulting spouse of any property accruing to him or her from the estate of the deceased.[2] In South Africa the defaulting spouse forfeits for the benefit of the minor children a sum equal to one fourth of his or her share in the joint estate, besides incurring a statutory penalty of fine or imprisonment.[3]

1863, sec. 3 (A); No. 7, 1885, sec. 3. In Ceylon the lex hac edictali has, apparently, never been recognized.

[1] Gr. 1. 9. 6–7; Voet, 23. 2. 100; V. d. K. *Th.* 142 ff.; V. d. L. 1. 5. 4; *Rechts. Obs.* pt. 1, no. 15, Boey, *Woordentolk, sub voce Vertigting*; *Ontwerp*, see 411; Cape Act 12 of 1856, sec. 1, re-enacted by Administration of Estates Act, 1913, sec. 56, which, however, does not require such payment or security, if the estate is of less value than one hundred pounds.

[2] Voet, 23. 2. 101: Binubus aut binuba amittat proprietatem relictorum sibi a priore conjuge cessuram aequaliter liberis prioris thori . . . solumque retineat usumfructum, quamdiu superstes fuerit.

[3] Administration of Estates Act, 1913, sec. 56 (3).

V

GUARDIANSHIP

In the Institutes of Justinian under the titles of tutela and cura are considered two several institutions designed by the law for the protection of persons who, though not subject to parental control, are nevertheless on account of immaturity of years or for other cause incompetent to be in all respects their own masters. The first of these, tutela, related to young persons alone, and ended with puberty. The second, in the case of young persons, extended from the fourteenth to the twenty-fifth birthday, and was also applicable to the case of lunatics and prodigals. Guardianship.

In Roman-Dutch Law there is one kind of minority only, which, as we have seen, now ends by statute at twenty-one. The distinction between tutela and cura has therefore largely disappeared.[1] But the terms tutor and curator are still retained to denote various cases of control.

In this chapter we shall consider: (1) the different kinds of guardianship and how guardians are appointed; (2) who may be guardians; (3) the powers, rights, and duties of guardians; (4) actions arising out of guardianship; (5) how guardianship ends.

Section 1.—The Kinds of Guardians and the Appointment of Guardians

In the Roman Law three principal kinds of guardians were recognized: (1) Tutores testamentarii, i.e. guardians appointed to minors in his power by the father or other male ascendant; (2) Tutores legitimi, i.e. the nearest agnatic (afterwards cognatic[2]) relatives of the minor, who acted in default of testamentary appointment; (3) Tutores dativi, i.e. guardians appointed by the magistrate in default of either of the first two classes. The kinds of guardians.

In early Germanic Law testamentary guardians were Tutors

[1] Gr. 1. 7. 3 and Schorer ad loc.; Voet, 27. 10. 1; V. d. K. *Th.* 111.
[2] Nov. 118, capp. 4–5 (A.D. 543).

testamentary. unknown, but fathers sometimes, before their death, committed the care of their minor children to persons in whom they confided;[1] failing these, some near relative or relatives were considered to be entitled to the guardianship; failing these, again, an appointment was made by the King, and in later times by the Count or other feudal lord, who also claimed the prerogative of confirming guardians belonging to either of the first-named classes. This prerogative right was the source of the upper guardianship (*opper-voogdij*) of minors, which in later Dutch Law and also at the present day is vested in the Court.

The Roman-Dutch Law here, as elsewhere, has worked the principles of the Roman Law into the original Germanic fabric. When in later times testaments came into use, testamentary guardians began to be appointed, and the phrase was taken to include guardians appointed whether in an ante-nuptial settlement or by other judicial or notarial act *inter vivos*,[2] and that by the mother no less than by the father of the minor children.[3]

Tutors assumed. A special variety of testamentary guardian was the assumed or substituted guardian, i.e. a guardian named by a testamentary guardian, by virtue of a special authority conferred upon him in that behalf, to act either together[4] with such testamentary guardian, or in substitution for him, particularly in the event of his death.[5]

[1] Hoola van Nooten, *Vaderlandsche Rechten*, vol. i, pp. 544–6; and see on the whole subject *Rechts. Obs.* pt. 4, no. 9, and Fock. Andr., *O. N. B. R.*, vol. ii, pp. 221 ff.

[2] Hoola van Nooten, vol. i, p. 558. Cf. Administration of Estates Act, 1913, sec. 72 (1).

[3] Gr. 1. 7. 9; Van Leeuwen, 1. 16. 3; Voet, 26. 2. 5. But in South Africa, by the Administration of Estates Act, 1913, sec. 71 (re-enacting and amending Cape Ord. No. 105, 1833, sec. 1): 'It shall not be lawful for any person except—(*a*) the father of a minor; or (*b*) the mother of a minor whose father is dead or has abandoned the minor; or (c) the mother of a minor to whom the custody of such minor has been given by a competent court, by any will or other deed to nominate any tutor or tutors to administer and manage the estate or to take care of the person of that minor.' This is without prejudice to the right to appoint a curator nominate.

[4] Voet, 26. 2. 5 (*magt van assumptie*). *Infra*, p. 102, n. 6.

[5] Hoola van Nooten, op. cit., p. 593 (*magt van surrogatie of substitutie*). *Vide* Boey, *Woordentolk, sub voce* Voogdye; V. d. L. 1. 5. 7.

The guardianship of blood relations.

Failing testamentary guardians, the guardianship or the appointment of guardians devolved upon the nearest relatives of the minor and, in particular, as Grotius[1] tells us, went to the 'four quarters' (*vier vieren-deelen*,) i.e. to the nearest of kin on the side of each of the four grandparents. 'Afterwards, however,' he continues, 'it was thought better that guardians should be appointed by the authorities, that is, by the Court of Holland, by the town and country Courts, or by the Orphan Chambers, which are in several places charged with that duty, the upper guardianship of orphans remaining, however, in the Court. These authorities are accustomed and bound in appointing guardians to take the advice of the nearest relatives, and to choose the guardian from amongst them so far as this can be done with advantage to the wards.'

Unknown in the modern law.

The consequence of the change described by Grotius was to extinguish the last survivals of the old Germanic guardianship of blood-relations as a separate institution, so that Grotius and Voet are able to speak of 'born' or 'lawful' guardians as no longer recognized by the common law of Holland.[2] All guardians thenceforward were either: (1) testamentary; or (2) appointed;[3] and the intermediate class of 'legitimi tutores' disappears. Over both of these classes, it is important to remember, subsists the upper guardianship of the Sovereign exercised through the Courts of Justice.[4]

Tutors dative.

Orphan Chambers.

At this point something may conveniently be said with regard to the Orphan Chambers. These were official boards charged with the supervision of orphan children,[5] which so early as the middle of the fifteenth century were already in existence in most of the towns of Holland.[6] Their functions were variously defined by the *keuren* of

[1] Gr. 1. 7. 10; Van Leeuwen, 1. 16. 4.
[2] Gr. 1. 7. 7–8; Voet, 26. 4. 4; V. d. K. *Th.* 117.
[3] Gr. 1. 7. 7; Voet, 26. 5. 5; V. d. L. 1. 5. 2.
[4] *Van Rooyen* v. *Werner* (1892) 9 S. C. at p. 428.
[5] i.e. of minor children who had lost one or both parents (Gr. 1. 7. 2); sometimes also of *onbestorven kinderen* (Gr. 1. 6. 1).
[6] Hoola van Nooten, vol. i, p. 550.

the towns. Strictly speaking, their authority was co-ordinate merely with that of the testamentary guardian,[1] but they constantly tended to supervise,[2] and sometimes to encroach upon,[3] his functions. Thus in the town of Alkmaar, testamentary guardians must be confirmed by the Orphan Chamber, though as a rule such guardians did not require confirmation.[4] Consequently it was the common practice of testators when appointing guardians to express in clear terms their wish to exclude the Orphan Chamber from interference with the estate.[5] Even this did not always produce the desired result.[6]

Is a surviving parent ipso jure guardian?

The word 'guardianship' is not free from ambiguity, for it implies sometimes guardianship of the person, sometimes administration of the property, sometimes both. Where property alone is concerned the term 'curatorship' may be employed. But it is not always easy to distinguish the two functions, for control of the property tends to imply control of the person. This is seen when we consider the relation of guardians testamentary or dative to a surviving spouse. Guardianship certainly does not exclude the parental power,[7] but neither is it excluded by it. A surviving parent, it must be remembered, was not, as such, guardian of the property of his or her minor children,[8] however much parental

[1] Hoola van Nooten, vol. i, pp. 564 ff. [2] Gr. 1. 9. 2.

[3] Van Leeuwen, 1. 16. 3.

[4] This is implied by Van Leeuwen, who mentions the case of Alkmaar as exceptional; but in *Cens. For.* 1. 1. 17. 3 he says: hodie omnes omnino tutores ex inquisitione dantur aut confirmantur. See Voet, 26. 3. 1 and 26. 7. 2 (*ad fin.*). It appears from Van der Keessel (*Th.* 116) that the practice varied. In South Africa confirmation is always necessary (Administration of Estates Act, 1913, sec. 72), provided that a father or mother does not require letters of confirmation (sec. 73).

[5] Hoola van Nooten, vol. i, p. 567; V.d.L. 1. 5. 2–3; V.d.K. *Th.* 120.

[6] Van Leeuwen, *ubi sup.* In South Africa Orphan Chambers exist at the present day and the administration of estates is often left to them, but they are not official and no longer appoint guardians. They are in fact merely Trust Companies. The place of the official Orphan Chamber has been taken by the Master of the Supreme Court.

[7] Gr. 1. 7. 8; Hoola van Nooten, vol. i, p. 568.

[8] Gr. *ubi sup.*; Voet, 26. 4. 4. But the parents had a prior claim

power might imply control of the person. Accordingly such parent, unless appointed by the deceased spouse[1] or by the Orphan Chamber or Court,[2] could not lawfully intermeddle with the estate.[3] This seems somewhat extreme in the case of the father, who having been sole administrator of the minor's property during the subsistence of the marriage, might reasonably expect to continue to exercise the same functions after his wife's death, at all events as regards property not coming to the child *ex parte materna*. The reasonableness of this claim is recognized by the law of South Africa, which gives the father the exclusive control of the person and also of the property of his minor children, during the whole of his life, and even permits him to bestow equally extended powers upon guardians appointed by his will.[4] He may, in this way, exclude the surviving mother from the guardianship during her life-time[5] and from the power of appointing testamentary guardians to act after her death.[6]

On the other hand, when no testamentary guardians have been appointed she is solely entitled to the guardianship to the exclusion of guardians dative.[7]

to be appointed, and usually were appointed, to act concurrently with one or two other tutors dative. Gr. 1. 7. 11–12.

[1] Voet, 26. 4. 4. [2] Gr. 1. 7. 10; Van Leeuwen, 1. 16. 2.

[3] Gr. 1. 7. 8. [4] *Van Rooyen* v. *Werner* (1892) 9 S. C. 425.

[5] Ibid., per de Villiers C.J. at p. 431, 'It is only on failure by the father to appoint such tutors that the surviving mother acquires her full rights.' But a deceased father cannot exclude the mother except by appointing a testamentary guardian in her place. Voet, 26. 4. 2. The right to the custody of the children (*supra*, p. 38, n. 4) must be distinguished from the guardianship.

[6] According to V. d. K. (*Dictat. ad* Grot. 1. 7. 9 and *Th.* 118) a surviving mother even though not appointed guardian by her husband's will may by her own will appoint co-guardians to act with the guardians appointed by her husband. The Administration of Estates Act, 1913 (sec. 71 (b), contemplates the appointment of a tutor testamentary by the mother of a minor, whose father is dead; but leaves the position undefined in case the father's will has made provision for the guardianship.

[7] (Cape) *Van Rooyen* v. *Werner*, *ubi sup.* The Natal Courts, however, have taken the view that a widow upon the death of her husband does not become the guardian for all purposes of her minor

In South Africa the appointment of tutors dative is vested in the Master of the Supreme Court, subject to review by the Court.[1] The same official confirms testamentary tutors,[2] and supplies casual vacancies in case of death, incapacity, or removal.[3]

Curators nominate.

A testamentary tutor, as we have seen, is appointed by parents only. But it is permitted to any person who gives or bequeaths property to a minor or insane person to direct at the same time that some specified person shall administer it.[4] A person so appointed is termed a curator nominate,[5] and if a curator nominate is expressly empowered to appoint another to act as co-guardian, such other becomes (after confirmation) a curator assumed.[6]

Curators assumed.

Curators dative.

Curators dative are appointed by the Court (in South Africa upon the application of the Master or of some

children; and this has lately been declared to be still law for Natal, *non obst.* Act No. 24 of 1913. *Ex parte Cumming* [1923] N. P. D. 405 per Tatham & Carter JJ., Dove-Wilson J.P. *dubitante.*

[1] Administration of Estates Act, 1913, secs. 76 and 107.

[2] Ibid., sec. 73.

[3] Ibid., sec. 78. By the Roman Law the mother, and by the R.-D. L. the surviving parent, was required within a short time of the death of the predeceasing spouse to notify the Court or the Orphan Chamber and to apply for the appointment of guardians. Gr. 1. 7. 13; *Cens. For.* 1. 1. 16. 9. In the Roman Law the mother who failed to do so lost all right of succession to the minor children. Cod. 6. 58. 10. This penalty was disused in the R.-D. L. Groen. *de leg. abr. ad* Cod. *ubi sup.*; Voet, 26. 6. 4 (*ad fin.*); V. d. K. *Th.* 123; but the local statutes usually imposed a small pecuniary penalty. The same duty attached in the R.-D. L. in respect of an inheritance coming to a minor child during the lifetime of both parents. Gr. 1. 6. 1; V. d. K. *Th.* 103. *Supra*, p. 39.

[4] Voet, 26. 2. 5; V. d. K. *Th.* 118; V. d. L. 1. 5. 2.

[5] Administration of Estates Act, 1913, sec. 71.

[6] Ibid., sec. 77: (1) Nothing in this Chapter contained shall prevent any tutor testamentary of any minor or curator nominate of any estate from assuming any other person as tutor of that minor or curator of that estate (as the case may be) by virtue of any power for that purpose committed to him by the will of, or any other deed duly executed by, the person by whom the tutor testamentary or curator nominate was appointed: Provided that no person shall be entitled or qualified to act as assumed tutor or curator unless, during the lifetime of the tutor testamentary or curator nominate, letters of confirmation have been granted to the assumed tutor or curator as such by the Master.

person interested) to insane persons or prodigals.[1] In case of minor disqualifications such as deafness, dumbness, or the like,[2] curators bonis may be appointed whose functions will be limited by the requirements of the particular case.[3] Curators bonis.

Curators ad litem are appointed to a minor or insane person or prodigal, for the purpose of bringing or defending an action, when such minor has no other guardian or curator, or when the guardian or curator is a party to the litigation.[4] Curators ad litem.

The various kinds of guardian, then, are: (1) tutors testamentary; (2) tutors assumed; (3) tutors dative; (4) curators nominate; (5) curators assumed; (6) curators dative; (7) curators bonis; (8) curators ad litem; and they are appointed in the ways above described.

Section 2.—Who may be Guardians

Van der Linden says that some persons are prohibited from being guardians, others may excuse themselves.[5] To the first class he assigns: (1) persons who are themselves subject to tutela or cura,[6] with whom must be Some persons are disqualified from being guardians,

[1] 1 Maasdorp, p. 277. The Master also appoints curators dative to administer the property of persons who are absent from the Colony and not otherwise represented. Administration of Estates Act, 1913, sec. 80. Such persons were known as *bejaerde wezen* (Gr. 1. 11. 1–4; Van Leeuwen, 1. 16. 13; Voet, 27. 10. 3 and 6; V. d. K. *Th.* 164–5) or as *Hofs-* or *Stads-kinderen* (V. d. L. 1. 5. 8).

[2] Gr. 1. 11. 2. An insane or prodigal wife is placed under the guardianship of her husband; an insane or prodigal husband is not placed under the custody of his wife, but his property may be. Gr. 1. 11. 7; V. d. K. *Th.* 168. *In re De Jager* [1876] Buch. 228. The marital power is suspended by the husband's insanity. V. d. K. *Th.* 101.

[3] Voet, 27. 10. 13. In the case of prodigality also the modern practice is to appoint a curator bonis, whose functions are limited to administering the estate. 'A curator bonis deals with the estate of the person under curatorship and not with the person.' *Mitchell* v. *Mitchell* [1930] A. D. at p. 223. For procedure see *Ex parte Hartzenberg* [1928] C. P. D. 385. There are cases also in which the Master may appoint a curator bonis *ad interim* (Adm. of Est. Act, 1913, sec. 30, sec. 81 (2); and a similar appointment may be made by the Court under Act 38 of 1916 (The Mental Disorders Act), sec. 62 (1).

[4] Van der Linden, *Judic. Prac.* 1. 8. 3.

[5] V. d. L. 1. 5. 1.

[6] Gr. 1. 7. 6.

included all persons less than twenty-five years of age, although majority may have been anticipated by marriage or venia aetatis;[1] (2) women, except a mother and grandmother, and they only so long as they have not contracted a second marriage;[2] (3) creditors and debtors of the minor, if the debt is considerable and the Court sees fit to exclude them.[3]

To these the laws of the Cape and of the Transvaal add: (4) any person who as witness has attested the execution of any will which appoints such person guardian, and the wife or husband of such person.[4]

others may excuse themselves;

The second class includes: (1) soldiers;[5] (2) persons already burdened with three guardianships; (3) persons upwards of seventy years of age; (4) persons disqualified by sickness or infirmity. This list is not exhaustive, nor by the common law can any one claim exemption as of right. In fact, no rigid rule can be laid down; for in the Dutch law the whole matter lay in the discretion of the Court.[6]

[1] Voet, 26. 1. 5; V. d. K. *Th.* 112. May a surviving spouse, though under age, be guardian to his or her children? Voet, 26. 4. 2; *Holl. Cons.* v. 213; Schorer *ad* Gr. 1. 7. 11.

[2] Gr. 1. 7. 6 and 11; Voet, 26. 1. 2; V. d. K. *Th.* 114. But see 1 Maasdorp, p. 306, and Schorer *ad* Gr. 1. 7. 11. In South Africa, by the Administration of Estates Act, 1913, sec. 83: (1) The provisions of this Act in regard to the election and appointment of tutors and curators shall apply to males and females; (2) Letters of confirmation shall not, without the consent in writing of her husband, be granted to a woman married in community of property or to a woman married out of community of property when the marital power of the husband is not excluded.

[3] Grotius is silent on this point. Voet (26. 1. 4) Groenewegen (*ad* Cod. 5. 34. 8) and van Leeuwen (*Cens. For.* 1. 1. 16. 19) agree that there is no absolute disqualification. See also Sande, *Decis. Fris.* 2. 9. 1.

[4] Cape, Act No. 22 of 1876, sec. 4; Transvaal, Ord. No. 14 of 1903, sec. 4; O. F. S. Ord. No. 11 of 1904, sec. 4. In Natal there is no such disqualification (see Law 2 of 1868, sec. 7). In Ceylon there is no statutory provision. Voet adds to the disqualifications mentioned in the text: (5) a person not subject to the jurisdiction cannot be tutor dative (26. 5. 3); (6) persons prohibited by the will of either parent (26. 1. 4).

[5] Grotius (1. 7. 6) says that soldiers cannot be guardians; so also Voet (26. 1. 4). Van der Keessel (*Th.* 113) and Van der Linden (1. 5. 1) say that they are not disqualified, but may be excused.

[6] Gr. 1. 7. 14; Voet, 27. 1. 12; V. d. K. *Th.* 124.

In South Africa, however, excuses are unnecessary, for guardianship is at the present day a purely voluntary office, which no one can be compelled to undertake against his will.[1] This marks a departure from the Roman-Dutch common law, according to which every one who was named guardian was bound to accept the office, and in the case of unwillingness could be compelled to undertake it by civil imprisonment.[2]

but in South Africa guardianship is voluntary.

Section 3.—The Powers, Rights, and Duties of Guardians

Without seeking to distinguish too exactly between the duties and the powers or rights of guardians, we may classify their functions of whatever kind under the following heads.

The duties and functions of guardians:

1. *The duty to find security.* In Holland practice varied in different localities. Van der Linden says:[3] 'The practice of guardians finding security is in our law fairly out of use, though where there are weighty reasons for doing so the Court may demand it.' But in South Africa, by the Administration of Estates Act, 1913, s. 82, every tutor and every curator now gives security, except only a testamentary tutor or a curator nominate when: (*a*) he is the parent of the minor; or (*b*) has been nominated by will executed before the commencement of the Act (October 1, 1913), and has not been directed by the will to find security; or (*c*) has been nominated by will executed after the commencement of the Act and the testator has directed the Master to dispense with security; or (*d*) the Court otherwise directs.

(1) To find security;

2. *Inventory.* Guardians must make a full inventory of the estate which they are to administer, or demand an inventory from a surviving parent.[4] In South Africa every tutor and every curator must make such inventory

(2) to make an inventory;

[1] 1 Maasdorp, p. 276; Administration of Estates Act, 1913, sec. 73 (2). [2] Gr. 1. 7. 15; Van Leeuwen, 1. 16. 5; V. d. L. 1. 5. 1.
[3] V. d. L. 1. 5. 3. Cf. Gr. 1. 9. 1; Voet, 26. 7. 2; V. d. K. *Th.* 134.
[4] Gr. 1. 9. 3 and 8; Van Leeuwen, 1. 16. 6; Voet, 26. 7. 4; V. d. K. *Th.* 135 ff.; V. d. L. *ubi sup.* The first-dying parent may not dis-

within thirty days[1] of the date of his entering on office. If a guardian fails herein, he is liable (besides other penalties)[2] to removal; as he is, also, if he wilfully omits items of credit or inserts false items of debit.[3] A surviving parent who, in preparing the inventory, fraudulently conceals any property forfeits his or her interest therein.[4] A similar inventory must be made by parent or guardian in the event of any property coming to a minor from any source whatever, e.g. by testament, either during the lifetime of both parents or after the death of one or both of them.[5] The inventory when complete must be delivered to the Orphan Chamber,[6] the place of which is taken in South Africa by the Master of the Supreme Court.

(3) to secure minors' portions;

3. *Securing minors' portions.* The next duty of the guardian (and this is the object of the inventory) is, subject to the control of the proper authority, to see that within the time prescribed by the local statute and at latest before proceeding to a second marriage the surviving parent assigns to the minor children of the marriage their shares in the joint estate,[7] or at all events gives security for future payment. In South Africa this security takes the form of a notarial general bond over movables,

pense the survivor from the duty of preparing an inventory. V. d. K. *Th.* 137.

[1] Administration of Estates Act, 1913, sec. 85.

[2] Ibid., secs. 108–9. [3] Voet, 26. 7. 5.

[4] Gr. 1. 9. 4; V. d. K. (*Th.* 139); Administration of Estates Act, 1913, sec. 110.

[5] Gr. 1. 6. 1 and 1. 9. 5. If a curator nominate has been appointed to the property in question, the duty of making an inventory falls on him and not on the parent. V. d. K. *Th.* 140.

[6] Gr. 1. 9. 3 and 8; V. d. K. *Th.* 135 ff. A testator might by his will: (1) exclude the Orphan Chamber; (2) remit the duty of making an inventory; but such directions were not always effectual. Gr. 1. 9. 3; Van Leeuwen, 1. 16. 6; Voet, 26. 7. 4; V. d. K. *Th.* 135–8. In the latter case it was sometimes permitted to furnish an inventory closed and sealed; and Cape Law allowed this course: (*a*) when the testator had so directed; (*b*) in the case of a surviving spouse whom the deceased spouse had appointed tutor and administrator (boedelhouder). Ord. 105, 1833, sec. 18. This is now repealed. There is no corresponding provision in the Administration of Estates Act, 1913. For Boedelhouder see above, p. 93.

[7] Gr. 1. 9. 6; Voet, 23. 2. 100, *supra*, p. 96, n. 1.

known as a *kinderbewijs*.[1] This done, the guardian proceeds to deal with the property of the minors in his charge, retaining it under his control as administrator, or placing it in the hands of the proper authority, as required by the local law.[2]

4. *Maintenance and education.* All preliminaries being properly settled, it is next the duty of the guardian to provide for the maintenance and education[3] of the ward according to the directions of the father, if he has left any, and, failing such, to see that the child is maintained and educated by the mother or other near relatives.[4] (4) to maintain and educate the minors;

The guardian must take care that his expenditure in

[1] 2 Maasdorp, p. 268; and see the judgment of Hopley J. in *Maxwell & Earp* v. *Dreyer's Estate* (1908) 25 S. C. 723. In Brit. Gui. the instrument in use was called an Act of *Verwezing*. By Administration of Estates Act, 1913, sec. 55, the bond required of the surviving spouse is a special hypothecation of immovable property. The old form of *kinderbewijs* is only utilized when the survivor has not sufficient immovable property to enable him [her] to pass a mortgage bond, and it thus becomes necessary to supply two sureties under § 55 (1). Howard, *Administration of Estates in S. A.* (4th ed.), p. 77.

[2] By Cape Ord. 105 of 1833, secs. 25 ff., tutors dative, curators dative, and curators bonis must pay their wards' moneys to the Master of the Supreme Court, except in so far as it may be required for the instant payment of debts, or for the immediate maintenance of their wards. This clause is re-enacted by the Administration of Estates Act, 1913, sec. 88, which extends the above provision to a tutor testamentary and curator nominate 'subject to the terms of the will or deed by which he was appointed'. Securities must be deposited. Gr. 1. 9. 9. It must be borne in mind that the guardian represents the minors, not the deceased. He has no general duty of liquidating the estate. In the modern law the estate of a deceased person vests for administration and distribution in an executor, testamentary or dative. (Administration of Estates Act, 1913, sec. 31). Subject to the right of the surviving spouse, in the absence of any provision to the contrary contained in the will of the first dying, as natural guardian to receive from the executor and retain for and on behalf of his minor child (on giving security) any sum of money due to that child from the estate of the deceased spouse, it is the duty of the executor to pay to the Master any money which has become due from the estate to any minor (ibid., sec. 54). *Ex parte Van Minlorp* [1926] C. P. D. 78.

[3] Gr. 1. 9. 9; Voet, 26. 7. 1 and 6. Generally speaking a surviving mother is entitled to the custody (V. d. K. *Th.* 114), notwithstanding a remarriage (Voet, 27. 2. 1).

[4] Gr. *ubi sup.*; Voet, 27. 2. 1.

this regard keeps well within the limits of the annual income of the estate, unless in very special circumstances, which should be made the subject of an application to the Court.[1]

(5) to administer the property;

5. *Administration of the ward's property.*[2] This includes the general supervision and management of the minor's estate, in which task the guardian must display the diligence of a *bonus paterfamilias*.[3] His expenditure must be such as is demanded by the interest and credit of the minor, regard being had to the value of the estate and the minor's position in life.[4] He must preserve and secure the property,[5] call in and enforce debts,[6] invest in good securities,[7] and meet the minor's liabilities as they fall due.[8] When the guardianship comes to an end, the guardian must properly wind up the business of his office, and is deemed to remain guardian for the purpose.[9] Where there are more guardians than one, it is not necessary that they should all act; but, whether he acts or not, each is responsible for the acts of every other.[10]

(6) not to alienate

6. *Alienation of property.* A guardian may, in due course of administration, sell[11] or mortgage any movable

[1] Voet, 27. 2. 2.

[2] Gr. 1. 9. 11; Van Leeuwen, 1. 16. 8; V. d. L. 1. 5. 3.

[3] Gr. 3. 26. 8; Voet, *Compendium*, 26. 7. 3; 27. 3. 4; V. d. L. 1. 5. 3. It seems that in R. L. he was not required to exhibit more than the *diligentia quam suis rebus*. Buckland, *Textbook*, p. 158.

[4] Voet, 26. 7. 6; 27. 2. 2.

[5] Voet, 26. 7. 8. [6] Voet, 26. 7. 8.

[7] Gr. 1. 9. 10; 3. 26. 7; Van Leeuwen, 1. 16. 8; Voet, 26. 7. 10; V. d. K. *Th.* 153–5; *Van der Byl & Co.* v. *Solomon* [1877] Buch. at p. 27 per de Villiers C.J. But as to the effect of Administration of Estates Act, 1913, sec. 88, upon the guardian's power to invest, and of this sec. in combination with the Public Debt Commissioners Act, 18 of 1911, upon the Court's power to authorize investments, see *Ex parte The Master* [1927] T. P. D. 117; *Ex parte Lorentz N. O.* [1928] S. W. A. 153. [8] Voet, 26. 7. 7.

[9] Voet, 26. 7. 15. If the guardianship is determined by the minor's death, the guardian must render accounts and make over the property to his heir. V. d. K. *Th.* 159.

[10] Gr. 1. 9. 11; Voet, 26. 7. 1; V. d. L. 1. 5. 3 (*ad fin.*). Remuneration of guardians—*Infra*, p. 114, n. 3.

[11] Gr. 1. 8. 5; Voet, 27. 9. 4. Grotius adds: 'doch met kennisse van de weeskamer daer de zelve niet en is uitgesloten'. Cf. V. d. K. *Th.* 129.

property under his charge. But the alienation or hypothecation of immovable property, except by leave of the Court,[1] is entirely void. Such leave is only given after full inquiry, and it is, besides, usual to consult the nearest relatives.[2] The measures proposed must be necessary for payment of debts, maintenance, or marriage of the ward, or otherwise to his manifest advantage.[3] The word 'immovables' extends to such incorporeal rights as are commonly included under the term immovable property, and to the cession of rights of action relating to such property.[4] Alienation includes any act of the guardian whereby a real right of the ward is in any way diminished, lost, or abandoned.[5] Failing a judicial decree (where such is necessary) everything that takes place in the course of, or incidentally to, such alienation is *ipso jure* null and void.[6] The same applies if the decree is shown to have been obtained from the Court by fraud.[7]

immovables without leave of Court.

The prohibition of the sale of immovables is stated by Grotius to extend to money put out at interest and rents.[8] Van der Keessel says that the same rule ought to be laid down in respect of public Dutch or foreign securities.[9] Voet goes still further and adds to the list all movables which are not perishable in their nature (*quae servando servari possunt*),[10] as gold, silver, and jewellery, whereas perishable movables the guardian not only may sell, but

[1] Gr. 1. 8. 6. Van Leeuwen (1. 16. 9) says, 'otherwise than with the consent of the Court or local tribunal'. Application must be made in the first instance to the Court of the minor's domicile; if the property is situated in another jurisdiction, it may be necessary to apply to the Court of the *locus rei sitae* as well. Voet, 27. 9. 5; *Ex parte Uys* [1929] T. P. D. 443. A power to mortgage cannot be conferred by will (Ceylon) *Girigorishamy* v. *Lebbe Marikar* (1928) 30 N. L. R. 209.

[2] Voet, 27. 9. 7; and the weeskamer. V. d. K. *Th.* 131.

[3] Voet, 27. 9. 7–8.

[4] Voet, 27. 9. 2.

[5] Voet, 27. 9. 3; Sande, *de prohib. rerum alienat.* 1. 1. 47. This covers a lease in longum tempus. *Breytenbach* v. *Frankel* [1913] A. D. 390. But short leases are permitted and bind the ward even after majority. Sande, *Decis. Fris*, 2. 9. 22; Voet, 19. 2. 17.

[6] Gr. 1. 8. 6.

[7] Voet, 27. 9. 9.

[8] Renten ende pachten. Gr. 1. 8. 6.

[9] V. d. K. *Th.* 130.

[10] Cf. Cod. 5. 37. 22. 6.

must.[1] By some local statutes of Holland even movables could not be sold except by public auction and after notice to the Orphan Chamber (unless this were expressly excluded).[2] In the case of immovables too the sale must be by public auction.[3]

South African Law as to alienation of immovables.

In South Africa by the Administration of Estates Act, 1913, sec. 87, no tutor and no curator (other than a tutor testamentary or a curator nominate duly authorized thereto by the will or deed under which he has been appointed) shall alienate or mortgage any immovable property belonging to a minor unless the Court or, when the Master is satisfied that the immovable property does not exceed three hundred pounds in value, unless the Master authorize the alienation or mortgage of such property. But the Master may authorize the mortgage of immovable property belonging to a minor to an extent not exceeding three hundred pounds, if satisfied that the mortgage is necessary for the preservation or improvement of the property, or for the payment of expenses necessarily incurred in connexion therewith, or for the maintenance or education of the minor. The same Act by sec. 86 saves the common law as regards the powers and duties of tutors except so far as they are affected by that Act. But it is submitted that in regard to the sale of the ward's property the principle 'Expressio unius est exclusio alterius' holds, and therefore all that is required of the guardian in alienating his ward's movable property is that he should exercise a wise discretion and in matters of difficulty seek the guidance of the Court.

Remedies in case of unauthorized alienation.

The ward's remedies in respect of unauthorized alienation are two: against the tutor and against the alienee. Against the first he has the actio tutelae directa. From the second he may vindicate the property (together with all fruits, if the defendant's possession is mala fide; but if it is bona fide, together with fruits existing at the date

[1] Voet, 27. 9. 1.
[2] Gr. 1. 8. 5; Van Leeuwen, 1. 16. 8; V. d. K. *Th.* 129; *Rechts. Obs.* ii. 13.
[3] Gr. 1. 8. 6; Van Leeuwen, 1. 16. 9.

of action brought). If, however, the purchase-money has been received and applied to the minor's use, it must be refunded with interest as a condition precedent of the return of the property.[1] A sale of immovable property made by a minor without judicial decree and without his guardian's authority cannot be impeached on behalf of such minor, when the minor has falsely represented himself as of full age.[2]

An alienation void *ab initio* may be ratified on full age. Ratification is express or tacit. An example of tacit ratification is when the ward, having reached full age, claims the purchase-money from the guardian in an actio tutelae; or when the ward after majority allows a certain time, which varies with the circumstances, to elapse without asserting his right.[3] When ratification has taken place the transaction may, in Roman-Dutch Law, still be rescinded on the ground of laesio enormis,[4] but in the Cape Province and in the Orange Free State this is no longer law.[5] Ratification of void alienations.

7. *Accounts.* The guardian must render annual or other periodical accounts as required by law to the proper authority.[6] If the testator has remitted this duty, the Court or other authority may none the less in its discretion insist upon it.[7] (7) Guardian renders accounts;

8. *Representing the minor in Court.* A minor has no persona standi in judicio.[8] He must therefore be represented or assisted by his guardian in any proceedings to (8) represents the minor in Court;

[1] Voet, 27. 9. 10. [2] Voet, 27. 9. 13 (*ad fin.*).

[3] Voet, 27. 9. 14. If the alienation was made for value the period is five years; if donationis titulo, ten years inter praesentes, twenty inter absentes. Cod. 5. 74. 3.

[4] Voet, ibid. (*ad fin.*); Cod. 4. 44. 2 and 8.

[5] See below, p. 239, n. 3.

[6] Gr. 1. 9. 12; Hoola van Nooten, vol. i, p. 583; V. d. K. *Th.* 120 and 157; Administration of Estates Act, 1913, sec. 89. An exception is made in favour of a surviving spouse 'to whom the predeceasing spouse has by will or other lawful instrument entrusted the administration of their joint estate during the minority of their children'.

[7] Van Leeuwen, 1. 16. 6.

[8] Gr. 1. 7. 8; V. d. K. *Th.* 127; V. d. L. 1. 5. 5.

which he is a party, whether as plaintiff or defendant.[1] If the guardian is himself a party to the proceedings the ward obtains a curator ad litem.[2] No doubtful action may be brought by a guardian in the name of the ward without previous sanction of the Court;[3] otherwise, if the ward fails in the suit, the guardian may be ordered to pay the costs himself.[4] In all other matters of importance too, says Van der Linden,[5] the Court should be consulted.

(9) contracts in the name of the minor;

9. *Contracting in the name of the minor.* Guardians have the right to contract on behalf of their wards, but must proceed with particular caution, otherwise they will be liable in damages.[6] By such contracts the wards acquire rights and incur liabilities. They may sue and be sued on the contracts entered into by their guardians,[7] saving, however, their right to restitutio in integrum, if they have been prejudiced thereby; which right they must prosecute within four years after attaining majority.[8] It seems that a guardian who has contracted *nomine pupilli* is himself alternatively liable to the other contracting party;[9] though if the contract was a proper one, he will be entitled to an indemnity from the estate. A ward is not bound by a donation made by his guardian or by a release of a manifest right.[10]

[1] Gr. 1. 8. 4; Voet, 26. 7. 12. [2] Gr. *ubi sup.*

[3] Or subsequent allowance by the Court?

[4] Voet, *ubi sup.* [5] V. d. L. 1. 5. 3. Cf. Gr. 1. 9. 2.

[6] Gr. 1. 8. 7; 3. 1. 30; Voet, 26. 9. 1–2.

[7] Gr. 1. 8. 8; V. d. K. *Th.* 133; and see Cod. 5. 39. *Semble*, if a guardian contracting on behalf of his ward, has acted fraudulently (or carelessly? Dig. 26. 7. 61), the ward is not liable, except: (1) to the extent of his enrichment; (2) in the absence of enrichment only if the guardian is solvent, so that the ward can have recourse against the guardian's estate; and the ward can always free himself by ceding his actions against the guardian. Gr. 3. 1. 30; Voet, 26. 9. 4. [8] Cod. 2. 52 (53) 7. pr.; Voet, 44. 3. 6–7.

[9] Voet, 26. 9. 3; but generally only during the continuance of the guardianship. Cf. Cod. 5. 39. 1.

[10] Gr. 3. 1. 30 and 3. 2. 7; unless it be a remuneratory donation. Gr. 3. 2. 3. Guardians may make a novation in the name of their wards, if for the wards' benefit. Voet, 46. 2. 8. Guardians may compromise on behalf of their wards provided they do not thereby effect an alienation of the wards' property. V. d. K. *Th.* 517.

10. *Authorizing the minor's acts.* Finally, it is the duty of the guardian (and the law gives him power) to 'interpose his authority', that is, to assist and represent the minor in all transactions; and in particular, as has been seen, to represent him in Court. 'Authority' in Roman Law meant a present consent to and approval of what is done by the ward, but in the modern law a subsequent ratification will have the same effect as a contemporaneous authority.[1] Where there are several co-tutors the authority of one alone is generally sufficient.[2] If the guardian withholds his authority the Court will in a fit case compel it.[3] A male or female minor upwards of fourteen or twelve years of age requires no authority to make a will,[4] nor is a marriage contracted without authority of the guardian invalid or voidable.[5] (10) authorizes the minor's acts.

Thus far the powers, rights, and duties of the guardians of minors. Since the functions of the curators of lunatics and interdicted prodigals are generally similar,[6] it is unnecessary in an elementary treatise to make them the subject of special discussion.

Section 4.—Actions arising out of Guardianship

Two actions arise out of guardianship, the one by the ward against the guardian (*actio tutelae directa*), the other by the guardian against the ward (*actio tutelae contraria*). The first is available to the ward and his heirs[7] against the guardian and his heirs,[8] and against each guardian *in solidum* (saving that on satisfaction by one the others are released), to render an account of his administration,[9] to transfer everything which by virtue of the guardianship has come under his control;[10] and also to make good all losses caused to the minor by his bad management. The actio tutelae directa and contraria.

[1] Voet, 26. 8. 1. [2] Voet, 26. 8. 7.
[3] Voet, 26. 8. 8, i.e. *moribus*. It was otherwise *jure civili*. Dig. 26. 8. 17. [4] Gr. 1. 8. 2.
[5] Gr. 1. 8. 3; *supra*, p. 60. [6] Gr. 1. 11. 5; Voet, 27. 10. 5 ff.
[7] Voet, 27. 3. 4; also to the husband of a minor against her former guardians and in some cases to creditors.
[8] Voet, 27. 3. 5; or other successors. [9] Voet, 27. 3. 7.
[10] Voet, 27. 3. 8; including claims arising *ex contractu*. Gr. 3. 1. 38.

The contrary action lies for the guardian and his heirs[1] against the ward and his heirs to be indemnified for expenses and loss incidental to his office,[2] and to recover a reasonable recompense for his time and trouble.[3]

In the Roman Law these actions lay only after the termination of the guardianship,[4] but in the modern law they may be brought, when necessary, during its continuance.[5]

Extent of guardians' liability.

The statement made above that each tutor is liable *in solidum* must be understood subject to the law as to the benefit of excussion and the benefit of division. Where one tutor alone has acted he must be sued before the rest, who otherwise can plead the beneficium excussionis. Where more than one tutor have acted, any one of the acting tutors may be sued, but by pleading the beneficium divisionis can divide his liability with the other tutors who were solvent at the earliest time at which the pupil could properly have sued. Where different duties of administration have been assigned by the testator, or the judicial authority, between several tutors, each is, generally speaking, liable only for his own particular sphere of duty.[6]

Other actions in Roman Law.

In addition to the above actions the Roman Law gave various other remedies or securities to the minor, more particularly: (1) the action 'rationibus distrahendis';[7] (2) an action against the magistrate by whom the guardian

But the emancipated ward may sue in respect of such claims without cession of the right of action. V. d. K. *Dictat.* ad. loc; Dig. 26. 9. 2.

[1] Voet, 27. 4. 2.

[2] Gr. 3. 26. 10; Voet, 27. 4. 3–7.

[3] V. d. L. 1. 5. 6. In the Roman Law the office of tutor was unpaid. Dig. 26. 7. 33. 3. In R.-D. L. a reasonable remuneration was allowed except to parents. Gr. 1. 9. 11; Voet, 27. 4. 12. The amount was usually fixed by local statutes. V. d. K. *Th.* 156.

[4] Dig. 27. 3. 4, pr. and 27. 4. 1. 3.

[5] Groen. *de leg. abr. ad* Dig. 27. 3. 4.

[6] Gr. 3. 26. 9; Voet, 27. 8. 6. 'With regard to losses occasioned by omissions, all the guardians are liable *in solidum*, and though they may claim the benefit of division as between themselves, are not entitled to the benefit of excussion.' 1 Maasdorp, p. 298; *Niekerk* v. *Niekerk* (1830) 1 Menz. 452.

[7] Dig. 27. 3. 1. 19; 27. 3. 2.

had been appointed;[1] (3) the crimen suspecti[2] for the removal of guardians on the ground of misconduct actual or anticipated; (4) a tacit hypothec or legal mortgage upon the whole of the guardian's estate.[3]

The action rationibus distrahendis, 'for separation of accounts', which was as old as the Twelve Tables,[4] applied only to those who during their administration had carried off something from the ward's estate.[5] It lay for twice the value of the thing taken. Voet seems to treat this remedy as still existing, but Groenewegen says that the penalty of double was disused.[6]

In the Roman Law a subsidiary action lay in certain cases against the magistrates, when the ward had failed to obtain satisfaction from the guardian appointed by them.[7] Whether this action subsisted in the Roman-Dutch Law was much debated. Voet and others[8] allowed it in case of fraud or gross negligence. But the Orphan Chamber, at all events, was answerable for the moneys of minors committed to its keeping.[9]

Removal of guardians.

With regard to the removal of guardians the Court, as the upper guardian, has a wide discretion,[10] exercised usually on the complaint of a co-guardian or near relatives of the ward.[11] Incapacity, dishonesty, or insolvency are the most frequent grounds of removal. In South Africa the final order for sequestration or assignment of the guardian's estate *ipso facto* determines the office of tutor or curator, unless he shall have found security to the satisfaction of the Master for due and faithful performance of his duties.[12]

[1] Dig. 27. 8. 1. This action was given by a S. C. of the time of Trajan. Cod. 5. 75. 5.

[2] Inst. 1. 26, pr.: Sciendum est suspecti crimen ex lege duodecim tabularum descendere.

[3] Cod. 5. 37. 20 (Constantine, A.D. 314).

[4] Dig. 26. 7. 55. 1. [5] Dig. 27. 3. 2.

[6] Groen. *de leg. abr. ad* Dig. 27. 3. 2. and Cod. 9. 47 (*rubric*).

[7] Inst. 1. 24. 2.

[8] Van Leeuwen, 1. 16. 4, and Decker's note; *Cens. For.* 1. 1. 17. 4; Voet, 27. 8. 5; Groen. *de leg. abr. ad* Inst. 1. 24. 4; Vinnius, ibid.; V. d. K. *Th.* 770. [9] Decker *ad* Van Leeuwen, 1. 16. 4.

[10] Voet, 26. 10. 2. [11] Gr. 1. 10. 4.

[12] Administration of Estates Act, 1913, sec. 84; and see secs. 32

The ward's tacit hypothec.

Lastly, wards have a legal or tacit hypothec over the property of their tutors or curators in respect of debts due to them arising out of the administration and to the extent of loss attributable to the guardian's misconduct.[1] By the Roman-Dutch Law this extends to the property of all tutors (natural, testamentary, or appointed) and curators, as well as of protutors[2] (i.e. persons who have acted as tutors without appointment or confirmation), and of agents and others who have concerned themselves in the administration of the minor's estate. Further, the liability attaches to a step-father who has married a mother tutrix before she has wound up the tutorship and settled her accounts; also (*semble*) to the wife, married in community, whose husband has, during the marriage, undertaken the duties of guardianship.[3] By statute this legal hypothec has been abolished in the Transvaal and materially restricted at the Cape; since the Insolvency Act, 1916, it has ceased throughout the Union to give any preference on the estate of an insolvent.[4]

Section 5.—How Guardianship ends

How guardianship ends.

Guardianship is determined by the following events: viz. (1) the death of the minor; (2) the death of the guardian,[5] in which case a surrogated tutor (if any) or tutor dative replaces him; (3) majority, unless the Court decides that the ward is to remain under guardianship for some time longer;[6] (4) marriage, unless the Court for weighty reasons orders that the guardianship is to continue either absolutely or with respect to the immovable property of the ward;[7]

and 73. But *semble*, it was not so by the common law. See *De Villiers* v. *Stuckeris* (1829) 1 Menz. 377.

[1] Gr. 2. 48. 16; Voet, 20. 2. 11 ff.; V. d. L. 1. 12. 2; 2 Maasdorp, p. 268; *infra*, p. 195. [2] Voet, 20. 2. 12.

[3] Voet, 20. 2. 11. [4] *Infra*, p. 189. [5] Gr. 1. 10. 1.

[6] Gr. *ubi sup.* The age of majority was sometimes anticipated by order of the pupillary magistrates, but this practice was replaced by grant of venia aetatis. V. d. K. *Th.* 110.

[7] Gr. 1. 10. 2. In *Vedeski* v. *Vedeski* [1923] W. L. D. 31 Morice A.J. held that where a woman had a curator bonis, appointed to manage her affairs on the ground of her prodigality, the curator-

(5) venia aetatis;[1] (6) arrival of time or cessation of purpose, when the guardianship was created for a limited time or purpose;[2] (7) removal[3] or release of the guardian by the Court; (8) absence of the ward[4] for a prolonged period, such as furnishes a presumption of his death, in which case his property is divided amongst his testamentary or intestate heirs, security being given for its return in the event of the ward's reappearance; (9) (in South Africa) the insolvency of the guardian[5] and, so far as concerns the property, of the ward.[6]

ship was not determined by her marriage in community. But a curator bonis has no *locus standi* to upset a marriage contracted without his consent. *Mitchell* v. *Mitchell* [1930] A. D. 217.

[1] Gr. I. 10. 3. But this does not carry the right to alienate immovables except by leave of the Court. *Supra*, p. 44. According to the modern practice the Court does not assume the power to declare a minor to be a major in law, but the Cape Courts have in several cases made an order releasing a minor from tutelage. *Supra*, p. 44.

[2] Gr. I. 10. 6.

[3] Gr. I. 10. 4; Voet. 26. 10. 1–4; V. d. K. *Th.* 162.

[4] Gr. I. 10. 5, and Schorer's note; V. d. K. *Th.* 163.

[5] *Supra*, p. 115.

[6] 1 Maasdorp, pp. 303–4.

VI

UNSOUNDNESS OF MIND—PRODIGALITY

Unsoundness of mind.

In the last chapter we saw that curators dative are appointed by the Court for insane persons, and (after interdiction) for prodigals. It is tempting to speak of unsoundness of mind as constituting a status; but it would not be correct to do so, for mental unsoundness is not necessarily permanent or constant, and the question which must be answered is not, 'Has the man been declared mad?' but, 'Was he, in fact, incapable of understanding the particular transaction which is brought in issue?'[1] If the answer is affirmative, the transaction is wholly void[2] for 'furiosus nullum negotium gerere potest, quia non intelligit quid agit'.[3] The same principle applies to any other form of mental alienation.[4] It is immaterial that the other party to the transaction was unaware of the condition of the person with whom he was dealing. The rule, however, admits two qualifications: (1) 'The Roman-Dutch law, while denying the capacity of an insane person to bind himself by contract, recognizes the equity of allowing a person who has in good faith expended money on behalf of a lunatic to have his expenses recouped'.[5] (2) 'Where acts have been done on behalf of an insane person by virtue of a power of attorney [or other mandate] given by him before he was bereft of his reason, there are authorities (such as Digest 46. 3. 32, and Pothier on Obligations, sec. 81) from which it might be fairly inferred that want of knowledge regarding the principal's change of condition

Furiosus nullum negotium gerere potest.

Qualifications of the rule.

[1] *Prinsloo's Curators bonis* v. *Crafford & Prinsloo* [1905] T. S. 669; *Pheasant* v. *Warne* [1922] A. D. at p. 488.

[2] Gr. 3. 1. 19; (Ceylon) *Soysa* v. *Soysa* (1916) 19 N. L. R. 314.

[3] Inst. 3. 19. 8; Van Leeuwen, 2. 7. 8.

[4] Such as drunkenness. Gr. 3. 14. 5; Voet, 18. 1. 4. And see *Manning & Wax* v. *Heathcote's Trustee* [1915] E. D. L. 81; *Essakow* v. *Galbraith* [1917] O. P. D. 53.

[5] *Molyneux* v. *Natal Land and Colonization Co.* [1905] A. C. 555; in appeal from Natal (24 N. L. R. 259), per Sir Henry de Villiers, at p. 569.

would protect persons dealing with the agent. The power is revoked by reason of the insanity; but if the power held out the agent as a person with whom third parties might contract as such until they receive notice of the revocation of the authority, their knowledge of the insanity would have an important bearing on their right to recover upon a contract thus made. That would, however, be a very different matter from saying that an agent appointed after the insanity of the principal could, under the Roman-Dutch law, validly bind such principal.'[1]

Interdicted prodigals.

The condition of the prodigal after interdiction and public notification thereof may correctly be described as a status. Until the interdict has been removed and the removal notified he is for most purposes subject to the same legal incapacities as a minor, and, like the minor, can without his curator's authority enter into a contract which is solely advantageous.[2]

[1] Ibid. at p. 563. The P. C. judgment in Appeal is reproduced in 26 N. L. R. 423.

[2] Grot. 1. 11. 4; Voet, 27. 10. 6 *seq.*

VII

JURISTIC PERSONS

Juristic persons.

To enter upon a detailed discussion of this topic lies outside our scope.[1] The Romans, more or less consciously, attributed an artificial personality to four several institutions:[2] viz. (1) Corporations (*corpora-universitates*); (2) Charities (*piae causae*); (3) the Fiscus; (4) Hereditas jacens.[3] These categories, or something like them, reappear in the Dutch Law of Holland.[4] In the modern law the second and the fourth may be ignored; the second, because we no longer attribute any kind of personality to an unincorporated charity, the only personality which comes in question being that of the trustees in whom the trust-property is vested;[5] the fourth, because it is of little or no practical importance. The first and the third remain. But the rights of the Fisc, i.e. of the State or Crown, may be said to belong rather to public than to private law; while the rights, duties, and powers of corporations are, at the present day, most often defined by the terms of some general or special statute.[6] If on the one hand corporations, being persons, are *prima facie* capable of enjoying the same rights and of incurring the same liabilities as natural

Corporations: their nature and capacity;

[1] See Gray, *Nature and Sources of Law*, secs. 111–43.

[2] Goudsmit, *Pandecten-Systeem*, vol. i, pp. 61 ff.

[3] Buckland, *Text-book of Roman Law*, pp. 304–5.

[4] Fock. And., vol. i, pp. 140 ff.

[5] The various organizations known in South Africa as voluntary associations seem to fall under the same category. 1 Maasdorp, p. 312. But see *Johannesburg Public Library Committee* v. *Spence* (1898) 5 O. R. 84. In Ceylon the English law of corporations was introduced by Ord. No. 22 of 1866. This seems to leave no place for the *pia causa* as a distinct juristic entity. See Arunachalam, *Digest of the Civil Law of Ceylon*, vol. i, pp. 181 ff. Has a club a *persona* apart from its members? *Reid* v. *S. African Party Club* [1922] T. P. D. 36. For *piae causae* in the old law see Fock Andr., *O. N. B. R.*, vol. i, p. 147; and De Blecourt, *Kort Begrip*, p. 31. A legal *persona* of this character came in question in *Das Königlich Preussisch-Brandenburgische Hausfideikommiss* v. *The Administrator of South-West Africa and the Registrar of Deeds* [1928] S. W. A. 82.

[6] See for S. A. The Companies Act (46 of) 1926.

persons, on the other hand this general proposition receives a necessary limitation both from the mere fact of their artificial personality and also from the terms and objects of the incorporation in each particular case. Within these limits, a corporation may acquire, own, and possess property; may contract; may sue and be sued in courts of law. But from the nature of the case it can only act through its agents properly authorized, whether permanently or for the particular work in hand.[1] Every corporation derives its being from the State, being created by a special act of the Legislature (or by the prerogative of the Crown) or under the provisions of a general Act, as is the case with most trading companies.[2] It ceases to exist: (*a*) when it has been called into existence for a limited time and that time has expired; (*b*) when all the individuals composing it (*corporators*) are dead—if only one member survives, it seems that the corporation still continues in his person;[3] (*c*) when the members (and in the absence of contrary provision the majority of members voting) resolve that the corporation shall be dissolved, provided that in the particular case such mode of dissolution is not forbidden or excluded by law or by the constitution of the corporation; (*d*) when any other event occurs which the law prescribes for the dissolution of the corporation in question. With these few words on the nature of corporations in general we leave the student to pursue the subject, as he may find desirable, in the system of law which particularly concerns him.[4]

how created;

how dissolved.

[1] Goudsmit, vol. i, p. 69.

[2] 1 Maasdorp, p. 309; Goudsmit, p. 71: Eene corporatie is dan aanwezig, zoodra meerdere personen met een gemeenschappelijk en geoorloofd doel zich hebben vereenigd tot het scheppen van een van de bijzondere leden afgescheiden rechtspersoon en deze als zoodanig van staatswege is erkend, hetzij ten gevolge van eenen algemeenen rechtsregel, hetzij telkens door eene bijzondere vergunning.

[3] Dig. 3. 4. 7. 2.

[4] For S. A. see 1 Maasdorp, chap. xlvii; and for the older law, Voet, lib. III, tit. 4.

BOOK II

THE LAW OF PROPERTY

BOOK II

INTRODUCTION

The 'Law of Things'.

THE Roman institutional writers make the Law of Things the second great division of the Jus Privatum. Under this general head they include: (1) Ownership, and Modes of Acquisition; (2) Proprietary rights less than ownership, such as Servitudes; (3) Inheritance, Testamentary and Intestate; (4) Obligations arising from Contract and from Delict. What the common element is which makes these various topics all referable to one great branch of law is not at once apparent. Probably it is ownership. 'The true point of contact between the various res seems in reality to be the fact that whoever has a res is actually or prospectively so much the better off.'[1] Accordingly, Grotius defines 'things' as 'whatever is external to man and in any way useful to man'.[2] This, however, is not wide enough, for 'thing' in its legal significance includes not merely material things but also rights over material things (*jura in re*) and rights to services (*jura in personam*). Voet's definition of res as 'everything of which the Courts take cognizance'[3] is perhaps to be preferred. It is, however, unprofitable to labour to define what is scarcely definable.

In the following pages we shall follow modern practice and treat as separate and principal divisions of the Law:—the Law of Property, the Law of Obligations, and the Law of Succession. The subject of this Book is the Law of Property, which will include ownership and real rights connected with or derived from ownership. We shall speak in the following chapters of:—

1. The meaning of ownership.
2. The classification of things.

[1] Moyle, Justinian's *Institutes*, 5th ed., p. 187.

[2] Gr. 2. 1. 3: Zaken noemen wy hier al wat daer is buiten den mensch, den mensch eenichsints nut zijnde.

[3] Voet (*Elem. Jur.* 2. 1. 1): Res est omne id de quo jus dicitur. Jus namque dicitur inter personas, de rebus, auxilio actionum.

3. How ownership is acquired.
4. The incidents and kinds of ownership.
5. Possession.
6. Servitudes.
7. Mortgage or Hypothec.

I

THE MEANING OF OWNERSHIP

Dominion or Ownership.

DOMINION or Ownership is the relation protected by law in which a man stands to a thing which he may: (*a*) possess, (*b*) use and enjoy, (*c*) alienate.[1] The right to possess implies the right to vindicate, that is, to recover possession from a person who possesses without title to possess derived from the owner. Grotius selects this right as the most signal quality of ownership, which he says is the relation to a thing by virtue of which a person not having the possession may obtain the possession by legal process.[2] This analysis of ownership is more particularly applicable to the ownership of a material thing, and it is in this sense that the word 'ownership' is used in this chapter. In an extended sense the word is also applied to the analogous relation in which a man stands to an incorporeal thing such as patent-right or copyright, or to a *universitas juris* such as inheritance.[3] To constitute full ownership all the above —mentioned rights must be exclusive. Where all these rights are vested in one person to the exclusion of all others he is sole owner.[4] Where all these rights are vested in two or more persons to the exclusion of all others they are co-owners. If one or more of these rights is vested in one person, the remainder in another or others, the ownership of each of such persons is qualified or restricted.[5] Thus, if you have by contract or otherwise acquired the right to: (*a*) possess, or (*b*) use, or (*c*) alienate, my property, my ownership is, so far, restricted; and ownership is, so

Full ownership

[1] Holland, *Jurisprudence* (13th ed.), p. 210; V. d. L. 1. 7. 1.

[2] Gr. 2. 3. 1.

[3] Holland, *Jurisprudence*, p. 211. Properly speaking, the subject-matter of ownership is in all cases a right, but usage and convenience permit us to speak of the ownership of a material thing and to distinguish this both from the extensive sense of ownership mentioned in the text, and from *jura in personam* (obligations) and *jura in re aliena* (servitudes, hypothec, &c.).

[4] Gr. 2. 3. 10.

[5] Gr. 2. 3. 11; 2. 33. 1.

far, vested not in me but in you. But since to speak of us both as owners would be misleading, unless the degree of ownership of each of us were on every occasion exactly specified, it is usual to speak of one of us only as owner of the thing, and as having a restricted ownership in it, while the other is spoken of as owner of the right, and as having a *right* of possession, a *right* of use and enjoyment, a *right* of alienation, in or over the property of another. Hereupon the question arises which of two or more such competitors is to be regarded as owner, which not as owner. The answer depends not so much on the extent of the right or of the profit derived from it as on the consideration where the residue of rights remains after the deduction from full ownership of some specific right or rights of greater or less extent. Thus, if I give you a right of way over my field, clearly your right is specific and limited, mine is unlimited and residuary.[1] I therefore am owner, you not. The same applies if you have the usufruct of property, the residuary rights over which are vested in me, or even if you have an inheritable right of the kind termed emphyteusis.[2] In all these cases the dominion remains in me, but in the two last, being reduced to a mere shadow, at all events for the time, it is merely bare ownership (*nuda proprietas*), i.e. ownership stripped of its most valuable incidents. All the above-mentioned rights, it must be noted, whether greater or less, are rights of property, and as such protected by appropriate remedies against all the world (*jura in rem*); but while the residuary right, however reduced, is a right of ownership (*dominium—jus in re propria*), the specific rights, however extended, are rights inferior to ownership (*jura in re aliena*). Such, at least, is the analysis commonly accepted. Grotius, however, uses the word *eigendom* (ownership) in an extended sense; for he includes under it both *dominium* (stricto sensu) which he distinguishes as *volle eigendom—dominium plenum*, and

Qualified ownership.

Jura in re aliena.

[1] Gr. 2. 33. 5.

[2] Gr. 2. 33. 1; Dig. 6. 3. 1: Qui in perpetuum fundum fruendum conduxerunt a municipibus, *quamvis non efficiantur domini*, &c.

jura in re aliena which he distinguishes as *gebreckelicke eigendom—dominium minus plenum.*[1] In the following pages when we use the word 'ownership' we shall mean either complete ownership or the residuary right which remains in a person after deduction from his ownership of specific and limited portions of ownership vested in another or others.

[1] Gr. 2. 3. 9.

II

CLASSIFICATION OF THINGS

How things are classified.

WHEN we speak of the classification of things, we mean their classification according to the legal system which we are examining. In the Roman-Dutch system things are classified, first, according to their relation to persons, i.e. in regard to the question whether they are or are not objects of ownership; and secondly, according to their nature, as corporeal and incorporeal, movable and immovable.[1] The significance of these distinctions will appear from the sequel.

Things as objects of ownership.

THINGS AS OBJECTS OF OWNERSHIP. Justinian distinguishes things as (*a*) res communes, (*b*) res publicae, (*c*) res universitatis, (*d*) res nullius, (*e*) res singulorum.[2] These categories have little scientific value, but will serve as a basis of classification.

Res communes and res publicae.

To the class of things common, i.e. common to all mankind, are referred the air, flowing water, the sea, and the sea-shore.[3] The class of things public includes harbours,[4] public rivers or lakes,[5] and public roads.[6] In the Roman view the above classes of things are extra commercium, i.e. cannot be owned either by individuals or by corporations. Thus, the air is insusceptible of ownership, but it is not inconsistent with this that a landowner has certain rights in respect of the air incumbent on his land, so that, e.g. he may require his neighbour not to project his building into it.[7]

The air.

[1] Gr. 2. 1. 4.

[2] Inst. 2. 1, pr.; Gr. 2. 1. 16; Voet, 1. 8. 1; (*a*) (*b*) (*c*) and (*d*) are said to be *extra nostrum patrimonium*, i.e. legally incapable of being owned, or acquired by a private person. Other things are *in nostro patrimonio*. Inst. loc. cit.

[3] Inst. 2. 1. 1; Dig. 1. 8. 2; Gr. 2. 1. 17 and 21; Voet, 1. 8. 3.

[4] Inst. 2. 1. 2. [5] Gr. 2. 1. 25–8; Van Leeuwen, 2. 1. 12.

[6] 'Herewegen.' Gr. 2. 35. 9; *Cens. For.* 1. 2. 14. 34; Stockmans, *Decis. Brabant.* no. 85.

[7] Gr. 2. 1. 23; 2. 34. 8. As to aircraft see Act No. 16 of 1923, sec. 9.

The sea-shore.

The sea-shore is said to be res communis,[1] but according to another and perhaps better view it was the property of the Roman people.[2] In the modern law it is the property of the Crown.[3] The use is common to the people of the State, so that every member of the community may use it for any lawful purpose not inconsistent with the rights of others.[4] The sea-shore extends on the land side as far as the highest winter flood.[5]

Public rivers.

Rivers are either public or private. Public rivers are such as flow perennially;[6] rivers which do not flow perenni-

[1] Grotius (2. 1. 21), perhaps in order to reconcile inconsistent texts of the Roman Law, makes the shore below mid-tide *res communis*, the shore above mid-tide *res publica*; but the distinction is devoid of significance.

[2] Thus in Inst. 2. 1. 1 we read communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. But in Dig. 43. 8. 3, pr. Celsus says: Litora in quae populus Romanus imperium habet populi Romani esse arbitror.

[3] *Surveyor-General (Cape)* v. *Est. De Villiers* [1923] A. D. at p. 594 per Innes C.J. For Ceylon see *Attorney-General* v. *Pitche* (1892) 1 S. C. R. 11, and *Rowel Mudaliyar* v. *Pieris* (1895) 1 N. L. R. 81.

[4] This in Roman Law included the right of building; and the ground occupied became the property of the owner of the fabric, but only for so long as the building stood. Dig. 1. 8. 6, pr.; 41. 1. 14; Voet, 1. 8. 3.

[5] Inst. 2. 1. 3; Dig. 50. 16. 96 and 112. On the sea side it extends presumably so far as the lowest ebb, but this is not stated. In *Pharo* v. *Stephan* [1917] A. D. 1 the Court decided that the landward boundary of the sea-shore is the farthest line reached by the sea during the ordinary winter storms, excluding an exceptional or abnormal flood. See also *Surveyor-General* v. *Ford* [1923] E. D. L. at p. 452.

[6] Dig. 43. 12. 1. 3: Publicum flumen esse Cassius definit, quod perenne sit. Does the same criterion apply to a *rivus*? In Cape Law: 'Under the designation of public streams are included all perennial rivers, whether navigable or not, and all streams which, although not large enough to be considered as rivers, are yet perennial, and are capable of being applied to the common use of the riparian proprietors. Under the designation of private streams are included rivers and streams which are not perennial, and streamlets which, although perennial, are so weak as to be incapable of being applied to common use.' Sir Henry de Villiers C.J., in *Van Heerden* v. *Weise* (1880) 1 Buch. A. C. at p. 7. In the (Union of South Africa) Irrigation and Conservation of Waters Act, 1912, public stream is defined (sec. 2) as 'a natural stream of water which, when it flows, flows in a known and defined channel (whether or not the channel is dry during any period), if the water

ally are private. But a public river does not become private merely from the circumstance of having dried up in one summer.[1] Private rivers are matter of private right and call for no further reference in this place. Public rivers are publici juris. As such they cannot be privately owned, but may be used and enjoyed by all members of the community for navigation or fishing.[2] Amongst public rivers the Roman-Dutch Law, following the feudal law, distinguished further between (1) navigable rivers and their tributaries, (2) other public rivers.[3] The former class fell under the head of *regalia*,[4] with the result that fishing in navigable rivers and other inland navigable waters was not permitted without licence from Government.[5] This distinction is of little or no importance at

Regalia.

thereof is capable of being applied to the common use of the riparian owners for the purposes of irrigation'; and 'a stream which fulfils these conditions in part only of its course shall be deemed to be a public stream as regards that part only'. See *Van Niekerk and Union Government* (*Minister of Lands*) v. *Carter* [1917] A. D. at p. 377.

[1] Dig. 43. 12. 1. 2; *Vermaak* v. *Palmer* [1876] Buch. at p. 28; *De Wet* v. *Hiscock* (1880) 1 E. D. C. at p. 257.

[2] Voet, 1. 8. 8.

[3] This distinction appears already in the Roman Law in connexion with the topic of leading water. If the public stream was navigable, or a tributary of navigable waters, it was not permitted to lead water from it. But from other public waters in the absence of statutory prohibition water might be led. Dig. 43. 12. 2; Voet, 1. 8. 9 (*ad fin.*).

[4] Lib. Feud. II. 56; Gudelin. *de jure novissimo*, 5. 3. 5; Groen. *de leg. abr. ad* Inst. 2. 1. 2; Vinnius *ad* Inst. 2. 1. 2, sec. 3; Gr. 2. 1. 25–7; Huber, *Heedensdaegse Rechtsgeleertheyt*, 2. 1. 17–19; Voet, 1. 8. 8 and 9 (*ad fin.*); 49. 14. 3; Heineccius, *Elem. Jur. Civ. ad* Inst., secs. 325 and 328; *Elem. Jur. German.*, lib. ii. tit. 1, sec. 16; Leyser, *Meditationes ad Pandectas*, vol. i, p. 255; Zypaeus, *Notitia Jur. Belg.*, lib. x, sec. *de jure fisci*; Bort, *Tractaet van de Domeynen van Hollandt*, deel 5; Van Zurck, *Codex Batavus*, *sub voce* Domeinen, sec. 6, n. 3; *Sententien en Gewezen Zaken van den Hoogen en Provincialen Raad*, nos. 5 and 166; Schomaker, *Consilia et Responsa Juris*, vol. v, cons. lvii; Schrassert, *Consultatien, Advysen en de Advertissementen*, vol. iii, cons. cxxviii.

[5] Gr. 2. 1. 25–7; Van Leeuwen, 2. 1. 13; Voet, 1. 8. 9 *ad fin.*; 41. 1. 6; but rod-fishing was allowed. Gr. 2. 1. 28. The right of ferry (veer-recht) also was included under the head of *regalia*. *Provincial Administration* (O. F. S.) v. *John Adams and Co.* [1929] O. P. D. 29. On the subject of ferries reference may be made to

the present time, for in the modern law the prerogative of the Crown extends to all public rivers and streams.[1] Whatever has been said as to the rights of the public in public rivers must be understood subject to the qualification that no person may exercise his right improperly to the public detriment. Accordingly an interdict lies to prohibit interference with navigation or the flow of the stream.[2]

Res nullius.

The phrase res nullius is used in the Roman Law in three distinct senses:[3] (1) Res communes are said to be res nullius and humani juris. (2) Res sacrae, religiosae and sanctae (churches, graveyards, city walls) are res nullius and divini or quasi divini juris.[4] (3) Things ownable, but unowned, are res nullius[5] and may be acquired by occupation. With regard to the second of these classes, which alone here concerns us, it is sufficient to say that it has no place in Roman-Dutch Law, since all the things comprised in it are owned either by corporations or by individuals.[6]

F. A. Holleman, *Rechtsgeschiedenis der Heerlijke Veren in Holland*, a thesis presented for the degree of *doctor juris*, Leiden, 1928.

[1] This seems a legitimate inference from *Van Niekerk's case*. By Dutch Law *regalia*, speaking generally, were inalienable; and in this connexion the distinction indicated in the text may still exist 'Without expressing any view upon the position of navigable rivers it will be sufficient to say that the Crown may validly include in a grant of land the bed of a non-navigable public stream' (per Innes C.J. in *Van Niekerk's Case*, at p. 373) and 'when once property is shown to be riparian—that is, to run up to the natural boundary of the river—then it lies upon him who contests its extension to midstream to show that it stops at the bank' (p. 376). For Ceylon see *Wanigatunga* v. *Sinno Appu* (1925) 27 N. L. R. 50 (the bed of a public stream belongs to the Crown).

[2] Dig. 43, tits. 12 and 13.

[3] See Kotzé's Van Leeuwen, vol. i, p. 148 (translator's note).

[4] Voet, 1. 8. 1.

[5] Inst. 2. 1. 12; Gr. 2. 1. 50–2.

[6] Gr. 2. 1. 15; Van Leeuwen, 2. 1. 9; Groen. *de leg. abr. ad* Inst. 2. 1. 8 and 9. For South African Law see *Cape Town and District Waterworks Co.* v. *Elder's Exors.* (1890) 8 S. C. 9, where it was held that the fact of burials having taken place in land with the consent of the owner did not make that land so sacred or religious as to be inalienable. On the other hand, in the Ceylon case, *Pullenayagam* v. *Fernando* (1900) 4 N. L. R. 88, Bonser C.J., citing *Cens. For.* 1. 2. 1. 10, said: 'By the law of this island a *res religiosa* is *res nullius* —no one's property.' No reference was made to conflicting authorities.

Passing over things ownable, but unowned in fact, of which we shall speak hereafter, we come to the last two classes in Justinian's division, viz. res universitatis and res singulorum. The first class comprises things owned by towns, villages, and similar societies or by corporations.[1] The second class comprises things owned by individuals. This distinction seems to be a distinction not of things, but of persons, i.e. according as they are (*a*) artificial or juristic persons; or (*b*) natural persons.

Res universitatis, res singulorum.

THINGS ACCORDING TO THEIR NATURE. Things are further classified according to their nature as corporeal and incorporeal.[2] Corporeal things can be touched, e.g. land, houses, cattle, clothes.[3] Incorporeal things consist in a right, as servitude, inheritance, obligations, debts, actions, rents.[4]

Things according to their nature: corporeal and incorporeal;

Again, things are divided into immovables and movables.[5] This is properly a classification of corporeal things; but in law most incorporeal things are deemed to be comprised under immovables or movables.[6] This division, therefore, becomes the principal basis of classification. Where, however, the context requires it, incorporeal things form a third and separate class by themselves.[7] The class of things immovable comprises not merely things physically immovable, but also some movable and incorporeal things, which are deemed to be immovable and are governed by the law of immovables. The class of things movable comprises not merely things physically movable, but also some incorporeal things which are deemed to be movable and are governed by the law of movables. Immovable[8] things and things

immovable and movable.

What things are

[1] Gr. 2. 1. 31 ff.; Voet, 1. 8. 10. The State (or what comes to the same thing, the fiscus) may, of course, own property *quâ* individual. Property so owned is not properly speaking *res publica*. It is *in pecunia populi*, not *publico usui destinata*. Dig. 18. 1. 6, pr.; Gr. 2. 1. 40.

[2] Gr. 2. 1. 9; Voet, 1. 8. 11.

[3] Gr. 2. 1. 10.

[4] Gr. 2. 1. 14; Voet, 1. 8. 18.

[5] Gr. 2. 1. 10; Voet, 1. 8. 11.

[6] Voet, 1. 8. 18.

[7] Voet, 1. 8. 29; V. d. K. *Th.* 178–9.

[8] Ontilbaer ofte onroerbaer; res immobiles.

classed as immovables.

deemed to be immovable are: (1) land and houses;[1] (2) things naturally or artificially annexed to or associated with land and houses[2] (under this head fall growing trees and fruits; minerals, stones, &c.; certain movables annexed to houses even though temporarily removed; certain movables not annexed to, but enjoyed along with, land and houses or destined for perpetual use therewith);[3] (3) praedial servitudes;[4] (4) personal servitudes over immovables;[5] (5) actions in rem directed to the recovery of immovables;[6] (6) annual rents charged on land;[7] and (*semble*), (7) in the modern law, leases of immovable property so far as they create rights in rem.[8] Mortgages, however, even of land, are classed as movables, the mortgage being considered as merely accessory to a

[1] Gr. 2. 1. 12. In the Old Dutch Law houses did not fall under the head of immovables unless the owner of the house was also the owner of the land. Fock. And., vol. i, p. 169. On the other hand, the larger kind of ship and all kinds of windmill were deemed immovable. Ibid. pp. 170–1.

[2] Gr. 2. 1. 13: Wat aerd- ofte naghel- vast is, werd ghehouden als een gevolg van het ontilbare; Voet, 1. 8. 13–14. *Rex* v. *Mabula* [1927] A. D. 159. Van Leeuwen (*Cens. For.* 1. 2. 1. 4) adds title-deeds. For Ceylon see *Brodie* v. *Attorney-General* (1903) 7 N. L. R. 81. The question whether an article, originally movable, has become immovable through annexation by human agency to realty depends upon the circumstances of each case. *Macdonald Ltd.* v. *Radin N. O. & Potchefstroom Dairies* [1915] A. D. 454. 'The thing must be in its nature capable of acceding to realty, there must be some effective attachment (whether by mere weight or by physical connexion), and there must be an intention that it should remain permanently attached' (per Innes C.J. at p. 466) and (*semble*) 'the intention required (in conjunction with annexation) to destroy the identity, to merge the title, or to transfer the *dominium* of movable property' must be the intention of the owner (p. 467). This dictum was adopted by the Court in *Champion's Ltd.* v. *Van Staden Bros.* [1929] C. P. D. 330. See also *Van Wezel* v. *Van Wezel's Trustee* [1924] A. D. 409; *Lewis* v. *Ziervogel* [1924] C. P. D. 310; *Land and Agricultural Bk. of S. W. A.* v. *Howaldt* [1925] S. W. A. 34.

[3] Voet, *ubi sup.*

[4] Voet, 1. 8. 20.

[5] Voet, ibid.

[6] Voet, 1. 8. 21.

[7] Voet, 1. 8. 24 ff.; but *semble*, only if they are irredeemable. Voet, 1. 8. 25–6; Schorer *ad* Gr. 2. 1. 13; V. d. K. *Th.* 180.

[8] *Collins* v. *Hugo* (1893), Hertzog 176 per Kotzé C.J. In Roman Law a *locatio conductio* of land was purely contractual, and gave the conductor no real right. In Roman-Dutch Law the lessee was recognized as having a proprietary right (Huur gaat voor koop). *Infra*, p. 161.

principal and personal obligation, whose nature it, therefore, follows.[1]

What things are classed as movables.

Movable things and things deemed to be movable are: (1) all movable things except such as are deemed to be immovable; (2) money, and rents accrued due[2] (This includes money destined to be laid out in land,[3] or arising from the sale of land);[4] (3) securities for money (including mortgages of immovable property);[5] (4) personal servitudes over movables;[6] (5) actions in personam and actions in rem directed to the recovery of movables;[7] (6) annual rents not charged on land;[8] (7) all other property capable of classification as movable or immovable and not specifically assigned to the class of immovables. This includes most incorporeal rights other than such as have already been mentioned.

The importance of the distinction between immovables and movables.

The legal consequences and therefore also the importance of the distinction of things as immovable or movable are principally the following:[9] (1) In relation to the Conflict of Laws immovables generally follow the lex loci rei sitae, movables generally following the lex domicilii.[10] (2) Immovables may be affected with real charges, which

[1] Voet, 1. 8. 27. *Eaton* v. *The Registrar of Deeds* (1890) 7 S. C. at p. 255; *Reinhardt* v. *Ricker & David* [1905] T. S. at p. 180. In S. A. by The Deeds Registries Act (No. 13) of 1918, sec. 61 'immovable property' includes:

(*a*) land or the usufruct thereof or any limited interest in land other than a lease;

(*b*) any mynpacht or any right to minerals or precious stones or a lease thereof;

(*c*) any registered lease which, when entered into, was for a period of not less than ten years or for the natural life of the lessee or any person mentioned in the lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods which, together with the first period, amount in all to not less than ten years. See also the definition of 'immovable property' in Adm. of Estates Act, 1913, sec. 2, and for Ceylon the definition of Land in Ord. No. 23 of 1927 (Registration of Documents Ordinance), sec. 3.

[2] Voet, 1. 8. 22. [3] Voet, 1. 8. 15. [4] Voet, 1. 8. 16. [5] Voet, 1. 8. 27. [6] Voet, 1. 8. 20. [7] Voet, 1. 8. 21. According to Van der Keessel (*Th.* 179) an action on a kusting-brief (*infra*, p. 206) is an immovable.

[8] And redeemable rents charged on land. *Supra*, p. 134, n. 7.

[9] Voet, 1. 8. 30.

[10] Paul Voet, *De mobil. et immobil. natura*, cap. xxiii, secs. 1 and 3.

will adhere to them, alienation notwithstanding, movables not.[1] (3) Immovables require special formalities of alienation or hypothecation.[2] (4) Special rules apply to the alienation of the immovable property of minors.[3] (5) The process of execution upon immovables differs from the process of execution upon movables.[4]

The above distinctions, though a useful guide, are not invariably conclusive. A thing may, for instance, be treated as immovable for some purposes but not for all. Thus a mortgage of land, like a sale or other alienation, requires to be solemnly executed and registered if it is to bind third parties, and so far resembles immovable property,[5] but is, nevertheless, as we have just seen, in other respects classed with movables.

[1] Op. cit., cap. xix, sec. 8.

[2] Op. cit., cap. xix, secs. 3 and 4; as to transfer of immovables out of an estate by an executor see Adm. of Est. Act, 1913, sec. 62.

[3] Op. cit., cap. xviii, sec. 1; *supra*, p. 48.

[4] Op. cit., cap. xx, sec. 7; Van der Linden, *Verhandeling over de Judicieele Practijcq*, book iii, chap. vi; Nathan, *Common Law of South Africa*, vol. iv, pp. 2206 ff. A judgment creditor must excuss the movable property of his debtor before proceeding against the immovables: *Cape Rules of Court*, Rule 36; Ingram De Villiers (2nd ed.), p. 16; *Hart* v. *Lennox* [1926] W. L. D. 219. See *infra*, p. 358, as to the incapacity of a guardian to take immovable property under the will of his ward. The distinction is also of importance in construing wills, contracts, and mortgages.

[5] Voet, 1. 8. 27.

III

HOW OWNERSHIP IS ACQUIRED

Modes of acquisition of corporeal things.

In this chapter we shall deal with the acquisition and extinction of ownership in corporeal things; and principally with the legal modes of acquisition of ownership, i.e. the processes which, in law, make a thing mine. The modes of acquiring and losing ownership of incorporeal things will be considered in connexion with the various incorporeal things of which we shall speak hereafter. The modes of acquisition of corporeal things, i.e. of single things (*rerum singularum*)—for with acquisition per universitatem we are not here concerned—are principally the following: viz. (1) occupation; (2) accession; (3) tradition or delivery; (4) prescription. We shall speak of these in order. Since the Dutch Law of modes of acquisition closely follows the Roman Law, we shall credit the reader with a knowledge of the first title of the second book of Justinian's *Institutes*; and limit ourselves to recalling the heads of classification therein contained, and to directing attention to some particulars in which the Roman-Dutch Law presents features of peculiar interest.

Occupation.

I. Occupation may be defined as the lawful seizing (with the intention of becoming owner) of an unowned corporeal thing capable of ownership.[1] This mode of acquisition is applicable to: (1) wild beasts, birds, and fishes;[2] (2) enemy goods;[3] (3) stones, &c., on the seashore;[4] (4) treasure (*thesaurus*);[5] (5) islands arising in the sea;[6] (6) abandoned things (*res derelictae*);[7] and, in short, to every ownable thing which either never has been owned or having once been owned is owned no longer.[8]

[1] Voet, 41. 1. 2; Heinecc. *Elem. Jur. Civ. ad* Inst., sec. 342.

[2] Inst. 2. 1. 12–16; *Richter* v. *Du Plooy* [1921] O. P. D. 117. Held by the Natal Court in *Dunn* v. *Bowyer* [1926] N. P. D. 516 that a person who captures a wild animal illegally does not become owner.

[3] Inst. 2. 1. 17.

[4] Inst. 2. 1. 18.

[5] Inst. 2. 1. 39.

[6] Inst. 2. 1. 22.

[7] Inst. 2. 1. 47.

[8] Gr. 2. 1. 50.

Wild animals.

With regard to wild animals, in particular, the Dutch Law departed very widely from the law of Rome. It is, however, unnecessary to recall the obsolete feudal customs and game laws which formed a great part of the old law.[1] Such matters are now regulated in each of the colonies by local legislation.[2] One doubtful point may be mentioned, viz. as to the ownership of tamed animals which have lost the animus revertendi.[3] According to several authorities they do not thereby revert to their natural liberty, but remain the subject of private ownership.[4] Falcons and sparrow-hawks are cited as examples. The instances given rather suggest that the rule itself belongs to an order of ideas which has passed away. Things which have been lost by their owner remain his property and cannot be acquired by occupation.[5] A person who takes them in bad faith commits theft.[6] But if after proper inquiry the owner is not found, the finder of the goods may retain them.[7] Wreckage, however, Grotius tells us, 'used from of old to be regarded as the private property of the Counts, but in view of the increase of shipping in and about these lands the Count, nobles, and towns decreed that every one might recover his shipwrecked and lost property'.[8] The claim must be made

Lost property.

Wreckage.

[1] For which see Gr., book ii, chap. 4; Van Leeuwen, 2. 3. 2 ff. They were swept away at the end of the eighteenth century (1795) (V. d. K. *Th.* 185–7); but fresh regulations were found necessary a few years later. V. d. L. 1. 7. 2.

[2] See e. g. Ceylon Ord. No. 1 of 1909, which amends and consolidates the law relating to the protection of game, wild beasts, birds, reptiles, and fish. Pereira, p. 340.

[3] Inst. 2. 1. 15; Dig. 41. 1. 5. 5; Gr. 2. 4. 13.

[4] *Cens. For.* 1. 2. 3. 7; Voet, 41. 1. 7; Groen. *de leg. abr. ad* Inst., *ubi sup.*

[5] Voet, 41. 1. 9; V. d. K. *Th.* 189; V. d. L. 1. 7. 2.

[6] Inst. 2. 1. 48 (*ad fin.*); Dig. 41. 1. 9. 8 and 41. 1. 58; 47. 2. 43. 4 and 11.

[7] Voet, *ubi sup.*; unless they are to be said to go to the fisc as bona vacantia. Groen. *de leg. abr. ad* Inst. 2. 1. 39, sec. 3; *Cens. For.* 1. 2. 3. 16. Van der Keessel (*Th.* 189) says 'cedunt inventori non fisco'. Groenewegen (*de leg. abr. ad* Inst. 2. 1. 47) distinguishes lost property from res derelicta. The former, he says, goes to the fisc, the latter to the finder.

[8] Gr. 2. 4. 36; Van Leeuwen, 2. 3. 9. There was much legislation

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within a year and six weeks,[1] and the owner must bear the cost of salvage.[2] If the wreckage remains unclaimed, it belongs not to the finder, but to the fiscus.[3]

Treasure trove in Roman Law went, as a rule, half to the finder, half to the owner of the land where it was found,[4] and, therefore, if found by the owner of the land, wholly to the finder. In Holland it was matter of acute controversy whether treasure followed the rules of the Roman Law or went to the Count or public chest. Grotius,[5] who is charged with official bias,[6] leaves the question open. Groenewegen decides against the Treasury;[7] and this view is confirmed by Voet,[8] Vinnius,[9] Van Leeuwen,[10] Schorer,[11] Van der Linden,[12] and Van der Keessel.[13] Treasure.

Where several persons are interested in the same land, e.g. as dominus and usufructuarius, mortgagor and mortgagee, vendor and purchaser (before delivery), the ques-

on the subject, consisting partly in Privileges granted by the Counts, partly in enactments of the States of Holland. This was the supreme legislative body, in which the 'Knights, Nobles and Towns' were represented. See Lee, *Grotius' Jurisprudence of Holland*, vol. i, p. 517.

[1] So says Grotius, but further authority is wanting; *Rechts. Obs.*, pt. 4, no. 18. Gr. is followed by Vinnius (*ad* Inst. 2. 1. 47) and by Schorer (*ad* Gr. 3. 27. 6), both of whom attribute this time limit to a Placaat of Philip II. If the reference is to the Placaat of May 15, 1574 (2 G. P. B. 2117) this is incorrect. The statement reappears in *Johnson & Irvin* v. *Mayston* (1908) 29 N. L. R. at p. 701. It may be open to question in S. A. whether matters relating to wreck are governed by R.-D. L. or by English Law. See Cape Act No. 8 of 1879; 2 Maasdorp, p. 41; *Crooks & Co.* v. *Agricultural Co-op. Union* [1922] A. D. 423.

[2] V. d. L. 1. 7. 2 (*bergloon*).

[3] Grotius (*ubi sup.*) adds 'but may easily be redeemed'. See also V. d. K. *Th.* 193–7. For Ceylon Law see Ord. No. 4 of 1862, sec. 2; Pereira, p. 343.

[4] Inst. 2. 1. 39; Dig. 41. 1. 31. 1; 49. 14. 3. 10; Cod. lib. x, tit. 15.

[5] Gr. 2. 4. 38.

[6] He was appointed advocate fiscal in 1607 and pensionaris of Rotterdam in 1613.

[7] Groen. *de leg. abr. ad* Inst. 2. 1. 39, sec. 4.

[8] Voet, 41. 1. 11.

[9] Vinnius *ad* Inst., *ubi sup.*, sec. 9 (*in fine*).

[10] Van Leeuwen, 2. 3. 13; *Cens. For.* 1. 2. 3. 18.

[11] Schorer *ad* Gr. *ubi sup.*

[12] V. d. L. *ubi sup.*

[13] V. d. K. *Th.* 198. In Ceylon by Ord. No. 17 of 1887, sec. 2, all

tion may well arise who is entitled to the owner's share.[1] The reader will find the matter carefully considered by Voet in his commentary on Digest, lib. xli, tit. 1.

Mines and precious stones.

Mines and precious stones should, on general principles, belong to the owners of the soil, and that this was so by Dutch Law is the opinion of Voet, expressed, however, with no certain voice.[2] In the modern law such matters are commonly regulated by statute.[3]

Accession.

II. Accession is a mode of acquiring ownership whereby a thing becomes the property of a person by becoming physically or intellectually associated with some other thing of which such person is already owner.[4] The thing which accedes may either be previously unowned (*res nullius*) or previously owned (*res alicujus*). When two owned things become united by accession it may be questioned which of the two accedes to the other, i.e. which is principal, which accessory, Grotius says that 'accession takes place when of two things which are joined together the more valuable draws to itself the less valuable'.[5] But the test adopted by Ulpian is better: 'Whenever we ask which of two things cedes to the other, we look to see which is applied to ornament the other';[6] so that, e.g. precious stones adhere to a silver plate in which they are set. If this test fails, it will usually be found that the lesser thing accedes to the greater, the less costly to the more costly.

Cases of accession.

Accession comprises the following modes of acquisition: viz. (1) increment by birth of young animals;[7] (2) alluvion;[8] (3) accession of part of my neighbour's land to

treasure trove is the absolute property of His Majesty, and the person finding the same is not, as of right, entitled to any portion thereof, but the Ord. (as amended) provides for a reward to the finder. Treasure trove is defined by Ord. No. 3 of 1891, sec. 2; found property, other than treasure trove, goes half to the finder, half to the Treasury. Regulation, No. 15 of 1823; Ord. No. 26 of 1917.

[1] Voet, 41. 1. 12.
[2] Voet, 41. 1. 13, and see 49. 14. 3.
[3] For Ceylon Law see Ord. No. 5 of 1890 and Pereira, p. 286.
[4] Voet, 41. 1. 14; V. d. L. 1. 7. 2.
[5] Gr. 2. 9. 1.
[6] Dig. 34. 2. 19. 13.
[7] Inst. 2. 1. 19.
[8] Inst. 2. 1. 20.

mine when detached from his by the force of a river;[1] (4) island rising in a river;[2] (5) change of river-bed;[3] (6) specification;[4] (7) industrial attachment (*adjunctio*);[5] (8) confusion of liquids;[6] (9) planting;[7] (10) sowing;[8] (11) perception and separation of fruits.[9] In this case, as in that of occupation, details will be noticed only so far as the Roman-Dutch Law presents features of peculiar interest.

Alluvion is defined as a 'latent increment, whereby something is added to land so slowly that it is impossible to say how much is added at any one moment'.[10] By the Roman Law land so added by the wash of a river or stream belonged to the owner of the land to which it adhered.[11] Alluvion.

In the Netherlands the law of alluvion was very unsettled, and varied from province to province.[12] According to one view alluvion, being an incident of rivers, fell under the head of regalia.[13] 'Certainly in South Holland,' says Vinnius, 'no man was formerly found to claim this right of increment as his own unless on the ground that the right had been granted to him by the Count, or that the land had been assigned to him to hold by the same right as the Count had therein, that is, up to the river.'[14] On

[1] Inst. 2. 1. 21. [2] Inst. 2. 1. 22.
[3] Inst. 2. 1. 23. [4] Inst. 2. 1. 25.
[5] Inst. 2. 1. 26 (*intextura*); secs. 29 and 30 (*inaedificatio*) (*Johnson & Co.* v. *Grand Hotel Co.* [1907] O. R. C. at p. 50; *Reed Bros.* v. *Ford* [1923] T. P. D. at p. 153); sec. 33 (*scriptura*); sec. 34 (*pictura*).
[6] Inst. 2. 1. 27.
[7] Inst. 2. 1. 31; *Secretary for Lands* v. *Jerome* [1922] A. D. at p. 117. [8] Inst. 2. 1. 32.
[9] Inst. 2. 1. 35. Voet brings acquisition of fruits under the general head of accessio. It is more often treated as a distinct title; but on a more careful analysis it appears that the various cases of acquisition of fruits cannot all be referred to the same principle (Girard, p. 344; Buckland, *Textbook*, p. 222). The lessee and usufructuary acquire by perceptio; the emphyteuta and bona fide possessor by separatio. [10] Inst. 2. 1. 20.
[11] Gr. 2. 9. 13; Voet, 41. 1. 15.
[12] Gr. 2. 9. 18 ff.; Van Leeuwen, 2. 4. 2.
[13] *Cens. For.* 1. 2. 4. 12; Groen. *de leg. abr. ad* Inst. 2. 1. 23; Voet, *ubi sup.*; Bort, *Tractaet van de Domeynen van Hollandt*, cap. 5, secs. 16 ff.
[14] Vinnius *ad* Inst. 2. 1. 20, sec. 2, following Gr. 2. 9. 26; Van

principle the claim of prerogative must be limited to navigable public rivers, these alone falling under the head of regalia.[1] This limitation is not always expressed by the Dutch writers, who lived in a land where all rivers are navigable. The claim, whatever its extent, is not admitted by Van Leeuwen,[2] or by Voet[3] except in the case of agri limitati.[4] Grotius declares the claim of the Count in this case to be undoubted.[5] Beyond this he expresses no certain opinion.

Island rising in river.

Another case of accession is that of an island rising in a public river. Here the claim of the Count is admitted by the Dutch writers, who consider that the ownership of the island follows the ownership of the stream.[6] The result is the same when a navigable public river wholly abandons its former course. The deserted river-bed belongs to the Crown.[7] But a partially abandoned river-bed accedes to riparian owners provided that they have the right of alluvion.[8]

Inundation.

If land is covered by flood it does not therefore the less continue to belong to its owner, who may resume

Leeuwen, 2. 4. 4: ten waar dat het Land opgedragen was tot de Rivier toe, of by den hoop, sonder juiste maat uit te drukken, in welken geval den eygenaar mede regt van aanwas heeft.

[1] But see above, p. 131. [2] *Cens. For. ubi sup.* [3] Voet, 41. 1. 28.

[4] i.e. 'defined by straight lines by authority, having no necessary relation to natural features, as was commonly the case with lands granted by the State.' Buckland, p. 212. [5] Gr. 2. 9. 25.

[6] Voet, 41. 1. 17; Vinnius *ad* Inst. 2. 1. 22, sec. 7; Schorer *ad* Gr. 2. 9. 24; Van Leeuwen, 2. 4. 2.

[7] Voet, 41. 1. 18: Moribus nostris magis est ut alveus fluminis desertus fisco cedat. The same holds good of the beds of public lakes. Ibid. Cf. 1 G. P. B. 1252; and see Bort, *Domeynen van Hollandt*, cap. 5, secs. 38 ff.

[8] Vinnius *ad* Inst. 2. 1. 23, sec. 3. The statement in the text must be read in connexion with the decision in *Van Niekerk & Union Govt.* (*Minister of Lands*) v. *Carter* [1917] A. D. 359 to the effect that property bounded by a non-navigable stream must be presumed to extend *ad medium filum fluminis*; and that, though this presumption may be rebutted, the mere facts that the diagram does not extend beyond the bank and that the specified measurement is complete without such extension are not, either singly or together, sufficient to establish a rebuttal (per Innes C.J. at p. 378). As to navigable rivers the Court refrained from expressing an opinion.

possession when the flood abates.[1] In Holland, naturally, the legal consequences of inundation were matter of serious interest. The rule of the Roman Law, which left inundated lands the property of their original owners, might have hindered efforts at reclamation. Accordingly the law provided that if the land had continued under water for a whole period of ten years, and the owner had not given any evident indication of an intention to retain possession (which, contrary to the Roman Law,[2] he might do by fishing merely), the land was held to be abandoned and to go to the Count.[3] It is scarcely necessary to add that intermittent floods do not affect the ownership of property without evidence of abandonment.[4] In Holland sand-drift was by custom assimilated to flood, so that if land had for a period of ten years remained unenclosed from the waste and completely covered by sand it became by accession the property of the owner of the adjoining waste and sand-hills, i.e. usually the property of the fiscus.[5]

Sand drift.

Another small difference between the Roman and the Roman-Dutch Law may be noted in connexion with the rights of the owner of material which another person has used for building his own house.[6] By a rule which dates from the XII Tables, the last-named person, at all events if the material were res furtiva, was answerable to the owner for double value (*actio de tigno juncto*).[7] In Dutch Law the double penalty was not admitted, but the owner of the material had his action for damages.[8]

Inaedificatio.

Under the head of 'mixed accession' the commentators speak at length of the 'perception and separation' of fruits, and of the various rights in this regard of the

Perception of fruits.

[1] Inst. 2. 1. 24.
[2] Dig. 7. 4. 23. The text is not altogether in point, but it is cited in this connexion.
[3] Gr. 2. 9. 7; Voet, 41. 1. 19; Vinnius *ad* Inst. 2. 1. 24, sec. 2.
[4] Gr. 2. 9. 8.
[5] Gr. 2. 9. 6; Voet, 41. 1. 20. No ultimate authority has been found for this statement.
[6] Inst. 2. 1. 29–30.
[7] Dig. 47. 3. 1; 24. 1. 63; 6. 1. 23. 6; 10. 4. 6.
[8] Gr. 2. 10. 7; Groen. *de leg. abr. ad* Inst. 2. 1. 29; Voet, 47. 3. 2 (*ad fin.*).

usufructuary and bona fide possessor.[1] The reader will find the subject fully discussed in Voet's Commentary on the Pandects.

Tradition or delivery.

III. Tradition or Delivery[2] considered as a mode of acquisition may be described as a transfer of possession of a corporeal thing under such circumstances that it effects a transfer of ownership.[3] Normally, tradition implies a physical transference of possession from one person to another. But this is not always so. The transference may have taken place already for some other cause. Thus, I have lent you my watch. Now I give it you.[4] As a rule the ownership in a gift does not pass until tradition. But here tradition has preceded and further handing-over is unnecessary. This is called 'brevi manu traditio'.[5] Conversely, I may agree to remain in possession, not as owner any longer, but as borrower, e. g. I give you my watch on condition that you are to lend it me until next week. Technically two transferences of possession are necessary, first to perfect the gift, secondly to effect the loan. But the two cancel one another, and I remain in physical possession, but under a new right. This is called 'constitutum possessorium'.[6] An alleged agreement of the sort is regarded by the Courts with some suspicion and disfavour.[7] In both the above cases

[1] Voet, 41. 1. 28–33. See also Gr., lib. ii, cap. 6; and Van Leeuwen, lib. ii, cap. vi; V. d. K. *Th.* 205. By perception is meant apprehension: [fructus] apprehensi fructuarii efficientur. Dig. 7. 1. 12. 5.

[2] Leevering ofte opdrachte. Gr. 2. 5. 2.

[3] Voet, 41. 1. 34. Heinecc. *Elem. Jur. Civ. ad* Inst., sec. 380, defines it in the following terms: Traditio est modus adquirendi derivativus, quo dominus qui jus et animum alienandi habet rem corporalem ex justa causa in accipientem transfert.

[4] Inst. 2. 1. 44; Dig. 41. 1. 9. 5. Cf. Dig. 12. 1. 9. 9; 12. 1. 10.

[5] Gr. 2. 5. 11; Van Leeuwen, 2. 7. 2; Voet, 41. 1. 34; *Meintjes* v. *Wilson* [1927] O. P. D. 183.

[6] This is still recognized as Law in S. A. *Goldinger's Trustee* v. *Whitelaw* [1917] A. D. 66; *Groenewald* v. *Van der Merwe* [1917] A. D. 233; *Katz* v. *Dreyer's Trustee* [1920] A. D. 454; *Visagie* v. *Muntz & Co.* [1921] C. P. D. 582.

[7] 'A process by which a change of *dominium* may depend upon a mere change of mental attitude is one the application of which

tradition is said to be 'feigned' or 'fictitious'; and so it is too when there is no actual handing-over, but a thing is placed in my sight or I am placed in sight of it, so that I may easily take possession. This is 'longa manu traditio'.[1] Another kind of tradition is said to be symbolical, e.g. when the keys of a warehouse are handed over in sight of the building, the building and its contents are deemed to pass also.[2] But it seems that there is nothing symbolical or fictitious about this process, for handing over the keys is the best means of giving control over and therefore possession of the warehouse and its contents.[3] In other words, the possessor of the keys is *prima facie* also possessor of the building.

'Fictitious' tradition.

Tradition will not operate as a means of acquiring ownership (but only as a transfer of possession) unless the following conditions concur:

Essentials of tradition as a mode of acquisition.

1. The transferor must be owner, or at least act by authority of the owner, viz. as his servant or agent.[4] Ratification is equivalent to antecedent authority.

2. The transferor must have the intention of transferring ownership[5] ex justa causa.[6] Such intention is absent when

should be carefully scrutinized' per Innes C.J. *Goldinger's Trustee* v. *Whitelaw & Son*, *ubi sup.*, at p. 74.

[1] Dig. 46. 3. 79: Pecuniam quam mihi debes aut aliam rem si in conspectu meo ponere te jubeam, efficitur ut et tu statim libereris et mea esse incipiat; nam tum, quod a nullo corporaliter ejus rei possessio detinetur, adquisita mihi et quodammodo manu longa tradita existimanda est. See *Groenewald* v. *Van der Merwe*, *ubi sup.*, at p. 239; *Kaal Valley Supply Stores* v. *Louw* [1923] O. P. D. 60.

[2] Inst. 2. 1. 45; Dig. 18. 1. 74; 41. 1. 9. 6.

[3] Savigny, *Das Recht des Besitzes*, book ii, sec. 16; C. H. Monro on Dig. xli, 1, Appendix 1.

[4] Inst. 2. 1. 42–3; Dig. 41. 1. 20, pr.; Gr. 2. 5. 15; Van Leeuwen, 2. 7. 5; Voet, 41. 1. 35. Sometimes the authority is conferred by law and not by act of party. 'Accidit aliquando ut qui dominus non sit alienandae rei potestatem habeat' (Inst. 2. 8. pr.), as the pledgee, or the guardian as administrator of his ward's property.

[5] Inst. 2. 1. 40.

[6] This means that the legal disposition intended is of such a kind that the transfer of possession carries with it in law transfer of ownership. Dig. 41. 1. 31, pr.: Nunquam nuda traditio transfert dominium sed ita si venditio aut aliqua justa causa praecesserit propter quam traditio sequeretur. See *Beyers* v. *McKenzie* (1880) Foord at p. 127.

a person transfers his own property in error, supposing that it is the property of another person.[1]

3. The transferor must be legally competent to alienate. Therefore a minor (generally speaking) or an interdicted prodigal cannot pass ownership by tradition without the authority of his tutor or curator.[2]

4. The thing transferred must be legally alienable by delivery. This rules out things which cannot be owned by individuals, and things which cannot be alienated by this process.[3]

5. The transferee must have the intention of becoming, and must be competent to become,[4] owner in consequence of the transfer.[5]

Transfer of immovables in Roman-Dutch Law.

Thus far we have spoken of transfer in general, making no distinction between movables and immovables. Nor was any such distinction known to the later Roman Law. Land and movables alike passed by the same simple process of delivery. But in Roman-Dutch Law it was otherwise. The customs of the Saxons and the Franks (with regard to the Frisians we have no information) demanded something more than mere delivery to perfect

[1] Dig. 41. 1. 35: Nemo errans rem suam amittit.

[2] *Supra*, pp. 48 and 119. For prohibition of alienation in fraud of creditors see Gr. 2. 5. 3 (*ad fin.*) and 4; Van Leeuwen, 2. 7. 8–9; Voet, lib. xlii, tit. 8 (*actio pauliana*); V. d. K. *Th.* 199–200; and the learned judgment of Berwick D. J. (Ceylon) in D. C. Colombo, 70, 260 (1877) Ramanathan, 1872–6, 7, p. 89. In the law of South Africa the ground has been to a great extent covered by the Insolvency Acts, but not to the exclusion of the common law remedy where applicable. *Scharff's Trustee* v. *Scharff* [1915] T. P. D. at p. 476; *Wiener* v. *Est. McKenzie* [1923] C. P. D. at p. 579; Mars, *Insolvency*, p. 135.

[3] Res incorporales. Dig. 41. 1. 43. 1.

[4] If a person fraudulently purchases goods in anticipation of an insolvency, which shortly afterwards follows, he is bound to restore the goods to the seller. Van Leeuwen, 4. 17. 3; V. d. K. *Th.* 204.

[5] Dig. 44. 7. 55: In omnibus rebus quae dominium transferunt, concurrat oportet affectus ex utraque parte contrahentium. Cf. *Weeks* v. *Amalgamated Agencies Ltd.* [1920] A. D. at p. 230. But it was not necessary that the transferee should intend to become owner by the *causa*, which was in the contemplation of the transferor. Dig. 41. 1. 36. But see Dig. 12. 1. 18. The special rules of law relating to the transfer of ownership in things sold are considered in a later chapter. *Infra*, p. 300.

a title to land.[1] In many parts of Holland the conveyance was required by local law to be passed before the Court of the district in which the land in question was situated.[2] This excellent practice was made general and obligatory by a placaat of the Emperor Charles V of May 10, 1529,[3] which enacts that 'henceforth no one shall presume to sell, charge, convey, alienate, or hypothecate any houses, lands, plots of ground, tithes, *tijnsen* (*infra*, p. 160, n. 2), or other immovable property except before the Judge and in the place where the goods are situated'. All sales &c., which do not comply with this provision are to be null and of no effect. An exception is permitted in case of feuds, which may be granted in the Lord's Court according to ancient custom. A later placaat of the States of Holland, the first of many such, dated December 22, 1598, imposed a duty of the fortieth penny (2½ per cent.) on all transports for value[4] (half to be paid by the seller, half by the purchaser), and the Political Ordinance of April 1, 1580 (Art. 37), further required registration in the land-book.[5] Failing compliance with either of these

Placaat of Charles V of May 10, 1529.

The duty of the 40th penny.

Registration.

[1] Fock. And., vol. i, pp. 192 ff.

[2] Ibid., p. 194; Gr. 2. 5. 13; Voet, 41. 1. 38; V. d. K. *Th.* 202; *Rechts. Obs.*, pt. 3, no. 32. In the old law the person making cession of the land symbolized the transfer by handing over a sod or twig, later by handing over or throwing from him a straw (*halm*). Fock. And., vol. i, p. 192. The handing over of the title-deeds sometimes served the same purpose. Ibid. This process (called 'overdracht' or 'transport') passed the property, though not followed by entry on the land. Ibid., p. 195, n. 1. It would seem that, whatever may have been the case in Gelderland (Sande, *de effestucatione*, cap. 2, sec. 18), in Holland all such solemnities were in course of time disused. Fock. And., vol. i, p. 198. Even the handing over of the deed was not necessary to pass the property. V. d. K. *Th.* 202. The history of land transfer in R.-D. L. is considered by the Ceylon S. C. in *Appuhamy* v. *Appuhamy* (1880) 3 S. C. C. 61. In this Colony: 'Traditio whether actual or symbolic is no longer necessary for the consummation of a sale of immovable property and has been replaced by the delivery of the deed' per Bertram C.J. in *Gunatilleke* v. *Fernando* (1919) 21 N. L. R. at p. 265; confirmed in appeal to P. C. [1921] 2 A. C. 357; 22 N. L. R. 385.

[3] 1 G. P. B. 374; Gr. 2. 5. 13; *Cens. For.* 1. 2. 7. 6; Voet, 41. 1. 38–42.

[4] 1 G. P. B. 1953; Van Leeuwen, 2. 7. 4.

[5] 1 G. P. B. 339. A similar provision is contained in the reissue of the Placaat of 1598, dated March 6, 1612. 1 G. P. B. 1957 and

conditions, the transaction is null and void.[1] This continued to be the law until the fall of the Dutch Republic, and it remains in its essential features the law of land-transfers in the Roman-Dutch Colonies at the present day.[2]

The Deeds Registry in South Africa.

In South Africa the only important change that has taken place consists in the creation of a special department called the Deeds Registry, which supervises all transfers of land and exercises the functions formerly vested in the Court.[3]

Between the parties an informal transfer holds good.

It should be noted that, though all transfers which fail to comply with the provisions of the Placaats of 1529 and 1598 are declared to be null and void, the transaction is in fact only avoided as against third persons, whether purchasers or creditors. As between the parties themselves the contract holds good.[4]

1961. Registration seems to have been first enjoined by Placaat of May 9, 1560 (2 G. P. B. 759 and 1402).

[1] Art. 13 of the Placaat. 1 G. P. B. 1957.

[2] British Guiana, together with other archaic usages, retained the practice of transfer coram judice. In Ceylon, by Ord. No. 7 of 1840, sec. 2, no sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month) nor any contract or agreement for the future sale or purchase of any land or other immovable property shall be of force or avail in law, unless the same shall be in writing and signed by the party making the same or by some person lawfully authorized by him or her, in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses, *Arseculeratne* v. *Perera* (1926) 28 N. L. R. 1. By Ord. No. 17 of 1852 deeds relating to land may be executed before a District Judge or Commissioner of a Court of Requests or Justice of the Peace. By Ord. No. 8 of 1863, and now by Ord. No. 23 of 1927, a land register office is established; and by sec. 7 an unregistered instrument shall be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument, which is duly registered.

[3] For the law of South Africa herein see *Harris* v. *Buissinne's Trustee* (1840) 2 Menz. 105; *Van Aardt* v. *Hartley's Trustees* (1845) 2 Menz. 135; *Melck, Exor. of Burger* v. *David* (1840) 3 Menz. 468; Wessels, *Hist. R.-D. L.*, pp. 498–9.

[4] Neostad, *Supr. Cur. Decis.* no. 70, and note to *Decis. van den*

Prescription: in the latest Roman Law;

IV. Prescription. In the latest Roman Law long-continued possession by a non-owner sometimes conferred ownership upon the possessor (*acquisitive prescription*), sometimes merely barred the original owner of his remedy without making the possessor owner in his stead (*extinctive prescription*). Thus: (1) Possession of movables for three years, of immovables for ten to twenty years, if originating in just title and accompanied in its inception by good faith, made the possessor owner. The thing possessed must not have been stolen (*res furtiva*) nor possessed by force (*res vi possessa*). (2) Possession, for thirty years, whether of movables or immovables, if accompanied in its inception by good faith, though not originating in just title, made the possessor owner even of a res furtiva but not of a res vi possessa. (3) Possession for thirty years, though not accompanied in its inception by good faith and though not originating in just title, even of res furtiva or of res vi possessa, barred the owner of his remedy without, however, vesting ownership in the possessor.[1] Accordingly, if the possessor lost possession he could not vindicate the property from the new possessor, while the original owner, on the other hand, could.

in the Netherlands.

In the Netherlands the whole subject of prescription was involved in the greatest uncertainty, according as local practice approached to or receded from the Roman Law.[2] The situation was further complicated by the presence of two new terms of prescription,[3] a shorter period of a year and a day (which meant in practice a year and six weeks),[4] and a longer period of a third of a century

Hove, no. 32; 2 Maasdorp, p. 79. Does the property pass? Voet seems to say so in 41. 1. 42, but this is scarcely to be reconciled with 18. 6. 6. In S. A. it is clear that it does not. *Harris* v. *Buissinne's Trustee, ubi sup.* The property passes 'at the moment that delivery of the property is given to [the purchaser], and that delivery occurs at the moment his name is entered on the register as the new dominus of the property', *Breytenbach* v. *Van Wijk* [1923] A. D. at p. 547.

[1] Cod. 7. 39. 8; Girard, p. 326.

[2] Gr. 2. 7. 5; Fock. And., vol. ii, pp. 123 ff.

[3] Gr. 2. 7. 6 ff.

[4] Voet, 44. 3. 4.

(which meant in practice thirty-three years and four months and, as some add, three or four days).[1]

The period of a year and a day.

The first of these was of purely Germanic origin.[2] Its application was very limited, and it was available only as a defence.[3] We shall meet with it again in connexion with the possessory remedy known as 'complaincte'.[4] Independently of this it fell out of use after the middle of the seventeenth century.[5]

The period of a third of a century for immovables.

The prescription of a third of a century—in origin, it would seem, merely a variant from the thirty years' prescription of the Theodosian Code[6]—came eventually to be the usual term of prescription, at all events for immovable property.[7] The 'Great Privilege' granted by Mary of Burgundy of March 14, 1476[8] (Art. 47), fixes the period of prescription for immovables (*leenen ende erffelijcke goeden*) at a third of a century,[9] and the same term is met with in numerous documents of the sixteenth century side by side with the shorter and longer periods of the Roman Law.[10] After Grotius pronounced in its favour it was very generally accepted as the proper term of prescription for immovables.[11] With regard to movables Grotius expresses no final opinion.[12] Groenewegen, whose

[1] Matthaeus, *Paroemiae*, no. 9, sec. 1. Voet (44. 3. 1) notes: In hodierna praescriptione longissimi temporis aut trientis seculi diem ultimum coeptum non haberi pro completo recte defenditur.

[2] Fock. And., vol. ii, p. 124.

[3] So says F. A. *ad* Gr. 2. 7. 7. But Van Apeldoorn maintains that it was a true case of acquisitive prescription.

[4] *Infra*, p. 167. [5] Voet, 44. 3. 8 (*ad fin.*); V. d. K. *Th.* 208.

[6] Cod. Theodos., lib. iv, tit. 14; Cod. 7. 39. 3 (A.D. 424); Van de Spiegel, *Oorsprong en historie der Vaderlandsche Rechten*, pp. 129–30.

[7] Gr. 2. 7. 8; Groen. *de leg. abr. ad* Cod. lib. vii, tit. 39; Van Leeuwen, 2. 8. 5; *Cens. For.* 1. 2. 10. 11.

[8] 2 G. P. B. 671. [9] See Gr. 2. 7. 8.

[10] Groningen followed the law of Justinian—three years for movables, ten to twenty for immovables. Fock. And., vol. ii, p. 125.

[11] V. d. K. *Th.* 206.

[12] He seems to imply a uniform term of one-third of a century for immovables and movables alike. So, at least, he is understood by Groenewegen (*ad* Cod. 7. 39, sec. 2), Van Leeuwen (2. 8. 5; *Cens. For.* 1. 2. 10. 11), and Voet (44. 3. 8). But Boel *ad* Loen. (*Decis. & Observ.* at p. 503) thinks it 'clear as daylight' that this was not his meaning.

book was published in 1649, says distinctly that the period of prescription is a third of a century for immovables, but thirty years for movables.[1] This view, endorsed by Van Leeuwen[2] and Van der Keessel,[3] outweighs the inclination of Voet[4] and the opinions of Schorer[5] and Van der Linden[6] in favour of a term of a third of a century for both kinds of property.

The period of thirty years for movables.

At the Cape the period of thirty years for immovable property is fixed by statute and for movables by the common law, whenever there is no express statutory provision to the contrary.[7]

Prescription at the Cape.

Some other points in the law of prescription are less doubtful. Contrary to the Roman Law the Roman-Dutch Law requires neither good faith nor just title.[8] Even stolen goods may be prescribed. All that is required is that the possession or quasi-possession of the person claiming by prescription should be 'peaceable, open and as of right',[9] and uninterrupted.[9] Interruption (*usurpatio*)[10] is either (1) natural, i.e. physical, or (2) judicial, i.e. by instituting proceedings to enforce an adverse claim.[11] Physical interruption, as negativing continued possession, is an absolute bar to prescription; judicial interruption prevents its running only against the person who institutes

Good faith and just title unnecessary;

but possession must be undisturbed.

[1] Groen. *de leg. abr. ad* Cod. 7. 39, sec. 3.

[2] Van Leeuwen, *ubi sup.* [3] V. d. K. *Th.* 206; Bijnk. *O. T.* i. 282.

[4] Voet, 44. 3. 8. [5] Schorer *ad* Grot. 2. 7 (*rubric*).

[6] V. d. L. 1. 7. 2 (*ad fin.*). But in his note to Pothier on *Obligations*, art. 702, V. d. L. agrees with V. d. K.

[7] Cape, Act 7 of 1865, sec. 106; 2 Maasdorp, p. 84. For Ceylon, see Ord. No. 22 of 1871, sec. 3, 'The effect of the Ordinance is to sweep away all the Roman-Dutch Law relating to the acquisition of immovable property by prescription except as regards the property of the Crown.' Pereira, p. 384.

[8] Voet, 44. 3. 9; Anton. Matthaeus, *Paroemiae*, no. 9, secs. 2–3; V. d. K. *Th.* 207.

[9] *Jones* v. *Town Council of Cape Town* (1896) 13 S. C. at p. 50; *Smith* v. *Martin's Exor.* (1899) 16 S. C. at p. 151; *Kareiga Baptist Church Trustees* v. *Webber* (1903) 17 E. D. C. 105; *De Beer* v. *Van der Merwe* [1923] A. D. at p. 384.

[10] *Van Schalkwyk* v. *Hugo* (1880) Foord 89; *De Klerk* v. *Pienaar* (1899) 16 S. C. 370.

[11] Voet, 41. 3. 17. Extrajudicial demand is insufficient for the purpose. Ibid., sec. 20.

the proceedings.[1] In calculating the period of prescription, the possession of the predecessor in title, if adverse to the original owner, may be reckoned (*conjunctio temporum*) without any distinction of good or bad faith in either party.[2] Prescription generally runs against the Crown, provided that the property claimed by this mode of acquisition is such as the Crown might have alienated by grant.[3] Time does not run against minors nor, says Voet, against madmen and other such persons, who are deemed to be minors and are subjected to guardianship; nor against persons who are absent because of war or on other public business;[4] nor against those who are disqualified from asserting their rights; and therefore not against a fidei-commissary whose right is suspended by a condition, if the fiduciary alienates the property which is the subject of the fidei-commissum before the condition is fulfilled;[5] nor against a married woman whose husband has improperly alienated dotal property.[6] Schorer, however, states and perhaps endorses a contrary view:

Against whom prescription runs.

'It has been advised that against this prescription of thirty years avails neither the frailty of sex, nor malice, nor absence, but that minority[7] alone is exempted from this penalty, for it is a rule of law that during minority prescription is dormant; so that even ignorance is not relieved by restitutio in integrum.'[8]

Effect of prescription.

The effect of prescription is to vest the ownership of the property in question in the possessor, so that he can

[1] Voet, 41. 3. 20: tantum in eorum cedit utilitatem qui litem movendo vigilarunt sibi; cum res inter alios acta aliis nec prosit nec noceat.

[2] Voet, 44. 3. 9.

[3] Voet, 44. 3. 11; *Union Govt.* (*Minister of Lands*) v. *Estate Whittaker* [1916] A. D. 194; *Union Govt.* v. *Tonkin* [1918] A. D. 533.

[4] Voet, 44. 3. 9; citing Anton. Matthaeus, *Paroemiae*, no. 9, secs. 22–3.

[5] See *De Jager* v. *Scheepers* (1880) Foord, 120.

[6] Voet, 44. 3. 11.

[7] 'Pupillarem aetatem'; but this must be taken to include all minors. V. d. K. *Th.* 210.

[8] Schorer *ad* Grot. 2. 7. 9. Decker (*ad* Van Leeuwen, 2. 8. 12) says that even minors are not relieved from the operation of prescription *ipso jure*, but only by way of restitutio in integrum. For Cape Law see Act No. 6, 1861, sec. 6.

vindicate it, if he subsequently loses possession, from the original owner as well as from third parties.

Limitation of actions.

From the acquisitive prescription above described the reader must distinguish the law as to the limitation of actions, which merely bars a plaintiff of his remedy.[1] This applies not only to claims for property, but also to all actions whatsoever. The limit of time is generally thirty years, but in the case of actions to recover immovable property and irredeemable rents[2] charged on land a third of a century.[3] In relation to property therefore the same period bars the remedy and transfers the right.

How ownership is lost.

The modes of extinction of ownership may be briefly dismissed; they correspond, in general, to the modes of acquisition. Such are: 1. Dereliction or abandonment of possession; loss of possession of an animal *ferae naturae*;[4] 2. Accession (when it effects a transfer of ownership); 3. Tradition; 4. Prescription: to which may be added 5. Expropriation by competent authority, e.g. when land is taken for some public purpose;[5] and 6. Forfeiture for crime. In the time of Grotius property might be declared forfeit by judicial sentence.[6] But all forfeitures for crime were abolished in Holland by Resolution of the States of Holland of May 1, 1732,[7] and in the Colonies by Publication of the States-General of August 10, 1778.[8]

[1] *Infra*, pp. 286 ff.

[2] With regard to rents the books speak with uncertain voice. See Loen. *Decis.*, Cas. 76; Van Leeuwen, 2. 8. 7 ff.; V. d. K. *Th.* 206. The limitation in the text seems to follow from the fact that rents if charged on land and irredeemable are classed with immovable property, otherwise not. *Supra*, p. 134.

[3] Grotius (3. 46. 3) says that the usual term of prescription is a third of a century; but Groenewegen in his note ad loc. says that in the opinion of many jurists the Roman term of thirty years applies to movable goods and to real and personal actions. See also Schorer's note ad loc., and Bynkershoek, *Quaest. Jur. Priv.*, lib. II, cap. xv.

[4] Gr. 2. 32. 3–4; V. d. L. 1. 7. 4.

[5] Gr. 2. 32. 7.

[6] Gr. 2. 32. 6.

[7] 6 G. P. B. 577; *Rechts. Obs.*, pt. 1, no. 50.

[8] 9 G. P. B. 458; Cape Statutes, vol. i, p. 2.

IV

INCIDENTS OF OWNERSHIP

Subject-matter of this chapter.

We have already spoken of the nature of ownership, and of the distinction between full ownership and the limited rights carved out of another's ownership, which are commonly known as jura in re aliena. In the present chapter we shall speak of the incidents of ownership and more particularly of the kinds of ownership in land.

Section I. The Incidents of Ownership in General

The incidents of ownership in general.

It is a common saying that a man may do what he will with his own. The proverb has an element of truth. Ownership comprises rights of possession, user, and alienation;[1] and all these rights are limited only by the duty which the law imposes upon all to have due regard to the rights of each according to the maxim 'male jure nostro uti non debemus'.

What is the landowner's duty towards his neighbour?

But what is 'male uti', and what use of land is regarded in law as an injury to another? It is not possible to give a general answer except that a landowner may do what he pleases so long as he does nothing which can be referred to a recognized head of legal wrong. Thus, it may be very annoying to you that I should build a house with windows looking out over your garden, but apart from servitude you have no lawful ground of complaint or legal remedy. Again, if I sink a well in my field, the result may be that, owing to the interception of percolating underground water, the well in your field will run dry. But you are without redress.[2]

[1] *Supra*, p. 126.

[2] Dig. 39. 2. 24. 12; Cod. 3. 34. 8; Gr. 2. 34. 27; Van Leeuwen, 2. 20. 16; Voet, 8. 3. 6; *Struben* v. *Cape Town Waterworks Co.* (1892) 9 S. C. 68; *Smith* v. *Smith* [1914] A. D. 257; *Union Govt.* (*Minister of Railways and Harbours*) v. *Marais* [1920] A. D. 240; provided that I acted sine animo nocendi vicino. Dig. 39. 3. 1. 12; Voet, 39. 3. 4; *Union Govt.* v. *Marais*, *ubi sup.* at p. 247; where, however, the question was left 'entirely open'; *Kirsh* v. *Pincus* [1927] T. P. D. 199.

It would be otherwise if I interfered with the flow of a defined underground stream.[1]

What then, apart from interruption of servitude, are the wrongs for which a landowner may obtain redress from his neighbour? or, to repeat the question in other words, what are the duties which one landowner owes to an adjoining landowner? They are mainly three: viz. (1) to respect his possession; (2) not to interfere with his enjoyment; (3) not to cause a subsidence of his land or interrupt the accustomed flow of a stream.

1. To respect his possession;

(1) I must respect my neighbour's possession. Thus, I must not deprive him of possession or wrongfully exclude him from the possession of what belongs to him. Further, I must not interfere with his possession. This I should do, for example, if I constructed a building on my land so that some part of it projected above my neighbour's land, for this would be an interference with his right to build as high as he pleases upon his own land.[2] A like wrong is committed if I allow my trees to spread their branches over the boundary.

'By the common law every one may build or plant trees on his own land, even though his neighbour's light or view may be obstructed thereby; but no one may by that law allow his trees to overhang the ground of a neighbour; and the latter may cause whatever so overhangs his ground to be cut down,[3] and if he does not do so, he is entitled to the fruits which hang over.'[4]

[1] 2 Maasdorp, p. 109; Juta, *Water Rights*, pp. 5 ff.

[2] Gr. 2. 1. 23 and 2. 34, secs. 4. 8. 11, 19, 23. 'Quia ejus est caelum cujus est solum,' Schorer *ad* Gr. 2. 1. 23.

[3] Voet, lib. xliii, tit. 27. As to the ownership of the severed branches see *De Villiers* v. *O'Sullivan* (1883) 2 S. C. 251. Action for damages caused by overhanging tree blown down by high wind does not lie without proof of negligence; (Ceylon) *Jinasena* v. *Engeltina* (1919) 21 N. L. R. 444. For nuisance caused by falling leaves see *Kirsh* v. *Pincus, ubi sup.*

[4] Gr. 2. 34. 21; Voet, lib. xliii, tit. 28. *Secus* jure civili. Groen. *de leg. abr. ad* Dig., lib. xliii, tit. 28. Neither Groenewegen nor Voet bears out the statement in the text that the neighbour may take hanging fruits. They both speak of fructus decidentes. Further, there is no proof of a general custom of the kind alleged. Voet merely says 'ex moribus multorum locorum'. See *Rechts. Obs.*, pt. 3, no. 54.

In like manner I may not, apart from servitude, allow the drip

2. not to interfere wrongfully with his enjoyment;

(2) I must not interfere wrongfully with my neighbour's enjoyment. This is a topic to which the Roman and Roman-Dutch lawyers give little attention. In the modern law, which is largely derived from English precedents, the Court will intervene by interdict to prohibit any disturbance of my neighbour's enjoyment which amounts to a nuisance. What this is, depends upon the circumstances and scarcely admits of definition. The safest guide in such matters is to be found not in any attempted generalization of principle, but in the practice of the Courts in dealing with other cases similar in character. Another test is afforded by the law of servitudes. An interference with enjoyment which can be justified as a servitude will often, in the absence of servitude, be found to constitute a nuisance.[1]

3. not to cause subsidence or interrupt flow of stream.

(3) I must not cause a subsidence of my neighbour's land or interrupt the accustomed flow of a stream[2] which passes from my land to his. As regards the first of these duties the law is, that though I am free to dig in my own land I must not do so in such a way as to let down my neighbour's soil. In other words, he has a right to vertical and lateral support of his soil by mine.[3] This right exists *jure naturae* without any servitude. It extends to land which has been built upon and the buildings upon it.[4]

from my eaves to fall on another's land (Gr. 2. 34. 11), nor discharge an artificial stream of water over another's land. Ibid., sec. 16.

[1] As to the application of the principle of *Rylands* v. *Fletcher* (1868) L. R. 3. H. L. 330 to Roman-Dutch Law see below, p. 334, n. 2. As to the liability of an owner of land in respect of work done upon his property which has the effect of diverting rain-water on to the land of a neighbour see *Cape Town Council* v. *Benning* [1917] A. D. 315.

[2] Or of storm-water, *Herzenberg Mullne Ltd.* v. *Cape Town Council* [1926] C. P. D. 451.

[3] *London & S. A. Exploration Co.* v. *Rouliot* (1890) 8 S. C. 75; *Johannesburg Municipal Council* v. *Robinson Gold Mining Co.* [1923] W. L. D. 99.

[4] *Phillips* v. *S. A. Independent Order of Mechanics* [1916] C. P. D. 61. But, surely, some regard must be had to the character of the buildings and of the soil. Right of support for buildings (*semble*) is not known in Ceylon. *Pedris* v. *Batcha* (1924) 26 N. L. R. 89.

With respect to the flow of a stream whether above or under ground[1] the lower riparian proprietor is entitled to have the stream reach his land unimpaired in quality and in quantity, subject only to the upper proprietor's right of reasonable user and enjoyment. As to quality, he is entitled to an interdict against any material pollution of the stream.[2] As to quantity, the upper proprietor's right of use and enjoyment is construed in the sense that he may: (1) take as much water as is reasonably necessary for the support of animal life upon his property, and do so even, if need be, to the exhaustion of the stream (primary use); (2) take water for agricultural purposes, but only so far as he can do so with due regard to the rights of lower proprietors to do the same (secondary use); and (3) subject thereto and upon like conditions take water for mechanical and industrial purposes (tertiary use).[3] Water-rights.

These rules, it must be remembered, apply only to public streams. The owner of a private stream, as pointed out above, may deal with it as he pleases.

If a stream rises in a man's land, it is in its inception private and may be dealt with as such; but if it has continued to flow in a defined channel for a considerable length of time (which in South Africa is taken to be thirty years) over adjoining land, the stream becomes public and the usual incidents of public streams attach to it.[4] When a private stream becomes public.

Just as a lower proprietor has rights against an upper proprietor, so he owes him duties. He must not do any-

[1] (*Semble*) 2 Maasdorp, p. 109.

[2] *Salisbury Municipality* v. *Jooala* [1911] A. D. at p. 185 per de Villiers C.J. See also *Orangezicht Estates Ltd.* v. *Cape Town Town Council* (1906) 23 S. C. 297 and Juta, *Water Rights*, pp. 179 ff. The extent of the lower proprietor's right to complain of contamination has not been exactly defined.

[3] 2 Maasdorp, pp. 125 ff.

[4] The Irrigation Act (8 of) 1912, sec. 8, *Retief* v. *Louw* (1855) [1874] Buch. 165; *Silberbauer* v. *Van Breda* (1866) 5 S. 231; *Van Breda* v. *Silberbauer* (1869) L. R. 3 P. C. 84; *Municipality of Frenchhoek* v. *Hugo* (1883) 2 S. C. 230; *Commissioners of French Hoek* v. *Hugo* (1885) 10 App. Ca. 336, 3 S. C. 346; *Vermaak* v. *Palmer* [1876] Buch. 25; *Pretoria Municipality* v. *Bon Accord Irrigation Board* [1923] T. P. D. 115; Juta, *Water Rights*, pp. 41 ff.; 2 Maasdorp, pp. 115 ff.

thing to interrupt the flow of the stream from the upper ground, or otherwise injure the upper proprietor's user of the stream.

With regard to rain-water the proprietor's rights are absolute. Apart from servitude he may dispose of it as he pleases.[1]

The limits of the jus vindicandi.

In the preceding paragraphs we have been speaking of the limits which the law places upon an owner's rights of use and enjoyment. Another question of great practical importance relates to the limits which the law places upon an owner's right of recovering his lost possession, his jus vindicandi. The first topic is principally concerned with the use of land. The second topic is principally, but not exclusively, concerned with the recovery of movables. It has been said above that the jus vindicandi is an incident of ownership. In the Roman Law the principle was general and applied alike to immovable and to movable property. But as regards movables, in the Netherlands the rule of the Roman Law came into sharp conflict with a contrary rule derived from the customary law of the German tribes, namely, that movable property cannot be followed into the hands of a third person: *Hand muss Hand wahren—mobilia non habent sequelam—meubelen en hebben geen gevolg—possession vaut titre.*[2] In the law of Holland, according to the prevailing opinion, the victory was on the side of the Roman doctrine, but subject to some qualifications and exceptions. In the modern law the owner's right of vindicating his property from a possessor who cannot show a good title as against the owner is in principle undoubted,[3] but again subject to exceptions, which, as might be expected, are not the same as

[1] Gr. 2. 34. 14.

[2] The proposition that the old Germanic law did not allow an owner, who had voluntarily parted with the possession, to reclaim his movable property from a third party has not passed unchallenged. See L. C. Hofmann, *Hand muss Hand wahren*, Leiden 1927, reviewed in *Tijdschrift voor Rechtsgeschiedenis*, vol. ix, p. 482, by Dr. B. M. Telders, and a recent article in *Tijdschrift*, vol. xi.

[3] As to what must be proved by a plaintiff in a vindicatory action see *Gruenewald* v. *Mathias* [1925] S. W. A. 117.

in the law of Holland. Exceptions which in the old law were based upon a special statute or local custom find no place in the modern law. It is questioned whether sales in a public market fall under this head. On the other hand the rules of negotiability are better defined to-day than they were in the eighteenth century, and the circumstances in which an owner cannot assert a title against a bona fide holder for value are consequently better ascertained. Finally, notions derived from the rules of English equity have certainly in Ceylon, and almost certainly in South Africa, made an impression on the modern law. A fuller consideration of these important questions is reserved for an appendix.[1]

Section II. The Kinds of Ownership of Land

In what different ways land may be owned.

In this section we shall speak of what is commonly called land tenure, i. e. of the different kinds of ownership of land recognized by law. In England all land is held by feudal tenure mediately or immediately of the King, who is 'Sovereign Lord, or Lord Paramount, either mediate or immediate, of all and every parcel of land within the Realm'.[2] In Holland feuds (*leen-goed*) existed side by side with lands held allodially (*eigen-goed*). Feudal lands were governed by the rules of the feudal law (*leenrecht*), which was administered by feudal Courts (*leen-gerechten*). Allodial lands were owned according to the ordinary principles of the common law and subject to the jurisdiction of the ordinary Courts. The principal difference between these two kinds of ownership is that feuds are always held by the landowner as tenant of another, while allodial property is owned, like movables, by an absolute and independent title.

Feudal and allodial ownership in Holland.

Leenen.

In Dutch law feuds (*leenen*) were always held on condition of military service.[3] This continued in theory to be the case until the end of the Republic, except where

[1] Appendix E (*infra*, p. 426).

[2] Co. Litt. 65, a; 2 Bl. Comm. 53. 'Every acre of land is technically held of the Crown', Cheshire, *The Modern Law of Real Property* (2nd ed.), p. 67.

[3] Fock. And., vol. i, pp. 309–10.

the land had been allodialized.[1] There was nothing in Dutch law precisely corresponding to the English tenure in free and common socage. But there existed from ancient times an institution which in many respects approached to socage tenure, though it exhibited also analogies with copyhold and leasehold. This was variously known as *tijnsrecht* or *cijnsrecht* (census right) or *erfpacht* (hereditary lease), *erfhuur* (hereditary hire), and by other like names.[2] It was a grant of land for an indefinite or limited period subject to the payment of an annual rent (*cyns—census*). Originally the grantor was regarded as owner of the land, the grantee merely as having a jus in re aliena. Later, the position was reversed. The grantee became the owner, with free rights of alienation *inter vivos* or by will, in default of which the land passed to his heirs by intestate succession.[3] The grantor, on the other hand, was now considered to have merely a rent-charge upon the land, which the grantee might, as a rule, redeem. On the other hand, the grantee must maintain the land, i. e. was liable for waste, and if the rent fell into arrear for a period which, under romanist influences, was often fixed at three years, or in case of other failure of duty, he incurred a forfeiture.[4]

Cijnsrecht or quit-rent tenure.

[1] Fock. And., vol. i, pp. 309–10; Gr. 2. 43. 5. The duty of military service was, however, disused by the seventeenth century. Gr. 2. 41. 44; Van Leeuwen, 2. 14. 13.

[2] Fock. And., vol. i, p. 320: Tijnsrecht, dat is het recht om een onroerend goed te hebben en te genieten tegen betaling van een jaarlijksch bedrag en somtijds het verrichten van zekere diensten. Grotius distinguishes *erfpachtrecht* (book ii, chap. xl) from *cijnsrecht* (book ii, chap. xlvi). Van Leeuwen (2. 10. 1) includes under the general term *Erfpachten*, 'Erf-pagt-regt, Emphyteusis, Tiend-regt, Cyns-regt, Pagten metten Houde (see Fock. And., vol. i, p. 325), Tyns-regt, en diergelyke meer'. Fockema Andreae (p. 320) says: 'Een vast verschil in den aard van het recht wijzen deze namen niet aan.' When an owner sold land reserving a rent the land was termed *oud-eigen*, and the rent might by agreement be made irredeemable. Gr. 2. 46. 4; 3. 14. 14; *Cens. For.* 1. 2. 17. 1.

[3] It tended to become, and in the sixteenth century usually was, hereditary and perpetual. Fock. And., vol. i, p. 325. Grotius (2. 40. 2) describes erfpacht-recht as 'erffelicke tocht', and Van Leeuwen says (2. 10. 1) 'Erfpagt-regt is een erfelyk onversterfelyk regt', but recognizes also another sort of erfpagt-regt, which came to an end if not periodically renewed. Cf. Gr. 2. 40. 4–5.

[4] But see V. d. K. *Th.* 383.

This mode of land tenure was not identical with the emphyteusis of the Roman Law, nor, it seems, derived from it. There can be no doubt, however, that it was influenced in its development by principles derived from the Roman Law. Even Grotius,[1] still more the distinctively romanist writers of the seventeenth and eighteenth centuries, fail to distinguish between the native and the exotic institution.[2]

Not the same as emphyteusis.

In addition to the above-mentioned modes of land-holding, villein tenure, which was always associated with villein status, played an important part in the old law. It did not survive the revolutionary influences of the end of the eighteenth century.[3] This institution, therefore, however interesting historically, need not detain us, since it has no counterpart in the modern law.

Villein tenure in Holland.

The life-interest in land (*lijf-tocht—usufruct*) will be considered in a later chapter.

Usufruct.

It remains to speak of the contract of hire of land, so far as it affects the proprietary rights of the parties. In the older Germanic Law, as in the Roman and in the English Law, a lease of land had no such consequence. It was purely contractual in character, and gave no right against third parties, nor did the benefit of a lease pass on death to the heirs of the lessee. Thus, if the lessor sold the land, the purchaser, though aware of the lease, was not bound by it. This is expressed by the proverbial saying, *Koop breekt huur* (Sale breaks hire). The reason was that leases, being mere contracts, required no solemnity and consequently did not transfer any proprietary interest.[4] In later times the rule was reversed, *Breekt koop geen huur* (Sale breaks no hire), *Huur gaat voor koop* (Hire goes before sale); with the result that the hirer could make good his right to the land against any third person to whom his

Lease of land,

in early law was merely contractual.

Koop breekt huur.

But, later, conferred a real right.

[1] Gr. 2. 40. 2. [2] e.g. Van Leeuwen, 2. 10. 2.
[3] Fock. And., vol. i, p. 52.
[4] i.e. did not create any right *in rem*. According to some authorities this continued to form part of the law of Holland. Thus Schorer (*ad* Gr. 3. 19. 3) writes: Hodie nullum, licet in longum tempus facta sit locatio, tribuat *jus in re*. Cf. Voet, 19. 2. 1.

Huur gaat voor koop.

landlord might have sold it. In this sense the law is laid down by Grotius,[1] with the qualification, however, that a lessee of land has no such right unless his lease is in writing,[2] passed before Schepenen (*coram lege loci*) or under the hand of the lessor.[3] Groenewegen goes further, for besides regarding writing as of the essence of all leases of lands[4] (but not of houses),[5] he requires that a lease *ad longum tempus*, i. e. for ten years and upwards, should be executed *coram lege loci*, if it is to prevail against a purchaser.[6] The reason is that a lease *ad longum tempus* is in effect an alienation and demands the same solemnity of execution.[7] According to Groenewegen, then: (1) a short lease of land, if in writing, holds good against a purchaser; (2) a short lease of houses holds good against a purchaser even without writing; (3) a long lease holds good against a purchaser if executed *coram lege loci*, otherwise not.[8] In

Groenewegen's statement of the law of leases.

[1] Gr. 2. 44. 9; Van Leeuwen, 4. 21. 7; and see Voet, 19. 2. 17.

[2] Gr. *ubi sup.* and 3. 19. 3.

[3] 'By publijcke instrumenten ofte d' eygen handt van den Eygenaar' is the language of the Pol. Ord. 1580 (Art. 31), which Grotius purports to follow. See next note. His own words (3. 19. 3) are: 'Zonder schepenkennisse ofte schrift by den eighenaer gheteickent.'

[4] Groen. *de leg. abr. ad* Cod. 4. 65. 24, sec. 1. As authorities for this proposition, reference is made to the Placaat of Philip Duke of Burgundy of June 11, 1452 (3 G. P. B. 586), the Placaat of Charles V of January 22, 1515 (1 G. P. B. 363), and the Pol. Ord. 1580, Art. 31 (1 G. P. B. 337). These enactments, however, relate not to original leases but to *nahuyr*. They are therefore no authority for the proposition advanced in the text. See V. d. K. *Th.* 672.

[5] Groen. *ubi sup.*, sec. 2, non obstante *Holl. Cons.*, vol. i, no. 262. Van der Keessel (*Th.* 670) agrees. Voet, however (19. 2. 2), and Decker (*ad* Van Leeuwen, 4. 21. 3) consider that the Edict of the States of Holland and West Friesland of April 3, 1677 (3 G. P. B. 1037), settled the law in the sense that leases of both lands and houses must be in writing. Van der Linden (1. 15. 11), though relying on a later statute, agrees with this statement of the law.

[6] *Ad* Cod. 4. 65. 9.

[7] In locatione enim longi temporis eadem solennitas intervenire debet quae in alienatione, cujus naturam induit atque sortitur ex communi atque inveterata Doctorum sententia. Voet (19. 2. 1) expresses with some hesitation the same opinion. Van Leeuwen (4. 21. 9) pronounces the other way.

[8] Groen. *ad* Gr. 3. 19. 9, where he says: 'It being well understood that in no case can immovable property be let for more than ten years unless the written lease (*huurcedulle*) is passed before the

Leases in South Africa.

South Africa, with some statutory exceptions, the validity of a lease as between the parties (and their heirs) is independent of the presence or absence of writing, and a lease which is good between the parties is also good as against persons claiming through the lessor by lucrative title.[1] As regards purchasers and creditors the law is otherwise. A short lease is absolutely valid against them;[2] a long lease only if registered against the title, or if the purchase was made or the credit given with knowledge of the lease. So the law has been laid down for the Cape Province.[3] In the other provinces it is substantially the same, subject to some statutory variations.[4] In the Transvaal a lease of land for ten years or upwards has no effect whatever, even between the parties, unless notarially executed.[5] In Natal any contract to grant or take a lease or sublease of immovable property or of any interest therein for a period exceeding two years from the time of making such contract, or for the cession of any such lease or sublease having then more than two years to run, must, unless there has been part performance, be evidenced by writing.[6] Over the whole of South Africa no distinction exists as

Court of the place where the property is situated.' For Ceylon see Ord. No. 7 of 1840, sec. 2. *Supra*, p. 148.

[1] *Semble*, *Canavan & Rivas* v. *The New Transvaal Gold Farms Ltd.* [1904] T. S. 136; *Exor. Est. Komen* v. *De Heer* (1907) 28 N. L. R. 577; *Komen* v. *De Heer* (1908) 29 N. L. R. 237.

[2] *Green* v. *Griffiths* (1886) 4 S. C. 346.

[3] An unregistered lease in longum tempus holds good, in any event, up to ten years. *Komen* v. *De Heer*, *ubi sup.*

[4] In the Free State a long lease was understood to be a lease for more than twenty-five years. *Fichardt* v. *Webb* (1889) 6 C. L. J. 258. This term is taken from an Ordonnantie op het middel van den veertigsten penning of the States of Holland dated May 9, 1744 (7 G. P. B. 1441). But this enactment has been held not to be in force at the Cape (*Maynard* v. *Usher* (1845) 2 Menz. 170); in the Transvaal (*Canavan & Rivas* v. *The New Transvaal Gold Farms Ltd.* [1904] T. S. 136); in Natal (*Exor. Est. Komen* v. *De Heer* (1907) 28 N. L. R. 577). Doubtless the rule is now general in South Africa that a lease *in longum tempus* means a lease for ten years or upwards. Compare the definition of immovable property in the Deeds Registries Act, 1918 (*supra*, p. 135, n. 1).

[5] Procl. No. 8 of 1902, sec. 29 (1). The reader should consult the section. See *Cohen* v. *Van der Westhuizen* [1912] A. D. 519.

[6] Law No. 12, 1884, secs. 1 (c) and 2.

regards the requirements of form and of registration between leases of land and leases of houses.

In the modern law a lease is a kind of tenure.

From what has been said it is plain that in the modern law, as in the later stages of the Roman-Dutch Law of Holland, a lease creates not only contractual rights as between the parties, but also proprietary rights, which the lessee can, within the limits above stated, make good against all the world. We are fully justified, therefore, in regarding a lease as a species of ownership in land.[1]

Land tenure in the colonies.

It does not fall within the scope of this work to describe in detail the systems of land tenure existing at the present day in the several Roman-Dutch colonies. We will merely observe that in South Africa besides (1) freehold, and (2) leasehold, (3) perpetual quit-rent tenure of lands held from Government was introduced into Cape Colony by Sir John Cradock's Proclamation of 1813, and exists also in various forms in the other provinces.[2]

[1] *Green* v. *Griffiths* (1886) 4 S. C. at p. 350. So in Ceylon. 'A lessee under a valid lease from the owner is *dominus* or owner for the term of his lease. He is owner during that term against all the world, including his lessor,' Hutchinson C.J. in *Abdul Azeez* v. *Abdul Rahiman* (1909), Current Law Reports, vol. i at p. 275; and again: 'In my opinion we ought to regard a notarial lease as a *pro tanto* alienation,' Bonser C.J. in *Goonewardana* v. *Rajapakse* (1895) 1 N. L. R. at p. 219. Cf. *Isaac Perera* v. *Baba Appa* (1897) 3 N. L. R. 48.

[2] See *Van Niekerk and Union Govt.* (*Minister of Lands*) v. *Carter*, 1917 A. D. at p. 379. Quit-rent tenure is not in use except in Government grants, and is regulated by statute. In the Transvaal and O. F. S. 'the tenure is practically ownership subject to higher taxation' (Morice, *Eng. & Roman-Dutch Law* (2nd ed.), p. 47). The history of quit-rent tenure at the Cape is traced in *De Villiers* v. *Cape Divis. Council* [1875] Buch. 50. For O. F. S. see *Webb* v. *Giddy* (1878) 3 A. C. 908, for Ceylon, *Podisingho* v. *Jaguhamy* (1923) 26 N. L. R. 87.

V

POSSESSION

WHATEVER theory of possession may have obtained in the native law of Holland, the theory of the Roman-Dutch lawyers approximates very closely to the doctrine of the Roman Law. The short chapter which Grotius[1] devotes to the subject reflects merely the views of the civilians. Since these are readily accessible from other sources we shall not occupy space with describing them. But the case is different with the remedies which Roman-Dutch Law afforded for the protection of possession. These, though they present some necessary analogies with the Roman interdicts, were, in fact, historically unconnected with them. In the modern law, again, they have ceased to exist as distinct institutions. Their historical importance, however, entitles them to some brief attention.

The theory of possession in Roman-Dutch Law.

Possessory remedies.

Like the Roman Law the Dutch Law distinguished possessory actions according as they were directed to the acquisition, the retention, or the recovery of possession. The process of the Court which the plaintiff invoked was called a mandament, and the various remedies available to him are distinguished as mandamenten van Immissie, van Maintenue, van Spolie, and van Complainte. We shall speak of these in order.

1. *Mandament van Immissie.* This was the process whereby an heir sought to be put in possession of the deceased testator's or intestate's estate. It was, according to Van der Linden, in common use, but was seldom employed except when one co-heir kept another co-heir or a person entitled to a legitim out of possession of the estate. It was almost always sued for in conjunction with the mandament van Maintenue.[2]

Mandament van Immissie.

2. *Mandament van Maintenue.* Any person disturbed in his possession might address a request either to the Hof

Mandament van Maintenue.

[1] Gr., book ii, chap. ii. [2] V. d. L. *Jud. Pract.* book ii, chap. xx.

or to the Hooge Raad for a mandament van Maintenue. To ground the action two conditions alone were necessary: (*a*) possession, (*b*) disturbance.[1] The suppliant prayed a mandament whereby he should be 'maintained, secured, and so far as necessary let into the possession or quasi-possession of the lands and goods in question, and that the defendant should be ordered to indemnify him against all past disturbance of possession and to abstain from the like in future'. In case of opposition to this prayer, suppliant further asked to be placed in interim possession (*recredentie*).[2]

The defendant could defeat plaintiff's case by showing that plaintiff's possession was aut vi aut clam aut precario ab adversario (*vitiosa possessio*).[3]

It should be noted that to maintain this action proof of physical disturbance was unnecessary. The mandament would be granted even in case of apprehended disturbance—propter metum oppositionis habendae et turbationis faciendae.[4] In case of serious threats of violence proceeding from powerful persons a process was granted called the mandament van Sauvegarde.[5] But this seems to have been not so much a possessory remedy as directed rather to the protection of person or property against apprehended violence.

Mandament van Sauvegarde.

Manda-

3. *Mandament van Spolie.*[6] This was a process directed

[1] Fock. And., vol. i, p. 218; V. d. L., *ubi sup.*

[2] For the Formula of Request for a mandament of Maintenue see Van Alphen, *Papegay*, chap. xv (ed. 1740, vol. i, p. 113). The material part of the petition runs: 'Versoekende Mandament daar by hy Suppliant werde gemaincteneert, gestijft en gesterkt (en voor zoo veel des noot zy) werde geimmitteert in de possessie, vel quasi, van de voorsz. Landen ende andere Goederen.'

[3] Fock. And., *ubi sup.*

[4] Vromans, *Tractaat de foro competenti*, 1. 2. 1, note, p. 66, Men simpele Maintenue mag versoeken schoon geen turbatie in de possessie geschiet is. Cf. Bort, *Tract. van Complaincte*, tit. 1, secs. 31–2.

[5] Bort, *ubi sup.*, secs. 26–30; V. d. L. *Jud. Pract.*, 4. 5. 21.

[6] V. d. L., op. cit., book ii, chap. xxii; *Papegay*, chap. xiv (vol. i, p. 112). The material part of the petition runs: 'ende alsoo *Spoliatus ante omnia debet restitui* keert hem (den Suppliant) aan desen Hove versoekende Mandament, by 't welke de voorsz. C. van wegen de

to the recovery of possession. The plaintiff had to prove: (*a*) possession, (*b*) dispossession. The defendant's only plea was a denial of the facts alleged. The plea of vicious possession was not admitted.[1] ment van Spolie.

This writ was available in respect of every kind of property movable, immovable, or incorporeal. It lay against the spoliator and his heirs and also against all mala fide possessors. The remedy asked for was restoration and compensation and that plaintiff should be reinstated in possession. The plaintiff need not prove actual violence.[2] This process was seldom employed.[3]

4. *Mandament van Complainte*.[4] The conditions of this writ were more stringent. Suppliant must show: (*a*) that he had possessed, (*b*) quietly and peacefully, (*c*) for a year and a day, (*d*) ouster or disturbance within the year next before action brought. It lay in the case of either disturbance or ouster,[5] and thus invaded the province both of Maintenue and of Spolie. According to circumstances suppliant prayed to be maintained in, or restored to, possession. The vitia possessionis might be pleaded as a defence. Mandament van Complainte.

The above-named remedies were usually sued for in combination. Thus, as already mentioned, the Immissie was combined with the Maintenue. Similarly the Main- The possessory manda-

Hooge Overigheyd belast ende bevolen zy, de handen te trekken ende te houden van 't voorsz. Land, ende den Suppliant daar mede te laten bewerden, als met zyn eygen goed, midsgaders kosteloos ende schadeloos af te doen alsulke Spolie ende belet, als hy den Suppliant in 't gebruyk van 't voorsz. Land gedaan heeft, ende ook te betalen de kosten hieromme gedaan,' &c.

[1] Fock. And., vol. i, p. 219.

[2] Fockema Andreae says: 'ontzetting met of zonder geweld'. Van der Linden says that this remedy is open to those 'die gewelddadiger wijze van het hunne berooft worden'. But there is no allegation of violence in the Formula given by Van Alphen, *Papegay*, chap. xiv. With this agrees *Nino Bonino* v. *de Lange* [1906] T. S. 120, and see *Shaw* v. *Hendry* [1927] C. P. D. 357; *Pretorius* v. *Pretorius* [1927] T. P. D. 178; *Sillo* v. *Naude* [1929] A. D. 21; *Wait* v. *Wait* [1929] E. D. L. 342; *Industrial & Commercial Workers' Union* v. *Rauch* [1929] N. P. D. 192.

[3] Van Apeldoorn's notes to Fock. And. (3rd ed.), p. 105.

[4] V. d. L., op. cit., book ii, chap. xxi; Bort, *Tract. van Complaincte*.

[5] Fock. And., *ubi sup.*

ments often used in combination.

tenue was asked for as a corollary either to the Complainte[1] or to the Spolie.[2]

According to Van der Linden the most commonly employed of the above-named interdicts were the Immissie and the Maintenue. The advantage of the latter over the Complainte lay in the fact that the plaintiff had to prove much less in order to obtain his remedy.[3]

Possessory actions in the modern law.

In the modern law the enumerated possessory actions are no longer in use. 'The procedure in all three cases' (viz. maintenue, spolie, complainte), says Mr. Justice Wessels, 'was very formal and cumbersome, and has long ago been superseded in South Africa by a far simpler practice. We nowadays effect the same object by the ordinary interdicts, by an action, or by a writ of spoliation; the latter, though the same in name as the old Dutch mandament, is far simpler in its nature.'[4] In the modern practice, when spoliation is alleged the Court will upon an *ex parte* application grant a rule *nisi*, calling upon defendant to show cause why he should not forthwith restore possession of the property.[5]

Their scope and application.

It must be carefully remembered that the possessory remedies above mentioned are available only to the possessor in the proper sense of the word, or at most to the quasi-possessor of a servitude, and in the modern law to the lessee,[6] but not to a mere detainer, or to one who possesses nomine alieno. Voet, however, allows the interdict unde

[1] Voet, 43. 17. 7.

[2] Vromans, *ubi sup.*; V. d. L., op. cit., 2. 22. 1; *Papegay*, vol. i, p. 116.

[3] Fock. And. and Van Apeldoorn on Gr. 2. 2. 6. On the other hand, complainte offered certain advantages in cases demanding urgency. Ibid., p. 105; Bijnk. *O. T.* i. 978.

[4] Wessels, p. 482.

[5] *Exors. of Haupt* v. *de Villiers* (1848) 3 Menz. 341; *Swanepoel* v. *Van der Hoeven* [1878] Buch., 4. By Ceylon Ord. No. 22 of 1871, sec. 4, any person who has been dispossessed of any immovable property, otherwise than by process of law, may institute proceedings against the person dispossessing him at any time within one year of such dispossession. The effect of this section has been considered in numerous cases. See Pereira, p. 543.

[6] *Swanepoel* v. *Van der Hoeven. ubi sup.*; *McLoughlin* v. *Delahunt* (1880) Foord, 129. So in Ceylon, *Perera* v. *Sobana* (1884) 6 S. C. C. 61. See Pereira, pp. 544 ff.

vi to a procurator, whose dominus is absent,[1] and a decision of the Privy Council has extended the same indulgence to the trustee of the Maradana Mosque at Colombo.[2]

[1] Voet, 43. 16. 3: ut tamen coloni et procuratores et similes extra ordinem audiendi videantur, qua tales, si absens sit dominus cujus nomine possident, et ob id restitutionem possessionis petere nequeat (*Cod.* 8. 5. 1).

[2] *Abdul Azeez* v. *Abdul Rahiman Mudliyar* [1911] A. C. 746.

VI

SERVITUDES

Servitudes.

THE next class of jura in re are Servitudes.[1] A servitude is a real right enjoyed by one person over or in respect of the property of another, whereby the latter is required to suffer the former to do, or himself to abstain from doing, something upon such property for the former's advantage.[2] The person for whose benefit such right is constituted may either enjoy it as incidental to and inseparable from immovable property of which he is owner, or may enjoy it personally and without reference to any property of which he is owner. In the first case the right is termed a real or praedial servitude; in the second case it is termed a personal servitude.[3]

Real or praedial servitudes.

In the case of real servitudes, the land in respect of which the right is enjoyed is termed the praedium dominans, the land over which the right is exercised is termed the praedium serviens.[4] Real or praedial servitudes exist for the benefit of lands and houses, and the burden of them is imposed on lands or houses. Personal servitudes exist for the benefit of persons, and are enjoyed in respect of movable as well as of immovable property.[5] When the word servitude is used without qualification it is usually a real servitude that is meant.[6]

A real servitude is a fragment of the ownership of an immovable detached from the residue of ownership and vested in the owner of an adjoining immovable as accessory to such ownership and for the advantage of such immovable.[7] Though ownership is thus divided and vested

[1] For a valuable note on this topic see Kotzé, *Van Leeuwen*, vol. i, pp. 302 ff.

[2] Voet, *Compendium*, 7. 1. 1: Servitus in genere est jus in re alterius alteri constitutum, qua res alteri quam domino utilitatem adfert contra dominii naturam. Gr. 2.33.4: Erfdienstbaerheid is een gerechtigheid om iet buiten 't ghemeene recht te hebben ofte te doen op eens anders grond tot dienste van de sijne.

[3] Voet, 7. 1. 1.

[4] Voet, 8. 1. 2.

[5] *Cens. For.* 1. 2. 14. 2.

[6] Voet, 8. 1. 1.

[7] If a right, which normally belongs to the class of real or prae-

in two persons, the detached fragment is, as a rule, relatively insignificant in comparison with what remains. It seems natural, therefore, to speak of the person to whom the residue belongs as owner of the land, while the person in whom the detached right is vested is said to have a jus in re aliena.[1] Personal servitudes approach more nearly to ownership and have little in common with real servitudes except the name. For the present we confine our attention to real servitudes.

Real servitudes are distinguished as rustic and urban. The distinction has regard to the character of the dominant tenement. Servitudes attached to land are rustic, servitudes attached to buildings are urban.[2]

Rustic servitudes.

The following are the principal kinds of rustic servitudes[3] (*veld-dienstbaerheden*).

1. Rights of Way: (*a*) for walking and riding (*iter*) which the Dutch writers subdivide into foot-path (*voet-pad*)[4] and bridle-path (*rij-pad*);[5] (*b*) for driving cattle as well as for going on foot and horse-back, and for light vehicles (*actus—dreef*);[6] (*c*) for all kinds of traffic including laden wagons (*via—weg*);[7] to which may be added (*d*) a way of necessity (*nood-weg*), i. e. a way to be used only for the harvest, for carrying a corpse to burial, or other necessary purpose;[8] or a way giving necessary access to a public road (way of necessity).[9]

dial servitudes, is constituted in favour of a person, not for the benefit of adjoining property, whether for life, or for a defined period, terminable on death, it constitutes a personal servitude of a peculiar kind. Voet, 8. 1. 4; *infra*, p. 181, note 11.

[1] Gr. 2. 33. 1.

[2] Voet, 8. 1. 3–4; Girard, p. 387; Buckland, p. 262. The distinction has little practical importance. But see p. 179, n. 10. Apparently, a right of way attached to a house is urban; but this raises difficulties, and opinions differ.

[3] See Fock. And., vol. i, pp. 275 ff.

[4] Gr. 2. 35. 2; Van Leeuwen, 2. 21. 2.

[5] Gr. 2. 35. 3; Van Leeuwen, 2. 21. 3; Voet, 8. 3. 1.

[6] Gr. 2. 35. 4; Van Leeuwen, 2. 21. 4; Voet, 8. 3. 2; *Breda's Exors.* v. *Mills* (1883) 2 S. C. 189.

[7] Gr. 2. 35. 5; Van Leeuwen, 2. 21. 5; Voet, 8. 3. 3.

[8] Gr. 2. 35. 7; Voet, 8. 3. 4.

[9] Gr. 2. 35. 8 and 11; Van Leeuwen, 2. 21. 7; Voet, *ubi sup.*

All rights of way must be exercised so as to burden the servient property as little as possible,[1] and the principle is general that the owner of the dominant property must keep strictly within the terms of the servitude.[2]

The principles by which the direction of a way is to be determined have been stated as follows. When a servitude of way is constituted *simpliciter*, *scil.* without precise definition, 'the owner of the dominant tenement has (in the first instance) the election where to lay the line, which he must however exercise *civiliter*.[3] If he has once exercised his election, he cannot afterwards change. But the owner of the servient tenement would have the right to do so, provided the new route is as convenient as the old one.'[4] The case is otherwise when the servitude has been precisely defined *ab initio*. In this case it can only be altered by mutual consent.[5]

2. Water Rights: viz. right of leading water over or out of another's land (*aquae ductus—water-leiding*);[6] right of discharging water on to another's land (*water-lozing*);[7] right of drawing water from another's private stream, well, or cistern (*aquae haustus—water-haling*);[8] right of watering cattle (*pecoris ad aquam appulsus*);[9]

Peacock v. *Hodges* [1876] Buch. 65; *Neilson* v. *Mahoud* [1925] E. D. L. 26; *Rampersad* v. *Goberdun* [1929] N. P. D. 32; (Ceylon) *Fernando* v. *Fernando* (1929) 31 N. L. R. 107. The right to use a trek path over the land of another is a larger right than any of the above, and peculiar to S. A. *Van Heerden* v. *Pretorius* [1914] A. D. 69; and see *Pretorius* v. *Barkly East Divisional Council* [1914] A. D. 407. See p. 173, n. 4. For public ways (which are either *via publica* or *via vicinalis*) see *Peacock* v. *Hodges* [1876] Buch. 65; *Rampersad* v. *Goberdun*, *ubi sup.*; 2 Maasdorp, p. 204.

[1] 'Alle servituten van pad en weg moesten "te minster schade en te naaster lage" worden gebruikt.' Fock. And., vol. i, p. 276; Gr. 2. 35. 6; Van Leeuwen, 2. 21. 6.

[2] *Van Heerden* v. *Coetzee* [1914] A. D. at p. 172.

[3] Dig. 8. 1. 9.

[4] *Gardens Estate Ltd.* v. *Lewis* [1920] A. D. 144, per de Villiers A. J. A. at p. 150. Cf. *Rubidge* v. *McCabe* [1913] A. D. 433.

[5] Ibid. [6] Gr. 2. 35. 14; Voet, 8. 3. 6.

[7] Gr. 2. 35. 16; Van Leeuwen, 2. 21. 15.

[8] Gr. 2. 35. 13; Voet, 8. 3. 7. The person who enjoys such right is, as a rule, bound to help to keep the well, &c., in repair.

[9] Gr. 2. 35. 19; Van Leeuwen, 2. 21. 14; Voet, 8. 3. 11, and see

right of access to water over another's land (*watergang*).[1]

3. Right of taking sand out of another's soil or of taking lime and having a lime-kiln on another's land.[2]

4. Right of pasture.[3]

The above list is not exhaustive. Other real servitudes may be created by agreement (or in any of the other recognized ways) provided that they are of such a nature as to benefit the dominant estate, and in other respects satisfy the legal conditions of servitudes.[4]

The following are urban servitudes:

Urban servitudes.

1. My right to require my neighbour to support the weight of my house or wall (*jus oneris ferendi—muurbezwaring*).[5] A peculiarity of this servitude is that, contrary to the general rule, it entails an active duty of keeping in repair. But if the owner of the servient tenement abandons it, the duty of repair ceases.

2. My right to drive timber, &c., into my neighbour's wall (*jus tigni immittendi—inbalcking ofte inanckering*).[6]

3. My right to have a balcony or other thing projecting

Smit v. *Russouw* [1913] C. P. D. 847. Grotius adds "t recht om te varen door een anders water', which Maasdorp renders 'the right of ford'; but it seems rather to be what Voet (loc. cit.) calls 'jus navigandi per alterius lacum perpetuum ad nostra praedia'. Dig. 8. 3. 23. 1. See also Van Leeuwen, 2. 21. 17; and *Cens. For.* 1. 2. 14. 41.

[1] Van Leeuwen, 2. 21. 13.

[2] Jus arenae fodiendae, jus calcis coquendae, &c. Voet, 8. 3. 11.

[3] Het recht om eens anders land te beweiden. Fock. And., vol. i, p. 277; Voet, 8. 3. 10. As to the effect of a grant of free grazing (*vrije vee-weide*) see *Volshenk* v. *Van den Berg* [1917] T. P. D. 321; *Badenhorst* v. *Joubert* [1920] T. P. D. 100. Free wood (*vrije hout*), *Volshenk* v. *Van den Berg*, *ubi sup.*

[4] Voet, 8. 3. 12. Restrictive covenants entered into by a purchaser of land may perhaps be considered to operate by way of servitude after registration. *Alexander* v. *Johns* [1912] A. D. 431; *Flats Ltd.* v. *Transvaal Consolidated Land & Exploration Co.* [1920] T. P. D. 146. In South Africa rights in the nature of rustic servitudes are frequently constituted in favour of the public generally, or some portion of it, and are known as 'public servitudes'. Such are rights of outspan, of using trek paths, of cutting fuel. *Meintjes* v. *Oberholzer* (1859) 3 Searle 265; *Van Niekerk* v. *Wimble* [1878] Buch. 190; 2 Maasdorp, p. 212.

[5] Gr. 2. 34. 3; Van Leeuwen, 2. 20. 2; Voet, 8. 2. 1.

[6] Gr. 2. 34. 7; Van Leeuwen, 2. 20. 6; Voet, 8. 2. 2.

over my neighbour's land (*jus tigni projiciendi vel protegendi*).[1] This case differs from the last mentioned in respect of the remedy if a servitude is exercised without right. In the former case the person whose land is encroached upon may remove the obstruction; in the latter case he must proceed by way of action.[2]

4. My right to require you not to raise the height of your buildings (*jus altius non tollendi—belet van hoger timmering*).[3] Scarcely distinguishable from this is my right that you should not interfere with my lights (*servitus ne luminibus officiatur—vrij licht*).[4] If we are to adhere in this matter to the Roman Law the last-named right merely goes to the length of prohibiting interference with access of light to my upper windows. In this respect it is more limited in scope than the jus altius non tollendi. On the other hand, obstruction of light by trees would be an interference with the second right, but not with the first.[5] Another allied right is the right of prospect[6]

[1] Van Leeuwen, 2. 20. 7; Voet, 8. 2. 3.

[2] Voet, 8. 1. 4; Dig. 9. 2. 29. 1.

[3] Gr. 2. 34. 18; Van Leeuwen, 2. 20. 12; Voet, 8. 2. 8. The contrary servitude *altius tollendi* is variously explained. See Voet, 8. 2. 5–7.

[4] Gr. 2. 34. 20; Van Leeuwen, 2. 20. 13; Voet, 8. 2. 11. This is my right to forbid any act on the part of the owner of the servient tenement which will interfere with access of light to my upper windows. Dig. 8. 2. 16: (Paulus) Lumen, id est ut coelum videretur, et interest inter lumen et prospectum; nam prospectus etiam ex inferioribus locis est, lumen ex inferiore loco esse non potest. This servitude may also be interfered with by planting a tree. Dig. 8. 2. 17, pr. A general servitude of light according to Voet (loc. cit.) includes future lights as well as present lights. But whether this is so or not depends upon the terms of the grant. *St. Leger* v. *Town Council of Cape Town* (1895) 12 S. C. 249.

[5] A neighbour may cut overhanging branches. Gr. 2. 34. 21. *Supra*, p. 155.

[6] Gr. 2. 34. 20; Van Leeuwen, 2. 20. 14; Voet, 8. 2. 12. Grotius adds (2. 34. 22) 'veinster-recht, i.e. 't recht om een veinster te hebben hangende ofte opgaende over eens anders grond'; or, as Voet (8. 2. 9) puts it, 'jus aperiendi fenestram pendulam supra aream alterius.' Gezichtverbod is my right to prohibit you from exercising a right of prospect over my land. Gr. 2. 34. 27. Jus luminum or jus luminis immittendi is my right to open lights or windows in your wall. Dig. 8. 2. 4; Voet, 8. 2. 9. Jus luminis non aperiendi is my right to require that you shall not open lights in your wall. Voet, 8. 2. 10.

(*vrij gezicht*), which seems, in Roman Law, to have implied access of light not only to upper but to lower windows as well.[1] In this case, too, I am entitled to require that my light shall not be intercepted by trees.

5. My right to discharge the water from my eaves or spout on to your land (*jus stillicidii vel fluminis recipiendi—drop*);[2] or my contrary right to require you to discharge such water on to my land (*jus stillicidii vel fluminis non recipiendi—drop-vang*).[3]

6. My right to have an artificial drain passing through or over your land (*jus cloacae mittendae—goot-recht*).[4]

How praedial servitudes are acquired.

Praedial servitudes are acquired by:

1. Agreement followed by acquiescence by the owner of the servient land.[5] In South Africa a grant, registered against the title of the *praedium serviens*, is required to create a right in rem, though a bare agreement is sufficient

[1] Latior pleniorque de prospectu quam de luminibus servitus. Voet, 8. 2. 12.

[2] Gr. 2. 34. 10; Van Leeuwen, 2. 20. 8. When the right is to discharge water in a stream it is called jus fluminis recipiendi (waterloop). Gr. 2. 34. 15.

[3] Gr. 2. 34. 13; Van Leeuwen, 2. 20. 9; Voet, 8. 2. 13.

[4] Gr. 2. 34. 24; Goot-recht—'t recht om een goot te hebben leghende ofte uitkomende op eens anders grond. Voet, 8. 2. 14; Dig. 8. 1. 7; Voet (loc. cit.) mentions many other servitudes of less frequent occurrence.

[5] Gr. 2. 36. 2. Grotius seems to found upon texts of the Digest such as Dig. 8. 3. 1. 2: Traditio plane et patientia servitutium inducet officium praetoris. Cf. Voet, *Elem. Jur.* lib. ii, tit. 3, sec. 36: Constituuntur praediales servitutes pactionibus et stipulationibus, accedente quasi-traditione, quae in usu et patientia vel in loci servituri assignatione consistit. Dig. 8. 1. 20. Consistently with what he here lays down Grotius advised in vol. iii, pt. 2 of the *Hollandsche Consultatien*, no. 316, that by the general usage of Holland servitudes are constituted under hand and not before the Court. But the contrary view is expressed by Groenewegen (*in notis ad* Gr. 2. 36. 2), Voet (8. 4. 1), Van Leeuwen (2. 19. 2), Decker (ad loc.), and Van der Keessel (*Th.* 369). See Kotzé's note at vol. i, p. 281, of his translation of Van Leeuwen, and *Steele* v. *Thompson* (1860) 13 Moo. P. C. C. 280, there cited. Van der Linden (1. 11. 4) alone supports Grotius. See also *Willoughby's Consolidated Co.* v. *Copthall Stores* [1913] A. D. 267; [1918] A. D. 1; *Texas Co. (S. A.) Ltd.* v. *Cape Town Munic.* [1926] A. D. at p. 473. (See the same case for the effect of 'leave and licence' in the law of S. A.)

to affect a purchaser of the servient land who buys with knowledge of the existence of a servitude.[1]

2. Prescription of one-third of a hundred years.[2] But no right can be grounded upon an enjoyment, however long continued, which was in its origin violent, clandestine, or precarious (*aut vi aut clam aut precario*).[3] Further, no prescriptive claim can be based upon an enjoyment which is not adverse to the person against whose land it is claimed.[4] Thus, the mere fact that you have for upwards of a third of a century refrained from exercising a right, gives me no negative servitude in derogation of your right. The servitude altius non tollendi, which, as has been seen, is your right to forbid me building higher, affords an illustration of this principle. No one is bound to build on his land unless he pleases, and the fact that a landowner refrains from exercising this right of ownership over a long period of time does not in the least prejudice his right to exercise it when he chooses to do so. Therefore, the mere fact that I have for upwards of a third of a century enjoyed an uninterrupted prospect, or access

[1] 2 Maasdorp, p. 225; *Judd* v. *Fourie* (1881) 2 E. D. C. 41; *Van Vuren* v. *Registrar of Deeds* [1907] T. S. at p. 295. But see the dissenting judgment of Shippard J. and *Ridler* v. *Gartner* [1920] T. P. D. 249. In Ceylon a servitude must (*semble*) be constituted by a notarial instrument in terms of Ord. No. 7 of 1840, sec. 2; and such instrument must be registered (Ord. No. 23 of 1927, sec. 16); but there is no provision for registering the servitude against the title to the land.

[2] Gr. 2. 36. 4; Van Leeuwen, 2. 19. 3. The term is now thirty years at the Cape (Act No. 7 of 1865, sec. 106). The authors of the *Rechtsgeleerde Observatien* point out (pt. 3, obs. 56) that Grotius is inconsistent with his own opinion in *Holl. Cons.* (vol. iii, pt. 2, no. 142) in favour (in some cases) of a prescription of thirty years. They further observe that many other periods of prescription existed in different parts of Holland.

[3] Van Leeuwen, 2. 19. 5; Voet, 8. 4. 4. But distinguish the effect of *vetustas* (immemorial user). *Allen* v. *Colonial Govt.* (1907) 24 S. C. 1; *De Beer* v. *Van der Merwe* [1923] A. D. 378; *Opperman* v. *Owens* [1924] E. D. L. 94. Can a public right of trek path be acquired by immemorial user; *Divis. Council of Fraserburg* v. *Van Wyk* [1927] C. P. D. 285; *Transkeian Territories General Council* v. *Mnqqibisa* [1928] E. D. L. 256; and see L. E. Krause, *S. A. L. J.*, vol. xl (1923), p. 37.

[4] *De Beer* v. *Van der Merwe* [1923] A. D. at p. 384.

of light, over your land gives me no right whatever to insist on the continuance of this advantage, which has been throughout merely matter of fact and not of law.[1] So, if for a number of years an upper riparian owner, having, as such, a right to reduce the volume of the stream within the limits and for the purposes permitted by law, has, in fact, allowed a lower proprietor to enjoy an uninterrupted flow of water, the lower proprietor has not thereby acquired any right that this state of things shall continue for his benefit.[2] The position would be different in both these cases if the one proprietor had refrained from exercising his proprietary right in deference to the other's claim of right to have him do so, and had so refrained during the whole currency of the term of prescription. What is here said applies to negative servitudes only. An affirmative servitude is from its nature adverse to the proprietor over whose land it is asserted and exercised.

Though the full period of prescription is necessary to constitute a servitude, it does not follow that the Court will always grant an injunction for the removal of a structure which has been maintained for a shorter period in derogation of another's right. Thus, by the *keuren* of Delft and other towns a building which had stood for a year and a day[3] without protest (*onbeklaagt*) was thereby sufficiently prescribed, i.e. its removal would not be decreed;[4] but

[1] Voet, 8. 4. 5; Schorer *ad* Gr. 2. 34. 20. A good illustration is afforded by Neostadius (*Supr. Cur. Decis.* no. 98). It relates to a claim of servitude in respect of access of light to a kitchen, which defendant had blocked. The report says: 'Cum enim naturalis haec aeris in culinam perceptio sit facultatis tantum, nullo unquam tempore praescriptionem parere potuit; hoc amplius, quod negativa haec servitus non nisi hominis praecedente facto acquiri potuit. Factum enim prohibitionis intercessisse oportuit, et praeterea huic prohibitioni obtemperatum; quorum neutrum hactenus intercessisse, vel fatente actore, verum est.'

[2] *Jordaan* v. *Winkelman* [1879] Buch. 79.

[3] i.e. for a year, six weeks, and three days. Anton. Matthaeus, *Paroemiae*, no. ix, sec. 17.

[4] Voet (8. 4. 6) seems to contemplate two cases: (1) the building has been set up 'sciente vicino et operi non intercedente'; (2) 'vel, cum, eo ignorante, opus perfectum esset, is deinde intra annum et

the party injured by its erection was entitled to compensation in damages.[1]

According to Voet, to make good a claim to a servitude by prescription bona fides is necessary,[2] though justus titulus is not. But the analogy of the general law of prescription in the Roman-Dutch Law suggests that neither the one nor the other is needed.[3] It is not required that the owner of the servient land should know that the servitude is being exercised against him.[4]

Finally, in order to establish title to a servitude by prescription enjoyment must be continuous. Thus a claim to a servitude of grazing was held to fail upon proof that plaintiff's enjoyment had been interrupted by *vis major* for a period of three months.[5]

3. Last will.[6]

4. Judicial decree;[7] e. g. in one of the judicia divisoria.

5. By operation of law (*implied grant*). According to Grotius, when the owner of two houses has used one of them in a way which, if the other house had not belonged to him, would have been in effect the exercise of a servitude, and the ownership is thereafter severed, each house retains its privileges and burdens as before.[8] This proposition is supported by Groenewegen[9] on the ground of

diem non contradixerit ac destructionem petierit.' In either event the building must have been set up either on my land or on your land in violation of a servitude or of a local law or custom. *Prima facie* any one may build on his own land at pleasure. Gr. 2. 34. 19. See Fock. And., vol. i, pp. 254 ff.

[1] Gr. 2. 36. 5; and Groen., ad loc.; Groen. *de leg. abr. ad* Cod. 3. 34. 1–2; Van Leeuwen, 2. 19. 4.

[2] Voet, 8. 4. 4; *Compendium*, 8. 4. 1.

[3] Cf. Anton. Matthaeus, *Paroemiae*, no. 9, secs. 2. 3.

[4] Voet, *ubi sup.*

[5] *Boshoff* v. *Reinhold* [1920] A. D. 29; *De Beer* v. *Van der Merwe* [1923] A. D. 378. What constitutes an interruption is determined by the nature of the servitude. Some servitudes are in their nature intermittent, and 'a break in the enjoyment may be merely the manner in which the servitude was being enjoyed'. Ibid. at p. 33; Voet, 8. 4. 17. Can a praedial servitude be acquired by a lessee *in longum tempus*? Is a praedial servitude necessarily perpetual? *City Deep* v. *McCalgan* (1924) W. L. D. 276.

[6] Gr. 2. 36. 3; Voet, 8. 4. 2. But see 2 Maasdorp, p. 233.

[7] Voet, loc. cit. [8] Gr. 2. 36. 6. [9] *Ad* loc. cit.

various *keuren*, and is accepted by the authors of the *Rechtsgeleerde Observatien*.[1] Voet does not admit it, unless a servitude is constituted, expressly or by the use of some formula which has the same effect.[2]

How praedial servitudes are lost.

Praedial servitudes are lost by:

1. Merger,[3] when the servient and the dominant land meet in the same hand (nulli res sua servit).[4] If the circumstances are such that the 'confusion' is permanent, the servitude is altogether gone; if the union of ownership is merely temporary, as would be the case if the ownership of the two lands was not 'perdurable' (to borrow a phrase from English Law), the servitude would be in suspense.[5]

2. Release,[6] which may be either: (*a*) express; or (*b*) tacit, as by acquiescing in some act of the owner of the servient land which is inconsistent with the continued existence of the servitude.[7]

3. Destruction of the dominant or servient property.[8]

4. Determination of the grantor's interest in the servient land.[9]

5. Non-user for the third of a hundred years.[10]

[1] *Rechts. Obs.*, pt. 3, no. 58; and see Van Leeuwen, 2. 19. 6; *Holl. Cons.*, vol. v, no. 75.

[2] e. g. 'uti nunc sunt'. Voet, 19. 1. 6. He cites *Holl. Cons.*, vol. ii, no. 145, where a vendor of one house who retained the other was denied a 'jus stillicidii'. In this case even a general clause of the usual character 'met zoodanige vrijdommen en servituten', &c., was said to be limited to servitudes of which the vendor was unaware. See the exhaustive discussion of the whole question by Kotzé J.P. (adopting Voet's view) in *Salmon* v. *Lamb's Exor.* [1906] E. D. C. 351.

[3] Dig. 8. 6. 1; Gr. 2. 37. 2; Van Leeuwen, 2. 22. 1; Voet, 8. 6. 2.

[4] Dig. 8. 2. 26.

[5] Schorer, *ad* Gr. 2. 36. 6; Voet, 8. 6. 3; 19. 1. 6; *Salmon* v. *Lamb's Exor.*, *ubi sup.*

[6] Gr. 2. 37. 3; Voet, 8. 6. 5.

[7] Gr. 2. 37. 4; Van Leeuwen, 2. 22. 3; Voet, *ubi sup.*; *Edmeades* v. *Scheepers* (1881) 1 S. C. 334; *Vermeulen's Executrix* v. *Moolman* [1911] A. D. at p. 409.

[8] Gr. 2. 37. 5; Van Leeuwen, 2. 22. 6; Voet, 8. 6. 4.

[9] Gr. 2. 37. 6; Van Leeuwen, 2. 22. 5; Voet, 8. 6. 13.

[10] Gr. 2. 37. 7; Van Leeuwen, 2. 28. 4; Voet, 8. 6. 7; in the Cape Province for thirty years. *Ohlsson's Cape Breweries* v. *Thompson* (1901) 11 C. T. R. 275; *Braun* v. *Powrie* (1903) 13 C. T. R. 464. Rustic servitudes are lost by non-user merely; but in the case of

6. Sale of land by public auction in pursuance of a judicial sequestration. In such case persons claiming rights of servitude, &c., are given an opportunity of asserting them, and if they fail to do so cannot afterwards make them good against a purchaser.[1]

Rules of general application to praedial servitudes.

Certain rules apply to all praedial servitudes, such as:

1. There cannot be a servitude over a servitude.[2] 'Servitus servitutis esse non potest.'[3]

2. The extent of the servitude may not exceed what is required for the convenience of the dominant land.[4]

3. There can be no praedial servitude without a dominant and a servient land; which last must be near enough to the first to be useful to it, but not necessarily contiguous.[5]

4. The duty laid upon the owner of the servient land must, with the single exception of the jus oneris ferendi, be a duty to forbear, not to do. 'Servitutium non ea natura est ut aliquid faciat quis, veluti viridia tollat aut amoeniorem prospectum praestet, aut in hoc ut in suo pingat, sed ut aliquid patiatur aut non faciat.'[6]

5. A servitude must have a perpetual cause.[7] The rule

urban servitudes it is necessary that the non-user should have been due to some adverse act on the part of the owner of the servient land. Voet, 8. 6. 11; *Braun* v. *Powrie, ubi sup.* This was called *usucapio libertatis*. Dig. 8. 2. 6; 41. 3. 4. 28.

[1] Voet, 8. 6. 14; *Holl. Cons.*, vol. ii, no. 6.

[2] Voet, 8. 4. 7. [3] Dig. 33. 2. 1.

[4] Voet, 8. 4. 13 ff. Hence a real servitude cannot consist in a mere amenity or personal enjoyment. Dig. 8. 1. 8, pr.: Ut pomum decerpere liceat et ut spatiari et ut cenare in alieno possimus servitus imponi non potest. Cf. Voet, 8. 4. 15.

[5] Voet, 8. 4. 19.

[6] Dig. 8. 1. 15. 1. 'It is not of the nature of servitudes that a man should [have to] do anything; for instance remove shrubs so as to [read *ut* for *aut*] afford a more pleasing view, or, with the same object, paint something on his own ground; but only that he should submit to something being done or abstain from doing something' (Monro's translation); Voet, 8. 4. 17.

[7] Dig. 8. 2. 28: Omnes servitutes praediorum perpetuas causas habere debent. See illustrations given in the text; and for the modern law see Voet, 8. 4. 17; Groen., *de leg. abr. ad* Dig., ad loc.; *City Deep* v. *McCalgan* [1924] W. L. D. 276. Even in the Roman Law the exercise of a servitude might be limited to certain times of the day or to alternate days. Dig. 8. 1. 4. 2 and 8. 1. 5. 1.

is somewhat obscure. It seems to mean that the thing over which the right is claimed, as well as the right exercised, must from their nature be capable of perpetual continuance, and not depend merely upon the act of man. But the limits of the rule are ill defined; and it may be doubted whether it forms part of the modern law.

PERSONAL SERVITUDES

Personal servitudes.

The principal kinds of personal servitude in Roman Law were usufruct and use. The corresponding institutions in Dutch Law are *lijftocht* and *bruick*. To describe these as servitudes is, perhaps, to make too great a concession to Roman terminology. Grotius departs from the arrangement of the Roman Law. From full ownership he distinguishes proprietary rights less than ownership, which he describes comprehensively as 'gerechtigheden'.[1] These, again, are either connected with the ownership of land or not so connected.[2] To the first of these sub-classes alone he accords the name of servitudes (*erfdienstbaerheden*).[3] For the second sub-class he has no distinctive name. It includes such various rights as: (1) usufruct;[4] (2) use;[5] (3) feuds;[6] (4) hereditary leases;[7] (5) tithes;[8] (6) mortgages;[9] and some others.[10] Such an arrangement is, perhaps, better suited to a treatise on jurisprudence than to the exposition of a system of positive law. In this book we have already mentioned feuds and hereditary leases under the head of ownership of land. Tithes we omit as having no place in the modern law. Mortgages will form the subject of our next chapter. Of the above-mentioned rights, therefore, usufruct and use alone remain to be considered in this place.[11]

Place in the legal system as arranged by Grotius.

[1] Gr. 2. 33. 1–2, and see Table iv to book ii, chap. i.
[2] Erfaenhangig, onerfaenhangig.
[3] Gr. 2. 33. 3.
[4] Gr., lib. ii, cap. xxxix.
[5] Cap. xliv.
[6] Capp. xli–xliii.
[7] Cap. xl.
[8] Cap. xlv.
[9] Cap. xlviii.
[10] Capp. xlvi–xlvii.
[11] This does not mean that there are no other personal servitudes, e.g. a right of way granted to an individual as such for his life and not to the owner of an adjoining property in perpetuity. See *Willoughby's Consolidated Co.* v. *Copthall Stores* [1913] A. D. at p. 281;

Usufruct.

In Roman Law usufruct meant 'the right to enjoy the property of another and to take the fruits, but not to destroy it, or fundamentally alter its character'.[1] It was usually for the life of the person entitled,[2] sometimes for a fixed or ascertainable period terminable on death.[3] A usufruct may be constituted over either immovable or movable property.[4] Fungible things are not, properly speaking, the subject of usufruct, but may be the subject of a quasi-usufruct.[5] Usufruct may be either of a single thing or of the whole of the grantor's estate.[6] In the last event it is usually created by testament.

Rights and powers of the usufructuary.

The rights and powers of a usufructuary are:

1. As the name indicates, to use the property and to take its fruits[7] as owner.

2. To possess the property and to recover possession from the dominus or from a third party.[8]

3. To alienate the right of use and enjoyment, but only for the term of the usufruct.[9] If, however, the property

Texas Co. (S. A.) Ltd. v. *Cape Town Munic.* [1926] A. D. 467; *Ex parte Geldenhuys* [1926] O. P. D. 155. Such rights (*semble*) are inalienable. Cf. Voet, 8. 1. 4.

[1] Inst. 2. 4, pr.; Buckland, *Textbook*, p. 268.

[2] Gr. 2. 39. 1; Voet, 7. 4. 1.

[3] Voet, 7. 1. 5; 7. 4. 13.

[4] Gr. 2. 39. 2; Voet, 7. 1. 14.

[5] Gr. 2. 39. 20.

[6] Voet, *ubi sup.*

[7] Fructus are distinguished as natural, industrial, and civil; and as *pendentes* (necdum a solo separati), *exstantes* (qui jam a solo separati asservantur), *consumpti* and *percipiendi* (qui licet percepti non sint, honeste tamen a diligente patre-familias percipi potuerunt). Voet, 41. 1. 28. The title to fructus naturales and industriales vests in the usufructuary as soon as he has gathered them (*fructus perceptio*: Inst. 2. 1. 36; Voet, 7. 1. 28), and not, as in the case of the bona fide possessor, as soon as they are by any means separated from the soil. Dig. 7. 4. 13 (*ad fin.*). *Fructus civiles*, such as rents of houses which accrue from day to day, are apportioned between usufructuary and dominus. Gr. 2. 39. 13; Voet, 7. 1. 30. The phrase *fructus civiles* is not strictly speaking Roman. Girard, p. 271.

[8] Dig. 7. 1. 60; Voet, 7. 1. 32. The usufructuary had not possession in the strictest sense (Inst. 2. 9. 4); but generally, in so far as he 'had rights to the enjoyment of the property as against the owner and all other men, he could use the same actions and interdicts as the owner'. Hunter, *Roman Law* (3rd ed.), p. 409.

[9] Dig. 7. 1. 12. 2; Voet, loc. cit. This seems quite clear, though the text in the Institutes (2. 4. 3), 'nam extraneo cedendo nihil

held in usufruct is let on hire to a third party, the lessee must be allowed a reasonable time after the determination of the usufruct to look out for other accommodation.[1]

4. To give the property in pledge or mortgage and to suffer it to be taken in execution, but only to the extent of his usufructuary interest.[2]

In the absence of special circumstances a usufructuary is not entitled to claim compensation for improvements.[3]

Duties of the usufructuary.

The duties of the usufructuary are:

1. To frame an inventory of the property comprised in the usufruct. In Roman Law this was advisable, but not compulsory.[4] In Roman-Dutch Law it may be compelled.[5]

2. To give security to the dominus: (*a*) for the use and cultivation of the property in a husband-like manner; (*b*) for its restoration in proper condition upon the termination of the usufruct.[6]

The duty of giving security cannot be remitted to the usufructuary by the last will of the settlor;[7] though it may be remitted by one who has granted a usufruct by act *inter vivos*; and also by the heir of a testator, who has constituted a usufruct by his will.[8] The security may

agitur', has given unnecessary difficulty. Van Leeuwen says quite correctly (*Cens. For.* 1. 2. 15. 25): 'Sic ut usufructus cessione extraneo facta non tam ipsum jus usufructus quam fructuum perceptionis commoditas translata videatur.' See *Van der Merwe* v. *Van Wyk* [1921] E. D. L. 298, and *S. A. L. J.*, vol. xl (1923), p. 148.

[1] Voet, loc. cit.; *Holl. Cons.*, vol. iv, no. 51. [2] Voet, loc. cit.

[3] *Brunsdon's Est.* v. *Brunsdon's Est.* [1920] C.P.D., at p. 172, per Kotzé J., dissenting from Schorer *ad* Gr. 2. 39. 13.

[4] Dig. 7. 9. 1. 4. [5] Voet, 7. 9. 2.

[6] Gr. 2. 39. 3; Van Leeuwen, 2. 9. 10; V. d. L. 1. 11. 5; 1. 14. 10; Dig. 7. 9. 1, pr.: Si cujus rei usus fructus legatus sit, aequissimum praetori visum est de utroque legatarium cavere; et usurum se boni viri arbitratu et cum usus fructus ad eum pertinere desinet, restituturum quod inde exstabit; *Ex parte Newberry* [1924] O. P. D. at p. 223. If a usufructuary has failed to give security, when called upon to do so, he is not entitled to the fruits, which in that case are imputed to capital. Neostad. *Decis. Supr. Cur.* no. 33 (*in fin.*); *secus*, if security has not been demanded. *Decis. en Resolut. van den Hove*, no. 354; *Holl. Cons.*, vol. vi, p. 326; V. d. K. *Dictat. ad* Gr. loc. cit.

[7] Gr., *ubi sup.*; V. d. K. *Th.* 371. [8] Voet, 7. 9. 9.

be demanded by the dominus at any time during the currency of the usufruct.[1]

3. To keep in repair at his own cost and to meet all ordinary expenses; but extraordinary expenses may be charged against the dominus.[2]

4. To pay all usual taxes and outgoings charged on the land.[3]

5. Not to commit waste by felling timber,[4] destroying houses,[5] and the like. The permitted uses of timber are very similar to those recognized by English Law. Undergrowth may be cut. Trees may be felled on timber estates in due course of husbandry,[6] and wood may be taken for vine-posts or necessary repairs. If large trees are thrown down by the wind they belong not to the usufructuary but to the dominus.[7]

6. Generally, to exercise all his rights with the care of a bonus pater-familias.[8]

The duties and rights of the dominus.

The duties and rights of the dominus are the counterpart of the rights and duties of the usufructuary. Thus, on the one hand, he may not prevent, hinder, or diminish the right of use and enjoyment; may not, for example, burden land held in usufruct with a real servitude without the consent of the usufructuary.[9] On the other hand, he retains all such rights as are properly incident to his rever-

[1] Voet, 7. 9. 11.

[2] Gr. 2. 39. 6; Van Leeuwen, 2. 9. 10; Voet, 7. 1. 36; *Ex parte Est. Meintjes* (1907) 17 C. T. R. at p. 453.

[3] Van Leeuwen, 2. 9. 11; Voet, 7. 1. 37.

[4] Gr. 2. 39. 7: Een lijftochter mag geen boomen afhouden dan die houbaer zijn. *Houbaer* is a translation of *caedua*, i. e. quae succisa rursus ex stirpibus aut radicibus renascitur. Dig. 50. 16. 30, pr. The usufructuary may work or open mines, but, as a rule, has a usufruct merely, not property, in the minerals gained. Van Leeuwen, 2. 9. 4. Apparently it is not waste to change the course of husbandry. Voet, 7. 1. 24; Dig. 7. 1. 13. 5, and Gothofredus, ad loc.

[5] Voet, 7. 1. 21. Ameliorating waste. Ibid.

[6] Schorer *ad* Gr., *ubi sup.*

[7] Voet, 7. 1. 22; and therefore the usufructuary was not bound to replace them. Dig. 7. 1. 59, pr.; Voet, ibid.

[8] Voet, 7. 1. 41.

[9] Voet, 7. 1. 20. But 'jure civili nec consentiente fructuario'.

sion, such as the right of alienating the property by sale or gift, subject, of course, to the usufruct.[1]

How usufruct is constituted.

Usufruct is constituted by: (1) agreement followed by acquiescence on the part of the dominus;[2] (2) last will;[3] (3) prescription of a third of a century;[4] (4) judicial decree.[5]

How usufruct is determined.

Usufruct is determined by: (1) The death of the usufructuary[6] or the arrival during his lifetime of the term or event fixed for its expiry.[7] (The heirs of the usufructuary have no right to remove standing crops; but rents are apportioned between the usufructuary and the dominus.[8] When the usufructuary is a corporation the event corresponding to natural death is the dissolution of the corporation, or the effluxion of one hundred years from the date of the inception of the usufruct);[9] (2) complete, but not partial, destruction[10] or change of form[11] of the subject-matter of the usufruct; (3) surrender;[12] (4) merger;[13] (5) non-user for one-third of a century.[14]

[1] Voet, *ubi sup.*

[2] Gr. 2. 39. 8; Voet, 7. 1. 7. [3] Gr. 2. 39. 9.

[4] Gr. 2. 39. 11; (Ceylon) *Selohamy* v. *Goonewardene* (1928) 30 N.L.R. 112.

[5] Gr. 2. 39. 12. Jure civili also in certain cases: (5) by operation of law. Voet, 7. 1. 6.

[6] Gr. 2. 39. 13; Voet, 7. 4. 1. [7] Voet, 7. 4. 11–13.

[8] Inst. 2. 1. 36; Gr. *ubi sup.*; Voet, 7. 1. 30. Schorer says 'aliis magis placet jus Romanum'. But the exceptional case mentioned by Vinnius, *ad* Inst., loc. cit., sec. 3 (Dig. 7. 1. 58), in which the colonus has taken all the year's fruits before the expiry of the usufruct, but not paid the year's rent, does not affect the generality of the rule laid down by Grotius.

[9] Gr. 2. 39. 15; Voet, 7. 4. 1. [10] Gr. 2. 39. 14; Voet, 7. 4. 8.

[11] Voet, 7. 4. 9. [12] Gr. 2. 39. 16.

[13] Gr. 2. 39. 17; Voet, 7. 4. 2. 3. Merger may take place in consequence of abandonment of the usufruct (Dig. 7. 1. 64–5) or cession thereof to the dominus or conversely, if the usufructuary becomes proprietor (*consolidatio*).

[14] Gr. 2. 39, 18; Voet, 7. 4. 6. Others say, for thirty years. Voet, loc. cit. Usufruct is not lost by 'abuse', the dominus being sufficiently protected by the *cautio fructuaria*. The Institutes indeed say (2. 4. 3) 'finitur usufructus non utendo per modum', which has given some difficulty to the commentators. Vinnius (ad loc., sec. 2) and Voet (7. 4. 5) admit this mode of determination in certain cases. Heineccius *ad* Vinn. (*ubi sup.*) explains it away. In English Law if a life-tenant purported to alienate the fee-simple he for-

Usus.

Usus or *bruick* is a lesser right than usufruct, but, like it, is a life interest.[1] Its incidents are the same as in the Roman Law. Closely akin to usus is habitatio (*recht van bewoning over een huis*), but, unlike usus, it includes the right of letting the house on hire.[2]

Grotius refers to the same legal category the right of grazing on common-lands and the hereditary right of fishing in another's water.[3]

Use, in general, is constituted and determined by the same modes as usufruct.[4]

feited his interest. There is no clear evidence of a corresponding rule in R.-D. L. *Cens. For.* 1. 2. 15. 25; Voet, 7. 4. 4. But see Groen. *ad* Gr. 2. 39. 16; and Van Leeuwen, 2. 9. 14.

[1] Gr. 2. 44. 6; Voet, 7. 8. 3; *Potgieter* v. *Zietsman* [1914] E. D. L. 32.

[2] Gr. 2. 44. 8; *Arend* v. *Est. Nakiba* [1927] C. P. D. 8 (habitatio). These rights are seldom met with at the present day (2 Maasdorp, p. 180).

[3] Gr. 2. 44. 7.

[4] Gr. 2. 44. 10; Voet, 7. 8. 3.

VII

MORTGAGE OR HYPOTHEC

MORTGAGE[1] is defined by Grotius as a 'right over another's property which serves to secure an obligation'.[2] The nature of mortgage.

The obligation intended to be secured may be either civil or natural, provided that it is not one which the civil law expressly disapproves.[3] Anything may be mortgaged which belongs to the mortgagor whether in full or qualified ownership,[4] and whether such property be movable or immovable, corporeal or incorporeal, in possession or consisting in a right of action.[5] A mortgage of a specific thing imports a mortgage of the fruits.[6] Generally speaking, a man cannot mortgage what does not belong to him,[7] but

[1] The term 'mortgage', derived from English law, is now in common use as a synonym for 'hypothec', though the tendency, perhaps, is to speak of express *mortgages* and of tacit *hypothecs*. Grotius uses the word onderzetting. Van Leeuwen distinguishes pand=*pignus*, and onderzetting=*hypotheca*. Van der Linden writes 'pand of hijpotheck'. Of all these words it may be said tantum nominis sonus differt'. 'Pledge' or 'pawn' is usually limited to a hypothec of movables perfected by delivery. For *pand en hypotheek* in the old law reference may be made to Fock. And., *O. N. B. R.*, vol. ii, p. 97; De Blecourt, *Kort Begrip*, p. 150; A. Herman, *Het Karakter van ons hypotheekrecht historisch beschouwd* (Amsterdam, 1914); Wessels, Part II, chap. xvi.

[2] Gr. 2. 48. 1: gerechtigheid over eens anders zaeck dienende tot zeeckerheid van inschuld. By 'gerechtigheid' Grotius means a proprietary right less than ownership. Gr. 2. 33. 1.

[3] Voet, 20. 1. 18. Mortgages are frequently made to secure future advances as well as existing liabilities. A mortgage of this kind is known as a 'covering bond'. See *Deeds Registries Act*, No. 13 of 1918, sec. 16, and Wille, *Mortgage and Pledge in S. A.*, p. 92; and for Ceylon, Ord. No. 21 of 1927, sec. 17.

[4] Gr. 2. 48. 2. Grotius (ibid., sec. 3), founding on the Roman Law, says that the mortgage of urban servitudes and of agricultural instruments is forbidden, but Schorer dissents.

[5] Voet, 20. 3. 1. See *National Bank of S. A.* v. *Cohen's Trustee* [1911] A. D. at p. 250. A mortgage itself may be mortgaged by the mortgagee to secure a debt due from himself (*sub-mortgage*). Van Leeuwen, 4. 13. 6.

[6] Voet, 20. 1. 3; *Standard Bank* v. *Odendaal's Trustees* (1887) 5 S. C. 331.

[7] Voet, 20. 3. 3. As between mortgagor and mortgagee the

sometimes he may. Thus a husband, by virtue of his marital administration, may mortgage the property of his wife, even though community of goods has been excluded;[1] and pawnbrokers, according to some authorities, are not required to restore to the true owner things pawned with them by a non-owner, except on terms of payment of the debt for security of which the pawn was given.[2] Further, a thing may be effectually mortgaged by a non-owner if the owner consents or afterwards ratifies the transaction; or if the mortgagor afterwards becomes owner of the property mortgaged.[3] But this last departure from the rule has no application to a special mortgage of immovables.[4]

The immovable property of a minor may not be mortgaged without judicial decree.[5]

Classification of mortgages.

Mortgages are either: (1) legal (or tacit); or (2) conventional (or express);[6] and each of these may be either general or special, according as the mortgage attaches to all the mortgagor's property, future as well as present, or only to some specific piece of property or collection of things, such as a flock of sheep or all the goods in a particular shop.[7] Tacit mortgages arise by operation of law apart from and without any agreement between the parties. Conventional mortgages, as their name implies, are created by agreement. No special form of words is necessary for the creation of a conventional mortgage. Whether in the circumstances the words used are apt to create a mortgage is a question of

transaction holds good, but not to the prejudice of the owner. V. d. K. *Th.* 539.

[1] Voet, 20. 3. 7; *Holl. Cons.*, vol. i, no. 151.

[2] Voet, *ubi sup.*; Schorer *ad* Gr. 2. 48. 2; Van Leeuwen, 4. 13. 4; Groen. *de leg. abr. ad* Cod., lib. viii, tit. 16. But see *Muller* v. *Chadwick & Co.* [1906] T. S. 30. Voet's phrase is 'qui mensam foenebrem exercent'. The Dutch equivalent is 'Bank van Leening', for which the word 'Lombard' also served as a synonym.

[3] Voet, 20. 3. 4. For other cases see Voet, 20. 3. 7.

[4] Voet, 20. 3. 6.

[5] Decker *ad* Van Leeuwen, 4. 12. 4; *De Villiers N. O.* v. *Lay* (1889) 3 S. A. R. 49; Administration of Estates Act, 1913, sec. 87; *supra*, p. 110. For other cases in which mortgage is not permitted see Decker's note.

[6] Gr. 2. 48. 7.

[7] Voet, 20. 1. 2.

intention and construction. It sometimes happens that what in essence is a mortgage is disguised in terms appropriate to sale or some other contract. But the Courts will always go behind the form to ascertain the essential nature of the transaction, and, if this is found upon its true construction to be a mortgage, will pronounce it to be so. This is an application of the principle: *Plus valet quod agitur quam quod simulate concipitur.*[1] Disguised mortgages.

The phrase judicial mortgage (*pignus praetorium* or *judiciale*) is used to describe an attachment of goods in execution of a judgment.[2] Judicial mortgage.

Numerous tacit hypothecs are mentioned in the books; of which some were peculiar to the law of Holland, but most are a legacy from the Roman Law which in the later Empire and particularly under Justinian multiplied these embarrassing clogs upon property.[3] Some are inapplicable to modern conditions; many have been abolished or restricted by statute in one or other of the Colonies. In South Africa such of them as were still in existence on January 1, 1917, are deprived of their principal value in practice by the Insolvency Act (32) of 1916, sec. 86, as amended by Act No. 29 of 1926, sec. 29, which enacts that: 'Subject to rights existing at the commencement of this Act no tacit or legal hypothec (under which shall not be included any right of retention) shall give any preference on the estate of the insolvent except the landlord's hypothec, and that hypothec shall give a preference for all rent in respect of the period current with and up to the sequestration and arrear rent, not exceeding three months, in respect of a period immediately prior thereto.'[4] Tacit hypothecs.

[1] Cod. 4. 22; *Zandberg* v. *Van Zyl* [1910] A. D. at p. 309; *Nat. Bk. of S.A. Ltd.* v. *Cohen's Trustee* [1911] A.D. at p. 242.

[2] As to which see Kotzé, Van Leeuwen, vol. ii, p. 656, and *Liquidators Union and Rhodesia Wholesale Ltd.* v. *Brown & Co.* [1922] A. D. 549; *Humphreys* v. *Pickles* [1925] A. D. 471.

[3] See Windscheid, vol. i, secs. 231–2; Buckland, p. 478.

[4] It has been said, even judicially (*Kayser & de Beer* v. *Est. Liebenberg* [1926] A. D. at p. 97), that the effect is to 'abolish' tacit hypothecs in general. But this is not the language of the Act (contrast the Provincial enactments cited pp. 191 ff. *in notis*).

The following list of tacit hypothecs is complete or nearly so. Some are special, affecting only particular properties (1–7), others are general, attaching to all the property of the debtor, or to all the property constituting the estate of a deceased person (8–13).

1. The grantor of lands upon condition of a perpetual quit-rent[1] (*cijnsen—tijnsen—oud-eigen*)[2] has a tacit hypothec over the lands so granted for security of his rent.

2. The Ward[3] or *Dijkring* for cost of works executed by it in constructing and maintaining dykes, windmills, and other such works has a tacit hypothec over the lands comprised within its area in respect of their several *pro rata* contributions.[4]

3. One who has lent money or supplied materials for repairing a house or a ship as well as any one who has expended labour in doing so has a tacit hypothec over the house or ship in question.[5]

Whether this hypothec applies to a ship as well as to a house has been doubted. Vinnius says that it does

Any procedural or other advantages consequent upon tacit hypothecs (e.g. in an Admiralty action *in rem*), other than a preference in insolvency, remain unaffected. Cf. *Crooks & Co.* v. *Agricultural Co-op. Union* [1922] A. D. 423.

[1] Gr. 2. 48. 11; Van Leeuwen, 4. 13. 8; Voet, 20. 2. 27 and 20. 4. 19; V. d. L. 1. 12. 2.

[2] There is little difference of fact corresponding to the difference in name. See *Cens. For.* 1. 2. 17; Fock. And., vol. i, pp. 319 ff.

[3] Waard (polder), a drained lake—Sewel, *Groot Woordenboek*; not 'reeve' as Sir H. Juta translates (V. d. L. *ubi sup.*).

[4] Gr. 2. 48. 12; and Schorer, ad loc.; Voet, 20. 2. 31, and 20. 4. 19. The same privilege was allowed to all persons who had lent or spent money for the purpose.

[5] Gr. 2. 48. 13, and Groen. ad loc.; Voet, 20. 2. 28–9; 20. 4. 19. Grotius says: 'Iemand die geld heeft gheleent om een huis ofte schip te bouwen ofte te herbouwen.' But the tacit hypothec does not extend to the case of the building or buying of a new house or ship. Groen. *ubi sup.* and *de leg. abr. ad* Dig. 20. 4. 5; Sande, *Decis. Fris.* 3. 12. 5. Persons, however, who had advanced money for such purposes were privileged after the Fisc. Dig. 42. 5. 26 and 34; Dig. 12. 1. 25. These passages speak of building a ship, but only of repairing a house. See also Decker *ad* Van Leeuwen, 2. 7. 3; and *Crooks & Co.* v. *Agricultural Co-op. Union* [1922] A. D. 423. The money must have been actually expended or the materials actually applied for the contemplated repairs. Voet, 20. 2. 28.

not.[1] But Voet,[2] Van Leeuwen, Huber,[3] Schorer,[4] and Van der Keessel[5] are of the contrary opinion. On the other hand, that it does not attach to a new house or ship is agreed, unless, perhaps, to a house built to replace another which has been burnt down or destroyed.[6]

This hypothec covers all necessary expenses, provided that the money has been actually applied to the repair of the house or ship.[7]

4. The lessor of a house has a tacit hypothec for rent, and for waste to the property, over movables and animals brought on to the premises by the hirer.[8] The lessor of land has the same right,[9] and a like right also over the fruits for his rent.[10] Invecta et illata.

[1] Vinnius, *Select. Jur. Quaest.*, lib. ii, cap. iv.

[2] Voet, 20. 2. 29; Van Leeuwen, 4. 13. 8: Die iemand geld heeft geleent om een huis of schip nodig te herstellen. Cf. *Cens. For.* 1. 4. 9. 7.

[3] Huber, *Praelect. Jur. Civ.*, vol. iii, p. 17 (*ad* Dig. lib. xx, tit. 2).

[4] *Ad* Gr. 2. 48. 13. [5] V. d. K. *Th.* 417.

[6] Voet, 20. 2. 28; V. d. K. *ubi sup.* Grotius seems to extend the hypothec to other cases than houses and ships. Voegt hier by die iet gheborgt hebben tot nodig onderhoud van de onderghestelde zaeck. Scheltinga (*Dictat.* ad loc.) understands him in this sense, citing Van Leeuwen, *Cens. For.* 1. 4. 9. 7, 'etiam in navi et qualibet alia re, cui quid in necessariam ejus refectionem impensum est'.

[7] Van Leeuwen (4. 13. 8) limits it to necessary expenses, and the great weight of authority is said to favour this view. *Crooks & Co.* v. *Agric. Co-op. Union, ubi sup.*, at p. 445 per De Villiers J. A. In any event it does not cover *impensae voluptuariae* except so far as the value of the house or ship has been actually enhanced. Voet, *ubi sup. United Building Soc.* v. *Smookler's Trustees* [1906] T. S. at p. 630. This hypothec has been abolished at the Cape (Act No. 5 of 1861, sec. 8, subsecs. 5 and 6), and in the Transvaal (Procl. No. 28 of 1902, sec. 130, subsecs. 10 and 11), with the proviso (in both laws) that nothing herein contained shall be construed so as to deprive any person of any right which he may now by law possess to retain any property whatsoever which shall be in his actual possession until his costs and charges incurred thereon shall have been paid. *Semble*, it has been preserved in Natal by Law No. 13 of 1887, sec. 11. *Crooks & Co.* v. *Agricultural Co-op. Union* at p. 446.

[8] Dig. 2. 14. 4, pr.; Gr. 2. 48. 17, and Schorer, ad loc.

[9] Van Leeuwen, 4. 13. 12; Voet, 20. 2. 2–3; V. d. K. *Th.* 423. In the Civil Law the tacit hypothec attached to the *invecta et illata* only in the case of houses, and to the fruits only in the case of land. Dig. 20. 2. 4, and 7; Cod. 4. 65. 5, and Groen. *de leg. abr.* ad loc.; Voet, 20. 2. 2. [10] Gr. *ubi sup.*; Voet, *ubi sup.*

This hypothec extends, as a rule, only to property which belongs to the hirer; not to goods belonging to a third party, found upon the premises occupied by the tenant, unless they have been brought there with the knowledge and consent, express or implied, of the owner of the goods for the permanent or indefinite use of the tenant, and the landlord is unaware that the goods do not belong to the tenant. Consent is implied if the owner, being in a position to give notice of his ownership to the landlord, has failed to do so.[1] The landlord's hypothec does not extend to goods placed in the hands of the hirer to be worked by him in the course of his trade.[2] It is not lost even though the lessor may have accepted a surety or a conventional mortgage for the payment of the rent, for no one ought to be prejudiced by an excess of caution.[3]

The lessor's hypothec in respect of invecta et illata, in the case of lands and houses alike, will not be effectual against third parties unless it is perfected by a decree of sequestration obtained from the magistrate before the goods have been removed from the leased premises.[4] The

[1] Dig. 20. 2. 7; Groen. *ad* Gr. *ubi sup.*; Voet, 20. 2. 5; *Bloemfontein Municipality* v. *Jackson's Ltd.* [1929] A. D. 266; *Sercombe* v. *Col. Motors (Natal) Ltd.* [1929] N. P. D. 58; *Rand Furnishing Co.* v. *Heydenrych* [1929] T. P. D. 583. In the case of goods supplied on a hire-purchase agreement to the lessee of a house they are *prima facie* intended for his permanent use and not for a temporary purpose, because the agreement contemplates that he will later become the owner of the goods by duly paying his instalments, ibid., p. 276. The landlord's hypothec is not effectual against the goods of a bona fide sub-tenant beyond the amount due for rent by such sub-tenant to his immediate landlord. Voet, 20. 2. 6, *in fin.*; *Smith* v. *Dierks* (1884) 3 S. C. 142; *Ex parte Aegis Assurance & Trust Co. Ltd.* [1909] E. D. C. 363. *Quaere*, whether this applies also to the produce of the land in the hands of a sub-tenant. *Smith* v. *Dierks*, *ubi sup.*; Wille, *Landlord and Tenant* (2nd ed.), p. 185.

[2] Van Leeuwen, 4. 13. 12.

[3] Voet, 20. 6. 12; Schorer *ad* Gr. *ubi sup.*

[4] 'To render this hypothec effectual it is necessary to attach the property, and the general rule is that the attachment must take place while the things are on the leased premises.' *Webster* v. *Ellison* [1911] A. D. at p. 79, per Lord de Villiers C.J.; *Reddy* v. *Johnson* [1923] N. P. D. 190. It must be noted, however, that the landlord's hypothec does not require any judicial arrest to make it effectual over the tenant's property so long as the property remains

law is stated by Voet[1] in the following passage and holds good at the present day.

'We must remember that now with us and in many other countries the right of tacit pledge in the "invecta et illata" of a tenement, whether rural or urban, has no force unless they are sequestered (*praecludantur*) by public authority while they are still in the tenement; or, unless, when the tenant removes them, they are seized (*arresto detineantur*) by a vigilant creditor in the very act of removal, in which case the things which had been begun to be transferred, but had not yet reached the place destined for their concealment, are to be taken back to the land; . . . which sequestration (*praeclusio*) by our usages not only confirms (*firmat*) the lessor's right of hypothec, but also gives him a preference, though by the Roman Law he seems to have been entitled only to a simple hypothec; and by the law of Amsterdam only the rent for one year besides the current year has preference.'[2]

Quick pursuit.

In the above passage Voet, it will be noticed, speaks of the possibility of seizure in the very act of removal; and Grotius[3] says that the lessor preserves his right if he proceeds against the mortgaged property immediately after its removal from the land (ende dit recht behoudt den verhuirder, indien hy 'tgoed, van sijn grond vervoert zijnde, dadelick vervolgt). This is the doctrine of 'quick pursuit', which was considered by the Appellate Division of the Supreme Court of South Africa in the case of *Webster* v. *Ellison*.[4] For the principle to apply there must be: (1) instant pursuit; (2) seizure of the goods

upon the premises. Over such property, being upon the premises, the landlord has a right of preference, in the event of insolvency, which prevails even against a *pignus praetorium* issued before the landlord has obtained an attachment or interdict in enforcement of his lien. *In re Stilwell* (1831) 1 Menz. 537; 2 Maasdorp, p. 286. Cf. Magistrates' Courts Act, 1917, secs. 31–2. The hypothec is not lost by the removal of the goods from the leased premises under a writ of execution taken out by the landlord upon a judgment for arrear rent. *Columbia Furnishing Co.* v. *Goldblatt* [1929] A. D. 27.

[1] Voet, 20. 2. 3 (Berwick's translation).

[2] By Cape Act 5 of 1861, sec. 5, the tacit hypothec of landlords was not 'claimable for any sum greater than one whole year's rent'. See now Insolvency Act, 1916, sec. 86 (as amended), *supra*, p. 189.

[3] Gr. 2. 48. 17.

[4] [1911] A. D. 73.

while still in transit to their place of destination. In no case can the landlord defeat the rights of third parties who, before sequestration, have obtained the goods for value without notice of the landlord's claim.

5. A ship is bound to the owner of the cargo, if the cargo has been sold by the master for the expense of necessary repairs.[1] The ship and the cargo are bound to the master and his ship-mates for freight[2] and other charges.

6. A factor or commision agent has a tacit hypothec on goods sent him on commission for advances made upon such goods to the owner,[3] or for pledging his credit on behalf of the owner.[4]

7. The fiscus has a tacit hypothec over all the property of administrators and receivers of public funds, and also of public contractors, in respect of debts arising out of their office or position.[5] Similar rights were commonly delegated to farmers of the revenue, but they were required to enforce their claim within six months of the termination of their contract with the fisc.[6] A like hypothec was enjoyed by municipalities and various other smaller bodies such as churches, orphanages, &c., over the property of their administrators.[7]

[1] Gr. 2. 48. 20; Voet, 20. 2. 30.

[2] Gr. 2. 48. 19; Van Leeuwen, 4. 13. 13 and 4. 40. 2; V. d. K. *Th.* 682. In this case the master is not necessarily the owner of the ship.

[3] Van Leeuwen, 4. 13. 13; V. d. L. 1. 12. 2.

[4] Gr. 2. 48. 21; Van Leeuwen, 4. 13. 13. If I do not misunderstand Neostadius, *Cur. Holl. Decis.*, No. 45, the hypothec may be claimed also in respect of a balance due upon a general account.

[5] Gr. 2. 48. 15 and Groen. ad loc.; Voet, 20. 2. 8; V. d. K. *Th.* 420. *In re Insolvent Est. of Buissinne* (1828) 1 Menz. 318. *Query*, whether this hypothec extends to the property of every one with whom the Crown has entered into any contract. *Chase* v. *Du Toit's Trustees* (1858) 3 Searle 78. Cf. Dig. 49. 14. 28; Cod. 8. 14 (15). 2. In the Cape and Transvaal Provinces it is not to apply to the estates of auctioneers and deputy-postmasters considered as collectors or receivers of the public revenue, nor to contractors with Government (Cape Act 5 of 1861, sec. 8, subsecs. 1 and 2; Trans. Procl. No. 28 of 1902, sec. 130, subsecs. 7 and 8). For Ceylon see *Attorney-General* v. *Pana Adappa Chetty* (1928) 29 N. L. R. 431.

[6] Voet, 20. 2. 8.

[7] Gr. 2. 48. 18; Van Leeuwen, 4. 13. 12; V. d. K. *Th.* 425; abolished at the Cape by Act 5 of 1861, sec. 8, subsec. 4, and in the Transvaal by Procl. No. 28 of 1902, sec. 130, subsec. 9.

8. The fiscus has a tacit hypothec over all the property of persons liable for taxes and dues.[1] This hypothec still holds good in South Africa.[2]

9. An orphan has a tacit hypothec over a surviving parent's whole estate in respect of property coming from a deceased parent[3] and over his guardian's whole estate to indemnify him against all losses for which the guardian is answerable.[4] This hypothec extends even to the property of a step-father if the mother-guardian has not wound up the estate, also to the goods of the tutor's wife; unless in the last case community of goods, or at least of profit and loss, has been excluded.[5] The same hypothec attaches also for the benefit of lunatics and prodigals over the estate of their curators.[6]

10. Justinian gave a wife a hypothec for her dower over the whole of her husband's property.[7] In the Roman-Dutch Law this right attached only when by ante-nuptial contract all community of goods had been excluded, and the wife had expressly or by implication stipulated for right of dower and tacit hypothec. If these conditions were present the wife had a hypothec to secure her property brought into the marriage or after-acquired, which

[1] Voet, *ubi sup.*; V. d. K. *Th.* 419.

[2] *Cape Government* v. *Liquidators of the Balmoral Diamond Co.* [1908] T. S. at p. 688. 'It was common cause during the argument that by R.-D. L. the fiscus enjoys a tacit hypothec upon the general estate of a debtor for arrears of taxes due to it.' In the Cape Province not more than three years' arrears is covered by the hypothec (Act 5 of 1861, sec. 2). In the Transvaal this hypothec has been abolished by Procl. No. 28 of 1902, sec. 130, subsec. 6.

[3] Abolished in the Transvaal by Procl. No. 28 of 1902, sec. 130, subsec. 5.

[4] Gr. 2. 48. 16; Van Leeuwen, 4. 13. 11; V. d. K. *Th.* 421; abolished in the Transvaal by Procl. No. 28 of 1902, sec. 130, subsec. 1. In the Cape Province the abolition is less far-reaching. The hypothec still exists in case of a testamentary guardian, surviving parent, or stepfather (Act 5 of 1861, sec. 8, subsec. 3); but its continuance is limited to a period of three (or five) years. Ibid., sec. 3.

[5] Voet, 20. 2. 11; V. d. K. *Th.* 422.

[6] Voet, 20. 2. 13; abolished in the Transvaal but not at the Cape.

[7] Cod. 8. 17 (18). 12. 4.

was preferred to the claims of her husband's post-nuptial (but not ante-nuptial) hypothecary creditors.[1]

11. Legatees and fidei commissarii[2] have a hypothec over the estate of the deceased,[3] but not one which can be made good to the prejudice of his creditors.[4]

12. One who has advanced money for the expenses of a deceased person's last illness or burial has a tacit hypothec over all the deceased person's goods.[5] Whether the cost of mourning falls under the head of funeral expenses seems doubtful.[6] Van der Keessel allows that funeral expenses constitute a privileged debt, but says that they do not create a tacit hypothec.[7]

Effect of tacit hypothec.

The effect of a tacit hypothec, whether special or general, was in Roman Law precisely the same as the effect of a conventional hypothec, whether special or general; that is to say, the mortgaged property passed to a third party, by whatever title, subject to the encumbrance. In the Roman-Dutch Law the rule is the same with regard to immovables. A tacit hypothec of immovables, whether special or general, follows the property into the hands

[1] Groen. *de leg. abr. ad* Cod. 5. 12. 30; Voet, 20. 2. 20 and 23. 4. 52; V. d. K. *Th.* 263; V. d. L. 1. 12. 2. *Supra*, p. 81. In the Transvaal, Procl. No. 28 of 1902, sec. 130, subsec. 4, abolishes 'the tacit hypothecation possessed by women married out of community of property upon the estates of their husbands in respect of assets belonging to such women administered by their husbands'.

[2] Transvaal Proc. No. 28 of 1902, sec. 130, subsecs. 2 and 3, abolishes the tacit hypothecs of legatees and fidei-commissary heirs or legatees. Cape Act 5 of 1861, sec. 4, limits the legatee's hypothec (nothing said about fidei-commissaries) to a period of twelve months, which may be extended in case of disability, but not beyond five years.

[3] Cod. 6. 43. 1. 1; Gr. 2. 23. 19; Voet, 20. 2. 21; V. de L. *ubi sup.* The hypothec did not extend to the general estate of the fiduciary, sed tantum modo earum [rerum] quae a testatore ad eum pervenerint. Cod. 6. 43. 1. 5.

[4] Gr. *ubi sup.*; Voet, *ubi sup.*

[5] Gr. 2. 48. 14; Van Leeuwen, 4. 13. 9.

[6] Groen. *ad* Gr. *ubi sup.*; *Utrechtsche Consultatien*, vol. ii, no. 110.

[7] V. d. K. *Th.* 418. This is the law at the present day in South Africa. Funeral and death-bed expenses rank as privileged claims, and as such take precedence of mortgage creditors (*Stewart* v. *Hyland's Trustee* (1907) 24 S. C. 254; *Insolvency Act*, 1916, sec. 82; 2 Maasdorp, p. 302; Wille, *Mortgage & Pledge in S. A.*, p. 415), but do not themselves create a right of hypothec.

cujusvis possessoris,[1] so that the hypothec attaches to the land even in the hands of a third person, whether he takes by onerous or by lucrative title.[2] In the case of movables, however, the benefit of the tacit hypothec only lasts so long as the debtor, or creditor, remains in the possession of the mortgaged property. It is extinguished by transfer to a third party whether by onerous or lucrative title; and, if a third party acquires a special hypothec accompanied by delivery, or a right of retention, over specific goods of the debtor, he is preferred to the creditor under the earlier hypothec.[3] This is one more instance of the well-known rule, 'mobilia non habent sequelam'—'meubelen en hebben geen gevolg'.

A tacit hypothec is not the same as a lien.[4] This is a creditor's right to retain immovable or movable property, presently in his possession, until some claim is satisfied. The claim usually, but not necessarily, relates to the property retained. Tacit hypothecs and liens have this in common, that both arise by operation of law, and not by act of party. But liens last only so long as possession is retained[5] and are not assignable, whereas a tacit hypothec does not depend upon possession, and, like other hypothecs, may be ceded to a third party.[6] In some respects a lien

Liens.

[1] But a general conventional hypothec of immovables does not bind the property in the hands of a bona fide purchaser for value. Voet, 20. 1. 14; *infra*, p. 204.

[2] V. d. K. *Th.* 429. In the Cape Province this has been altered by statute, and tacit hypothecs of fixed property no longer affect property in the hands of a bona fide purchaser for value without notice. But no mortgagee is for the purpose of this section deemed to be a purchaser. Act 5 of 1861, sec. 9 (as to the meaning of bona fide see the sec.).

[3] Voet, 20. 1. 14 (*ad fin.*). Voet is speaking here of general hypothecs. But the same rule would apply also to a special tacit hypothec.

[4] Lien or *jus retentionis* is distinguished from *pignus* in *Reed Bros.* v. *Ford* [1923] T. P. D. 150. The former is a weapon of defence only (per Wessels J. P. at p. 154).

[5] *United Building Soc.* v. *Smookler's Trustees* [1906] T. S. at p. 627; *Savory* v. *Baldochi* [1907] T. S. 523.

[6] But when a pledge of movables has been constituted by delivery it seems that the right to hold the subject of the pledge as security for the debt cannot be ceded to a third party without the

is more analogous to a pledge of a movable perfected by delivery [*infra*, p. 206].

Classification and legal effect.

Liens fall into one of two classes, which have been distinguished as: (1) Salvage and improvement liens; (2) debtor and creditor liens.[1] The first of these classes of lien exists in favour of any person who has necessarily or usefully incurred expense about property presently in his possession. The second is a consequence of contract, and covers all expenses duly incurred in terms of the agreement.[2] The first is good against all the world, the second only against the other party to the contract and persons claiming through him;[3] not against an owner who is not a party to the contract unless it has been made by his authority express or implied.[4] Instances of the first are the rights of retention, which the law gives to possessors and occupiers of land in respect of improvements,[5] and perhaps to a finder of lost property in respect of necessary expenses.[6] Instances of the second are the rights of retention enjoyed by builders,[7] by artificers, e.g. when cloth has been delivered to a tailor to make up into clothes,[8] by livery stable keepers,[9] by carters and warehouse-

consent of the pledgor, *Deutschmann* v. *Mpeta* [1917] C. P. D. 79. This is one of the points of resemblance between a lien and a pledge of movables.

[1] *United Building Society* v. *Smookler's Trustees*, *ubi sup.*; *Colonial Manufacturing Co.* v. *Wiid* [1927] C. P. D. 198.

[2] *Nieman* v. *Scrivenor N. O.* [1922] O. P. D. 101.

[3] Ibid.; so far at least as they cover expenses which are not shown to be either 'necessary' or 'useful'. *United Building Society* v. *Smookler's Trustees*, *ubi sup.*, at p. 628.

[4] *Ford* v. *Reed Bros.* [1922] T. P. D. at p. 278; *Reed Bros.* v. *Ford* [1923] T. P. D. 150; *Colonial Cabinet Manufacturing Co.* v. *Wiid* [1927] C. P. D. 198.

[5] *Infra*, p. 443.

[6] *Killian* v. *Reilly* (1908) 18 C. T. R. 159.

[7] *United Building Society* v. *Smookler's Trustees*, *ubi sup.*; *Scholtz* v. *Faifer* [1910] T. S. 243; *Phillips & Gordon* v. *Adams* [1923] E. D. L. 104.

[8] Voet, 16. 2. 20; 20. 2. 28 (*in fin.*); *Spurrier* v. *Coxwell* [1914] C. P. D. at p. 88.

[9] *Ford* v. *Reed Bros.* [1922] T. P. D. 266; *Reed Bros* v. *Ford* [1923] T. P. D. 150. By Roman-Dutch Law, differing herein from English law, expenses incidental to the maintenance of the lien, e.g. the feed and stabling of horses, may be charged against the

men.[1] By an extension of the same principle attorneys and other legal practitioners have a right to retain documents until paid their charges in connexion with legal proceedings to which the documents relate.[2] The innkeeper's lien may perhaps be referred to the same head.[3]

It may be remarked that in many cases the books leave room to doubt whether rights of the kind of which we have been speaking are more properly described as liens or as tacit hypothecs.

The Court reserves to itself the discretion, where equity demands it, to order a lien-holder to surrender the property against adequate security.[4]

Conventional mortgages are created by agreement between mortgagor and mortgagee. We shall consider, first, their form; secondly, their effect. Conventional mortgages.

1. In Roman Law no form was required for the creation of a mortgage. All that was needed was the agreement of the parties, which might be expressed verbally or in writing.[5] In Roman-Dutch Law the 1. Requirements of form.

debtor. Ibid., *Secus*, *Longpan Salt Co. Ltd.* v. *Blumenfeld & Co.* [1922] N. P. D. 177.

[1] *Anderson & Co.* v. *Pienaar & Co.* [1922] T. P. D. 435.

[2] Van Leeuwen, 4. 40. 2; *Queen's Town Assurance Co.* v. *Wood's Trustee* (1887) 5 S. C. 327. But see Insolvency Act, 1916, sec. 45 (as amended by Act 29 of 1926, sec. 17), which provides that 'no person shall be entitled to any preference by virtue of the retention of any books of account belonging to the insolvent or having reference to his business or affairs'. Has an attorney a right of retention over moneys in his hands for his costs? The question was left open in *Kayser & de Beer* v. *Est. Liebenberg* [1926] A. D. at p. 98. Book-keeper's lien, *Nieman* v. *Scrivenor N. O.* [1922] O. P. D. 101; Wille, p. 157.

[3] Van Leeuwen, loc. cit. See *Holmes Garage Ltd.* v. *Levin* [1924] G. W. L. D. 58, where the Eng. law is contrasted.

[4] *Ford* v. *Reed Bros.* [1922] T. P. D. at pp. 272–3. For the procedure in the event of the insolvency of the owner of property, held by a creditor under claim of lien, see Mars, *Insolvency*, p. 106; Insolvency Act, No. 32 of 1916, sec. 77; Insolvency Act, 1916, Amendment Act, 1926, sec. 27, and definition of 'security', ibid., sec. 3 (d).

[5] In the later law an instrument executed publicly or subscribed by three witnesses was preferred to other mortgages. Cod. 8. 17 (18). 11. 1 (Leo; A.D. 472).

matter is not so simple. We have to distinguish five cases:

(*a*) Special mortgage of immovables;
(*b*) General mortgage of immovables;
(*c*) Special mortgage of movables;
(*d*) General mortgage of movables;
(*e*) General mortgage both of immovables and of movables (*general bond*).
(*f*) Mortgage of a right (*res incorporalis*).

(*a*) Special mortgage of immovables.

(*a*) Special mortgages of immovables were required by the Placaat of Charles V of May 10, 1529, to be executed by solemn writing passed 'before the Judge and in the place where the goods are situated'.[1] The transaction must be duly registered[2] in the land-book. A duty must be paid of 2½ per cent.[3] of the amount of the loan.[4] All these conditions were indispensable if the mortgage was to affect third parties, i.e. to bind the property.[5]

(*b*) General mortgage of immovables.

(*b*) General mortgages of immovables required the same conditions of execution,[6] registration,[7] and payment of the fortieth penny,[8] but might be passed before any Judge in the province of Holland.[9]

[1] 1 G. P. B. 374. *Supra*, p. 147.

[2] Political Ordinance of April 1, 1580, Art. 37 (1 G. P. B. 339). It should be noted that the reference in that article is to the Placaat of May 9, 1560 (2 G. P. B. 759 and 1402) and not to the Placaat of 1529.

[3] Placaat der 40ste Penning, December 22, 1598, as reissued 1632, (1 G.P.B. 1953). The duty must, however, have been imposed before that date, for it is already mentioned by Grotius (2. 48. 30), whose work was written in 1620 and published in 1631. See Boel *ad* Loen., p. 118.

[4] V. d. K. *Th.* 427.

[5] Gr. 2. 48. 30: Bizondere onderzetting over ontilbaer goed is krachtig zo wanneer de selve geschied voor 't gerechte van de plaetse alwaer het goed is gelegen mids dat oock den veertigsten penning daervan zy betaelt ende de onderzetting te boeck aengheteickent, maer anders niet.

[6] Pol. Ord., Art. 35 (1 G. P. B. 339); Gr. 2. 48. 23.

[7] Ibid., Art. 37; Placaat der 40 Penn., Art. 12 (1 G. P. B. 1957).

[8] Waerschouwinge van de Staten van Hollandt ende West-Vriesland, February 5, 1665 (3 G. P. B. 1005). This enacts that no hypothec general or special, whether on movables or immovables, shall give any preference unless the fortieth penny is paid at the time of the passing of the mortgage. Certain exceptions are speci-

(c) Special mortgages of movables are either accompanied by delivery of the subject of the mortgage to the mortgagee, or unaccompanied by delivery. In the first case the transaction is commonly called a pledge (*pignus—pand ter minne*). To the validity of a pledge, transfer of possession is essential.[1] An agreement, therefore, which allows the pledgor to retain the goods pledged as a loan or deposit by the pledgee renders the pledge invalid, any such arrangement being looked upon as a fraud upon the law, which insists upon delivery as an essential element in the transaction.[2] In the second case the hypothec gives a right of preference against unsecured creditors provided it is executed before three witnesses or before a notary and two witnesses. So the law is stated by Grotius.[3] The advertisement of 1665 added the further requirement of the payment of the fortieth penny,[4] and in the modern law registration is also necessary.[5] (c) Special mortgage of movables.

It follows that when Van der Linden says: 'In order that a pledge of movables may be valid not only as against the debtor himself, but also as against third parties, delivery of the property to the creditor to whom it

fied: (*a*) mortgages in favour of orphans (Verbanden gedaan op Wees-kamers recht, ten voordeele van Wees-kinderen, welckers Goederen ter Wees-kamere gebracht, ende onder d'administratie van Wees-meesteren ghestelt zijn); (*b*) legal hypothecs; (*c*) bottomry bonds. Kusting-brieven (Gr. 2. 48. 40; 3. 14. 25) required solemn execution, but not payment of duty. Voet, 20. 1. 11; (*d*) pledges of movables accompanied by transfer of possession.

[3] Pol. Ord., Art. 35; Voet, 20. 1. 10; V. d. K. *Th.* 428.

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[1] But *brevi manu traditio* may be sufficient. *O'Callaghan's Assignees* v. *Cavanagh* (1882) 2 S. C. 122.

[2] Voet, 20. 1. 12; *Holl. Cons.*, vol. iii, pt. 2, no. 174, p. 470; V. d. K. *Th.* 536; *Goldinger's Trustee* v. *Whitelaw and Son* [1917] A. D. at p. 89; *Lighter & Co.* v. *Edwards* [1907] T. S. 442.

[3] Gr. 2. 48. 28. The three witnesses are taken from the jus civile, p. 199, n. 3.

[4] V. d. K. *Th.* 427.

[5] South Africa: *Francis* v. *Savage & Hill* (1882) 1 S. A. R. 33; *Hare* v. *Trustee of Heath* (1884) 3 S. C. 32. Ceylon: Ord. No. 23 of 1927, sec. 18; No. 21 of 1871; Pereira, p. 528. For the older law of Ceylon see *Tatham* v. *Andree* (1863) 1 Moo. P. C. C. (N.S.) 386.

is pledged is necessary,'[1] his words must not be taken to exclude the possibility of a mortgage of movables by notarial deed duly registered but unaccompanied by delivery.[2]

(*d*) General mortgage of movables.

(*d*) General mortgages of movables, according to Voet, may be made under the same conditions as a general mortgage of immovables;[3] that is, they require execution *coram judice*, registration, and payment of the fortieth penny.

(*e*) General bond.

(*e*) A general mortgage of immovables and movables, in other words of all the property of the debtor, is constituted by an instrument called a general bond, or more often by a general clause in a special bond. According to Van der Linden it was not valid unless the payment of the fortieth penny (2½ per cent.)[4] was made to the State. It could be executed before the Court, before a notary and witnesses, or even under hand.[5]

(*f*) Mortgage of incorporeal property

(*f*) A mortgage of incorporeal things (rights) is effected by cession. 'An incorporeal right is by its nature not susceptible of physical delivery, but the pledgor must do some act to show that he divests himself of that right and vests it in the pledgee for the purpose of his holding it as security.'[6]

How con-

Such, then, are the ways in which conventional mort-

[1] V. d. L. 1. 12. 3.

[2] Kotzé's Van Leeuwen, vol. ii, p. 108. Consider the effect of the definitions of 'free residue' and 'special mortgage' incorporated in Insolvency Act, 1916, sec. 2, by the amending Act of 1926, sec. 3. *B. Ebrahim Ismail & Co.* v. *Khan's Trustee* [1930] N. P. D. 136; *Mosenthal & Co.* v. *Master Supreme Court* C. P. D. (1930) 16 P. H., C. 83.

[3] Voet, 20. 1. 12: Potest tamen procul dubio generalis hypothecae constitutio etiam sine ulla traditione secundum Hollandiae mores efficax esse, si coram aliquo Hollandiae judice solenniter constituta et actis publicis insinuata et quadragesima debiti aerario illata sit. In the case of *In re Insolvent Estate of Loudon*; *Discount Bank* v. *Dawes* (1829) 1 Menz. 380, it was said that there is no authority to show that the law required registration of a general hypothecation of movables.

[4] Waerschouwinge of February 5, 1665, *ubi sup.*

[5] V. d. L. 1. 12. 3.

[6] *Smith* v. *Farrelly's Trustee* [1904] T. S. at p. 955; and see *Nat. Bk. of S. A. Ltd.* v. *Cohen's Trustee* [1911] A. D. 235. As to what is necessary to constitute a cession of a right see p. 253, *infra.*

gages are constituted in the Roman-Dutch Law, and the method is substantially the same at the present day. In South Africa a special mortgage of immovable property is constituted by means of a bond executed before the Registrar of Deeds.[1] A general conventional mortgage, whether of immovables or of movables, is constituted by a general bond or by a general clause in a special bond. A general bond is executed before a notary and two witnesses.[2] A special mortgage of movables (unaccompanied by delivery) is effected in the same way as a general mortgage. In all the above-mentioned cases registration in the office of the Registrar of Deeds is necessary to give the mortgagee preference over other creditors.[3]

ventional mortgages are constituted at the present day: in South Africa;

In Ceylon conventional general mortgages have been abolished by statute.[4] A special mortgage of immovables must be executed before a notary and two witnesses or a District Judge, &c., and must be registered.[5] A special mortgage of movables must be effected by actual delivery or by writing duly registered.[6]

in Ceylon.

In Roman Law, as above remarked, a mortgage, whether general or special,[7] whether of movables or of immovables, whether express or tacit, bound the mortgaged property into whose hands soever it might come. This result was quite independent of notice of the existence of the mortgage. In Roman-Dutch Law we must distinguish between the different kinds of mortgage. Thus: (*a*) A special mortgage of immovable property, validly executed, has the same effect as in Roman Law,

Effect of mortgages.

[1] 2 Maasdorp, p. 256.
[2] The Deeds Registries Act, 1918, sec. 3 (i); 2 Maasdorp, p. 257.
[3] Ibid., p. 258.
[4] Ord. No. 8 of 1871, sec. 1; re-enacted, Ord. No. 21 of 1927, sec. 3. [5] Ord. No. 7 of 1840, sec. 2; Ord. No. 17 of 1852, sec. 1.
[6] Ord. No. 23 of 1927, sec. 18.
[7] Voet, 20. 1. 14–15. There was a difference, however, as regards alienation, which in the case of a general hypothec was permitted subject to the burden—*cum sua causa*—(Cod. 4. 53. 1), but in the case of a special hypothec was forbidden. Dig. 47. 2. 67 (66) pr.: Si is qui rem pignori dedit vendiderit eam, quamvis dominus sit, furtum facit, sive eam tradiderat creditori, sive speciali pactione tantum obligaverat.

and creates a *jus in re* available against all third parties.[1] (*b*) A general mortgage of immovable property affects the property in the hands of an alienee who takes by lucrative title (or with notice); it does not burden the property in the hands of an alienee who takes in good faith by onerous title.[2] (*c*) A special mortgage of movables accompanied by delivery binds the property so long as the pledgee retains possession.[3] If he alienates or pledges the property to a third party, it seems that his right is extinguished, and that the owner of the property may vindicate it from the pledgee or alienee.[4] (*d*) A general mortgage of movables and a special mortgage of movables unaccompanied by delivery binds the property so long as it remains *in dominio debitoris*; but a subsequent alienee or pledgee takes free of the encumbrance.[5] (*e*) A

[1] Gr. 2. 48. 32; Voet, 20. 1. 13. The only qualification is that in certain cases the creditor may be estopped by his conduct from asserting his right. Ibid. In practice the mortgagee, at all events in South Africa, is completely protected by the fact that his mortgage is registered against the title to the property. At the Cape 'it will be the duty of the Registrar to decline to register anything that can in any way amount to an interference with the dominium, and where he fails to do so the mortgagee may apply to the Court for redress.' 2 Maasdorp, p. 288.

[2] Gr. 2. 48. 24; Voet, 20. 1. 14: Nostris moribus immobilia generali hypotheca solenniter coram lege loci devincta, si quidem titulo oneroso in tertium bona fide accipientem alienata sint, non amplius vinculo pignoris obnoxia manent; at si lucrativo titulo, durat etiamnum pignoris causa, et hypothecaria adversus possidentem titulo lucrativo salva est. Cf. V. d. K. *Th.* 429. Voet limits this to a conventional general mortgage of immovables, for he continues: Si tamen hypotheca generalis non conventionalis, sed legalis sit, magis est ut aeque moribus hodiernis ac jure Romano res immobiles sub ea comprehensae non nisi cum onere etiam in emptorem, aut alio ex titulo oneroso accipientem transferantur. With this V. d. K. agrees.

[3] Voet, 20. 1. 13. Non aliter creditori securitas in mobilibus specialiter obligatis et traditis superest quam si ipse possessioni sibi traditae adhuc incumbat remque teneat. Cf. 2 Maasdorp, p. 254.

[4] There is little authority, but the first consequence seems to follow from the nature of pledge, the second from the nature of ownership. Nemo plus juris ad alium transferre potest quam ipse habet; Dig. 50. 17. 11. *Supra*, p. 158. *Deutschmann* v. *Mpeta* [1917] C. P. D. 79.

[5] Voet, 20. 1. 14; V. d. K. *Th.* 432; Christenaeus, *ad leg. Mech.*,

general bond, and a general clause in a special bond, have in modern practice the same effect as a general mortgage of movables.

'A general conventional mortgage gives the mortgagee no possessory or quasi-possessory rights over any portion of the debtor's property, whether movable or immovable, and consequently he has no power either to interfere with the debtor's right of alienating or disposing of his own property or pledging or mortgaging the same to third parties, or to prevent other creditors who have obtained judgment against the debtor from attaching such property in execution of such judgment. The only right it does confer upon the mortgagee is a right of preference (if the mortgage has been duly registered) upon the estate of the debtor in case it should afterwards be sequestrated as insolvent.'[1]

(*f*) The effect of the cession of a right would depend, it may be suggested, upon the nature of the right and the character of the cession. If the cession were made by way of pledge[2] the result would be the same as stated above under (*c*). If the cession, though intended merely *in securitatem debiti*, were absolute in its terms, the cessionary might give a good title to a purchaser or pledgee who took the property in ignorance of the facts.[3]

Tit. vii, art. 8. Grotius (2. 48. 29) says that a mortgage of movables, general (2. 48. 23) or special (2. 48. 29), is lost if the property comes into a third hand 'door wettelicke aankomste'; he does not distinguish between onerous and lucrative title. Cf. Scheltinga, *Dictat.* ad loc.; Voet, 20. 1. 14; 20. 6. 6 (*ad fin.*). In South Africa the tendency of judicial decision has been to exonerate the property in the hands of an alienee only if he takes by onerous title and without notice. *Coaton* v. *Alexander* [1879] Buch. 17; *Meyer* v. *Botha and Hergenröder* (1882) 1 S. A. R. 47. 'Now it is quite clear that knowledge, or notice, of the existence of a pledge places a person, who purchases or otherwise obtains possession of the property pledged, in no better position than the debtor and pledgor himself' (Grot. in *Holl. Cons.*, vol. 3, pt. 2, no. 174, sec. 8 [De Bruyn's *Opinions of Grotius*, p. 475]; Loen. *Decis.*, Cas. 80), per Kotzé C.J.; *Cato* v. *Alion and Helps* [1922] N. P. D. 469; Cape Act No. 5 of 1861, sec. 9.

[1] 2 Maasdorp, p. 292; Morice, *English and Roman-Dutch Law* (2nd ed.), p. 63.

[2] Cf. *National Bank of South Africa Ltd.* v. *Cohen's Trustee* [1911] A. D. at p. 245.

[3] In *Cohen's* case there was 'no question as to third parties

Priorities. Priorities amongst mortgages are governed by the following rules:

1. A legal right of retention (*jus retentionis*) and a pledge of movable property perfected by delivery give the creditor an inexpugnable right to retain the property concerned against all rival claimants until his own claim is satisfied.[1] To the same category belongs the landlord's tacit hypothec.[2] The so-called *pignus praetorium*, which arises from the attachment of property in execution of a judgment, belongs to the same class.[3] Within this group no question of priority arises, for the simple question is, 'Who is in actual possession of the property?' Thus, if a creditor with a right of retention parts with the possession to the debtor, who subsequently pledges the property with a third party, the pledgee's right is paramount both against the prior creditor and also, so long as he retains the possession, against a judgment creditor who seeks to attach the property under an execution.

2. Subject to the prior claims of mortgages falling under class 1, the rule is that all mortgages, however constituted, rank in order of time.[4] But an unpaid vendor of land (or a third party who has advanced money to pay the purchase price),[5] who has secured himself by taking an express hypothec contemporaneously with the transfer, termed a *kusting-brief*, in respect of the unpaid purchase-money, is preferred before all other mortgagees for the

being misled by the form of the cession', per Lord De Villiers C.J. at p. 242.

[1] Voet, 20. 1. 12; 20. 4. 19; V. d. K. *Th.* 437. By the R.-D. common law, in the event of insolvency, the duty was cast upon the creditor of delivering the pledge to the insolvent's curator (or trustee) for realization. This is no longer the case.

[2] Voet, 20. 4. 19; V. d. K., *ubi sup.*

[3] *In re Woeke* (1832) 1 Menz. 554. But note that by the Insolvency Act, 1916, sec. 84, a *pignus judiciale* no longer gives any preference in case of sequestration of the judgment-debtor's estate, except for the taxed costs of execution. *Liquidators' Union and Rhodesia Wholesale Ltd.* v. *Brown & Co.* [1922] A. D. 549.

[4] Cod. 8. 17 (18). 2: Nam cum de pignore utraque pars contendat praevalet jure qui praevenit tempore. Gr. 2. 28. 34–6; Voet, 20. 4. 16.

[5] *United Building Society* v. *Smookler's Trustees* [1906] T. S. 623.

principal sum, and also, if he has expressly stipulated for it, for arrears of interest as well.[1]

3. By Art. 35 of the Political Ordinance of 1580 general conventional mortgages of immovables are postponed to special conventional mortgages, though of later date.[2] This rule has no reference to general tacit mortgages, as to which the statute is silent.[3] These, therefore, rank in their proper place in order of time, and are pre-

[1] Kusting-brief is een schuldbrief spruitende uit een restand van koop-penningen, die den Verkoper houd op het verkogte goed, en gepasseert werd ten tyde van de opdragt, en heeft voor alle verbanden praeferentie omtrent de hoofdsom, dog niet omtrent de verscheene interesse, ten waare zulks uitdrukkelyk was bedongen. Boey, *Woordentolk, sub voce*. Cf. Gr. 2. 48. 40 and 3. 14. 25; Voet, 19. 1. 12; V. d. K. *Th.* 437; *In re Buissinne's Insolvent Estate* (1828) 1 Menz. 326–7; *Est. Ghislin* v. *Fagan* [1925] C. P. D. 206.

[2] 1 G. P. B. 338; Gr. 2. 48. 34; Voet, 20. 1. 14; V. d. K. *Th.* 436.

[3] 'Altum de legali in dict. art. 35 silentium est', says Voet (20. 1. 14), 'quo etiam fundamento responsum generalem legalem anteriorem adhuc hodie potiorem esse speciali posteriore conventionali,' citing *Holl. Cons.*, vol. iv, nos. 189 and 392. The words of Art. 35 of the P. O. literally translated run as follows: *The effect of general hypothec preceding special hypothec.* 'And concerning constitution and bond of general hypothec which shall be passed after two months from the publication hereof, the same shall in no wise hinder or prejudice him who afterwards shall acquire constitution or bond of special hypothec, so that he to whom any immovable goods shall be specially bound in the said special hypothec and the monies therefrom proceeding shall be preferred to him to whom (the property?) shall be mortgaged under general hypothec after the two months aforesaid from the publication hereof; but the aforesaid constitution of general hypothec passed before the Court shall have place and take effect against those who have like constitution or bond; under whom the oldest constitution shall be preferred to the younger, without in that case, distinction made or regard had before what Judges in the said lands the general constitution of hypothec shall be passed, and in like manner the general constitution aforesaid shall have place and take effect against those who have a merely personal action, according to the disposition of the written laws.' Van der Keessel says (*Th.* 437) that a tacit or legal mortgage has the same force as a special mortgage and therefore—(*a*) is preferred to a subsequent special mortgage, and to a prior general conventional mortgage; (*b*) is postponed to a prior special mortgage (and to a prior tacit mortgage, general or special). But rule (*a*) does not apply if the subsequent special mortgage is a pledge of a movable accompanied by possession, or a kusting-brief of an immovable (*supra*, n. 1); and rule (*b*) does not apply if the legal mortgage is privileged or if the legal mortgage over *invecta et illata* is confirmed by arrest (*supra*, p. 192).

ferred to all mortgages of later date whether general or special.[1]

4. The statement that subject to the above exceptions mortgages rank in order of time means that they rank from date of execution, and in modern practice from the date of registration, where registration is required by law.[2] Tacit hypothecs take effect from the moment when the circumstances exist which give birth to them.[3]

With the exception noted above of general hypothecs of immovables, it makes no difference whether the mortgage is conventional or legal,[4] general or special. All rank in order of time.[5] 'Qui prior est tempore potior est jure.' General bonds, however, and specific mortgages of movables unaccompanied by delivery, as observed above, only bind the property of the mortgagor so far as he has not alienated it. They are, in fact, merely a floating charge, which takes effect in the event of the debtor's insolvency or death, and attaches only to such property as is still in his possession at one or other of these two dates;[6] and in case of insolvency they have ceased to be of any value to a creditor in consequence of sec. 87 (1) of the Insolvency Act, which provides that 'no general bond registered after the commencement of this Act shall confer any preference in respect of immovable property, and no general clause in a special mortgage registered after the commencement of this

[1] This is still the law even at the Cape. Act 5 of 1861, sec. 9 (*in fine*), but subject to sec. 86 of the Insolvency Act, *supra*, p. 189.

[2] Voet, 20. 4. 29; Insolvency Act, 1916, sec. 87 (2), which destroys the effect of the *Standard Bank of S. A.* v. *Heydenrych* [1907] A. C. 336; 3 Buch. A. C. 145.

[3] Thus the minor's hypothec over his guardian's estate attaches from the moment when the tutorship devolves. Voet, 20. 2. 17; *Schutte* v. *Meyer's Assignee* [1927] C. P. D. 371.

[4] Gr. 2. 48. 36; Voet, 20. 4. 28; V. d. K. *Th.* 437.

[5] According to Voet (20. 4. 19) all the above-mentioned special tacit hypothecs are privileged. But it seems doubtful whether in the modern law any special tacit hypothecs are recognized except as rights of retention (including the landlord's lien which has been confirmed by attachment). For which see 2 Maasdorp, p. 305.

[6] Morice, *English and Roman-Dutch Law* (2nd ed.), p. 63.

Act shall confer any preference in respect of immovable property or of movable property which was not delivered to the mortgagee at the time of mortgage and retained by him during the term thereof.'[1]

Rights of mortgagee and mortgagor.

The mortgagee is entitled to the possession of the mortgaged property, not, as in English Law, because the mortgage has passed the ownership, but because the right to possess is considered to be incidental to the right of hypothec.[2] By the actio hypothecaria, which is a species of vindication, he asserts his right to possess against the mortgagor and against every one else except a mortgagee with prior or better title.[3] Not being owner, the mortgagee, even if in possession, has no power of granting leases.

In principle there is no reason why a mortgagor should not deal with the mortgaged property as he pleases, subject to the rights of the mortgagee. But in fact it is otherwise. In South Africa he cannot do so. For since transfer of land on which a mortgage is registered cannot take place without the consent of the mortgagee, without his consent the land cannot be alienated. A mortgagor is not prohibited from granting a lease, but he may not do so in prejudice of the mortgagee's rights.[4] The imposition of a servitude, being plainly prejudicial, is not permitted.[5]

Special covenants contained in mortgages.

Any covenants which are lawful and not contrary to public policy may be annexed to the contract, e.g.: (1) that the destruction of the pledge without fault on his part shall free the debtor; (2) that the pledge shall not be redeemed for a certain time; (3) that if the debt is not paid within a certain time the creditor may *propria*

[1] There had been earlier and similar legislation in Natal (Law 27, 1863, sec. 5; Law 47, 1887, sec. 122).

[2] This proposition is perhaps scarcely applicable to the law of S.A. Cf. *Roodepoort United Main Reef G. M. Co.* (*In Liquidation*) v. *Du Toit N. O.* [1928] A. D. at p. 71. As to the rights of a mortgagee in possession see *Judes* v. *S. A. Breweries Ltd.* [1922] W. L. D. 1.

[3] Girard, pp. 825–6.

[4] *Watson* v. *McHattie* (1885) 2 S. A. R. 28; *Dreyer's Trustee* v. *Lutley* (1884) 3 S. C. 59; *Reed's Trustee* v. *Reed* (1885) 5 E. D. C. 23.

[5] *Stewart's Trustee* v. *Uniondale Municipality* (1889) 7 S. C. 110.

auctoritate enter into possession of the mortgaged land; (4) that the creditor is to repay himself out of the rents and profits of the land; (5) that if the debt is not paid the creditor (or a surety who pays) may buy the property at af air price; (6) that the creditor may sell the pledge[1] —this right passes to heirs and is assignable; (7) that the creditor shall take the profits in lieu of interest (*antichresis*).[2]

An agreement for forfeiture in the event of non-payment (*pactum commissorium—lex commissoria*) is not permitted.[3]

Enforcement of mortgages.

In the Roman Law the mortgagee ultimately acquired a power of sale, which could not be excluded by express agreement. This right, however, was enjoyed only by a first mortgagee.[4] He could also, in certain cases, obtain an order of foreclosure (*impetratio dominii*).[5]

In the Roman-Dutch Law neither of these remedies is generally available. Foreclosure is unknown, and sale cannot be effected except with the consent of the debtor. The proper and only mode of realizing a mortgage is by obtaining a judgment of the Court upon the mortgage debt and taking out a writ of execution against the property.[6] In South Africa, if the mortgaged property is immovable, a special order of Court is required declaring the property executable before it is taken in execution.[7]

The mortgaged property may be sold without an order of Court with the consent of the debtor;[8] but an agreement

[1] Voet, 20. 1. 21. But see *infra*, n. 8.

[2] Voet, 20. 1. 23; (Ceylon) *Wijeysinghe* v. *Velohamy* (1928) 29 N. L. R. 349.

[3] Voet, 20. 1. 25; Cod. 8. 34 (35). 3, pr. (Constantine, A. D. 326); *Dawson* v. *Eckstein* (1905) 10 H. C. G. 15; *Mapenduka* v. *Ashington* [1919] A. D. 343; *Sun Life Insurance Co. of Canada* v. *Kuranda* [1924] A. D. 20. For *lex commissoria* in contract see *Cloete* v. *Union Corp. Ltd.* [1929] T. P. D. 508.

[4] Girard, p. 830; Cod. 8. 17 (18). 8.

[5] Girard, p. 831.

[6] 2 Maasdorp, p. 322. For Ceylon see Civil Procedure Code (Ord. No. 2 of 1889), secs. 640 ff.

[7] See cases cited by Maasdorp, *ubi sup.* *Semble*, by R.-D. L. this was required in all cases; not in the case of immovables alone. Voet, 20. 5. 3.

[8] Voet, 20. 5. 6 (and authors there cited). Nemini licet hodie

for extra-judicial sale contained in the mortgage-deed will not be enforced if the debtor afterwards objects, or if a private sale would be prejudicial to other hypothecary creditors.[1]

If the debtor is insolvent the mortgaged property is sold not by the mortgagee, but by the trustee of the insolvent estate.[2]

In the Roman-Dutch Law, differing herein from the Roman Law,[3] a later mortgagee cannot[4] redeem or buy out an earlier mortgagee against his will so as to step into his place.[5] But he can do so indirectly, by suing the mortgagor and obtaining a sale in execution, in which event he will have the same right as any one else[6] of making a bid for the purchase of the mortgaged property.[7] When property is sold in execution it is the practice to pay the purchase-money to the judgment-creditor only on condition of his giving security *de restituendo* in the event of

privata auctoritate pignus vendere invito debitore, licet id ita ab initio fuisset actum, sed impetrata sententia condemnatoria pignus subhastatur auctoritate judicis. Voet, *Compendium*, 20. 5, sec. 8. Van der Keessel, however (*Th.* 439), says that a pledgee may sell a pledge which has been delivered to him, if it was stipulated *ab initio* that he might sell it.

[1] Voet, *ubi sup.*; 2 Maasdorp, p. 323. The tendency of judicial decisions in South Africa is to recognize the validity of an agreement for extra-judicial sale (*parate executie*) of movables. 'The conclusion at which I have arrived is that an agreement for the sale, by means of *parate execution*, of movables delivered to a creditor by his debtor is valid in law. It is, however, open to the debtor to seek the protection of the Court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights.' Kotzé J. in *Osry* v. *Hirsch, Loubser & Co.* [1922] C. P. D. at p. 547. In *Paruk* v. *Glendale Estate Co.* [1924] N. P. D. 1 the Court admitted the validity of *parate executie*, and Tatham J. said: 'I am unable to find in any of the authorities which have been cited any distinction drawn between movables and mortgaged immovables in this respect.' But see L. E. Krause, 'The History of Parate Executie', *S. A. L. J.*, vol. xlii (1924), p. 20 and p. 185.

[2] Maasdorp, *ubi sup.* [3] Cod. 8. 17 (18). 1 *et passim.*

[4] Van der Keessel (*Th.* 441) merely says 'an possit, non sine caussa dubitari potest'.

[5] But he (or any one else) may, by agreement, take an assignment of the mortgage. Gr. 2. 48. 43; Voet, 20. 4. 35.

[6] *Secus*, jure civili. Voet, 20. 5. 3. [7] 2 Maasdorp, p. 326.

prior claims emerging. Thus, if a second or later mortgagee sells, the prior encumbrancer is secured against loss. The purchaser on the other hand gets a good title.[1]

Extinguishment of mortgages.

A mortgage may be extinguished in the following ways,[2] viz. by:

1. Discharge of the principal debt or liability. This includes performance and its equivalents, release, novation, &c. (*infra*, pp. 278 ff.).[3]
2. Renunciation of the mortgage: (*a*) express;[4] (*b*) implied, as by consenting to alienation by the mortgagor of the mortgaged property.[5]
3. Confusion or merger, viz. when the titles of mortgagor and mortgagee meet in the same person.[6]
4. Destruction of the mortgaged property.[7]
5. Alienation of the mortgaged property, viz. in the cases in which the effect of alienation is to deprive the mortgagee of the benefit of his security (*supra*, pp. 203–5).
6. Expiry of time or operation of condition, when the mortgage was expressed to be temporary or conditional.[8]
7. Extinction of the mortgagor's title to the object of the mortgage, e.g. by death, if his interest was a life interest; or in the case of a sub-mortgage

[1] Voet, 20. 5. 11 (*secus* in Ceylon *Kristnappa Chetty* v. *Horatala* (1923) 25 N. L. R. 39). Van der Keessel says (*Th.* 442) that the mere knowledge of a creditor that property mortgaged to him is being sold, even though by public auction, is not to be taken as a tacit remission of his mortgage.

[2] Wille, *Mortgage and Pledge in S. A.*, ch. viii; 2 Maasdorp, p. 309.

[3] Voet, 20. 6. 2.

[4] Voet, 20. 6. 5. To the same head may be referred novation of a mortgage by substituting some other right in its place. Wille, p. 290.

[5] Voet, 20. 6. 6–7; *Swanepoel* v. *Van Heerden* [1928] A. D. 15. Voet says that if the property reverts to the debtor the mortgage revives; citing Groen. *de leg. abr. ad* Cod. 8. 25 (26). This merely means that the property in question like any other after-acquired property is bound by a general hypothec; praesertim (says Groen.) propter verbum 'futurarum rerum', quod in generalibus hypothecis poni solitum est.

[6] Voet, 20. 6. 1.

[7] Voet, 20. 6. 4.

[8] Voet, 20. 6. 10.

(i.e. a mortgage of the mortgagee's interest) by the determination of the principal mortgage.[1]

8. Prescription. Grotius adopts the Roman law periods of forty years, if the property is in the hands of the mortgagor or his heirs; of thirty years, if it has come into the hands of a third party by title adverse to the mortgagor,[2] or by no title at all. Other writers express a preference for the general common law term of a third of a century.[3] In the Transvaal, and it seems also in the Cape Province, the period is fixed by statute at thirty years. In Natal and the Free State there is no statutory provision.[4]
9. Decree of the Court, when, e.g. the mortgage is set aside on the ground of mistake or fraud, or under the provisions of the Insolvency Act, 1916, secs. 24, 27, and 28.
10. Judicial sale, or sale in insolvency, of the mortgaged property.

[1] Voet, 20. 6. 2 (*in fine*).
[2] Gr. 2. 48. 44; V. d. K. *Th.* 443; V. d. L. 1. 12. 6.
[3] Voet, 20. 4. 9; Matthaeus, *Paroem.* no. 9, sec. 6 (7).
[4] Wille, pp. 303–5.

BOOK III

THE LAW OF OBLIGATIONS

BOOK III

INTRODUCTION

The meaning of Obligation.

FROM the law of property, or real rights, we pass to the law of obligations or personal rights. A real right, as we have seen, constitutes a claim which the law will sustain against any and every invader. It is a right against all the world. A personal right, on the contrary, is a right against some specific person and against him alone. When one person is legally entitled to demand from another some specific act or forbearance, a relation exists between them which is termed an obligation. When we say that one person is legally entitled we imply that the other person is legally bound or obliged. Accordingly, Justinian defines obligatio as 'juris vinculum quo necessitate adstringimur alicujus solvendae rei secundum nostrae civitatis jura'[1]—'An obligation is a legal fetter with which we are bound by the necessity of performing some matter in terms of the laws of our country.' Any giving, doing, or forbearing may be the subject-matter of an obligation,[2] provided only that it be something possible and not contrary to law.[3] From legal obligations, as defined in the last paragraph, or 'civil obligations', as they are specifically called, must be distinguished 'natural obligations'. These are personal claims founded not in law, but in morality,[4] e.g. the claim of a father to receive services of duty and affection from his children. More precisely, in Roman law, the phrase 'natural obligation' was limited to claims which, while not enforceable by action, were, nevertheless, available as a defence and had certain other important consequences in the field of positive law.[5] In the modern law this distinction has lost much of its former significance.[6]

Obligations are civil and natural.

[1] Inst. 3. 13, pr. The term 'obligation' is not understood to include personal relations arising from status. *Infra*, p. 340.

[2] Voet, 44. 7. 1.

[3] Voet, 2. 14. 16.

[4] Voet, 44. 7. 3.

[5] Voet, *ubi sup.*

[6] See, however, Windscheid, vol. 2, sec. 289; Girard, p. 682.

How obligations arise.

A legal bond or obligation between two persons may arise in many different ways. These have been variously classified by the jurists. We adopt as most convenient the arrangement chosen by Gaius in his book called *Aurea* or *Golden Words*.[1] According to this, obligations arise: (1) from agreement; (2) from wrongdoing; (3) from various other causes. This arrangement we shall follow, and discuss obligations under the three heads of Contractual, Delictual, and Miscellaneous.

[1] Obligationes aut ex contractu nascuntur aut ex maleficio aut proprio quodam jure ex variis causarum figuris. Dig. 44. 7. 1, pr.

PART I

OBLIGATIONS ARISING FROM CONTRACT

The definition of contract.

The subject-matter of the law of contract is in all legal systems the same, viz., agreements and promises. What agreements, what promises, will the law enforce? This is the problem to be solved, and it is solved by different systems of law in different ways. But the definition of contract in the abstract is always the same, viz. 'an agreement enforceable at law' or, what comes to the same thing, 'an agreement which creates a legal obligation between the parties to it'. An agreement which produces this effect is a contract; an agreement which fails to produce this effect, however much it may be intended to do so, is a void contract, i.e. no contract at all.[1] Sometimes the agreement has in law the effect that it lies in the option of one of the parties whether he will be bound by it, or not. In that case it is said to be voidable by such party. Agreements directed to illegal ends are usually void; agreements procured by fraud or menace are usually voidable. Instances will be given in the following pages.

Contracts are: valid, void, voidable.

There is no contract unless the parties intend to contract.

From what has been said it is apparent that the law of contract is concerned not with all agreements, but only with such agreements as are intended to create a legal obligation between the parties. If the parties do not wish to be bound the law will not bind them.[2] Therefore no

[1] Or we may, if we please, define contract as 'an agreement which creates or is intended to create a legal obligation between the parties to it' (Jenks, *Digest of English Civil Law*, § 182). This will permit us without abuse of language and in harmony with common usage to speak of a 'void contract', i.e. a contract which is intended to create, but does not create, a legal obligation between the parties.

[2] Pothier, *Traité des Obligations*, sec. 3. The generality of this statement must be qualified to the extent of admitting that a person may in certain cases have acted in such a way as to induce another to believe that he intended to contract with him, and may be estopped from denying that his apparent intention corresponded with his real intention. *Infra*, p. 225, n. 6.

legal consequence attaches to words spoken and understood as a jest,[1] nor to agreements for the performance of something patently impossible,[2] for they cannot be supposed to have been seriously intended.[3]

Divisions of the law of contract.

In discussing the law of contract we shall have to consider: (*a*) the formation of contract, i.e. the conditions of its existence; (*b*) its operation or effect; (*c*) its interpretation; (*d*) its determination. These topics will form the subject of the following chapters.

[1] Vinnius *ad* Inst. 3. 14. 2, sec. 11; Van Leeuwen, 4. 1. 3.
[2] Gr. 3. 1. 19 and 42; Voet, 2. 14. 16; 45. 1. 5; V. d. L. 1. 14. 6.
[3] Voet, 28. 7. 16; Vinnius, *ubi sup.*

I

FORMATION OF CONTRACT

The elements of a valid contract.

To constitute a valid contract: (A) the parties must be agreed; (B) the parties must intend, or be deemed to intend, to create a legal obligation; (C) the object of the agreement must be physically and legally possible; (D) the requisite forms or modes of agreement (if any) must be observed; (E) the agreement must not be impeachable on the ground of fraud, fear, misrepresentation, undue influence, or lesion; (F) the agreement must not be directed to an illegal object; (G) the parties must be competent to contract.

Section A

The parties must be agreed.

Agreement.

How agreements are made.

The nature of agreement is explained in many well-known works. We are here concerned with the modes in which agreements are concluded and with some circumstances in which agreement is absent. Agreement usually results from the acceptance of an offer, or from the reply to a question. Thus, if I say 'I offer to buy your horse for £50'; and you answer 'Agreed'; the contract is complete from the moment that your answer makes known to me your acceptance of the offer made to you.[1] So, if I say 'Will you sell me your horse for £50?' and you answer 'I will'; there is a contract completed by your answer, expressing a willingness to sell, given in reply to my question expressing a willingness to buy. In Roman Law the contract known as the stipulation was normally expressed in the form of question and answer.

[1] The general rule is as stated in the text. But in the case of acceptances through the post actual communication to the offeror is not indispensable (see below, p. 222); and the offer may in some cases, from its nature or by express terms, dispense with communication of acceptance. *Rex* v. *Nel* [1921] A. D. at pp. 344, 351 ff.; *McKenzie* v. *Farmers' Co-op. Meat Industries Ltd.* [1922] A. D. 16; *Cullinan* v. *Union Govt.* [1922] C. P. D. 33.

In Roman-Dutch Law neither offer and acceptance nor question and answer are indispensable, but any expression of a common intention, whether conveyed by spoken or written words, or by conduct, or partly by words and partly by conduct, will constitute an agreement which (other necessary conditions being satisfied) the law will enforce.[1] But without union of minds there can be no agreement.[2] Therefore, a mere declaration of intention not intended to be assented to,[3] or not yet assented to, or a mere offer unaccepted, is destitute of legal consequences.[4] To such unilateral declarations of intention the Roman lawyers gave the name of 'pollicitation'.[5] Since an unaccepted offer does not bind the offeror until acceptance, before acceptance it may at any time be revoked.[6] Once accepted, it becomes irrevocable. An offer, if not accepted within the time, or in the manner

[1] Van Leeuwen, 4. 3. 1.

[2] Gr. 3. 3. 45; *Joubert* v. *Enslin* [1910] A. D. at p. 23; *Jones* v. *Reynolds* [1913] A. D. 366; *Bloom* v. *American Swiss Watch Co.* [1915] A. D. 100 (information given in ignorance of offered reward); *Dobbs* v. *Verran* [1923] E. D. L. 177 (one party thought that a ride in a motor-car was to be paid for, the other thought that it was gratuitous).

[3] Gr. 3. 1. 11.

[4] Gr. 3. 1. 48; Van Leeuwen, 4. 1. 3. Grotius says that a pollicitation made in God's honour or ex praecedenti causa for public purposes is binding. This is taken from the Roman Law (Dig. 50. 12. 1. & 2). But it scarcely holds good to-day. Such a pollicitation however, if accepted, might be binding as an actionable pact or contract. See Groen. *de leg. abr.*, ad loc. *in fin.*

[5] Dig. 50. 12. 3, pr., Pactum est duorum consensus atque conventio, pollicitatio vero offerentis solius promissum. Grotius renders pollicitatio by 'belofte'. An offer intended to be accepted is 'toezegging'.

[6] Gr. 3. 3. 45. Since the decision in *Conradie* v. *Rossouw* [1919] A. D. 279 (*infra*, p. 231) an option to purchase must be taken, at all events in certain cases, to constitute a binding contract, from which the person giving the option cannot withdraw without the consent of the person to whom the option was given. *Boyd* v. *Nel* [1922] A. D. 414. But an option *may* be a mere offer. A promise to give a 'voorkeur' may confer an option (*Fourie* v. *De Bruyn* [1914] A. D. 374), or merely a preference, in which case it may or may not give a legal right to the promisee. *Van Pletsen* v. *Henning* [1913] A. D. at p. 90; *Robinson* v. *Randfontein Est. G. M. Co.* [1921] A. D. at p. 188; *Edwards (Waaikraal) G. M. Co. Ltd.* v. *Mamogale* [1927] T. P. D. at p. 295; and see *Sher* v. *Allan* [1929] O. P. D. 137.

prescribed, for acceptance,[1] or where no time is prescribed within a reasonable time lapses, and *ipso jure* determines in the event of the death of the offeror[2] or offeree before acceptance. A purported acceptance subject to conditions, additions, restrictions, or alterations takes effect as a rejection of the original offer and as a new offer.[3]

Contracts concluded through the post.

In the case of negotiations through the post, or by other such medium of correspondence, it is often matter of importance to determine whether and when a contract has been concluded. Suppose, for instance, an offer made through the post and an acceptance posted which never reaches the offeror, or reaches him late. Can it be said that the offer has been accepted? English Law is now settled in the sense that the posting of a letter of acceptance concludes the contract, so that both parties are from that moment bound.[4] Modern decisions upon the Roman-Dutch Law incline to the same view.[5] Voet's view seems to be that the contract is concluded when and where the letter of acceptance reaches the offeror, 'ubi literae negotium concludentes acceptatae sunt'[6]—'where the letter concluding the contract is received'.

The acceptance of railway tickets, &c.

The acceptance of railway tickets, cloak-room tickets, and the like has raised the same difficulties in modern Roman-Dutch Law as in English Law, and with similar results. A party is bound if he has had a reasonable opportunity of acquainting himself with the contents.[7]

Effect of

Sometimes it is agreed between the parties that their

[1] *Laws* v. *Rutherfurd* [1924] A. D. 261.

[2] Voet, 5. 1. 73. See *Stofberg* v. *Est. Van Rooyen* [1928] O. P. D. 38.

[3] Jenks, *Digest*, art. 197; *Watermeyer* v. *Murray* [1911] A. D. 61; *Houston* v. *Bletchly* [1926] E. D. L. 305.

[4] Anson, *Law of Contract* (17th ed.), p. 27.

[5] *Cape Explosives Works Ltd.* v. *S. A. Oil & Fat Industries Ltd.* [1921] C. P. D. 244. But the question was reserved in *McKenzie* v. *Farmers' Co-op. Meat Industries Ltd.* [1922] A. D. at p. 24.

[6] Voet, *ubi sup.*; *Rex* v. *Dembovsky* [1918] C. P. D. at p. 240; *Cape Explosive Works, &c.*, at p. 258.

[7] *Peard* v. *Rennie & Sons* (1895) 16 N. L. R. 175; *Central South African Railways* v. *McLaren* [1903] T. S. 727; *Dyer* v. *Melrose Steam Laundry* [1912] T. P. D. 164.

contract shall be reduced to writing. Whether they are bound independently of the writing or not before the contract has been written down is in each case a question of intention.[1] Agreement to reduce contract to writing.

There is no agreement if it is left to one of the parties to perform or not as he chooses: 'nulla promissio potest consistere quae ex voluntate promittentis statum capit';[2] nor if the subject-matter of the negotiations is so vague that its meaning cannot be ascertained.[3] No contract where agreement is vague or uncertain.

Without union of minds there is no agreement. Mistake may exclude agreement.[4] 'Non videntur qui errant consentire.'[5] 'Nulla voluntas errantis est.'[6] It is important to distinguish the different ways in which mistake affects contract. Effect of mistake.

Mistake consists in a misapprehension as to the existence or non-existence of a fact or state of facts. All mistake is mistake of fact. But a mistaken belief that a rule of law exists or does not exist is distinguished from other mistakes of fact and is called specifically mistake of law.[7] With regard to this the maxim applies 'juris ignorantiam cuique nocere';[8] which means that no one can excuse himself from performance of a contract by alleging that he entered upon it under some mistaken belief as to the Mistake of law.

[1] Gr. 3. 14. 26; Voet, *ubi sup.*; *Goldblatt* v. *Fremantle* [1920] A. D. 123; *Woods* v. *Walters* [1921] A. D. 303; *De Bruin* v. *Brink* [1925] O. P. D. 68.

[2] Dig. 45. 1. 108. 1; 44. 7. 8; Gr. 3. 3. 47 (*ad fin.*); Van Leeuwen, 4. 3. 5; Voet, 44. 7. 1. *Secus*, if he is to perform *when* he chooses. Dig. 45. 1. 46. 2; Voet, 45. 1. 20.

[3] Dig. 45. 1. 94; V. d. L. 1. 14. 6; *Humphreys* v. *Cassell* [1923] T. P. D. 280; *Beretta* v. *Beretta* [1924] T. P. D. 60; *Schneier & London Ltd.* v. *Bennett* [1927] T. P. D. at p. 359.

[4] Gr. 3. 1. 19; 3. 14. 4; V. d. L. 1. 14. 2.

[5] Dig. 50. 17. 116. 2.

[6] Dig. 39. 3. 20.

[7] Voet, 22, 6. 1.

[8] Dig. 22. 6. 9, pr.: (Paulus) Regula est juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere. An exception may perhaps be admitted when a law is of merely local application, in favour of a stranger to the locality. Voet, 22. 6. 2. Some indulgence is allowed to minors and women. Voet, 22. 6. 3. The question has been much debated whether ignorantia juris excludes the condictio indebiti. Voet (12. 6. 7) held that it does, dissenting from Vinnius (*Select. Quaest.* I. 47). Grotius (3. 30. 6) is of the same opinion as Vinnius, but his commentator Schorer agrees with Voet.

Mistake of fact.

existence or non-existence of a rule of law.[1] As distinct from mistake of law, mistake of fact often affects the formation or the operation of a contract, and that in various ways. In relation to the formation of contract, mistake, if it has any effect at all, prevents a valid contract from coming into existence. To constitute a contract there must be parties who agree and something agreed upon. If either of these elements is wanting there may indeed be the external indicia of a contract, but there is no consensus of minds. Therefore, in principle, there is no contract:

Different kinds of mistake.

1. If one of the parties to a supposed contract is under a misapprehension as to the person with whom he is contracting (error in persona);[2]
2. If there is a misunderstanding as to the nature of the transaction (error in negotio);[3] or
3. As to the identity of the subject-matter of the contract (error in corpore);[4] or
4. As to the quality of the subject-matter (error in substantia);[5] or
5. Generally, as to the terms of the contract.[6]

No doubt every one of these propositions must be taken subject to qualifications which cannot be developed in an elementary treatise. A few points may be mentioned. First, it is not every mistake as to persons which will be fatal to a contract; where the individuality of the party

Van der Keessel (*Th.* 796) follows Grotius. See *Rooth* v. *The State* (1888) 2 S. A. R. 259, where all the authorities are collected in Kotzé C.J.'s learned judgment; *Heydenrych* v. *Standard Bk. of S. A.* [1924] C. P. D. 335; *S. A. L. J.*, vol. xxxiii (1916), p. 45.

[1] Whether mistake as to private rights is a mistake of law? *Rooth* v. *The State, ubi sup.*, at p. 267; *Umhlebi* v. *Umhlebis Est.* [1905] 19 E. D. C. 237; *Est. Jonsson* v. *Est. Jonsson* [1926] N. P. D. at p. 300.

[2] Pothier, *Obligations*, sec. 19; *Beyers* v. *McKenzie* (1880) Foord, 125.

[3] Ibid., sec. 17; *Dobbs* v. *Verran* [1923] E. D. L. 177.

[4] *Maritz* v. *Pratley* (1894) 11 S. C. 345; Anson, p. 160.

[5] Pothier, sec. 18.

[6] *McAlpine* v. *Celliers* [1921] E. D. L. 112. This was a case of mistake as to the meaning of a representation inducing the contract, but it illustrates the principle.

is not a material consideration the contract holds good notwithstanding the mistake.[1] Thus, where an order is sent to one tradesman and executed by another, in the absence of special circumstances the goods must be paid for, though the purchaser may have been under a misapprehension as to the person who supplied them.[2] Next, as regards what may be called the material basis or subject-matter of the contract—the crucial question to determine is what was the bargain between the parties. 'Videamus quid inter ementem et vendentem actum sit', says Julian in the Digest.[3] Clearly, mistake which lies outside the orbit of the bargain cannot affect it in any way. Thus, in a Canadian case, where A offered ten boxes of matches for sale at $2.55 per box, and the offer was accepted, he could not escape from the contract on the plea that he meant to charge $4.25 per box, and had named the lower figure by mistake.[4] Similarly, where it is a question of quality, e.g. if the bargain is for the sale of 'these candlesticks' it is beside the mark that the purchaser thinks he is getting silver candlesticks, when in fact they are plated. The case would be different if the seller thought that the bargain was for the sale of 'these candlesticks', while the buyer thought that the bargain was for the sale of 'these silver candlesticks'. In that event there would be no union of minds between the parties; each being under a misapprehension as to the intention of the other.[5] This is a case of *mutual* error.

The objective theory of contract.

Even where such misapprehension exists it by no means always follows that a party to an apparent contract can escape liability by alleging his mistake. It is to some extent true that a contract has an objective existence independent of the volition of the parties.[6] In

[1] Pothier, sec. 19; Anson, p. 157.

[2] In this case the duty seems to be rather quasi-contractual than contractual.

[3] Dig. 18. 1. 41, pr.

[4] *Morisset* v. *Brochu* (1883) 10 Quebec Law Reports, 104.

[5] Pothier, sec. 18, where, however, the author seems rather to have in view the case of error common to both parties.

[6] 'Cases arise in which, although there is in fact no mutual

estimating the consequences of mistake the question which is asked is not so much what a person intends as what he says; and not so much what he says as what expectation his words excite (or reasonably may excite) in another person's mind. Therefore, on the one hand, 'the promisor is bound to perform what his language justified the promisee in expecting;'[1] and, on the other hand, a promisee's expectation must be reasonable in the circumstances. Neither promisor nor promisee can take advantage of his mistake unless it was a reasonable mistake—justus et probabilis—not imputable to his own carelessness.[2] Thus if at a sale by auction a person bids for property A, intending to bid for property B, as a rule he must accept the consequences of his mistake;[3] but the result will be different, if there was something in the circumstances to make the mistake excusable.[4]

Mistake common to both parties.

We have spoken of cases in which mistake may have the effect of excluding agreement. There are other cases in which the parties are in fact agreed but labour under a *common* error. Such is the case where the contract between the parties is based upon a false assumption of fact—e.g. where the parties have contracted for the purchase and sale of a thing which in fact does not exist.[5]

assent, and accordingly no contract, one of the parties may be estopped by his statements or conduct from setting this up. In such cases there may be said to be a quasi-mutual assent.' Blackburn J. in *Smith* v. *Hughes* (1871) L. R. 6 Q. B. at p. 607, cited in *Van Ryn Wine and Spirit Co.* v. *Chandos Bar* [1928] T. P. D. at p. 422. 'Where a party has entered into a written agreement, he is not entitled to relief, because he understood the contract differently from what it is truly construed to mean'. *Hoffmann* v. *S. A. Conservatorium of Music* (1908) 25 S. C. at p. 30, *per* Maasdorp J.

[1] *Pieters & Co.* v. *Salomon* [1911] A. D. at p. 138 per Innes J.; *Pheasant* v. *Warne* [1922] A. D. at p. 487; *Hodgson Bros.* v. *S. A. Rlwys.* [1928] C. P. D. 257; *Van Ryn Wine and Spirit Co.* v. *Chandos Bar* [1928] T. P. D. 417.

[2] Voet, 12. 6. 7; 22. 6. 6; *Logan* v. *Beit* (1890) 7 S. C. at p. 216.

[3] *Merrington* v. *Davidson* [1905] 22 S. C. 148; *De Villiers* v. *Parys Town Council* [1910] O. P. D. 55.

[4] *Maritz* v. *Pratley* [1894] 11 S. C. 345; and see the English case of *Scriven* v. *Hindley* [1913] 3 K. B. 564; Anson, p. 162.

[5] Gr. 3. 1. 42; *Scrutton* v. *Ehrlich* [1908] T. S. 300; and see *Theron Ltd.* (*In liquidation*) v. *Gross* [1929] C. P. D. 345. The same

The contract collapses from its foundation. Another case of common error is when the parties are in fact agreed, but the writing to which they have reduced their agreement fails to express their real intention. In such case the Court will decree rectification of the instrument.[1]

Mistake induced by fraud.

A contract procured by the fraud of a third party is void if the circumstances are such as to exclude consent. The same principle seems to apply to a contract procured by the fraud of one of the contracting parties, if the fraud is of such a character as to exclude consent; e.g. when a man is deceived as to the nature of the transaction. Certainly, in such a case he would have no consenting mind.

'If the defendants were induced by fraud to enter into a contract they never intended to enter into, in the absence of a contracting mind on their part, the contract would be wholly void, and not only voidable; but the defence of fraud could not be set up by them against the bank, an innocent party, if they were guilty of negligence in signing the contracts.'[2]

Property alienated under mistake.

The effect of mistake, where it operates, being to render the contract void, not voidable, property alienated under mistake can be recovered even from bona fide possessors. It is, however, not unusual to take active steps to protect oneself against liability by applying to the Court for rescission of the contract, and this is particularly

principle applies, where there is a common error as to a substantial quality. Si aes pro auro veneat, non valet, Dig. 18. 1. 14; Moyle, *Contract of Sale in the Civil Law*, p. 55.

[1] *Port Elizabeth Harbour Board* v. *Mackie, Dunn & Co.* (1897) 14 S. C. per de Villiers C.J. at p. 479; *Caithness* v. *Fowlds* [1910] E. D. L. 261; *Winshaw* v. *Gie Bros.* [1920] C. P. D. 662; *Bushby* v. *Guardian Assurance Co. Ltd.* [1916] A. D. 488; *Weinerlein* v. *Goch Buildings Ltd.* [1925] A. D. 282; *Watts* v. *Goodman* [1929] W. L. D. 199; and on the question whether the *error* need be *justus*, *S. A. L. J.*, vol. xliv (1927), p. 31, and *Tshoba Colliery (Natal) Ltd.* v. *Tshoba Coal Syndicate Ltd.* [1926] N. P. D. 526.

[2] *Standard Bank* v. *Du Plooy* (1899) 16 S. C. at p. 172, per Maasdorp J.; Mackeurtan, *Sale of Goods in S. A.*, p. 112. It may be presumed that the South African Courts would not accept the reasoning in *Carlisle Banking Co.* v. *Bragg* [1911] 1 K. B. 489; Anson, p. 167.

matter of prudence when the contract is expressed in writing.

Decree of restitution.

A decree of restitution on the ground of mistake implies that both parties must be replaced in their former position. For example, a purchaser of shares who seeks restitution on the ground that he reasonably and justifiably mistook the meaning of terms in the contract of sale must account for profit made by sale of such shares as were delivered to him.[1]

Section B

The parties must intend, or be deemed to intend, to create a legal obligation.

Intention to contract.

Since the foundation of contract is the intention of the parties to bind themselves, where this is absent their agreement does not create a legal obligation.[2] Whether such an intention exists or not is usually to be inferred from the circumstances, and particularly from what the parties said and did. The English Law regards the giving of consideration as evidence (and, in general, necessary evidence) of such intention. In the Roman-Dutch Law, which does not require consideration as a constituent element of a contract,[3] 'it becomes all the more important that the evidence should establish clearly that the intention of the parties was to create a legal obligation'.[4] If the transaction is of a usual business character this intention will be inferred to be present in the absence of clear evidence to the contrary.[5]

[1] *Logan* v. *Beit* (1890) 7 S. C. 197.

[2] Van Leeuwen, 4. 1. 3; Vinnius *ad* Inst. 3. 14. 2, sec. 11.

[3] *Infra*, p. 231.

[4] *Robinson* v. *Randfontein G. M. Co.* [1921] A. D. at p. 237 per Solomon J. A.

[5] The English case of *Rose & Frank Co.* v. *Crompton* [1923] 2 K. B. (C. A.). 261 supplies a remarkable illustration of the effect of such contrary intention (reversed on appeal to the House of Lords, but not on this point [1925] A. C. at p. 454). Cf. *Foster* v. *Wheeler* (1887) 36 Ch. D. 695; *Balfour* v. *Balfour* [1919] 2 K. B. 571.

Section C

The object of the agreement must be physically and legally possible.

Physical and legal possibility.

The Courts will consider that an agreement is without legal effect if according to the prevailing standard of knowledge it is supposed to be impossible of performance.

The same may be said of an agreement designed to create a legal relation which the law does not recognize as possible—e.g. if a person agrees to create a servitude in favour of himself over his own property contrary to the principle 'nemo res sua servit'.

Section D

The requisite forms or modes of agreement, if any, must be observed.

Requirements of form.

The historical development of the law of contract follows substantially the same course in the various legal systems known to us. In a primitive society few promises are enforced by law, and only upon condition of their being accompanied by some solemnities of form or expression, which serve to mark their serious character and to distinguish them from the mass of agreements and promises of which the law in its initial stages fails to take account.[1] Later, the categories of actionable agreements are multiplied, or the conditions of enforceability made more simple. Lastly, a stage is reached in which all agreements intended to create legal relations, contracted by competent persons for lawful objects, are upheld by the courts. It may be, however, that the law still requires that all agreements indifferently should satisfy some condition which is taken to be the test of the serious intention of the parties. It may be, further, that for special reasons some kinds of agreement are still required to be expressed in writing or in solemn written form.

Contracts in Roman Law.

The Roman Law, as is well known, was far from en-

[1] Maine, *Ancient Law*, p. 327.

forcing all agreements. In Justinian's system only the following classes of agreement were actionable, viz.: (1) real contracts, nominate and innominate; (2) stipulations; (3) the four consensual contracts; (4) certain pacts, which at various times and in various ways had been clothed with actionability and thus became contracts in everything but name.

Pacta nuda.

All other agreements remained bare pacts (*pacta nuda*). They could not be enforced by action, but might be pleaded by way of exception.[1] 'Nuda pactio obligationem non parit sed parit exceptionem.'[2] The stipulation in its latest stages was almost always reduced to writing, so that it is substantially true to say that in Justinian's law any agreement whatever would be enforced provided that it was expressed in a written instrument, but other agreements only if they fell within certain known classes, or if one party had performed his part and was demanding performance from the other.

Contracts in the early Dutch Law;

The ancient Dutch Law has been partly made known to us by the researches of the late Professor Fockema Andreae and other scholars. It may be, as Grotius and others assert, that the Germans of old attached the highest importance to the duty of keeping faith,[3] but it was not the case that every promise was legally enforceable. Here, as elsewhere, the history of the law of contract is the history of a slow transition from form to formlessness.[4]

in Roman-Dutch Law.

In the Roman-Dutch Law—the system derived from the two above-named sources—the process of development, aided, without doubt, by the influence of the Canon Law,[5] has reached its furthest limit. By many of the old writers the phraseology of the Roman Law is retained, but it does not correspond with facts. There is no need to refer an agreement to any specific head of contract or actionable pact, for by the Roman-Dutch Law all

All contracts consensual.

[1] Gr. 3. 1. 51.
[2] (Ulpian) Dig. 2. 14. 7. 4.
[3] Gr. 3. 1. 52: Heineccius, *Elem. Jur. Germ.*, lib. ii, secs. 330–1.
[4] Fock. And., vol. ii, pp. 1 ff.
[5] Vinnius, *De pactis*, cap. vii, sec. 6; Voet, 2. 14. 9.

contracts are consensual,[1] and any pact whatever is enforceable[2] provided only that it is freely entered upon by competent persons for an object physically possible and legally permissible. 'If I consult the law of our own fatherland,' says Van Leeuwen's commentator, C. W. Decker,[3] in a well-known passage, 'I merely consider: (1) whether the persons were capable of binding themselves; (2) whether the agreement was made deliberately and voluntarily; (3) whether it has a physical and moral possibility or reasonable cause. If these essentials concur, I say with safety that a valid action for performance arises.'[4]

Decker on the essentials of contract.

From the above description of the essential elements of contract it is apparent that the Roman-Dutch Law pays no attention to the formal requirements of the Roman Law. It is equally a stranger to the English requirement of Form or Consideration. It may be asserted with some confidence that the doctrine of consideration did not form part of the Roman-Dutch Law of Holland. The late Lord de Villiers, indeed, on more than one occasion, judicially advanced the view that in the Roman-Dutch Law every contract must be based upon some reasonable cause (*redelijk oorzaak*), and that reasonable cause, as understood and applied by the Dutch lawyers, was in effect indistinguishable from the 'quid pro quo' which passes for consideration in English Law.[5] But this identification has now been rejected by the highest judicial authority.[6] It may, indeed, be doubted whether

Roman-Dutch Law requires neither form nor consideration.

The doctrine of causa or redelijk oorzaak.

[1] Heineccius, *Elem. Jur. Germ.*, lib. ii, sec. 345; Decker *ad* Van Leeuwen, 4. 2. 1, n. 1.

[2] 'Moribus hodiernis ex nudo pacto datur actio.' Groenewegen, *de leg. abr. ad* Inst. 3. 20 (19). 19; Gr. 3. 1. 52; Voet, *ubi sup.*

[3] Van Leeuwen, 4. 2. 1, n. 1 (Kotzé's translation, vol. ii, p. 11).

[4] Decker, it will be observed, identifies reasonable cause with physical and moral possibility. But perhaps (strictly understood) it corresponds rather with the second term in his series, viz. a serious and deliberate intention. See Appendix F (*infra*, p. 432).

[5] See in particular the Cape case of *Mtembu* v. *Webster* (1904) 21 S. C. 323, and the Transvaal case of *Rood* v. *Wallach* [1904] T. S. 187.

[6] *Jayawickreme* v. *Amaseriya* [1918] A. C. 869; *Conradie* v.

the doctrine of causa really occupied the important place in the Roman-Dutch Law which has been assigned to it in recent discussions. If, as seems probable (the identification of cause with consideration being rejected), to say that a promise or contract will be enforced if it has reasonable cause is understood to-day as meaning simply that it will be enforced if it is reasonable (and lawful) and if the parties intended to contract a legal obligation; the retention of the phrase 'reasonable cause' may be justified as a compendious form of expression, but, on the other hand, its disuse would leave the substance of the law unimpaired.

The modern law in some cases requires that contracts should be in writing.

It was said above that even in a developed legal system form may sometimes be required in particular cases. Thus English Law requires sometimes a deed, sometimes that a contract should be evidenced by writing. No such requirement existed in the Roman-Dutch common law. Van der Linden,[1] indeed, says that an ante-nuptial contract must be in writing, but Van der Keessel[2] does not agree with him. It was not necessary that contracts relating to land should be in writing; but in the modern law writing is generally required as a condition of validity or of proof.[3] Further, as has been seen above, ante-nuptial contracts do not affect third parties unless registered in the office of the Registrar of Deeds,[4] and transfers, mortgages, and long leases of land are subjected to the same condition. According to the prevailing view gifts

Rossouw [1919] A. D. 279; *Robinson* v. *Randfontein Est. G. M. Co.* [1921] A. D. at p. 236.

[1] V. d. L. 1. 3. 3; *supra*, p. 71, n. 3. [2] *Th.* 229.

[3] By Transvaal Procl. No. 8 of 1902, sec. 30, 'No contract of sale of fixed property shall be of any force or effect unless it be in writing and signed by the parties thereto or by their agents duly authorised in writing.' (*Levy* v. *Phillips* [1915] A. D. 139.) Fixed property is defined in sec. 2. Similar provisions in O. F. S. (Ord. 12 of 1906 (O. R. C.) sec. 49); *Wilken* v. *Kohler* [1913] A. D. 135. For Ceylon see Ord. No. 7 of 1840, sec. 2 (*supra* p. 148); for Natal, Law No. 12 of 1884, sec. 1 (*Royston* v. *Radebé* [1914] A. D. 430), which follows more or less closely the English Statute of Frauds, sec. 4 (now the Law of Property Act 1925 sec. 40 (1)); see Anson, *Contract* (17th ed., p. 69). There is no such legislation in the Cape Province.

[4] *Supra*, p. 72.

in excess of £500, unless registered, are invalid to the extent of the excess.[1]

Section E

The agreement must not be impeachable on the ground of Fraud, Fear, Misrepresentation, Undue Influence, or Lesion.

Agreement must be free.

All contracts derive their validity from the mutual and free consent of the contracting parties. Free consent is absent when a contract has been procured by fraud or fear.

Fraud.

Fraud is defined by Labeo as 'omnis calliditas, fallacia, machinatio, ad circumveniendum, fallendum, decipiendum alterum adhibita'[2]—'any craft, deceit, or contrivance employed with a view to circumvent, deceive, or ensnare another person'.

In the Roman Law dolus produced (*inter alia*) the following effects: viz. (1) In stricti juris actions it might be the subject of a special plea (*exceptio doli*); (2) In relation to bonae fidei contracts it might be alleged either as ground of action or of defence (without special plea) in the action appropriate to the transaction in question, e.g. sale or deposit;[3] (3) If no other remedy was available it grounded an action (*actio doli*).

Remedies in case of fraud in Roman-Dutch Law.

In Roman-Dutch Law the victim of fraud could: (*a*) set up the fraud as a defence;[4] (*b*) sue for damages;[5] (*c*) take steps to have the contract set aside.[6] This he did by applying to the Hooge Raad for a writ directing

[1] *Infra*, p. 295.

[2] Dig. 4. 3. 1. 2. This definition, together with the English Law as interpreted in *Derry* v. *Peek* (1889) 14 App. Cas. 337, is discussed in *Tait* v. *Wicht* (1890) 7 S. C. 158. See also *Roorda* v. *Cohn* [1903] T. H. 279.

[3] Girard, p. 492.

[4] Gr. 3. 48. 7; Van Leeuwen, 5. 17. 13.

[5] Decker *ad* Van Leeuwen, 4. 2. 2 (Kotzé's translation, vol. ii, p. 14).

[6] Van Leeuwen, 4. 42. 2 and 4. Apparently a claim for restitution must always be made by way of mandament van relief or request civil. Gr. 3. 48. 5; *Cens. For.* 1. 4. 42. 5; *Papegay*, cap. xliv, vol. i, p. 614; Kersteman, *Woordenboek*, *sub voce* Relief; Van der Linden, *Verhandeling over de Judicieele Practijcq*, 4. 1. 4 (vol. ii, p. 172).

a Court of first instance to inquire into the truth of his allegations and, if they were well founded, to grant relief.

In the Roman-Dutch Colonies the procedure has been simplified, but the remedies are substantially the same.[1]

Dolus dans locum contractui and dolus incidens in contractum.

The old writers distinguish between fraud which causes a contract (*dolus dans locum, vel causam, contractui*) and fraud incidental to a contract (*dolus incidens in contractum*). Fraud was said to cause a contract when a person who, otherwise, had not the intention of contracting was induced to contract by, and would not have contracted but for, the fraud. Fraud was said to be incidental to a contract when a person freely contracted but was deceived in the terms of the contract (in modo contrahendi), e.g. in the price.[2] This distinction, which seems to have no solid foundation in Roman Law,[3] has been adopted in many modern codes,[4] but does not form part of the Law of South Africa. The law of to-day rejects any such arbitrary classification. Each case is decided with reference to its special circumstances:

'the person deceived may not be able to state with certainty that he would have refrained from entering into the contract if he had known the truth, but if the circumstances are such that the knowledge of the truth would have been calculated to induce a reasonable man acting with ordinary prudence and discretion not to enter into the contract, the Court, or jury, as the case might be, is justified in drawing the inference that the representation did in fact form an inducement to the contract.'[5]

Are contracts induced by fraud void

What is the effect of fraud upon contract? In the old books the question is much debated whether fraud which is the cause of a contract renders the contract void or

[1] *Frost* v. *Leslie* [1923] A. D. 276; *Kleynhans Bros.* v. *Wessel's Trustee* [1927] A. D. at p. 277.

[2] Voet, 4. 3. 3; Vinnius, *Select. Quaest.* lib. i, cap. xii; Van der Linden, *Supplement. ad Pandect.* 4. 3. 3.

[3] Girard, p. 493, n. 4; Cuq, *Manuel des Institutions Juridiques des Romains*, p. 392, n. 11.

[4] C. N. art. 1116; B. W. B. art. 1364.

[5] *Woodstock, &c. Councils* v. *Smith* [1909] 26 S. C. at p. 701 per de Villiers C. J. A mere statement of opinion is not in itself a representation. *Naude* v. *Harrison* [1925] C. P. D. 84; *Lamb* v. *Walters* [1926] A. D. 358.

merely voidable. Grotius in one passage says in absolute terms that a person is not bound by anything he does when misled by fraud;[1] but he is speaking, as the context shows, of the law of nature. When he comes to speak of the contract of sale, he says: 'If the whole sale was induced by the seller's fraud and otherwise would not have taken place the sale is annulled at the instance of the purchaser.'[2] This amounts to saying that the contract is not void, but voidable. There can be no doubt that this view accords better with the modern law. Mr. Justice Kotzé in his edition of Van Leeuwen says: 'It must be borne in mind that fraud does not necessarily render a contract void, but voidable at the election of the party sought to be defrauded.'[3] No doubt if a person is induced by fraud to execute an instrument purporting to be a contract in entire ignorance of its nature, the absence of a contracting mind on his part would (apart from estoppel due to negligence) render the contract wholly void.[4] But a case of this kind may more properly be referred to the topic of mistake than of fraud.[5]

or merely voidable?

As between defrauded and defrauder the distinction between void and voidable is perhaps of no great importance, but it affects the rights of innocent third persons to whom property obtained by fraud has passed. If the transaction is wholly void the third party has no title and the defrauded person can recover it from him by vindication.[6] If the transaction is merely voidable the innocent possessor is in the better position. It would seem that the South African Courts have adopted this view.[7]

Importance of the distinction.

[1] Gr. 3. 1. 19. [2] Gr. 3. 17. 3.

[3] Kotzé, Van Leeuwen, vol. ii, p. 14. Cf. *United Shoe Machinery Co. of Canada* v. *Brunet* [1909] A. C. 330 (P. C. in appeal from Quebec).

[4] *Standard Bank* v. *Du Plooy* (1899) 16 S. C. at p. 172.

[5] *Supra*, p. 227.

[6] Voet, 4. 3. 3. This is expressly stated also by Groenewegen *ad* Gr. 3. 48. 7. citing Neostad. *Supr. Cur. decis.* no. 5.

[7] The Natal case of *Bergtheil* v. *Crowly* (1896) 17 N. L. R. 199; (1899) 20 N. L. R. 67, [1899] A. C. 374 may be thought to point the other way, but the circumstances were peculiar. In *Beyers* v. *McKenzie* (1880) Foord 125 there was no contract at all, and the

Remedies in the modern law.

Since a contract induced by fraud is voidable, not void, the party defrauded may in his option either (*a*) abide by, or (*b*) repudiate, the contract. If he means to repudiate he must do so within a reasonable time,[1] and may then either bring an action for rescission, or set up the fraud as a defence to an action on the contract.

The defrauded party, whether he elects to abide by or to repudiate the contract, may, in any event, claim damages for the fraud, if he has suffered prejudice in consequence of it, unless he has not only affirmed the contract, but also waived his claim for damages.[2]

A person seeking to be relieved from a contract on the ground of fraud must as a rule tender to restore what he has received under the contract.[3]

Innocent misrepresentation.

It must be noted that dolus always implies an intention to deceive. In the Dutch Law innocent misrepresentation inducing a contract gave no right of action nor claim to relief. It was, however, available as a defence, for it is inequitable to sue upon such a contract.[4]

The modern law, influenced by English practice, allows a plaintiff to sue for rescission of a contract induced by innocent misrepresentation, but no more than the Dutch Law allows an action for damages.[5]

innocent purchaser acquired no title. Cf. *Cundy* v. *Lindsay* (1878) 3 App. Ca. 459; *Philips* v. *Brooks* [1919] 2 K.B. 243; Anson (17th ed.), pp. 157–8.

[1] *Penefather* v. *Swaffield* [1926] E. D. L. 253.

[2] *Bowditch* v. *Peel & Magill* [1921] A. D. 561; *Frost* v. *Leslie* [1923] A. D. 276; *Pathescope Union of S. A.* v. *Mallinick* [1927] A. D. 292.

[3] *Marks Ltd.* v. *Laughton* [1920] A. D. 12. But this rule will not apply where the subject-matter of the contract has perished, without fault of the purchaser, in consequence of the defect which is alleged as the ground of rescission, e.g. eggs fraudulently represented as of good quality and after delivery destroyed by the local authority. Ibid.

[4] Van der Linden, *Supplement. ad. Pandect.* 4. 3. 1. (*ad fin.*). For South African Law see *Viljoen* v. *Hillier* [1904] T. S. 312 (citing *Redgrave* v. *Hurd* (1881) 20 Ch. D. 1; *Karoo & Eastern Board of Exors.* v. *Farr* [1921] A. D. 413; *Sampson* v. *Union of Rhodesia Wholesale Ltd.* [1929] A. D. at p. 480; *Ravene Plantations Ltd.* v. *Est. H. Abrey* [1927] N. P. D. 174.

[5] *Steyn* v. *Davis & Darlow* [1927] T. P. D. 651, whether an action lies in tort? *Infra*, p. 325. Note that misrepresentation of

Duty of disclosure: Contracts uberrimae fidei.

There are certain classes of contract known as contracts uberrimae fidei in which the law is not satisfied with the absence of misrepresentation fraudulent or innocent, but goes further and requires an active disclosure of material facts. Contracts of insurance belong to this class. 'In policies of insurance . . . there is an understanding that the contract is *uberrima fides*, that if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it . . . you will state what you know. There is an obligation there to disclose what you know; and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy'.[1]

Fear.

Fear is another ground of invalidity in contract. 'Quod metus causa gestum erit ratum non habebo,' said the Roman Praetor in his edict.[2] Ulpian defines fear as 'a disturbance of mind caused by instant or future peril'.[3] Grotius describes it,[4] more largely, as 'a great terror as of death, dishonour, great pain, unlawful imprisonment of oneself or of one's belongings'.[5] It is an old controversy whether a contract procured by fear is void or voidable. The latter view is now generally adopted, following the well-known dictum of Paulus, 'coactus volui',[6] to which the glossator adds the ex-

the legal effect of a written agreement which a party signs with full knowledge of its contents is not a ground for avoiding the agreement. This is because every man is supposed to know the legal effect of an instrument which he signs. *Union & Rhodesia Wholesale Ltd. (In Liquidation)* v. *Sampson* [1928] C. P. D. at p. 456 per Gardiner J. P. citing English cases.

[1] *Fine* v. *General Assurance Corporation* [1915] A. D. 213; *Colonial Industries Ltd.* v. *Provincial Insurance Co.* [1922] A. D. 33 (where the passage in the text is cited and adopted from Lord Blackburn's judgment in *Brownlie* v. *Campbell* (1880) 5 A. C. at p. 954). For the duty of disclosure between partners see *De Jager* v. *Olifant's Syndicate* [1912] A. D. 505.

[2] Dig. 4. 2. 1; *White Bros.* v. *Treasurer-General* (1883) 2 S. C. at pp. 350 ff.

[3] Instantis vel futuri periculi causa mentis trepidatio. Ibid.

[4] Gr. 3. 48. 6. [5] i.e. wife and children. Voet, 4. 2. 11.

[6] Dig. 4. 2. 21. 5; Gr. *ubi sup.*; Voet, 4. 2. 1; Pothier, *Traité des*

planation 'voluntas coacta est voluntas'. Accordingly a contract induced by fear remains good until repudiated or rescinded,[1] and may be ratified expressly or tacitly when the fear is removed.[2] It is not every kind of fear that affects the formation of a contract, but only a just or reasonable fear—'metus non vani hominis'[3]—(regard being had, however, to the age, sex, and condition of the person intimidated),[4] and a fear of unlawful not of lawful violence.[5] Mere threats are not enough, unless they are of a serious character and are likely to take effect.[6] The action 'quod metus causa' lies against the intimidator, and against any other person into whose hands the proceeds of the intimidation[7] have come, or who has otherwise benefited by it,[8] at the expense of the plaintiff.[9] But a person seeking to avoid a contract or conveyance on the ground of metus can only do so on condition of restoring the defendant to his former position.[10] This applies equally to the intimidator and to third parties, so that the position of a third party, whether he be a bona fide or a mala fide possessor, is better in a case of metus than in a case of error. An action to set aside a transaction on the ground of fear is prescribed in thirty years.[11]

Undue influence.

The topic of undue influence, as distinct from metus, is not developed in the Roman-Dutch writers.[12] However,

Obligations, sec. 22, with V. d. L.'s note in the Dutch translation; Van der Linden, *Supplement. ad Pandect.* 4. 2. 2.

[1] Voet, 4. 2. 2. [2] Voet, 4. 2. 16.

[3] Dig. 4. 2. 6; Voet, 4. 2. 11; V. d. L. 1. 14. 2.

[4] Voet, *ubi sup.* [5] Voet, 4. 2. 10. [6] Voet, 4. 2. 13.

[7] Voet, 4. 2. 4. [8] Voet, 4. 2. 5–6.

[9] In the Roman Law the action lay for four-fold damages in case of failure to restore (Dig. 4. 2. 14. 1); but in R.-D. L. the action was always in simplum. Voet, 4. 2. 18.

[10] Voet, 4. 1. 22; 4. 2. 9.

[11] Gr. 3. 48. 13; *Cens. For.* 1. 4. 41. 8; Voet, 4. 2. 18.

[12] 'Roman-Dutch authority upon the question of undue influence as distinguished from *metus* would appear to be somewhat scanty' (*Van Pletsen* v. *Henning* [1913] A. D. at p. 94 (per Innes J.) and see MacKeurtan, *Sale of goods in S. A.*, pp. 115 and ff.). For 'duress of goods' as a ground of restitutio in integrum or condictio indebiti see *White Bros.* v. *Treasurer-General* (1883) 2 S. C. 322;

the books contain hints which might have been worked out by judicial decisions without the aid of English precedents.[1]

Lesion (prejudice) may be invoked by minors as a ground of relief against contracts entered into by them with the authority of their parents or guardians, or entered into by parents or guardians on their behalf,[2] and by persons of full age in case of laesio enormis, where this institution still remains in force.[3]

Section F

The agreement must not be directed to an illegal object.

Legality of object.

The next requisite of a valid contract is that it should be directed to a proper object. An object is improper if it is condemned by common law or by statute.[4] In all mature legal systems the principal heads of illegality will

Benning v. *Union Government* (*Minister of Finance*) [1914] A. D. 420; *Union Government* (*Minister of Finance*) v. *Gowar* [1915] A. D. 426. The topic seems to fall under the head of undue influence rather than of *metus* properly so called.

[1] Voet, 2. 14. 19; 4. 2. 11; V. d. L. 1. 15. 1 (gift by patient to medical attendant).

[2] *Supra*, pp. 49, 50; *infra*, p. 416.

[3] The rule that a vendor of land for less than half its real value might get back his land on returning the price, unless the buyer preferred to pay the full value, is attributed in Justinian's Code (4. 44. 2 and 8) to constitutions of Diocletian and Maximilian (A. D. 285 and 293), but perhaps was of later origin. Girard, p. 575. In the Dutch, and perhaps in the Roman Law, a similar indulgence was allowed to a purchaser who had paid more than double value (*Kingsley* v. *African Land Corporation* [1914] T. P. D. 666), and in Dutch Law the principle was extended to other contracts besides sale. Gr. 3. 17. 5; 3. 52. 2, and Schorer, ad loc. Van Leeuwen, 4. 20. 5; Voet 18. 5. 13. Did the rule extend to movables as well as to land? Girard, p. 576. Does it apply to sales in execution? Schorer, loc. cit. Laesio enormis has been abolished at the Cape by the General Law Amendment Act No. 8 of 1879, sec. 8, and in the Free State by Ord. No. 5 of 1902, sec. 6. It still obtains in the other R.-D. Colonies (except Southern Rhodesia, which follows Cape Law): viz. in the Transvaal, *McGee* v. *Mignon* [1903] T. S. 89; *Kingsley* v. *African Land Corp. Ltd.* [1914] T. P. D. 666; *Roff & Co.* v. *Moseley* [1925] T. P. D. 101; *Hoffman* v. *Prinsloo & Hoffman* [1928] T. P. D. 621; in Natal, *Mfunda* v. *Brammage* [1913] N. P. D. 477; in Ceylon, *Gooneratne* v. *Don Philip* (1899) 5 N. L. R. 268; *Wijesiriwardene* v. *Gunasekera* (1917) 20 N. L. R. 92 (lease).

[4] Gr. 3. 1. 42–3; Voet 2. 14. 16.

be much the same. But since social progress brings with it new conditions and fresh abuses, the illegalities of one age will not be identical with the illegalities of another. Accordingly, the categories of unlawfulness in contract are not in the modern law quite the same as they were in the Roman Law or in the Dutch Law of the eighteenth century.

Effect of illegality.

Unlawful contracts are regarded by Roman Law as civilly impossible.[1] For this reason Decker speaks in the same breath of physical and of moral possibility (i.e. legality) as together making one of the essentials of contract.[2] It is, however, more in accordance with modern usage to keep these topics distinct. Unlawful contracts are null and void.[3] No action can be grounded upon them. On the other hand, money paid in pursuance of an unlawful contract cannot be recovered back, for, as was said by an English Judge: 'Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again. You shall not have a right of action, when you come into a court of justice in this unclean manner to recover it back.'[4] The same doctrine is expressed in the Roman Law maxim, 'in pari delicto potior est conditio defendentis'.[5] This rule excludes cases in which the defendant alone is guilty. For if an innocent party has paid money or transferred property for a purpose in fact unlawful, he may get it back (together with fruits and accessions), or the value, by the process which in Roman Law was known as the condictio ob turpem causam;[6] and the principle has been extended

Condictio ob turpem causam.

[1] Voet, *ubi sup.* [2] *Supra*, p. 231.

[3] Gr. 3. 1, secs. 42 and 43; V. d. L. 1. 14. 6. Under unlawful contracts are included contracts subject to a suspensive condition which is unlawful. Gr. 3. 14. 29.

[4] Wilmot C. J. in *Collins* v. *Blantern* (1767) Smith's *Leading Cases* (13th ed.), vol. i, at p. 411.

[5] *Aliter*, In delicto pari potior est possessor. Dig. 12. 7. 5 pr.; Gr. 3. 1. 43; *Brandt* v. *Bergstedt* [1917] C. P. D. 344.

[6] Voet, 12. 5. 1, condictio ob turpem causam est actio personalis stricti juris, qua repetitur quod datum est ob factum continens

to the case of a plaintiff guilty, but not equally guilty with the defendant, as for instance if he entered upon the transaction under the influence of compulsion or menace.[1]

Collateral transactions.

It is not always easy to determine how far the taint of illegality extends. Contracts may have some connexion with an illegal transaction without necessarily being in themselves illegal. The general rule applicable to such cases is that if a plaintiff can make out a cause of action without alleging the illegal transaction as part of his case he is entitled to judgment in his favour.[2] This does not mean that a plaintiff can evade the stigma of illegality by ingenuity in stating his case.

'The true principle seems to me to be that the plaintiff is only entitled to recover upon an obligation connected with an immoral [or illegal] transaction, if upon a consideration of all the facts of the case and of the real objects of the parties whatever form may have been adopted to express their arrangements and not merely upon the plaintiff's presentation of them, the obligation sought to be enforced is separable from the immoral [or illegal] transaction and is not itself tainted with illegality.'[3]

A contract is not illegal, merely because to the knowledge of the parties it is entered upon in breach of a

turpitudinem ex parte accipientis, ita ut condicens turpitudinis expers sit, licet jam turpe factum subsecutum sit; *Sandeman* v. *Solomon* (1907) 28 N. L. R. 140.

[1] See *Wells* v. *Du Preez* (1906) 23 S. C. 284; *R.* v. *Seebloem* [1912] T. P. D. at p. 34. It seems further that money can sometimes be recovered back where the illegality is not so much the object as the consequence of the contract, at all events when nothing further has been done in pursuance of the contract. Cf. Dig. 12. 7. 5, pr.: Avunculo nuptura pecuniam in dotem dedit neque nupsit; an eandem repetere possit quaesitum est. Papinian answered yes. But the general rule of English law which allows a locus poenitentiae and an action to recover money paid when no part of the illegal purpose has been carried into effect does not seem to form part of the law of S. A. *Sandeman* v. *Solomon, ubi sup*; *Pillay* v. *Yeanamoothoo* [1917] N. P. D. 155; *Affhauser* v. *McLeod* [1909] T. S. 827; *Levy* v. *Katz* [1914] W. L. D. 88.

[2] *Silke* v. *Goode* [1911] T. P. D. 989; *Fisher & Son* v. *Voges* [1925] C. P. D. 370; *Heilman* v. *Vorbeck* [1925] T. P. D. 790.

[3] *Vuurman* v. *Universal Enterprises Ltd.* [1924] T. P. D. at p. 496, *per* Mason J. P.

contract subsisting between one of the parties and some other person.[1]

What contracts are illegal:

The principal categories of illegality in contract are the following:

I. *Contracts made in breach of statute.*

Contracts made in breach of statute.

If a contract is prohibited by law, or is directed to an object condemned by law, there can be no question that the whole transaction is illegal and void.[2] But whether a contract to which a statutory penalty attaches is thereby rendered: (*a*) illegal, or (*b*) void, or (*c*) merely expensive to the parties,[3] is in each case matter of construction. Likewise, apart from any question of penalty, a contract may be rendered void by law without being therefore necessarily illegal.[4]

II. *Contracts prohibited by the common law.*

Contracts prohibited by the common law.

Such are: 1. Agreements to commit a crime or civil wrong;[5] promises inducing the commission of a crime or civil wrong; promises made as an inducement to the promisees to abstain from such wrongful acts.[6]

2. Agreements which tend to pervert the course of justice, e.g. to stifle a prosecution,[7] to condone the commission of a future crime,[8] to prevent a person seeking

[1] *Isaacman* v. *Miller* [1922] T. P. D. 56. A trader disposed of his business and contracted not to trade during a certain period. In breach of this agreement he recommenced business and purchased goods for his business from a wholesale dealer who knew of the above contract. *Held* that the purchase and sale of the goods was not such an unlawful act as to disentitle the seller to sue for the price.

[2] *McLoughlin N. O.* v. *Turner* [1921] A. D. at p. 549; *Schierhout* v. *Minister of Justice* [1925] A. D. at p. 109. See e.g. cases decided under the Sunday Trading Acts, such as *Cape Dairy and General Livestock Auctioneers* v. *Sim* [1924] A. D. 167; *Fisher & Son* v. *Vosges* [1925] C. P. D. 370; *Lubbe* v. *Trollip* [1926] E. D. L. 239.

[3] *Williams* v. *Rondebosch Fountain Garage Co.* [1929] C. P. D. 439.

[4] Anson, *Contract* (17th ed.), p. 252.

[5] Inst. 3. 19. 24; Gr. 3. 1. 42; Vlet, 2. 14. 16.

[6] Dig. 12. 5. 2, pr.

[7] V. d. K. *Th.* 520; *Hotz* v. *Standard Bank* (1907) 3 Buch. A. C. 53; *Bezuidenhout* v. *Strydom* (1884) 4 E. D. C. 224; *Vuurman* v. *Universal Enterprises Ltd.* [1924] T. P. D. 488; *Smits* v. *Pienaar* [1928] T. P. D. 450.

[8] Gr. 3. 1. 42; Voet, *ubi sup.*

redress in a court of justice for a future ~~inquity~~ INJURY or wrong,[1] to pay a witness a fee for attendance larger than the amount fixed by law;[2] agreements purporting to authorize one of the contracting parties to take the law into his own hands.[3] To the same class may be referred such agreements as in English Law are known by the names of maintenance and champerty, viz. agreements to promote and maintain legal proceedings in which the promisor has no direct concern, and in particular to do so with a view to sharing with a plaintiff the proceeds of a suit.[4] Voet mentions in this connexion an agreement *de quota litis* between lawyer and client, an agreement that a lawyer is not to be paid unless the suit is successful, an improper agreement for the assignment of another's right of action.[5] Cession of actions is, however, free from objection, unless of a speculative character, or for other reasons contrary to legal policy.

3. Agreements for the sale or procurement of public offices or otherwise tending to injure the public service.[6]

4. Agreements tending to injure the State in its foreign relations.

5. Agreements directed to a fraud upon the public.[7]

6. Agreements tending to sexual immorality.[8]

[1] *Schierhout* v. *Minister of Justice ubi sup.* at p. 424, per Kotzé J.; *Wells* v. *S. African Alumenite Co.* [1927] A. D. at p. 72.

[2] *Knox* v. *Koch* (1883) 2. S. C. 382.

[3] *Blomson* v. *Boshoff* [1905] T. P. D. 429; *Nino Bonino* v. *De Lange* [1906] T. P. D. 120 (clause in a lease permitting the lessor, in the event of breach of condition, to expel the lessee and re-enter on the premises without legal process).

[4] Gr. 3. 1. 41; *Incorporated Law Soc.* v. *Reid* (1908) 25 S. C. 612. But it is not unlawful bona fide and properly to assist a litigant to defend or establish his rights, even though the person so assisting may derive some benefit from the subject-matter of the action. *Patz* v. *Salzburg* [1907] T. S. at p. 527, per Innes C. J. Cf. *Fellows-Smith* v. *Shanks* [1925] N. P. D. 168.

[5] Gr. 3. 1. 41; and Schorer ad loc.; Voet, 2. 14. 18; e.g. assignment to the attorney in a case of all plaintiff's right and interest, *East London Munic.* v. *Halberd* (1884) 3 S. C. 140.

[6] Van Leewen, 4. 14. 6; V. d. K. *Dictat. ad* Gr. 3. 1. 42.

[7] *St. Marc* v. *Harvey* (1893) 10 S. C. 267; *Robinson* v. *Randfontein Ests. G. M. Co.* [1925] A. D. 173.

[8] Voet, 12. 5. 6; *Louisa* v. *Van den Berg* (1830) 1 Menz. 471; *Aburrow* v. *Wallis* (1893) 10 S. C. 214.

7. Agreements in restraint of marriage;[1] e.g. an arrangement between two persons that whichever of the two marries first shall pay a sum of money to the other. But agreements to procure marriage for reward, contrary to English law, are not unlawful by Roman-Dutch law.[2]

8. Agreements between husbands and wives for future voluntary separation;[3] agreement to live apart made at the time of marriage.[4]

9. Promise by a married man (or woman) to contract another marriage when his (or her) existing marriage shall have been dissolved by death or divorce.[5]

10. Agreements in undue restraint of trade.[6]

11. Agreements tending to produce forced labour.[7]

12. Agreements in fraud of creditors.[8]

13. Agreements in fraud of a statute (*in fraudem legis*)[9]

[1] Voet, 2. 14. 21; *Holl. Cons.*, vol, v, no. 23.

[2] Bynkershoek, *Quaest. Jur. Priv.*, lib. ii, cap. vi; V. d. K. *Th.* 482. In *King* v. *Gray* (1907) 24 S. C. 554, however, the Court adopted the principle of the English case of *Hermann* v. *Charlesworth* [1905] 2 K. B., 123, and this was followed in *Hurwitz* v. *Taylor* [1926] T. P. D. 81. See *S.A.L.J.*, vol. xxxvi (1919), p. 352, and Kotzé, Van Leeuwen, vol. ii, p. 633. In *Livera* v. *Gonsalves* (1913) 17 N. L. R. 5, the Ceylon Court followed *King* v. *Gray*. See also *De Silva* v. *Juan Appu* (1928) 29 N. L. R. 417.

[3] *Braude* v. *Braude* (1899) 16 S. C. 565.

[4] *Van Oosten* v. *Van Oosten* [1923] C. P. D. 409.

[5] *Staples* v. *Marquard* [1919] C. P. D. 181 (divorce); *Friedman* v. *Harris* [1928] C. P. D. 43.

[6] *Edgcombe* v. *Hodgson* (1902) 19 S. C. 224; *Federal Insurance Corp. of S. A.* v. *Van Almelo* (1900) 25 S. C. 940; *African Films Trust Ltd.* v. *Hoffman* [1921] C. P. D. 18; *African Theatres Trust Ltd.* v. *Johnson* [1921] C. P. D. 25; *Ko-operatieve Wynbouwers Vereeniging Van Z. A. Bpkt.* v. *Botha* [1923] C. P. D. 429; *Bathurst Farmers' Union* v. *Bradfield* [1923] E. D. L. 391; *Gordon* v. *Van Blerk* [1927] T. P. D. 770; *African Theatres Ltd.* v. *D'Oliviera* [1927] W. L. D. 122; *Est. Matthews* v. *Redelinghuys* [1927] W. L. D. 307; *Tilney* v. *Rock & Way* [1928] E. D. L. 108; *Elcock & Co.* v. *Elcock* [1928] W. L. D. 121; *Halliwell* v. *Laverack* [1929] W. L. D. 175.

[7] *Eastwood* v. *Shepstone* [1902] T. S. 294; *Biyela* v. *Harris* [1921] N. P. D. 83.

[8] Gr. 3. 1. 27; *Cohen* v. *Herman & Canard* (1904) 21 S. C. 621; *Wiener* v. *Est. McKenzie* [1923] C. P. D. at p. 582. Alienations in fraud of creditors may be avoided by the *actio pauliana*, *Wiener* v. *Est. McKenzie* [1923] C. P. D. at p. 579; *supra*, p. 146, n. 2.

[9] *Dadoo Ltd.* v. *Krugersdorp Municipal Council* [1920] A. D. 530; *Colonial Banking & Trust Co.* v. *Hill's Trustee* [1927] A. D. 488; *Rex* v. *Gillett* [1929] A. D. 364.

14. Agreements relating to a future right of succession or limiting freedom of testation.[1]

This is a head of illegality derived from the Roman Law. As expounded by Voet the law reprobates any agreement relating to the succession of an ascertained person still alive, even though made with such person's consent. Such agreements are contrary to public policy, 'tanquam continentia votum captandae mortis et eventus tristissimi ac periculosi plena'.[2] Nor can a person contract to make another his heir.[3] Nor can two persons mutually stipulate that they shall succeed to one another.[4] The general rule extends to legacies, so that a promise to leave money by will cannot be enforced against a deceased person's estate, nor found an action for damages.[5] An agreement, however, relating to the estate of an uncertain person still alive, or of a deceased person, is free from objection. Agreements in ante-nuptial contracts relating to the succession of the spouses *inter se*, or of the spouses to a third party, or of a third party to the spouses, and agreements for the division of an inheritance amongst co-heirs (*de familia erciscunda*) are permitted.

Agreements which burden the obligor without benefiting the obligee,[6] and promises which are merely silly and foolish,[7] though not illegal in the sense of being contrary to law, are devoid of legal effect.[8]

[1] Dig. 45. 1. 61; Cod. 2. 3. 15; 8. 38 (39). 4; Gr. 3. 1. 41; V. d. K. *Th.* 479, and *Dictat.* ad loc.; Voet, 2. 14. 16; *Cens. For.* 1. 4. 3. 15; Bijnk. *O. T.* i, 295, 360; unless such agreement is contained in an ante-nuptial contract. V. d. K. *Th.* 235 ff. For S. A. see *Jones* v. *Goldschmidt* (1881) 1 S. C. 109; *Eksteen* v. *Eksteen* [1920] O. P. D. 195; *Niewenhuis* v. *Schoeman's Est.* [1927] E. D. L. 266.

[2] Cod. 2. 3. 30; Voet, *ubi sup.*

[3] *Holl. Cons.*, vol. iv, no. 30.

[4] Voet, *ubi sup.* (but see Schorer ad Gr. 3. 14. 11). If, however, two persons contracted as to the succession to a third, and such third person assented, and did not subsequently revoke his assent, the contract was allowed to be good. Cod. *ubi sup.*, sec. 3; *Cens. For. ubi sup.*; Voet, *ubi sup.*

[5] Voet, loc. cit. (*ad fin.*), 'et si quis alteri pollicitatione', &c. *Niewenhuis* v. *Schoeman's Est.* (*ubi sup.*).

[6] Voet, 2. 14. 20. [7] Voet, 2. 14. 16.

[8] Grotius (3. 1. 40) adds: Contracts relating to res extra com-

Gaming and wagering contracts.

Gaming and wagering contracts occupy a peculiar position, for, though not positively illegal, it is the policy of the law to discourage them.[1] Whether by the Roman-Dutch common law wagers were or were not invalid is a question which, in view of the great variety of opinion expressed by different writers, must be considered to be quite unsettled.[2] In the modern law the tendency of judicial opinion has been against their enforcement. Thus, in a case decided in the Transvaal Supreme Court in 1905, Innes C. J. said: 'I think, having regard to the general current of legal decision in South Africa, the Court should not enforce contracts in the nature of wagers'.[3] On the other hand, money paid under a wager cannot be recovered back by the loser. But one who has deposited money or any other thing to abide the result of a wager may reclaim it from the stakeholder at any time before it has been paid over to the winner (even if the contest in respect of which the deposit was made is illegal),[4] and if the stakeholder nevertheless hands it over to the winner may maintain an action for its value.[5] A person who has made bets for me as my agent must hand over the winnings;[6] and money lent to make or to pay bets can be recovered.[7]

mercium. The sale of a res litigiosa is not forbidden in R.-D. L. V. d. K. *Th.* 630; Gr. 3. 14. 10; Groen. *de leg. abr.* ad Cod. lib. 8. tit. (36) 37; *Hall* v. *Howe* [1929] T. P. D. 591. But see *Kader* v. *Frank & Warshaw* [1926] A. D. at p. 347. In *Ibrahim Saibo* v. *Pallaku Lebbe* (1928) 29 N. L. R. 347 (Ceylon) a mortgage of a res litigiosa was held void.

[1] The reader will do well to consult a careful article on 'The Roman-Dutch Law in relation to Gambling and Wagering'. *S. A. L. J.*, vol. xxiii (1906), p. 21.

[2] See Gr. 3. 3. 49; Van Leeuwen, 4. 14. 5; V. d. K. *Th.* 514.

[3] *Dodd* v. *Hadley* [1905] T. S. at p. 442.

[4] Voet, 11. 5. 9; *Clarke* v. *Bruning* [1905] T. S. 295.

[5] *Sloman* v. *Berkovitz* (1891) 12 N. L. R. 216. In this case the wager had not matured; but does this matter?

[6] *Dodd* v. *Hadley, ubi sup.*

[7] *To make bets*—Voet, 11. 5. 4. *Contra* Van Leeuwen, 4. 14. 5. In *Biljoen* v. *Petersen* [1922] N. P. D. 63 money lent to be used as stakes in a game of poker was held to be recoverable. The *ratio decidendi* was that poker is not a game of chance prohibited by Law No. 25 of 1878. This seems to distinguish the case from *Sandeman* v. *Solomon* (1907) 29 N. L. R. 140, in which money lent for the pur-

A person to whom a negotiable instrument has been given in respect of a gaming or wagering transaction cannot recover upon it, but a bona fide holder for value would probably not be under the same disability.

Statute Law in South Africa.

At the Cape, Act No. 36 of 1902, reproducing the provisions of the English Gaming Act of 1845 (8 and 9 Vic. c. 109), by sec. 11 enacts: 'All contracts [or] agreements, whether verbal or in writing, by way of gaming or wagering, shall be null and void, and no suit shall be brought or maintained in any court of law for recovering any sum of money or valuable thing alleged to be won upon any wager, or which has been deposited in the hands of any person to abide the event on which any wager has been made: Provided always that nothing in this section shall be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner of any lawful game, sport, pastime, or exercise.'

Section G

The parties must be competent to contract.

Capacity of parties.

Incapacity to contract attaches in greater or less degree to the following classes of persons:

1. Minors. 2. Married Women. 3. Lunatics. 4. Prodigals. 5. Juristic or Artificial Persons. 6. Insolvents.

Most of these cases have been considered under the head of the Law of Persons. With regard to insolvents the law of South Africa has been stated in the following terms:

'If the insolvent follows any profession or occupation, or enters into any service or carries on any trade with his trustee's permission, he may enter into any contracts with reference thereto and sue and be sued in his own name on any claim arising in

pose of discharging a cheque given in payment of a gambling debt was held to be irrecoverable. This may be inferred from *Dodd* v. *Hadley* and *Biljoen* v. *Petersen*. The point does not seem to be absolutely covered by decision.

connexion therewith, but outside the limits thereof he should not enter into any contract without the written consent of his trustee.'[1]

[1] Mars, *The Law of Insolvency in South Africa*, pp. 188–9; *Pienaar* v. *Van Lill* (1928) C. P. D. 299; *Vaughan* v. *Bush* [1927] W. L. D. 217.

II

OPERATION OF CONTRACT

In this chapter we shall consider:

I. The persons affected by a contract.
II. The duty of performance.
III. The consequences of non-performance.

Section I

The persons affected by a contract.

A contract primarily affects the parties to it and none other. In other words, no one can be bound or benefited by a contract to which he is not a party. Such was the Roman Law expressed in the maxims 'Nemo promittere potest pro altero'; 'Alteri stipulari nemo potest'.[1]

The persons affected by a contract.

Nemo promittere potest pro altero. This means that a promise made by A cannot impose a burden on B, for no one can be bound by another man's contract.[2]

Nemo promittere potest pro altero.

In the Roman Law the rule was carried so far that a promise by A that B would do something was destitute of legal effect,[3] not binding A because it was not intended that it should, not binding B because it was not his promise. However, such a promise would now generally be construed as equivalent to a promise by A that he would procure B to do the thing in question.[4] It must be noted further, that the rule nowadays has no application to the relation of principal and agent. A servant or agent, acting within his authority, contracts for his principal and binds his principal by his contract.[5] Moreover, there are certain legal relations other than that of principal and agent which give to one person in greater

[1] V. d. L. 1. 14. 3.

[2] Certissimum enim est ex alterius contractu neminem obligari. Cod. 4. 12. 3; Gr. 3. 1. 28; Van Leeuwen, 4. 2. 4.

[3] Inst. 3. 19. 3; Vinnius, ad loc.; Dig. 45. 1. 83, pr.

[4] Gr. 3. 3. 3; Van Leeuwen, 4. 2. 5; Groen. *de leg. abr. ad* Inst. 3. 19 (20). 3; Voet, 45. 1. 5.

[5] Van Leeuwen, 4. 2. 6–7.

or less measure the power of binding another by contract. Thus a husband may bind his wife,[1] a tutor his ward,[2] a father his child,[3] and a master of a ship the ship-owner.[4]

Alteri stipulari nemo potest.

Alteri stipulari nemo potest.[5] This rule is the converse of the one stated above. It means that just as a person cannot be burdened by a contract to which he is not a party, so neither can he be benefited by it.[6]

Like the other, this maxim is qualified in the modern law by the rule which permits an agent to acquire a contractual right on behalf of his principal[7] and is also modified in favour of the wife,[8] the ward,[9] the parent,[10] and the child,[11] who may benefit by the contracts respectively of husband, guardian, child, or parent, made on their behalf.

Is this law at the present day?

But does the rule itself hold good in the Roman-Dutch Law? The contrary is asserted *inter alios* by Voet,[12] Groenewegen,[13] Heineccius,[14] and with accustomed vehemence by Decker,[15] and this view was adopted by Sir Henry de Villiers, in the case of *Tradesmen's Benefit Society* v. *Du Preez*, subject, however, to the qualification that there must be some consideration moving from the original

[1] Gr. 1. 5. 22; Rodenburg, *De jure conjugum*, 2. 1. 3; Fock. And., *Bijdragen*, ii. 115.

[2] Gr. 3. 1. 30.

[3] Gr. 3. 1. 28. A father who has sons in his power may bind them to perform anything which a person *sui juris* might undertake by contract; e.g. he may let out their services on hire. V. d. K. *Dictat.* ad loc.

[4] Gr. 3. 1. 32.

[5] Inst. 3. 19. 19; Dig. 45. 1. 38. 17.

[6] Gr. 3. 1. 36; 3. 3. 38.

[7] V. d. K. *Th.* 478; V. d. L. 1. 14. 3 (*ad fin.*).

[8] Gr. 3. 1. 38; *Dekenah* v. *Linton* [1920] C. P. D. 579.

[9] Gr. 1. 8. 8; 3. 1. 38.

[10] Gr. 3. 1. 38; 3. 3. 36.

[11] Gr. 3. 3. 36. Grotius says that if a parent stipulates or accepts on behalf of a child in power, the benefit of the contract accrues to the parent. But this is not so in the modern law. See Schorer ad loc. and V. d. K. *Th.* 509 and cf. *Slabber's Trustee* v. *Neezer's Exor.* (1895) 12 S. C. 163.

[12] Voet, 2. 14. 12 (*ad fin.*); 45. 1. 3.

[13] Groen. *de leg. abr. ad* Inst. 3. 20 (19). 19; see also Vinnius *ad* Inst. 3. 20 (19). 4, sec. 3, and *Tract. de Pactis*, cap. xv.

[14] Heineccius, *Elem. Jur. Germ.*, sec. 347.

[15] Decker *ad* Van Leeuwen, 4. 2. 5 (Kotzé's translation, vol. ii, p. 17).

promisee.[1] But if we turn to Van der Keessel we find the law stated with more caution. According to this writer, the third person acquires no right in the case supposed, unless either: (1) he accepts the promise, or (2) the original promisee is a notary.[2] Having regard to this statement of the law and to the terms in which Huber,[3] Heineccius,[4] and Decker[5] express themselves, we may question whether these jurists intended more than to assert the principle that if B, assuming without authority to act for C, contracts with A on C's behalf, C may, on coming to know of it, make the benefit of the contract his own by ratification without cession of action by B.[6] This is a proposition which to-day is beyond dispute, but it is no foundation for the further proposition that, if A and B as principals contract that one or both of them will pay a sum of money to C, C may sue one or both of them if the money is not paid. However, in South Africa, the principle that a third party may take the benefit of a stipulation made in his favour is now firmly established by judicial decision. The juridical basis of the relations thereby created has been much debated in the legal literature of other countries, but has hitherto received little attention from the South African Courts. Some questions of interest remain for future discussion.[7]

[1] *Tradesmen's Benefit Society* v. *Du Preez* (1887) 5 S. C. 269.

[2] V. d. K. *Th* 510; Vinnius,, *ad* Inst. *ubi sup.* The exceptional treatment of a promise made to a notary scarcely holds good in the modern law. *Tradesmen's Benefit Society* v. *Du Preez, ubi sup.*, at p. 277.

[3] Huber, *Heedensdaegse Rechtsgeleertheyt*, 3. 21. 40.

[4] *ubi sup.*

[5] *ubi sup.*

[6] This appears to be all that Grotius intends when he says (3. 3. 38) that a third person may accept the promise and thus acquire a right, unless the promisor revokes the promise before acceptance by such third person. The words in the text 'voor de toezegging' should be corrected to 'voor de aanneming'. Van der Linden (1. 14. 3, and note) agrees with Grotius, rejecting the view of Groenewegen and Voet.

[7] See Appendix G, p. 434. English law knows nothing of a jus quaesitum tertio arising by way of contract, per Lord Haldane in *Dunlop Tyre Co.* v. *Selfridge* [1915] A. C. at p. 853; Anson (17th ed.), p. 97, p. 275. But see *Contracts for the benefit of third persons* by Professor A. L. Corbin, *L. Q. R.*, vol. xlvi (1930), p. 12.

Cession and transmission of actions.

Cession and Transmission of Actions. It has been said above that a contract primarily affects the parties to it and none others. But persons not originally parties may become so, either by agreement (*cession of actions*) or by operation of law (*transmission of actions*).

By agreement, contractual rights and duties may be transferred so as to substitute another person in place of the original party. But there is a great difference between assignment of duties and assignment of rights.

Assignment of contractual duties.

Contractual duties cannot be transferred except in consequence of a substituted contract (*novation*), which requires the consent of the original parties and also of the substituted debtor. The effect is to discharge the original debtor from further liability, the substituted debtor taking his place.

Assignment of contractual rights:

in the Roman Law;

Contractual rights are now, with some exceptions, freely transferable by cession of actions. Such is the result of a long process of legal development. The Roman Law never, it seems, quite reached this point. For though in its latest period an assignee was 'allowed: (1) to secure to himself the benefit of the obligation, even before bringing an action, by giving the debtor notice of the assignment (Cod, 8. 41. 3); and (2) to sue not in the assignor's name, but in his own by actio utilis'; yet, 'it is disputed whether the effect of the change was to make the assignee sole creditor, or whether, in relation to the debtor, he did not still legally continue a mere agent, enforcing by action in his own name the right of another; in other words, whether a genuine assignment by which the assignee simply and actually stepped into the shoes of the assignor, who simultaneously dropped altogether out of the matter, was recognized at any time in Roman Law.'[1]

in the Roman-Dutch Law.

This doubt does not exist in the modern law, for now:

1. Contractual rights and rights arising from breach of

[1] Moyle, *Institutes of Justinian* (5th ed.), pp. 482–3.

contract, exceptions apart, may be ceded without the consent and against the will of the debtor.[1]

2. The cession can generally be completed by bare agreement without formality,[2] and without notice to the debtor;[3] but the law requires that the intention to effect the cession should be clear and beyond doubt, and that no further act on the part of the cedent should be necessary to make the cession complete; i.e. he must have done everything in his power to divest himself of his right of action.[4]

'Where a right of action exists independently of any written instrument, the cession of such right may be effected without corporeal delivery of any document. Where, however, the sole proof of a debt is the instrument which records it, the cession of the debt is not complete until the instrument is delivered to the cessionary . . . I am not prepared to say that circumstances may not arise under which a cession of action may be completed without delivery of the instrument which constitutes the proof of the debt. The document may, for instance, be lost, and, in such a case, if the cedent has done everything in his power to divest himself of his right of action, there is no reason why the cession should not be held to be complete. But among the things required, under such circumstances, to be done by the cedent would certainly be the notification of the cession to the debtor.' (De Villiers C. J. in *Jacobsohn's Trustee* v. *Standard Bank*, 16 S.C. at pp. 203–4.)

3. The effect of cession is to substitute the cessionary in place of the cedent as creditor in respect of the obliga-

[1] Sande, *De actionum cessione*, cap. ix, sec. 5; *Paterson's Exors.* v. *Webster, Steele & Co.* (1881) 1 S. C. at p. 355, per de Villiers C.J.: 'No rule is more clearly established in our law than that rights of action may be ceded to third parties without the consent of the party liable'. *Cullinan* v. *Pistorius* [1903] O. R. C. 33.

[2] Sande, cap. ii, sec. 1; *Wright & Co.* v. *Colonial Govt.* (1891) 8 S. C. at p. 260; *Cutting* v. *Van der Hoven* [1903] T. H. at p. 117; *Ex parte Narunsky* [1922] O. P. D. 32; *Est. Greenberg* v. *Rosenberg & Greenberg* [1925] T. P. D. at p. 929.

[3] Voet, 18. 4. 5; *Jacobsohn's Trustee* v. *Standard Bank* (1899) 16 S. C. at p. 203.

[4] *Wright & Co.* v. *Colonial Government* (1891) 8 S. C. at p. 269; *McGregor's Trustees* v. *Silberbauer* (1891) 9 S. C. 36; *Van de Merwe* v. *Franck* (1885) 2 S. A. R. 26.

tion ceded,[1] and to vest in the cessionary all the cedent's rights against the debtor.[2]

4. Therefore, the debtor after cession is no longer liable to the cedent and cannot be required by him to perform the contract, nor be sued by him in case of non-performance.[3] After notice of the cession, payment must be made to the cessionary and not to the cedent,[4] whose right of action is extinguished by the cession.[5] If after notice, or knowledge,[6] of the cession, the debtor chooses to pay the cedent, he does so at his risk.

5. If, however, the debtor, in ignorance of the cession, satisfies, or is released[7] from, the claim of the cedent, his liability is at an end.[8] For this reason, at all events, it is

[1] *Fick* v. *Bierman* (1882) 2 S. C. at p. 34. By the constitution *Per diversas* (Cod. 4. 35. 22), commonly known as the *lex Anastasiana*, enacted by the Emperor Anastasius (A.D. 506) and confirmed by Justinian (Cod. 4. 35. 23), a cessionary of a debt could not recover from the debtor a sum in excess of that for which he had acquired the debt from the cedent. Gr. 3. 16. 14; Voet, 18. 4. 18. There was great difference of opinion as to whether this rule had been adopted in Holland. See Groen. *de leg. abr. ad* Cod. 4. 35. 22. The *lex Anastasiana* has been declared to be obsolete in South Africa. *Seaville* v. *Colley* (1891) 9 S. C. 39 (Cape); *Machattie* v. *Filmer* (1894) 1 O. R. 305 (Transvaal). It seems doubtful whether and how far it obtains in Ceylon. Pereira, p. 654.

[2] Sande, cap. ix, sec. 1. The intention, however, may be not to transfer the debt, but merely to indicate a source from which the creditor of the so-called assignor may receive payment. The Civilians call this *assignatio*. It must be distinguished on the one hand from *delegatio*, which is a species of novation (*infra*, p. 283), and on the other hand from cession of a right of action, which is the case dealt with in the text. *Assignatio* does not discharge the *assignans* nor render the *assignatus* liable. Gr. 3. 44. 5; V. d. K. *Th.* 837–8.

[3] Voet, 18. 4. 15; *Fick* v. *Bierman, ubi sup.*

[4] V. d. L. 1. 18. 1. Knowledge is enough without notice. *Van der Heever's Est.* v. *Greyling* (1907) 24 S. C. 414.

[5] *Keeler* v. *Butcher & Sons* (1907) 28 N. L. R. at p. 48.

[6] *Van der Heever's Est.* v. *Greyling* (1907) 24 S. C. 414.

[7] Bijnk, *O.T.*, I. 51.

[8] Voet, *ubi sup.*; *Morkel* v. *Holm* (1882) 2 S. C. at p. 65; *Keeler* v. *Butcher & Sons* (1907) 28 N. L. R. at p. 49. The same result follows, according to Voet, if the debtor satisfies the debt by bona fide payment to the cedent even with knowledge of the cession, but before notice from the cessionary. The reason given by Voet is not entirely satisfactory 'cum utique ei solvat cui obligatus fuit, nec ipsi factum tertii obesse queat quamdiu denunciatio haud intercessit'. But he has said immediately above: 'Plane nostris moribus circa

matter of prudence for the cessionary at the earliest possible date to acquaint the debtor with the fact of the cession.

6. Whether, in the event of the creditor ceding the same debt twice over to successive cessionaries, a second cessionary who has anticipated a first cessionary in giving notice to the debtor will be preferred to the first cessionary seems to be unsettled. Opinion inclines to a negative answer; in other words, priorities are determined not by date of notice but by date of cession.[1]

7. A cessionary cannot, generally, be in a better position than his cedent.[2] Therefore all defences which might have been pleaded against the cedent at the date of cession may equally be pleaded against the cessionary.[3]

8. Generally speaking, any right may be ceded which is transmitted by the death of the party entitled.[4] This

cessas actiones magis placuit jus omne cedentis cessione extinctum esse'.

[1] This is the opinion of Voet (18. 4. 17) dissenting from Sande, *de act. cess.*, cap. xii, sec. 8. See *Morkel* v. *Holm* (1882) 2 S. C. 57; *Wright & Co.* v. *Colonial Government* (1891) 8 S. C. 260. In *Hanau & Wicke* v. *The Standard Bank* (1891) 4 S. A. R. 130 the Court preferred Sande to Voet. This was a case between two claimants to certain syndicate shares. No question arose as between either party and the debtor. In *Mackenzie* v. *Bilbrough* [1906] T. H. at p. 125, Wessels J. expressed a preference for the principle laid down by Voet.

[2] *Anderson's Assignee* v. *Anderson's Exors.* (1894) 11 S. C. at p. 440; Voet, 18. 4. 13; *Biggs* v. *Molefe* [1910] C. P. D. 242; *Yates* v. *Aukland Park Sporting Club & Roberts* [1915] W. L. D. 55. In accordance with this principle the Appellate Division has held that an agreement, whereby an employee undertakes not to cede or assign wages due to him without the consent of his employer (*pactum de non cedendo*) can be raised by the employer as a defence to an action by a cessionary to recover the amount of wages ceded to him by the employee. *Paiges* v. *Van Ryn Gold Mines Estates Ltd.* [1920] A. D. 600; and see *Sampson* v. *Union and Rhodesia Wholesale Ltd.* [1929] A. D. at p. 482.

[3] Sande, cap. xiii. At all events 'exceptiones in rem' may be so pleaded (sec. 2); such as 'compensation'. *Smith* v. *Howse* (1835) 2 Menz. 163; *Walker* v. *Syfret* N. O. [1911] A. D. at pp. 160 and 162. The case of *National Bank* v. *Marks & Aaronson* [1923] T. P. D. 69 is not inconsistent with this, for in the last-named case the debt was illiquid and therefore there was no compensation.

[4] This excludes penal actions *ex delicto*, e.g. the *actio injuriarum*. But there is no rule that actions *ex delicto* as a class are not assign-

excludes cases in which the debtor's duty of performance does not extend beyond the person of the creditor, and the debtor, therefore, may decline to recognize as entitled any other than the creditor in person (*delectus personae*).[1] Contrary to the Roman Law, the Roman-Dutch Law permits the transfer of a thing in litigation (*res litigiosa*);[2] but this does not imply the lawfulness of the cession of a right of action in a suit which has been already commenced.[3] With these exceptions, it seems that all contractual rights may be ceded whether before or after breach, whether arising out of liquid, or illiquid claims, whether obligations to give or obligations to do.

9. A cession may be absolute or by way of charge. If a cession is intended to take effect in securitatem debiti, merely, it will be so construed, though in terms absolute, and dominium will remain with the cedent.[4]

Formalities required in some cases.

It has been said that, exceptions apart, a cession of actions requires no formalities. The principal exceptions are: (1) negotiable instruments (which are governed by rules of their own); (2) the transfer of shares in companies (which are commonly regulated by statute); (3) leases of rural tenements (the benefit of which cannot be transferred to a third party without the leave of the lessor).[5]

In addition to these, Roman-Dutch Law required that hypothecs of immovable property should be transferred *coram lege loci* and subject to a transfer duty of 2½ per cent. In the Cape Province, at all events, this rule no longer obtains.[6]

able. Sande, cap. v, secs. 1, 2, and 11. Personal servitudes cannot be ceded. *Eastern Rand Exploration Co.* v. *Nel* [1903] T. S. at p. 51; *Willoughby's Consolidated Co.* v. *Copthall Stores* [1913] A. D. at pp. 282–3 per Innes J. *Supra*, p. 181.

[1] *Cullinan* v. *Pistorius* [1903] O. R. C. at p. 38.

[2] *Supra*, p. 245, n. 8.

[3] Sande, cap. v, secs. 15–22; *Kader* v. *Frank & Warshaw* [1926] A. D. at p. 347, where the method of enforcing a ceded judgment is considered.

[4] *National Bank of S. A.* v. *Cohen's Trustee* [1911] A. D. 235.

[5] See below, pp. 310–11.

[6] *Le Roux* v. *De Villiers* (1866) [1869] Buch. 90; Wille, *Mortgage and Pledge in S. A.*, p. 142.

By operation of law, contractual rights are transmitted on insolvency and death.[1] Under the head of property passing to the trustee in an estate under sequestration is included 'any debt or claim which was due or the cause of which arose before the sequestration'; and every payment or other satisfaction in whole or in part of such debt or claim if made to the insolvent after sequestration is void, unless the debtor proves that it was made in good faith and without knowledge of the sequestration.[2] With regard to the effect of death on contract, it may be said that all contractual rights and duties,[3] unless they be of a purely personal character, pass upon death to the representatives of a deceased person, who may sue or be sued in respect of them. In the modern law their liability in no case exceeds the assets of the estate. Transmission of actions.

Section II

The Duty of Performance.

The duty of a party to a contract is faithfully to perform his part with the care and diligence proper in the circumstances, and with due regard to any rules of law or lawful customs by which the character of the performance due from him is determined. 'Stare pactis.'

Generally speaking, the parties to a contract may incorporate in it any terms they please, and each is bound to the other to do what he has undertaken. When the parties have expressly agreed, and the object contemplated is not unlawful, the function of the Court is limited to interpreting the terms expressed. The rules of interpretation form the subject of a later chapter. Generally the parties make their own terms.

Generally, the Court will not make a contract for the parties. They must make up their minds what they mean, and they should express their meaning clearly and But the law may impose terms,

[1] Also by marriage in community, for which see above, p. 67.

[2] Insolvency Act, No. 32 of 1916, sec. 20.

[3] Gr. 3. 1. 44. Where there are several co-heirs they are liable *pro rata portione* unless the claim is in its nature indivisible, in which case each is liable *in solidum* and has his remedy over against the others.

fully. But within limits law and usage operate to determine the content of the contract and therefore the duties of the parties.

absolutely,

If a rule of law is imperative the parties must conform to it. They cannot contract themselves out of an express legal duty. But if, as often happens, the law merely lays down rules which are to govern a particular transaction in the absence of agreement to the contrary, it is open to the parties to modify or to depart from the rule in their absolute discretion, for 'conventio vincit legem'. The same remark applies to customs, whether local or relating to some particular trade or business. They bind only so far as the parties have not seen fit to exclude their operation.

or in the absence of contrary agreement.

In this chapter we shall speak of various rules of law by which the duty of performance is determined where the parties have not departed from them by express agreement.

All contracts are commonly referred to one or other of two classes: viz. (*a*) contracts to give, (*b*) contracts to do or to abstain from doing.[1] But it is evident that both of these duties may be incumbent upon the same person under the same contract. Thus, if I agree to make a cabinet according to certain specifications and to deliver it when made to a purchaser, I incur an obligation first to do and then to give. Indeed the distinction is of no great importance. The substantial thing is that, whatever the nature of the contract, I must carry it out according to its terms.[2]

Performance.

In the Latin texts of the Roman and of the Roman-Dutch Law the words '*solvere*' '*solutio*' are used in an extended sense to express the performance of any contractual duty. 'Solvere dicimus eum qui fecit quod facere promisit.'[3] The use of the Dutch 'betaling'[4] and

[1] Gr. 3. 39. 8; V. d. L. 1. 14. 6; Pothier, *Traité des Obligations*, sec. 53.

[2] Voet, 46. 3. 8.

[3] Dig. 50. 16. 176: Solutio est naturalis praestatio ejus quod debetur. Voet, 46. 3. 1.

[4] V. d. L. 1. 18. 1: Betaaling, dat is de dadelijke vervulling van het geen men zig verpligt heeft te geven of te doen.

of the English 'payment' in the same wide sense can only be justified as a permitted abuse of language. We shall, so far as possible, limit the word 'payment' to a payment of money. The principles applicable to a money payment will, however, in many cases be found to be no less applicable to any other performance of a contractual duty.

By whom performance may be made.

Performance may be made either by the debtor in person or by his agent acting within the scope of his authority. Indeed, performance may be made by an independent third party in the name of the debtor, even without his knowledge and against his will, with the result that the debtor will be discharged from liability, unless the performance is of such a personal character that it cannot be effectually made except by the debtor in person.[1] This means, in effect, that performance of this character is permitted when the debtor's obligation consists in giving, but seldom when it consists in doing.[2]

Persons under disability:

A person under disability cannot discharge a legal debt without his tutor's or curator's authority. If he does so, the sum of money or other thing alienated can be recovered by vindication, if still extant; if it has been consumed, the debt is deemed to be discharged.[3] This only applies, however, if the debt in question springs from a valid civil obligation.

minors,

If a minor has contracted without his tutor's authority, the thing delivered, or its value, can always be recovered.[4]

married women.

A married woman, being in law a minor and unable to contract[5] without her husband's authority, is also unable to make a valid payment. Consequently, money paid by her may be recovered by the husband stante matrimonio, or by herself after its dissolution. She

[1] Gr. 3. 39. 10; Voet, 46. 3. 1; *Rolfes Nebel & Co.* v. *Zweigenhaft* [1900] T. S. at p. 195; or unless the transaction is, in effect, not intended as a discharge of the debt, but as a purchase of the creditor's right of action. *Mitchell Cotts & Co.* v. *Commissioner of Railways* [1905] T. S. 349.

[2] V. d. L. *ubi sup.*

[3] Gr. 3. 39. 11; Voet, 4. 4. 21 and 46. 3. 1.

[4] Voet, loc. cit.

[5] This is the general rule. For exceptions see p. 65, *supra*, and p. 421, *infra*.

may even recover money paid after the dissolution of the marriage in respect of a debt contracted during its continuance, provided that she made the payment in ignorance of her rights and under the mistaken idea that she was effectively bound.[1]

To whom performance may be made.

Payment may be made to the creditor or his nominee or to any person to whom payment is agreed to be made, such person being regarded as the creditor's mandatary to receive payment.[2] Payment may in any case be made to the creditor's agent, if to receive payment falls or fell within the scope of his authority, until the debtor has notice that the authority is revoked.[3] Payment made to a person who has no authority to receive payment on behalf of the creditor will become good *ex post facto* if the creditor ratifies the transaction or if the money paid is applied to his use.[4] A person employed to serve a summons or execute process is not an agent to receive payment, unless, perhaps, in case payment has been extorted from the debtor by threats.[5] Payment to servants is valid, if it is within their authority to receive it.[6] Payment of a debt due to a minor is validly made to his guardian, unless the debt is of large amount, in which case an order of Court is desirable.[7] If the minor's father is alive, payment to him as natural guardian may be made without having him first confirmed as guardian by the Court.[8] Payment to a married woman of a debt due to her or to her husband, made without his knowledge or against his will, is invalid, unless it has been applied to his use, or unless it is of small amount and may be sup-

[1] Voet, 12. 6. 19.

[2] Gr. 3. 39. 13; Voet, 46. 3. 2; V. d. L. *ubi sup.* Such a person is said to be *solutionis causa adjectus.* Dig. 45. 1. 56. 2. Cf. *Mutual Life Insurance Co. of New York* v. *Hotz* [1911] A. D. at p. 566.

[3] Voet, 46. 3. 3.

[4] V. d. L. *ubi sup.*

[5] Voet, *ubi sup.*

[6] Voet, 46. 3. 4.

[7] Gr. 3. 39. 14; Voet, 4. 4. 22 (*ad fin.*); *Holl. Cons.*, vol. i, no. 167, and vol. iii, pt. 1, no. 182. The Court, and in South Africa the Master, here, as elsewhere, takes the place of the Orphan Chamber.

[8] See *Van Rooyen* v. *Werner* (1892) 9 S. C. at p. 430; *supra*, p. 39, n. 2.

posed to have been applied by the wife to the purposes of the household.[1] Payment may safely be made to a fiduciary pending the condition of a fideicommissum.[2] In the event of the creditor's death payment must be made to (his heirs[3] and now to) his personal representatives.[4] When two persons claim payment of the same debt, payment cannot safely be made to either. The debtor should deposit the money in Court, or if he pays to one of the rival claimants, take from him security against the claim of the other.[5] Payment to a creditor's creditor, apart from express authority, can only be justified, if at all, on the ground of negotiorum gestio. But a sublessee may pay a head lessor to avoid an execution upon his own goods. Payment made in good faith to an invading enemy under pressure of vis major operates a discharge.[6]

Obligatio generis.

When a debtor is bound by contract to deliver a thing of a certain genus, he must deliver a thing of the kind of average quality.[7]

Part performance.

The creditor may, if he chooses, demand, but the debtor is not compellable to render, nor the creditor to accept, part performance.[8] Part performance, if accepted, *pro tanto* extinguishes the debt, and in the case of a money debt prevents the further accrual of interest.[9]

Alternative performances.

When one of two performances is agreed to be rendered in the alternative, the choice of alternative rests with

[1] Groen. *ad* Gr. 3. 39. 14; Voet, 23. 2. 50 and 46. 3. 5; Neostadius, *Supr. Cur. Decis.*, no. 88.

[2] Voet, 36. 1. 63 and 46. 3. 5.

[3] V. d. L. *ubi sup.*

[4] Payment made to the supposed heir of a deceased person discharges the debt, Voet says, if made through reasonable error of fact and not of law. Voet, 46. 3. 5.

[5] Voet (46. 3. 6) says 'consignandum ac deponendum in usum victoris'. Interpleader with payment into Court is the modern equivalent.

[6] Voet, 46. 3. 7.

[7] Voet, 46. 3. 9 (*ad fin.*); Groen. *de leg. abr. ad* Dig. 17. 1. 52. But Brunneman, ad loc., says: 'In obligatione generis liberatur quis praestando vilissimum. Groenewegen hanc legem putat abolitam, sed nullo fundamento.'

[8] Gr. 3. 39. 9; Voet, 46. 3. 11; V. d. L. *ubi sup.*

[9] V. d. L. 1. 18. 1.

the debtor, unless it has been expressly given to the creditor.[1]

Substituted performance.

Substituted performance may be made with the consent of the creditor, but not otherwise.[2] It has the same effect as performance of the thing originally agreed to be done.

Effect of performance.

The effect of performance is to discharge from further liability the principal debtor, his co-debtors, if any, and all personal sureties and real securities for performance.[3] But if one of several co-debtors, or if a surety, pays the debt, he may demand from the creditor a cession of actions against co-debtors or sureties and thus keep the debt alive.[4] If the thing given in payment, or one of several things given in payment, is recovered from the creditor by a third party (*eviction*), the payment is rendered void, and all former rights revive, unless the creditor prefers to sue the debtor for damages on the ground of eviction. The same result follows if the debtor has fraudulently misrepresented the value of the property given in settlement.[5]

Penalty for non-performance.

When a penalty is agreed to be paid in the event of non-performance, payment of the penalty releases the debtor, unless the penalty falls short of the value of the principal liability, i.e. of the measure of damages due to the creditor for non-performance.[6]

Proof of payment.

Payment may be proved by any lawful evidence and, in particular, by producing a receipt for the money, signed by the creditor or his agent. A creditor is bound to give a receipt, and a debtor is not otherwise compellable to pay.[7] When yearly or half-yearly (or other periodic) payments are due from the debtor, three several receipts, for the last three payments, furnish presumptive evidence that earlier payments have been duly made.[8]

[1] Dig. 18. 1. 25, pr.; 23. 3. 10. 6; Voet, 45. 1. 22; V. d. L. 1.14. 9. May the person who has made his election recall it? Voet, loc. cit.
[2] Gr. 3. 42. 4–5; Voet, 46. 3. 10.
[3] Voet, 46. 3. 13; V. d. L. 1. 18. 1.
[4] V. d. L. *ubi sup.*
[5] Voet, *ubi sup.*
[6] Voet, *ubi sup.*, and 46. 2. 4.
[7] *Welch* v. *Harris* [1925] E. D. L. 298; Voet, 46. 3. 15.
[8] Voet, 46. 3. 14.

When several distinct debts are due from the same debtor to the same creditor, questions often arise as to the appropriation of payments. The rules relating to this subject are stated by Voet[1] in considerable detail, and are the following: (1) The debtor may appropriate the payment to any debt he chooses; failing which—(2) The creditor appropriates;[2] but he must do so as he would were he himself the debtor,[3] and therefore not to—(*a*) a disputed debt; (*b*) a debt not yet accrued due; (*c*) a debt due naturally and not civilly; (*d*) a debt for which the debtor is surety in preference to a debt due from him as principal.[4] Appropriation must be made in re praesenti,[5] i.e. at the moment of payment, so as to give an opportunity to the creditor to refuse to accept, or to the debtor to refuse to pay.[6] Appropriation of payments.

If a payment is made to a person who has a claim in his own name and also in the name of another, in the absence of expression to the contrary the payee is supposed to apply the payment to his own and not to his principal's claim, for charity begins at home—'dum ordinata charitas a se ipsa incipit'.[7] (3) Failing appropriation by debtor or creditor, the law appropriates the payment as follows: viz. (*a*) to interest before principal; (*b*) to the debt which the debtor at the time of payment is legally compellable to pay; and if more than one debt is of this nature, then—(*c*) to the debt which lays the heaviest burden on the debtor, i.e. to that debt which it is most in his interest to discharge;[8] and subject thereto

[1] Voet, 46. 3. 16; and see Gr. 3. 39. 15; and V. d. L. 1. 18. 1 (*ad fin.*).

[2] *Macrae* v. *National Bank of S. A.* [1927] A. D. 62. The best evidence of appropriation by the creditor is a statement to that effect in the receipt. *Scott* v. *Sytner* (1891) 9 S. C. 50, per de Villiers C.J.

[3] Dig. 46. 3. 1–2. [4] Gr. *ubi sup.*

[5] Statim atque solutum est, seu dum solvitur. Voet, *ubi sup.*—Ter selver stonde. Grot. *ubi sup.*

[6] Dig. 46. 3. 2; Cod. 8. 42 (43). 1; *Stiglingh* v. *French* (1892) 9 S. C. 386. [7] Voet, *ubi sup.*

[8] *Watermeyer's Exors.* v. *Watermeyer's Exor.* [1870] Buch. 69; *Wilhelm's Trustee* v. *Shepstone* (1878) N. L. R. 1.

—(*d*) to a debt due from him as principal in preference to a debt due from him as surety; and subject thereto—(*e*) to the debt which is earlier in time;[1] and in case of debts of equal date, finally—(*f*) to all such debts proportionately to their amount.[2]

Interest.

The subject of payment suggests the subject of interest. This may be either agreed between the parties, or allowed by the law as damages, if one or other party is in default (*damage-interest*). As regards the legal rate of interest, Grotius says that ordinary citizens are allowed to stipulate for one-sixteenth, i.e. 6¼ per cent. per annum.[3] Groenewegen in his note applies this to secured debts only. In the case of unsecured debts, interest at the rate of seven or eight per cent. was permitted.[4] Merchants, by the Perpetual Edict of 1540 (Art. 8), enjoyed the special privilege of stipulating for interest up to twelve per cent.[5]

An agreement for interest in excess of the legal rate is void only for the excess, which may be either recovered by action or imputed to the capital debt.[6] In South Africa it was formerly held that there was no general legal rate of interest and that no agreed rate of interest could be pronounced usurious, except in view of the circumstances of the particular case;[7] but the law on this subject is now contained in the Usury Act (No. 37 of) 1926. The rule of the Roman-Dutch Law prohibiting compound interest[8] still retains its force, as

Compound interest.

[1] Voet, *ubi sup.*; *Scott* v. *Sytner* (1891) 9 S. C. 50.

[2] Gr. 3. 39. 15; Voet, *ubi sup.*

[3] Gr. 3. 10. 10 (*ad fin.*); Loen. *Decis.* Cas. 21; Voet, 22. 1. 3; V. d. K. *Th.* 545.

[4] But, as appears from Groenewegen, could not always be enforced.

[5] 1 G. P. B. 317. Van der Keessel (*Th.* 547) says that this privilege was disused so early as 1590.

[6] Voet, 22. 1. 5. The same applies when a penalty for non-payment is agreed in excess of the legal rate.

[7] *Dyason* v. *Ruthven* (1860) 3 S. 282; *Reuter* v. *Yates* [1904] T. S. 855; *Cloete* v. *Roberts* (1903) 20 S. C. 413. The law is the same in Ceylon. *Pulle* v. *Candoe* (1875) Ramanathan, 1872–6, p. 189; *Peria Carpen* v. *Herft* (1886) 7 S. C. C. 182.

[8] Gr. 3. 10. 10 (*ad fin.*); Voet, 22. 1. 20; V. d. K. *Th.* 548; but see *Natal Bank* v. *Kuranda* [1907] T. H. 155. For Ceylon see *Pulle* v.

well as the rule that the amount of interest recovered in any one action (*simul et semel*) cannot under any circumstances exceed the amount of the principal.[1]

No interest payable except by agreement.

In the absence of agreement, no interest can be claimed except when the law allows interest by way of damages for default. Where interest has been agreed to be paid, but no specific rate of interest has been fixed, the current rate of interest is payable.[2] This is determined, *prima facie*, by the lex loci solutionis.[3] The mere payment of interest for several years without any previous agreement in that behalf does not confer any right to have such payment continued.[4] A continued payment of less than the agreed interest may be construed as a tacit agreement for such lesser amount, but mere non-payment is not evidence of an agreement not to pay.[5]

How the obligation to pay interest is determined.

The obligation to pay interest is determined: (1) by release;[6] (2) by payment of the principal debt (but without prejudice to the right to recover interest already accrued due);[7] (3) by judgment. A claim for damage-interest is merged in the judgment, but according to Voet this does not apply to interest stipulated for in a contract.[8]

Tender.

'Tender' is an offer of payment which, to be effective, must be made 'to a person who is competent and authorized to receive payment, and must be in strict conformity with the terms of the original contract'.[9] According to

Candoe, ubi sup.; *Mudiyanse* v. *Vanderpoorten* (1922) 23 N. L. R. 342.

[1] Voet, 22. 1. 19; V. d. K. *Th.* 549; *Van Diggelen* v. *Triggs* [1911] S. R. 154. See now the Usury Act 1926, sec. 2, and for Ceylon, Ords. No. 5 of 1852, sec. 3; No. 2 of 1918, sec. 5; No. 25 of 1927, sec. 97. In *Union Govt.* v. *Jordaan's Exor.* [1916] T. P. D. 411 it was said that no interest runs after the amount is equivalent to the amount of the capital. *Sed quaere.* Groen., *de leg. abr. ad* Cod. 4. 32. 27. 1; Voet, *ubi sup.*; V. d. K., *Dictat.* ad Gr. 3. 10. 10.

[2] Voet, 22. 1. 8.

[3] Voet, 22. 1. 6.

[4] Voet, 22. 1. 13.

[5] Voet, 22. 1. 14.

[6] Voet, 22. 1. 15. By the Roman-Dutch common law rent is *ipso jure* remitted in case of hostile incursion and other calamities, but the law does not, as a rule, give a similar indulgence in the matter of interest.

[7] *Cens. For.* 1. 4. 4. 30.

[8] Voet, 22. 1. 16.

[9] 4 Maasdorp, p. 171; *infra*, p. 278.

Voet mere tender of principal and interest does not prevent interest continuing to run unless accompanied by consignation and deposit.[1] In the modern law consignation is not in use. The same effect now results from simple tender, if regularly made, and *a fortiori* from payment into Court.[2]

Rules of law as to: (*a*) place of payment;

The law lays down special rules as to place and time of payment by which, in the absence of contrary expression, the parties are bound. As regards *place*, performance must *prima facie* be made where the obligation was contracted, unless another place of performance has been expressly or impliedly agreed.[3] But, where a *thing* is in question, the debtor is not as a rule bound to bring it to the house of the creditor. Such at least is the opinion of Voet, who says that other writers think differently.[4] It follows from this view that in the absence of agreement or clear proof of custom to the contrary the delivery of goods sold should be made at the place where they were when sold,[5] and if goods are to be manufactured the place of delivery will be the place of manufacture.[6]

(*b*) time of payment.

Next as regards *time*: if no time for performance is expressly or impliedly agreed, performance falls due immediately,[7] i.e. after a reasonable time.[8] If the contract is expressed to take effect from a certain day or subject to a suspensive condition, performance is not due until the day arrives or the condition is satisfied.[9]

[1] Voet, 22. 1. 17. For consignation vide *infra*, p. 279.

[2] Ibid., n. 2.

[3] Gr. 3. 39. 9, and Schorer ad loc.; Voet, 46. 3. 12; Windscheid, vol. ii, sec. 282; *Collet* v. *Eva* [1926] C. P. D. 187.

[4] Voet, *ubi sup.* See also Schorer *ad* Grot. loc. cit., and Van Leeuwen, 4. 40. 6; *Cens. For.* 1. 4. 32. 14–15.

[5] *Gilson* v. *Payn* (1899) 16 S. C. 286.

[6] *Richards, Slater & Co.* v. *Fuller & Co.* (1880) 1 E. D. C. 1; *Goldblat* v. *Merwe* (1902) 19 S. C. 373.

[7] Dig. 45. 1. 41. 1; Gr. 3. 3. 51; Voet, 45. 1. 19; 46. 3. 8; V. d. L. 1. 14. 9.

[8] Dig. 46. 3. 105: quod dicimus . . . debere statim solvere, cum aliquo scilicet temperamento temporis intellegendum est; nec enim cum sacco adire debet. What is a reasonable time depends upon the circumstances. *Goldschmidt* v. *Adler* (1884) 3 S. C. 117; *De Waal* v. *Adler* (1887) 12 App. Cas. 141.

[9] Voet, 46. 3. 12.

When a day is named for performance the debtor is not in default until the day is wholly past, for he has the whole day for performance.[1] The same principle applies when a thing is to be done in a named month or year.[2] Sometimes a stipulation as to time is implied from an agreement as to place;[3] for if a place is named for performance time enough is understood to be allowed to enable the promisor conveniently to reach the place destined for performance,[4] unless it appears that the matter has been previously arranged so as to allow of performance taking place by means of agents at the place intended.[5] Even when a contract fixes a definite time for performance the Court will consider, in view of the circumstances of each particular case, whether the true intention of the parties at the time of contracting was to fix a reasonable time or to make time of the essence of the contract.[6] This second alternative is usually intended in mercantile contracts.[7]

May performance be made before it is due?

Just as a debtor cannot be compelled to perform before performance falls due,[8] so it would seem reasonable that a creditor should not be compellable to accept performance before the time agreed. But there is a text in the Digest[9]

[1] Gr. 3. 3. 50; Voet, 45. 1. 19 (*ad init.*).

[2] Dig. 45. 1. 42. When something is to be done, or take place, within e.g. fourteen days from date, the first day is included, the last day excluded, in making the computation, unless a contrary intention is to be inferred from the circumstances of the case or from the language of the contract. *Joubert* v. *Enslin* [1910] A.D. 6; *National Bank of S. A.* v. *Leon Levson Studios* [1913] A. D. 213; *Feigenbaum* v. *Mills* [1929] N. P. D. 235. Thus where there was a policy of insurance on a schooner for a period of twelve months from January 14, 1857, to January 14, 1858, and the schooner was lost at 10 p.m. on January 14, 1858, it was held that the loss was not covered by the policy. *Cock* v. *Cape of Good Hope Marine Assurance Co.* (1858) 3 Searle 114.

[3] Gr. 3. 3. 53.

[4] Dig 45. 1. 73, pr.

[5] Dig. 45. 1. 141. 4; Voet, 45. 1. 19.

[6] *Bergl & Co.* v. *Trott Bros.* (1903) 24 N. L. R., at p. 518, per Bale C. J.; *Crook* v. *Pedersen Ltd.* [1927] W. L. D. at pp. 76 ff.; *Olivier* v. *Paschke* [1928] S. W. A. 116.

[7] *Algoa Milling Co.* v. *Arkell & Douglas* [1918] A.D. at p. 167; *Lewis & Co.* v. *Malkin* [1926] T.P.D. 665; *Blatt* v. *Swakopmunder Bankverein* [1929] S. W. A. 90.

[8] Voet, 46. 3. 12.

[9] Dig. 45. 1. 137. 2 (*ad fin.*); Sande, *Decis. Fris.* 3. 16. 1.

which seems to imply the contrary, for Venuleius says: 'quod in diem debetur ante solvi potest, licet peti non potest'. Voet, however, suggests that this dictum should be limited to the case where postponement of payment has been agreed upon for the exclusive benefit of the debtor.[1] It would not apply, for instance, where money had been lent at interest for a fixed period.[2] Schorer[3] admits prepayment in this case also, but it must include payment of future interest as well as of interest already accrued due.

Section III

The Consequences of Non-performance.

In what cases failure to perform is justified.

In the last section we discussed the duty of performance. We are now to consider what happens if that duty is not carried out. If a party fails to perform or fails in performing what he has undertaken, either he can justify his failure or he can not. If he can, he incurs no liability. If he cannot, he has broken his contract and must suffer the consequences.

The grounds on which non-performance is justified scarcely, perhaps, admit of formal classification. They include every case in which a defendant can plead that the contract on which action is brought is void or voidable; void (e.g.) on the ground of mistake, impossibility of performance,[4] illegality; voidable (e.g.) on the ground

[1] Dig. 50. 17. 17: in stipulationibus promissoris gratia tempus adicitur. So V. d. L. (1. 14. 9).

[2] Voet, 12. 1. 20; Van Leeuwen, 4. 40. 5; *Cens. For.* 1. 4. 32. 16; V. d. K. *Th.* 542; *Kelly* v. *Holmes Bros. Ltd.* [1927] O. P. D. 29.

[3] *Ad* Grot. 3. 39.

[4] Impossibilium nulla obligatio est, Dig. 50. 17. 185. It is not possible to assign impossibility to any one place in the theory of contract. It may be of such a character as to negative any serious intention to contract (*supra*, pp. 219, 228); or it may operate to make the contract void *ab initio* on the ground of fundamental error (*supra*, p. 226); or it may arise subsequently to the contract, in which case it will sometimes operate to discharge the promisor from liability (*infra*, p. 284). When performance is impossible *ab initio*, the general rule is that if the impossibility is absolute (i.e. impossible for everybody) the promisor incurs no liability; if it is relative (impossible for the promisor, not for everybody) he will be bound Dig. 45. 1. 137. 5, si ab eo stipulatus sim, qui

of fraud, or minority. Another case is the operation of a suspensive condition. If a person has undertaken to perform in a certain event, it is plain that, unless and until that event happens, performance cannot be demanded.[1] Finally, there is the question, often difficult, of the effect of default on the part of the other contracting party. Where performances are due from both parties to a contract, performance by one is usually conditional upon performance by the other. It may be that one is to perform before the other, or that both are to perform concurrently. In the first case performance on the one side is said to be a condition precedent of performance on the other. In the second case each performance is a concurrent condition of the other. Thus, if I am to buy your house provided that you first put it in repair, if you fail to repair I am not bound to buy. Again, in an ordinary contract of sale, in the absence of agreement to the contrary, payment and delivery are concurrent conditions. I need not deliver, unless you are ready and willing to pay. You need not pay, unless I am ready and willing to deliver.[2] If the one party sues for delivery without tendering payment, or for payment without tendering delivery, the other party is under no liability to perform. Once more: I am not bound to continue ready and willing to perform, if you

efficere non possit, cum alio possibile sit, jure factam obligationem Sabinus scribit. But even in the first case the promisor will be bound, if he has contracted in terms which import a warranty that performance is possible. See on the whole subject Moyle, *Institutes of Justinian* (5th ed.), p. 411; Windscheid, *Lehrbuch des Pandektenrechts*, vol. ii, § 264.

[1] Unless he himself actively brings about the failure of the condition. Dig. 45. 1. 85. 7. Quicumque sub condicione obligatus curaverit ne condicio existeret nihilo minus obligatur. *Bowern* v. *Gowan* [1924] A. D. 550; *Macduff & Co.* v. *Johannesburg Consolidated Investment Co.* [1924] A. D. 573; *Eschini* v. *Jones* [1929] C. P. D. 18.

[2] *Trichardt* v. *Muller* [1915] T. P. D. at p. 178; cf. *Wolpert* v. *Steenkamp* [1917] A. D. 493. But in S. A. this rule is tempered by the principle that no one may be unjustly enriched at another's expense. *Hauman* v. *Nortje* [1914] A. D. 293; *Ambrose & Aitken* v. *Johnson & Fletcher* [1917] A. D. at p. 343; *Spencer* v. *Gostelow* [1920] A. D. 617; *Viljoen* v. *Visser* [1929] C. P. D. 473.

on your side make it quite plain that you do not intend to do your part. Therefore, if you refuse to perform, or disable yourself or me from performing, or announce your intention not to perform, I on my side am released from the duty of performance.[1] If you do not wholly decline to perform, but perform badly or incompletely, it is a question of fact in each case whether your failure in performance will justify me in refusing to perform. As a rule I am not released from my duty of performance unless your failure in performance amounts in effect to a repudiation by you of your duty under the contract, or is a failure to perform a vital term of the agreement.[2]

Breach of contract and its consequences.

In the absence of any of the above excuses for non-performance a party who fails to perform or who fails in performance has broken his contract and is liable to the consequences which the law attaches to his default.[3]

The consequences to the defaulting party of breach of contract are principally two: (1) He is liable to pay damages. (2) He may, in a fit case, be compelled to specific performance. We deal with these in order.

Damages.

1. **Damages.**[4] A person who has broken his contract is liable to make compensation to the injured party. The law relating to this subject is treated in modern books under the head of 'the measure of damages'. The Roman-Dutch writers have not very much to say about it. Voet, however, lays down three rules which are of general application, viz.:

(*a*) Under the head of damages, account is taken of advantage lost and damage sustained (lucrum cessans—damnum emergens).

[1] Voet, 22. 1. 29; *Bergl & Co.* v. *Trott Bros.*, *ubi sup.* at p. 515.

[2] *Strachan* v. *Prinsloo* [1925] T.P.D. 709.

[3] For the theory of Mora see Appendix H (*infra*, p. 437).

[4] For the Roman Law see Windscheid, vol. ii, § 258; Girard, p. 687. Justinian's solution in Cod. 7, tit. 47, leaves things as uncertain as before. Did this lex find a place in R.-D. L.? See Voet, 45. 1. 10; Pothier, *Obligations*, sec. 164, and Van der Linden's note to his translation of this work (p. 179). On the whole subject consult Nathan and Schlosberg, *The Law of Damages in South Africa* (Johannesburg, 1930).

(*b*) Damages must not be too remote.[1]

(*c*) The standard is a commercial standard. The plaintiff's peculiar affections and feelings are not taken into account.[2]

For the rest, the law of damages in the modern Roman-Dutch Law is substantially the same as in English Law. It is necessary in each case to inquire whether the law lays down a special rule as to the measure of damages in the class of contracts in question. Thus, in a contract of sale, when the purchaser refuses to take delivery and the property is resold at a loss, the measure of damages recoverable from the original purchaser is the difference between the contract price and the amount realized on the resale.

The following passage from the judgment of Innes C. J. in *Victoria Falls and Transvaal Power Co.* v. *Consolidated Langlaagte Mines Ltd.*[3] contains a useful summary of the law relating to the measure of damages:

'The agreement was not one for the sale of goods or of a commodity procurable elsewhere. So that we must apply the general principles which govern the investigation of that most difficult question of fact—the assessment of compensation for breach of contract. The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party. The reinstatement cannot invariably be complete, for it would be inequitable and unfair to make the defaulter liable for special consequences which could not have been in his contemplation when he entered into the contract. The laws of Holland and England are in substantial agreement on this point. Such damages only are awarded as flow naturally from the breach, or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom (see Voet, 45. 1. 9; Pothier, *Oblig.* sec. 160; *Hadley* v. *Baxendale*, 9 Exch., p. 341; *Elmslie* v. *African Merchants, Ltd.*, 1908, E. D. C., p. 82, &c.). Moreover, it is the duty of the complainant to take all legal steps to mitigate

[1] *Kotzé* v. *Johnson* [1928] A. D. 313.
[2] Voet, 45. 1. 9.
[3] [1915] A. D. at p. 22.

the loss consequent on the breach (see *British Westinghouse Coy.* v. *Underground Railway Coy.*, 1912, A.C., p. 689). It follows that damages for loss of profits can only be awarded when such loss is the direct, natural, or contemplated result of non-performance.'

If the cause of action is a breach of promise to pay a fixed sum of money, a plaintiff cannot recover anything beyond the amount of the debt with interest. A claim for general damages is not allowed.[1]

Nominal Damages. It often happens that a plaintiff proves a breach of contract, but fails to prove that he has sustained any damage or to establish the amount of the damage sustained. The question then arises whether he is entitled, at all events, to nominal damages. In some cases the South African Courts have awarded damages for a merely technical breach of contract.[2] In others they have refused to entertain the action except on proof of actual damage.[3] But perhaps the prevailing tendency is to take a middle course and to allow nominal damages, where it appears from the evidence or the circumstances that the plaintiff must have sustained some prejudice, though he may be unable, or find it difficult, to prove its precise nature or extent.[4]

Penalty and liquidated damages. If the parties to a contract have agreed for a penalty in the event of non-performance, the penalty in question is incurred by the party in default. In the Dutch Law if the penalty was much larger than the actual loss it was within the competence of the Court to reduce it;[5] on

[1] *Becker* v. *Stusser* [1910] C. P. D. at p. 294.

[2] Cf. *Sauermann* v. *English and Scottish Law Life Assurance Association* (1898) 15 S. C. at p. 88. *Lord* v. *Gillwald* [1907] E. D. C. 64.

[3] *Steenkamp* v. *Juriaanse* [1907] T. S. 980; *Blumberg* v. *Buys & Malkin* [1908] T. S. at p. 1181; *Silbereisen Bros.* v. *Lamont* [1927] T. P. D. 382.

[4] *Wheeldon* v. *Moldenhauer* [1910] E. D. C. 97. See also *Cohen* v. *D. Isaacs & Co.* [1918] C. P. D. 581; *Turtle* v. *Koenig* [1923] C. P. D. 367; *Trystam* v. *Knight* [1922] N. P. D. 186; *Probart* v. *S. A. Rlwys. & Harbours* [1926] E. D. L. 205. Apparently damages are more readily granted when they are claimed merely as an alternative to specific performance. *Farmers' Co-op. Soc.* v. *Berry* [1912] A. D. at pp. 351–2.

[5] Groen. *de leg. abr. ad* Cod. 7. 47, § 10; Voet, 45. 1. 13 (*in fine*)

the other hand, if the penalty proved insufficient to cover the damages the aggrieved party might fall back on his original cause of action.[1] The modern law has taken over the English distinction between Penalties and Liquidated Damages.[2]

Specific performance.

(a) Roman Law.

2. **Specific Performance.** In Roman Law, during the formulary period, condemnation was always pecuniary. A decree of Court ordering a defendant to carry out a contract specifically or to hand over property to the plaintiff was unknown, though specific performance was in certain cases procured indirectly by means of the formula arbitraria.[3] In the period of the extraordinaria judicia this was changed, and the Court would in certain cases order that an act should be done, and employed the armed force at its disposal to see that its orders were obeyed.[4] Such is the account of the matter which is generally accepted at the present day. But the old Dutch writers were divided in opinion on the question whether the law permitted a decree of specific performance except in the case of a promise to marry. To say that it does not amounts to saying that it lies in the option of a party to a contract either to carry out his undertaking or to pay damages instead; and this is in fact the view of Grotius, who says:[5] 'But although by natural law a person who has promised to do something is bound to do it if it is in his power, he may nevertheless by civil law release himself by paying the other contracting party the value of his interest, or the penalty, if any has been agreed upon

(b) Dutch Law.

and see Bynkershoek, *Q. J. P.*, lib. ii, cap. xiv. See (Ceylon) *Fernando* v. *Fernando* (1899) 4 N. L. R. 285. When a penal rate of interest is stipulated for, the amount recoverable may not exceed the amount of the principal. V. d. K. *Th.* 481 and *Dictat. ad* Gr. 3. 1. 42.

[1] Voet, 46. 2. 4.

[2] (South Africa) *Bartholomew* v. *Johnson* (1901) 22 N. L. R. 79; *Chaffer* v. *Richards* (1905) 26 N. L. R. 207; *Commissioner of Public Works* v. *Hills* [1906] A. C. 368; *Moll* v. *Pretoria Tyre Depot & Vulcanising Works* [1923] T. P. D. 465; *Bourne* v. *Fourie* [1924] O. P. D. 147; *Cloete* v. *Union Corpn. Ltd.* [1929] T. P. D. 508; (Ceylon) *Saibo* v. *Cooray* (1892) 1 S. C. R. 233; *Webster* v. *Bosanquet* [1912] A. D. 394.

[3] Girard, p. 1085.

[4] Girard, p. 1145.

[5] Gr. 3. 3. 41.

in case of failure to perform.'[1] However, Groenewegen in his note on this passage writes: 'But at the present day he cannot so relieve himself, but may be compelled by civil imprisonment to the strict fulfilment of what he has promised.' This view is endorsed by Schorer and Van der Keessel,[2] and Van der Linden admits, reluctantly, that it was in accordance with the practice of his time.[3] So far as the law of South Africa is concerned the remedy by way of decree of specific performance is firmly established. In *Farmers' Co-operative Society* v. *Berry*[4] Innes J. said:

(c) Modern Law.

'*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotzé C. J. in *Thompson* v. *Pullinger* (1 O. R. at p. 301) "the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt". It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance should be made. They will not of course be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of Story (*Equity Jurisprudence*, Sec. 717 (*a*)) "it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it". The election is rather with the injured party subject to the discretion of the Court.'

Comparison with

From the above passage we shall, perhaps, be justified in concluding that the theory of specific performance

[1] In 3. 15. 6 Grotius departs from his rule and says that if a vendor is in *mora* to deliver, the purchaser may demand delivery or damages at his option. *Cohen* v. *Shires McHattie & King* (1882) 1 S. A. R. 41; *Silverton Estates Co.* v. *Bellevue Syndicate* [1904] T. S. at p. 467. [2] Th. 512. [3] V. d. L. 1. 14. 7.

[4] [1912] A. D. at p. 350. See also *Woods* v. *Walters* [1921] A. D. at p. 309. The earlier South African cases are collected by Bale C. J. in *Bergl & Co.* v. *Trott Bros.* (1903) 24 N. L. R., pp. 512 ff.

is not the same in South African as in English Law. In South Africa a plaintiff has a right to claim this remedy, subject to the discretion of the Court to refuse it. In England he has no right to this remedy except so far as the Court may see fit to grant it in accordance with the settled principles by which this equitable jurisdiction is exercised. Where damages are an adequate remedy, specific performance will not be granted.[1] Perhaps the practical result is not very different in the two systems; but it is interesting to note the difference of approach. In either system the most frequent case for a decree of specific performance is a contract for the sale or lease of land.[2]

English Law.

[1] *Ryan* v. *Mutual Tontine Association* [1893] 1 Ch. (C. A.) at p. 126. The reason, of course, lies in the supplementary nature of the equitable remedy of specific performance. The common law courts originally gave damages only.

[2] See Appendix I (*infra*, p. 440), where the subject is developed in greater detail.

III

INTERPRETATION OF CONTRACT

Proof of contract.

If an action is brought upon a contract, the plaintiff must prove its terms, and identify the defendant as the party liable. The proof of contract is part of the law of evidence, and as such lies outside the scope of this work. Let it suffice to point to the general rule that in every case the best evidence must be produced. In the case of a written contract this means the original instrument together with so much parol evidence as is necessary to explain the circumstances of the contract and the nature of the liability alleged. When the written contract has been produced, the next step is for the Court to interpret its meaning, i.e. to construe its language and to determine its legal effect. To assist the judge in this task the law lays down certain rules of construction, which, however, must be regarded not as rules of law from which there is no escape, but rather as finger-posts or indicia, whereby the Court may arrive at the intention of the author or authors of the instrument. It is true that a man must be taken to mean what he says, and, as a rule, if he uses technical phrases he will be understood to have used them in their technical meaning. None the less, a man is his own interpreter, and a rule of construction, however respectable, will not be allowed to override a reasonable inference of intention, to be collected from an examination of the whole and of every part of the instrument in question.

Interpretation of contract.

Rules of construction.

The following rules of construction are taken from Van der Linden's *Institutes*.[1]

1. In agreements we should consider what was the general intention of the contracting parties rather than follow the literal meaning of the words.

2. When a stipulation is capable of two meanings it

[1] V. d. L. 1. 14. 4.

should rather be constructed in that sense in which it can have some operation than in that in which it cannot have any.[1]

3. Whenever the words of a contract are capable of two meanings they should be construed in that sense which is most consonant with the nature of the agreement.[2]

4. That which appears ambiguous in a contract should be construed according to the usage of the place where the contract was made.

5. Usage has such weight in the construction of agreements that the usual stipulations are understood to be included in them, although not expressly mentioned.

6. A stipulation must be construed by the aid of the other stipulations contained in the contract, whether they precede or follow it.

7. In cases of ambiguity a stipulation must be construed against the party who has stipulated for anything, and in favour of the release of the party who has contracted the obligation.[3]

8. However general the expressions may be in which an agreement is framed, they only include the matters in respect of which it appears that the contracting parties intended to contract, and not those which they did not contemplate.[4]

9. Under a general term are comprehended all the specific matters which constitute this generality, even those of which the parties had no knowledge.

[1] *Kotzé* v. *Frenkel & Co.* [1929] A. D. 418.
[2] *West Rand Estates Ltd.* v. *New Zealand Insurance Co.* [1925] A. D. at p. 261.
[3] Dig. 45. 1. 38. 18; 45. 1. 99, pr.; Gr. 3. 3. 54; *Poynton* v. *Cran* [1910] A. D. at p. 213; *Coronation Collieries Co.* v. *Malan* [1911] A. D. at p. 612; *Van Pletsen* v. *Henning* [1913] A. D. at p. 102; *Bon Accord Irrigation Board* v. *Braine* [1923] A. D. at p. 486.
[4] *Est. Sharp* v. *Schcepers* [1919] C. P. D. 26.

IV

DETERMINATION OF CONTRACT

How contracts are determined.

A CONTRACT may be determined in any one of the following ways: viz. by (1) performance and its equivalents; (2) release; (3) novation; (4) impossibility of performance; (5) condition subsequent; (6) prescription. We shall deal with each of these in order.

1. Performance and its equivalents.

1. **Performance and its equivalents.** The subject of performance and of substituted performance has been considered in a previous chapter. We speak here of various processes, which in certain cases have the same legal consequences as if the contract had been actually carried out.

Tender.

Tender is an offer of performance. If the debtor's duty consists in something to be done, it is not his fault if he duly offers performance and the creditor refuses to accept. In such an event the debtor may usually treat the contract as determined by the creditor's refusal. He is not required to waste his time in soliciting an acceptance, which may never be given. If, on the other hand, the performance due from the debtor consists in giving, the case is different. Mere tender does not, as a rule, discharge the debt. The debtor, tender notwithstanding, must continue ready and willing to pay, and if sued for the money must plead the tender and pay the money into Court. He will then be entitled to his costs in the action.

Effects of tender.

The effects of valid tender are:[1] (1) to relieve the debtor from liability in case of accidental destruction of the thing to be given; (2) to discharge a penalty agreed to be paid in the event of non-performance; (3) to arrest the accrual of interest, and to prevent mora-interest from arising.[2] This third consequence followed in some cases in the Roman Law and follows in all cases in the modern law. In the Roman-Dutch Law of Holland tender did not arrest

[1] Voet, 46. 3. 28.

[2] Voet, 22. 1. 17; Groen. *de leg. abr. ad* Cod. 4. 32. 6.

the course of interest unless it took the form of consignation and deposit.[1]

Consignation and deposit was an institution, no longer in use,[2] which permitted a debtor with the approval of the Court to seal and deposit a specific thing or sum of money with some third person to hold for the benefit of the creditor and at his risk. Such deposit validly made, and not revoked by the debtor, had the same legal effect as payment.[3] Consignation and deposit.

Confusion or 'merger'[4] takes place when by succeeding to the claim or liability of another, a person who owed to that other a duty or had against that other a claim becomes in his own person both creditor and debtor in respect of the same performance, with the result that the obligation is extinguished. This usually occurred when, without benefit of inventory, the creditor succeeded as heir to the debtor, or *vice versa*.[5] Since universal succession is unknown in the modern law, confusion of this kind no longer occurs as a direct consequence of death. But it is still possible in the case of a residuary legatee, who has a claim against the estate; for if the estate is solvent Confusion or Merger.

[1] Grotius (3. 40. 2–3) calls it *onderrecht-legging*. *Quaere* whether tender made in court prevented mora-interest from running. Voet, *ubi sup.*; Van Leeuwen, 4. 11. 3.; *Odendaal* v. *Du Plessis* [1918] A. D. at p. 476.

[2] It existed already in Roman Law. Cod. 8. 13 (14). 20 (consignato atque deposito); Dig. 22. 1. 7 (obsignavit ac deposuit). In the Dutch Law tender was first made through an officer of the Court or a notary with two witnesses 'met opene beurse en klinkende gelde'. Boey, *Woorden-tolk, sub voce* Consignatie. See also V. d. K. *Th.* 824; Pothier, *Traité des Obligations*, secs. 572 ff. The modern equivalent is payment into Court. But money so paid can probably not be withdrawn without an order of Court. 4 Maasdorp, p. 176. The nature and effect of tender in the modern law is discussed in *Odendaal* v. *Du Plessis* [1918] A. D. 470; and see *Harris* v. *Pieters* [1920] A. D. 644; *Leviseur* v. *Scott* [1922] O. P. D. 138; *Ayob & Co.* v. *Clouts* [1925] W. L. D. 199.

[3] Gr. 3. 40. 3; Voet, 46. 3. 29. Pothier (sec. 580) discusses the position of a surety in case the debtor has made a valid consignation and afterwards resumes the property.

[4] Vermenging, Schuldvermenging. Gr. 3. 40. 4; Voet, 46. 3. 18–27; V. d. L. 1. 18. 5; Boey, *Woorden-tolk, sub voce* Confusie; Pothier, secs. 641 ff.

[5] Gr. 3. 40. 5; Voet, 46. 3. 27.

he may not think it worth his while to anticipate the distribution of assets by demanding payment from the executor of the deceased. Another case of confusion occurs when a principal debtor becomes surety, or a surety becomes principal debtor, in respect of the same debt, with the result that the accessory obligation is extinguished.[1]

Compensation or set-off.

Compensation or set-off[2] takes place when a debtor has a counter-claim against his creditor. If the creditor sues his debtor, the creditor's claim is deemed to have been extinguished or reduced by the amount of the counter-claim from the moment when the right to enforce the counter-claim by action vested in the debtor.[3] Compensation is only allowed where both claim and counter-claim are liquid,[4] unconditional, and presently enforceable,[5] and relate to fungible things *ejusdem generis*.[6] Thus, money may be set off against money or wine against wine, but not wine of one quality against wine of another. A merely natural debt is available as a set-off[7] except in cases where the law forbids it. In certain cases compensation is disallowed on grounds of public policy. Thus, a person who has got possession of property by theft or other wrongful act may not plead a set-off against the owner's claim to recover what belongs to him; nor is this defence available to one who is indebted to the State or to a local government for taxes or rates;[8] and there can be no compensation in insolvency proceedings unless mutuality between

[1] Voet, 46. 3. 20; Pothier, secs. 384 ff.

[2] Vergelyking, compensatie, schuld-vereffening. Gr. 3. 40. 6 ff.; Voet, 16. 2. 1; V. d. L. 1. 18. 4; *Schierhout* v. *Union Govt.* [1926] A. D. 286; (Ceylon) *Muttunayagam* v. *Senathiraja* (1926) 28 N. L. R. 353.

[3] Voet, 16. 2. 2. A counter-claim is ineffectual as compensation unless it is available against a plaintiff in the capacity in which he is suing. *De Villiers* v. *Commaile* (1846) 3 Menz. 544.

[4] *Nat. Bank* v. *Marks & Aaronson* [1923] T. P. D. 69; *Baskin & Barnet* v. *Barnard* [1928] C. P. D. 58.

[5] Cod. 4. 31. 14. 1; Gr. 3. 40. 8; *Cens.* For. 1. 4. 36. 3; Voet, 16. 2. 17.

[6] Voet, 16. 2. 18.

[7] Voet, 16. 2. 13.

[8] Gr. 3. 40. 11; Voet, 2. 16. 16. In the Roman Law compensation could not be pleaded to an actio depositi directa. Cod. *ubi sup.*; 4. 34. 11. This does not hold good in the modern law. 4 Maasdorp, p. 226.

the opposing claims existed at the date of sequestration.[1]

The effect of compensation (which, however, must be specially pleaded[2]) is to extinguish the creditor's claim in whole or in part,[3] and in the same measure to arrest the accrual of interest, to set free sureties and real securities, and to relieve the defendant from a penalty to which he would otherwise be liable, provided that the right of set-off has vested before the date when payment would, but for the set-off, have fallen due.[4] Further, if a debtor has paid his creditor without claiming set-off he may get his money back to the extent of the set-off by the condictio indebiti.[5] Where a right of action has been ceded, the debtor may set up against the cessionary any set-off available to him against the cedent; for since compensation, if pleaded, takes effect *ipso jure*, the amount of the debt is mechanically reduced by the amount of the counter-claim from the moment when the right to assert it first vested in the debtor.[6] But a debtor cannot compensate against the cessionary a claim which has vested in him after notice of the cession. In other words compensation implies the coexistence of mutual debts.[7] Effect of compensation.

2. Release.[8] A debt may be released by way of gift,[9] i.e. as an act of liberality on the part of the creditor, or in exchange for some advantage.[10] In the absence of proof to the contrary a release is presumed to be gratuitous.[11] No form of words is required.[12] It is enough 2. Release.

[1] *National Bank of S. A.* v. *Cohen's Trustee* [1911] A. D. at p. 254.
[2] Van Leeuwen, 4. 40. 2; Voet, 16. 2. 2; V. d. L., 1. 18. 4.
[3] Gr. 3. 40. 7; Voet, *ibid.* Van der Keessel (*Th.* 827) cites a decision to the effect that compensation may be set up, after sentence, against execution of a judgment. Cf. Voet, *ubi sup.*
[4] Voet, *ubi sup.*
[5] Voet, *ubi sup.*; V. d. L., *ubi sup.*; unless the payment was made in obedience to a judicial decree. [6] Voet, 16. 2. 4.
[7] *Smith* v. *Howse* (1835) 2 Menz. 163; *Oudtshoorn Town Council* v. *Smith* [1911] C. P. D. 558; *Consolidated Finance Co.* v. *Reuvid* [1912] T. P. D. 1019.
[8] Quijtschelding—Acceptilatio—Liberatio. [9] Gr. 3. 41. 5.
[10] Voet, 46. 4. 1. [11] Gr. 3. 41. 6.
[12] *Secus*, jure civili. Inst. 3. 29. 1.

that the creditor by words or conduct[1] declares his intention to abandon his right, and that this is accepted by the debtor or by some one else on his behalf. No one can release a debt who is not competent to alienate his property.[2] A promise not to sue[3] operates as a release unless it is merely personal in its incidence, e.g. a promise not to sue A does not necessarily release his representatives after his death.[4] With this reservation a promise not to sue releases co-debtors and sureties;[5] but a promise not to sue a surety does not release his principal, unless it was clearly intended to have that effect.[6] If an instrument of debt is returned to the debtor, the debt is presumed to be discharged.[7]

Promise not to sue.

Mutual release.

In case of reciprocal promises each party may by agreement release the other from performance, each returning to the other any advantage he may have derived from the contract.[8]

3. Novation.

3. Novation.[9] The parties to a contract may, if they please, enter into a new contract, putting an end to an original liability, and substituting a new liability in its place. This is called Novation. Any agreement in that behalf express or tacit is sufficient;[10] but in case of doubt

[1] Gr. 3. 41. 7; V. d. L. 1. 18. 3.

[2] Gr. 3. 41. 8; nor persons charged with the administration of another's property without power of alienation. Ibid.

[3] Pactum de non petendo. Van Leeuwen, 4. 40. 7, and Decker, ad loc.

[4] Gr. 3. 41. 9.

[5] Gr. *ubi sup.*; Voet, 46. 4. 4; V. d. K. *Th.* 828; V. d. L. 1. 18. 3. Pothier, however, *Traité des Obligations* (sec. 617), says that a release of one co-debtor only releases the other to the extent to which the second is prejudiced by the release of the first by being deprived of the opportunity of claiming contribution from him. This view was adopted by the Transvaal Supreme Court in *Dwyer* v. *Goldseller* [1906] T. S. 126.

[6] Voet, 2. 14. 12; V. d. L. *ubi sup.* Grotius and Voet (46. 4. 4) say that a discharge of a surety discharges the principal, founding, however, on technicalities of Roman Law. It is all a question of intention.

[7] Gr. 3. 41. 10; V. d. L. *ubi sup.*

[8] Handelbraeck—Recessio a contractu. Gr. 3. 42. 2; V. d. K. *Th.* 833.

[9] Schuldvernieuwing—Novatie. Gr. 3. 43. 1; Voet, 46. 2. 1; V. d. L. 1. 18. 2.

[10] Gr. 3. 43. 3; Voet, 46. 2. 2–3. Groenewegen (*de leg. abr. ad*

an intention to novate is not presumed.[1] Thus a creditor is not held to novate his debt merely by allowing his debtor an extension of time for payment. Such an allowance, therefore, does not set free sureties or mortgages.[2] Novation fails to take effect if the second contract is *ipso jure* void; or conditional and the condition is not implemented; or if the thing which forms the subject of the novating contract has perished,[3] while the condition is still pending.

Any debt may be novated, as well natural as civil and whether arising from contract or delict or judgment.[4] The effect of novation is to discharge the old liabilities with all their incidents, such as interest, real and personal securities, and to purge any previous mora.[5] Novation may consist not only, as above, in the substitution of one debt for another, but also in the substitution of one debtor for another. This was known in Roman Law as delegation.[6] The consent of all three parties is required;[7] for though the law allows the assignment of a claim without the consent of the debtor, so that a new creditor takes the place of an old one, there is no corresponding rule allowing the debtor to make over his liability to a third party, unless the creditor, and, of course, the third party,[8] agree. In this case, as in the first, the intention to novate must clearly appear. The mere assignment by a debtor to his creditor of the debtor's claim against a third party, even though the third party consent, does not itself effect a novation.

Delegation.

A third case of novation in Roman Law was incidental to judicial proceedings[9] and took place at the moment

Novatio necessaria.

Inst. 3. 30. 3) does not allow a tacit novation.—'Mores nostros ab hoc jure civili non recessisse censeo cum Hugone Grotio.'

[1] V. d. K. *Th.* 835; *Brenner* v. *Hart* [1913] T. P. D. at p. 616; *Bhana Nana* v. *Patel* [1929] W. L. D. 234.

[2] Gr. 3. 43. 4; V. d. K. *Th.* 836; nor by a subsequent stipulation for a penalty (Voet, 46. 2. 4), or for substituted performance, or for interest, or for a higher rate of interest (Voet, 46. 2. 5).

[3] Voet, 46. 2. 7.

[4] Voet, 46. 2. 9–10.

[5] Voet, 46. 2. 10; *Holl. Cons.*, vol. ii, no. 126.

[6] Overzetting—Delegatie. Gr. 3. 44. 2.

[7] Voet, 46. 2. 11.

[8] Gr. 3. 44. 3.

[9] Gaius, iii. 180; Dig. 46. 2. 29.

of litis contestatio. This, though admitted by Grotius,[1] did not entail the usual consequences of novation,[2] and may therefore be left out of account.

Assignation.

From delegation properly so called must be distinguished assignation,[3] which takes place when a debtor requests his own debtor to pay his creditor, or refers his creditor to his own debtor for payment. The effect is to discharge the debtor from liability,[4] if, and only if, the creditor recovers his debt from the third party, unless of course the creditor agrees to accept the assignation in full discharge.[5] In other words, assignation is, as a rule, a conditional delegation. In the modern law the same result usually follows if a debtor gives his creditor a cheque or other such instrument in payment of a pre-existing debt.

4. Impossibility of performance.

4. Impossibility of Performance. If a contract, possible when made, subsequently becomes impossible of performance, the parties are sometimes discharged from future liability. Whether this will be so or not depends upon the nature of the contract and the circumstances of each particular case.[6] The English law on this subject was stated by Blackburn, J. in terms which are equally applicable to the Roman-Dutch Law:

> 'Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible. But this rule is only applicable when the contract is positive and absolute and not subject to any condition either express or implied'.[7]

Such a condition exempting a party from liability, when a contract has become impossible of performance,

[1] Gr. 3. 43. 3. [2] Voet, 46. 2. 1.
[3] Aenwijzing—Assignatie. Gr. 3. 45. 1; *Brenner* v. *Hart* [1913] T. P. D. at p. 612. [4] Gr. 3. 44. 5.
[5] Van Leeuwen, 4. 40. 10; Voet, 46. 2. 13.
[6] *Hersman* v. *Shapiro & Co.* [1926] T. P. D. 367.
[7] *Taylor* v. *Caldwell* (1863) 3 B. & S. at p. 833, adopted by Maasdorp J.A. in *Algoa Milling Co.* v. *Arkell & Douglas* [1918] A. D. at p. 171.

has been taken to be implied in the event of the destruction, without fault of the debtor and before he was *in mora*, of some specific thing which in terms of the contract he was bound to deliver;[1] and the same construction has been adopted in other cases, as, for example, when the parties contemplated as the foundation of their contract some condition or state of things which has since ceased to exist or has not been realized (frustration of contract):[2] or when the party liable is disabled by illness, or prevented by vis major or casus fortuitus.[3] Mere difficulty of performance furnishes no excuse for non-performance.[4] But a contract is discharged if performance becomes legally impossible (e.g. if the thing to be given passes extra commercium),[5] or illegal.

5. Condition subsequent.

5. **Condition Subsequent.** A contract may include, either expressly or by implication, a provision for its determination after the lapse of a certain time or upon the happening of a specified event. Upon the expiry of the time or the happening of the event, the parties are discharged

[1] Dig. 45. 1. 23 and 33; Gr. 3. 47. 1. In these cases the distinction between absolute and relative impossibility (*supra*, p. 268, n. 4) does not apply. 'Where the impossibility arises ex post facto its absoluteness or relativity is immaterial: the only question is whether it is due or not to the fault of the debtor; provided, of course, that it is a fault for which, in the particular relation, he is answerable.' Moyle, *Institutes of Justinian* (5th ed.), p. 411; Windscheid, *Lehrbuch des Pandektenrechts*, vol. ii, § 264. In recent cases, English and South African, the issue has been made to turn on what was, or ought to have been, in the contemplation of the parties at the time of contracting. See, e.g. *Ward* v. *Francis* (1896) 8 H. C. G. 82; and *Morgan & Ramsay* v. *Cornelius & Hollis* (1910) 31 N. L. R., 447.

[2] Cf. *African Realty Trust* v. *Holmes* [1922] A. D. at p. 400; *M. Leviseur & Co.* v. *Friedman* [1922] O. P. D. 182. For the English Law see Salmond & Winfield, *Principles of the Law of Contracts*, chap. xii, p. 290; Anson, *Contract*, pp. 373 ff.

[3] *Peters, Flamman & Co.* v. *Kokstad Municipality* [1919] A. D. 427; *Schlengemann* v. *Meyer, Bridgens & Co.* [1920] C. P. D. 494.

[4] Dig. 45. 1. 2. 2. (*ad fin.*): Non facit inutilem stipulationem difficultas praestationis.—Dig. 45. 1. 137. 4: Et generaliter causa difficultatis ad incommodum promissoris, non ad impedimentum stipulatoris, pertinet; i.e. difficulty of performance prejudices the promisor, and does not deprive the promisee of his action. Cf. *Algoa Milling Co.* v. *Arkell & Douglas* [1918] A. D. at pp. 170–1.

[5] Gr. 3. 47. 1 and 4.

from their obligations and the contract is at an end. Pothier gives in illustration a contract of suretyship whereby the surety undertakes to be answerable for the repayment of a loan for the period of three years only, or until the return of a certain ship. If the creditor has not put his debtor in mora by demanding payment before the term has expired or the ship returned, the liability of the surety is at end. But if there has been default on the part of the borrower before the accomplishment of the term or the happening of the event, the surety must make it good, for he is now bound unconditionally to answer for the principal debtor's default.[1]

6. Prescription.

6. **Prescription.** Grotius treats prescription as a release of a debt effected by operation of law,[2] in consequence of the lapse of a certain period of time. His opinion, which is also that of Voet, is that the effect of prescription is not merely to bar the remedy, but to extinguish the right.[3] But Van der Keessel says that this view is not free from difficulty,[4] and in South Africa 'the more correct view is that prescription merely affords a ground of defence or exception to an action, and does not act as an extinguishment of the obligation *ipso jure*'.[5]

Does it extinguish the right or merely bar the remedy?

Periods of prescription in Roman-Dutch Law.

The periods fixed by the Roman and the Roman-Dutch Law for the prescription (or limitation) of actions varied greatly,[6] and, as the law relating to this matter is now generally regulated by statute, it is not necessary to state them in detail.[7] Unless the law provides otherwise, the term of prescription is the third of a century, or, as some say, thirty years.[8] This is the usual period also for demanding restitutio in integrum, but, as we have

[1] Pothier, secs. 224–5 and 672.
[2] Quijtschelding door verjaring. Gr. 3. 46. 1.
[3] Gr. 3. 46. 2; Voet, 44. 3. 10. [4] V. d. K. *Th.* 874.
[5] 4 Maasdorp, p. 194. [6] See Voet, 44. 3. 5–7.
[7] For the statute law as to limitation of actions see Cape Act No. 6 of 1861; Transvaal Act No. 26 of 1908, amended by (Union) Act No. 9 of 1914; O. F. S., Law Book, chap. xxiii; Natal, Law 14, 1861; Ceylon, Ord. No. 22 of 1871.
[8] Gr. 3. 46. 3; Van Leeuwen, 4. 40. 8; Voet, 44. 3. 8; Bynkershoek, *Quaest. Jur. Priv.*, lib. ii, cap. xv (*ad init.*); V. d. L. 1. 18. 8.

seen, a claim to set aside a transaction on the ground of minority is barred after four years from the attainment of majority.[1] A well-known clause (Art. 16) of the Perpetual Edict of 1540, dealing with the prescription of actions, has been abrogated by statute in the Cape Province and the Transvaal; but, since it may still be in force in the Free State and Natal, a translation is appended:[2]

Perpetual Edict of October 4, 1540, Art. 16.

'All salaries of all Advocates, Attorneys, Secretaries, Physicians, Surgeons, Apothecaries, Clerks or Notaries or other workers; hire of servants of either sex; as also the price of merchandize sold by retail, and payment of tavern debts must be judicially demanded within two years of the day of the service or work done, merchandize delivered, or score credited;[3] and after the expiry of the said time no such claims may be lawfully pursued unless there shall be thereof a *cedulle* or letter of obligation; by force whereof the creditor may sue for such debts within ten years against the principal debtors. But if such debtors shall die, then the creditor shall be bound to pursue his claim against the heirs within two years after the debtor's death, reckoned from the day on which the creditor shall have had knowledge of the death of his debtor, and not afterwards. But after the expiration of the said time such debts shall be considered duly discharged, and no action shall lie in respect thereof.'[4]

Against whom prescription does not run.

Prescription does not begin to run against minors or lunatics or other persons under like disability, nor against such as, owing to war or public service, are absent from the jurisdiction and unable to prosecute their claim.[5]

[1] *Supra*, p. 50; Gr. 3. 48. 13; V. d. K. *Th.* 881.

[2] It was repealed in Cape Colony by Act No. 6 of 1861, sec. 4 ('to the end that the substance thereof with certain amendments may be re-enacted by this Act'; cf. *McLeod* v. *Estate Urquhart* [1923] C. P. D. 385) and withdrawn from operation in the Transvaal by Act No. 26 of 1908. Is it in force in O. F. S.? See *Rabie* v. *Neebe* (1879) O. F. S. 5; Nathan, *Common Law of S. A.*, vol. iv, p. 2400. For Natal see *Union Share Agency & Investment Ltd.* v. *Spain* [1928] A. D. at p. 75.

[3] Gelagh gheborcht. See *S. A. L. J.*, vol. xxv, p. 429.

[4] 1 G. P. B. 319; Gr. 3. 46. 7; Van Leeuwen, 2. 8. 11; V. d. K. *Th.* 876. Van Leeuwen, in the seventeenth century, thought this article already obsolete through disuse.

[5] Voet, 44. 3. 9 (*ad fin.*): Neque minoribus currit aut furiosis aliisque similibus, qui minorum jure censentur ac sub cura sunt,

How prescription is interrupted.

Prescription is interrupted by judicial interpellation or by any acknowledgement of the debt.[1] Such at least was the Roman-Dutch common law; but as the matter is regulated to-day by local Acts and Ordinances, the student should be careful to consult the statute law of his own Province or Colony.

Prescription of rights of action.

When a principal debt is prescribed, interest on the debt is prescribed with it.[2]

Rights of action arising out of breach of contract are in Roman-Dutch Law extinguished in the same way as primary rights arising ex contractu.[3]

neque belli aut alias reipublicae causa absentibus. But Schorer *ad* Gr. 2. 7. 9 (note 37) admits no exception except 'pupillarem aetatem' (quia est regula quod durante pupillari aetate dormiat praescriptio). Decker (*ad* Van Leeuwen, 2. 8. 12) says that neither minors nor those who are unable to manage their own affairs nor persons absent from the jurisdiction are relieved *ipso jure*, i.e. without restitutio in integrum.

[1] Voet, *ubi sup.* (*in med.*).

[2] Voet, 22. 1. 16; *Est. Obermeyer* v. *Est. Wolhuter* [1928] C. P. D. 32.

[3] But not by the same term, for the effect of litis contestatio is to render the obligation 'perpetual'. Dig, 27. 7. 8. 1 (*ad fin.*), Nam litis contestatione et poenales actiones transmittuntur ab utraque parte et temporales perpetuantur.

V

PLURALITY OF CREDITORS AND DEBTORS

Co-creditors and co-debtors.

THE parties to a contract are entitled or liable as co-creditors or co-debtors (*correi stipulandi vel credendi— correi promittendi vel debendi*) when two or more stipulate or promise as principals and not as sureties at the same time in respect of the same performance, with the intention of becoming thereby entitled or liable severally in respect of the whole performance (*singuli in solidum*) and not merely *pro rata parte*.[1]

Plurality of debtors.

The position of a co-debtor must be distinguished from that of a surety. Each co-debtor is liable as principal. The liability of the surety, as such, is merely accessory and secondary. To constitute the relation of co-creditor or co-debtor, as above defined, it is not enough that two or more persons should stipulate for or promise the same thing at the same time, unless they do so with the intention of becoming each entitled or each liable in respect of the whole debt. In the absence of evidence of such intention, the parties, even in the earlier civil law, were not correi but were each entitled or liable only in respect of his rateable share.[2] In the Roman-Dutch Law, following herein the latest Roman Law, a co-debtor cannot as a rule be made liable in solidum unless there is a special agreement to that effect.[3] Thus if William, Thomas, and James jointly contract to pay a hundred aurei to Rudolph, in the absence of special agreement, each of

[1] Voet, 45. 2. 1, and *Compendium*, 45. 2. 1.

[2] Dig. 45. 2. 11. 1–2 (Papinian).

[3] Authent. *ad* Cod. 8. 39 (40). 2. Hoc ita si pactum fuerit speciale unumquemque teneri in solidum. . . . Sin autem non convenerint specialiter, ex aequo sustinebunt onus. Sed et si convenerint, ut uterque eorum sit obligatus: si ambo praesentes sint et idonei, simul cogendi sunt ad solutionem. See Groenewegen, ad loc. The authentica is taken from Nov. 99 *c.* 1 (A.D. 539), which only refers to sureties, but is nevertheless, according to the general opinion and common consent, also extended to two or more joint principal debtors. Van Leeuwen, 4. 4. 1; V. d. K. *Th.* 494.

them is liable only for one-third of the total.[1] Apart from agreement, there are cases in which the law creates, or presumes, a solidary liability, where no contrary intention is expressed. Such is the case of partners in business contracting in relation thereto;[2] and persons who become joint parties to a bill of exchange or promissory note, whether as drawers (makers), acceptors, or indorsers, are similarly liable. Supposing a solidary obligation validly created whether by act of party or by operation of law; one co-debtor who is sued for the whole debt may still claim the benefit of division if he has not renounced it, provided that the other co-debtors are solvent and within the jurisdiction.[3]

Plurality of creditors.

The principle stated above with regard to co-debtors,

[1] Neostad. *Decis. Supr. Cur.* No. 97; Gr. 3. 3. 8–11; Van Leeuwen, *ubi sup.*; Voet, 45. 2. 4 (*in fine*), and *Compendium*, 45. 2. 5. So in the case of joint-purchasers, *Barnet* v. *Glanz* (1908) 25 S. C. 967; *Wirths* v. *Albow Bros. & Van Zyl* [1922] S. W. A. 127; *Lydenburg Estates* v. *Palm & Schutte* [1923] T. P. D. 278.

[2] Van der Linden, 1. 14. 9.

[3] According to the statement in the text, a co-debtor who has bound himself *in solidum* may still claim the benefit of division, unless he has renounced it. This, according to a jurist in the *Bellum Juridicum* (Cas. 24), is known to every one who has 'licked the spoon' of jurisprudence. But de Haas *ad* Van Leeuwen, *Cens. For.* 1. 4. 17. 1, and Van der Linden (Translation of Pothier, *Obligations*, vol. i, sec. 270), and *Handbook* (1. 14. 9) say that a co-debtor who has bound himself *in solidum* cannot claim the benefit of division. De Haas cites Grotius, 3. 3. 29 (*ad fin.*): 'Die haer verbinden een voor al, ofte elck sonderling, worden verstaen de voorsz. rechten af te staan.' But Grotius is here speaking of sureties. Where he speaks of co-debtors (3. 3. 10–11) he plainly contemplates two renunciations, viz. (*a*) of the beneficium de duobus vel pluribus reis debendi created by the Authentica and (*b*) of the benefit of division. Van der Keessel (*Th.* 494) seems to agree in effect with Van der Linden that co-debtors who bind themselves 'singuli pro omnibus tanquam rei principales' are deemed to have renounced the benefit of division. Mr. G. T. Morice says (*English and Roman-Dutch Law* (2nd ed.), p. 89): 'It is probable that the latter view (viz. that persons who have expressly bound themselves *in soldidum* or each for the whole amount cannot claim the benefit of division) will be adopted in South Africa.' With regard to partners the rule in South Africa is that all the partners must be joined as defendants to an action, but a judgment obtained against the partnership may be enforced by execution against any partner *in solidum*. *Theunissen* v. *Fleischer, Wheeldon and Munnik* (1883) 3 E. D. C. 291

in the modern law applies also in case of plurality of creditors, so that in the absence of express agreement to the contrary each is entitled, and may sue, only in respect of his rateable share of the performance which forms the subject-matter of the contract.[1]

If the contract contemplates that several co-debtors shall be liable in solidum without benefit of division, or that several co-creditors shall be entitled in solidum, the rules of the older Civil Law apply. In case of plurality of creditors each one may sue for the whole debt, and payment or its equivalent, or novation, made to, or with, one creditor, discharges the whole liability,[2] for 'in utraque obligatione una res vertitur; et vel alter debitum accipiendo vel alter solvendo omnium peremit obligationem et omnes liberat'.[3] But an agreement not to sue one of several debtors, being merely personal in its incidence, has no effect upon the liability of the others,[4] except their liability is proportionately reduced.[5] The debtor, on his side, until, but not after, action brought, may pay any co-creditor that he pleases. In case of plurality of debtors the creditor may proceed against any one of them for the whole or any part of the debt; and his election to sue one does not preclude him from going against another, since it is not his election, but only payment or its equivalent, or novation, which discharges the liability of the other co-contractors. If one co-debtor has voluntarily paid part, but not the whole, of the debt, the creditor is not precluded from suing him for the balance, unless he has expressly or tacitly agreed to that effect. The case is different if the creditor has taken proceedings against one

Excepted cases.

[1] *De Pass* v. *Colonial Government* (1886) 4 S. C. at p. 390.

[2] Voet, 45. 2. 4. [3] Inst. 3. 16. 1.

[4] Gr. 3. 3. 8. If the creditor becomes heir to one of two co-debtors, the other co-debtor remains liable *in solidum*, unless the co-debtors are partners, in which case the remaining co-debtor is only liable for half the debt. Voet, 45. 2. 5. A debt may be extinguished by prescription against all co-creditors and in favour of all co-debtors; but a demand in judicio against one keeps the debt alive against all. Voet, 45. 2. 6.

[5] *Dwyer* v. *Goldseller* [1906] T. S. at p. 129; *De Charmoy & St. Pol* v. *Dhookoo* [1924] N. P. D. 254.

co-debtor in respect of his rateable share of the debt; for by so doing he precludes himself from taking fresh proceedings against him for the balance. However, as explained above, these rules of the jus civile are generally inapplicable to the modern law.

Contribution between co-creditors and co-debtors.

If one co-creditor recovers the whole debt, or if one co-debtor pays the whole debt, the other co-creditors in the one case may sue, and the other co-debtors in the other case may be sued, in respect of their rateable share of the benefits or loss. Such is the modern law.[1] In the Roman Law no action for contribution lay except in the case of partners.[2]

[1] Gr. 3. 3. 8; Voet (45, 2. 7) says: Quae cum ita sint, non mirum quod nunc vulgo a pragmaticis tradatur, ex aequitate uni solidum solventi adversus reliquos regressum dari opportere aliquando in solidum, aliquando pro virili, prout aut nihil aut aliquid ad solventem pervenerit ex eo cujus intuitu correi facti sunt, etiam sine cessione actionis. He does not say that a co-creditor who has recovered the whole is obliged to share it with the other co-creditors (not being partners), but presumably he is so obliged *jure hodierno*.

[2] Voet, ibid. Cf. Dig. 35. 2. 62, pr.

VI

SPECIAL CONTRACTS

To undertake a detailed statement of the law applicable to the various kinds of contract into which men may enter lies outside the scope of an elementary treatise. As observed above, in Roman-Dutch Law all contracts are consensual. The differences of the Roman Law between contracts re, verbis, litteris, and consensu have in a great measure lost their significance; and the ancient distinction between contracts and pacts is equally a thing of the past. It follows that the principles which have been stated with regard to contracts in general apply to every kind of contract, except so far as the parties have chosen to depart from them, or the law attaches special rules to contracts of the kind in question. All contracts partake of the same nature; and all take a special colour from the subject-matter with which they deal. If we select some contracts for special treatment it is because they concern certain relations of mankind which are of such frequent occurrence that every reasonably equipped lawyer must be prepared to deal with them. A young lawyer may be excused if he knows little of the law relating to marine assurance or to apprenticeship in the cloth-trade, but he will be expected to have some acquaintance with such common transactions as sale, hire, deposit, mandate, and suretyship.

In Roman-Dutch Law all contracts are consensual.

Why some contracts are selected for special treatment.

In this chapter we shall describe in briefest outline some of these contracts of frequent occurrence. We shall speak of: (1) Donation or Gift; (2) Sale; (3) Exchange; (4) Hire; (5) Mandate or Agency; (6) Partnership; (7) Loan for Consumption; (8) Loan for use; (9) Deposit; (10) Pledge; (11) Suretyship or Guarantee; (12) Carriage by water and by land.

Enumeration of special contracts.

1. **Donation or Gift**[1] is regarded in Roman-Dutch Law

1. Dona-

[1] (Donatio—Schencking) Gr. 3. 2. 1; Van Leeuwen, lib. iv, cap. xxx; Voet, 39. 5. 1; V. d. L. 1. 15. 1; 3 Maasdorp, chap. 7.

tion or Gift

as a contract. A distinction is drawn, as in the case of sale, between the contract, which binds the parties, and the handing over, which passes the property.[1] Any promise to give is enforceable, provided that it is made with a serious and deliberate mind.[2] As in other contracts, no obligation arises until acceptance by the donee, or by some person qualified to accept on his behalf.[3] It is a general rule that a donation is not presumed, but must be proved by the person who relies upon it.[4] The capacity of parties, generally, is the same as in other contracts. Thus, minors cannot make a gift, nor can guardians in their name.[5] According to Grotius, parents cannot make gifts to their unemancipated children,[6] but this proposition does not hold good at the present day. In the Roman Law, gifts between husband and wife were invalid[7] until

[1] Gr. 3. 2. 14.

[2] Grotius says (3. 2. 11) that a gift *inter vivos* of all one's goods—present as well as future—is bad 'om dat het maecken van de uiterste wille daer door werd belet'. So also Van Leeuwen, 4. 30. 6. *Contra*, Voet, 39. 5. 10. Van der Keessel says (*Th.* 487): Jure Romano quidem ex saniori doctrina omnium bonorum donatio non fuit prohibita: sed cum contraria sententia olim juri civili magis consentanea haberetur, eadem a plerisque in foro recepta et nostris quoque probata videtur. In *Meyer* v. *Rudolph* [1917] N.P.D. at p. 177 Broome J., delivering the judgment of the Court, said: 'In my opinion, the weight of authority is in favour of permitting a donation of this kind and the reasons given for forbidding it have ceased to operate.' In this case there was a gift mortis causa of all donor's estate.

[3] Gr. 3. 2. 12. A father may accept on behalf of his minor son. *Barrett* v. *O'Neil's Exors.* (1879) Kotzé, at p. 108.

[4] *Meyer* v. *Rudolph's Exors* [1918] A.D. at p. 76; *Timony & King* v. *King* [1920] A.D. 133; *Smith's Trustee* v. *Smith* [1927] A.D. 482 (gift of husband to wife).

[5] Gr. 3. 2. 7.

[6] Dig. 41. 6. 1. 1; Gr. 3. 2. 8. Voet says (*Compendium*, 39. 5. 7): *Moribus*. Donatio inter patrem et filium familias omnino consistit. Van der Keessel (*Th.* 485) agrees, subject to acceptance by the minor, or by a notary on his behalf, if he is under the age of puberty. Cf. *Slabber's Trustee* v. *Neezer's Exor.* (1895) 12 S.C. 163. In South Africa a parent, being solvent, may make a valid gift to a child, who, if above the age of puberty, may accept on his own behalf. If he is below that age the father may accept on his behalf by doing some act which puts it out of his power to revoke the gift. See 1 Maasdorp, p. 265. For Ceylon see *Fernando* v. *Weerakoon* (1903) 6 N.L.R. 212.

[7] Dig. 24. 1. 1 (Ulpian): Moribus apud nos receptum est ne inter

confirmed by death.[1] This rule was received in the Roman-Dutch Law,[2] which also, as we have seen above, rendered void gifts, whether ante- or post-nuptial, made by a minor, who contracted marriage without the necessary consents, in favour of the other spouse.[3]

Registration of gifts.

As a general rule the contract of donation requires no special form; but the constitution of Justinian,[4] which, subject to some exceptions, required registration of gifts exceeding 500 aurei in value, was admitted into the Roman-Dutch Law,[5] and has been recognized as in force in South Africa,[6] the aureus being taken as equivalent to the pound sterling.[7] Gifts in excess of the permitted value are void to the extent of the excess.[8]

virum et uxorem donationes valerent. Moderate gifts of jewellery, &c., are excepted from the rule. Voet, 24. 1. 11. There are other exceptions. *Wagenaar* v. *Wagenaar* [1928] W.L.D. 306. The Roman-Dutch writers seem to have experienced difficulty in deciding whether a gift to a concubine was valid. See de Haas ad *Cens. For.* 1. 3. 4. 41. For S.A. see *Louisa & Protector of Slaves* v. *Van den Berg* (1830) 1 Menz. 471; *Aburrow* v. *Wallis* (1893) 10 S.C. 214.

[1] Dig. 24. 1. 32. 2; Girard, p. 1000.

[2] Gr. 3. 2. 9; Van Leeuwen, 4. 24. 14; V. d. K. *Th.* 486; *Van der Byl's Assignees* v. *Van der Byl* [1886] 5 S.C. at p. 176; *Haines' Exors.* v. *Haines* [1917] E.D.L. at p. 56.

[3] Gr. 3. 2. 10.

[4] Cod. 8. 53 (54). 36. 3 (A.D. 531); Inst. 2. 7. 2.

[5] Van Leeuwen, 4. 30. 3; Voet, 39. 5. 18. But Grotius (3. 2. 15) says: waer van ick in onzes lands wetten niet en vinde, misschien, om dat de mildheid hĕr niet te groot en is geweest. Van der Keessel (*Th.* 489), following Voet (loc. cit.) and Van Leeuwen (*Cens. For.* 1. 2. 8. 8), say that a solemn cession of immovable property *in judicio*, or in the case of movables a declaration before notary and witnesses, has the same effect as registration. Van der Linden (as usual) follows Grotius. See also Loen. *Decis.* no. 123, and Bijnk. *O.T.* I. 90.

[6] 3 Maasdorp, p. 101.

[7] *Thorpe's Exors.* v. *Thorpe's Tutor* (1886) 4 S.C. 488. However, in *Simons* v. *Board of Exors., Cape Town* [1915], C.P.D. 479, Juta J.P. held that if the rule in question ever formed part of R.D.L., which was doubtful, it had been superseded in S.A. by the statutes relating to insolvency, which render registration no longer necessary for the protection of creditors. This decision and the reasoning upon which it is founded have since been disapproved by the E.D.C. in *Haines' Exor.* v. *Haines* [1917] E.D.L. 40; and by the Natal Court (Dove Wilson J.P. and Hathorn J.; Tatham J. *dissent.*) in *Rudolph* v. *Exors. Est. Rudolph* [1918] N. P. D. 425. See also *Hart* v. *African Mutual Life Assurance Soc.* [1926] C. P. D. 38.

[8] Cod. 8. 53 (54). 34. 1; Van Leeuwen, 4. 30. 5. But the donor is

Reciprocal and remuneratory gifts do not fall within the rule, provided in the latter case that the gift does not exceed the value of the service rendered by more than £500.[1] The rule applies if several gifts are made by the same person at the same time to different persons.[2]

Uncertain state of the law.

The preceding paragraph states what appears to be the existing state of the law upon this subject. But there is judicial authority for saying that the rule does not apply: (1) as between donor and donee;[3] (2) to a gift of movables perfected by delivery.[4] If these decisions are correct, and since a conveyance of immovables in any event requires registration, the scope of the rule (if it still exists) will be narrowed down to the case of certain incorporeal rights, not otherwise registrable. The whole topic stands in need of elucidation by a Court of appellate jurisdiction.

No implied guarantees.

A gift being gratuitous there is no implied guarantee against eviction or against latent defects.[5] If the property given does not belong to the giver the gift is void.[6]

In what cases gifts may be revoked.

Gifts are, as a rule, irrevocable.[7] Therefore if property has been handed over by the donor, it cannot be recovered back; and if the donor fails to hand over the property, he can be sued by the donee for breach of contract. But

not entitled to revoke a gift to the extent of the excess on the ground of non-registration. *Kolver* v. *Groenewald* [1922] O. P. D. 65, and cases there cited. A gift between husband and wife in excess of £500 is not confirmed by death. *Haines* v. *Haines, ubi sup.*

[1] Voet, 39. 5. 17. As to remuneratory donations see *Fichardt Ltd.* v. *Faustmann* [1910] A. D. 168. [2] Voet, 39. 5. 16.

[3] *Barett* v. *O'Neil's Exors.* (1879) Kotzé, 104; *Potgieter* v. *Groenewald* (1905) O. R. C. 101; *Wiese* v. *Wiese's Exors.* (1905) O. R. C. 130; *Kolver* v. *Groenewald* [1922] O. P. D. 65. On this view a donee may sue to enforce an unregistered gift, and a donor is not entitled to revoke an unregistered gift to the extent of the excess over £500.

[4] *Van As* v. *Nel* (1896) 13, S. C. 427, per De Villiers C.J. *dubitando; Kolver* v. *Groenewald, ubi sup.* On the other hand, in *Haines' Exors.* v. *Haines, ubi sup.*, the Court went to the extreme length of holding that delivery does not obviate the necessity of registration, and that a wife's excutors could recover by action a sum of money given to the husband to the extent of the excess.

[5] Voet, 39. 5. 10. [6] Dig. 39. 5. 9. 3; Gr. 3. 2. 5.

[7] Gr. 3. 2. 16.

exceptions are admitted in both cases. Property which has passed may be recovered: (*a*) on the ground of gross ingratitude;[1] and (*b*) if the donee fails to make good a condition attached to the gift (*donatio sub modo*).[2] If the property has not passed, the donor may defend an action on the ground of want of means (*beneficium competentiae*); and the claims of creditors are preferred to the claim of the donee.[3]

In the later Roman Law the rules of the querela inofficiosi testamenti were, with modifications, applied also to gifts (*querela inofficiosae donationis*).[4] This practice was followed in the Dutch Law.[5]

Another ground of revocation was the subsequent birth of legitimate children to the donor; which, however, was limited in the Roman Law to the case of gifts made by patrons to freedmen,[6] and was available only between the original parties to the contract, so that the right of revocation was neither actively nor passively transmissible. In the Roman-Dutch Law, according to the prevailing opinion, the privilege was extended to all donors,[7] and was available to the donor's heir.[8]

[1] What amounts to ingratitude is specified in Cod. 8. 55 (56). 10 (A. D. 530). See Gr. 3. 2. 17; Van Leeuwen, 4. 30. 7; Voet, 39. 5. 22; V. d. L. *ubi sup.* *Mulligan* v. *Mulligan* [1925] W.L. D. at p. 182. This ground of avoidance does not apply to remuneratory gifts. Voet, 39. 5. 25. For Ceylon see D. C. Colombo 54, 687 (1871), Vanderstraaten, p. 144, and *Sansoni* v. *Foenander* (1872) Ramanathan, 1872–6, p. 32.

[2] Cod. 4. 6. 8; Girard, p. 1002. In *Ex parte Trustees of the Pretoria Hebrew Congregation* [1922] T. P. D. 296 the Court declared that it had no jurisdiction to release a donee from a condition attached to a gift. V. d. K. (*Th.* 488) admits a personal action only, not a vindication.

[3] Dig. 39. 5. 12: Qui ex donatione se obligavit, ex rescripto divi Pii in quantum facere potest convenitur. Sed enim id quod creditoribus debetur erit detrahendum; haec vero, de quibus ex eadem causa quis obstrictus est, non debebit detrahere. Voet, 35. 9. 19.

[4] Dig. lib. xxxi, lex 87. 3; Cod. 3. 29. 9.

[5] Gr. 3. 2. 19; Voet, 39. 5. 36; V. d. K. *Th.* 491.

[6] Cod. 8. 55 (56). 8.

[7] Gr. 3. 2. 18; Voet, 39. 5. 26 (*ad fin.*); (Ceylon) *Guneratne* v. *Yapa* (1926) 28 N. L. R. 397.

[8] Van der Keessel (*Th.* 490) maintains the opposite opinion.

Donatio mortis causa.

A special kind of gift is the donatio mortis causa,[1] which partakes of the nature both of contract and of legacy. Like the ordinary contract of donation it is perfected by agreement between two persons, of whom one intends to give, the other to accept what is given;[2] and, as in the case of ordinary contracts, the property does not pass until delivery.[3]

On the other hand a gift mortis causa resembles a legacy in that it takes effect on death, is revocable during the donor's lifetime, is *ipso jure* revoked by the death of the donee before the donor, and is postponed to the claims of all creditors of the deceased.[4] In form too it must comply with the requirements of testamentary disposition,[5] which in the modern law usually implies execution by the donor in the presence of at least two witnesses.[6] This requirement must be understood of a promise to give. It does not exclude any appropriate method of transferring the property which forms the subject of the gift.

The distinction between a gift mortis causa and a gift inter vivos is often difficult to draw. A gift mortis causa is not necessarily made by a dying man or even by a man who is in immediate danger of death provided that it is made in contemplation of death,[7] nor is a gift made

[1] Gr. 3. 2. 22 ff.; Voet, Lib. 39, tit. 6; V. d. K. *Th.* 492–3; 1 Maasdorp, chap. 31; (Ceylon) *Parampalam* v. *Arunachalam* (1927) 29 N. L. R. 289. Buckland (p. 256) describes it as 'a gift made in expectation of death, either general or on a certain event, to be absolute only if and when the expected death occurred'.

[2] Voet, 39. 6. 6; *Exor. Est. Komen* v. *De Heer* (1908) 29 N. L. R. 487; *Meyer* v. *Rudolph's Exors.* [1918] A. D. at p. 77 per Innes C.J.

[3] So says Voet, but under Justinian's legislation a donatio mortis causa executed before five witnesses (the form required for codicils) took effect on death like a legacy without transfer of possession. Buckland, *ubi sup.*

[4] Voet, 39. 6. 4. *Brink's Trustees* v. *Mechan* (1864) 1 Roscoe at p. 212.

[5] Voet, ibid.

[6] *Meyer* v. *Rudolph's Exors. ubi sup.*, pp. 84 ff. per Solomon J.A.; *Wiley* v. *The Master* [1926] C. P. D. at p. 103.

[7] Voet, 39. 6. 1; Voet adds: 'ac necesse videtur ut aliqua in donando mortalitatis aut redhibitionis mentio fiat.'

by a dying man necessarily a gift mortis causa.[1] It is a question of intention. In case of doubt the presumption is in favour of a gift inter vivos. If a man says 'I give after my death' without more, it is a gift inter vivos to take effect on death.[2]

A gift mortis causa may consist either in a promise to give accepted by the donee,[3] which, of course, leaves the property in the donor; or in actual delivery to the donee,[4] in which case the property passes subject either to (*a*) a suspensive condition, so that, actually, there is no vesting of ownership in the donee unless the gift remains unrevoked and the donee survives the donor; or, (*b*) a resolutive condition, so that the property revests in the donor if he revokes the gift or if the donee predeceases him.[5]

There is some difference of opinion in the books as to capacity to make a gift mortis causa. According to Voet it is a question of testamentary capacity, which qualifies a married woman and a minor;[6] according to Grotius neither of these is competent. It may be that the distinction turns upon the question whether the gift is merely promissory or purports to effect an alienation of property.[7]

A gift mortis causa is rendered inoperative:[8] (1) by express revocation; (2) cessante periculo, e.g. if the gift was made in contemplation of death from a particular illness, and the donor recovers; (3) if the donee predeceases the donor; (4) if the donor becomes insolvent. If there is not enough money in the estate to meet all

[1] Dig. 39. 6. 42. 1 (*in fine*) Papinianus: respondi . . . eum qui absolute donaret non tam mortis causa quam morientem donare.

[2] Voet 39. 5. 4; 39. 6. 2.

[3] *Komen's Exor.* v. *De Heer* (1908) 29 N. L. R. 487.

[4] Gr. 3. 2. 22.

[5] 'Under Justinian the reversion operated *ipso facto* and the thing could presumably be vindicated.' Buckland, p. 257.

[6] Voet, 39. 6. 5.

[7] Gr. 3. 2. 23. Sande, *Decis. Fris.* (2. 4. 4), agrees that a married woman is incapable; *contra*, Schorer *ad* Gr. loc. cit., and V. d. K. *Th.* 100, 'si rei donatae post mortem demum transferatur dominium'.

[8] Gr. 3. 2. 23; Voet, 39. 6. 7.

the gifts mortis causa they abate rateably like legacies, without regard to priority of creation.[1]

2. Sale.

2. **Sale.**[2] The Roman-Dutch Law on this subject is fundamentally Roman Law varied at some points by Dutch custom. In South Africa the law, which remains uncodified, has been influenced by English case-law. In Ceylon, Ordinance No. 11 of 1896 follows the English Sale of Goods Act, 1893.

When the contract of sale is complete.

The contract of sale is complete so soon as the parties are agreed as to the price;[3] i.e. so soon as the price is certain or readily ascertainable. In English Law, when no price is fixed, there is a presumption that the parties intended to contract for a reasonable price. In the Roman-Dutch Law such a contract would not, perhaps, satisfy the requirements of the definition of sale.[4] But this is a question of words. The Courts would give effect to it as an innominate contract or actionable pact.

When the property passes.

The property in things sold passes, as a rule, upon delivery. But: (*a*) if the sale is made subject to a suspensive condition the property does not pass until the condition is satisfied; and (*b*) where credit has not been given the property does not pass until payment of the purchase price.[5] Subject to some exceptions, the goods

[1] Voet, loc. cit.

[2] Emptio venditio—Koop ende Verkooping. Gr. lib. iii, cap. xiv; Van Leeuwen, lib. iv, cap. xvii; Voet, lib. xviii, tit. 1; V. d. L. 1. 15. 8; 3 Maasdorp, chaps 11–16; Wille & Millin, *Mercantile Law of South Africa* (6th ed. 1928), chap. 2; Morice, *Sale in Roman-Dutch Law*, (1919); Norman, *Purchase and Sale in South Africa* (1919); MacKeurtan, *The Sale of Goods in South Africa* (1921).

[3] Inst. 3. 23, pr.: Emptio et venditio contrahitur simul atque de pretio convenerit. Cf. Van Leeuwen, 4. 17. 1. The parties must also be at one as to the *res*. As to auction sales see *Marcus* v. *Stamper & Zoutendijk* [1910] A. D. 58; *Demerara Turf Club Ltd.* v. *Wight* [1918] A. C. 605, and *Neugebauer & Co.* v. *Hermann* [1923] A. D. 564.

[4] Gr. 3. 14. 1 and 23.

[5] Inst. 2. 1. 41; Gr. 2. 5. 14; Voet, 19. 1. 11. Consequently an unpaid vendor may follow up and reclaim the property in the hands of a third person (Van Leeuwen, 2. 7. 3; 4. 17. 3; *Laing* v. *S. A. Milling Co.* [1921] A. D. 387), even though the sale was not *expressed to be* for cash (V. d. K. *Th.* 203). He must assert his claim within a reasonable time. Groen. *ad* Gr. 2. 5. 14; V. d. L. 1. 7. 2;

are at the purchaser's risk from the moment when the contract is concluded.[1]

It is not an implied condition in the contract of sale that a vendor should make a good title to the thing sold. A man can contract to sell res aliena no less than res sua. But he is bound to give vacua possessio to the purchaser.[2] If he fails to do so, or if after delivery the purchaser is evicted by superior title, the vendor is liable in damages.[3] Warranty against eviction.

Except in the case of money and negotiable instruments, a vendor cannot, generally, give to an innocent purchaser a better title than his own. In Holland, a purchaser who had no notice of his vendor's defect of title might sometimes retain the goods against the true owner, unless the latter paid him the price which he had given for them.

Daniels v. *Cooper* (1880) 1 E. D. C. 174; *Sadie* v. *Standard Bk.* (1889) 7 S. C. 87; Mackeurtan, *Sale of Goods in S. A.*, p. 236.

[1] Inst. 3. 23. 3; Dig. 18. 6. 8, pr; Voet, 18. 6. 1; Gr. 3. 14. 34; V. d. K. *Th.* 639, *Horne* v. *Hutt* [1915] C. P. D. 331. Moyle, *Contract of Sale in the Civil Law*, p. 76. The risk passes when the emptio is 'perfecta'. If the sale is absolute and the res specifically determined and existing this coincides with the conclusion of the contract. In other cases 'the contract may be quite complete for the purpose of producing the obligations which ordinarily result from it, and yet not "perfect" for the purpose of transferring the risk from the vendor to the purchaser', e. g. suspensive condition. Ibid., p. 77. The right to the fruits and other accessories accompanies the risk. Gr. ibid. and 3. 15. 6; Van Leeuwen, 4. 17. 2. including rents accruing due under an existing lease. *De Kock* v. *Fincham* (1902) 19 S. C. 136; *Walker* v. *Wales* [1922] C. P. D. 49; *Kidney* v. *Garner* [1929] C. P. D. 163.

[2] *Lourenson* v. *Swart* [1928] C. P. D. 402. *Sauerlander* v. *Townsend* [1930] C. P. D. 55. If a vendor sells a res aliena sciens ignoranti, it is a fraud upon the purchaser, who may at once maintain an action ex empto without waiting for eviction. Dig. 19. 1. 30. 1; *Kleynhans Bros.* v. *Wessel's Trustee* [1927] A. D. at p. 290.

[3] In case of eviction the purchaser has the option to sue for damages or for the value of the thing sold, as on the day of sale. Gr. 3. 15. 4. In the absence of agreement, one who knowingly purchases a res aliena cannot even recover the price. V. d. K. *Th.* 641. If the vendor is in mora the purchaser may claim either the thing as it then is, together with profits and with compensation for depreciation, or alternatively damages for non-delivery. Gr. 3. 15. 6. There is no warranty against eviction if the vendor merely sold a thing or right for what it was worth (zoo goed ende quaet als 't is, zonder daer voor in te staen, 't welck men noemt met de voet stoten). Gr. 3. 14. 12. Even in this case the vendor must restore the price. Van Leeuwen, 4. 18. 2.

The principal case is sale in a 'free market'.[1] But this has no equivalent in the modern law.[2]

Warranty against defects.

The vendor is understood to warrant the purchaser against latent defects in the property sold.[3] Where the latent defect is of such a character that, had he known it, the purchaser would not have entered into the contract, he may rescind the sale and recover the purchase-money by the actio redhibitoria, together with interest on the purchase price from the date of payment and necessary expenses incurred in connexion with the sale, but not damages in respect of loss of profit.[4] If the defect would not have had this consequence, but would have reduced the purchase price, the purchaser may recover the excess in the actio quanti minoris.[5]

[1] Grotius, after stating the general rule that an owner may vindicate his property from a possessor who has given value for it, without making compensation (2. 3. 5), continues (sec. 6): 'Except when a person has bought a thing in good faith in a free market (op een vrije mart); for he is entitled to have refunded the sum which he declares on oath that the thing cost him, in case he does not know how to recover it from his vendor.' A free market was one which enjoyed special privileges, e.g. that those resorting to it were free from arrest for debt. Van Zutphen, *Nederlandtsche Practycke*, sub verbo *Vrye-Marckt;* Huber, *Heedendaegse Rechtsgeleertheyt*, 3. 3. 38; *Cape Law Journal*, vol. v (1888), p. 70. It was by no means the case that every public market was a free market.

[2] See Kotzé, Van Leeuwen, vol. ii, p. 130; Wessels, p. 507; Appendix E, *infra*, p. 426. The cases in which the question has been discussed are *Van der Merwe* v. *Webb* (1883) 3 E. D. C. 97; *Retief* v. *Hamerslach* (1884) 1 S. A. R. 171; *Kotzé* v. *Prins* (1903) 20 S.C. at p. 161; *Woodhead Plant & Co.* v. *Gunn* (1894) 11 S. C. 4.

[3] In the absence of contrary agreement (Van Leeuwen, 4. 18. 7), which would be another case of 'met den voet stooten', or 'voet stoots'; *Bosman Bros.* v. *Van Niekerk* [1928] C. P. D. 67.

[4] *Seggie* v. *Philip Bros.* [1915] C. P. D. 292; nor, as a rule, other consequential damages. *Erasmus* v. *Russell's Exor.* [1904] T. S. 365. *Secus*, if defendant knew of the defect. Ibid. It makes no difference that there is an express warranty. Ibid.; Mackeurtan, *Law of Sale of Goods in S. A.*, pp. 191–2. But see comment in *Marais* v. *Commercial General Agency Ltd.* [1922] T. P. D. at p. 445, and Prof. H. D. J. Brodenstein in *S. A. L. J.*, vol. xxxi (1914), p. 155. *Evans & Plows* v. *Willis & Co.* [1923] C. P. D. 496 seems to be in direct conflict with *Erasmus* v. *Russell's Exor.*

[5] Gr. 3. 15. 7; Van Leeuwen, 4. 18. 5; V. d. K. *Th.* 642; *Maennel* v. *Garage Continental Ltd.* [1910] A. D. 137. If the vendor knows of a defect and does not reveal it, he is liable to the purchaser for all damages arising from the defect; and if he has deceived the

In Holland, by general custom, the Court had a right of pre-emption over feuds; and, by local custom, relatives and others had a similar right over other immovable property. This right was called *naasting* or jus retractûs.[1] It has no equivalent in the modern law, but a right of pre-emption may, of course, be the subject of express stipulation (conventional retractus).[2]

3. Exchange. 3. **Exchange.**[3] The rules applicable to the contract of sale are in general applicable to the contract of exchange. In the Roman Law, exchange was a real contract, i.e. no obligation arose until one party had delivered property to the other. In the modern law, an agreement to exchange is actionable *per se*.[4] In the Roman Law the property exchanged must be res sua, not res aliena, and in this respect exchange differed from sale.[5] In the modern law, there seems no reason why, if you agree to give me the horse of Titius in exchange for my ox, you should not be bound by your agreement.

4. Hire. 4. **Hire.**[6] In the Roman Law, the contract locatio conductio has a wide extension. It covers not only the hire of things (*locatio conductio rei*), but also the hire of services (*locatio conductio operarum*), and the putting out of a piece of work on contract (*locatio conductio operis*).[7]

purchaser by representing the value of the property to be higher than was actually the case, the purchaser may bring an action for the return of the excess (Gr. 3. 15. 7 and 8). For laesio enormis see above, p. 239.

[1] Gr. lib. iii, cap. xvi; Van Leeuwen, lib. iv, cap. xix; Voet, 18. 3. 9 ff.; V. d. K. *Th.* 643 ff.

[2] 3 Maasdorp, p. 146; *Robinson* v. *Randfontein G. M. Co.* [1921] A. D. at p. 188; *Sher* v. *Allan* [1929] O. P. D. 137.

[3] Permutatio—Ruiling. Gr. 3. 31. 6; Voet, lib. xix, tit. 4; 3 Maasdorp, p. 371.

[4] *Worcester Municipality* v. *Colonial Govt.* (1909) 3 Buch. App. Cas. at p. 553. [5] Voet, 19. 4. 2.

[6] Locatio conductio—Huir ende Verhuiring. Gr. lib. iii, cap. xix; Van Leeuwen, lib. iv, capp. xxi–xxii; Voet, lib. xix, tit. 2; V. d. L. 1. 15. 11; 3 Maasdorp, chaps. 17–21; Wille & Millin, chap. 3; Wille, *Landlord and Tenant in South Africa* (2nd ed., 1927). The lease (so-called) of mineral rights in the form usual in S. A. is a contract *sui generis*. *Edwards* (*Waaikraal*) *G. M. Co.* v. *Mamogale* [1927] T. P. D. 288.

[7] Buckland, *Text-book*, p. 502. 'It differs from the last case

Under the first head are included the hire of movables, such as a horse or carriage, and the hire of land, or what is nowadays commonly known as a lease. The term 'hire of services' covers contracts between master and servant, and all other contracts of employment for reward. In the modern law, it includes also contracts for professional services, which, having originally been in theory, if not in fact, honorary in character, were referred by the Roman Law to the head not of hire, but of mandate.[1]

In the Roman-Dutch Law the rules relating to the hire of movables and the hire of services correspond closely with the Roman Law, and need not detain us.

Hire of land:

The contract of hire of land calls for separate treatment. The rules which we shall state with regard to it are in many respects applicable to the hire of movables as well.

in relation to the law of property;

In an earlier chapter we have considered the hire of land in relation to the law of property, and have inquired how far a lease creates a right in rem.[2]

as regards form.

As regards form, we have seen that sometimes, to produce this result, the lease must be effected by a judicial act or by a notarial deed duly registered, and that the law of some of the provinces or colonies requires that leases for shorter periods should be in writing.[3]

Landlord's lien.

The landlord's lien has been mentioned in the chapter on Mortgage or Hypothec.[4]

Hire of land in relation to the law of contract.

In its more purely contractual aspect, the contract of hire of land (*lease*) involves the consideration of the rights and duties which, in the absence of contrary agreement, the law confers and imposes upon lessor and lessee, the rights of the one being the counterpart of the duties of the other.

Duties of lessor.

The duties of the lessor[5] are: (1) to deliver the subject of the lease to the lessee;[6] (2) after delivery to abstain

in that here what was contemplated was not services but a completed piece of work, a house to be built,' &c. Ibid.

[1] Girard, p. 607. [2] *Supra*, pp. 161–4. [3] Ibid. [4] *Supra*, p. 191.
[5] 3 Maasdorp, p. 216. [6] Voet, 19. 2. 26; V. d. L. 1. 15. 12.

from interfering with the lessee's occupation and enjoyment, and to guarantee him against justifiable interference by others;[1] (3) to place and maintain the subject of the lease (if it admits of it) in such a state of repair that it may be conveniently used by the lessee;[2] (4) to see that the subject of the lease is free from such defects as will prevent its being properly and beneficially used for the purpose for which it was leased;[3] (5) to pay all taxes imposed upon the property.[4]

Duties of lessee.

The duties of the lessee[5] are: (1) to pay the agreed rent in terms of the contract;[6] (2) to take proper care of the property leased—thus, not to injure or destroy it;[7] (3) not to use it for any other purpose than that for which it was leased;[8] (4) to retain the leased property until the lease expires;[9] (5) to restore it to the lessor in a proper state of repair on the expiry of the lease.[10]

[1] V. d. L. ibid.; Wille, *Landlord & Tenant*, p. 136.

[2] Gr. 3. 19. 12; Voet, 19. 2. 14; V. d. L. *ubi sup.* *Poynton* v. *Cran* [1910] A. D. 205; *Henning* v. *Le Roux* [1921] C. P. D. 587; *Cape Town Munic.* v. *Paine* [1923] A. D. at p. 218; *Amin* v. *Ebrahim* [1926] N. P. D. 1. But there is no duty to rebuild in case of destruction, e.g. by fire. Windscheid, vol. ii, p. 677, § 400 (*in notis*). Certain minor repairs fall on the tenant. *Bresky* v. *Vivier* [1928] C. P. D. 202. *Vid. inf.* n. 10.

[3] *Hannay* v. *Parfitt* [1927] T. P. D. 111. If the lessor neither knew nor ought to have known of the defect he will not be liable in damages, but the lessee may claim remission of rent. Voet, 19. 2. 14 *in fin.* In other cases he is liable in damages. Gr. 3. 19. 12; 3 Maasdorp, p. 221.

[4] Gr. 3. 19. 15; Van Leeuwen, 4. 21. 5.

[5] 3 Maasdorp, p. 222.

[6] Voet, 19. 2. 22. Strictly speaking, where no rent is agreed there is no contract of letting and hiring, but the owner of the property is entitled to compensation for 'use and occupation'. *Murphy* v. *London & S. A. Exploration Co.* (1887) 5 S. C. 259; Pereira, p. 667. Cf. Voet, 19. 2. 7 (*ad fin.*).

[7] Gr. 3. 19. 11; Voet, 19. 2. 29. He may not (e.g.) convert pasture into arable land, Van Leeuwen, 4. 21. 4; V. d. K. *Th.* 680 (mistranslated by Lorenz).

[8] V. d. L. *ubi sup.*

[9] Gr. 3. 19. 11 (*in fin.*).

[10] Voet, 19. 2. 32. This is a corollary of (2). Apart from minor cases of disrepair, 'such as customarily occur through the fault of the tenants, or their families, and which do not arise from the age or bad quality of the deteriorated articles' (*Bresky* v. *Vivier* [1928] C. P. D. 202), the lessee will not be answerable, unless the disrepair is shown to be the result of his wrongful act or negligence. *A. B. Reid & Co.* v. *Federal Supply & Cold Storage Co.* (1907) 24 S.C. 102.

Tacit relocation.

If the lessee remains in possession after expiry of the lease, without objection on the part of the lessor, there is held to be a renewal of the lease for a period, which varies with the terms of the original hiring and other circumstances (tacit relocation).[1] In the case of a yearly tenancy of a rustic tenement the renewal will usually be for a year.[2] As regards urban tenements: 'In the Cape Province . . . it has been repeatedly held that where the original lease provides for a monthly rent, the relocation becomes a monthly tenancy terminable on a month's notice, whether the original lease was for a year, three years, six years, or some other period.'[3]

When lessee may claim remission of rent.

The lessee may in certain cases claim a reduction or remission of rent. These are: (1) if the lessor fails to deliver the whole of the property agreed to be leased;[4] (2) if the lessee is evicted,[5] or if his use or enjoyment is interfered with, either by the lessor or by some third person in the exercise of a legal right;[6] (3) if the lessor

If the lessee has covenanted to repair, 'the ordinary rule is . . . that the buildings must be left in the state of repair in which they were delivered to the lessee. *De Beers Consolidated Mines* v. *London & S. A. Exploration Co.* (1893) 10 S. C. at p. 373; *Poynton* v. *Cran* [1910] A. D. at p. 238.

[1] Voet, 19. 2. 9; *Tiopaizi* v. *Bulawago Munic.* [1923] A. D. at p. 325; *Tshabalala* v. *Van der Merwe* [1926] N. P. D. at p. 79.

[2] *Semble*, Gr. 3. 19. 8; Voet, 19. 2. 10; *Japhtha* v. *Mill's Exors.* [1910] E. D. C. at p. 155.

[3] Wille, p. 48. The cases do not afford much guidance. There seems to be some tendency to make the rent-period determine the period of tacit renewal. Ibid.

[4] Voet, 19. 2. 26. The same principle applies to the hire of services. An employee who fails owing to illness to render the full service which he has undertaken to perform can recover the agreed salary only *pro rata parte*. There is some mitigation of this rule in favour of domestic servants. Voet, 19. 2. 27; *Boyd* v. *Stuttaford* [1910] A. D. 101.

[5] Voet, 19. 2. 26.

[6] Voet (19. 2. 23) gives as an instance the case of the lessor alienating the property before the lease has expired. But this would only hold at the present day in cases in which koop gaat voor huur (V. d. L. 1. 15. 12). Another case is—si non commodus sit praestitus rei usus—e.g. if a lessee's lights are wholly obscured by a neighbour (Voet, 19. 2. 23); but slight interference does not entitle the lessee to relief. Dig. 19. 2. 27, pr.; Voet, 19. 2. 18. It may be necessary for the lessor to deprive the lessee of possession for the purpose of effecting repairs. The lessee while so out of possession

fails to keep in repair;[1] (4) if the lessor fails to see that the thing leased is free from defects;[2] (5) if the property leased has been destroyed completely,[3] or to such an extent as to be useless for the purpose for which it was let; (6) if the lessee is disturbed in his possession by hostile attack or other just cause of fear;[4] (7) if there has been an extraordinary failure of crops, due to tempest or the like, or to interference with cultivation, by fire, flood, or foe.[5]

Most of these grounds of remission rest upon the broad principle that the duties of lessee and lessor are reciprocal. If the latter fails in his duty the former need not pay his rent. But for the last two grounds of remission the lessor is no more to blame than the lessee. Accordingly in the Cape Province the General Law Amendment Act, No. 8 of 1879, provides (sec. 7) that the rent accruing under a lease shall not 'be incapable of being recovered on the ground that the property leased has, through inundation, tempest, or such like unavoidable misfortune, produced nothing (or on the ground that the lessor himself has absolute need of the land)'.[6] By judicial interpretation the phrase 'unavoidable misfortune' has been extended to acts of war.[7]

State of the law in the Cape Province.

In the Roman Law a lessee was entitled to compensation

Compensation for

pays no rent. Voet, 19. 2. 16; *Shapiro* v. *Yutar* [1930] C. P. D. 92; unless he entered into the lease with knowledge of the circumstances rendering repairs necessary. *Larkin* v. *Jacobs* [1929] T. P. D. 693; *Orsmond* v. *Van Heerden* (1930) T. P. D. 16 P. H. A. 64. See below, p. 285, n. 6.

[1] Gr. 3. 19. 12; Voet, 19. 2. 23.

[2] Dig. 19. 2. 19. 1; Voet, 19. 2. 14. (*ad fin.*).

[3] Dig. 9. 2. 9. 1; V. d. L. 1. 15. 12.

[4] Such as ghosts—spectra in aedibus dominantia; or if the house becomes ruinous or dangerous. Voet, 19. 2. 23.

[5] Gr. 3. 19. 12; Van Leeuwen, 4. 40. 7; Voet, 19. 2. 24–5. May the lessor require the lessee to set off extraordinary gain in one year against extraordinary loss in another (sec. 24)? What is extraordinary loss (sec. 25)?

[6] See below, p. 312, n. 9.

[7] 3 Maasdorp, p. 225. The corresponding clause in O. R. C. Ord. No. 5 of 1902, sec. 5, before the words 'through inundation' inserts the words 'through war or insurrection or'. For Ceylon see *Wijesiriwardene* v. *Gunasekera* (1917) 20 N. L. R. 92.

improvements.

for necessary and useful expenses,[1] being in this respect assimilated to the bona fide possessor.[2] Grotius, following the Roman Law, makes no distinction between the two cases.[3] But, after his time, a Placaat of September 26, 1658, contained provisions very inimical to lessees.[4] By this enactment a lessee is entitled to compensation for structures (*getimmer*) annexed to the land with the lessor's consent, and for ploughing, tilling, sowing, and seed-corn.[5] His claim to compensation, after vacating possession, is enforceable by action and is secured by a statutory hypothec upon the land. He has no right to retain possession until his claim is satisfied.[6]

Compensation is assessed on a singularly ungenerous scale. The law provides that 'account shall be taken only of the bare materials, without sand, lime, and workmen's wages, such as they shall actually be worth at the time of the said assessment, just as if they were removed from the ground'.[7] In other words, the lessee gets what the materials would be worth to a housebreaker after destruction and removal.

If the structure was erected without the landlord's consent the lessee is entitled to no compensation whatever.

In either case he may remove the structure, which he has set up, before, but not after, the determination of the lease.[8] This is limited to cases in which removal can be

[1] Dig. 19. 2. 55. 1. [2] See Appendix J, p. 443. [3] Gr. 2. 10. 8.

[4] *Placaet van de Staten van Hollandt tegens de Pachters ende Bruyckers van de Landen* (2 G. P. B. 2515), re-enacted by Placaat of Febuary 24, 1696 (4 G. P. B. 465).

[5] Placaat, art. 10. Though the text of the Placaat speaks of 'structure', an agricultural tenant's right to compensation is not confined to structures in the nature of buildings, but extends to other structures or improvements, as wire fences, bridges, dams, &c. *Von Holdt* v. *Brewer* [1918] C. P. D. 163.

[6] Placaat, arts. 10 and 11.

[7] Placaat, art. 11; *De Beers Consolidated Mines* v. *The London & S. A. Exploration Co.* (1893) 10 S. C. at p. 368; *Steinbach* v. *Schmidt* (1930) S. W. A. 16 P. H. A. 68.

[8] The tenant's right of removal extends to all fixtures annexed to the land with or without the landlord's consent, not being necessary improvements. *De Beers Consolidated Mines* v. *London and South African Exploration Co.* [1893] 10 S. C. at pp. 370, 373.

effected without serious injury to the premises,[1] and subject to the duty of restoring them to their original condition.[2] When it is said that the right of removal cannot be exercised after the determination of the lease this must be understood of fixtures which have become immovable by annexation to the soil. If they remain movable, they may be removed before or after the determination of the tenancy.[3]

The above considerations do not apply to necessary improvements, as to which the Placaat is silent.[4] In this case the Common Law applies and the lessee is entitled to compensation on the same basis as a bona fide possessor, and has, perhaps, a right of retention, but no right of removal.

The weight of judicial opinion is in favour of the view that the provisions of the Placaat are to be taken to apply to houses as well as to agricultural property.[5]

Compensation for trees planted by lessee.

The lessee is not entitled to compensation for trees planted by him, unless he can prove that he planted them at the lessor's instance (*last ende bevel*), and even in that case is only entitled to recover the cost of the trees at the time of planting.[6] He may not, in general, remove such trees during the continuance of the lease.[7]

Has the landlord the option to retain them, paying compensation? Windscheid, vol. ii, p. 679, § 400.

[1] *De Beers Consolidated, &c.*, loc. cit. [2] Cf. Dig. 19. 2. 19. 4.

[3] *Abrahams* v. *Isaacs & Co.* (1887) 5 S. C. 183; *M'Intyre* v. *Johnston* (1895) 2 Off. Rep. 202; Wille, p. 264.

[4] But . . . 'there is ample authority for holding that compensation must be paid for such improvements, whether made by a possessor or lessee, in the same way as if such possessor or lessee had acted as *negotiorum gestor*' (*De Beers Consolidated Mines* v. *The London & South African Exploration Co.* per de Villiers C.J. at p. 369). It seems that in this case compensation is due whether the improvements were made with or without the landlord's consent.

[5] *De Beers Consolidated Mines* v. *London & S. A. Exploration Co.* (1893) 10. S. C. 359, affirmed in appeal to P. C. (1895) 12 S. C. 107 [1895] A. C. 451; *Rubin* v. *Botha* [1911] A. D. at p. 579 (per Innes J.); contra, *Burrows* v. *McEvoy* [1921] C. P. D. at p. 234 per Kotzé J.P.

[6] Placaat, art. 13; *Oosthuizen* v. *Oosthuizen's Est.* [1903] T. S. at pp. 692–3.

[7] 'The enactment is silent as to the removal of trees before the

Assignment and sub-lease.

The interests of the lessor and lessee respectively are assignable by act of party.[1] The effect of assignment by a lessee is to substitute the assignee (*cessionary*) in the place of the original lessee, who thereupon ceases to be bound or entitled under the contract.[2] A sub-lease has no such effect. It is a contract whereby the original lessee lets the property to a third party for the whole or for a part of the unexpired term of the original lease. As between lessee and sub-lessee there is a cession of the lessee's rights of use and enjoyment; but the lessee does not cease to be liable to the lessor,[3] nor does the sub-lessee become liable to, or acquire any rights against, the lessor. As between lessor and sub-lessee there is no privity of contract.[4]

Is the consent of the lessor necessary

Since, then, assignment has the effect of discharging the original lessee from his liabilities under the lease, it is in accordance with principle to hold that it can only

expiration of the lease, but I take it that the civil law principle would apply that the trees having derived their chief nourishment from the soil belong absolutely to the owner of the soil.' *De Beers Co.* at p. 369 per De Villiers C.J. But this does not cover the case of *silva caedua*, which sprouts anew from the roots, such as blue gum trees, *Houghton Est.* v. *McHattie & Barrett* (1894) 1 Off. Rep. 103; unless planted for ornament, *Brice* v. *Zurcher* [1908] T. S. 1082; and in *Burrows* v. *McEvoy*, *ubi sup.*, Kotzé J.P. held that the lessee of an urban tenement may during his tenancy and on its determination, but not after, remove garden flowers and vegetables. By Art. 14 of the Placaat, fruit trees and timber trees (vruchtbare Boomen ofte opgaende Hout) are not to be lopped or cut down without the landlord's written consent (*opgaende hout*, hoc est arbores procerae. Christenaeus, *ad legg. Mechl.*, xv. 4. 8). Van der Keessel says in general terms (*Th.* 215): Plantatae in fundo conducto arbores solo cedunt nec earum pretium dominus qui plantari non jussit restituit.

[1] If the lessor assigns, the lessee must pay the rent to the assignee even though he may have paid the lessor in advance. Voet, 19. 2. 19.

[2] *Reeders & Wepener* v. *Johannesburg Town Council* [1907] T. S. at pp. 652, 654; *Jassat* v. *Lewis* [1924] T. P. D. 11. The term 'assignment' is an importation from English Law, which seems to have established itself in South African usage. Wille, p. 102. The word 'cession' is used in the same sense.

[3] *Dunman* v. *Trautman* (1891) 9 S. C. at p. 17 per de Villiers C.J.

[4] Voet, 19. 2. 21; *Green* v. *Griffiths* (1886) 4 S. C. 351; Wille, pp. 102–3.

take place with the landlord's consent, and that this is equally the case whether the subject-matter of the lease is a house or land (urban or rural property). The law of South Africa may now be taken to be settled in this sense.[1] in case of assignment,

Different considerations apply to a sub-lease. The right to sublet may be restricted by covenant, but in the absence of such agreement the lessee of a praedium urbanum is free to sublet without the consent of the lessor. Whether the lessee of a praedium rusticum may do the same has long been a vexed question. The Courts of Cape Colony have held consent to be necessary.[2] The Courts of the Transvaal have held it to be unnecessary.[3] or sub-lease?

[1] *Rolfes, Nebel & Co.* v. *Zweigenhaft* [1903] T. S. 185; *Hattingh* v. *Venter* [1924] O. P. D. 34; Wille, pp. 103–4.

[2] *De Vries* v. *Alexander* (1880) Foord 43; *Friedlander* v. *Croxford* (1867) 5 S. 395; *Du Preez* v. *Mkwambi* [1929] E. D. L. at p. 92. The law is the same (*semble*) in O. F. S. (*Cullinan* v. *Pistorius* [1903] O. R. C. 33).

[3] *Eckhardt* v. *Nolte* (1885) 2 S. A. R. 48. Grotius (3. 19. 10) says in general terms that a hirer may let the subject of the hire to another person in the absence of agreement to the contrary, but in the case of houses, he adds, this is usually forbidden by the *keuren* of the towns to be done without the landlord's consent. Voet (19. 2. 5), on the other hand, says that consent is necessary for the sub-location of lands, citing as authority the Placaat of Charles V of January 22, 1515 (1 G. P. B. 363), and Pol. Ord. of April 1, 1580, Art. 30 (1 G. P. B. 337). In the case of houses, he says, the landlord must be offered the opportunity of taking the house himself. Van der Keessel (*Th.* 674) says that a sub-location is valid *ex jure communi*, but not of lands without the written consent of the landlord, and bases this last proposition on Art. 9 of the Placaat of September 26, 1658 (2 G. P. B. 2515), re-enacted by Placaat of February 24, 1696 (4 G. P. B. 465). Van Leeuwen (4. 21. 4 and *Cens. For.* 1. 4. 22. 9) agrees with Grotius. It seems doubtful whether the enactments cited by Voet and Van der Keessel have the effect which they attribute to them. The conflict of opinions amongst the jurists is reflected in the decisions of the South African Courts; and besides the question of the interpretation of the Placaats there is (or was) the further doubt whether they form part of the law of South Africa. See on the one side, *De Vries* v. *Alexander* (*ubi sup.*); on the other, *Eckhardt* v. *Nolte* (*ubi sup.*). See also Kotzé, Van Leeuwen, vol, ii, p. 629.

There is a somewhat ill-defined rule that a lessor may object to a sub-location which he deems to be prejudicial to his interest, e.g. if the sub-lessee is likely to use the premises in a way unsatisfactory to him. Voet, 19. 2. 5: Si conductor secundus ejus conditionis sit ut magis utendo nociturus sit rebus conductis quam

How the contract of hire is determined.

The contract of letting and hiring is determined: (1) by expiration of the term fixed or implied for its duration,[1] but in the case of a lease at will by a declaration of intention by, or by the death of, either party;[2] (2) by the determination of the lessor's interest,[3] e.g. if he is merely a usufructuary[4] or fiduciary; (3) by the insolvency of the lessor[5] or of the lessee; (4) by destruction of the subject-matter;[6] (5) by merger of the titles of lessor and lessee in one person;[6] (6) by mutual agreement; (7) by renunciation by either party for just cause. A just cause exists if the conduct of either party amounts to a repudiation by him of his duties under the contract. Such would be an entire failure to keep in repair by the party liable for repairs,[7] or, on the part of the lessee,[8] acts of waste, or a contumacious refusal of rent.[9] It is safer,

primus aut aliis usibus rem locatam destinaturus. But why cannot the lessor, if he apprehends anything of the kind, protect himself by express stipulation? Consult on the whole subject Wille, *Landlord and Tenant in South Africa*, chap. viii, *Subletting and Assignment of Leases;* Morice, *English and Roman-Dutch Law*, p. 172.

[1] V. d. L. *ubi sup.*

[2] Gr. 3. 19. 9; Voet, 19. 2. 9.

[3] In this and such other cases, however, the lessee must have a reasonable time to turn round. He must not be bundled out 'velut Jovis ignibus ictus'. Voet. 19. 2. 18.

[4] Voet, 19. 2. 17.

[5] V. d. K. *Th.* 676. In S. A. a lease is not determined by the lessor's insolvency. If the lessee becomes insolvent, the trustee may determine the lease by notice in writing. Insolvency Act, No. 32 of 1916, see 36.

[6] V. d. L. *ubi sup; Grootchwaing Salt Works Ltd.* v. *Van Tonder* [1920] A. D. 492.

[7] Gr. 3. 19. 12; *Bliden* v. *Carasov* [1927] C. P. D. 2. If it is necessary to rebuild or repair the house the lessor may resume and retain possession for the purpose. Meanwhile the lessee pays no rent. Van Leeuwen, 4. 21. 7, and Decker, ad loc.

[8] Voet, 19. 2. 16; i.e. of a serious character. Voet, 19. 2. 18.

[9] Grotius (3. 19. 11) and Decker *ad* Van Leeuwen, *ubi sup.*, say, 'if the rent is more than two years in arrear'. Cf. Dig. 19. 2. 54. 1; and lex 56; but see *Solomon* v. *Van Zijl* (1908) 25 S. C. 974. In the Roman and Dutch Law a lessor might also resume the property in case of pressing need, if he showed that it was necessary for his own use. Cod. 4. 65. 3; Gr. 3. 19. 11 (*ad fin.*); Van Leeuwen, 4. 21. 7; Voet, 19. 2. 16. Van der Keessel (*Th.* 675) doubts. In any event this is no longer law in the Cape Province since the General Law Amendment Act of 1879, sec. 7, nor in the O. F. S., *supra*, p. 312.

however, instead of leaving the law to determine whether a cause of forfeiture has occurred, to provide for the event by express agreement.[1] But in no case may the lessor (or any other person who wishes to eject the lessee) take the matter into his own hands. He must apply to the Court to declare the lease forfeited, and to replace him in possession.[2] It has been held that a South African Court has no equitable jurisdiction to relieve against a cancellation stipulated for in the lease, but it will be guided by considerations of equity in determining whether a breach entitling a party to cancellation has or has not in fact been committed.[3]

No relief against forfeiture.

5. **Mandate or Agency.**[4] The Roman-Dutch writers reflect the inadequate treatment of agency met with in the Roman Law and typified in the fact that the word 'mandate' points principally to the relation between principal and agent, i.e. between employer and employed, while the word 'agency' points rather to the juristic relation established by the agent between his principal and third parties.[5] In this state of things, in all jurisdictions where the Roman-Dutch law is administered at the present day, the English law of agency has been substantially adopted and followed.[6] Such differences as

5. Mandate or agency.

[1] See, e.g. Voet, 19. 2. 5 (clause for forfeiture in the event of subletting without leave). But forfeiture may be enforced even in the absence of such clause in case of breach of covenant not to sublet or assign without the previous consent in writing of the lessor. *Abdulla & Co.* v. *Kramer Bros.* [1928] C. P. D. 423.

[2] Voet, 19. 2. 18.

[3] *Human* v. *Rieseberg* [1922] T. P. D. 157; *Gluckman* v. *Goodworths Ltd.* [1928] E. D. L. 95; *G. A. Fichardt Ltd.* v. *Brand* [1928] O. P. D. 56.

[4] Mandatum—Lastgeving. Gr. lib. iii, cap. xii; Van Leeuwen, lib. iv, cap. xxvi; Voet, lib. xvii, tit. 1; V. d. L. 1. 15. 14; 3 Maasdorp, chaps. 23–5; Wille & Millin, chap. 9.

[5] The Roman-Dutch Law, however, was tending to or had reached the same result as the English Law. For some remarks on the historical development of the law of agency see *Blower* v. *Van Noorden* [1909] T. S. 890. The same case considers and adopts the action for the breach of an implied warranty of authority (*Collen* v. *Wright*, (1857) 8 E. & B. 647; Anson, p. 426). See V. d. K. *Th.* 478 and 572.

[6] In Ceylon Ord. No. 22 of 1866 introduces the English law of

exist between the two systems belong to the theory of contract in general or are matter of detail, upon which we have not space to enter.

6. Partnership.

6. **Partnership.**[1] In Ceylon the English law of partnership for the time being in force has been introduced by statute.[2] In South Africa the law of partnership depends partly on the Roman-Dutch common law, partly on statute. But it is very far from being the case that the partnership law of South Africa differs entirely from the partnership law of England. 'Developed from a common source, viz. the mercantile custom of Europe, the two systems exhibit a great similarity, together with some notable differences. Further, the influence of English case law has tended towards assimilation. . . . Whatever theoretical differences may be found to exist between the Roman-Dutch and English systems, the South African Courts have been guided and will continue to be guided by the analogies of English Law. This is natural. The commercial conditions of to-day are not what they were one or two centuries back. The English rules have stood the test of practice, while much of the Roman-Dutch Law on this subject is purely theoretical. The channel of 'reception' for the English Law is mercantile custom, which in the matter of partnership is much the same in South Africa as in England.'[3]

Comparison of English and Roman-Dutch partnership law.

principals and agents for the time being in force. Ord. no 7 of 1840, sec. 21, requires writing and signature of the party for establishing a partnership when the capital exceeds £100. *Pate* v. *Pate* [1915] A. C. 1100.

[1] Societas — Societeit — Compagnieschap — Maetschap — Vennoodschap. Gr. lib. iii, cap. xxi; Van Leeuwen, lib. iv, cap. xxiii; Voet, lib. xvii, tit. 2; V. d. K. *Th.* 698 ff.; V. d. L. 4. 1. 11; 3 Maasdorp, chap. 26–8; Wille & Millin, chap. 8. The essentials of a partnership are considered in *Joubert* v. *Tarry & Co.* [1915] T.P.D. 277 and *Wulfsohn* v. *Taylor* [1928] T. P. D. 99. A colonus partiarius is not a partner, *Blumberg & Sulski* v. *Brown & Freitas* [1922] T. P. D. 130; *Cassels* v. *Love* [1924] E. D. L. 128; but a lessee. *Du Preez* v. *Steenkamp* [1926] T. P. D. 362.

[2] Ord. No. 22 of 1866.

[3] *The Commercial Laws of the World* (*South Africa*), vol. xv, part ii, pp. 84–5. In an early Ceylon case, *Boyd* v. *Stables* (1821) Ramanathan, 1820–33, at p. 21, Giffard C.J. observed upon the

The law of South Africa recognizes various kinds of partnerships, in addition to joint-stock companies, which are regulated by special statutes and do not fall within the scope of this chapter.[1] Partnerships proper are either ordinary or extraordinary. The law of ordinary partnerships corresponds in most particulars with the law of England. The principal difference consists in the fact that in English Law the liability of partners for partnership debts is joint, while in Roman-Dutch Law it is joint and several.[2] But in South Africa, as in England, actions arising out of partnership transactions must be directed against the firm, not against individual partners, and all the partners must, as a rule, be joined as defendants.[3]

Kinds of partnership in South Africa: (*a*) Ordinary;

Extraordinary partnerships are either: (*a*) anonymous partnerships; or (*b*) partnerships *en commandite*;[4] or (*c*) (in the Cape Province) statutory limited partnerships created by Act 24 of 1861. The common element in all three cases is that certain non-active partners incur a limited liability, or no liability at all, to creditors of the firm. In the last two cases, but not in the first, the liability to active co-partners is limited to the amount agreed upon. In the first case it is unlimited.[5] But a dormant partner may not, any more than a declared partner, compete with the creditors of the firm in respect of debts due to him from the other partners.[6]

(*b*) Extraordinary.

7 & 8. **Loan for Consumption**[7]**—Loan for Use.**[8] All this is Roman Law. Some matters connected with money-

7, 8. Loan for consumption

affinity of the commercial law of England with that of Holland, and added: 'We look upon every decision of the Courts of Westminster upon commercial subjects as a commentary upon the Dutch Commercial Law, the law which we are bound to observe.'

[1] See the Companies Act (no. 46 of) 1926; Wille & Millin, chap. 13. Ceylon follows the English law. *Supra*, p. 23.

[2] V. d. K. *Th.* 703.

[3] *Commercial Laws of the World*, vol. xv, *ubi sup.*; Morice, 2nd ed., p. 199. [4] V. d. K. *Th.* 704. [5] Morice, p. 193.

[6] *Watermeyer* v. *Kerdel's Trustees* (1834) 3 Menz. 424; *Sellar Bros.* v. *Clark* (1893) 10 S. C. 168.

[7] Mutuum—Verbruickleening. Gr. lib. iii, cap. x; Van Leeuwen, lib. iv, cap. vi; V. d. L. 1. 15. 2; 3 Maasdorp, chap. 10.

[8] Commodatum—Bruickleening. Gr. lib. iii, cap. ix; Van

—Loan for use.

loans and the permitted rate of interest have been considered above in the chapter on Operation of Contract.[1]

9. Deposit.

9. **Deposit.**[2] This too is essentially Roman Law. But the double penalty in case of depositum miserabile is no longer in use.[3] A so-called deposit with a bank is not deposit but loan.[4]

10. Pledge.

10. **Pledge.**[5] The contract of pledge, which defines the personal relations between pledgor and pledgee, is governed by the rules of Roman Law. The real rights created by pledge have been discussed in Book II.[6]

11. Suretyship or guarantee.

11. **Suretyship or Guarantee.**[7] A contract of suretyship is a contract whereby one person undertakes a secondary

Leeuwen, lib. iv, cap. x; Voet, lib. xiii, tit. 6; V. d. L. 1. 15. 4; *Doubell* v. *Tipper* (1892) 11 S. C. 23; *Gonstana* v. *Ludidi Duna* (1894) 7 E. D. C. 60; *Enslin* v. *Meyer* [1925] O. P. D. 125; 3 Maasdorp, chap. 9.

[1] *Supra*, p. 264. The S. C. Macedonianum of the reign of Vespasian forbade loans of money to filiifamilias. It did not avoid the loan *ipso jure*, but might be pleaded by way of exception. The f.f. might renounce the benefit of the S. C. after full age. It has been doubted whether, and how far, the S. C. has place in the modern law. It is, of course, not applicable to a f.f. of full age. But in case of minority there is a general inclination to hold that it may sometimes be usefully pleaded. Groenewegen, *de leg. abr. ad* Cod. lib. iv, tit. 28, says: Quum ne hodie quidem filii minorennes sui juris sint, in iis S. C. etiam moribus nostris obtinere nullus dubito. See also Voet, 14. 6. 5 (*ad fin.*); and *Compendium*, 14. 6. 5; *Cens. For.* 1. 4. 3. 12; V. d. K. *Th.* 475, and *Dictat. ad* Gr. 3. 1. 26.

[2] Depositum—Bewaergeving. Gr. lib. iii, cap. vii; Van Leeuwen, lib. iv, cap. xi; V. d. L. 1. 15. 5; *Sakazi* v. *Gurr* [1906] T. S. 303; *Rama Narotam* v. *Natha Dullabh* [1914] N. P. D. 227; 3 Maasdorp, chap. 8. Depositum sequestre and consignation (*supra*, p. 279) are varieties of deposit. Gr. 3. 7. 12; V. d. L. 1. 15. 6, loc. cit.

[3] Groen. *de leg. abr. ad* Dig. 16. 3. 1; Voet, 16. 3. 11.

[4] Dig. 42. 5. 24. 2: Aliud est enim credere, aliud deponere. Cf. Voet, 20. 4. 14; 46. 2. 5. These passages speak expressly of a deposit with a bank which bears interest. But (*semble*) in the modern law if the money is to be used by the bank the contract is in every case a mere loan. 3 Maasdorp, p. 110.

[5] Pignus—Pandgeving ofte Verzetting—Onderzetting. Gr. lib. iii, cap. viii; Van Leeuwen, lib. iv, cap. xii; Voet, lib. xiii, tit. 7; V. d. L. 1. 15. 7; 2 Maasdorp, chap. 29; Wille & Millin, chap. 5; Wille, *Mortgage and Pledge in S. A.*

[6] *Supra*, pp. 187 ff.

[7] Fidejussio—Borgtogt. Gr. lib. iii, cap. iii; Van Leeuwen, lib. iv, cap. iv; Voet, lib. xlvi, tit. 1; V. d. L. 1. 14. 10; 3 Maasdorp, chaps. 30–2; Wille & Millin, chap. 7.

or collateral liability for the debt[1] or delict[2] of another person who is primarily liable. The principal debt may be civil or natural, but must not be void or illegal.[3] Any male person capable of contracting may conclude a contract of suretyship.[4] But by the well-known enactments, Senatus-Consultum Velleianum[5] and Authentica si qua mulier,[6] women are prohibited from binding themselves as sureties, and, in particular, married women are prohibited from binding themselves as sureties for loans of money to their husbands. The policy of the law extends to the case of a woman binding herself as principal debtor for another or taking another's debt upon her as her own.[7] The effect of these laws is so far-reaching that money paid by a woman under a contract of suretyship may be recovered back if she was ignorant of the benefit conferred by them,[8] and even sub-sureties, i.e. persons who have bound themselves as sureties for the female surety, may plead them as a defence.[9] There are, however, some exceptions to the rule of non-liability. These are principally the following: (1) if the woman has acted fraudulently, and in particular if she has professed herself to be a co-principal debtor;[10] (2) if she has benefited by the principal contract,[11] or if she has gone surety for her creditor;[12] (3) if, after the lapse of two years, she has confirmed her suretyship by a new agreement;[13] (4) if, being a public trader, she has become surety in relation

Special rules as to women sureties.

Cases excepted from their operation.

[1] Gr. 3. 3. 12. [2] Gr. 3. 3. 21; Voet, 46. 1. 7.

[3] Gr. 3. 3. 22; Voet, 46. 1. 10–11.

[4] Even minors with the authority of their guardians. Voet, 46. 1. 5.

[5] Passed in the consulship of Marcus Silanus and Velleius Tutor (A. D. 46). Dig. 16. 1. 2, pr. and 1; Van Leeuwen, 4. 4. 2; see Kotzé, vol. ii, p. 616.

[6] Nov. 134, c. 8 (A. D. 556).

[7] Van Leeuwen, *ubi sup.*; i.e. it includes both cumulative *intercessio* and privative *intercessio*. Buckland, Text-book, p. 444.

[8] Voet, 16. 1. 12. [9] Voet, 16. 1. 2.

[10] Gr. 3. 3. 15; Voet, 16. 1. 11.

[11] e.g. if she has received consideration for becoming surety. Voet *ubi sup.* and 46. 1. 32; *Richter* v. *Transvaal Govt.* [1906] T. S. 146; *Pettersen* v. *Yates* [1928] N. P. D. 453.

[12] Gr. 3. 3. 16.

[13] Cod. 4. 29. 22. 1; Gr. 3. 3. 17; Voet, 16. 1. 11.

to her business;[1] (5) if, expressly and with full knowledge of what she was doing, she has renounced the benefits of the Senatus-Consultum and of the Authentica.[2] A woman who has renounced the benefit of the first will not be held by implication to have renounced the benefit of the second. There must be a separate and distinct renunciation of each, if a married woman is to be held liable for her husband's debts.[3]

In Ceylon contracts of suretyship must be in writing.

By the Roman-Dutch common law a contract of suretyship need not be in writing. But in Ceylon[4] no contract for charging any person with the debt, default, or miscarriage of another will be of force or avail in law unless it be in writing and signed by the party making the same, or by some person thereto lawfully authorized. In Natal no action is maintainable on a contract of suretyship, 'unless and save so far as such contract shall be evidenced by some writing'.[5] This does not mean that the writing must contain all the terms of the contract.[6]

The benefits available to sureties:

beneficium ordinis sive excussionis;

In the Roman Law up to the time of Justinian a surety might be sued before the principal debtor.[7] Justinian, however, required the creditor to excuss the principal before pursuing the surety.[8] If he failed to do so, in case the principal debtor was solvent and within the jurisdiction, the surety might plead in his defence the beneficium ordinis sive excussionis.[9] In the Roman-Dutch, differing from the Roman Law, the surety has the further advantage

[1] Voet, *ubi sup.*; *Oak* v. *Lumsden* (1884) 3 S. C. at p. 148. This does not apply when she has gone surety for her husband. Ibid.

[2] Gr. 3. 3. 18; Voet, 16. 1. 9; V. d. L. *ubi sup.* *Mackellar* v. *Bond* (1884) 9 App. Cas. 715 (in appeal from Natal). It is an unsettled question whether the renunciation must be notarially executed. See V. d. K. *Th.* 496 and translator's note, ad loc.; Kotzé, Van Leeuwen, *ubi sup.*, where all the authorities are collected. For Natal see Law 40, 1884, which provides a form of renunciation.

[3] Gr. 3. 3. 19; Voet, 16. 1. 10. Both these benefits have been abolished in Ceylon. Ord. No. 18 of 1923, sec. 29.

[4] Ord. No. 7 of 1840, sec. 21.

[5] Law 12 of 1884; *supra*, p. 232.

[6] *Amod* v. *Parsotham* [1929] N. P. D. 163.

[7] Girard, pp. 802–3; Buckland, *Text-book*, p. 447.

[8] Nov. 4, cap. i (A. D. 535); Van Leeuwen, 4. 4. 7.

[9] Gr. 3. 3. 27; Voet, 46. 1. 14; V. d. L. 1. 14. 10.

that he may require the creditor to realize any real security which he may have for his debt before seeking to render the surety liable upon his personal obligation.[1] In the Roman-Dutch Law, as in the Roman, sureties may also invoke the beneficium divisionis[2] and the beneficium cedendarum actionum.[3] All these benefits may be renounced.[4] In the modern law, one of several joint sureties who has paid the whole debt, and perhaps who has paid more than a rateable share of the debt, is entitled to go against his co-sureties for contribution without cession of actions.[5] He may also, in the absence of agreement to the contrary, equally without cession of action, claim reimbursement from the principal debtor, but he is not obliged to go against the principal debtor before taking proceedings against the co-surety.[6]

beneficium divisionis; beneficium cedendarum actionum.

12. **Carriage by land and by water.**[7] In the Roman Law the section of the praetor's edict—de nautis, stabu-

12. Carriage by land and by water.

[1] Placaat of Philip II, February 21, 1564 (1. G. P. B. 379); Gr. 3. 3. 32; V. d. K. *Th.* 507 and *Dictat.* ad loc.; *Serrurier* v. *Langeveld* (1828) 1. Menz. 316. (But the benefit of the Placaat cannot be set up by a surety who has expressly renounced the beneficium ordinis sive excussionis. Ibid.) In Roman Law the rule was just the other way; viz. the creditor must excuss the surety personally before pursuing the hypothecated goods of the debtor in the hands of third parties. Nov. 4, cap. ii (A. D. 535).

[2] Gr. 3. 3. 28; Voet, 46. 1. 21; V. d. L. 1. 14. 10.

[3] Gr. 3. 3. 31; Voet, 46. 1. 27; V. d. K. *Th.* 506; including any claims which the creditor may have against a third party in respect of the debt or default to which the suretyship relates. *Yorkshire Insurance Co.* v. *Barclay's Bank* [1928] W. L. D. at p. 210.

[4] Gr. 3. 3. 29; V. d. K. *Th.* 502; and, in some places, says Van der Keessel (*Th.* 503), are taken to have renounced them, if the sureties bind themselves 'each for all', or 'each as principal debtor'. Cf. Gr. loc. cit. and *Van der Vyver* v. *De Wayer* (1861) 4 Searle 27. For del credere contracts see V. d. K. *Th.* 504.

[5] This is statutory in Natal (Law No. 9 of 1885), but the law is the same in the other Provinces. *Nosworthy* v. *Yorke* [1921] C. P. D. 404; *Est. Steer* v. *Steer* [1923] C. P. D. 354; *Pearce* v. *De Jager* [1924] C. P. D. 455; *Lever* v. *Buhrmann* [1925] T. P. D. 254.

[6] *Est. Steer* v. *Steer, ubi sup.* For dissolution of suretyship see 3 Maasdorp, chap. 32. As to the effect upon the surety's liability of an extension of time for payment given by the creditor to the debtor see *Est. Liebenberg* v. *Standard Bank of S. A.* [1927] A. D. 502.

[7] Gr. 3. 38. 9; Van Leeuwen, 4. 2. 9; Voet, lib. iv, tit. 9; 3 Maasdorp, chap. 22; Wille & Millin, chap. 11.

lariis et cauponibus—made carriers by water, along with stable-keepers and innkeepers, the insurers of goods entrusted to them.[1] Except in case of damnum fatale or of vis major their liability was absolute.[2] The language of the edict does not in terms cover the case of carriers by land, and it has been doubted whether in the modern law they must be taken to be included within its scope. An affirmative answer has been given in the Cape Province.[3] If the edict does not apply to them, they are liable as conductores operis to show the highest diligence, but will not be answerable in damages except on proof of culpa.[4]

Carriers, stable-keepers and innkeepers may retain the goods of their customers until their reasonable charges are satisfied (*recht van retentie—lien*).[5]

[1] Dig. 4. 9. 1, pr.: Ait praetor Nautae caupones stabularii quod cujusque salvum fore receperint nisi restituent in eos judicium dabo.

[2] Dig. 4. 9. 3. 1. Hoc edicto omnimodo qui recepit tenetur, etiamsi sine culpa ejus res periit vel damnum datum est nisi si quid damno fatali contingit. Inde Labeo scribit siquid naufragio aut per vim piratarum perierit non esse iniquum exceptionem ei dari. Idem erit dicendum et si in stabulo aut in caupona vis major contigerit. As to 'vis major' see *New Heriot G. M. Co.* v. *Union Govt.* [1916] A. D. 415. As to contracting out, *Burger* v. *Central S. A. Rlwys.* [1903] T. S. 571; *S. A. Rlwys.* v. *Conradie* [1922] A. D. 137. A notice posted up in an hotel purporting to limit the proprietor's liability has no effect without proof that the client agreed thereto. *Davis* v. *Lockstone*, [1921] A. D. 153.

In S. A. the Praetors' Edict has been applied to the case of an hotel proprietor in *Davis* v. *Lockstone*, *ubi sup.* See also *Toy* v. *Blake* [1923] C. P. D. 98; *Koenig* v. *Godbold* [1923] C. P. D. 526.

[3] *Tregidga & Co.* v. *Sivewright* N. O. (1897) 14 S. C. 86 per de Villiers C.J. and Buchanan J., dissentiente Maasdorp J. This is also the opinion of Mr T. E. Dönges in his careful study, *The Liability for Safe Carriage of Goods in Roman-Dutch Law* (Juta & Co., 1928).

[4] In Ceylon by Ord. No. 22 of 1866 the law of England for the time being is made applicable to all questions relating to carriers by land. For innkeepers see Hotel Keepers' Liability Ord. No. 19 of 1916; for Carriage of Goods by Sea, Ord. No. 18 of 1926.

[5] Van Leeuwen, 4. 40. 2, and *Cens. For.* 1. 4. 37. 8 and 9; *Anderson & Co.* v. *Pienaar & Co.* [1922] T. P. D. 435 (cartage contractors); *Reed Bros.* v. *Ford* [1923] T. P. D. 150 (livery-stable keeper); *Marais* v. *Andrews* [1914] T. P. D. 290 (innkeeper—boarding-house keeper); *Holmes Garage Ltd.* v. *Levin* [1924] G. W. L. 58 (innkeeper).

PART II

OBLIGATIONS ARISING FROM DELICT

The law of delicts is principally Roman in origin.

THE second principal class of obligations is that which arises from delicts. A delict is a wrongful act which grounds an action in favour of the person injured. In this branch of law, as in others, the jus civile was received in Holland. In the pages of Grotius and occasionally of Voet we detect indications of a more archaic order of ideas derived from Teutonic sources. But the Roman Law drove the native law out of the field. In the text-book writers, and probably also in the practice of the Courts, of the eighteenth century the Roman-Dutch law of delicts was substantially the same as the Roman Law expounded in the Institutes and the Digest. Such a complete break in historical continuity is easily regretted. It is enough in this place to record it as a fact.

The Roman theory of delict.

The Roman law of delicts, derived from the XII Tables and from a still more primitive customary law, came in time, thanks to the directing influence of jurists and of praetors, to express a very complete theory of civil liability. A few simple principles covered the whole ground, and, adopted in modern codes, have been found sufficient to provide for the complexities of modern life.

Dolus and culpa.

A man must see that he does not wilfully invade another's right, or carelessly cause him pecuniary loss. If he does either of these things he is answerable in damages. There may also be cases, resting upon a more archaic principle, in which he is answerable absolutely for damage which he has caused, though without intention and without negligence. Such in a few words is the Roman theory of delictual liability.

Exceptional cases of absolute liability.

Defective terminology.

In one respect the Roman law of delicts has suffered from the simplicity of its principles, namely, in its vocabulary. It is convenient to distinguish by different names the various groups of circumstances which give rise to

liability. The English Law—poor in principle, rich in detail—does so. It distinguishes various heads of liability under the names of assault, trespass, libel, slander, malicious prosecution, and the rest. The Roman Law has no such distinctions or corresponding terminology.

Influence of the English law of torts in the colonies.

In the Roman-Dutch Colonies the English law of torts has imposed itself upon the Roman-Dutch law of delict much as the Roman law of delict imposed itself upon the native law of Holland. The adoption of English nomenclature has accompanied the adoption of much of the substance of the English Law. The process has gone further in some jurisdictions than in others, but in all the influence of English Law has been very great. South Africa, here as elsewhere, is most retentive of the Roman-Dutch common law. In Ceylon the reception of the English Law has been more complete.

Difficulty of a systematic presentation.

The course of events briefly described in the foregoing paragraphs makes it matter of some difficulty to apply to the law of delicts the method of treatment applied in this volume to other departments of the Roman-Dutch Law. In writing of the law of persons, of things, and of contract, we have tried to build upon the foundations laid in the seventeenth century by Grotius, Van Leeuwen, and Voet, and in the eighteenth and early nineteenth centuries by Bynkershoek, Van der Keessel, and Van der Linden. For the law of delicts the foundations are wanting or must be sought in the pure Roman Law (which we suppose to be known to our readers), while the superstructure, as observed above, is largely English in character, and the complex whole varies in the various colonies. In this chapter we shall state very shortly the general principles of the Roman-Dutch law of delicts, so far as it is at all applicable to the conditions of modern life, and indicate how far these principles have been recognized as still in force in the Roman-Dutch Colonies. As a justification for treating the subject of delict rather in principle than in detail we may point to the example of modern codes.[1]

Method adopted.

[1] The law of delicts occupies in the French Code five articles

Any wrongful act or omission which grounds an action, i.e. any act or omission which is wrongful in law, is known in Roman Law as an injury. 'Generaliter injuria dicitur omne quod non jure fit.'[1] An injury may or may not cause pecuniary loss (*damnum*), but every injury gives rise to an action for pecuniary compensation (*id quod interest—schade en interessen—damages*). In some cases there is no injury or right of action unless pecuniary loss is proved; in other cases there is an injury and right of action, whether pecuniary loss is proved or not (*injuria sine damno*); in others, again, pecuniary loss may be proved, and yet no action lie (*damnum sine injuria*), because the law does not condemn either the act in itself or the act together with the consequent loss as constituting a legal wrong.[2]

The general meaning of injuria.

Injuria sine damno.

Damnum sine injuria.

The classification of delicts is a matter of some difficulty. In the Roman Law the delicts proper were four in number: viz. (1) furtum; (2) rapina; (3) damnum injuria datum; (4) injuria (specifically so-called).[3] Since rapina was merely an aggravated form of furtum, the principal heads of delict may be reduced to three. This classification, however, is by no means exhaustive. There were other grounds of liability such as dolus, and there were certain quasi-delicts which differed from true delicts in little but in name.

Classification of delicts: in Roman Law;

In writing of delicts proper Grotius and Van Leeuwen adopt a different arrangement.[4] In their system delict (*misdaad*) is directed: (1) against life; (2) against the person; (3) against freedom; (4) against honour; and (5)

in Grotius, Van Leeuwen,

(1382–6), in the Dutch sixteen (1401–16), in the German thirty-one (823–53); in the Swiss *Code des Obligations* twenty-one (41–61). In the *Digest of English Civil Law* (ed. E. Jenks) it has been found possible to compress the law of torts into about three hundred articles.

[1] Inst. 4. 4, pr.; Dig. 47. 10. 1, pr. (Ulpian): Omne enim quod non jure fit injuria fieri dicitur.

[2] Thus in *Greyvensteyn* v. *Hattingh* [1911] A. C. 355 it was held that no action lay against an adjoining owner, who hindered locusts from settling on his own land with the result that they settled on the land of the Appellant.

[3] Dig. *ubi sup.*: Specialiter autem injuria dicitur contumelia.

[4] Gr. 3. 33. 1; Van Leeuwen, 4. 32. 9.

against property. Both these writers treat the subject of wrongs principally from the point of view of crime. Van der Linden[1] follows their lead except that he includes 'wrongs against freedom' under the head of wrongs against honour, thus making four classes in place of five.

and Van der Linden.

Classification adopted in this chapter.

Neither the Roman nor the Dutch arrangement is completely satisfactory. In this chapter we shall speak of:

1. Wrongs against the person;
2. Wrongs against property;
3. Wrongs against reputation;
4. Wrongs against the domestic relations;
5. Breach of a statutory or common law duty.
6. Wrongs other than the above mentioned.

General theory of delicts in Roman-Dutch Law.

But first a few words must be said about the theory of delictual liability in general, which is essentially the same as in Roman Law.

In the modern law the Roman terminology serves not as an enumeration of particular delicts, but as a general touchstone of liability. The underlying principles of injuria and damnum injuria datum are applicable to all kinds of delict. To-day all delictual liabilities (with few exceptions) are referable to one or other of these two heads.[2] I am answerable for wilful aggression on another's right (*injuria*). I am answerable for careless aggression on another's right which causes pecuniary loss (*damnum injuria datum*).[3] In principle it would seem that any act

[1] V. d. L. 1. 16. 1.

[2] 'With us all wrongs are either damna injuria data or injuriae proper.' 4 Maasdorp, p. 6. Consult: *Union Govt.* (*Minister of Rlwys. and Harbours*) v. *Warneke* [1911] A. D. 657; and *Whittaker* v. *Ross & Bateman* [1912] A. D. 92; *Matthews* v. *Young* [1922] A. D. at pp. 503 ff.; *Stoffberg* v. *Elliott* [1923] C. P. D. 148.

[3] Or physical pain. Gr. 3. 34. 2. 'The compensation recoverable under the Lex Aquilia [*scil.* for damnum injuria datum] was only for patrimonial damages, that is loss in respect of property, business, or prospective gains. . . . The award of compensation for physical pain caused to a person injured through negligence, which was recognized by the law of Holland, constitutes a notable exception to the rule in question.' *Union Govt.* v. *Warneke*, *ubi sup.* at p. 665, per Innes J. For a discussion of the general principles of liability for negligence see *Farmer* v. *Robinson Gold Mining Co.* [1917] A. D. 501; *Union Govt.* (*Minister of Rlwys. and Harbours*) v.

which, if wilful, would produce liability under the first head, should equally, if careless and attended by loss, produce liability under the second. But this cannot safely be affirmed of the anglicized systems of Roman-Dutch Law which exist to-day. Thus an action lies for a false statement upon which I act to my pecuniary detriment, but not, perhaps, for a careless misstatement made with no intention to deceive.[1]

An action of a special character is that which lies in respect of a statement made not to me, but about me; which is false, but not defamatory. In this case a plaintiff must prove both injuria and damnum.[2]

An act or omission, wilful or careless, will not support an action unless the act or omission was the breach of a duty owed to the plaintiff.[3]

Apart from the general theory of responsibility there are, as we shall see, a few cases of absolute liability.

Specific delicts.

1. Wrongs against the person.

1. **Wrongs against the person.** To this head may be referred the wrongs which in English Law are known as assault, battery, false imprisonment, malicious arrest. If the wrongful act is an intentional aggression the plaintiff recovers damages measured in the discretion of the Court by the nature of the outrage.[4] If the act is unintentional but careless the plaintiff is entitled to compensation for

Matthee N. O. [1917] A. D. 688; *Union Govt.* v. *Nat. Bank of S. A.* [1921] A. D. at p. 128; *Cape Town Municipality* v. *Paine* [1923] A. D. 207; *Morley* v. *Wicks* [1925] W. L. D. 13.

[1] See *Dickson & Co.* v. *Levy* (1894) 11 S. C. 33; *Parke* v. *Hamman* [1907] T. H. 47; *De Kock* v. *Gafney* [1914] C. P. D. 377. For innocent misrepresentation inducing a contract of sale see *Steyn* v. *Davis & Darlow* [1927] T. P. D. 651.

[2] *G. A. Fichardt Ltd.* v. *The Friend Newspapers Ltd.* [1916] A. D. 1; *Carelse* v. *Van der Schyff* [1928] C. P. D. 91; *Yates* v. *MacRae* [1929] T. P. D. 480. This is the wrong which is sometimes described as 'injurious falsehood'. Salmond, *The Law of Torts*, 7th ed., p. 580.

[3] *Halliwell* v. *Johannesburg Municipal Council* [1912] A. D. at p. 672. Thus other persons do not always owe me a duty to abstain from the contravention of a public statute; but they do owe me a duty not to cause me special damage by such contravention. 4 Maasdorp, p. 4. *Infra*, p. 332.

[4] Gr. 3. 34. 2; Van Leeuwen, 4. 35. 9.

actual damage, if proved. In this case the action is usually termed an action for negligence.[1]

In principle, then, there is no liability without dolus or culpa. But in South Africa it will be no defence to an action for false imprisonment to plead that the defendant acted in good faith and without negligence.[2] This is a departure from principle due to the fact that this action, like the action for malicious arrest and the action for malicious prosecution (of which we shall speak hereafter), is derived from English Law and governed by English precedents.[3]

Action for seduction.

The action for seduction (*defloratie*) may be conveniently mentioned under the head of wrongs against the person. In Dutch Law a virgin who had been seduced might bring an action to compel marriage or alternately to obtain compensation for the loss of her maidenhood,[4] and if she were with child also for her lying-in expenses (*kraam-*

[1] The corresponding actions in Roman Law were the actio injuriarum, when the wrong was intentional (Voet, 47. 10. 7), and the utilis actio legis Aquiliae for damnum culpa datum (Voet, 9. 2. 11), which lay when the wrong was either intentional or negligent. In the phrase 'damnum culpa datum', the word culpa is used widely, so as to include dolus. Dig. 9. 2. 30. 3. In hac quoque actione dolus et culpa punitur.

[2] 4 Maasdorp, p. 90.

[3] This, it is submitted, is the fact, though attempts have been made, as by Connor C.J. in *Cottam* v. *Speller* (1882) 3 Natal Law Reports at p. 133, to accommodate the action for false imprisonment to the principles of the Roman-Dutch Law. These actions are in fact an alien element in the modern system. See R. W. Lee, 'Malicious Prosecution in Roman-Dutch Law'. *S.A.L.J.* vol. xxix (1912), p. 22.

[4] Voet, 48. 5. 3: 'aut ducere aut dotare'; 4 Maasdorp, p. 145. At common law the action did not lie if the woman knew that the man was married (but see V. d. K. *Th.* 801), or if she declined to marry him, or could not lawfully marry him, or had married some one else. Voet, 48. 5. 4. In *Bensimon* v. *Barton* [1919] A. D. 13 it was held by the majority of the Court (Maasdorp J.A. *dissent.*) that the fact that plaintiff knew at the time of her seduction that her seducer was a married man was no bar to the action. The opposite view was adopted by the Ceylon S. C. in *Meenadchipillai* v. *Sanmugam* (1916) 19 N. L. R. 209. It has been held in two South African cases that the Cape Marriage Order in Council, 1838, having abolished the action to compel marriage, an offer of marriage on the part of the defendant is no longer a defence to plaintiff's action for damages. On this point Innes C.J. reserved his opinion. *Bensimon* v. *Barton, ubi sup.* at p. 23.

kosten).[1] In the modern law the action lies for damages only.[2] This action has no resemblance to the English action for seduction which a father can bring for the pretended loss of his daughter's services.[3]

2. Wrongs against property.

2. **Wrongs against property.** Any intentional invasion of another's right to own, to possess, or to detain is actionable.[4] Any person whose right is invaded may bring the action, whether entitled in possession or in expectancy.

The corresponding actions in English Law are conversion, detinue, trespass to land and to goods.

Damage to property falls under the same head.

In this case if the act which caused the damage was unintentional but negligent the action is usually termed an action for negligence.

In all these cases the character of the wrong and the nature of the remedy is largely determined by English Law.

The law of nuisance has been borrowed in substance from English Law.[5]

[1] Gr. 3. 35. 8; also for reasonable maintenance for the child, V. d. L. 1. 16. 4; *Kalamie* v. *Armadien* [1929] C. P. D. 490; and in case of the child's death for funeral expenses, V. d. L., loc. cit. If the woman knew that the man was married she may sue for lying-in expenses and maintenance, Voet, 48. 5. 6; V. d. L., loc. cit.

[2] As to what may be claimed under the head of damages see *M'guni* v. *M'twali* [1923] T. P. D. 368; *Els* v. *Mills* [1926] E. D. L. 346. Voet (48. 5. 5) says that the action is passively transmissible, but not actively transmissible before lis mota. However, as the last part of this proposition is based upon the argument that the death of the woman deprives the man of the alternative of offering marriage, it may be that it does not hold good at the present day. As to the term of prescription in the action for seduction see *Carelse* v. *Estate de Vries* (1906) 23 S. C. at p. 539.

[3] But the father may sue for lying-in expenses if he has defrayed them or made himself liable for them. *Webb* v. *Langai* (1885) 4 E. D. C. 68.

[4] Gr. 3. 37. 5; Voet, 9. 2. 10; *Maraisburg Divis. Council* v. *Wagenaar* [1923] C. P. D. 94.

[5] See for instance *Demerara Electric Co. Ltd.* v. *White* [1907] A. C. 330 (Brit. Gui.); *Rivas* v. *The Premier (Transvaal) Diamond Mining Co.* [1929] W. L. D. at p. 11. But the liability of an owner of land in respect of excavations near a public road which may be a source of danger is determined by the law of *culpa*, not, as in English Law, by the law of nuisance. *Transvaal & Rhodesian Estates Ltd.* v. *Golding* [1917] A. D. per Innes C.J. at p. 28.

In regard to trespass to land the modern Roman-Dutch Law retains something of its original character. An action will not lie unless the trespass was 'injurious' or caused damage.[1] A trespass is injurious when it is committed in defiance of or as a denial of another's right or accompanied by circumstances of insult or contumely. This is but one illustration of the principle, now generally accepted, that actual damage is a necessary ingredient of any claim for damages based on delict, unless (*a*) the action, though in form one for damages, is brought to establish a right (challenged by defendant), or (*b*) the act complained of was done in circumstances amounting to contumelia.[2]

It may seem out of place to mention offences against life under the head of wrongs against property, but the action which the law gives to the relatives of a deceased person is in fact referable to this title. Such persons if they have suffered pecuniary loss by the death may maintain an action for damages against the person by whom the death was intentionally or negligently caused.[3]

3. Wrongs against reputation.

3. **Wrongs against reputation.** All the authorities agree that an action lies for written or spoken defamation. Grotius devotes a short chapter to *lasteringh*, or *misdaed jegens eer*, which he describes as an outrage upon 'the good

[1] *Edwards* v. *Hyde* [1903] T. S. at p. 387, per Solomon J.; *Richmond* v. *Chadwick* [1927] N. P. D. 92; *De Villiers* v. *Barlow* [1929] O. P. D. at p. 57; *Vanston* v. *Frost* [1930] N. P. D. 121.

[2] *Richmond* v. *Chadwick*, *ubi sup.*

[3] Gr. 3. 32. 16; 3. 33. 2; Van Leeuwen, 4. 34. 15; Voet, 9. 2. 11. See, for a full discussion of this action, *Union Government* (*Minister of Railways and Harbours*) v. *Warneke* [1911] A. D. 657, and *Union Govt.* (*Minister of Rlwys.*) v. *Lee* [1927] A. D. 202. Plaintiff may succeed in this action notwithstanding contributory negligence of the deceased. Ibid. and *Mancho* v. *S. A. Rlwys. and Harbours* [1928] A. D. p. 103. As to assessment of damages, see *Hulley* v. *Cox* [1923] A. D. 234; *Smart* v. *S. A. Rlwys. and Harbours* [1928] N. P. D. 362. A husband is entitled to recover the actual pecuniary loss sustained by him in consequence of injuries to his wife which do not cause her death. *Abbott* v. *Bergman* [1922] A. D. 53. Can a husband maintain an action in respect of his wife's death? *Steenkamp* v. *Juriaanse* [1907] T. S. 980. In any event, he is not entitled to pecuniary compensation as solatium for the loss of his wife's society (ibid. per Innes C.J. at p. 986).

opinion which others have of us'.[1] Van Leeuwen[2] in his corresponding chapter speaks of outrage upon a man's 'honour and good name'.[3] Both these writers evidently regard defamation as a species of injuria, which, as we read in the Digest, is a wrong directed against a man's person or affecting his dignity or reputation.[4] If this identification is correct the plaintiff in an action for defamation, as in other cases of injury, must make out the animus injuriandi as part of his case. This, however, is not the law, for if the language complained of is clearly defamatory in character, the intention to injure will be presumed.[5] In short the injurious mind required by the modern Roman-Dutch Law of defamation amounts to little, if to anything, more than the implied malice of the English law of libel.[6] In other respects, too, such as in regard to the law of innuendo and of absolute and qualified privilege, the English Law is closely followed.[7] But the

The animus injuriandi.

[1] Gr. 3. 36. 1 (het goed ghevoelen dat anderen van ons hebben).

[2] Lib. iv, cap. xxxvii.

[3] For defamation of the dead and consequent actions see Voet, 47. 10. 5; *Spendiff* v. *East London Daily Despatch Ltd.* [1929] E. D. L. 113; and Dr. F. P. Walton in *Journ. Comp. Leg.*, 3rd series, vol. ix, pt. i [1927].

[4] Dig. 47. 10. 1. 2: Omnemque injuriam aut in corpus inferri aut ad dignitatem aut ad infamiam pertinere (Labeo cited by Ulpian).

[5] Voet, 47. 10. 20: Sin tales fuerint prolati sermones qui per se et propria significatione contumeliam inferunt, injuriandi animus adfuisse creditur, eique qui illa protulit probatio incumbit injuriae faciendae consilium defuisse. 'In defamation, as in all *injuriae*, the intention of the perpetrator is vital. But the Court cannot dive into the mind of a defendant; it can only interpret his language as it would be understood by reasonable men; he is assumed to have meant what his language thus interpreted would convey.' *Sutter* v. *Brown* [1926] A. D. at p. 163, per Innes C.J.; *Mankowitz* v. *Geyser* [1928] O. P. D. 138. In the modern law good intentions are no excuse for defamation, but the presumption of malice may be rebutted by proof of special circumstances such as privilege. *Tromp* v. *McDonald* [1920] A. D. 1; *Ehmke* v. *Grunewald* [1921] A. D. 575; *McLean* v. *Murray* [1923] A. D. 406; *Nasionale Pers Bpkt.* v. *Long* [1930] A. D. 87.

[6] In *Botha* v. *Brink* [1878], Buch. at p. 130, de Villiers C.J. said: 'The rule of the Roman-Dutch law differs, if at all, from that of the English law in allowing greater latitude in disproving malice. But see comment in *Tothill* v. *Foster* [1925] T. P. D. at p. 863.

[7] See as to privilege (besides cases above cited): *Monkten* v.

Roman-Dutch Law departs from the English Law in two important particulars: (1) It makes no distinction between spoken and written defamation;[1] (2) according to the more probable opinion the truth of a defamatory statement is no defence to an action for damages.[2]

Malicious prosecution.

Malicious prosecution is a kind of defamation and should be governed by the same rules. In Holland private prosecutions for crime were infrequent, and the books speak on this topic with uncertain voice. The writers of the seventeenth century give some indications that any prosecutor who failed to secure a conviction exposed himself to an action for damages. In the eighteenth century it seems probable that he would not have been liable in the absence of affirmative proof of injurious intent. However this may be, the question is merely of historical interest, for the modern Roman-Dutch Law has adopted the

Brit. S. A. Co. [1920] A. D. 324; *Middler* v. *Hamilton* [1923] T. P. D. 441; *Tothill* v. *Foster* [1925] T. P. D. 857; *Perl* v. *Shapiro* [1926] A. D. 121; *Horzgen* v. *Woollwright* [1928] T. P. D. 5; *Kriel* v. *Kruger* [1928] E. D. L. 282; *Kleinhans* v. *Usmar* [1929] A. D. 121; *Yates* v. *MacRae* [1929] T. P. D. 480;—privilege of witnesses (not absolute), *Dippenaar* v. *Hauman* [1878], Buch. at p. 140; *Van Rensburg* v. *Snyman* [1927] O. P. D. 123;—fair comment, *Crawford* v. *Albu* [1917] A. D. 102; *Hooper* v. *Jackson* [1923] E. D. L. 410;—justification, *Van Wyk* v. *Steyn* [1924] O. P. D. 68; *Johnson* v. *Rand Daily Mails* [1928] A. D. 190;—rixa, *Glass* v. *Perl* [1928] T. P. D. 264;—retorsion or self-defence, *Wilkinson* v. *Trevett* [1922] C. P. D. 393; *Tietze* v. *Woschnitzok* [1929] S. W. A. 39;—assessment of damages, *Salzmann* v. *Holmes* [1914] A. D. 471;—what may be pleaded in mitigation of damages, *Cressey* v. *African Life Assurance Socy. Ltd.* [1917] A. D. 605; Nathan and Schlosberg, *Law of Damages*, p. 155—the provinces of judge and jury, *Richter* v. *Mack* [1917] A. D. 201; *De Middellandsche Nationale Pers* v. *Stahl* [1917] A. D. 630; *Smith* v. *Lawrence* [1929] N. P. D. 132;—words defamatory *per se*, *Holdt* v. *Meisel* [1927] S. W. A. 45; *Glass* v. *Perl, ubi sup.*; *Yates* v. *MacRae, ubi sup.*;—words not defamatory *per se*, *Richter* v. *Mack, ubi sup.*, *Hardaker* v. *Tjabring* [1927] N. P. D. 145; *Wallach's Ltd.* v. *Marsh* [1928] T. P. D. 531.

[1] 4 Maasdorp, p. 112.

[2] Gr. 3. 36. 2; Voet, 47. 10. 9. But see V. d. K. *Th.* 803. The law has been settled for South Africa in the sense of the text. *Botha* v. *Brink, ubi sup.*; 4 Maasdorp, p. 130. A further question is whether publication is necessary to ground an action for defamation (Morice, p. 250; *Cape Law Journal*, vol. xiv (1897), p. 184). In South Africa the question has been answered affirmatively. *Hall* v. *Zietsman* (1899) 16 S. C. 213; 4 Maasdorp, p. 109.

English law of malicious prosecution, which requires the plaintiff to establish not merely the element of malicious intention but also the absence of reasonable cause.[1]

In Holland and Germany actions for injury were brought very frequently and upon the slightest occasion. By his statement of claim the plaintiff asked for 'amende honorabel' and 'amende profitabel'.[2] The first was an apology from the defendant.[3] The second consisted in a sum of money to be paid to the plaintiff or applied to the use of the poor. In the modern law the amende honorabel is no longer in use;[4] the action for damages remains.

Amende honorabel en profitabel.

The Roman action for injuries included many cases of affront or insult, which cannot, except by an abuse of language, be described as defamation. It is not apparent how far the law of to-day recognizes as actionable an insult which does not convey a defamatory meaning.[5]

In the Roman Law an injury to wife, child, or servant was construed as an injury to the husband, parent, or master.[6] There are South African cases in which an insult to, or defamation of, a wife has been held to give the husband a cause of action.[7]

Injuries to wife, child, &c.

[1] (Ceylon), *Corea* v. *Peiris* [1909] A. C. 549; (South Africa) 4 Maasdorp, p. 96.

[2] Gr. 3. 35. 2; 3. 36. 3; Voet, 47. 10. 17; V. d. L. 1. 16. 4. For the form of request in the action for injuries see *Papegay*, vol. i, chap. viii.

[3] The defendant must make his palinodia before the Court 'bloots hoofts op zijn knyen biddende de Justitie ende den Impetrant om vergiffenis'. Ibid.

[4] 'In South Africa the action for an apology has somewhat fallen into disuse.' 4 Maasdorp, p. 105. In Ceylon the Dutch form of apology was declared to be obsolete in *Moss* v. *Ferguson* (1875) Ramanathan, 1872–6, p. 165.

[5] The cases cited in note 7 below are in point. Maasdorp (vol. 4, chap. 8) has two pages on *Wrongs to Honour, Dignity, and Reputation*. 'Verbal injuries' are mentioned, but only as another name for defamation. In *Epstein* v. *Epstein* [1906] T. H. 87 an interdict was granted to a wife who was annoyed by the attentions of private detectives. But this scarcely goes the length of proving that to 'shadow' another person is an actionable wrong.

[6] Inst. 4. 4. 2. Grot. (3. 35.6) allows the action if an insult is intended to the husband, &c. Cf. Voet, 47. 10. 6.

[7] *Banks* v. *Ayres* (1888) 9 N. L. R. 34; *Jacobs* v. *Macdonald* [1909] T. S. 442. In the Ceylon case of *Appuhami* v. *Kirihami*

4. Wrongs against the domestic relations.

4. Wrongs against the domestic relations. An action for damages lies against an adulterer [1] which in modern practice is usually (but not necessarily) combined with the action for divorce against the guilty spouse.[2] Apart from adultery a husband has an action against one who deprives him of the consortium of his wife,[3] and a father or master has an action against one who takes from him his child or servant.[4]

5. Breach of statutory or common law duty.

5. Breach of a Statutory or Common Law Duty. In either case, the person committing the delict is liable to an action at the suit of any one of the public who has sustained damage by reason of such commission.[5] Thus it is the duty of a gaoler to keep safely every prisoner lawfully confined. If he illegally allows his prisoner to escape he is answerable in damages.[6]

6. Miscellaneous

6. Wrongs other than the above mentioned. The

(1895) 1 N. L. R. 83 it was said that a father is not entitled to sue for words defamatory of his daughter, although he may have felt pained and distressed.

[1] Gr. 3. 35. 9; *Norton* v. *Spooner* (1854) 9 Moo. P. C. C. 103; *Sutcliffe* v. *Sutcliffe and Westgate* [1913] T. P. D. 686; but not against a female co-respondent. *Wait* v. *Wait* [1913] E. D. L. 519; *De Bruyn* v. *De Bruyn and Raynor* [1916] O. P. D. 221. *Contra*, *Tutt* v. *Tutt* [1929] C. P. D. 51.

[2] *Viviers* v. *Kilian* [1927] A. D. 449.

[3] *Union Government* (*Minister of Railways and Harbours*) v. *Warneke* [1911] A. D. at p. 667 per Innes J. The action is based on injuria. Damages cannot be claimed for mere loss of consortium due to culpa. 'It is not a material loss, however deeply felt, and affords no ground for patrimonial damages.' Ibid. As to the measure of damages see (Ceylon) *De Silva* v. *De Silva* (1925) 27 N. L. R. 289.

[4] In Roman Law a filius familias might be stolen and become the subject of an actio furti. Inst. 4. 1. 9. But Mr. Morice, speaking of the action 'per quod servitium amisit' says: 'Such wrongs do not seem to be known to Roman-Dutch Law' (*Eng. and Rom.-Dutch Law*, 2nd ed., p. 249). I do not think that the Roman-Dutch Law is so impotent as to afford no remedy for a flagrant wrong.

[5] But the statute may create a special obligation and prescribe a special remedy, in which case, as a rule, no other remedy is available. *Madrassa* v. *Johannesburg Munic.* [1917] A. D. 718.

[6] *Sandilands* v. *Tompkins* [1912] A. D. at p. 177 per de Villiers C.J. This was a case of civil imprisonment for debt; see also *Begemann* v. *Cirota* [1923] T. P. D. 270—action of damages by shopkeeper against hawker for illegal trading in breach of statute.

kinds of liability already mentioned are certainly not exhaustive. For example, the actio doli lay in Roman Law in any case where the plaintiff had been cheated by the defendant and had no other remedy.[1] Probably the action for fraud is now governed by the same conditions as in English Law.[2] Other questions readily suggest themselves. Have I a right of action if one interferes with my livelihood, my trade, or my contracts? What remedies does the law provide for the infringement of patents, trade-marks, copyright, and the like? At what point and under what conditions does an act of yours (e.g. in the way of business competition) cease to be the exercise of a right and become an actionable wrong? Questions such as these point to some of the most complex situations of modern life. The old writers may suggest an argument, but hardly supply an answer. The various colonial judicatures will arrive each at its own solution guided, probably, in the absence of legislation, more by British or American decisions than by text-writers of the seventeenth or eighteenth centuries.[3] As bearing on some of these questions, perhaps one may hazard the opinion that as a general rule an act otherwise innocent will become guilty if prompted by an injurious motive.[4] If this be so the nature of the motive will go further than in English Law towards determining the quality of the act.

wrongs: e.g. fraud; interference with livelihood, trade, or contract.

It has been said above that a man is liable for intended wrongs, and for negligence which causes damage. Are there also cases in which his liability must be stated higher, viz. as an absolute duty not to cause injury even in circumstances which exclude dolus and culpa? A man's

Cases of absolute liability.

[1] Dig. 4. 3. 1. 4; Voet, 4. 3. 8; Buckland, p. 589.

[2] In *Douglas* v. *Sander & Co.* [1902] A. C. at p. 445 Lord Robertson delivering the judgment of the Board said: 'Their Lordships think it right to add that they do not desire to assert as on their own authority that an action of deceit in Natal will only lie under the conditions stated in the texts of the Roman Law.'

[3] Trade competition, &c. (South Africa), 4 Maasdorp, pp. 40 ff.; wilfully inducing another to break his contract with a third party, *Isaacman* v. *Miller* [1922] T. P. D. at p. 61 (*dicta*).

[4] Animus nocendi vicino. Voet, 39. 3. 4.

liability for mischief done by his animals[1] is of this character. If my dog bites you, you may obtain damages without proof of scienter or of negligence. In like manner I am liable for damage done by trespassing cattle, and by wild and savage animals which I have brought upon my land and which have escaped. It is doubtful whether there is any other case of absolute liability.[2] There are cases in which the duty of taking care is very high and the liability for carelessness proportionately great. But these fall under the head of negligence and conform as a rule to English Law.[3]

Who are liable for delicts.

Who are liable for delicts. Any person is answerable for his wrongful acts if he had intelligence to understand that he was doing wrong. This excludes lunatics and young children.[4] Corporations are answerable ex delicto for the wrongful acts of their agents; principals and masters for the wrongful acts of their agents and servants, provided in all these cases that the act was done in the course of the employment or service.[5] Ratification of the

[1] *O'Callaghan N. O.* v. *Chaplin* [1927] A. D. 310; *S. A. Rlwys. and Harbours* v. *Edwards* [1930] A. D. 3; *Greydt-Ridgeway* v. *Hoppert* T. P. D. (1930) 15 P. H. J. 14.

[2] The Judicial Committee may be thought to have incorporated the rule in *Rylands* v. *Fletcher* into the Law of Cape Colony by its decision in *Eastern and S. A. Telegraph Co., Ltd.* v. *Cape Town Tramways Co., Ltd.* [1902] A. C. 381. But see *Union Government (Minister of Railways)* v. *Sykes* [1913] A. D. at pp. 161, 169; *Jurgenson* v. *Cape Town Municipality* [1923] C. P. D. 351; *Goosen* v. *Reeders* [1926] T. P. D. 436; *Strydom* v. *Griffin Engineering Co.* [1927] O. P. D. at p. 55. As to whether an upper proprietor is, in the absence of negligence, liable for damage caused by a discharge of water from his land on to that of a lower proprietor, see *Van der Merwe* v. *Zak River Estates, Ltd.* [1913] C. P. D. 1053. The rule in *Rylands* v. *Fletcher* is in force in Ceylon. *Subaida Umma* v. *Wadood* (1927) 29 N. L. R. 330.

[3] Natal Act, No. 3 of 1905, in the case of an action for damages sustained by fire occasioned by a railway engine, throws upon the defendant the onus of disproving negligence. For the general law as to damage by fire see Voet 9. 2. 19–21.

[4] Gr. 3. 32. 19; Voet, 9. 2. 29; 47. 10. 1. As to the effect of drunkenness see Voet, ibid. Minors who have reached years of discretion are liable. *Collinet* v. *Leslie* (1907) 17 C. T. R. 110.

[5] *Est. van der Byl* v. *Swanepoel* [1927] A. D. 141; *Ravene Plantations Ltd.* v. *Est. Abrey* [1928] A. D. 143; *Limason* v.

act of a subordinate is equivalent to a prior command.[1] Fathers are not, as such, answerable for the delicts of their children,[2] nor husbands for the delicts of their wives.[3]

An action lies as a rule against the (heirs or) personal representatives of a wrong-doer.[4] All persons who have in any way authorized, instigated, or assisted in, the commission of a wrongful act are answerable.[5] Every co-delinquent is liable in solidum,[6] but if one makes satisfaction the others are discharged,[7] and cannot be called upon to contribute.[8]

Who may sue. Any person and the (heirs or) personal representatives of any person who has been wronged may sue for damages.[9] Infants and lunatics may sue, assisted

Who may sue.

Leyland Motors (S. A.) Ltd. [1929] C. P. D. 348; *Wright* v. *Stuttaford & Co.* [1929] E. D. L. 377.

[1] *Whittaker* v. *Roos & Bateman* [1912] A. D. at p. 113.

[2] Gr. 3. 38. 8; Voet, 9. 4. 10; V. d. K. *Th.* 476. But note the application of the principle 'qui prohibere potest, tenetur'; *Philpott* v. *Whittal, Elston, and Crosby & Co.* [1907] E. D. C. at p. 207.

[3] V. d. K. *Th.* 225; *Pretoria Municipality* v. *Esterhuizen* [1928] T. P. D. at p. 682; Melius de Villiers, *The Roman and Roman-Dutch Law of Injuries*, p. 49; *supra*, p. 78 (n. 6). In Ceylon a husband is not liable for his wife's torts merely on the ground that he is her husband. Ord. No. 18 of 1923, sec. 5 (2).

[4] Gr. 3. 32. 10 and Schorer, ad loc.; Voet, 9. 2. 12; (Ceylon) *Fernando* v. *Livera* (1927) 29 N. L. R. 246. But an action for 'injuries' is not passively transmissible before litis contestatio. Inst. 4. 12. 1; Voet, 47. 10. 22; Sande, *Decis. Fris.* 5. 8. 4. Grotius says (3. 35. 5) 'unless carried through to judgment', but wrongly. In *Willenburg* v. *Willenburg* (1908) 25 S. C. 775 (action for divorce against wife on the ground of her adultery with G, coupled with a claim for damages against G's estate) the Court applied the maxim actio personalis moritur cum persona, and rejected the claim.

[5] Gr. 3. 32. 12; *McKenzie* v. *Van der Merwe* [1917] A. D. 41; *Mouton* v. *Beket* [1918] A. D. at p. 190.

[6] Gr. 3. 32. 15; *Naude and Du Plessis* v. *Mercier* [1917] A. D. at p. 38. But when a plaintiff in an action for injuria claims sentimental, not patrimonial, damages, it may be that different damages will be assessed by the Court according to the blameworthiness of the various co-delinquents. *Gray* v. *Poutsma* [1914] T. P. D. 203.

[7] Gr. 3. 32. 15; Voet, 9. 2. 12; *Grek* v. *Jankelowitz* [1918] C. P. D. 140.

[8] Voet, 9. 2. 20 (*ad fin.*); *Gray* v. *Poutsma, ubi sup.* at p. 215; *Naude and Du Plessis* v. *Mercier* [1917] A. D. 32.

[9] Gr. 3. 32. 10. But where there is no special damage, as in most

by their tutors or curators. Corporations may sue for wrongs against property, but not for wrongs against reputation.[1] A wife may sue her husband for real injuries of a serious character.[2]

General exceptions.

General exceptions from liability. No one is liable for inevitable accident,[3] or for acts done in the lawful exercise of a right[4] or performance of a duty.[5] No action lies against a judge for acts done or words spoken in honest exercise of his judicial office. If he acts in bad faith or with injurious intention he will, perhaps, be liable.[6] No action lies, as a rule, if the plaintiff consented to the alleged wrong.[7]

cases of defamation, the action is not actively transmissible before litis contestatio. Gr. 3. 35. 4; Voet, 47. 10. 22. The children of a defamed person, however, may sue for the consequential injury to their own reputation. Gr. loc. cit.; Voet, 47. 10. 5 (*in fin.*).

[1] A corporate body, as such, has no reputation to lose. But a 'trading corporation' may sue for defamation which affects it in its trade or business or property. *Witwatersrand Native Labour Association* v. *Robinson* [1907] T. S. at p. 265, per Innes C. J.; *Bhika* v. *Prema* [1910] T. S. 101.

[2] Voet, 47. 10. 2.

[3] Gr. 3. 34. 4; Voet, 9. 2. 29. 'Act of God', Voet, 9. 2. 21 (*ad fin.*); *Moffat* v. *Rawstorne* [1927] T. P. D. 435—*vis major, supra*, p. 320.

[4] e.g. defence of one's person, Gr. 3. 33. 9; 3. 34. 4; Voet, 9. 2. 22—defence of one's own property, Dig. 43. 24. 7. 4; Voet, 9. 2. 28—parendi necessitas, Voet, 47. 10. 3—error, Voet, 47. 10. 20—provocation, ibid.—statutory authority: 'Speaking generally, no man can be sued for doing what Parliament has declared to be a lawful act. To that principle, however, there is a well-established exception, and that is, that the act sanctioned must not be done negligently, *Union Government* (*Minister of Railways*) v. *Sykes* [1913] A. D. at p. 169; *Jo'burg Munic.* v. *African Realty Trust Ltd.* [1927] A. D. 163—quasi-judicial capacity, *Matthews* v. *Young* [1922] A. D. at p. 509;—acts done under the sanction of and within the limits of the authority conferred by judicial process, *Hart* v. *Cohen* (1899) 16 S. C. 363.

[5] e.g. intervention to stop a breach of the peace. Voet, 9. 2. 29.

[6] Voet, 47. 10. 2. See authorities cited by counsel in *Matthews* v. *Young* [1922] A. D. at p. 493.

[7] Voet, 47. 10. 4; Dig. 47. 10. 1. 5: Quia nulla injuria est quae in volentem fiat. *Sikani* v. *Mekeni* [1915] E. D. L. 126; *Agricultural Co-op. Union Ltd.* v. *Constable* [1921] N. P. D. 332. For contributory negligence see Voet, 9. 2. 17, who says 'novum non est ut in concurrente duorum culpa is teneatur cujus culpa major conspicitur'. See also Pollock, *Torts*, Appendix D, 'Contributory

Measure of damages. The damages recoverable for delict vary according as damages are or are not of the gist of the action. If actual pecuniary loss to the plaintiff is a necessary condition of defendant's liability, the sum recoverable as damages will be adjusted, so far as possible, to the loss actually sustained.[1] If actual pecuniary loss is not a necessary condition of defendant's liability the assessment of damages lies in the discretion of the judge,[2] who will take account not only of the loss,[3] if any, actually sustained, but also, especially in the case of actions in the nature of injuria, of circumstances which aggravate or mitigate the offence.[4] Sometimes damages are exemplary, sometimes merely nominal.[5] But whenever actual loss is taken into account it is essential that the damages (or more correctly, the damage) should not be too remote, i.e. that the loss to the plaintiff which forms the basis of assessment should be connected not too remotely with

Measure of damages.

Negligence in Roman Law'. In the modern law English decisions are followed. *Union Govt.* (*Minister of Rlwys.*) v. *Lee* [1927] A. D. 202; *Frank* v. *Van Rooy* [1927] O. P. D. 231; *Robinson Bros.* v. *Henderson* [1928] A. D. 138; *Thornton* v. *Fismer* [1928] A. D. 398; *Beech* v. *Setzkorn* [1928] C. P. D. 500; *Sparks* v. *Benson* [1928] T. P. D. 38; *Bezuidenhout* v. *Berman* [1929] O. P. D. 148; *Katzenstein* v. *Duvenhage* [1929] N. P. D. 294. Simultaneous negligence, *Melville* v. *Price* [1929] T. P. D. 800; *Howitt* v. *Bell* [1930] E. D. L. 76; J. C. Macintosh, *Negligence in Delict*, p. 26—the so-called doctrine of identification (unknown to R.-D. Law), *Greenshields* v. *S. A. Rlwys. and Harbours* [1917] C. P. D. 209; *Pretoria Munic.* v. *Esterhuizen* [1928] T. P. D. 678—plaintiff a child of tender years *Smith* v. *Burger* [1917] C. P. D. 662; *Lentzner* v. *Friedmann* [1919] O. P. D. 20; *Harmsworth* v. *Smith* [1928] N. P. D. 174.

[1] Voet, 9. 2. 6. and 11.

[2] Or jury.

[3] Voet, 47. 10. 18.

[4] Voet, 47. 10. 13 and 17. When an action lies without proof of pecuniary loss (*actio injuriarum*) a successful plaintiff recovers 'sentimental damages'. In the contrary case on proof of pecuniary loss he will be awarded patrimonial damages. If a plaintiff alleges an intentional infringement of his right, he may, according to the modern practice, if so advised, claim both kinds of redress in one and the same action. *Matthews* v. *Young* [1922] A. D. at p. 505.

[5] The South African Courts have, however, shown a marked disinclination to giving nominal damages, except where the action, though in form one of damages, is brought to establish a right. *Edwards* v. *Hyde* [1903] T. S. at p. 387; *Richmond* v. *Chadwick* [1927] N. P. D. at p. 94; *Rampersad* v. *Goberdun* [1929] N. P. D. 32.

the wrongful act or omission alleged.[1] In other words the loss must have been not merely the consequence of a wrongful act or omission but also a consequence which the defendant foresaw, or, judged by ordinary standards, might or could have foreseen had he been reasonably careful and prudent.[2] In estimating damages account is taken not merely of actual expense, depreciation of property, and the like (*damnum emergens*), but also of the loss of probable profit (*lucrum cessans*).

In case of injury to the person, physical pain and disfigurement go to enhance the damages,[3] but allowance is not made for mental suffering and anguish. All this is in substantial conformity with English Law.

Quasi-delicts.

Quasi-delicts.[4] Under the title of obligationes quasi ex delicto the Institutes of Justinian mention the following cases of liability: (1) the occupier of a house or room from which anything is thrown or poured down on a way in common use so as to do damage to a person passing or standing beneath (*actio de effusis vel dejectis*);[5] (2) the occupier of a house who keeps something placed or suspended which may fall on some one passing or standing on the road beneath (*actio positi aut suspensi*);[6] (3) the keeper of a ship, tavern, or stable on whose premises a theft is committed or damage done by persons in his employ (*actio de damno in nave aut caupona aut stabulo facto*).[7] These may be regarded as cases of absolute

[1] Voet, 9. 2. 16 ff.; *Luyt* v. *Morgan* [1915] E. D. L. 142; *Anderson* v. *Van der Merwe* [1921] C. P. D. 342.

[2] *Transv. Provincial Administration* v. *Coley* [1925] A. D. at p. 26, per Innes C.J.; *Venter* v. *Smit* [1927] C. P. D. 30; *Foster* v. *Moss and Dell* [1927] E. D. L. at p. 217. The implications of *In re Polemis* [1921] 3 K. B. 560 have not yet left their mark on the law of S. A. See the cases last cited.

[3] Gr. 3. 34. 2; Voet, 9. 2. 11; *Van der Westhuizen* v. *Du Preez* [1928] T. P. D. 45.

[4] Gr. lib. iii, cap. xxxviii; Van Leeuwen, lib. iv, cap. xxxix.

[5] Inst. 4. 5. 1; Dig. 44. 7. 5. 5; *Transvaal and Rhodesian Estates Ltd.* v. *Golding* [1917] A. D. at p. 28.

[6] Inst. loc. cit.; Gr. 3. 38. 5; V. d. K. *Th.* 810; and see *Rechts. Obs.*, pt. i, no. 98. Contrary to the Roman Law, R.-D. L. only gave an action in case of actual injury.

[7] Inst. 4. 5. 3; Gr. 3. 38. 9; V. d. K. *Th.* 811. For all practical

liability or (which comes to the same thing) as cases in which the law draws an irrebuttable inference of culpa and of consequent liability.[1]

Actions of this class are actively, but not passively, transmissible.[2]

Limitation of Actions. Actions arising out of delict are usually prescribed by the lapse of thirty years, but actions for verbal or written injuries [3] by the lapse of one year from the time when the injured party had knowledge of the wrong. The law as to limitation of actions now, however, depends for the most part upon statutes in the various colonies. Limitation of actions.

purposes the ground is covered by the contractual liability mentioned above, p. 319. Dönges, *The Liability for safe carriage of Goods in Roman-Dutch Law*, pp. 25–6, considers the differences between the two actions.

[1] Another case of quasi-delict was 'si judex litem suam fecerit'. Inst. 4. 5, pr. The subject of judicial liability in the modern law has been touched on above.

[2] Inst. 4. 5. 3 (*ad fin*).

[3] Gr. 3. 35. 3 (and Groen. ad loc.); 3. 36. 4; Voet, 47. 10. 17 (*ad fin.*) and 21; Van Leeuwen, 4. 37. 3, and Kotzé's note; *Beukes* v. *Coetzee* (1883) 1 S. A. R. 71; 4 Maasdorp, p. 25.

PART III

OBLIGATIONS ARISING FROM SOURCES OTHER THAN CONTRACT AND DELICT

Obligationes quasi ex contractu.

We have spoken of obligations arising from contract, and of obligations arising from delict. It remains to refer to a residuary group of obligations which it is customary to describe as quasi-contractual. It embraces a variety of cases in which the law, in order to secure fair-dealing between persons who are brought into relation with one another, makes one the creditor of the other in respect of a specific act or forbearance, thereby creating a *vinculum juris* between them. We must not, perhaps, extend the phrase 'quasi-contractual obligation' so as to include ties arising out of the domestic relations, such as those existing between husband and wife, or parent and child, so far as they are capable of legal enforcement.[1] But, apart from these, there are many relations between persons which give rise to obligations created not by agreement or by wrong, but by operation of law. Thus, where one person has been inequitably enriched at the expense of another, the law imposes a duty of making compensation. Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem.[2] In accordance with this principle, enrichment without cause, or from an unjust cause, constitutes a frequent source of quasi-contractual obligation. Thus, where money has been paid under reasonable error of fact to a person not entitled[3] or under protest as a means of obtaining possession of property or the recognition of a right[4] (*indebiti solutio*), an action (*condictio indebiti*) lies

[1] See Sohm's *Institutes of Roman Law*, translated by J. C. Ledlie (3rd. ed.), p. 308, note 1, and pp. 358–9.

[2] Dig. 12. 6. 14; *supra*, p. 46; *Pretorius* v. *Van Zyl* [1927] O.P.D. 226.

[3] Inst. 3. 27. 6; Grot. 3. 30–4; Voet, lib. xii, tit. 6; *Union Govt.* v. *Nat. Bank of S.A.* [1921] A. D. 121; 3 Maasdorp, chap. 34.

[4] *Union Govt.* (*Minister of Finance*) v. *Gowar* [1915] A. D. 426; *Wilken* v. *Holloway* [1915] C. P. D. 418.

for its recovery, and there are many other cases, which can be referred to the same general head.[1] Another case in which an obligation is said to arise *quasi ex contractu* is *negotiorum gestio*,[2] which occurs when a person without previous mandate has managed another's affairs, or rendered him some other service, not merely as an act of kindness, but in circumstances apt to create a legal relation.[3] In such case the volunteer (*negotiorum gestor*) is bound: (*a*) to manage the affairs of his principal with *exacta diligentia*,[4] and (*b*) to render account of his administration; the principal (*dominus negotiorum—dominus rei gestae*) is bound to indemnify the agent in respect of expenses and liabilities usefully incurred. Other cases of quasi-contractual obligations are such as exist between co-owners, coheirs, heir and legatee, executor and legatee, guardian and ward, fiduciary and fideicommissary; and the duty of a surviving spouse, party to a mutual will under which such spouse has accepted a benefit, to recognize and give effect to the will of the first-dying spouse has been assigned to the same class of obligation.[5]

[1] For the action to recover money paid upon a consideration which has failed (condictio causa data, causa non secuta), in Scots Law, see *Cantiare San Rocco S.A.* v. *Clyde Shipbuilding and Engineering Co.* [1924] A. C. 226.

[2] Grot. lib. 3, cap. 27; Voet, lib. iii, tit. 5, V. d. L. 1. 15. 15; Buckland, *Text-book*, p. 533; 3 Maasdorp, chap. 33.

[3] Dig. 10. 3. 14. 1.

[4] Inst. 3. 27. 1. But Van Leeuwen (*Cens. For.* 1. 4. 26. 3) thinks that the degree of diligentia which can be demanded of the gestor varies with the circumstances. *Lawrie* v. *Union Govt.* [1930] T. P. D. 15 P. H. M. 14.

[5] *Rosenberg* v. *Dry's Exors.* [1911] A. D. at p. 695; *Receiver of Revenue, Pretoria* v. *Hancke* [1915] A. D. at p. 74.

BOOK IV

THE LAW OF SUCCESSION

BOOK IV

THE LAW OF SUCCESSION

In this book we shall speak of the devolution of property upon death, under the two titles of testamentary and intestate succession. But first it will be convenient to preface some remarks on succession in general.

I

SUCCESSION IN GENERAL

The position of the heir in Roman Law.

It is familiar knowledge that, according to the principles of Roman Law, the heir, whether testamentary or intestate, until the time of Justinian was, and under that emperor's legislation might be, the universal successor of the deceased.[1] As such, he assumed the dead man's rights and liabilities, the latter in full and without reference to the sufficiency of the assets. Hence the phrase 'damnosa hereditas', meaning a succession which involved more loss than gain to the acceptor. Further, in the early law, the family-heir, if the paterfamilias had not excluded him by testament, could not refuse the inheritance, which vested in him immediately upon the death of his ancestor. For this reason he was known as 'heres suus et necessarius'. His liability in this regard was the same, whether he was instituted heir in his ancestor's will, or left to succeed upon an intestacy.[2] In the maturity of Roman Law, however, he might abstain from the inheritance (*beneficium abstinendi*),[3] and so avoid liability. But if he intermeddled with the estate, he 'sustained the person' of the deceased, and succeeded not only to the benefits of the inheritance, but also, without limit, to its burdens.[4]

Heres suus.

Heres extraneus.

The 'extraneus heres', that is, any one who was not suus

[1] Dig. 50. 17. 62: (Julianus) Hereditas nihil aliud est quam successio in universum jus quod defunctus habuerit.

[2] Girard, p. 843.

[3] Inst. 2. 19. 2; Dig. 29. 2. 57.

[4] Inst. 2. 19. 6; Cod. 6. 30. 22. 14.

et necessarius,[1] was, originally, in a better position. So soon as the testator died,[2] the inheritance was said to be 'delated' to the heir;[3] but he need not accept unless he pleased. If he neither accepted nor acted as heir (*pro herede gerere*), he incurred no liability. If he accepted or acted as heir, he was said to 'adiate' the inheritance (*adire hereditatem*), and from that moment was in the position of a universal successor. It might happen that the heir hesitated to enter, apprehensive that the inheritance might prove 'damnosa'. In such case the creditors of the estate would apply to the praetor to fix a 'spatium deliberandi',[4] a period within which he must accept, if he meant to do so, and a similar indulgence was given on the application of the heir himself.[5] If at the end of the time fixed[6] he had failed to accept, he was treated by the praetor as having refused the inheritance, which was then offered or delated to the person next entitled. Such was the law until the time of Justinian. But that emperor's legislation gave the heir the choice of alternatives.[7] (1) He might enter at once, subject to the benefit of inventory (*beneficium inventarii*). If he did so, he was liable not as universal successor, but only to the extent of the assets. This was a change of far-reaching consequence. 'It was', as Dr. Hunter observes, 'a bold and successful stroke to convert the heir into a mere official, designated by the deceased for the purpose of winding up his affairs and distributing his property. The heir was now

Changed position of the heir in Justinian's system.

[1] Inst. 2. 19. 3: Ceteri qui testatoris juri subjecti non sunt extranei heredes appellantur. The case of the slave (*heres necessarius*) does not concern us.

[2] i.e. in the simple case of a sole heir instituted unconditionally.

[3] Dig. 50. 16. 151: Delata hereditas intellegitur quam quis possit adeundo consequi.

[4] i.e. to give the heir the option of asking for it, or of allowing the creditors to realize the estate. Gaius, ii. 167; Dig. 28. 8. 5, pr.

[5] Dig. 28. 8. 1 and 5.

[6] Originally not less than one hundred days. Dig. 28. 8. 2. Justinian allowed nine months when deliberation was granted by the magistrate, one year when granted by the emperor. Cod. 6. 30. 22. 13a.

[7] Inst. 2. 19. 5 and 6; Cod. 6. 30. 22. 14a (gemini tramites). The inventory must be completed within three months. Cod. 6. 30. 22. 2a.

a mere executor, with the privilege of being residuary legatee.'[1] (2) If he did not choose to take advantage of the procedure by inventory, he might, as under the old law, claim the spatium deliberandi. In that event, under Justinian's system, if he did not expressly repudiate the inheritance within the time allowed, he was deemed to have accepted.[2] An acceptance[3] or repudiation,[4] once made, was irrevocable except by a minor, who might obtain from the praetor restitutio in integrum.[5]

The Dutch Law of testaments is Roman in origin.

No department of the Roman-Dutch Law is more thoroughly penetrated by the Roman tradition than that of testamentary succession. The institution was unknown to early Germanic Law.[6] The whole law of testaments, therefore, is derived from foreign, namely from Roman, sources, and principally through the channel of the Canon Law. As to the intestate heir—though ascertained in accordance with rules of customary, not of Roman, origin —once determined, he is in the same position as the heir instituted by testament. In the later stages of the Dutch Law, as in the Roman Law, both the one and the other were universal successors of the deceased.[7] In English Law the universal successor is unknown.[8] In his place we find an executor or administrator charged with the office of applying the dead man's personalty (now his whole estate) in payment of debts and legacies, and of distributing the surplus amongst the persons entitled to succeed in the event of intestacy.

[1] Hunter, *Roman Law* (3rd ed.), p. 755.
[2] Cod. 6. 30. 22. 14. [3] Inst. 2. 19. 5. [4] Cod. 6. 31. 4.
[5] Some further indulgence was allowed to a suus heres of full age, provided that the estate had not been sold by the creditors. Cod. 6. 31. 6.
[6] Tacitus, *Germania*, cap. 20; Fockema Andreae, *Het Oud-Nederlandsch Burgerlijk Recht*, vol. ii, pp. 313 ff.; Gr. 2. 14. 2.
[7] Gr. 2. 14. 7: Erfgenaem ofte oir is een die intreed in des overledens boedel als sijn recht ende last in't gemeen verkregen hebbende. Cf. Van Leeuwen, 3. 10. 3. In the Dutch Law the heres suus et necessarius was unknown. Even descendants were free to accept or repudiate as they thought fit. Voet, 29. 2. 2.
[8] At all events we must go back to the time of Glanville to find him. E. Jenks, *Short Hist. of Eng. Law*, p. 63.

The testamentary executor in Roman-Dutch Law,

Testamentary executors were not unknown to the law of Holland, but their functions were confined within narrow limits. They were, as Van der Keessel[1] observes, 'procurators appointed by the testator to manage his funeral, to recover what is due to him, to pay legacies and debts, and to administer his property until a division thereof can be effected'. But they 'cannot debar the heirs from the inheritance, unless the testator has directed otherwise, nor alienate the property without their consent'. It would seem from this that the appointment of executors did not affect the position of the heir as universal successor[2] (in every case where he had not obtained benefit of inventory),[3] nor prevent him from suing or being sued in respect of debts due to or by the deceased. An office so alien from English ideas of the function of an executor has not held its ground in South Africa against the competing analogy of the English Law.[4] By legislation or by practice executors and administrators of the English type have superseded at once the executor and the universal successor of the old law. To-day 'an inheritance is the net balance of the estate of a deceased person which is left after the debts and legacies have been paid, and which has to be handed over by the executor to the heir. The heir, therefore, is merely a residuary legatee'.[5] If the deceased dies intestate

and in the modern law.

The position of the heir in the modern law.

[1] V. d. K. *Th.* 323; V. d. L. 1. 9. 10.

[2] Gr. 2. 21. 7; *Cens. For.* 1. 3. 1. 3; Fock. And., vol. ii, p. 348.

[3] In Holland the benefit of inventory was not granted as of course. Voet, 28. 8. 11. Application must be made to the Sovereign or, in Holland, to the Hooge Raad. Gr. 2. 21. 8 ff., with Schorer's note.

[4] The older conception of the executor's office is reflected in the P. C. cases, *De Montfort* v. *Broers* (1887) 13 App. Cas. 149 (Cape), and *Farnum* v. *Administrator-General of British Guiana* (1889) 14 App. Cas. 651, and still, to some extent, obtains in Ceylon. *Gopalsamy* v. *Ramasamy Pulle* (1911) 14 N. L. R. 238; *Muttiah Chetty* v. *Ukkurala Korala* (1925) 27 N. L. R. 336.

[5] 1 Maasdorp, p. 117. For the history of the law and the position of the heir in South Africa see *Oosthuysen* v. *Oosthuysen* [1868] Buch. 51; *Fischer* v. *Liquidators of the Union Bank* (1890) 8 S. C. 46; *Vermaak's Exor.* v. *Vermaak's Heirs* [1909] T. S. at p. 682. 'It may still be material for certain purposes to determine whether a beneficiary takes as heir or legatee,' *per* Juta J. A. in *Est. Cato* v. *Est.*

the heir is in the same position as if he had been appointed sole legatee by will.

The heir, having been reduced in the modern law to this entirely secondary position, it is matter of indifference whether a testator does or does not institute an heir by his will. The institution of the heir,[1] which was once 'caput et fundamentum testamenti', is no longer a necessary formality.[2] Consistently with this, again contrary to the Roman Law, a man may die partly testate, partly intestate.[3] What he fails to dispose of by his will goes to his intestate successor.[4] In Roman Law it would have gone to the instituted heir by accrual.[5]

It is common to testamentary and to intestate succession that a child or grandchild of the deceased must bring into account what has been advanced to him during the deceased's lifetime. The Romans called this process of accounting 'collatio bonorum'. The Dutch lawyers call it 'inbreng'.[6]

Cato [1915] A. D. at p. 309. For Ceylon Law see *Pulle* v. *Pulle* (1893) 2 S. C. R. at p. 106.

[1] Fock. And., vol. ii, p. 329; V. d. K. *Th.* 290. If the testator does not appoint an heir the (debts and) legacies are paid by his executor or intestate heir. Voet, *Compendium*, 28. 5. 6.

[2] This is expressly enacted for Natal by Law, No. 2 of 1868, sec. 4.

[3] Voet, 28. 1. 1; 28. 5. 26. [4] V. d. K. *Th.* 309 and 322.

[5] Voet, 29. 2. 40: Jus accrescendi, quatenus Romani juris subtilitatibus nititur, inter coheredes locum non habet. See, however, this passage. Grotius (2. 24. 19 and 2. 26. 4) merely follows the Roman Law. Van der Linden says (1. 9. 6) that the jus accrescendi applies, unless each of the heirs is appointed to a separate portion. Voet (*ubi sup.*) and Schorer *ad* Gr. 2. 26. 4 make the question depend upon the intention of the testator. See also Van Leeuwen, 3. 4. 4 (and Decker *ad loc.*) and 3. 6. 8; and V. d. K. *Th.* 326.

[6] Gr. 2. 28. 13; Voet, lib. 37 tit. 6; Van Leeuwen, lib. iii, cap. xvi; *Est. Van Noorden* v. *Est. Van Noorden* [1916] A. D. 175; *supra*, p. 69, n. 2. Contrary to the Roman Law, R.-D. L. requires also collation of *debts*, which are of such a nature as to 'involve an actual depletion of the ancestral estate in favour of a descendant'. See the case last cited at pp. 186 and 192. Collation is made for the benefit of other descendants and of a surviving spouse married in community, not of strangers. Gr. *ubi sup.*; Voet, 37. 6. 6–8.

II

TESTAMENTARY SUCCESSION

In this chapter we shall consider: (1) how wills are made; (2) what may be disposed of by will; (3) who may make a will; (4) who may take under a will; (5) who may witness a will; (6) restrictions on freedom of testation; (7) institution and substitution of heirs; (8) acceptance and repudiation of the inheritance; (9) legacies; (10) codicils; (11) how wills and legacies are revoked; (12) fideicommissa; (13) mutual wills. Contents of this chapter.

1. How Wills are made. In the latest period of Roman Law the will commonly in use was the *testamentum tripertitum*, so called because derived from three sources, the civil law, the praetor's edict, and imperial constitutions.[1] The testator 'subscribed' it in the presence of seven competent witnesses, who, then, themselves subscribed it and afterwards affixed their seals.[2] Alternatively, but only, perhaps, in case of emergency, he might declare his will orally in the presence of the same number of witnesses. This was the nuncupative will.[3] The different kinds of will in Roman Law: (*a*) written, (*b*) nuncupative.

As observed above, wills were not an original Germanic institution, but from the Frankish period onwards contrivances were in use, whereby acts *inter vivos* were made to serve the purpose of a disposition *mortis causa*. The testament properly so-called developed in the Middle Ages under the influence of the Canon and the Roman Law.[4]

The writers on the Roman-Dutch Law tell us that it was not forbidden to make a will in Roman form,[5] but it was usual to employ one or other of the two forms of will How wills were made in Holland.

[1] Inst. 2. 10. 3.
[2] Girard, p. 863; Buckland, p. 285.
[3] Inst. 2. 10. 14; Buckland, p. 286.
[4] Gr. 2. 14. 2; Fock. And. *O.N.B.R.*, vol. ii, pp. 313 ff.; Wessels, Part II, chap. viii.
[5] Gr. 2. 17. 16; Voet, 28. 1. 20; V. d. K. *Th.* 293; V. d. L. 1. 9. 1, whose statement, however, does not extend beyond the nuncupative will with seven witnesses. But this mode, he adds, is now very seldom used.

prescribed by native custom, viz. wills executed either: (1) before two *schepenen* (local magistrates) and the secretary of the Court; or (2) before a notary and two witnesses.[1]

The second of these survives in the law of South Africa, where it exists together with a statutory will of the English type, executed in the presence of two witnesses.

The notarial will.

The notarial will depends for its effect upon the solemnity of its execution and the public character of the notary's office. The notary must know the testator,[2] or, failing that, must know the witnesses, who must know the testator; and in the last event the fact of knowledge must be recorded in the instrument.[3] The witnesses must be males of full age and good repute.[4] The ancient writers discuss the question whether the notarial will is more properly described as oral (nuncupative) or as written. Voet says that it is *mixti generis* or intermediate in character.[5] In fact, the mode of execution was not always the same. Sometimes the will verbally pronounced by the testator was reduced to writing by the notary.[6] Sometimes the notary drew it up in writing from instructions privately communicated by the testator.[7] The practice was for the notary to read over to the testator in the presence of witnesses the completed will, after which he asked him if he understood it, and acknowledged it as his last will.[8] If the testator assented, the will was valid even without the signature of testator and witnesses.[9] But no will is upheld, un-

[1] Gr. 2. 17. 17–18; Van Leeuwen, 3. 2. 6 ff.; V. d. L. 1. 9. 1.

[2] Perpetual Edict of Charles V of October 4, 1540, art. 14; 1 G. P. B. 319; Gr. 2. 17. 22; Voet, 28. 1. 24.

[3] Gr. 2. 17. 22. A will is not void which fails to express this fact, says Voet (28. 1. 24). But see *Resolution of the States of Holland and West Friesland* of March 18, 1671; 3 G. P. B. 487.

[4] Luyden van eeren, weerdich van gheloove. Perpetual Edict, *ubi sup.*; Gr. 2. 17. 21.

[5] Voet, 28. 1. 23.

[6] Gr. 2. 17. 23; Van Leeuwen, 3. 2. 3. This process, which seems to have been very common, is neatly described by Neostadius: *Decis. van den Hove*, no. 1 (*ad fin.*): Notarius excipit viva voce mentem testatoris et deinde, ad probationem, redigit ejus voluntatem, nuncupative prolatam, in scriptis et registro suo inserit.

[7] Voet, *ubi sup.*

[8] Van Leeuwen, 3. 2. 3.

[9] Voet, 28. 1. 23, citing Groenewegen, *de leg. abr. ad* Inst. 2. 10. 3; V. d. K. Th. 296. Van der Linden says (1. 9. 1): 'Although it is

less it manifestly corresponds with testator's intention. Therefore (in South Africa) the reading over of the will was held to be indispensable. If this was omitted, the will was void.[1] The completed will, which the notary retains in his protocol, is termed 'the minute'. The fair-copy supplied, if desired to the testator, or after his death to his representatives, is termed the 'grosse'.[2] Wills of the kind described above are known as 'open wills'.[3]

The closed will.

A special kind of notarial will is the 'closed will' (*besloten testament*).[4] This is an instrument written by the testator, or by another by his direction,[5] and signed by him, which he produces to a notary and two competent witnesses, declaring it to be his last will. The notary then encloses the will in a wrapper, seals the wrapper on the outside, and adds a note of the testator's declaration, which is subscribed by the testator [6] and the witnesses (*acte van superscriptie*).[7]

necessary that the testator should sign in the presence of the notary and witnesses, yet a will clearly declared by word of mouth to the notary and the witnesses must be followed as a valid will in case the testator should die before the minute was properly drafted and was thus unable to sign.'

[1] By Cape Act No. 3 of 1878, sec. 1; Transvaal Ord. No. 14 of 1903, sec. 5; and O. F. S. Ord. No. 11 of 1904, sec. 5: No notarial will shall be taken to be invalid by reason that the same was not read over by the notary or by any other person to the testator in the presence of the subscribing witnesses. The Cape Act was passed in consequence of the decision in *Meiring* v. *Meiring's Exors.* [1878] Buch. 27, 3 Roscoe 6, that a will of this kind, which had not been read by the notary to the testator in the presence of the witnesses, was invalid. Voet, 28. 1. 23; Sande, *Decis. Fris.* 4. 1. 5. The authorities leave it uncertain whether the reading of the will was a necessary solemnity or merely matter of proof of testator's mind. Van der Linden, *Verzameling van merkwaardige gewijsden*, casus xxv.

[2] See W. H. Somerset Bell, *South African Legal Dictionary*, sub verbis *Grosse*, *Prothocol*.

[3] V. d. L. *ubi sup.*

[4] In S. A. also called a 'close will'. Van Leeuwen, 3. 2. 5; Voet, 28. 1. 26; V. d. L. *ubi sup.*

[5] Provided such other takes no benefit under the will. V. d. L. *ubi sup.*

[6] Voet, *ubi sup.* The testator's endorsement was (*semble*) usual, but not necessary. See de Haas *ad Cens. For.* 1. 3. 2. 7, citing Gr. 2. 17. 25, which he understands to apply to the closed will.

[7] When the will was opened it was usual for the notary and

A notarial testament, Voet says, must be dated; otherwise it will be held void, unless the circumstances exclude the risk of fraud.[1]

The modern statutory will.

The statutory, or 'under-hand will', as it is called, is the creation of statutes, which are not textually identical in the several Provinces. It is made with the ceremonies prescribed by the English Wills Act, 1837.[2]

Privileged wills.

In addition to the wills of the normal types described above (known to the commentators as 'solemn' wills, written and nuncupative) the Roman Law admitted in special circumstances the use of exceptional or 'privileged' wills, so called because the testator was dispensed partly or entirely from observance of the usual solemnities. Such were: (*a*) will made in time of pestilence—testamentum tempore pestis conditum—(witnesses need not be present at the same time);[3] (*b*) will made in the country—testamentum ruri conditum—(five witnesses sufficient);[4] (*c*) will by which a parent disposed of his property amongst his children—testamentum parentis inter liberos—(no witnesses necessary, if the will was holograph, i.e. written wholly in the testator's own hand);[5] (*d*) soldier's will—testamentum militare—(no formalities required, any indication of testamentary intention sufficient).[6]

To these the Canon Law added: (*e*) will made for pious causes (churches and charitable institutions)—testamentum

witnesses to be present. Gr. 2. 17. 26; Decker *ad* Van Leeuwen, *ubi sup.* The fact was placed on record by the notary (*acte van opening*). V. d. L. *ubi sup.* All the papers contained in the enclosures of a will must be taken and read as forming the entire will. *Hofmeyr.* v. *De Wet* (1853) [1868] Buch. at p. 333.

[1] Voet, 28. 1. 25; *Holl. Cons.* iii (2), 328. (But see Bijnk. *O. T.* i. 420.)

[2] Cape Ord. No. 15 of 1845, sec. 3; Natal Law 2 of 1868, sec. 1; Transvaal Ord. No. 14 of 1903, sec. 1; O. R. C. Ord. No. 11 of 1904, sec. 1. It should be noted that the Cape Act requires that the testator and witnesses should sign at least one side of every *leaf* upon which the will is written. The Transvaal and O. F. S. Ordinances require them to sign 'every sheet'. *Robb* v. *Mealey's Exor.* (1899), 16 S. C. 133; *Ex parte F. Miller* [1922], W. L. D. 105. There is no such provision in the Natal Act.

[3] Cod. 6. 23. 8. 1.

[4] Cod. 6. 23. 31. 3.

[5] Nov. 107 cap. i (A.D. 541).

[6] Inst. lib. II. tit. 11.

ad pias causas—(this, too, by the Canon Law was relieved from all requirements of form).

Of these privileged wills the Dutch Law admitted (*c*) and (*d*),[1] and they persist in the law of South Africa.[2] The testament whereby an ascendant disposes of property amongst his or her children or remoter descendants, if written out in full in the testator's own handwriting, requires no witness.[3] It may even be nuncupative (*minus sollemne nuncupativum*), but must, in that case, be proved by two witnesses.[4] The testator may distribute the property amongst his children in any proportion he pleases. 'Children' means legitimate children, at all events if the father is the testator;[5] in the case of a mother, perhaps illegitimate children may be considered to be on the same footing as legitimate issue.[6] It seems that, though only children may be instituted in this kind of will, legacies may be made to a wife, or even to a stranger, if the will, written in the testator's hand, has been read and declared in the presence of witnesses.[7] It is essential that the docu-

Testamentum parentis inter liberos.

[1] Gr. 2. 17. 28. 29.

[2] The Cape Act by implication, the Transv. or O. F. S. Ordinances in express terms preserve the privileged will. The test. parent. inter lib. is not recognized in Natal *In re Est Lalla* [1922], N. P. D. 18. Other cases of privilege are questionable (Gr. 2. 17. 30–1), or, requiring two witnesses, confer no advantage in the modern law. The testamentum ad pias causas is fully considered by Van der Keessel in *Dictat.* ad Gr. 2. 17. 30 and was mentioned in *Sim* v. *The Master* [1913], C. P. D. 187. The test. temp. pest. cond. has re-emerged in O. F. S. *Ex parte de Wet* [1919] O. P. D. 61; *Smith* v. *Mathey* [1926] O. P. D. 31.

[3] Nov. 107, cap. i (A.D. 541); Voet, 28. 1. 15; Van Leeuwen, 3. 2. 13; *Cens. For.* 1. 3. 2. 19. Voet says that if the will is written by another person by testator's direction it requires two witnesses. Van Leeuwen merely says that he must subscribe it himself. So Grotius (2. 17. 28). In S. A. such a will is not privileged unless wholly in testator's handwriting. *In re McCalgan* (1893) 10 S.C. 277. It is essential that it should be dated. *Nurok* v. *Nurok's Exors.* [1916] W. L. D. 125.

[4] Gr. 2. 17. 28; Voet, *ubi sup.*; *Cens. For.*, *ubi sup.*; Windscheid, *Lehrbuch des Pandektenrechts*, vol. iii, sec. 544. The witnesses may be male or female. Groenewegen, *de leg. abr. ad* Inst. 2. 10. 6; de Haas *ad Cens. For.*, *ubi sup.*

[5] *Wilkinson's Est.* v. *Wilkinson* (1907) 24 S. C. 602.

[6] Voet, 28. 1. 16.

[7] Nov. 107, cap i (abrogating Cod. 6. 23. 21. 1 and 3. 36. 26);

ment put forward as a holograph will should really be a declaration of the testator's last wishes, and not merely a draft or memorandum of a will to be executed afterwards. Further, every child must be named, and no one of them may be disinherited.[1]

Testamentum militare.

The military testament, i.e. one made by a soldier *in expeditione*, requires no solemnities whatever. It may be written or oral.[2] Voet, following Grotius, permits the same informal mode of testamentary disposition to ambassadors and their suites residing abroad in the course of duty.[3]

In the modern law no particular form of words is required.

In the modern law, it is not required that a will should be framed in any particular form of words. Even an institution of heirs is unnecessary. Of course, the law lays down certain rules of construction of words and phrases,[4] which in the absence of evidence of a contrary intention on the part of the testator the Courts will follow. But we must not allow them to detain us. Here it will be enough to mention two particular clauses frequently inserted in wills, which were known in the Dutch Law as the 'clausule reservatoir' and the 'clausule derogatoir', each of which requires a few words of explanation.

Voet, *ubi sup.* Whether two witnesses were sufficient, and whether the witnesses were a condition of validity or merely of proof, are points upon which the commentators are not in agreement. See Windscheid, vol. iii, sec. 544. 4 and notes. The South African Courts do not appear to have pronounced upon the validity of legacies to a wife or to strangers contained in a privileged will. The practice has been to grant letters of administration without pronouncing upon their rights. *Eaton's Exors.* v. *Eaton* [1875] Buch. 173; *Steer's Exor.* v. *The Master* (1887) 5 S. C. 313; *In re Sluiter* (1900) 17 S. C. 381; *Ex parte Huskisson* (1904) 21 S. C. 4.

[1] Voet, 28. 1. 17. 'All the cases that have been cited show that where a privileged will by a parent has been supported, it has been where the property has been distributed amongst all the children, not necessarily equally, but amongst all.' *Van de Wall* v. *Van de Wall's Exors.* (1896) 13 S. C. at p. 321 per Buchanan A.C.J.

[2] Inst. lib. ii, tit. 11; Gr. 2. 17. 29; Voet, 29. 1. 11; Van Leeuwen, 3. 2. 14; *Ex parte Scheuble* [1918] T. P. D. 158. Such a will holds good for one year after the soldier's honourable discharge from service, not, as Grotius says, for one year after the end of the expedition (V. d. K. *Th.* 299). Sailors enjoy the same privilege as soldiers. *Vervolg op de Holl. Cons.* ii. 64.

[3] Voet, 28. 1. 14; Grot. in *Holl. Cons.* III (2), No. 341.

[4] See Gr. lib. ii, cap. xxii.

The clausule reservatoir [1] is a clause in which the testator reserves to himself the right of adding to, or subtracting from, the dispositions of the will, and ratifies by anticipation any further dispositions which he may make under his hand, such dispositions to have the same effect as if inserted in the testament. Voet expresses a strong opinion against this practice, but hesitates to declare it illegal.[2] The reservatory clause is firmly established in the law of South Africa.[3] Clausule reservatoir.

The clausule derogatoir is one in which the testator purports to disable himself by anticipation from departing from the tenour of his will, either by any subsequent disposition whatever, or by any disposition not expressed in a particular form of words or the like.[4] Voet justly observes that such a clause contains merely a signification of future intention and no derogation from testator's power of changing his will.[5] Whether he has done so or not depends upon the true construction of his subsequent Clausule derogatoir.

[1] *Cens. For.* 1. 3. 11. 10; *Holl. Cons.*, vol. i, no. 125; Bynkershoek, *Quaest. Jur. Priv.*, lib. iii, capp. iv–v; V. d. K. *Th.* 337; V. d. L. 1. 9. 2.

[2] Voet, 28. 1. 29.

[3] See Precedents of Wills, pp. 411 ff. Cape Ord. No. 15 of 1845 retains the reservatory clause, expressly in the case of the notarial will, and by implication in the case of the underhand will. *In re Sir John Wylde's will* (1859) [1873] Buch. 113; *Erasmus* v. *Erasmus' Guardians* [1903] T. S. 843; *Joseph* v. *Est. Joseph* (1907) 24 S. C. 76. See also *Nelson* v. *Currey* (1886) 4 S. C. 355, where de Villiers C.J. said: 'All the writers whom I have consulted are agreed that the reservatory clause in a will cannot confer validity on a subsequent testamentary instrument unless that instrument is incontestably proved to have been executed by the testator, and unless it purported to be and was executed under and by virtue of the reservatory clause in the will.' May a reservatory clause in a mutual will, by apt words, confer power upon the survivor to depart from its terms? *Est. Ebden* v. *Ebden* [1910] A. D. 321. A codicil executed under the reservatory clause must be signed by the testator. It need not be in his handwriting. *Hart* v. *The Master* [1923] C. P. D. 78.

[4] Gr. 2. 24. 8; e.g. containing the words 'arma virumque cano' (Voet, 28. 3. 10), or the whole of the credo (*Holl. Cons.*, vol. v, no. 42), or the words 'Heaven be my portion' (V. d. L. 1. 9. 11), or 'Our soul waits upon the Lord. He is our help and shield' (Bynkershoek, *Quaest. Jur. Priv.*, lib. iii, cap. vii).

[5] Voet, 28. 3. 10. Schorer (*ad* Gr. *ubi sup.*) and Van Leeuwen (3. 2. 16) agree.

testamentary dispositions. Express revocation of the clausule derogatoir is not necessary.[1]

Summary of the law of South Africa.

From what has been said it appears that the law of South Africa admits the following types of will or codicil, viz.

1. The notarial will (open and closed); 2, the statutory or underhand will; 3, the privileged will; 4, the codicil executed by virtue of the reservatory clause.

Ceylon.

In Ceylon a will must be executed either in the presence of a notary, and two witnesses, or in the presence of five witnesses [2] if a notary is not present.[3]

What may be left by will.

2. **What may be disposed of by Will.** Anything may be disposed of by will which is capable of ownership,[4] whether corporeal or incorporeal,[5] whether the property of testator [6] or of his heir [7] or of any one else; [8] for the Roman-Dutch Law, following the Roman Law, permits a bequest of a res aliena no less than of a res sua.[9]

Active testamentary capacity.

3. **Who may make a Will.** All persons may make a will except: (*a*) minors under the age of puberty;[10] (*b*) persons

[1] de Haas *in notis ad Cens. For.* 1. 3. 11. 6. The whole question is fully discussed by Bynkershoek in *Quaest. Jur. Priv.*, lib. iii, capp. vi and vii. See also Van Leeuwen, 3. 2. 16–18, and V. d. K. *Th.* 328.

[2] Ord. No. 7 of 1840, sec. 3; Pereira, pp. 418 ff. There is a saving in favour of the wills of 'any soldier being in actual military service, or any mariner or seaman being at sea', who 'may dispose of his personal estate as he might have done before the making of this Ordinance' (sec. 13).

[3] i.e. if a notary is not present acting in his notarial capacity. *Perera* v. *Perera* [1901] A. C. 354.

[4] Gr. 2. 22. 7. [5] Gr. 2. 22. 9.

[6] Gr. 2. 22. 32. [7] Gr. 2. 22. 35. [8] Gr. 2. 22. 38.

[9] *Receiver of Revenue, Pretoria* v. *Hancke* [1915] A. D. at p. 77.

[10] Gr. 2. 15. 3; Van Leeuwen, 3. 3. 2; Voet, 28. 1. 31; V. d. L. 1. 9. 3. In this case 'ultimus impuberis aetatis dies coeptus pro completo habetur'. Voet, loc. cit. In Ceylon: No will made by any male under the age of twenty-one years or by any female under the age of eighteen years shall be valid unless such person shall have obtained letters of *venia aetatis* or unless such person shall have been lawfully married. Ord. No. 21 of 1844, sec. 2. In Natal: No will or codicil shall be valid unless the testator shall at time of execution or re-execution thereof have attained the age of twenty-one years, or have otherwise become entitled to the privileges of majority by emancipation from paternal power by *venia aetatis* or otherwise. Law 2 of 1868, sec. 6.

mentally incapable;[1] (c) interdicted prodigals (*hofs- ofte stads-kinderen*);[2] but the wills of these last will be upheld so far as their dispositions are just and equitable.[3] There seems no reason why a deaf-mute, though born so, if of sufficient understanding, should not make a will at the present day.[4] Married women and minors may make wills without the authority of their husbands[5] and parents or guardians[6] respectively. If a deceased spouse, married in community, has left something to the survivor, and at the same time directed how the common property shall devolve after the survivor's death, acceptance by the survivor of the benefit in question deprives him or her of the power of disposition over his or her share of the joint-estate.[7] We shall return to this subject later.[8]

[1] Gr. 2. 15. 4; Voet, 28. 1. 34. As to insane delusions see *Rapson* v. *Putterill* [1913] A. D. 417;—drunkenness, Voet, 28. 1. 35.

[2] Gr. 2. 15. 5; Van Leeuwen, 3. 3. 2; Voet, 28. 1. 34.

[3] See Van der Keessel (*Th.* 281), who says: 'The will of a prodigal which is just and equitable under the 39th Novel of Leo is supposed to be valid in Holland also, as decreed by the Court on the 22nd Nov. 1616' (*Decis. van den Hove van Hollandt*, no. 116). Leo's rule was that if the prodigal's will was directed to a useful end it was to be upheld (quae ad utilitatem spectent . . . nequaquam reprobentur). See authorities cited by Voet, *ubi sup.* and Bijnk. *O. T.* i. 442. Van der Linden (1. 9. 3) says: De laatstgemelden worden nogthans tot het maken van uiterstenwil toegelaten, mits zij zulks doen na bekomen octroij en ten voordeele hunner bloedvrienden. See also Van Leeuwen, 3. 3. 2. V. d. K. *Dictat.* ad Gr. 2. 15. 5 doubts whether octrooi is necessary. For S. A. see *Ex parte F.* [1914] W. L. D. 27.

[4] Grotius (2. 15. 6) and Voet (28. 1. 36) say that, if a dumb man cannot write, he should obtain a licence from the Sovereign (*landoverheid; Princeps*), and Van der Linden recommends this course in the case of persons who become thus afflicted after birth. See *Rechts. Obs.*, pt. ii, no. 38. A blind man jure civili must make his will before a notary or other eighth witness. Cod 6. 22. 8. Whether a third witness was necessary in the case of a notarial will was debated. Voet, 28. 1. 37; Van Leeuwen, 3. 2. 9.

[5] Voet, 28. 1. 38. [6] Gr. 1. 8. 2; Voet, 28. 1. 43. [7] Gr. 2. 15. 9.

[8] For other cases of incapacity now obsolete or inapplicable see Van Leeuwen, 3. 3. 4 ff.; Voet, 28. 1. 39–40; Bynkershoek, *Quaest. Jur. Priv.*, lib. iii, cap. ii; V. d. K. *Th.* 277–80; V. d. L. *ubi sup.* The last-named author does not refer to the Placaat of the States of Holland of February 25, 1751 (8 G. P. B. 535), which punishes a man or woman who elopes with a woman or man of any age who has parents living, or with a minor who is under tutelage, with loss of testamentary capacity (Zullen inhabil zyn om te konnen dis-

Passive testamentary capacity.

4. **Who may take under a Will.** Except as hereafter stated any person whether native or foreigner,[1] individual or corporate, born or unborn,[2] may take under a will, provided he be ascertained or ascertainable.[3] The exceptions were or are: (1) spiritual persons or houses (*geestelicke luiden ende huizen*) prohibited from taking immovable or movable property;[4] (2) the tutors and curators or administrators of minors, and their children, as well as the godparents and concubines of such minors prohibited from taking under the will of such minors any immovable property or interest therein;[5] (3) a person who has con-

poneeren onder de leevenden of ter zaake des doods van de Goederen, &c.).

[1] Gr. 2. 16. 1; but not outlaws (woestballingen), or those who adhere to the enemy. Van Leeuwen, 3. 3. 9; Voet, 28. 5. 5.

[2] Voet, 28. 5. 12.

[3] Gr. 2. 16. 2; Voet, 28. 5. 2.

[4] Gr. 2. 16. 3; or by gift *inter vivos*. Placaat of March 20, 1524 (1 G. P. B. 1588). The prohibition, so far as regards title by succession, was extended to movable property by Placaat of October 16, 1531 (2 G. P. B. 2973; Bynkershoek, *Quaest. Jur. Priv.*, lib. iii, cap. i). In S. A. these disabilities exist no longer (Cape Act, No. 11 of 1868; Nathan, vol. iii, sec. 1764), and there is no general law of mortmain.

[5] Perpet. Edict of October 4, 1540, art. 12 (1 G. P. B. 318); Gr. 2. 16. 4; Voet, 28. 5. 8; Bijnk. *O. T.* i. 163; V. d. K. *Th.* 285–6; V. d. L. 1. 9. 4. Voet suggests that the same prohibition extends to a tutor's wife (*sed quaere*). Van Leeuwen speaks (3. 3. 12) in general terms of the tutors, curators, and administrators of minors, their wives or children, godparents, concubines, &c. The restriction does not apply to parent-guardians (Lybreghts, *Redenerend Vertog over 't Notaris Ampt*, vol. i, cap. xix, sec. 7, p. 243), and other guardians who are near relatives. The limits of this exception are ill defined. See Groenewegen, *de leg. abr. ad* Cod. 5. 37. 17; Bynkershoek, *Quaest. Jur. Priv.*, lib. iii, cap. iii. Van Leeuwen (3. 3. 12) says that the restriction does not extend to any persons who without last will would by law inherit the property of such minors *ab intestato*. Van Leeuwen (loc. cit.) and others extend the prohibition to 'movable property of considerable value' (roerende goederen van merkelyke waarden). Bynkershoek dissents, as also de Haas *ad Cens. For.* 1. 3. 4. 43. Van der Keessel (*Th.* 286) agrees with Van Leeuwen. It has been suggested that the reference to godparents is attributable to a mistranslation of a French draft version of the *P. E.*, parâtre and marâtre (= vitricus–noverca) being confounded with parrain and marraine. Bijnk. loc. cit. It seems clear that by 'concubines' is meant concubines of the minors, though Van Leeuwen takes it to mean concubines of the tutors, &c.

tracted a betrothal or marriage with a minor without the necessary consents of parents, relatives, or of the Court, prohibited from taking any benefit under the will of such minor;[1] (4) adulterine and incestuous bastards prohibited from taking directly or indirectly under the will of either parent more than is sufficient for their necessary maintenance;[2] other illegitimate children, however, may be benefited without restriction, unless the testator has at the same time legitimate children, in which case the bastard issue may not take more than one-twelfth of his estate;[3] (5) persons who have committed adultery or incest together prohibited from taking under each other's will;[4] (6) a surviving spouse prohibited from taking under the will of a deceased spouse (who was previously married) more than the smallest share left by the deceased spouse to any child of his or her previous marriage;[5] (7) a woman who marries within the *annus luctus* prohibited from taking anything under a will;[6] (8) a notary prohibited from taking any benefit under a will made and passed before him.[7] A

[1] Perpet. Edict of 1540, art. 17 (1 G. P. B. 319); Gr. 2. 16. 5; Van Leeuwen, 3. 3. 16; Voet, 28. 5. 7. The Placaat of February 25, 1751, extends the prohibition to persons of any age (having parents or guardians) who have eloped together.

[2] Gr. 2. 16. 6; Van Leeuwen, 1. 7. 4 and 3. 3. 10; Voet, 28. 2. 14; V. d. L. 1. 9. 4. According to Voet the same disability attaches to grandchildren 'sive legitimi nepotes sint ex filio incestuoso sive incestuosi ex filio legitimo'; and incestuous parents cannot be instituted by their children. In South Africa an adulterine child can take under the will of the mother. *Green* v. *Fitzgerald* [1914] A.D. 88. In Ceylon it has been held that an adulterine bastard may take a legacy from the father. *Jayashamy* v. *Abeysuriya* (1912) 15 N. L. R. 348.

[3] Nov. 89. 12. 2 (A. D. 539); Voet, 28. 2. 13; Schorer *ad* Gr. *ubi sup.*; V. d. K. *Th.* 287.

[4] Voet, 28. 5. 6. So far as adultery is concerned this is no longer law in S. A. *Est. Heinamann* v. *Heinamann* [1919] A. D. 99. *Semble* a testamentary gift to a concubine holds good. Voet, loc. cit.; de Haas *ad Cens. For.* 1. 3. 4. 41.

[5] Cod. 5. 9. 6 (*lex hac edictali*); Gr. 2. 16. 7; this is no longer law. *Supra*, p. 95, n. 6.

[6] Cod. 5. 9. 1; Voet, 28. 5. 5. But the penalties of remarriage within the *annus luctus* are stated by Van Leeuwen to be obsolete. *Cens. For.* 1. 1. 13. 27.

[7] Lybreghts, *Redenerend Vertoog over 't Notaris Ampt*, vol. i, cap. xxi, sec. 57, p. 349.

like disqualification attaches to any other person who writes a will for another and inserts therein a disposition for his own benefit;[1] and in the modern law to an attesting witness of a will[2] to whom or to whose wife or husband a benefit thereunder is given.

Of the above prohibitions some are certainly, and others probably, obsolete in the modern law. But the penalty of unauthorized marriages (no. (3) *supra*) remains in force, at all events in South Africa;[3] and the same may be said of the prohibition which stands last in the list (no. 8).

A gift to a person incapable of benefiting under a will is taken *pro non scripto*.[4]

[1] Van Leeuwen, 3. 2. 5 and 3. 3. 15; Voet, 34. 8. 3; *Holl. Cons.*, vol. vi, part 2, no. 43; *Benischowitz* v. *The Master* [1921] A. D. 589; *Smith* v. *Mathey* [1926] O. P. D. 31. An appointment as executor is a 'benefit' within the meaning of the rule. *Smith* v. *Clarkson* [1925] A. D. 501; *Hagen N. O.* v. *Buchner* [1928] S. W. A. 134. But see V. d. K. *Th.* 292. Quaere, does the prohibition extend to the wife or relations of the Notary or other person? *Serfontein* v. *Rodrick* [1903] O. R. C. 51; Nathan, vol. iii, pp. 1811 ff. If the Notary were instituted heir the will would at common law have wholly failed, the heir being an incompetent witness.

[2] Cape, Act No. 22 of 1876, sec. 3; Natal, Law No. 2 of 1868, sec. 7; Transvaal, Ord. No. 14 of 1903, sec. 3; O. F. S., Ord. No. 11 of 1904, sec. 3; Ceylon Ord. No. 7 of 1840, sec. 10.

[3] *Mostert* v. *The Master* [1878] Buch. 83.

[4] Grotius (2. 24. 22) says that if the gift is clandestine it is forfeited to the fiscus; but Van der Keessel (*Th.* 333) following Bynkershoek (*Quaest. Jur. Priv.*, lib. iii, cap. ix) excludes the fisc in favour of the legitimi heredes. Nowadays the lapsed gift would go to the substituted heir or fall into residue. Grotius adds (sec. 23) that gifts to persons adhering to the enemy or to outlaws (*woestballingen*) are forfeited to the fisc. So also Van Leeuwen (3. 3. 9). Groenewegen (ad loc.) dissents. If a beneficiary under a will has: (*a*) caused testator's death; (*b*) failed to discover the author of his death; (*c*) disputed the will; (*d*) slandered the memory of the deceased; (*e*) after the execution of the will entertained a deadly enmity against the testator; (*f*) defiled his wife; (*g*) plundered the inheritance; (*h*) in the testator's lifetime contracted with regard to the inheritance with a third party—by the Roman Law he forfeited the benefit to the fiscus, but not, says Grotius (2. 24. 24), to the prejudice of an innocent substitute direct or fideicommissary. Groenewegen (ad loc.) says that, even where there is no substitute, in all these cases an innocent heir is preferred to the fisc. Van der Keessel (*Th.* 334) comments on the first of the above-mentioned cases alone, and says that, though the guilty party could not take, his children might. Ereption for indignitas

5. **Who may witness a Will.** In the Roman Law 'those persons only can be witnesses who are legally capable of witnessing a testament. Women, persons below the age of puberty, slaves, persons deaf or dumb,[1] lunatics, and those who have been interdicted from the management of their property or whom the law declares worthless and unfitted to perform this office, cannot witness a will'.[2] Persons connected by potestas were incompetent to witness one another's will;[3] so was the heir and those connected with him by potestas, but legatees and fideicommissaries were under no such disability.[4] Who may witness a will: in Roman Law,

Generally speaking, the Dutch Law followed the Roman Law as regards the capacity and qualification of witnesses.[5] But in some respects it departed from it. Thus: (1) It was unnecessary that the witnesses should be specially requested to witness the will. It was enough that they knew that they were doing so.[6] (2) A legatee was not a competent witness to an open will[7] notarially executed, but to a closed will he was.[8] On the other hand, the Dutch Law followed the Roman Law: (*a*) in requiring capacity in the witnesses only at the date of the will;[9] and (*b*) in considering a woman an incompetent witness to a will,[10] as also the heir.[11] Further (herein exhibiting in the modern law.

is recognized in the modern law. *Taylor* v. *Pim* (1903) 24 N. L. R. 484.

[1] Or blind. Voet, 28. 1. 7.

[2] Inst. 2. 10. 6; Dig. 28. 1. 20.

[3] Inst. 2. 10. 9.

[4] Inst. 2. 10. 11.

[5] Van Leeuwen, 3. 2. 8.

[6] Voet, 28. 1. 22.

[7] Voet, *ubi sup.*; V. d. L. 1. 9. 1.

[8] Voet, 28. 1. 26. Groenewegen, however (*ad* Inst. 2. 10. 11, sec. 7), says in general terms: Etiam hodie legatarios et fideicommissarios in testamentis testes adhibere a juris ratione alienum puto. Van Leeuwen (*Cens. For.* 1. 3. 2. 6) is to the same effect. Voet refers to the view expressed in *Holl. Cons.*, vol. i, no. 103, that (as in English Law) a legatee-witness disqualifies only himself, and says that it is altogether erroneous. Van der Keessel, however, adopts it (*Th.* 291), and it is now statutory in South Africa (*supra*, p. 360, n. 2) and in Ceylon (Ord. No. 7 of 1840, sec. 10).

[9] Voet, 28. 1. 22.

[10] Voet, ibid.; Groenewegen, *de leg. abr. ad* Inst. 2. 10. 6; but not to a codicil executed before five witnesses jure Romano; Gr. 2. 25. 2; Voet, 29. 7. 1; *Dwyer* v. *O'Flinn's Exor.* (1857) 3 Searle 16. Codicils notarially executed required male witnesses; Voet, 29. 7. 5.

[11] Gr. 2. 17. 12; *Joubert* v. *Exor. of Russouw* [1877] Buch. 21.

a greater stringency than the Roman Law), it excluded as witnesses persons too nearly related to the heir or testator by blood or affinity.[1]

Restrictions on testamentary disposition. A. The legitim: in Roman Law,

6. Restrictions on Freedom of Testation. (A) THE LEGITIM. The Roman Law as early as the time of Ulpian accorded the querela inofficiosi testamenti to three classes of persons: (1) descendants; (2) ascendants; (3) brothers or sisters passed over in favour of turpes personae.[2] In the latest law descendants were entitled to one-third of their intestate share if the deceased left four children or less, to one-half if he left more than four;[3] ascendants and brothers and sisters were entitled to one-fourth of their intestate share.[4] Further, descendants[5] or ascen-

[1] Voet, 28. 1. 22. It does not appear that this limitation extends further than to exclude a son from witnessing, or acting as notary for, a will in which his father is instituted and vice versa. Lybreghts, *Redenerend Vertoog over 't Notaris Ampt*, vol. i, cap. xix, sec. 10; Voet, *ubi sup.* As regards nearness of kin to the testator the restriction here mentioned was taken to extend to the fifth degree of consanguinity inclusive. Lybreghts, *op. cit.*, vol. i, cap. xix, sec. 12. Cognati enim et affines ad quintum gradum a testimonio prohibentur. See also *Holl. Cons.*, vol. iv, no. 245. The authority for this proposition—viz. Dig. 22. 5. 4—seems altogether insufficient. But the rule was accepted by the Cape Supreme Court in *Le Sueur* v. *Le Sueur* [1876] Buch. 153; *Van Niekerk* v. *Raubenheimer's Exor.* [1877] Buch. 51. The restriction applied to notarial wills only, not to underhand wills. *Semble* in the case of underhand wills the Roman Law excluding *domesticum testimonium* (Inst. 2. 10. 9) was in force in Holland. Voet, 28. 1. 8.

At the present day in the Cape Province every person above the age of fourteen years who is competent to give evidence in a court of law is competent to attest the execution of a will or other instrument. Act. No. 22 of 1876, sec. 2. Similar provisions in Transvaal (Ord. 14 of 1903, sec. 2), and O. F. S. (Ord. 11 of 1904, sec. 2), but not in Natal. *Momololo's Exor.* v. *Upini* [1919] A. D. 58. The Ceylon Law contains no general provision as to the competency of attesting witnesses, with the exception of Ord. No. 7 of 1840, sec. 9, to the effect that: 'If any person who shall attest the execution of any will, testament or codicil shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will, testament or codicil shall not on that account be invalid'.

[2] Inst. lib. ii, tit. 18; Girard, p. 915. [3] Nov. 18, cap. i (A. D. 536).

[4] Girard seems to be of this opinion. Others think that Justinian intended that parents and brothers and sisters should take a third instead of a fourth. Windscheid, vol. iii, sec. 580.

[5] Nov. 115 (A. D. 542), cap. iii (*ad init.*). Fourteen grounds of

dants[1] must be instituted heirs, though not necessarily to the amount of the legitim. If they were not instituted (except for good cause) the will failed so far as concerned the institution of the heir.[2] The same result followed if brothers and sisters (who need not be instituted) took nothing under the will.[3] In other cases, if the persons entitled did not receive their legitim, they had an 'actio ad supplendam' to bring their share up to the legal limit.[4]

The general principles of the Roman Law were accepted in Holland.[5] A child, unjustly disinherited or passed over by an ascendant,[6] could upset the will as regards the institution of the heir;[7] but only with effect in the absence of a codicillary clause. If such were inserted or even implied,[8] the inheritance must be made over to the instituted heirs.[9] The phrase 'child' included the issue of a deceased child.[10] If the *de cujus* was a father, only legitimate children could bring the querela; in the case of a mother's will the same privilege extended to natural issue.[11] The amount of the legitim was the same as in the Roman Law.[12] If the child were left something, he had the actio ad supplendam.[13] A testator might not burden with fideicommissum the legitima portio of his children, but he might give them the choice of taking either the legitim unburdened or their rateable share of the whole inheritance subject to fideicommissum.[14] Parents were

in Dutch Law;

disherison are enumerated in the text, to which the Dutch Law added one more, viz. when a daughter under age marries without her parents' consent. Gr. 2. 18. 13–14.

[1] Nov. 115, cap. 4 (*ad init.*).
[2] Ibid., capp. 3 and 4 (*ad fin.*).
[3] Voet, 5. 2. 13.
[4] Inst. 2. 18. 3.
[5] Gr. 2. 18. 5.
[6] Gr. 2. 18. 10.
[7] Gr. loc. cit.; Van Leeuwen, 3. 5. 6; Voet, 5. 2. 7.
[8] Voet, 29. 7. 7; Schorer *ad* Gr. 2. 24. 7.
[9] The praeteritus, however, was entitled, jure civili, to his legitim, and by the Dutch Law also to the quarta Trebelliana, making together one-half. Voet, 5. 2. 14; 28. 2. 11. Van Leeuwen's editor agrees (3. 5. 6). So does Van der Keessel (*Th.* 307). But Decker (*ad* Van Leeuwen, 3. 4. 6 and 3. 5. 6) protests loudly. The effect seems to be, as stated by Van der Keessel (*Th.* 332), to leave the will otherwise undisturbed.
[10] Gr. 2. 18. 6.
[11] Gr. 2. 18. 7.
[12] Gr. 2. 18. 8.
[13] Gr. 2. 18. 10.
[14] V. d. L. 1. 9. 8.

not allowed to bring the querela unless: (*a*) they were entitled to succeed ab intestato [1] (which was not always the case, for, as we shall see, in South Holland a sole surviving parent was entirely excluded); and (*b*) they had not been disinherited for good cause.[2] Brothers and sisters, if themselves of good fame, might, to the extent of the institution,[3] impeach a will in which a turpis persona [4] had been instituted.

abolished in the modern law.

In British Guiana the right of children to their legitimate portion was expressly saved by statute.[5] In the other Colonies the legitimate portion and the law relating thereto have been abolished;[6] in South Africa expressly, in Ceylon by implication.

B. The Falcidian portion.

(B) QUARTA FALCIDIA. In Dutch, as in Roman, law, the heir is entitled to retain, as against legatees, a clear fourth of the estate or of the share in which he is instituted after payment of funeral and other expenses and debts; the legacies are, if necessary, reduced *pro rata*.

C. The Trebellian portion.

(C) QUARTA TREBELLIANA. The principle of the Lex Falcidia was applied by later legislation to the relation of fiduciary and fideicommissary. We shall deal with this topic in a later section.

Both the Falcidian and the Trebellian portions have been abolished in the Colonies.[7]

[1] V. d. K. *Th.* 308.

[2] Nov. 115, cap. iv; Gr. 2. 18. 15–16. Justinian gives eight grounds of disherison which Grotius recounts.

[3] Gr. 2. 18. 17; Voet, 5. 2. 9. The plaint might be brought by germani and consanguinei, but not by uterini.

[4] Van Leeuwen says (3. 4. 9): 'Infamous persons are considered to be not only those who have by sentence been declared such, but also those whose conduct is such that they are generally reputed not to be honest persons.'

[5] Deceased Persons' Estates Ordinance, No. 9 of 1909, sec. 4; abolished by the Civil Law of B. G. Ord. (No. 15 of) 1916, sec. 7.

[6] Cape, Act No. 23 of 1874, sec. 2; Natal, Law 22 of 1863, sec. 3 (A) and Law 7 of 1885, sec. 1; O. F. S. Law Book of 1901, cap. xcii, sec. 3; Transv. Procl. No. 28 of 1902, sec. 128. There is no express abolition in Ceylon, as pointed out by the late Mr. Justice Thomson (*Institutes of the Laws of Ceylon*, vol. ii, p. 208); but see Ord. No. 21 of 1844, sec. 1.

[7] Cape, Act 26 of 1873, sec. 1; Natal, Law 22 of 1863, sec. 3 A, and Law 7 of 1885, sec. 2; Transv. Procl. No. 28 of 1902, sec. 126;

Institution and substitution of heirs.

7. **Institution and Substitution of Heirs.** It is unnecessary to linger over the rules relating to this topic, which Grotius [1] and other writers have taken over in detail from the Roman Law. As observed above, the institution of an heir is no longer necessary to the validity of a testament.[2] Vulgar substitution is the same as in the Roman Law.[3] Pupillary and exemplary substitution in the Roman sense are not in use,[4] the same result being sufficiently obtained by fideicommissa.[5] Two particular departures from the Roman Law may be noticed: first, that an institution subject to an impossible condition is commonly regarded as not seriously intended and therefore void; [6] secondly, that an institution *a die* or *in diem* is good, the effect being to shift the property *from* the intestate heir (*institutio a die*) or *to* the intestate heir or substituted heir named by the testator (*institutio in diem*).[7]

Acceptance or repudiation of the inheritance.

8. **Acceptance or Repudiation of the Inheritance.** Contrary to the Roman Law, no one need accept unless he pleases.[8] Descendants may refuse without beneficium abstinendi. Every heir may either: (*a*) accept unconditionally; or (*b*) accept with benefit of inventory; or (*c*) claim spatium delibèrandi; or (*d*) refuse.[9] Married women

O. F. S. Law Book of 1901, cap. xcii, sec. 2. As to Ceylon there may be some doubt. Thomson, *Institutes*, vol. ii, p. 225.

[1] Gr. lib. ii, capp. xviii and xix.

[2] *Supra*, p. 348.

[3] V. d. L. 1. 9. 7.

[4] Gr. 2. 19. 9; Voet, *Compendium*, 28. 6. 16; Van Leeuwen, 3. 7. 5; V. d. K. *Th.* 106. But Van der Keessel (*Th.* 312) and Van der Linden (1. 9. 7) admit exemplary or quasi-pupillary substitution. See *Rechts. Obs.*, pt. i, no. 41.

[5] Or, says Van der Linden, by *verkiezing van het landrecht* (Gr. lib. ii, cap. xxix), which bears some analogy to pupillary substitution. Cf. V. d. K. *Th.* 360 ff.

[6] Gr. 2. 18. 20. Voet (28. 7. 16) dissents. Van der Keessel (*Th.* 310) agrees with Voet.

[7] Gr. 2. 18. 21; V. d. K. *Th.* 311; and see *Th.* 106. See also *Est. Cato* v. *Est. Cato* [1915] A. D. at p. 300; where Innes C.J. points out that Voet (28. 5. 12) takes a different view of the effect of such an institution; and cites *Black* v. *Black's Exors.* (1904) 21 S. C. at p. 563. In *Van der Merwe* v. *Van der Merwe's Executrix* [1921] T. P. D. 9 Gregorowski J. followed Voet, but there was no argument.

[8] Voet, *Compendium*, 29. 2. 14; V. d. L. 1. 9. 10.

[9] Gr. 2. 21. 2. Grotius (2. 21. 4) and Voet (28. 8. 2) allow a year

cannot accept without the consent of their husbands. Guardians accept for their wards.[1] Acceptance or refusal may be indicated by words or by conduct.[2] Acceptance or refusal once made cannot be recalled except by minors, who may sue for restitutio in integrum.[3] If an heir to whom an inheritance has been delated dies before acceptance, the right of acceptance passes to the dead man's heirs, or may be disposed of by his will.[4] In Holland the benefit of inventory was by no means granted as of course, but only on application to the Sovereign or to the Hooge Raad, and not in case a substituted heir was willing to accept unconditionally.[5]

Legacies.

9. **Legacies.** In regard to the creation and interpretation of legacies, the rules of the Roman Law are closely followed. We may be content on this topic to refer to the usual sources of information.[6]

Codicils.

10. **Codicils.** In Roman Law, codicils were originally informal documents in the nature of notes or memoranda containing directions from the deceased to his heir testamentary or intestate. In Justinian's legislation they were generally executed in writing by the maker,[7] in the presence of at least five witnesses, male or female,[8] who added their signatures.[9] Though as regards form, therefore, they fell little short of regular wills, in several respects they differed from them. Thus: (*a*) they could not dispose of

for deliberation; but Van der Linden (1. 9. 10) says that it lasts only so long as the creditors choose to wait, as they have the right of compelling the heir to accept or repudiate the inheritance. In South Africa (Cape Province) 'the Act of deliberation is wholly in disuse, and there is not a recorded case, at all events after the passing of the Ordinance No. 104 (1833), of any application to the Court for the writ of Benefit of Inventory'. *Fischer* v. *Liquidators of the Union Bank* (1890) 8 S. C. at p. 52, *per* de Villiers C.J.

[1] Gr. 2. 21. 2; Voet, 29. 2. 9. [2] Gr. 2. 21. 3 and 5.

[3] Gr. 2. 21. 6. [4] V. d. K. *Th.* 321.

[5] Gr. 2. 21. 8–9. For the formalities required see Gr. loc. cit., secs. 10–11, and V. d. L. 1. 9. 10.

[6] For the treatment of the topic by the Roman-Dutch writers see Gr. lib. i, capp. xxii and xxiii; Van Leeuwen, lib. iii, cap. ix.

[7] He need not sign. Voet, 29. 7. 1. They might also be nuncupative. Cod. 6. 4. 3, pr.

[8] Gr. 2. 25. 2; Voet, *ubi sup.* [9] Cod. 6. 36. 8. 3.

the inheritance, and therefore could not institute or substitute an heir (directly), nor contain a clause of disherison.[1] On the other hand: (*b*) their validity did not depend upon the existence of a will: if there was a will the codicil was usually construed as part of it, and if the will failed the codicil failed too; but in the absence of a will a codicil validly executed might impose a fideicommissum upon the intestate's heir; (*c*) though a man could only leave behind him one valid will, he might leave any number of valid codicils.[2]

Any one might make or take under a codicil who could make or take under a will.[3]

Owing to the greater elasticity of the codicil, and the liability to failure of the formal will, it became usual among the Romans to insert in every will a clause providing that if the instrument failed to take effect as a will it should take effect as a codicil. This was called the clausula codicillaris. It cured defects of form but not of substance, and even the first only if the form satisfied the requirements of the law in case of codicils.[4]

Does the distinction

The Dutch jurists discuss at some length whether there was any longer any difference between will and codicils.[5]

[1] Inst. 2. 25. 2; V. d. L. 1. 9. 2. Van der Linden says further that a will can never be contained in an underhand instrument whereas a codicil may, if the testator has in his will reserved to himself this power by the clausule reservatoir. But this must be understood subject to the law relating to the testamentum parentis inter liberos.

[2] Inst. 2. 25. 3; Moyle, ad loc.

[3] Dig. 29. 7. 6. 3; Voet, 29. 7. 2; Girard, p. 847.

[4] Gr. 2. 24. 7. Grotius says also that a will in which an heir is not instituted takes effect as a codicil by virtue of the codicillary clause. But even in the absence of such a clause the will held good. Van Leeuwen, 3. 2. 2, and Decker, ad loc. Decker is wrong in saying that Voet lays down (29. 7. 7) that the codicillary clause is always implied.

[5] Grotius simply follows the Roman Law with the addition (2. 25. 3):—'With us codicils are commonly made [like wills] before two members of the Court and the Secretary, or before a notary and two witnesses'. Groenewegen says (*de leg. abr. ad* Inst. lib. ii, tit. 25): Inter testamenta et codicillos nullam hodie differentiam agnoscere licet. Decker *ad* Van Leeuwen (3. 2. 2) argues with much force that the Roman law of codicils is entirely foreign to

between wills and codicils exist in the modern law?

Voet says: 'The law of codicils has been very nearly assimilated to that of testaments, and so not merely do codicils demand the same solemnities as wills, but also anything can be done by way of codicils that can be done by way of will, such as a direct institution or disherison. From which it follows that a woman cannot witness a codicil any more than a will [1] . . . and that the failure of the will does not involve the failure of the codicils.'[2] Van Leeuwen observes [3] that since two wills cannot co-exist,[4] if a testator has left two wills behind him the second invalidates the first, unless the intention is indicated that the first should take effect as codicil. At the present day the difference between wills and codicils seems, as in English law, to be one of name merely, and not of substance.[5]

Revocation of wills.

11. How Wills and Legacies are Revoked.[6] A will, validly made, may be revoked: (1) by a subsequent will,[7] unless the intention is expressed or implied to keep the first will alive.[8]

the law of Holland. Van der Keessel (*Th.* 289) speaks of existing differences between wills and codicils.

[1] Voet is referring to a codicil notarially executed. *Dwyer* v. *O'Flinn's Exor.* (1857) 3 Searle at p. 33. *Vide supra*, p. 361, n. 10.

[2] Voet, 29. 7. 5: nec corruere codicillos corruente testamento, e.g. if the instituted heir does not take up the inheritance. See also Voet, 36. 1. 6; and *Van Reenen* v. *Board of Exors.* [1876] Buch. at p. 47.

[3] *Cens. For.* 1. 3. 2. 2. Cf. Gr. 2. 24. 11.

[4] But they can, as Van Leeuwen himself observes lower down (*Cens. For.* 1. 3. 11. 9), and Voet (28. 3. 8), and Decker, *ubi sup.*

[5] *Est. Ebden* v. *Ebden* [1910] A. D. at p. 332; (Ceylon) *Goonewardene* v. *Goonewardene* (1929) 31 N. L. R. at p. 15. 'In the ordinary course (however) a codicil is employed merely for the purpose of supplementing and making alterations in a will, and it is usually read as an annexure to the main document.' Therefore 'where you have a distinct disposition made by will, that disposition cannot be revoked by a codicil except through the medium and use of words equally clear and distinct'. *Kleyn* v. *Est. Kleyn* [1915] A. D. at p. 537 per Solomon J.A.

[6] For Natal Law see Law 2 of 1868, secs. 8–10; for Ceylon, Ord. No. 7 of 1840, sec. 5.

[7] Gr. 2. 24. 9. Grotius (2. 24. 18), following the Roman Law (Nov. 107, cap. 2), says that a testamentum parentis inter liberos cannot be revoked except by a later will executed in solemn form and with express mention that the later will is intended to revoke the former. This does not hold good in the modern law. *Vimpany* v. *Attridge* [1927] C. P. D. 113.

[8] Gr. 2. 24. 11; V. d. K. *Th.* 329. But Voet (28. 3. 8) says that

(2) by declaration of intention to revoke with the formalities proper to a will;[1] in the case of a closed notarial will a revocation, endorsed on the will and signed by a notary and two witnesses, will deprive the original of its effect:[2]

(3) by destruction animo revocandi.[3]

(4) According to some writers a will is rendered invalid by marriage followed by birth of issue; but this is questionable.[4] Grotius says further, that a will is revoked by

there must be an express revocation of the earlier will, otherwise effect is given, so far as they are not irreconcilable, to both. This view is to be preferred. *Re Est. Whiting* [1910] T. S. 527; *Ex parte Scheuble* [1918] T. P. D. 158; *Ex parte Marks' Exors.* [1921] T. P. D. 284.

[1] Gr. 2. 24. 16; Voet, 28. 3. 1; V. d. L. 1. 9. 11.

[2] Voet, 28. 3. 1, and *Holl. Cons.*, iii (2), 192 (Grotius), and v. 16. If a will executed by a testator was last seen in his possession and cannot be found on his death there is a (rebuttable) presumption that the will was destroyed by him animo revocandi. *Ex parte Slade* [1922] T. P. D. 220.

[3] Gr. 2. 24. 15; Voet, 28. 4. 1. If the will has been executed in duplicate, destruction of one duplicate animo revocandi destroys the effect of the other (*Nelson* v. *Currey* (1886) 4 S. C. 355). The destruction of the copy or grosse of a notarial will has no effect (at all events if the will was orally pronounced and taken down in writing by the notary). So say Voet (*ubi sup.*); Groenewegen (*ad* Gr. *ubi sup.*); and Van der Linden (1. 9. 11). To the same effect is *Holl. Cons.*, vol. iii, pt. 2, no. 156, with which agrees Neostadius, *Decis. van den Hove*, no. 1. The opinion in *Holl. Cons.*, vol. i, no. 109, directly contrary, is followed by Schorer *ad* Gr. *ubi sup.* Van der Keessel says (*Th.* 330): Deleto testamenti exemplo (de Grosse) quod testator adservat, non rumpitur exemplar (de Minute) quod in protocollo Notarii invenitur, nisi probetur testatorem delevisse, ut intestatus decederet (cf. *In re Herron, Ex p. Waters* (1840) 2 Menz. 422). Partial destruction, if intentional, *prima facie* only revokes the part destroyed. Voet, 28. 4. 3. But cutting the strings or breaking the seals of a closed will destroys the whole. V. d. L. *ubi sup.*

[4] V. d. L. *ubi sup.*; V. d. K. 306. This statement rests upon the assumption that the birth of a postumus renders the will void. But does it? In the Dutch law praeteritio was regarded as tacit disherison (Voet, *Compendium*, lib. xxviii, tit. 2 (*ad fin.*)), with the result that the testament was treated as inofficious (Voet, 5. 2. 7), and the praeteritus came in to the extent of his legitim, as if expressly disinherited. Even Voet, whom Van der Linden purports to follow, does not profess that the birth of a postumus always avoids the will, but only, or principally, when the father, having no other children, has in ignorance of the fact that his wife was with child instituted a stranger (Voet, 5. 2. 17). The opinion in *Holl. Cons.*,

a declaration to the Court (*inter acta*), or made before three witnesses, that the testator does not desire his will to stand, provided that ten years have elapsed since the date of its execution.[1] This piece of romanism finds no place in the modern law.

By the Roman Law a will was always liable to fail, owing to non-acceptance of the inheritance. But in the modern law, which, as we have seen, dispenses with the institution of an heir altogether, the non-acceptance of the inheritance by the instituted heir is not allowed to operate to the prejudice of legacies,[2] which must be duly paid by the intestate successors, or, if there are none such, by the fisc. The result is the same if the testator has erased the names of the heirs without intending thereby to revoke the whole will.[3]

Revocation of legacies.

Legacies in particular are extinguished:

(1) if expressly revoked by will or codicil;[4]

(2) if impliedly revoked, which happens if the subject-matter of the legacy is given away or (except under stress of necessity) sold;[5]

vol. iv, no. 21 is to the same effect. In Natal, by Law 2 of 1868, sec. 8, a will is (subject to some exceptions) revoked by marriage (but no joint will is revoked by the marriage of the surviving spouse). In the other provinces (*semble*) this is not so; *Shearer* v. *Shearer's Exors.* [1911] C. P. D. at p. 821. In Ceylon (Ord. No. 7 of 1840, sec. 5) a will is revoked by marriage.

[1] Gr. 2. 24. 14. This is taken from Cod. 6. 23. 27. See *Holl. Cons.*, vol. i, no. 89. Groenewegen (*de leg. abr.* ad loc.) doubts. Schorer (*ad* Gr. loc. cit.) dissents: 'moribus vix admitti potest'. Van Leeuwen (3. 2. 17) admits it without comment.

[2] Voet (28. 3. 14) and Schorer (*ad* Gr. 2. 24. 19) attribute this consequence to the codicillary clause; but the insertion of this clause is certainly not necessary to-day, though sometimes met with.

[3] Voet, 28. 4. 3.

[4] Gr. 2. 24. 27; Voet, 34. 4. 3.

[5] Gr. 2. 24. 28; Voet, 34. 4. 5–6. Grotius, following Dig. 34. 4. 3. 11 and lex 4, adds 'serious enmity between testator and legatee'. Groenewegen doubts (*de leg. abr. ad* Dig. lib. xxxiv, tit. 4). Voet (34. 4. 5) affirms and extends the principle. According to Grotius (2. 24. 27) a legacy may be revoked by a declaration before two witnesses—*sed quaere*. Van der Keessel says (*Th.* 335) that a legacy may be revoked by a marginal note in the grosse or copy of a notarial will signed by the testator. See *Holl. Cons.*, vol. v, no. 45.

(3) if the legatee dies before the testator, or before the condition (if any) of the legacy has been implemented;[1]

(4) by erasure, &c., in the will animo revocandi.[2]

It seems that if the assets of an estate are insufficient to cover the liabilities, all the legacies abate *pro rata*. The distinction which the English law makes between general and specific legacies is foreign to the Roman-Dutch system.[3]

Fideicommissa: in Roman Law,

11. **Fideicommissa.** The student who derives his knowledge of Roman Law at first or second hand from the Institutes of Gaius and Justinian may be supposed to be familiar with the origin and history of fideicommissa, as made known to us in those works. He has learnt that the fideicommissum owed its beginning to the cumbersome technicalities of the Roman system of testamentary succession, and, in particular, to the fact that none but Roman citizens[4] could be validly instituted heirs. But he may sometimes have wondered why the fideicommissum retained its importance in a later age, when the codicil (which was the usual vehicle of the fideicommissum) so far as form went was little less technical than the formal testament; and when, as a rule, the classes disqualified from taking by will were equally disqualified from taking by way of fideicommissum.[5]

employed to settle property.

It is possible that it may hardly have occurred to him that the great part which the fideicommissum played in the Roman Law was due, not merely, and perhaps not principally, to the fact that it afforded an escape from the fetters of form, but much more to the fact that it supplied an easily adaptable method of tying up property through successive generations. The fideicommissum of the jus civile was in fact the equivalent of what English lawyers call a settlement.[6] When, therefore, we read the well-

[1] Gr. 2. 24. 29, and Schorer, ad loc.; Voet, 34. 4. 9.
[2] Gr. 2. 24. 27. [3] *Ex parte Moroka's Exor.* [1930] O. P. D., 61.
[4] And Latins. Girard, p. 121. Peregrini poterant fideicommissa capere: et fere haec fuit origo fideicommissorum, Gaius, ii. 285.
[5] Girard, p. 977.
[6] See examples in Hunter, *Roman Law*, p. 823.

known formula: 'Be Titius my heir, and let him restore the inheritance to Maevius', we must remember that, to aid our comprehension, the situation is presented, as it were, *in vacuo*. In practice it is highly probable that the direction would be that Titius should hand over the estate at his death, or, perhaps, after the lapse of a fixed time or on the occurrence of some certain or uncertain future event. In the first case, Titius takes what an English lawyer would describe as a life-estate with remainder to Maevius; in the other cases he takes the ownership subject to an executory limitation over in favour of Maevius. Perhaps the latter phrase suggests a better analogy in the first case also; for the Roman Law knew nothing of any doctrine of 'estates'. There was no half-way house between dominium and servitude. If you were not dominus you had merely a jus in re aliena. To speak of a man as owner for life is to use a phrase which, to the Roman lawyer, would have been unfamiliar and inartistic, if not positively incomprehensible.

Fideicommissa and trusts.

It is not unusual to describe fideicommissa as testamentary trusts.[1] Passing by the objection that they were frequently intended to take effect upon an intestacy, we may remark that to apply the terms of art proper to one system of law to another system in which they are not at home is always dangerous and often misleading. The differences between the trust and the fideicommissum are fundamental. Thus: (1) The distinction between the legal and the equitable estate is of the essence of the trust; the idea is foreign to the fideicommissum. (2) In the trust, the legal ownership of the trustee and the equitable ownership of the beneficiary are concurrent, and often co-extensive; in the fideicommissum the ownership of the fideicommissary begins when the ownership of the fiduciary ends. (3) In the trust, the interest of the beneficiary, though described as an equitable ownership, is properly 'jus neque in re neque ad rem',[2] against the

[1] e.g. Hunter, p. 809.
[2] *Chudleigh's* case (1589) 1 Co. Rep. at 121 b.

bona fide alienee of the legal estate it is paralysed and ineffectual; in the fideicommissum the fideicommissary, once his interest has vested, has a right which he can make good against all the world, a right which the fiduciary cannot destroy or burden by alienation or by charge.[1]

(4) A further difference, more familiar perhaps but not more important than the others already mentioned, is that while a trust is created as often by act *inter vivos* as by last will, in the Roman Law a fideicommissum always, or almost always, took effect *mortis causa* by virtue of a testament or codicil. Voet,[2] indeed, and other writers say that a fideicommissum could also be created by act *inter vivos*; but the passages from the Corpus Juris cited in support of this view are neither numerous nor convincing.[3] In the law of Holland it was otherwise. Though the books have little to say on the subject, it is clear that fideicommissa were created by ante-nuptial settlement or other act *inter vivos*.[4] As to the modern law

In the Roman Law fideicommissa usually created by will or codicil; but in the Dutch Law also by act inter vivos.

[1] Cod. 6. 43. 3. 3; Voet, 6. 1. 6; 18. 1. 15; 36. 1. 64; V. d. L. 1. 9. 8. The Roman Law on this point is clear, but the Courts in South Africa and Ceylon have shown a strong disposition to refuse relief against a bona fide purchaser for value. See *Lange* v. *Liesching* (1880) Foord at p. 59.

[2] Voet, 36. 1. 9; Vinnius, *Tract. de pact.*, cap. xv, nos. 11 and 12.

[3] Dig. 16. 3. 26, pr.; Dig. lib. xxxii, lex 37. 3; Cod. 8. 54 (55). 3; Dig. lib. xxx, lex 77. The last-cited passage contains the words: Ab omni debitore fideicommissum relinqui potest, i.e. every debtor may be charged with a fideicommissum. But such a f.c. falls short of a f.c. in the full sense, if Voet and Vinnius are right in saying that it gave rise to a personal action merely, not to a vindication. All that the passage last cited from the Digest means is that a debtor may be directed to make payment to a third party, and if he does so may repel a claim by his creditor's heir.

[4] It seems that they were recognized to have the same effect as fideicommissa arising *mortis causa*. By a Placaat of the States of Holland and West Friesland of July 30, 1624 (1 G. P. B. 375), all fideicommissa or prohibitions of alienation affecting immovable property were to be destitute of effect unless registered. But this Placaat, as Voet tells us (36. 1. 12), was never introduced into practice and so became obsolete. *Rechts. Obs.*, pt. i, no. 42; V. d. K. *Th.* 319. For an early case, in the modern law, of fideicommissum created by ante-nuptial contract see *Buissinne* v. *Mulder* (1835) 1 Menz. 162. See also *Du Plessis* v. *Estate Meyer* [1913] C. P. D. 1006, and *Brit. S. A. Co.* v. *Bulawayo Munic.* [1919] A. D. 84. A f.c. in respect of immovable property duly registered confers a

there can be no question. The doubt remains, however, whether we are to regard the trusts which, made familiar by settlements framed upon English models, have invaded the Courts and even the statute book as a development of the native institution, or frankly accept them as a useful importation from a foreign system.

Fideicommissa and trusts in the modern law.

In South Africa it has been said:

'The English law of trusts forms, of course, no portion of our jurisprudence, nor . . . have our Courts adopted it; but it does not follow that testamentary dispositions couched in the form of trusts cannot be given full effect to in terms of our own law.' [1]

In Ceylon the English law of trusts was long ago received into the law of the country, and to-day the trust and the fideicommissum exist side by side.[2]

Method of treatment.

Since all the text-books of the Roman-Dutch Law follow the Roman Law in their treatment of fideicommissa, it will be convenient to pursue the same method, and to regard the fideicommissum primarily as a mode of testamentary substitution which derives its importance from its utility as a means of tying up property through successive generations.[3] The student will find no difficulty in applying the rules which we shall proceed to state, to dispositions *inter vivos* as well.

No form of words required

No particular form of words is needed for the creation of a fideicommissum. All that is required is that the

jus in rem. Ibid. at p. 97, *Ex parte Nel* [1929] N. P. D. 240. Fideicommissa created by act *inter vivos* are even more strictly construed than fideicommissa created by testament. *Holl. Cons.*, vol. iii, pt. 2, no. 111.

[1] *Est. Kemp* v. *McDonald's Trustee* [1915] A. D. at p. 499 per Innes C.J. Cf. Solomon J. A. ibid. at p. 508, and *Adam* v. *Jhavary* [1926] A. D. at p. 150.

[2] *Suppramaniam* v. *Evampakurukal* [1922] 23 N. L. R. at p. 424; *Narayanan Chetty* v. *James Finlay & Co.* [1927] 29 N. L. R. 65. Ord. No. 9 of 1917 defines and amends the Law relating to trusts. Sec. 3 defines a trust and concludes with the words 'A trust does not include a *fideicommissum*'.

[3] Huber, *Heedensd. Rechtsg.* (2. 19. 5) says: 'Schier altoos valt de beswarenisse heedensdaegs niet anders op den eersten erfgenaem als om nae sijn doodt de goederen over te dragen'. But sometimes the fiduciary plays the part of a 'bare trustee'. Ibid. sec. 11.

testator's meaning should be clearly expressed or implied,[1] for the law is unfriendly to fideicommissa and will not lightly presume in their favour.[2] An express fideicommissum is created by such words as these: 'I make my wife my heir, but when she comes to die I desire that she will let the property go to those who shall be then nearest to me in blood' or to certain named persons.[3] An implied fideicommissum is created in many ways, for example, by prohibition of alienation,[4] provided that there is some clear indication of a person or class of persons for whose advantage the prohibition is imposed.[5] Where there is such an indication, the prohibition takes effect as a fideicommissum in favour of the person or class of persons indicated.[6] Where there is no such indication, the prohibition is 'nude' and wholly inoperative.[7] If the heir is forbidden to alienate the property out of the family the law raises a conditional fideicommissum in favour of the intestate heirs,[8] so that the heir is not free to dispose of the property out of the family either by act *inter vivos* or by will.[9] Such was the effect in Holland generally.

to create a fideicommissum.

Fideicommissa are: (*a*) express, (*b*) implied.

Effect of prohibition of alienation.

[1] Van Leeuwen, 3. 8. 4; V. d. L. 1. 9. 8.

[2] Voet, 36. 1. 72; Huber, op. cit. 2. 19. 75–7; *Union Govt.* (*Min. of Finance*) v. *Olivier* [1916] A. D. at p. 81; *Moolman* v. *Est. Moolman* [1927] A. D. at p. 140. Huber, 2. 19. 37.

[3] Van Leeuwen, 3. 8. 6; Huber, 2. 19. 53.

[4] Gr. 2. 20. 11; Voet, 36. 1. 27; Huber, 2. 19. 54. *Ex parte Short* [1928] T. P. D. 155; *Ex parte Martens* [1928] N. P. D. 323; *Ex parte Nel* [1929] N. L. R. 240. For Ceylon see Ord. No. 11 of 1876 sec. 3; and *Salonchi* v. *Jayatu* (1926) 27 N. L. R. 366; *Meiya Nona* v. *Davith Vedarala* (1928) 31 N. L. R. 104.

[5] *Holl. Cons.*, i. 19; vi (pt. 2). 131; *Ex parte Van Eeden* [1905] T. S. 151; *In re Est. Kleinhans* [1927] C. P. D. 73.

[6] *Ex parte Fulton* [1912] C. P. D. 868; *Ex parte Laas* [1923] N. P. D. 104. Apparently a prohibition to alienate to a specified class of persons e.g. to the *agnati* of the beneficiary is free from objection. Bijnk. *O.T.* i. 50.

[7] i.e. of the last possessor (usually), not of the settlor. Huber, 2. 19. 68.

[8] Gr. 2. 20. 12; Voet, 36. 1. 27 ff.; the f.c. is conditional, because it takes effect only in the event of a prohibited alienation taking place. Not only is such alienation void, but the interest of the alienor is forthwith determined and the interest of the heirs immediately vests in possession. So the law is stated by Sande (*de prohib. rer. alienat.* 3. 4. 7 ff.). [As regards the effect of a

But in Amsterdam a proviso of this nature was almost destitute of effect; for it was construed as merely prescribing the course of descent in respect of so much of the property as the heir had not alienated *inter vivos* or disposed of by his testament.[1]

Fideicommissum residui.

Nearly, but not quite, the same freedom of alienation is enjoyed by the heir who is given power to diminish or waste the property, with a direction to make over the residue to some person named by the testator (*fideicommissum residui*).[2] In this case the heir may freely dispose of three-quarters[3] of the estate otherwise than by (fraudulent?) donation or last will,[4] leaving one quarter only to the fideicommissary; if he has alienated more than three-quarters, the goods last alienated may be followed in the hands of the alienee.[5]

judicial sale see p. 427.] In *Josef* v. *Mulder* [1903] A. C. 190, 20 S. C. 144 the P. C. held that a direction that the property should 'never be sold or parted with in favour of a stranger' was not infringed by a mortgage. But see Cod. 4. 51. 7, and Huber, *Heedensdaegs. Rechtsg.* 2. 19. 58; *Ex parte De Jager* [1926] N. P. D. 413. As to leases ad longum tempus see Sande, op. cit. 1. 1. 45. Huber (sec. 59) says that if the direction is that the property is not to be alienated out of the family the fiduciary may leave it by will to any one of the family near or remote. *Secus*, if the property is left *to* the family (gemaekt aen het geslachte). For the distinction between a f.c. familiae 'verbis in rem conceptis' and 'verbis in personam conceptis', see Voet, 36. 1. 28; *Union Govt.* (*Min. of Finance*) v. *Olivier* [1916] A. D. 74; *Moolman* v. *Est. Moolman* [1927] A. D. 133; (Ceylon) *Sopinona* v. *Abeywardene* (1928) 30 N. L. R. 295; *Palipane* v. *Taldena* (1929) 31 N. L. R. 196.

[1] Gr. *ubi sup.*; Voet, 36. 1. 5. See V. d. K. *Th.* 318.

[2] Nov. cviii, cap. 1; Gr. 2. 20. 13; Van Leeuwen, 3. 8. 9; Huber, 2. 19. 103; V. d. K. *Th.* 320. *McCarthy* v. *Newton and Zeederberg* (1861) 4 Searle 64; *Ex parte Bekker* [1928] O. P. D. 28; (Ceylon) *Veerapillai* v. *Kantar* (1928) 30 N. L. R. 121. The same result follows when a usufruct with a power of alienation has been left subject to a condition that the property should be restored after death. V. d. K. *Th.* 372.

[3] Grotius says one-fourth; but this is a slip corrected in Groenewegen's and later editions. In certain cases he might dispose of the whole, viz. ex causa dotis seu propter nuptias donationis seu captivorum redemptionis vel si non habeat unde faciat expensas. Nov. 108 (A.D. 541); Authentica *ad* Cod. 6. 49. 6; Gr. loc. cit.

[4] Voet, 36. 1. 54; Van Leeuwen, 3. 8. 9; V. d. K. *Dictat. ad* Gr. 2. 20. 13 and *Th.* 320.

[5] Distinguish the case of a mutual will by which the spouses

Conditional fideicommissa.

Very often the fideicommissum depends upon a condition, as where a wife is appointed heir with a gift over in the event of re-marriage: e.g. 'I appoint my wife Jane my heir; but, if she marries again, I desire her to make over the property to my brother Henry'; or when a son is appointed heir with a gift over in the event of his dying under the age of five-and-twenty.[1] But the commonest condition is that which provides that the goods are to go over if the first taker dies without children. The formula is something of this kind: 'If my heir dies without children I will that he shall let the property which comes to him from me go to my nearest of kin then in being'. The effect is that the gift over is only realized in case the heir leaves no legitimate children surviving him at the date of his death.[2]

The clause 'si sine liberis decesserit'.

If the clause *si sine liberis decesserit* was expressly inserted as the condition of a gift over taking effect, and the first taker had children who survived him, the gift over would certainly fail; but whether a fideicommissum would be implied in favour of the children was disputed. Grotius says that a negative answer is commonly given unless the testator was an ancestor, or the children are themselves charged with a fideicommissum, or from other circumstances it appears that the testator intended that they should benefit under his will.[3]

reciprocally institute each other heirs with power of alienation and direct that whatever is left of the massed estate shall be divided between the heirs of the spouses. In this case the surviving spouse is free to alienate the whole estate by act *inter vivos*, even (*semble*) by donation; Voet, 36. 1. 56; Coren, *Obs.* xi, p. 43; *Holl. Cons.*, vol. iv, 278; Bijnk. *O.T.* i. 981; *Brown* v. *Rickard* (1883) 2 S. C. 314; *In re Jordaan's Est.* (1907) 24 S. C. 84; *Ex parte Venter* [1920] O. P. D. 153.

[1] Huber, 2. 19. 44.

[2] Voet, 36. 1. 13 ff.; Huber, 2. 19. 45–6.

[3] Gr. 2. 20. 5; Huber, 2. 19. 30. I institute my brother; if he dies without children, the property to go over to my nephew. This does not create a f.c. in favour of the brother's children. Ibid. sec. 55. Voet (39. 5. 44) observes: Nititur scilicet tota quaestionis hujus definitio ex determinatione controversiae, an positi in conditione censeantur etiam positi in dispositione. See also Neostad. *Decis. van den Hove*, No. 22; Van Leeuwen, 3. 8. 12;

If however the testator was an ancestor, not only does the above-mentioned clause create a fideicommissum in favour of the children, but even if the clause has been omitted it will be read into the will with the same result.[1] For if an ascendant confers a benefit by his will upon a descendant who was childless at the date of the will, with an unqualified gift over in the event of such descendant's death, none the less, if, at the date of his death, such descendant leaves children surviving him, a fideicommissum will be implied in their favour, in derogation of the express fideicommissum contained in the testator's will.[2]

The effect of fideicommissum as regards the ownership of property subject to it.

In the Roman Law it was the duty of the fiduciary to 'restore' the property to the fideicommissarius either forthwith or upon the vesting of the fideicommissum. The texts of the Corpus Juris leave us in some uncertainty as to what was required to constitute restitution. *Prima facie* the property in question vests in the first instance in the fiduciary, as heir or legatee, by title of inheritance or legacy; and it would appear that some act of restitution—delivery or its equivalent—was, as a rule, necessary

Voet, 28. 2. 10; Bijnk. *O.T.* i. 1032; *Steenkamp* v. *Marais* (1908) 25 S. C. 483; *Ex parte Odendaal* [1926] O. P. D. 223.

[1] This may perhaps, in view of *Ex parte Odendaal*, seem to be stated too absolutely. But if descendants 'positi in conditione' are to be taken to be 'positi in dispositione', it is correct. It cannot make any difference whether the condition is express or implied. Cf. Voet, 36. 1. 17, *in fin.*

[2] Voet, 36. 1. 17; Huber, 2. 19. 49. See *Galliers* v. *Rycroft* [1901] A. C. 130, 17 S. C. 569. It was held in this case that in Roman-Dutch Law, differing in this respect from Scots Law, the clause 'si sine liberis decesserit' is implied in case of fideicommissary substitution only, and not also in case of direct substitution. Query whether the presumption mentioned in the text ought to operate when the fiduciary heir to the knowledge of the testator has children of whom no mention is made? *Est. Cato* v. *Est. Cato* [1915] A. D. at p. 303 per Innes C.J. citing Voet, 36. 1. 17 (read 18). In the absence of proof of contrary intention 'children' means descendants of the first degree only. Voet, 36. 1. 22; *Galliers* v. *Rycroft, ubi sup.*

The question of 'The vesting and divesting of rights under a will in Roman-Dutch Law' suggested by a dictum of De Villiers, Sir Henry De Villiers in *Galliers* v. *Rycroft*, is discussed in an article so entitled in *L. Q. R.* vol. xxvi, p. 126, by A. J. McGregor; and see *Tredgold* v. *Est. Arderne* [1926] C. P. D. 25.

to vest the property in the fideicommissary.[1] But Justinian put fideicommissa and legacies on an equal footing, and gave to all legatees the real action which, before his time, had been limited to legatees by vindication.[2] As regards res singulares, at all events, the effect would be to vest the property in the fideicommissary *eo instanti* that the fideicommissum matured. In the modern law it would seem reasonable to infer the same result in every case of fideicommissum. If this be so, the true parallel in English Law to the fideicommissum is not the trust but the grant to uses. If the fideicommissum is expressed to take effect at once, the fiduciary will be a conduit-pipe to convey the property to the beneficiary. If, on the other hand, the vesting of the fideicommissum is postponed, the fiduciary will be in the position of an owner in fee simple subject to an executory limitation over to another. Upon the happening of the contemplated event the ownership will shift over to the fideicommissary. If the terms of the fideicommissum involved active duties in relation to the property, the case would, no doubt, be different. In such a case an actual conveyance would be necessary to transfer the property to the fideicommissary owner.[3]

Parallel in English Law.

Let us now confine our attention to the most usual case of fideicommissum, viz. where the fiduciary is intended to take a life interest and to 'restore' the property upon his death. What is his position? In the first place, unless the testator has directed otherwise,[4] he must give security

Fideicommissum taking effect: (*a*) on death;

[1] Dig. 36. 1. 38 (37), pr.; Voet, 36. 1. 34; Huber, 2. 19. 108; Sande, *Decis. Fris.* 4. 5. 13, where it is laid down that before 'restitution' a fideicommissary cannot, as a rule, maintain an action against a third party in possession.

[2] Inst. 2. 20. 2; Cod. 6. 43. 1. 1.

[3] What is stated in the text is true in the modern law in so far as a fideicommissarius whose title has matured has a right of action to vindicate the property (Maasdorp, vol. ii, p. 36). But by the law of S. A. his title will be incomplete (and perhaps insecure) until he has obtained transfer. 'It is the transfer which gives the dominium.' Op. cit. p. 76, *supra*, p. 148, n. 4 (on p. 149).

[4] Huber, 2. 19. 134; V. d. K. *Th.* 511 (mistranslated by Lorenz), *non obstante* Voet, 36. 3. 6 (*ad fin.*). See also Van Leeuwen, 3. 8. 18.

for the restoration of the property, undiminished in amount and value, to the person entitled to succeed him.[1] In the interval he is dominus, and may exercise all rights of dominion not inconsistent with the rights of his successor. Like the usufructuary, he may transfer his right of enjoyment to another, remaining liable, however, to the fideicommissary for the acts and defaults of the transferee.

(*b*) during the lifetime of the fiduciary.

Next, put the case of a fideicommissum expressed to take effect upon the happening of a contemplated event during the lifetime of the fiduciary, which event has happened. Has he *ipso jure* ceased to be dominus? It seems that he has. At all events, he cannot deal with the burdened property, so as to give a good title to an innocent purchaser. This is expressly enacted in Cod. 6. 43. 3 to the following effect:

Can the fiduciary give a good title to a purchaser without notice?

In Roman Law;

'If a legacy or fideicommissum be left to any one with a condition of substitution or restitution, either in an uncertain event or in a certain event but at an indefinite time, he will do better if in these cases he refrains from selling or mortgaging the property, lest he should expose himself to still greater burdens under a claim of eviction. But if in his lust for wealth he should hastily proceed to a sale or mortgage in the hope that the conditions will not take effect: let him know that, upon the fulfilment of the condition, the transaction will be treated as of no effect from the beginning, so that prescription will not run against the legatee or fideicommissary. And this rule will, in our opinion, equally obtain whether the legacy has been left unconditionally or to take effect at some certain or uncertain future time, or in an uncertain event. But in all these cases let the fullest liberty be given to the legatee or fideicommissary to claim the property as his own, and let no obstacle be placed in his way by those who detain the property.'[2]

in Roman-Dutch Law.

That the principles set forth in this law were accepted as part of the law of Holland admits of no doubt. The reader will observe that the tenderness for the bona fide

[1] Huber, 2. 19. 83 and 131. He must also make an inventory. From this duty he cannot be excused even by the testator himself. Voet, 36. 1. 36; Neostad, *Supr. Cur. Decis.* No. 91; Bijnk. *O.T.* i. 694, and *Quaest. Jur. Priv.* Lib. iii, cap. 10.

[2] *De Jager* v. *Scheepers* (1880) Foord at p. 123, *per* de Villiers C.J.

purchaser for value, which characterizes the jurisprudence of the Court of Chancery, has no counterpart in the Roman-Dutch law of fideicommissa.[1]

The position if: (*a*) fiduciary dies before testator; (*b*) fideicommissary dies before vesting.

Next let us consider the position if: (*a*) the fiduciary dies before the testator, or (*b*) the fideicommissary dies before the vesting of the fideicommissum. The result in each case is the same; the fideicommissum fails. In the first case there is never any one burdened;[2] in the second case there is never any one entitled.[3] A cautious testator can, no doubt, by taking the proper steps provide against such a result.[4] But if he has failed to do so, there is no escape from the legal consequences.

Distinction between life interest created: (*a*) by

This is why when a life interest is given by will it is of the utmost importance to find out whether the testator intended to create the life interest by way of fideicommissum or by way of usufruct.[5] From the point of view

[1] But, when a deed of gift creating a f.c. was unregistered, and the fiduciary, who was also the intestate heir of the donor, sold the property to the defendant, who registered the deed, the Ceylon Court held that defendant's title was superior to that of the fideicommissary heirs. *De Silva* v. *Wagapadigedera* (1929) 30 N. L. R. 317. *Vide infra*, p. 428.

[2] Voet, 36. 1. 69; Huber, 2. 19. 112–21. The result is the same, Huber says, if the fiduciary dies before he has accepted the inheritance. In *White* v. *Landsberg's Exors.* [1918] C. P. D. 211 Searle J. held that the rule of R. D. L. that a f.c. fails if the fiduciary dies before the testator has in effect been abrogated by modern legislation with regard to executors. See also, *Van der Merwe* v. *Van der Merwe's Extrix.* [1921] T. P. D. 9 (repudiation of the inheritance by the fiduciary).

[3] Voet, 36. 1. 67; Huber, 2. 19. 31 and 50; *Van Dyk* v. *Van Dyk's Exors.* (1890) 7 S. C. at p. 196. Voet adds 'nisi aliud appareat voluntas testatoris'. Cf. Bijnk. *O.T.* i. 419. He further distinguishes f.c.c. created by will and f.c.c. created by act *inter vivos*, e.g. antenuptial contract. In the latter case 'magis est ut pacto designati successores fideicommissarii ante conditionis eventum morientes, spem fideicommissi ad heredes transmittant'. But on this point opinions varied. Wassenaar, *Prax. Judic.* cap. 18, sec. 126; *Brit. S. A. Co.* v. *Bulawayo Munic.* [1919] A. D. at p. 95; (Ceylon) *Balkis* v. *Perera* (1927) 29 N. L. R. 284. In some cases the fideicommissary may claim the property even before the vesting of the f.c., notably if the fiduciary has alienated all the property. Ibid. sec. 125. If the fiduciary dies after the vesting of the inheritance but before the fideicommissary, the f.c. must be implemented by his heir. Ibid. sec. 120.

[4] Huber, 2. 19. 38.

[5] *Strydom* v. *Strydom's Trustee* (1894) 11 S. C. 425; *Commrs. of*

fideicommissum; (*b*) by usufruct.

of the life tenant the result is, perhaps, much the same in either case. But from the point of view of the person who is to take after him the distinction is of vital importance. If the life tenancy is created by way of usufruct the dominium vests forthwith in the person who is to take as successor. He acquires from the very moment of the testator's death a real right, which he can dispose of *inter vivos* or by will or transmit to his intestate heirs. But if the life tenancy is the consequence of a fideicommissum, the fideicommissary takes no immediate interest. He must be alive when the fiduciary dies. If he predeceases the fiduciary, he transmits nothing to his heirs,[1] for he had nothing to transmit, and the ownership, which was from the beginning vested in the fiduciary, being now freed from the burden of the fideicommissum, is his to dispose of in any way he pleases.[2] This fundamental distinction is seldom present to the mind of lay people who make wills, and the task of construing their dispositions is often a matter of some difficulty. A clause forbidding alienation by the life tenant points to a fideicommissum, but affords merely a presumption, not a positive rule of law.[3] Before the Court will construe a testamentary disposition to be a fideicommissum, it must be satisfied beyond a reasonable doubt that the testator intended to burden the bequest with a fideicommissum.[4]

Inland Rev. v. *Est. Hollard* [1925] T. P. D. 154; *Ex parte Cilliers* [1927] O. P. D. 65; *De Villiers* v. *Est. De Villiers* [1929] C. P. D. 106.

[1] Voet, 7. 1. 13; 36. 1. 26. But 'although there is a presumption in the case of a fideicommissum that a testator intended a fideicommissary legatee to have no transmissible rights unless he survives the fiduciary legatee, such presumption would have to yield to other clear indications in the will of an intention to the contrary'. *Samaradiwakara* v. *De Saram* [1911] A. C. at p. 765, *per* Lord de Villiers. [2] Bijnk. *O.T.* i. 197.

[3] Voet, 7. 1. 10; *Samaradiwakara* v. *De Saram*, *ubi sup.* at p. 762. Conversely if a person is instituted as heir in the usufruct of a thing with power of alienation, he is considered to have been instituted in the ownership. Van Leeuwen, 3. 8. 17. Cf. V. d. K. *Th.* 374–5.

[4] *Brits* v. *Hopkinson* [1923] A. D. 492; *Moolman* v. *Moolman's Exor.* [1927] A. D. 133. But it has been said that there is no pre-

The Trebellian portion;

It will be remembered that the Senatus-Consultum Pegasianum (between A.D. 69 and 79) allowed the fiduciary heir or legatee to retain one-fourth share against the fideicommissarius. Justinian, while abrogating the Senatus-Consultum as a whole, re-enacted this clause as part of the S. C. Trebellianum.[1] In the modern books, therefore, this fourth share is commonly known as the quarta Trebelliana (*Trebellianique portie*).[2] The Roman-Dutch Law adopted this provision of the Roman Law and extended its scope. By the Roman Law children and other descendants were not permitted to retain the legitima portio and, in case they were burdened with fideicommissa, the Trebellian portion as well. The Canon Law, however, allowed them to claim under both heads, and this practice was adopted into the law of Holland and of other countries.[3] The result was that a son or other descendant charged with a universal fideicommissum and unprovided for by legacy or otherwise, deducted first of all his legitima portio, which (if there were not more than four sons) would be one-third of his intestate share, and, then, the Trebellian portion, namely one-fourth of the residue. An only son, therefore, got in the aggregate $\frac{1}{3} + (\frac{1}{4} \times \frac{2}{3} =) \frac{1}{6} = \frac{1}{2}$. It is often said that he takes two quarters—a simpler, though inaccurate, way of expressing the actual result. Whatever the number of the children, they did not in Holland in any event retain more than one-half of the whole estate between them.[4]

in Roman-Dutch Law might be accumulated with the legitim;

abolished in the modern law.

We need not say any more about the quarta Trebelliana, for it has been disused or abolished by statute in all the Roman-Dutch Colonies.[5]

sumption against f.c. in favour of usufruct. *Miller* v. *Attwell* [1927] C. P. D. 150; *Ex parte Ward* [1928] C. P. D. 70; contra, *Commrs. of Inland Rev.* v. *Hollard* [1925] T. P. D. at p. 163.

[1] Inst. 2. 23. 7.

[2] Voet, 36. 1. 47 ff.

[3] Gr. 2. 20. 10; Voet, 5. 2. 14; 36. 1. 52; Huber, 2. 19. 85. The testator, however, might put his child to election whether he would take the legitim unburdened or his whole intestate share subject to a fideicommissum. V. d. L. 1. 9. 8; *Simpson* v. *Forrester* (1829) 1 Knapp, P. C. at p. 243.

[4] Voet, 5. 2. 14; V. d. K. *Th.* 316.

[5] *Supra*, p. 364.

It has been observed more than once that the chief use of the fideicommissum was to tie up property through succeeding generations. We are told in the Institutes that a testator might charge a fideicommissum not only on an heir or legatee, but also on a fideicommissary. In this way the testator might tie up the property for so long as he pleased. Had the Roman and the Roman-Dutch Law, then, no Rule against Perpetuities? Yes; but one which gave way before the clearly expressed intention of the testator to override it. The rule, which is derived from Justinian's 159th Novel (A.D. 555), is stated by Voet in the following terms:[1]

The rule against perpetuities in Roman and Dutch Law.

'Now since there has been frequent mention of a perpetual fideicommissum in the preceding sections, it should be known that it has been generally held that where there is any doubt such perpetuity only extends to the fourth generation, and that thereafter the property is unburdened, so that the fifth generation is able to dispose thereof at will; unless there be clear evidence of a contrary intention on the part of the testator, desiring to subject the property to a further burden. For it seems that we cannot deny the testator's right to multiply the degrees of fideicommissary substitution at his discretion *in infinitum* as in the case of direct substitution.'

The testator, then, may tie up the property for ever if he pleases. But the mere use of the word 'perpetual', or the like, is not sufficient to produce this result.[2]

Thus, if he says: 'I will that my goods after the death of my first heir shall descend to my next of kin then in being, and that they shall always go from one to the other of my blood-relations, and shall not at any time pass outside my family',[3] these words will not be sufficient to tie up the property beyond the fourth generation inclusive, unless he goes on to add that: 'the fideicom-

[1] Voet, 36. 1. 33.

[2] *Ex parte Barnard* [1929] T. P. D. 276. Cf. Sande, *Decis. Fris.* 4. 5. 4, where the head-note runs: 'Perpetuum fideicommissum non extendi ultra quartum gradum, nisi enixa Testatoris voluntas aliud suadeat'.

[3] Huber, 2. 19. 63. Cf. *Ex parte Steenkamp* [1919] C. P. D. 112.

missum shall not at any time or in any event whatsoever come to an end', or other words of like import.[1] As to the mode of computing the degrees, Voet continues: 'In Holland and Friesland the general opinion of commentators has been accepted . . . that it is not the first instituted or fiduciary heir, but the first fideicommissary heir, who constitutes the first degree, and consequently only the fifth fideicommissary heir is able to exercise his free discretion in regard to the fideicommissary property.'[2]

Relief from the burden of fideicommissum, when granted.

The inconvenience of allowing testators to 'tie up' their property over a long series of successive generations is obvious. It is not surprising therefore that applications are made to the Court to discharge the property from the burden which attaches to it, or to authorize exchange or sale or mortgage. But apart from the limited cases provided for by statute, permission is rarely given unless the property is of a wasting character, so as to render exchange or sale desirable in the interest of all parties presently or contingently interested;[3] and it is only under special

[1] Huber, 2. 19. 64–5: ten ware de Testateur met zeer krachtige en dringende woorden hadde belast dat hy immers de bezwarenisse ten eeuwigen dage wilde hebben uitgestrekt, in welken gevalle de wille van de Testateur plaets soude moeten hebben.

[2] Van Leeuwen (3. 8. 7) agrees with Voet; and this view was adopted by de Villiers C.J. in *Rykclief's Heirs* v. *Rykclief's Exors.* (1896) 13 S. C. 64. See further, as to the method of computing the degrees, *Strickland* v. *Strickland* [1908] A. C. 551 (P. C. in appeal from Malta). In Ceylon by Ord. No. 11 of 1876 immovable property may not by any will, deed, or other instrument be made inalienable for a longer period than the lives of persons who are in existence or *en ventre sa mere* at the time of its execution and are named described or designated in it, and the life of the survivor of such persons (sec. 2); and any prohibition or restriction of alienation so far as it extends beyond the above-mentioned period is null and void (sec. 3). The Trusts Ord., No. 9 of 1917, repeals this Ord. in so far as it relates to trusts; but sec. 110 (1) provides that 'no trust shall operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the constitution of the trust, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong'. But a fideicommissum can be created extending over four generations. (Ceylon) *Carolis* v. *Simon* (1929), 30 N.L.R. 266.

[3] Voet, 36. 1. 63 and 70; V. d. K. *Th.* 317 *Dictat.* ad Gr. 2. 20. 11; V. d. L. 1. 9. 8. The power to relieve property of the burden of f.c.

circumstances that the Court will grant leave to the fiduciary to raise money on the security of the fideicommissary property.[1] On the other hand, where all the fideicommissaries are ascertained and *sui juris* they may agree to the sale or mortgage of the property or to the total extinguishment of their rights. If they are minors consent may be given by their guardians on their behalf, but subject to approval by the Master and the Court.[2]

Mutual wills.

12. **Mutual Wills.** This topic has been referred to above. It was in Holland, and is in South Africa, the common practice for two or more persons, usually but not necessarily spouses married in community of property,[3] to join in making a disposition of property which is known as a reciprocal or mutual will.[4] The principles of law applicable to such disposition are briefly and accurately stated by Van Leeuwen in the following passage:[5]

'A husband and wife may together make their joint will in one writing. Such joint will, however, is considered as two separate wills, which either of them may specially and without the knowledge of the other, or even after that other's death, always alter; except only where either of them has reciprocally benefited the other thereby, and directed how the disposition of the property of their joint estate after the death of the

was expressly denied to the Courts by a Placaat of the States of Holland and West Friesland of July 23, 1670 (3 G. P. B. 491). For the modern law see The Removal or Modification of Restrictions on Immovable Property Act (No. 2 of) 1916 (amended by Act, No. 20 of 1924), and the following cases: *Ex parte Van Wyk* [1922] O. P. D. 92, *Ex parte Schoeman* [1925] O. P. D. 271; *Ex parte Marks* [1926] T. P. D. 1; *Ex parte Est. Marks* [1927] T. P. D. 316; *Ex parte Barnard* [1929] T. P. D. 276; *Ex parte Meeser* [1929] T. P. D. 762; *Ex parte Est. Weber* [1929] N. L. R. 340.

[1] *Ex parte Short* [1928] T. P. D. 155 (leave refused); *Ex parte Macdonald* [1929] W. L. D. 18 (leave granted); *Ex parte Odendaal* [1928] O. P. D. 218 (leave to mortgage in order to raise money for necessary expenses).

[2] *Ex parte Odendaal, ubi sup.*

[3] *Est. Koopmans* v. *Est. De Wet* [1912] C.P.D. 1061 (joint will of two sisters); Bijnk. *O.T.* i. 496 (joint will of brother and two sisters); *In re Murray's Est. ex p. Mulhearn* (1901) 18 S. C. 213 (spouses married out of community).

[4] Gr. 2. 15. 9; 2. 17. 24, and Groenewegen, ad loc., *Cens. For.* 1. 3. 2. 15 and 1. 3. 11. 7; Voet, 23. 4. 63; Boel *ad* Loen. Cas. 137; V. d. K. *Th.* 283, 298.

[5] Van Leeuwen, 3. 2. 4 (Kotzé's translation).

survivor is to be regulated; in this case the survivor, if he or she has enjoyed or wishes to enjoy the benefit, cannot make any other disposition or will of his or her half unless the benefit bestowed has been repudiated and renounced.'

In another place he writes:[1]

'Whenever two spouses have bequeathed to one another some benefit, and coupled therewith a direction indicating how the property of the common estate shall be disposed of upon the death of the survivor, the latter, having enjoyed the benefit, cannot alter by subsequent will the disposition of his or her share.'

All the propositions laid down by Van Leeuwen in these passages were approved and adopted by the Privy Council in *Denyssen* v. *Mostert*[2] and in many subsequent cases.[3]

'The judgment of the Privy Council in this case [*Denyssen* v. *Mostert*] has,' as observed by Solomon J.A. (*Receiver of Revenue, Pretoria* v. *Hancke* [1915] A. D. at p. 78), 'always been accepted in South African Courts as an

Massing.

[1] Van Leeuwen, 3. 3. 8.

[2] (1872) L. R. 4 P. C. 236; reported also as *Secretary S. A. Association* v. *Mostert* [1873] Buch. 31.

[3] Such as *Dias* v. *Livera* (1879) L. R. 5 App. Ca. 123 (Ceylon); *Abeyesekera* v. *Tillekeratne* [1897] A. C. 277 (Ceylon); *Natal Bank, Ltd.* v. *Rood* [1910] A. C. 570 (Transvaal). In *Rosenberg* v. *Dry's Exors.* [1911] A. D. 679 and *Receiver of Revenue, Pretoria* v. *Hancke* [1915] A. D. 64 the Court considered the effect of a mutual will, under which the survivor had accepted benefit, upon the property of the survivor, and held that the heirs in remainder did not acquire a real right in such property, but a personal right against the survivor to compel him or her to recognize and give effect to the will of the first dying. There is however much authority for the proposition that the *dominium* in the survivor's share passes under the will (per Solomon J.A. *Receiver of Revenue, Pretoria* v. *Hancke* at p. 79). In S. A. this second alternative has been accepted by Act 24 of 1913, sec. 115, which in terms applies only to the mutual wills of spouses married in community. See *Standard Bk. of S. A.* v. *Est. C. J. van Rooyen* [1927] N. P. D. 300, which deals with the special case of a policy of insurance on the life of the survivor.

The result now is that 'when there is a mutual will made irrevocable by massing and acceptance of benefits . . . this will operates as *one* will and as that of the first dying. . . . The estate is . . . in every real sense one estate falling under the dispositions of one will, namely, that of the first dying'. *Meyer's Exors.* v. *Meyer's Exors.* [1927] T. P. D. at pp. 339–40 per Stratford J.

authoritative exposition, so far as it goes, of the law on the subject.'

'It was there decided . . . that the power which a surviving spouse generally has to revoke a mutual will, so far as it affects half the property, is taken away on the occurrence of two conditions:

1. That the will disposes of the joint property on the death of the survivor, or, as it is sometimes expressed, where the property is consolidated into one mass for the purpose of a joint disposition of it.

2. That the survivor has accepted some benefit under the will.' (Ibid. per Innes C.J., at pp. 71–2.)

Later cases have developed and qualified the implications of this decision.

'Bearing in mind the terms of the Roman-Dutch authorities, it would seem that the distinguishing feature of the "massing" there referred to must be that the testator has disposed of the survivor's share of the joint estate (or a specific portion of it) as well as of his own. Indeed a mutual disposition of joint property implies that . . . so that mere consolidation is not in itself sufficient; it is necessary to irrevocability that one spouse should dispose of the other's share in the consolidated mass as well as of his own. The two elements then which must concur in order to deprive the survivor of the right to revoke the mutual will are a disposition of the survivor's property or a specific portion of it after the survivor's death, and an acceptance by the survivor of some benefit under the will. Upon electing to take the benefit, he automatically assents to the bequest. On the other hand, if he elects to reject the benefit he reverts to his legal position before the testator's death, the mutual arrangement falls away, and the will of the first-dying operates only upon his share of the property.' (Ibid.)

The conclusion to be drawn from the above passage is that what is called 'massing' is in fact an application of the principle of election. If this is borne in mind it is apparent that there will be no question of irrevocability of the will of the surviving spouse unless the will of the predeceasing spouse bears the construction that it disposes of the whole or part[1] of the survivor's share, as well as of

[1] In Mostert's case itself the massing of the joint estate was only

his own share in the joint estate. For it is quite possible for husband and wife to make a joint will in which each disposes exclusively of his or her share of the joint estate without disposing in any way of the share of the other spouses.[1] Such a will sometimes takes effect as the will of the first-dying only, viz. of husband or wife alone, as one or other may happen to die first;[2] or it may be construed as 'two dispositions of two equal portions of the joint patrimony',[3] or (to vary the phrase) as 'two separate wills embodied for convenience in one document'.[4] Finally, it must be remembered that for the rule to apply actual acceptance or, as it is often called, 'adiation' by the survivor is essential. The opinion expressed by Fitzpatrick J. in *S. A. Association* v. *Mostert*,[5] that the parties to a joint will were mutually bound by contract not to change their dispositions except by mutual consent, and that this was so whether benefit was accepted or not, was dissented from by his colleague Mr. Justice Denyssen, and was overruled by the Judicial Committee.

partial, but 'their lordships decided that the will had so dealt with the joint estate that the survivor would not have had the power to revoke any part of it if she had adiated'. De Villiers C.J. in *Barry* v. *Mundell* (1909) 26 S. C. at p. 480. Other cases of partial massing—*Exors. Est. Viljoen* v. *The Master* [1922] C. P. D. 208; *Est. Smuts* v. *Est. Rust* [1923] C. P. D. 449.

[1] For a mutual will which did not effect a massing of the joint estate see *Kleyn* v. *Est. Kleyn* [1915] A. D. 527. Note that the use of the words 'joint estate' or 'the whole of the joint estate' in a will does not point conclusively to an intention to mass the joint estate (ibid. and *Est. Coaton* v. *The Master* [1915] C. P. D. 318). For another case where there was no massing see *De Kock* v. *Est. de Kock* [1922] C. P. D. 110. 'As the ordinary and natural course for a testator is to dispose only of his own property' the presumption is against massing. *Van Reenen* v. *Est. Van Reenen* [1925] O. P. D. 239.

[2] *Est. Coaton* v. *The Master, ubi sup.*

[3] *Receiver of Revenue, Pretoria* v. *Hancke ubi sup.* at p. 72, per Innes C.J.

[4] *Warren and Turpin* v. *The Master and Silberbauer* [1913] C. P. D. at p. 791. Bijnk. *O. T.* i. 450 is to the same effect. For Ceylon see *Paramanathan* v. *Saravanamuttu* (1928), 30 N.L.R. 188. For mutual wills at common law see *Gray* v. *Perpetual Trustee Co.* [1928] A.C. 391 (on appeal from the High Court of Australia).

[5] [1869] Buch. 231.

III

INTESTATE SUCCESSION

The law of intestate succession.

A MAN is said to die intestate when he dies without leaving a valid will, or if no one accepts a benefit under his will.[1] Further, since one may in the modern law die partly testate, partly intestate, an intestacy also arises with regard to any property of the deceased which falls under either of the above-mentioned categories, although he may not die intestate in respect of other property.

Bewildering variety in the Netherlands.

The law of intestacy in the United Provinces presented a bewildering picture. It varied from province to province and, almost, from town to town. In Holland and West Friesland in particular two systems of intestate succession principally prevailed, the geographical limit which defined the two being, in the main, determined by the River Ijssel.[2] This stream (which is not to be confounded with another river of the same name, which discharges into the Zuyder Zee) was from ancient times the boundary line between North and South Holland. South of it prevailed a system of intestate succession known as Schependoms-recht, so called because it was laid down in the dooms or judgments of the local magistrates called Schepenen.[3] North of it prevailed a different system known as Azingdoms-recht or Aasdoms-recht, because derived from the dooms of a judicial authority called the Azing, who in Friesland and some adjoining districts was anciently associated with other men of the neighbourhood in the administration of justice.[4] These two systems

Schependoms-recht.

Aasdoms-recht.

[1] Inst. 3. 1. 1, pr.: Intestatus decedit, qui aut omnino testamentum non fecit aut non iure fecit, aut id quod fecerat ruptum irritumve factum est, aut nemo ex eo heres extitit. In *Kunz* v. *Swart* [1924] A. D. 618 the Court held by a majority (Solomon and Kotzé JJ.A., de Villiers J.A. dissent.) that a will regular on the face of it is presumed to be valid until its invalidity has been established in a Court of Law. Therefore if the heir *ab intestato* alleges that such a will is a forgery, the *onus probandi* lies on him and not on the person maintaining the validity of the will.

[2] Gr. 2. 28. 2. [3] Gr. 2. 28. 10–11. [4] Gr. 2. 28. 7–9.

differed *toto caelo*.[1] The principal characteristic of each is expressed in the proverbial maxims, 'Het goed moet gaan van daer het gekomen is' and 'Het naaste bloed erft het goed'. By the Schependoms Law 'the goods must go whence they came';[2] which means that the goods of a deceased person were taken by a fiction of law to have devolved upon him *mortis causa* from both parents equally. If, therefore, the deceased left one surviving parent behind him, the deceased's estate was supposed to have come to him wholly from the dead parent and not at all from the living one. Accordingly it reverted to the side from which it was supposed to have come, viz. if the father were dead, to the relatives *ex parte paterna* to the exclusion of the mother; if the mother were dead, to the relatives *ex parte materna* to the exclusion of the father. This rule, together with the further principle of unlimited representation[3] in the descending and collateral lines, was the key-note of the old Schependoms Law, which accordingly determined the succession as follows:[4]

Different theories of these two systems.

1. Children succeed equally, males and females alike, with representation *per stirpes in infinitum*.

2. Failing children, if both parents are alive, they succeed to equal moieties.

Canons of succession under the Old Schependoms Law.

3. If one parent only survives, the whole estate goes to the children of the deceased parent, i.e. to the brothers and sisters of the intestate, whether of the whole or of the half blood, with representation *per stirpes in infinitum*.

4. If both parents are dead, the estate goes in equal moieties to the children of the deceased father and to the children of the deceased mother, i.e. one moiety to brothers and sisters of the intestate, *ex parte paterna*, whether of the whole or of the half-blood, with representation as before stated; the other moiety to brothers and sisters of the intestate, *ex parte materna*, whether of the whole or

[1] Vinnius *ad* Inst. lib. iii, tit. 5, *in appendice* '*forma succedendi ab intestato apud Hollandos et Westfrisios*', sec. 1.
[2] Gr. 2. 28. 6; Vinnius, *ubi sup.*, sec. 2; V. d. K. *Th.* 347.
[3] Van der Vorm, *Versterfrecht*, ed. Blondeel, p. 34.
[4] Van der Vorm, pp. 35–6.

of the half-blood, with representation as before stated. From this it will be seen that whole brothers and sisters take 'with the whole hand', i.e. take twice over: once as children of intestate's father, once as children of intestate's mother. Half brothers and sisters, however, take with the half-hand, i.e. take only once—viz. in concurrence with the brothers and sisters of the whole blood in respect of the father's or of the mother's moiety according as they are related to the deceased on the father's or on the mother's side.[1]

5. Failing children, parents, and issue of parents, the estate goes in like manner to the four quarters (*vier vierendeelen*), i.e. to the grandparents of the intestate *per lineas*, viz. one moiety to the paternal grandparents, the other moiety to the maternal grandparents. Within each line identically the same principles are applied as have been stated above in rules (2), (3), and (4)—a sole surviving grandparent taking nothing—representation of uncles and aunts by their issue being admitted *per stirpes in infinitum*—the half-blood always taking with the half-hand.

6. Failing children, parents and issue of parents, grandparents and issue of grandparents, the estate goes in like manner to the eight eighths, viz. to the stocks of the eight great-grandparents, and so on *in infinitum*.

Canons of succes-

By the Aasdoms Law 'the nearest blood inherits the

[1] But, if only one parent is dead, the half-blood on the side of the deceased parent takes with the whole hand in concurrence with the children of the whole blood. This principle is of universal application, and will be assumed as known, wherever the half-blood is said to take with the half-hand. The reader must be cautioned against the mistake of supposing that, when there are full brothers or sisters, and also half brothers and sisters, the full brothers and sisters take one-half of the estate and divide the other half with the half brothers and sisters [1 Maasdorp, p. 130]. This conclusion rests upon a misapprehension of the effect of the Interpretation (of the Political Ordinance) of 1594 (*infra*, p. 395), and is unsupported by any original authority on the Roman-Dutch Law. The Interpretation itself is a little misleading because it does not deal explicitly with the case in which there are half brothers and sisters *on both sides*, but the intention is plain enough.

goods'.[1] This rule, together with the preference of descendants to ascendants and of ascendants to collaterals, and the total exclusion of all representation, furnishes the key to this system; which, further, makes no distinction between the whole and the half-blood, and has no theory as to the source from which the goods may be supposed to have come. sion under the Old Aasdoms Law.

Accordingly the order of succession is:[2]

1. Descendants—children excluding grandchildren, grandchildren excluding great-grandchildren, &c.

2. Ascendants—two surviving parents equally; one surviving parent solely; in default of parents, grandparents (on both sides or on one side) equally; a single surviving grandparent solely; and so on, to the exclusion of collaterals.

3. Collaterals—brothers and sisters, of the whole or of the half-blood equally, to the exclusion of nephews and nieces; collaterals of the third of remoter degrees equally without representation.

In 1580 the States of Holland and West Friesland, desiring to establish one uniform system of intestate succession for the whole Province, enacted the Political Ordinance of April 1 of that year.[3] The system therein laid down, which came to be known as the New Schependoms Law, departed from the Old Schependoms Law in one particular only, viz. in restricting representation in the collateral line to the fourth degree,[4] i.e. it does not go beyond the grandchildren of brothers (sisters), and the children of uncles (aunts). Succession under the Political Ordinance of April 1, 1580.

Succession under the Political Ordinance therefore is as follows:

1. Children[5] (*ut supra*, p. 391).

2. Parents[6] (*ut supra*, ibid.).

[1] Gr. 2. 28. 3; Vinnius, *ubi sup.*, sec. 3; V. d. K. *Th.* 346.

[2] Van der Vorm, pp. 79–80.

[3] Ordonnantie van de Policien binnen Hollandt, in date den eersten Aprilis 1580, Arts. 19 ff. (1 G. P. B. 335); Gr. 2. 28. 11; Vinnius, *ubi sup.*, sec. 4; Van Leeuwen, lib. iii, cap. xiii.

[4] Van der Vorm, p. 37. [5] P. O. Art. 20. [6] P. O. Art. 21.

3. Brothers and sisters being the issue of a deceased parent, their children and grandchildren, according to the system above described.[1]

4. Remoter descendants of such brothers and sisters *per capita* according to proximity of degree.[2]

5. Grandparents *per lineas*[3] and the children and grandchildren (but not remoter descendants) of a deceased grandparent, according to the system above described.[4]

6. Remoter descendants of grandparents *per capita* according to proximity of degree.

7. Great-grandparents and the descendants of a deceased great-grandparent according to the system above described, collaterals of equal degree taking *per capita* to the exclusion of remoter degrees[5] and so on *in infinitum*.[6]

8. Failing all relatives whatsoever, the fisc succeeds to the property as *bona vacantia*[7] to the exclusion of a surviving spouse.[8]

It must be borne in mind that the principle of splitting the inheritance, when the two parents are dead (or alive), and in case one parent alone is dead, of carrying the whole inheritance to the issue of the deceased parent, persists throughout the whole scheme of intestate succession. Each ascendant in his (or her) own person, together with his (or her) descendants, makes a fresh line, and when such line is exhausted (but not before) the share belonging to that line is divided into halves, and carried half and half to the father and mother of such ascendant and their respective descendants. This is why grandchildren of uncles and aunts (though in the fifth degree) come in before great-grandfathers or great uncles, though in the

[1] P. O. Arts. 22 and 23.
[2] P. O. Arts. 22, 24, and 28.
[3] P. O. Art. 25.
[4] P. O. Arts. 24 and 28.
[5] P. O. Art. 28.
[6] V. d. K. *Th.* 364.
[7] V. d. K. *Th.* 366. However, if there is a complete failure of kin on one side only the relatives on the other side are admitted before the fisc. Ibid. In the case of bastards the whole estate goes to the relatives *ex parte materna*. This is so both by Schependoms and by Aasdoms Law. V. d. K. *Th.* 368.
[8] V. d. K. *Th.* 365. This, however, is not universally accepted. Kotzé, Van Leeuwen, vol. i, pp. 501 ff.

third and fourth degree respectively. Though this consequence is not clearly stated in the Political Ordinance, it is a necessary inference from the root principles of the Schependoms-recht; and is expressed in the maxim 'Het goed klimt niet geern'; or, in other words, a nearer ancestor and his (or her) descendants (the nearer line) are called to the succession before a remoter ancestor and his (or her) descendants (the remoter line).[1]

The Interpretation of May 13, 1594.

This new system of succession and an Interpretation[2] of it, dated May 13, 1594, failed to win the adhesion of most of the towns and districts of the northern part of Holland. Accordingly in 1599 the States, yielding to the representation of fourteen principal towns, enacted a placaat, under date December 18, designed to supply a common law for North Holland in substitution for the Political Ordinance.[3] The order of succession in the placaat, though known as the New Aasdoms Law, departs considerably from the Old Aasdoms Law, approaching more nearly in some respects to the Schependoms Law; in other respects to the Roman Law.

The Placaat of December 18, 1599.

It is unnecessary to recall the details of this complicated system, which is not in its entirety in force in any part of the modern world. Its salient feature is that, in default of descendants of the intestate, one parent being dead, it admits the survivor to one half of the estate, the other half going to brothers and sisters of the deceased (being children of the deceased parent) and to the children and grandchildren of brothers and sisters (children of the deceased parent) by representation; failing brothers and sisters the surviving parent takes the whole.[4]

This provision (with a variation) is incorporated in the law of South Africa by the Octrooi of 1661.[5]

Thus far we have described the two prevailing systems

[1] Van der Vorm, *Versterfrecht*, p. 68. [2] 1 G. P. B. 342.

[3] Placaet op 't stuck van de Successien ab intestato, December 18, 1599 (1 G. P. B. 343); Gr. 2. 28, 12; Vinnius, *ubi sup.*, sec. 4; Van Leeuwen, lib. iii, cap. xiv, and cap. xii, sec. 8, where a list is given of the towns and places which followed the Placaat of 1599.

[4] Placaat, Art. 3. [5] *Infra*, p. 402.

of intestate succession of the province of Holland. Each of the other provinces had its own scheme, and there were, besides, numerous local variations. In view of this great variety of usage the question of intestate succession in the Dutch Colonies must have been insoluble except by legislative authority.

Intestate succession in the Dutch Colonies.

Accordingly, we find the States-General prescribing the canons of intestate succession for the East and West Indies, in a way, however, which sometimes tended rather to deepen than to remove the obscurity in which the subject was involved.

We shall speak first of the East Indies, including Ceylon and South Africa.

1632–4. The case of Gregorius Cornely.

In the year 1632 one Gregorius Cornely, domiciled at Middelburg in Zeeland, died in the Indies leaving two children, who also died. The States-General (1634) directed that the succession should go according to the Schependoms Law observed in the Province of Zeeland.[1] This was merely an application of the general principle that succession to movables is governed by the law of the domicil.[2]

1642. The Old Statutes of Batavia.

In 1642 Governor A. Van Diemen promulgated his collection of statute law known as the Old Statutes of Batavia (or India).[3] It is expressed to be provisional in character,[4] and to remain in force until the Council of Seventeen with the authority or approbation of the States-General should otherwise determine. With regard to intestate succession in particluar it provides that 'the law of the towns of North Holland shall be followed as was ordained in the year '16 on directions from the Council of Seventeen'.[5] The detailed rules which follow correspond in all particulars with the Placaat of 1599.

[1] J. A. Van der Chijs, *Nederlandsch-Indisch Plakaat Boek*, vol. i, p. 365.

[2] *Supra*, p. 135.

[3] Op. cit., p. 472.

[4] Op. cit., p. 474.

[5] Op. cit., p. 543. There is some mistake here. Perhaps '1625' was intended. See *Nederlandsch Intestaaterfrecht buiten Europa* door M. H. Van der Valk, *Tijdschrift voor Rechtsgeschiedenis*, Deel x, p. 412, which contains much interesting matter.

1661. The Octrooi to the East India Company;

In 1661 the States-General, moved thereto by representations from the Company's officials, issued the well-known Octrooi or Charter of January 10.[1] Having considered the regulations of 1629 and 1636 issued for the West Indies, which introduced the Political Ordinance into those regions, they resolved 'after ripe deliberation that the same law together with the Interpretation of 1594 should apply to all Lands, Towns and Peoples in India obedient to the State of the United Netherlands and under the direction of the East India Company', and also in respect of succession to persons dying on the outward or homeward voyage. The Octrooi does not contain the terms of the Political Ordinance, but incorporates them by reference, subject to an important deviation in the sense of the Aasdoms Law in favour of a sole surviving parent, who by the Political Ordinance is not admitted to the inheritance of a deceased child. This interpolated section corresponds closely, but not exactly, with Art. 3 of the Placaat of 1599, and lends some colour to the statement that the Octrooi is based upon the law neither of North Holland nor of South Holland, but is partly derived from both. The statement, however, is misleading, for except for the above-mentioned modification it enacts that the law of South Holland shall be observed.

in what respect it differs from the Political Ordinance.

1766. The New Statutes of Batavia.

In 1766 Governor Van der Parra submitted for the approval of the Seventeen and of the States-General the collection known as the New Statutes of Batavia (or India).[2] This Code, though in use in the courts—so Mr. Van der Chijs informs us—for nearly a century, never received recognition from the highest authority. It had not, therefore, strictly, the force of law.[3] In respect of intestate succession, it reproduces seriatim the substance of Van Diemen's earlier Code, together with the express provisions of the Octrooi above cited. This is plainly wrong. The Old Statutes of Batavia as regards succession cannot

[1] 2 G. P. B. 2634; Van der Vorm, p. 631. Burge, vol. i, pp. 103–4. The Charter was promulgated in Batavia on February 7, 1662. Van der Chijs, vol. ii, p. 340.

[2] Van der Chijs, vol. ix.

[3] Op. cit., p. 25.

have continued to exist side by side with the Octrooi, which is inconsistent with them. That the Octrooi, and therefore the Schependoms-recht, was in fact the law of succession for Batavia appears *inter alia* from another portion of Van der Parra's Statutes, where it is laid down that Orphan Masters are not liable to actions, except on the ground of wilful default, or if they act contrary to the clear language of statutes or of the Octrooi on intestate succession.[1]

Intestate succession in Ceylon: conflicting opinions,

So far we have spoken of the East Indies in general. It remains to see how the law stood, and stands, in Ceylon and in South Africa in particular. In neither of these countries was the matter free from doubt.

For Ceylon we have the guidance of two cases in which the question of intestate succession was carefully considered. In the first of these, decided in 1822,[2] Sir Hardinge Giffard C.J., delivering the judgment of the Court of Appeal, pronounced, not without considerable hesitation, in favour of the view that the North Holland law obtains in Ceylon. In 1871 the same Court, over which Sir Edward Creasy then presided as Chief Justice, clearly indicated an opposite opinion.[3] This is the better view.

now settled by statute.

To-day the question is of merely historical interest. The law of intestate marriage succession in this colony is now regulated by the Matrimonial Rights and Inheritance Ordinance (No. 15 of) 1876, which provides (sec. 40) that 'in all questions relating to the distribution of the property of an intestate, if the present Ordinance is silent, the rules of the Roman-Dutch Law as it prevailed in North Holland are to govern and be followed'.[4]

Intestate succes-

The law of South Africa, like the law of Ceylon, exhibits

[1] Op. cit., p. 229. A like provision recurs more than once in later volumes of Van der Chijs.

[2] *Dona Clara* v. *Dona Maria* (1822) Ramanathan, 1820–33, p. 33.

[3] *Anon.* Van der Straaten, p. 172, and Appendix A.

[4] The Ordinance itself in its detailed provisions is to a great extent, but with considerable variations, based upon the Placaat of 1599. In particular (community of goods being at the same time abolished as regards marriages contracted after the promulgation

some confusion between the two systems of succession. In Cape Colony, in the case of *Spies* v. *Spies*,[1] 'the counsel for both parties admitted that, by the Placaat of January 10, 1661, the law of North Holland, including the Political Ordinance of April 1, 1580, and the Interpreting Ordinance of May 13, 1594, was made the law of the Colony'. This is plainly a mistake. For 'North Holland' we must substitute 'South Holland'. In *Raubenheimer* v. *Exors. of Van Breda*,[2] which settled the law for Cape Colony, de Villiers C.J. referred to a Resolution of the Governor-General in Council, bearing date June 19, 1714, whereby the Board of Orphan Masters was directed in all cases of succession *ab intestato* to follow secs. 19 to 29 of the Ordinance of 1580 and the Edict of 1594, in so far as they have been adopted by the charter of 1661. The charter therefore determines the law for the Cape Province. The learned Chief Justice indeed goes on to say that 'it is a mistake to speak either of the North Holland law or of the so-called South Holland law as the law of this Colony'; nevertheless, since the Octrooi itself rests upon the Schependoms Law, except where it expressly departs from it, we may accept as generally true the *dictum* of Mr. Justice Smith, that 'the South Holland law as included in the Political Ordinance of 1580 is the law of inheritance *ab intestato* in the Colony'. sion in South Africa: at the Cape;

Upon a total failure of blood relations the Crown is entitled to claim a vacant inheritance.[3]

For Natal the case of *In re the intestate estate of P. K. Gledhill*[4] decides in favour of the Schependoms Law. Van Breda's case was cited and followed. in Natal;

Apart from statute, a surviving spouse in South Africa

of the Ordinance) a surviving spouse in any event inherits one-half of the property of the deceased (sec. 26), and takes the whole to the exclusion of remote collaterals (sec. 36).

[1] (1846) 2 Menz. 454.

[2] (1880) Foord, 111; and cf. *Green* v. *Fitzgerald* [1914] A. D. at pp. 99, 100.

[3] *Ex parte Leeuw* (1905) 22 S. C. 340.

[4] (1891) 12 N. L. R. 43. See also *In re Gordon's Intestate Estate* (1909) 30 N. L. R. 325.

does not succeed *ab intestato* to the predeceasing husband or wife.[1] In Natal there has been some legislation. By Law No. 22 of 1863, sec. 2: Community of goods . . . shall not attach to any spouses who have been or shall be married elsewhere than in South Africa, unless the spouses by written and registered agreement exempt themselves from this law, and by sec. 5: When the husband of any marriage, from which community of goods is excluded by the provisions of this Law, shall die intestate and leave his wife him surviving, then, in any such case, the wife so surviving her husband shall be entitled to receive and have one-half of the property belonging to her deceased husband; but if there is lawful issue of the marriage she takes one-third.[2] It has been held that the above section applies whenever community of goods is excluded whether under sec. 2 (*supra*), or by ante-nuptial or post-nuptial contract.

in the Transvaal and Free State.

In the Transvaal and Orange Free State Provinces, intestate succession does not seem to have been the subject of legislation or of judicial decision. Pending further information, the common law on this subject may be assumed to be the same in all four provinces.

Intestate succession in the West Indies.

In British Guiana the Roman-Dutch Law no longer obtains, but the history of the law of intestate succession in this colony claims attention, if only to show that here too the course of legislation was uncertain and inconsistent. In 1629 the States-General issued an Order of Government for the places conquered and to be conquered in the West Indies.[3] This applied to such lands 'the Political Ordinance of 1580, and further the common customs of South Holland and Zeeland, since the same are most known, can easily be applied, and will introduce

[1] See, however, Kotzé, Van Leeuwen, vol. i, p. 504; where the learned Judge says 'In our South African Courts the last word cannot be said to have been definitely spoken on the subject'.

[2] For Southern Rhodesia see The Deceased Estates Succession Act, 1929; *S. A. L. J.* vol. xlvii (1930), p. 171.

[3] Ordre van Regieringe, October 13, 1629, Art. 59 (2 G. P. B. 1235); Van der Vorm, p. 634.

the least obscurity and alteration'. Thus the settlements in the West Indies were to be governed by the Schependoms-recht, the law of succession of South Holland.

In the year 1732 a new rule was enacted for the colony of Berbice. The charter of December 6 of that year,[1] after reciting the importance of providing for the intestate succession to colonists and others who shall have established themselves in the colony aforesaid, enacted that every person going thither shall be allowed to choose such known law of intestacy as shall please him,[2] but in default thereof, the charter given to the East India Company under date January 10, 1661, shall be followed. This charter, as mentioned above, is in its main features (with one important modification) Schependoms Law. Finally, for Demerara and Essequibo, by resolution of October 4, 1774,[3] the States-General enjoined the observance of the Aasdoms Law of North Holland as contained in the Placaat of 1599.

Intestate succession in British Guiana.

The three settlements of Demerara, Essequibo, and Berbice have from 1831 been combined in the colony of British Guiana. Since no statutory change had harmonized the law of intestate succession in the three counties, this colony until January 1, 1917, retained within its limits the two principal schemes of intestate succession which obtained in the old motherland, viz. for Demerara and Essequibo the Aasdoms Law, for Berbice the Schependoms Law as modified by the Octrooi to the East India Company of 1661.

Summary of the Law of intestate succession in the Roman-Dutch Colonies.

The result of our inquiry is that in Ceylon the law of intestate succession is now defined by statute. In Demerara and Essequibo the Aasdoms Law obtained; over the whole of Roman-Dutch South Africa the rules of intestate succession are those of the New Schependoms Law as modified by the Octrooi of 1661, and this was also law for Berbice. In Natal there is a statutory succession of

[1] Van der Vorm, p. 637; V. d. K., *Th.* 352.
[2] Verkiezing van landrecht. Gr. lib. ii, cap. xxix.
[3] *The Laws of British Guiana* (ed. 1905), vol. i, p. 1.

husband and wife, but only when the spouses are married out of community.

Octrooi of January 10, 1661.

We conclude this chapter with a translation of the Octrooi and a summary of the order of succession which it establishes.

'*Charter for the East India Company of these lands relating to the law of Intestate Succession in the East Indies and on the voyage thither and thence.*'

'The States-General of the United Netherlands make known that we, after report received from Mr. Huigens and our other Commissioners having viewed and examined the Memorial presented to us by or through the Administrators of the East India Company of the United Netherlands aforesaid, tending thereto that a settled law in the matter of the succession *ab intestato* to those who die in the East Indies or on the voyage thither or thence should be introduced by us; and taking into consideration that we heretofore in the years 1629 and 1636 have permitted and ordained that the Political Ordinance issued by the States of Holland and West Friesland over the said province in the year 1580 in the places conquered by those of the West Indian Company and Brazil should be followed and there accepted as a general rule: after ripe deliberation have found good to consent, grant, and allow to the East India Company, as we consent, grant, and allow hereby, that in the matter of succession *ab intestato* and what therefrom depends, over all Lands, Towns, and Peoples in the Indies aforesaid, being subject to the State of the United Netherlands and to the administration of the Company aforesaid, as also with regard to the same on the outward and homeward voyage, the said Political Ordinance shall be followed and ensued; so and in such manner as the same by further declaration of the States of Holland aforesaid dated May 13, 1594, was elucidated; and with this understanding that, the bed between parents (*ouderen*) of the deceased being severed, and one of them, whether father or mother alone surviving, the surviving parent shall, along with the brothers and sisters of the deceased and their children and children's children by representation, succeed to the deceased's whole inheritance; that is to say, the surviving father or mother to the one half, and the sisters and brothers, their children and children's children, to the other half; it being understood that in such case the half brothers and sisters together with their children and children's children must be related to the deceased

on the side of the deceased parent. And in case the deceased left no sisters and brothers, but left sisters' and brothers' children and children's children, in such event the said children and children's children of the deceased brother and sister by representation alike and along with the surviving father or mother shall succeed to the one half of the estate.[1] And if there are no brothers or sisters, nor children or children's children of brothers or sisters living, in that case the surviving father or mother shall succeed as universal heir to all the goods of the deceased and shall be preferred to all collateral relatives; all with the understanding that in so far as the inheritance of such deceased persons shall be found to include Lands, Houses, or other fixed and immovable goods, in regard thereof shall be followed the Law and Customs of the Provinces, Quarters, or Places, under which the same fixed and immovable goods are situated.'

Canons of succession in South Africa.

The combined effect of the Political Ordinance of 1580, the Interpretation of 1594, and the Octrooi of 1661 is to establish the following order of succession as the Common Law of South Africa.

1. Children succeed equally, males and females alike, with representation *per stirpes in infinitum*.

2. Both parents surviving succeed to equal moieties.

3. If one parent survives, one moiety goes to such parent, the other moiety to brothers and sisters of the intestate being the children of the deceased parent, their children and grandchildren by representation. If there is no such brother or sister alive, but only children (grandchildren) of deceased brothers and sisters, such children (grandchildren) take *per stirpes* by representation.

If there are no brothers or sisters, being the children of the deceased parent, surviving, or children or grandchildren of deceased brothers or sisters, the whole estate goes to the surviving parent.

[1] This is the point at which the Octrooi departs from the Placaat and follows the P. O. By the Placaat, if there were no brothers and sisters alive related to the intestate on the side of the deceased parent, descendants of deceased brothers and sisters had no independent right of succession to the inheritance, which in that case went wholly to the surviving parent. Van der Vorm, p. 95; V. d. L. 1. 10. 2.

4. If both parents are dead, the estate goes in equal moieties to the issue of the deceased father and to the issue of the deceased mother, i.e. one moiety to brothers and sisters of the intestate, whether of the whole or of the half-blood, *ex parte paterna*, their children and grandchildren by representation; the other moiety to brothers and sisters of the intestate, whether of the whole or of the half-blood, *ex parte materna*, their children and grandchildren by representation. The whole brothers and sisters (and their children and grandchildren) take with the whole hand; half brothers and sisters (their children and grandchildren) take with the half hand as above explained.

4 a. Failing the above, the estate goes on similar principles to remoter descendants of brothers and sisters *per capita* according to proximity of degree without representation.

5. Failing children and issue of parents, the estate goes in like manner to the four quarters (*vier vierendeelen*), i.e. to grandparents of the intestate, viz. one moiety to the paternal grandparents (both living), the other moiety to the maternal grandparents (both living). If on either side, paternal or maternal, one grandparent alone survives, such surviving grandparent takes no part of the moiety of the inheritance belonging to that side, but such moiety goes wholly to the uncles and aunts of the intestate, being the children of the deceased grandparent, and to their children (but not grandchildren) by representation.[1]

If both grandparents on either side are dead, the moiety of the inheritance belonging to that side is again divided into moieties, of which one (i.e. a quarter of the whole inheritance) goes to the uncles and aunts of the intestate, being the children of the deceased grandfather, and to their children (but not grandchildren) by representation, the other (i.e a quarter of the whole inheritance) goes to the uncles and aunts of the intestate, being the children

[1] In other words, a grandparent never takes any share of the inheritance unless his or her wife or husband is also alive. *Caney v. Est. Johnsson* [1928] N. P. D. 13.

of the deceased grandmother, and to their children (but not grandchildren) by representation.[1]

5 a. Failing uncles and aunts, and the children of deceased uncles and aunts of either side in either line, their portion of the estate goes to the remoter descendants of such uncles and aunts *per capita* according to proximity of degree without representation.

6. Failing all the above, the estate goes to the 'eight eighths', viz. to great-grandparents and to the descendants of deceased great-grandparents, according to the system above described, collaterals of equal degree taking *per capita* to the exclusion of remoter degrees.

7. In default of all[2] blood relations of the deceased, the estate goes (in the absence of statutory provision to the contrary) not to the surviving spouse but to the fisc as *bona vacantia*.[3]

It will be noticed that under the above scheme, as under the Schependoms Law, the estate is divided into halves, quarters, eighths, &c. Suppose that there is a complete failure of inheritable blood under any one of these heads, a case might be made for carrying the vacant share to the fisc as *bona vacantia*, and this view commends itself to Grotius,[4] who in this and other respects has been charged (perhaps unjustly) with official bias. However, a different view has prevailed, and the law is settled in the sense that the fisc is only admitted on failure of all heirs whatever: where there is a failure of heirs on one side only, the heirs on the other side take *jure accrescendi*.[5]

[1] *In re Stephens* (1899) 16 S. C. 555.
[2] V. d. K. *Th.* 364, non obstante Gr. 2. 30. 1 (*in fine*).
[3] *Supra*, p. 394.
[4] Gr. 2. 28. 6; 2. 30. 3. It was anciently so; *Het Aasdoms- en Schependoms-recht in Holland en Zeeland* door Mr. L. M. Rollin Couquerque ('s Gravenhage, 1898) p. 21, who cites a decision dated 1539 (*Sentent. v. den Hoog. en Provincial. Raad in Holland*, No. 113).
[5] V. d. K. *Th.* 366; *Ex parte Spangenberg* (1907) 24 S. C. 288; *Est. Baker* v. *Est. Baker* (1908) 25 S. C. 234.

APPENDICES

APPENDIX A

FORMS AND PRECEDENTS

I

FORM OF GRANT OF VENIA AETATIS IN CEYLON

By His Excellency

Sir Henry Edward McCallum, Knight Grand Cross of the Most distinguished Order of Saint Michael and Saint George, Governor and Commander-in-Chief in and over the Island of Ceylon with the Dependencies thereof.

(Sgd.) HENRY MCCALLUM.

To all to whom These Presents shall come Greeting.

Whereas A. B. of by his Petition to us dated the solicited Letters of Venia Aetatis to supply his want of age and to enable him to manage transact and administer his affairs and property as fully and effectually to all intents and purposes as if he had attained his full age.

And whereas it appears to us that the said A. B. is capable of managing his own affairs.

Now these presents witness that having taken the said Petition into consideration we do hereby grant these our Letters of Venia Aetatis to the said A. B. thus supplying his want of age as fully and effectually to all intents and purposes as if he had attained the age of twenty-one years.

And we do hereby also authorize him the said A. B. to administer or cause to be administered all and singular his affairs and property and to manage and dispose of such property according to the Laws and Customs of this country as if he had attained the said age of twenty-one years provided that he the said A. B. shall not alienate any immovable property whatsoever without the sanction of the District Court within the Territorial Jurisdiction of which such property shall be situated, and except as aforesaid all and singular the acts matters and things that the said A. B. shall or may do by virtue of these presents shall be considered valid and legal to all intents and purposes without the same being impeached or called in question on the ground of minority of the said A. B.

And we do hereby require and command the several Courts of Justice in this Island and all subjects of His Majesty the King to conform themselves to these presents all objections to the contrary notwithstanding.

Given under Our Hand and the Public Seal of the Said Island on this day of in the year of Our Lord one thousand nine Hundred and

By His Excellency's Command

Colonial Secretary.

II

FORM OF GRANT OF VENIA AETATIS IN SOUTH AFRICA

(*The Government Gazette*, Pretoria, June 20th, 1924.)

No. 125, 1924.

VENIA AETATIS—RICHARD FOX

Whereas Richard Fox at present residing on the farm Freda-dale in the district of Frankfort in the Province of the Orange Free State, did on the 2nd day of April 1924, by petition to me as Governor-General of the Union of South Africa pray for *venia aetatis*, which said petition was duly referred to the Honourable the Supreme Court of South Africa, Orange Free State Provincial Division, for consideration and report:

And whereas the Hon. Sir J. E. R. de Villiers, Judge President of the said Court holden at Bloemfontein on the 15th day of May 1924, did, after due inquiry at a sitting of such Court, report to me that in the opinion of the said Court it was desirable to grant *venia aetatis* to the said Richard Fox;

And whereas it appears to me that all the other formalities required by law have been duly complied with;

Now, therefore, under and by virtue of the powers in me vested by chapt. lxxxix of the Orange Free State Law Book, I do hereby grant to the said Richard Fox *venia aetatis* with all rights and privileges appertaining thereto, *but excluding the right of alienating or encumbering immovable property belonging to him*, to have and enjoy as fully and effectually to all intents and purposes as he, the said Richard Fox, might or could do if he had already attained the full age of twenty-one years.

God Save the King.

Given under my Hand and the Great Seal of the Union of South Africa at Borkerton this Ninth day of June One Thousand Nine Hundred and Twenty-four

Athlone
Governor-General

By Command of His Excellency
The Governor-General in Council
N. J. de WET.

III

FORM OF ANTE-NUPTIAL CONTRACT IN USE IN SOUTH AFRICA

[From *The Notarial Practice of South Africa*, by C. H. Van Zyl, p. 201.]

Know all whom it may concern,

That on this the day of one thousand nine hundred and before me, A. B. of Cape of Good Hope, Notary Public, by lawful authority, duly sworn and admitted, and in the presence of the subscribing witnesses, personally came and appeared C. D. of Bachelor, and E. F. of Spinster, who declared that whereas a marriage has been agreed upon, and is intended to be shortly had and solemnized between them, they do, by these presents, contract and agree, each with the other, as follows:

FIRST.—That there shall be no community of property or of profit or loss between the said intended spouses, but that he or she respectively retain and possess all his or her estate and effects movable or immovable, in possession, reversion, expectancy or contingency, as fully and effectually as if the said intended marriage did not take place.

SECOND.—That the one of them shall not be answerable for the debts and engagements of the other of them, whether contracted before or after the said intended marriage.

THIRD.—That all inheritances, legacies, gifts, or bequests which may devolve upon, or be left, given or bequeathed to either of the said intended spouses, shall be the sole and exclusive property of him or her upon whom the same shall devolve, or to whom the same may be left, given, or bequeathed.

FOURTH.—That each of the said intended spouses shall be at full liberty to dispose of his or her property and effects by will, codicil or other testamentary disposition, as he or she

may think fit, without the hindrance or interference in any manner of the other of them.

FIFTH.—That the marital power which the husband by law possesses over the property and the estate of his wife, is hereby excluded, and that he is expressly deprived thereof over the estate of his intended spouse.

UPON ALL WHICH conditions and stipulations the appearers declared it to be their intention to solemnize the said intended marriage, and mutually promised and agreed to allow each other the full force and effect hereof under obligation of their persons and property according to law.

THUS DONE, contracted and agreed at aforesaid, the day, month, and year first aforewritten, in the presence of the subscribing witnesses.

As witnesses: (Sgd.)

1. G . H .
2. I . J .

C . D .
E . F .
Quod Attestor.
A . B .
Notary Public.

IV

FORMS OF MUTUAL WILL IN USE IN SOUTH AFRICA

A

NOTARIAL WILL

BE it hereby made known that on this twentieth day of December in the year of our Lord one thousand eight hundred and eighty-seven before me Conrad Christian Silberbauer of Cape Town Cape of Good Hope Notary Public duly admitted and sworn in the presence of the subscribed witnesses personally came and appeared [*name, description, place of abode*] and his Wife [*name*]. And these Appearers being in health of body of sound and disposing mind memory and understanding and capable of doing any act that required thought judgment or reflection declared their intention to make and execute their last Will and testament—Wherefore, hereby revoking and annulling all Wills codicils and other testamentary acts heretofore passed by them or either of them the Appearers declared to nominate and appoint the survivor of

them together with the child or children begotten by them during their marriage to be the sole and universal heirs of the first dying of all his or her estate goods effects stock inheritance chattels credits and things whatsoever and wheresoever the same may be nothing excepted which shall be left at the death of the first dying of them whether movable or immovable and whether the same be in possession reversion remainder or expectancy. And if the Testator the said . . . shall happen to survive the Testatrix the said . . . then the Appearers declared to nominate and appoint the Testator to be the Executor of this their Will and administrator of their estate and effects and guardian of their minor heirs. And if the Testatrix shall happen to survive the Testator then the Appearers declare to nominate and appoint the Testatrix together with the Testator's brother [*name, description, place of abode*] to be the Executors of this their Will administrators of their estate and effects and guardians of the minor children of the Testator hereby giving and granting unto them all such powers and authorities as are required or allowed in law and especially those of assumption substitution and surrogation.

The Testators declare to reserve to themselves jointly during their joint lives the power from time to time and at all times hereafter to make all such alterations in or additions to this Will as they shall think fit either by a separate act or at the foot hereof desiring that all such alterations or additions so made under their own signatures shall be held as valid and effectual as if they had been inserted herein.

All which having been clearly and distinctly read over to the Appearers they declared that they fully understood the same and that it contains their last Will and testament desiring that it may have effect as such or as a codicil or otherwise in such manner as may be found to consist with law.

This done and passed at Cape Town aforesaid the day month and year first aforewritten in the presence of the consignatory witnesses.

As Witnesses

(Sgd.) C. E. J.
(Sgd.) J. J. E.

(Sgd.) G. P. H. [*Husband*]
(Sgd.) F. E. S. [*Wife*].

Quod Attestor

(Sgd.) C. Christian Silberbauer
Notary Public.

B

UNDER-HAND WILL

[From Foster's *Legal Forms*]

We, A. B. and L. B., born S, married in community of property, do hereby revoke all former testamentary dispositions made by us, either jointly or severally, and declare this to be our last will and testament.

(1) We appoint the children born of our marriage to be the sole and universal heirs, in equal shares, of all the estate and effects of whatsoever kind which shall be left by the first dying at his or her death.

(2) We appoint the survivor of us, together with G. H. of . . . to be the executors of this our will, administrators of our estate and guardians of our minor children, granting to our said executors and guardians all power and authority allowed in law, and especially those of assumption.

(3) We reserve to ourselves jointly the power to make all such alterations in or additions to this our will as we shall think fit, either by a separate act or at the foot hereof, desiring that all such alterations or additions so made under our signatures shall be held as valid and effectual as if they had been inserted herein.

In witness whereof we have hereunto set our hands at . . . this . . . day of . . . nineteen hundred and . . . in the presence of the subscribing witnesses.

A. B.
L. B.

Witnesses
C. D.
E. F.

APPENDIX B

THE CONTRACTS OF MINORS

There are numerous reported cases in South Africa, but they do not afford the guidance which might be expected. The following rules may be laid down provisionally.

(1) A minor is bound if he contracts with the consent of his parent (being his natural guardian; *Moolman* v. *Erasmus* [1910] C. P. D. 79; *Skead* v. *Colonial Banking & Trust Co. Ltd.* [1924] T. P. D. 497) or of his guardian (*supra*, p. 46). Ratification is usually equivalent to consent.

(2) He is bound, if he has been benefited by the contract. This exception from the general non-liability of a minor should be based, perhaps, not so much, as suggested by de Villiers C.J. in *Nel* v. *Divine Hall & Co.* (1890) 8 S. C. 16, upon the ground of enrichment (which raises a quasi-contractual obligation) as rather upon the wider principle—meliorem quidem suam condicionem licere eis facere etiam sine tutoris auctoritate, deteriorem vero non aliter quam tutore auctore (Inst. 1. 21, pr.). See V. d. K. *Dictat.* ad Gr. 1. 8. 5, who says that in the *weeskeuren* of many towns this principle was extended to onerous (scil. bilateral) contracts, si appareat insigne emolumentum inde in pupillos redire. The rule has received an extensive application in S. A. so as to cover contracts of service. *Queen* v. *Koning* (1900) 17 S. C. 541; *Fick* v. *Rex* [1904] O. R. C. 25; *Silberman* v. *Hodkinson* [1927] T. P. D. at p. 570. Mackeurtan (*Sale of Goods*, p. 80, note 11) thinks that such cases are 'quite inaccurate', but they seem to be a legitimate development along the line suggested by V. d K. The burden of proving benefit to the minor is upon the person seeking to enforce the contract against him, *Silberman* v. *Hodkinson*, *ubi sup.*

(3) Tacit emancipation by the father (or guardian?) of the minor places the minor as regards his contracts (all his contracts?) in the same position as a major. This proposition, though resting upon a considerable weight of South African authority, derives little support from the R.-D. L. and raises difficult questions. Emancipation is a means of determining the *patria potestas*. In the eighteenth century express emancipation was disused, its place being taken by grants of *venia aetatis* made either by the sovereign or by the Court (Decker *ad* Van Leeuwen, 1. 13. 5; *Rechts. Obs.* pt. ii, no. 7; V. d K. *Th.* 107). But tacit emancipation was admitted to have the same effect [*supra*, p. 42]. It is difficult to see how emancipation, express or tacit, can be applied to *tutela*, which is a *munus*, not a *potestas*. It is not so applied by the Roman-Dutch writers. But the S. A. courts do not distinguish. Thus *Le Grange* v. *Mostert* (1909) 26 S. C. 321 was a case of 'emancipation' by a guardian.

As to the effect of tacit emancipation the old authorities afford little information. Reference may be made to Grotius, 1. 6. 4; Van Leeuwen (*Cens. For.* 1. 1. 9. 15), and Munniks,

Handleiding tot de Hedendaagsche Rechtsgeleerdheid (published in 1776), p. 12. Van der Keessel (*Dictat. ad* Grot. *loc. cit.*) evidently considers tacit emancipation as of very doubtful value unless followed by a grant of *venia aetatis*: 'Si minores sint 25 annis vix utilis erit emancipatio, saltem quod ad extraneos attinet: nam ut in judicio consistant minores emancipati ne quidem juris civilis ratio patitur: . . . extra judicium autem negotia gesturis vix fidem haberent nostri homines: quare solent qui liberos adhuc minorennes mercaturam facere volunt, ne qua difficultas excitetur, pro liberis ejusmodi veniam aetatis ab Ordinibus impetrare.'

There are numerous S. African cases in which a minor (in years) has been held liable on the ground of tacit emancipation. The dictum in *Riesle* v. *McMullin* (1907) 10 H. C. G. 381 that an emancipated minor carrying on a trade may contract but only with reference to such trade derives no support from the authorities cited and is inconsistent with other South African cases, such as *Cairncross* v. *De Vos* [1876] Buch. 5; *Nangle* v. *Mitchell* (1904) 18 E. D. C. 56; *Orkin* v. *Lyons* [1908] T. S. 164; *Steenkamp* v. *Kamfer* [1914] C. P. D. 877. The same view has, however, been re-affirmed by Benjamin J. in *Ambaker* v. *African Meat Co.* [1927] C. P. D. 326. See also *Griffiths & Co.* v. *Winifred & Cie.* C. P. D. 44 *S.A.L.J.* vol. xliv (1927), p. 449.

It has been said that 'if a minor was once fully emancipated he would remain so' (*Cohen* v. *Sytner* (1897) 14 S. C. at p. 16, per Buchanan J.), and, as observed by de Villiers C.J. in the same case: 'The Court should be very careful to require full proof of emancipation.' Sometimes the facts point rather to a tacit consent of parent or guardian to contracts incidental to the particular adventure; cf. Van der Keessel, *Dictat. ad* Gr. 1. 6. 4. Contra, propria negotiatio sive in domo parentum sive in separato domicilio non tollit potestatem patriam, si contrariam voluntatem parentes declaraverint (Roseboom, *Keuren van Amsterdam*, C. 39, Art. 8); quamvis quoad hanc negotiationem valide obligari possint, cum voluntate patris contraxisse videantur (*Arg. tit. de tributor. actione* (Dig. 14. 4); vid. et *Costum. van Antwerpen*, tit. 43, art. 73). Perhaps it would be better to pursue this suggestion instead of continuing to speak of 'emancipation', while denying its consequences. Contrast Van Leeuwen, *Cens. For.* 1. 1. 9. 15

(*Secundus modus solvendae Patriae Potestatis est* separatio, qua liberi se a suis parentibus separant, separatim habitant propriamque oeconomiam et rem familiarem instituunt) with *Ex parte Keeve* cited above at p. 42. See on the whole question '*N Paar Aspekte van die Emancipatie Van Minderjariges* by Dr. I. Van Zyl Steyn, *S.A.L.J.*, vol. xliv (1927), p. 313. In the Civil Code of the Province of Quebec, by art. 323, following the Old French Law, 'A minor engaged in trade is reputed of full age for all acts relating to such trade'.

Is there any limit to the capacity of a minor tacitly emancipated? Is he free to make an ante-nuptial contract? to marry? [V. d. K. says not; cf. *Greef* v. *Verreaux* (1829) 1 Menz. at p. 154]; to alienate immovables?

The R.-D. L. writers distinguish (*a*) contracts of minors unassisted by their parents or tutors which are *ipso jure* void (in the sense that restitutio in integrum is not needed to avoid them) (*De Beer* v. *Est. De Beer* [1916] C. P. D. 125), and (*b*) contracts of minors duly assisted, or of tutors acting for minors, which are not void, but voidable by restitutio in integrum (Gr. 3. 48. 10; *Cens. For.* 1. 4. 43. 1–2; *Van der Byl & Co.* v. *Solomon* [1877] Buch. at p. 28). This distinction has important consequences:

1. In (*a*) minority is a defence without proof of lesion; in (*b*) lesion must be proved.

2. The grounds for refusing the extraordinary remedy of restitutio in integrum which apply to (*b*) do not necessarily apply to (*a*). Such are, (i) the fact that the minor has falsely represented himself to be of full age; (ii) the fact that he has conducted himself as of full age, and is generally supposed to be so—communi omnium errore pro majorenne habitus . . . sic agens publice, sic muneribus fungens, ut majorennes. (Voet, 4. 4. 43.) This distinction was perhaps somewhat overlooked in *Pleat* v. *Van Staden* [1921] O. F. S. 91.

3. In (*a*) and (*b*) the burden of proving minority is on the minor; but this being established—in (*a*) the burden of proving benefit (*Nel* v. *Divine Hall & Co., ubi sup.*) or emancipation (*Venter* v. *De Burghersdorp Stores* [1915] C. P. D. at p. 255) is on the other party: in (*b*) the burden of proving lesion is as a rule on the person who relies upon it. (Voet, 4. 4. 13.)

It is not suggested that the above propositions are reconcilable in all respects with the judicial decisions of the S. A.

Courts. They are, however, it is submitted, all fairly open to argument; at all events before the Appellate Division.

APPENDIX C

MARRIAGE: PROHIBITED DEGREES

Cape Province

Act No. 40 of 1892, sec. 2, enacts:

'It shall be lawful for any widower to marry the sister of his deceased wife, provided such sister be not the widow of a deceased brother of such widower, or to marry any female related to him in any more remote degree of affinity than the sister of his deceased wife, save and except any ancestor of or descendant from such deceased wife.' By sec. 4 nothing in the Act contained 'shall be deemed to legalize or render valid the marriage of a man with the sister of a wife from whom he has been divorced'.

Transvaal

Law No. 3 of 1871, sec. 4, enacts: 'Under the prohibited degrees of blood-relationship are included: (*a*) all persons in the ascending and descending line *ad infinitum*, and in the collateral line to the third degree inclusive, consequently uncle and niece, aunt and nephew, whether by blood or marriage; (*b*) first cousins when both the parents of the one are related to both the parents of the other, as own brothers and sisters.' The law is silent as to the prohibited degrees of affinity, which therefore depended upon the common law. It followed that marriage with a deceased wife's sister was not allowed. *Rex* v. *Paterson* [1907] T. S. 619.

But now by Union Act No. 11 of 1920, sec. 1 (2): 'Anything to the contrary notwithstanding in Law 3 of 1871 of the Province of the Transvaal or in any other law in force in that Province, it shall be lawful for any widower to marry the sister of his deceased wife or to marry any female related to him through his deceased wife in any more remote degree of affinity than the sister of his deceased wife, save and except any ancestor of or descendant from such deceased wife.' And (sec. 3):—'Notwithstanding anything contained in this Act it shall not be lawful for a man to marry the sister of

his divorced wife, or of his wife by whom he has been divorced, during the lifetime of such wife.'

Orange Free State

Ord. No. 31 of 1903, sec. 1, enacts: 'Marriage is prohibited between all persons related to one another in the following degrees of consanguinity or affinity: (1) In the ascending and descending lines between persons related to one another either by legitimate or illegitimate birth, or by marriage. (2) In the collateral degrees:—(*a*) Between brother and sister by birth legitimate or illegitimate; (*b*) between uncle or great-uncle and niece or great-niece by birth legitimate or illegitimate; (*c*) Between aunt or great-aunt and nephew or great-nephew by birth legitimate or illegitimate. (3) (*a*) Between cousins whose fathers are brothers and whose mothers at the same time are sisters by birth legitimate or illegitimate; (*b*) Between cousins of whom the father of the one is brother of the mother of the other and at the same time the mother of the one is sister of the father of the other by birth legitimate or illegitimate.

Sec. 2. No marriage shall be deemed unlawful by reason only that the persons contracting such marriage are related to one another in any other degree of consanguinity or affinity than those in sec. 1 mentioned.'

Natal

In this Province the prohibited degrees are left to the common law except that Act No. 45, 1898, sec. 2, legalizes the marriage of a man with his deceased wife's sister; and by Union Act No. 11 of 1920, sec. 1 (1): 'Anything to the contrary notwithstanding in any law in the Province of Natal, it shall be lawful for any widower to marry any female related to him through his deceased wife in any more remote degree of affinity than the sister of his deceased wife, save and except any ancestor of or descendant from such deceased wife.' Sec. 3 (*supra*) applies also to Natal.

Union of South Africa

The Marriage Law Amendment Act No. 17 of 1921 provides (sec. 1): 'Anything to the contrary notwithstanding in any law in force in any Province of the Union it shall be lawful for any widow to marry the brother of her deceased husband or to marry any male related to her through her deceased

husband in any more remote degree of affinity than the brother of her deceased husband, save and except any ancestor or descendant from such deceased husband'; and (sec. 3) 'Notwithstanding anything contained in this Act it shall not be lawful for a woman to marry the brother of her divorced husband, or of her husband by whom she has been divorced, during the lifetime of such husband.'

Ceylon

Ord. No. 19 of 1907, sec. 17, enacts:

'No marriage shall be valid:

(*a*) Where either party shall be directly descended from the other; or

(*b*) Where the female shall be sister of the male either by the full or the half blood, or the daughter of his brother or of his sister by the full or the half blood, or a descendant from either of them, or daughter of his wife by another father, or his son's or grandson's or father's or grandfather's widow; or

(*c*) Where the male shall be brother of the female either by the full or the half blood, or the son of her brother or sister by the full or the half blood, or a descendant from either of them, or the son of her husband by another mother, or her deceased daughter's or granddaughter's or mother's or grandmother's husband.'

It has been held that by the law of the Colony there is no objection to a man's marrying his wife's sister. (*Valliammai* v. *Annammai* (1900) 4 N. L. R. 8.)

APPENDIX D

THE LEGAL CAPACITY OF MARRIED WOMEN

This note is designed to supplement the account of this matter given *supra*, pp. 64–6. The ground is by no means covered by authority. So far as this is so the following remarks are submitted as a tentative solution of questions which call for, but have not yet received, judicial decision.

I

Persona standi in judicio

In *Van Eeden* v. *Kirstein* (1880) Kotzé, at p. 184, Kotzé J. states the general rule of incapacity and the exceptions from

it in the following terms: 'The general rule of our law is that a married woman, being a minor, has no *persona standi in judicio*, and must in law proceed by, or with the assistance of, her husband. To this rule only three exceptions are admitted, viz. 1st, in the case of married women carrying on a public trade in regard to all transactions connected with such trade; 2nd, where a woman married by ante-nuptial contract has reserved to herself the free administration of her separate property; and 3rd, in a suit by the wife against the husband (*V. d. Linden, Judicieel Practyk*, 1. 8, § 3). . . . I have been unable to find a single Roman-Dutch authority giving a married woman the right to appear in a civil suit unassisted by her husband, in any but the three exceptions above enumerated.'

The above statement of the law has 'been adopted generally in the South African Courts': *McCullogh* v. *Ross* [1918] C. P. D. at p. 395. It applies equally whether it is a question of bringing or of defending an action.

The first two exceptions are referred to below; the third finds its most frequent application in matrimonial causes such as suits for divorce, judicial separation, or for declaration of nullity of marriage (Van Zyl, *Judicial Practice* (3rd. ed.), pp. 79 and 80; Nathan (1st ed.), vol. iv, pp. 2100 ff.), *Barnett* v. *Milnes* [1928] N. P. D. 1. In modern practice a further exception is admitted, when the husband has deserted the wife and disappeared from the jurisdiction, so that it is not known where he is, or whether he be alive or dead: *McCullogh* v. *Ross*, *ubi sup.* at p. 396; *Kunne* v. *De Beer* [1916], C. P. D. 667. When the desertion is less complete, or the husband cannot or will not give his assistance, the Court in which the action is brought will, in a fit case, give the wife leave to bring (*McGregor* v. *S. A. Breweries, Ltd.* [1919] W. L. D. 22; *Lacey* v. *Lacey* [1929] W. L. D. 132) or to defend (*Ex parte Gerber* [1928] W. L. D. 228) an action in her own name: *McCullogh* v. *Ross*, at pp. 395, 397. Note that 'ability to litigate does not follow from her right to contract'. Kotzé, Van Leeuwen, vol. i, p. 489.

II

Capacity to Contract

The general rule is that a married woman cannot bind herself or her husband or the community without the consent or subse-

quent ratification of her husband. But this rule is subject to exceptions and may be excluded by ante-nuptial contract. Further, like other minors, a woman can confirm the contract when the disability ceases, *scil.* after the dissolution of the marriage, and hold the other party to his bargain. (Voet, 23. 2. 43.)

The cases in which a married woman's contract is followed by legal consequences during and after marriage are the following:

1. *If she contracts with her husband's consent or if he subsequently ratifies her contract.* (Voet, 23. 2. 42.) In this case the contract is the wife's contract. Therefore it binds her; and if she is married in community, it binds the community also. Accordingly (*a*) during the marriage it may be enforced against the husband as head of the community; and, when community has been excluded, against the wife 'duly assisted by her husband' (1 Maasdorp, p. 45).

(*b*) After the dissolution of the marriage it may, if the marriage was in community, be enforced against the common estate (previous to distribution) or against the wife, but not against the husband, who was not a party to the contract. If, however, the marriage was in community and the wife has satisfied the whole debt, she will have *regressus pro semisse* against her husband, just as the husband in like case has *regressus pro semisse* against the wife (*supra*, p. 69, n. 3).

2. *If she contracts as her husband's agent.* In this case the contract is the husband's contract. It binds him (*Selby* v. *Friemond* [1887] 5 S. C. 266). Whether it also binds the wife depends upon the general principles of the law of agency and the special rules of law relating to the contractual capacity of married women. To this head may be referred cases in which the husband has held out his wife to third parties as having authority to pledge his credit.

3. *If she contracts in relation to a public trade which she is carrying on with the consent of her husband.* Grotius (1. 5. 23) says that she binds herself and her husband. Voet speaks of an implied agency resulting from the fact that the husband allows his wife to manage his business for him (Voet 4. 4. 51; 23. 2. 44; *Holl. Cons.* vi. 95).

On Roman Law principles she would bind herself and her husband also (*actio institoria*), but in the modern law if she

were a mere agent she would bind her husband and not herself. On the other hand the husband is not necessarily liable. (Christenaeus *ad leg. Municip. Mechlin.* tit. ix, art. 10, citing Gaill, *Pract. Observ.* lib. ii, No. 90.) The contract may bind the wife alone. As regards the husband it seems that he will be bound *in solidum*, or *pro semisse* (Sande, *Decis. Fris.* 2. 4. 4), or not at all, according to circumstances. The wife's liability also depends upon the circumstances; thus she may be *correa debendi* with her husband (Gaill, *ubi sup.*); but where the contract is *her contract* she is answerable *in solidum* both during and after the dissolution of the marriage. This is a logical consequence of her personal liability and does not (it is submitted) rest, as suggested by Mason J. in *Hern & Co.* v. *De Beer* [1913] T. P. D. at p. 725, upon the special provision of the Perpetual Edict of Charles V, Art. 2 (Gr. 2. 11. 18–19), which relates to a different situation. The case of the wife who is carrying on a public trade is, as remarked above, one of the exceptional cases in which a married woman may sue and be sued apart from her husband: V. d. L. 3. 1. 2. 2; *McIntyre* v. *Goodison* [1877] Buch. 83; *Hill & Co.* v. *Mc Clure* [1909] T. H. 212; *Grobler* v. *Schmilg & Freedman* [1923] A. D. at p. 501. (But according to the practice of the Cape Court even when a woman is a public trader she ought to be sued assisted by her husband: *Bown* v. *Mowbray Munic.* [1911] C. P. D. at p. 436.) When the husband is also liable, a creditor is under no obligation to sue the wife before suing the husband. (*Matson* v. *Dettmar* [1917] E. D. L. 371.)

4. *If she contracts for necessaries for the joint household.* Grotius tells us [1. 5. 23] that by such contract she binds herself and her husband. Voet (23. 2. 46) says the same. But this statement requires qualification. The legal result varies with the circumstances.

Thus: (*a*) In the ordinary case of the wife ordering goods for the joint household the wife 'is *prima facie* the agent of the husband and contracts the debt on his behalf' (*Hern & Co.* v. *De Beer* [1913] T. P. D. at p. 725 per Mason J.;—but as to the wife being the husband's agent see below), with the result that the husband as head of the community is liable *in solidum*, and the wife after the dissolution of the marriage is liable *pro semisse*: *Grassman* v. *Hoffman* (1885) 3 S. C. 282; *Copeland & Creed* v. *Ditton* (1895)) 9 E. D. C. 123.

It has been held that the husband is liable notwithstanding that he and his wife are living apart by mutual consent, and he made her a reasonable allowance: *Frame* v. *Boyce & Co.* [1925] T. P. D. 353. (*Secus Excell* v. *Douglas* [1924] C. P. D. 472, where the Court took the view that the existence of a 'common household' is a condition of the husband's liability, and *Waverley Hotel* v. *Harris* (N. P. D. 1929), 14 P. H. B.41, where the ground of the decision was principally the fact that the husband made his wife a reasonable allowance). But if the wife has unlawfully deserted her husband, and is living apart from him, he will not be liable for necessary services rendered to the wife (*Bing & Lauer* v. *Van der Heever* (1922) T. P. D. 279).

(*b*) If the wife contracts in her own name so that the other party looks to her credit it is *her contract*, and she binds both herself and the community, as in other cases in which the law allows the wife to contract in her own name. In such case 'an action will lie against her and . . . execution might issue against the goods in community' (*Hilder* v. *Young* (1890) 11 N. L. R. at p. 157). Upon the dissolution of the community, the wife remains liable *in solidum* and the husband is liable *pro semisse* (the converse of case (*a*)); Bijnk. *O. T.* i. 280. When the spouses are not married in community and the wife purchases in her own name she is personally liable (*Mason & Co.* v. *Williams* (1884) 5 N. L. R. 168; *Pocklington* v. *Cowey & Son* (1885) 6 N. L. R. 118). Her husband may be liable also.

(*c*) The wife's authority to bind her husband may be put an end to by judicial injunction and publication (Gr. 1. 5. 23; Voet, 23. 2. 46), or other public notification (*Reloomel* v. *Ramsay* [1920] T. P. D. 371); but not, it seems, by merely forbidding her to pledge his credit. Ibid.

(*d*) 'It may be that by express terms the husband or wife may assume the whole liability for the purchase of necessaries, and if the vendor *agrees* to look only to him or her, I do not think he can, thereafter, sue the non-contracting spouse.' Stratford J. in *Van Rensburg* v. *Swersky Bros.* [1923] T. P. D. at p. 259.

(*e*) Either spouse (but subject to (*d*)?) is, in any event, liable *pro semisse* for necessaries supplied to the joint household. Thus 'even if [the wife] has by ante-nuptial contract excluded community of profit and loss, and liability for her

husband's debts, she is liable [upon the dissolution of the marriage] for half the price of the goods supplied to her and her husband for domestic purposes, though recourse against her husband or his estate is reserved to her to recover what she pays'. *Hern & Co.* v. *De Beer*, *ubi sup.*, pp. 723, 726. This proposition rests upon decisions of the Court of Holland of 1603 and 1607: Neostad, *de pact. antenupt.*, Obs. ix, note (*d*); *Decis. en Resolut. van den Hove van Holland*, no. 396; *Holl. Cons.*, vol. iii (Part I), *in appendice*, p. 39; *Holl. Cons.*, vol. vi, p. 328. The Transvaal Court has held that this liability attached also during the marriage to a wife, married by a.c., which excluded all community and the marital power, for half the cost of necessaries purchased by the husband in his own name and on his sole credit. (*Van Rensburg* v. *Swersky Bros.*, *ubi sup.*)

(*f*) The question what falls under the head of necessaries depends upon circumstances. 'Whether in any particular case goods purchased by the wife are necessaries or not is for the Court to judge, and in deciding that question it must have regard to the social standing and means of the parties and their habits of life in the past' (*Reloomel* v. *Ramsay*, *ubi sup.* at p. 380, per Bristowe J.).

(*g*) The question whether the authority of the wife to pledge her husband's credit for necessaries is based upon agency or is, independently of agency, an incident of the marriage gave rise to a difference of judicial opinion in *Reloomel* v. *Ramsay*. If the second view, adopted by Bristowe J., is correct, the husband cannot escape liability by forbidding his wife to pledge his credit. Upon the first hypothesis he can. Gregorowski J., who took this view, was 'not prepared to add another terror to matrimony'. 'It seems to me that the wife against the will of her husband can only pledge his credit when he leaves her destitute, or manifestly inadequately supplied with things which are necessary and which she ought reasonably to have.' Ibid. at pp. 387–8.

5. *Unilateral contracts.* *Supra*, p. 65.

6. *If the wife has taken a benefit under the contract.* Ibid.

7. *If the husband has deserted his wife and is absent from the jurisdiction.* *Supra*, p. 67.

8. *If the wife by ante-nuptial contract has reserved to herself the free administration of her own property, or has excluded the*

marital power. (*Pepler* v. *Liebenberg* [1928] C. P. D. 266; *supra*, p. 80.)

It has been said (and often repeated) that 'if a woman married in community enters into a contract she either contracts as agent for her husband or she has no power to contract at all'; *Nestadt* v. *Hope* [1928] W. L. D. at p. 33, per Solomon J., citing *Smith* v. *Bard* [1917] C. P. D. 616. Made without reservations, this statement is misleading; for not only may she contract in the circumstances set out above, but, generally, she may bind herself by contract with her husband's consent. *Supra*, p. 65. The law is stated in more detail in *Pretorius* v. *Hack* [1925] T. P. D. at pp. 646–7, where all these exceptions are admitted by Curlewis J.P. But it is difficult to follow the learned judge when he goes on to say 'Where a woman is married out of community of property, her status is different, and she may contract in her own name and bind herself, and she may be sued on the contract'. This consequence does not follow unless there is not only exclusion of community but also exclusion of the marital power (*supra*, p. 80). No particular disability attaches to marriage in community as such.

According to South African practice, when action is brought upon a contract entered into by a woman married in community, it is the husband who is sued, not the wife (*Moogi* v. *Matsibi* [1910] 10 H. C. G. 302; *Smith* v. *Bard* [1917] C. P. D. at p. 618); but to base this upon the principle that 'a woman married in community cannot contract save as agent for her husband' is to confound procedure and substantive law. To ascertain whether a married woman has bound herself as well as the community, or her husband and the community, but not herself, we must ask what will be the position after the dissolution of the marriage. If the contract was the wife's contract, she will be liable *in solidum*; if it was her husband's contract, she will be liable only *pro semisse*.

It has been said in a very recent case (*Olufsen* v. *Fielder*) (No. 2) N. P. D. (1930), 16 P. H. B.44, that the case of *Hilder* v. *Young*, cited above, 'has not been followed in . . . any . . . Courts of the Union'. But the authority of Connor C.J. is not lightly to be set aside. In this case the wife had contracted for domestic necessaries (the services of a midwife), and the learned Chief Justice said, 'When a married woman is validly liable under a contract or other obligation, she is, I apprehend, always

liable to be sued as assisted by her husband, or if he is under disability by some one else; and the marriage having been in community of goods occasions no distinction in that respect'; and below: 'As to credit having been given to the wife, every person who validly contracts must be taken to pledge his credit, unless the contrary is shown.'

If the wife's contract does not fall within one of the excepted cases, the presumption is that she contracted as her husband's agent (ut res magis valeat quam pereat); *Smith* v. *Bard*, *ubi sup.* at p. 622.

APPENDIX E

THE LIMITS OF THE JUS VINDICANDI

The following note indicates very cursorily certain exceptions from the general rule (Gr. 2. 3. 5) that an owner may recover his lost possession even from a bona fide possessor who has given value. As will appear, they are not all valid in the modern law.

1. *Sales in a free market* (*op een vrije mart—in publico emporio*). The following texts may be consulted: Gr. 2. 3. 6; Van Leeuwen, *R. H. R.* 2. 7. 3; *Cens. For.* 1. 2. 11. 4; 1. 4. 19. 20; *Bellum Juridicum*, Casus I; Groenewegen ad Gr. 2. 3. 6 and *de leg. abr.* ad Cod. 6. 2. 2; Zypaeus, *Notit. jur. Belg.* p. 96; Wassenaar, *Praxis Judiciaria*, c. ix, num. 4; Christenaeus, *In leg. municip. Mechlin. Comment.* tit. 2, art. 2; Voet, *Comment. ad Pandect.* 6. 1. 8; and *Compendium Juris*, 6. 1. 12; Antonius Matthaeus, *Paroem*, vii. 17; Schorer ad Gr. 2. 3. 5. Scheltinga [Wessels, p. 342], commenting upon Grotius (hoc loc.), says: 'Alwaar onder meer andere staat aan te merken dat niet overal dit recht stant grypt; by gevolge wanneer iemand moet restitutie doen van goed dat hy op een vrye markt heeft gekogd, dan zal men altoos onderzoeken of de plaatselyke wet of costumen sodanige uitsonderingen maaken; . . . de reeden daar van is om dat deeze uitsonderinge strekt tot vermindering van het regt van den eigenaar, en die heeft GEEN grond ten sy die door de wetten of oude costumen is bevolen.' [Wessels translates a somewhat different version of the above at p. 507.] Van der Keessel (*Dictat.* ad loc.) seems to hesitate to come to any conclusion, but points out that the rule was jus commune in Zeeland, as appears from Groenewegen's note, and that the

statutes of Zeeland formerly enjoyed considerable authority in Holland.

For South African cases see above, p. 302, n. 2. There are no public markets in Ceylon. *Northmore* v. *Meyapulle* (1864) Ramanathan 95.

The claim of privilege for a purchaser at a private auction sale was rejected in *Retief* v. *Hamerslach* (1884) I. S. A. R. 171.

2. *Sales or pledges to licensed 'table-holders'* (*lombarden*). Gr. 2. 3. 6; V. d. K. *Th.* 184. This exception is not admitted in S. A., *Muller* v. *Chadwick & Co.* [1906] T. S. 30. The business of pawnbrokers is now regulated by statute. See Cape, Act No. 36 of 1889; Transvaal, Law No. 13 of 1894 (as amended); Natal, Act No. 22 of 1895.

3. *Sales to old clothes dealers.* Grot. and V. d. K. *Th. ubi sup.*; local in Holland, not admitted in S. A.

4. *Sales to gold- and silver-smiths.* Van Leeuwen, *R. H. R.* 2.7.4; V. d. K. *Th. ubi sup.*; statutory in Holland, not admitted in S. A., *Muller* v. *Chadwick & Co.*, *ubi sup.* at p. 40.

5. *Judicial sales.* Voet, 6. 1. 13; Math. *Paroem.* vii. 17 and *de auctionibus*, 1. 11. 70–1; 1. 14. 5; V. d. K. *Dictat.* ad Gr. 2. 3. 6. For S. A. consult *Woodhead Plant & Co.* v. *Gunn* (1894) 11 S. C. at p. 12; *Adams* v. *Mocke* (1906) 23 S. C. at p. 788; *Willoughby's Consolidated Co.* v. *Copthall Stores Ltd.* [1913] A. D. at p. 270, per De Villiers C.J. arguendo. The result is that a fiscal sale gives a good title to a purchaser, at all events against an owner of full age who has notice of the sale and fails to assert his right. *S. A. Association* v. *van Staden* (1892) 9 S. C at p. 98 (Can the original owner recover the property on payment of the price?). By the Magistrates' Courts Act (No. 32 of), 1917, sec. 59: 'A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.' Pound sales are regulated by provincial statutes, and confer an unassailable title on the purchaser. Norman, *Purchase and Sale*, p. 32. (Cf. for Southern Rhodesia *Roberts & Letts* v. *Fynn* [1920] A.D. 23.)

6. *Sales in insolvency.* 'A public sale in insolvency is to all intents and purposes a judicial sale.' Per De Villiers C.J. *Lange* v. *Liesching* (1880), Foord at p. 62. See Insolvency Act (32 of), 1916, sec. 35 (3).

7. *Goods sold and delivered without an agreement for credit and not paid for.* The owner who fails to revindicate within a short time loses his right [and the property vests in the purchaser], V. d. K. *Th.* 203; V. d. L. 1. 7. 2; Mackeurtan, p. 236; *supra*, p. 300, n. 5.

8. *Money and negotiable instruments payable to bearer*:— cannot be recovered from a person who has received them in good faith and for value. *Woodhead Plant & Co.* v. *Gunn* (1894) 11 S. C. 4; *Adams* v. *Mocke* (1906) 23 S. C. at p. 788.

9. *Goods entrusted to agents for sale and factors.*—If they sell or pledge goods entrusted to them though contrary to the instructions of their principals they give a good title to a purchaser or pledgee to the extent that the owner cannot vindicate the goods without making good the price or redeeming the pledge. Voet 6. 1. 12. *Morum Bros.* v. *Nepgen* (1916) C. P. D. 392. For English Law see *The Factors' Act*, 1889, sec. 2.

10. *Estoppel.* The same principle applies to other cases in which an owner 'has led others into the reasonable belief that the person to whom he has entrusted his goods is entitled to dispose of them'. *Adams* v. *Mocke*; *Morum Bros.* v. *Nepgen.* This may be regarded as an application of the principle of estoppel, which forms part of R.-D. L. Whether it applies or not depends upon the circumstances of each case.

11. *Sale by a trustee or fiduciary.* In Ceylon, where the English Law of Trusts has been received with the consequent distinction between legal and equitable ownership, the legal owner can undoubtedly give a good title to a bona fide purchaser for value. But a fideicommissum is not the same as a trust. If movable property is alienated contrary to the terms of a fideicommissum the fideicommissary has no right of pursuit—*mobilia non habent sequelam.* Voet, 36. 1. 64. As regards immovables, in the present state of the authorities it cannot be asserted as beyond question that a person who in good faith purchases burdened property from a fiduciary may hold it as against the fideicommissary. But, 'although in theory [immovables] can be followed into any hands, the courts of South Africa would certainly be disinclined to interfere with a *bona fide* purchaser without notice who had obtained registered transfer': Morice, *English and Roman-Dutch Law* (2nd ed.), p. 321. Cf. *Lange* v. *Liesching*, Foord, at p. 59: 'There is no title

which the law is more inclined to respect than that of a *bona fide* purchaser for value without notice of the defect of title of the seller.' *Michelsen* v. *Aaronson & Baikie* [1914] T. P. D. at p. 167. For Ceylon see p. 381, n. 1, *supra*. A fideicommissum created by act inter vivos does not in any circumstances give a real right over movable property. *Brit. S. A. Co.* v. *Bulawayo Municipality* [1919] A. D. 84; *Kruger* v. *Verster* [1925] C. P. D. 6. The same may be said of a donatio sub modo of movables. The person for whose benefit the modus is imposed cannot vindicate the property, but has a personal action to compel observance of its terms. Groen. *de leg. abr.* ad Cod. 4. 6. 3; 8. 54 (55). 1; Windscheid, vol. ii, sec. 316.

In conclusion, note that the wider application of the rule *mobilia non habent sequelam* to the case of alienations by a borrower, depositary, &c., was not generally admitted by writers on the R.-D. L. and does not exist in the modern law. The principle *Possession vaut titre* in this extended sense has no place in the law of South Africa or of Ceylon.

APPENDIX F

CONTRACT AND CAUSA

In this note I propose to say something about the treatment of the subject of contract by Grotius with special reference to the theory of *causa*.

Legal obligation, Grotius tells us, arises from two sources: (*a*) promise (*toezegging*), (*b*) inequality (*onevenheid*) (Gr. 3. 1. 47). Promise is express or by implication of law (*uitdruckelick—door wetduiding*) (sec. 49). Express promise is spoken or written (sec. 50).

Promises by implication of law are with agreement or without agreement (3. 6. 1). Agreement, otherwise termed contract, is a union of wills of two or more persons for the benefit of one or more of them.—*Overkominge die anders handeling genoemt werd is de eendracht des willes van twe ofte meer luiden tot eens ofte beider nut* (sec. 2).

To some of these contracts, which are of daily occurrence, the law annexes terms, which bind the parties in the absence of agreement to the contrary. These are promises by implication of law. Some of these contracts of daily occurrence are real, others consensual (sec. 10).

In addition to the above the law sometimes raises an obligation or implies a promise without any agreement at all. To this head are referred obligations *quasi ex contractu*, e.g. the relation between heir and legatee, guardian and ward, *negotiorum gestor* and principal, or between co-owners. (Chaps. XXVI–XXIX.)

To revert to express promises: To make a verbal promise binding the Roman Law required a formal stipulation (or, later, an oath) (3. 1. 51). 'But since the Germans from of old have esteemed no virtue above good faith, such subtlety has not been accepted by them, but it has been understood and used that all promises, which proceed from any reasonable causes, whatever be the form of words employed, whether the parties were together in one place or not, gave a right of action and of defence to an action' (sec. 52). Reasonable cause is understood [to exist] whenever the promise (*toezegging ofte belofte*) takes place by way of gift or is incidental to some other contract (*dient tot eenige andere handelinge*), whether such takes place at the time of the contract or after it (sec. 53).

Gift forms the subject of chap. II. Promises incidental to some other contract are treated in chap. III. They take place either to confirm or to depart from the usual incidents of such contract (3. 3. 1): to confirm, e.g. if a purchaser expressly promises payment or a vendor delivery;—to depart from, e.g. if a vendor promises to furnish security against eviction, or a purchaser promises not to hold the vendor liable in case of eviction (Van der Keessel, *Dictat.* ad loc.).

Chap. IV treats of compromise (*transactio—dading*) which is said to belong to the *genus* 'promise'. Its place in the system is not further indicated.

It is noticeable that Grotius has not thrown off the shackles of the Roman Law. His verbal express contract is still the stipulation in modern dress. He nowhere frames a comprehensive definition of contract as we understand it in the modern law.

Further, he nowhere says that *all* promises must proceed from a reasonable cause. It may be conceded, however, that this was his meaning, for in 3. 30. 14 he evidently supposes reasonable cause to be, in principle, a requirement of the contract of sale, and in 3. 31. 3 (*in fine*) he describes the sources of obligation as (*a*) inequality, (*b*) a reasonable promise

(*redelicke toezegging*), which is equivalent to a promise proceeding from a reasonable cause.

There are some cases of contract which do not easily find a place in the Grotian system. Instances are compromise (already mentioned), and promises leading up to real contracts, nominate and innominate, e.g. a promise to lend, to accept a deposit, to constitute a pledge (3. 6. 11); a promise to give in exchange (3. 31. 8). In view of the circumstances in which Grotius wrote and published his *Introduction* occasional flaws are not surprising. It seems from the above instances that Grotius fully accepts the principle that 'every paction begets an action'; but he does not make this plain. Further, pact or promise (he says) must spring from a reasonable cause.

What is meant by reasonable cause? It is not the same as lawful cause. A promise may be reasonable but unlawful. Put the case of a marriage brocage contract, a contract relating to a future succession, a contract of purchase and sale concluded on the Lord's Day. It is not enough that a contract should be lawful, it must be reasonable; but if it belongs to a class of transactions to which legal consequences are commonly attached, the law will not readily regard the promise of a party to it as unreasonable. 'Now although in case of sale, hire and so forth, any promise which exceeds or falls short of the real value seems to that extent to be destitute of reasonable cause (*ontblootet te zijn van redelicke oorzaeck*), nevertheless, inasmuch as the very foundation of the contract has a cause known to the law (*rechtelicke oorzaeck*) and the value often cannot be precisely determined . . . the law has thought fit to allow such promises to have their effect provided that if the prejudice resulting to one of the parties is too great and apparent [*laesio enormis*] it is open to him to claim the remedy of restitution.' (Gr. 3. 30. 14.)

In another passage (3. 5. 7), speaking of promises in writing, Grotius uses the phrase *wettelicke oorzaeck*, which plainly has reference to the texts of the Roman Law, more particularly to Cod. 4. 30. 13, upon which the practice of making express mention of the cause in written instruments was founded. When Grotius speaks of an unlawful cause he does not say '*onredelijke*', but uses the phrase '*oneerlijcke oorzaeck ofte inzicht*' (3. 1. 43) or '*oneerlicke ofte verboden oorzaeck*' (3. 3. 44), just as in another passage speaking of the *condictio ex turpi*

causa he writes: *Hier onder is mede begrepen alle 't gunt iemand heeft gegeven om een onrechtmatighe ofte andersins oneerlicke zake* (3. 30. 17). If reasonable cause does not mean lawful cause, what does it mean? Surely nothing but this—a cause of a nature to induce a reasonable man to give his promise, a cause which another reasonable man, the judge, considers apt to produce a legal obligation. Where this condition is present the promisor is bound in law, where it is absent he is not bound in law. This rules out promises which are merely silly and foolish (Voet, 2. 14. 16) and promises which burden the obligor without having any interest for the obligee (Voet, 2. 14. 20). Practically we arrive at the same result when we say that a promise binds if it is given *serio et deliberato animo* (Vinnius *ad* Inst. 3. 14. 2, sec. 11; Voet, 2. 14. 9).[1]

Upon the basis of certain texts in the Roman Law, and the traditional interpretation of them, modern civilians, following Domat (*Les loix civiles*, 1689–97), have constructed what has been termed 'the theory of cause in obligations'. Through the medium of Pothier this passed into the French Civil Code and thence into the other modern codes, which have taken it for their model. The essence of the theory seems to be this. Just as tradition, or handing over, is nothing in itself but only acquires legal significance so far as it is an 'act in the law' (nunquam nuda traditio transfert dominium, sed ita, si venditio vel aliqua justa causa praecesserit propter quam traditio sequeretur. Dig. 41. 1. 31, pr.), so an obligation apart from its cause has no juristic significance. The element in the situation, whatever it be, which gives vitality to the obligation is termed its 'cause'.[2]

[1] It seems that this identification was made, or implied, by the Canonists (with whose works Grotius was, of course, familiar). For them 'le pacte n'est valable que si le promettant a manifesté son intention, et . . . d'autre part cette intention profonde donne force à son engagement, même si elle ne se réalise point dans le cadre des anciens contrats, à la seule condition qu'elle soit raisonnable. De sorte que la théorie canonique du pacte nu aboutit à sanctionner toute promesse donnée avec une volonté réflechie' (Henri Capitant, *De la cause des Obligations* (3me éd.) p. 142). Van Leeuwen in his early work, *Paratitula Juris Novissimi* (Lib. iv, cap. 1, *in fine*), says that the reasonable cause of Grotius is the same as the *serio et deliberato animo* of Voet. Sir John Kotzé (*Causa in the Roman and Roman-Dutch Law of Contract*, p. 45, n. 1) mentions this passage, but does not accept it as correct.

[2] La cause est le soutien nécessaire, indispensable qui supporte l'obligation. Capitant, *op. cit.* p. 31.

This is variously, according to circumstances, conceived of as an intention of the party to produce a legal result, or as the result apprehended and desired.[1] But this is not what Grotius means by 'reasonable cause'. What he is looking for is a test of the validity of contracts in general, more particularly of the verbal contract. Following in the steps of the canonists, he finds this in the reasonableness of the transaction. The distinction between 'cause' as Grotius understands it and 'cause' as it is understood by modern exponents of the 'theory of cause' is the distinction between actionability and liability. Actionability is a quality of promise or agreement. Is this agreement actionable, i.e. a contract? Yes, if reasonable (*aliter*, serious and deliberate). Liability attaches to the person. Is this person bound? Yes, if his obligation has a lawful cause. The first relates to the inception of the contract. The second relates not to the inception merely, but to the continuance of the obligation.

To speak, lastly, of the place of cause in the modern law of contract, it must be said that if the decisions of the Privy Council and of the Appellate Division, cited in the text, have told us what *causa* is not, neither they nor the earlier decisions of the Courts of South Africa, nor the discussions to which the question has given rise, have made clear what it is. It is variously described as (*a*) 'the ground or reason of the contract—that which brought it about' (Innes C.J. in *Rood* v. *Wallach* [1904] T. S. at p. 199); 'the reason or ground of the transaction or agreement' (Kotzé, *Causa in the Roman and Roman-Dutch Law of Contract*, p. 31); (*b*) 'the particular transaction out of which the obligation is said to arise, be it sale, hire, donation, or any other contract or *handeling*'. (De Villiers A.J.A. in *Conradie* v. *Rossouw* [1919] A. D. at p. 314.) This last view is subjected by Mr. Justice Kotzé to critical examination at p. 56 of his monograph, where he says that it fails to distinguish between causa contractûs and causa obligationis. Mr. Justice de Villiers adheres to his view, as appears from his article in *S. A. L. J.*, vol. xxxix (1922), p. 169. *Non nostrum tantas componere lites.* It will, perhaps, be more helpful to remark that on the question what is necessary and sufficient to constitute a binding contract by the law of South

[1] There are variations on the theme into which it is unnecessary to enter.

Africa there is room for little, if any, difference of opinion. In *Conradie* v. *Rossouw* Solomon A.C.J. says [p. 288]: 'The rule may be simply stated as follows: "An agreement between two or more persons entered into seriously and deliberately is enforceable by action" '; De Villiers A.J.A. says [p. 320]: 'According to our law, if two or more persons, of sound mind and capable of contracting, enter into a lawful agreement, a valid contract arises between them enforceable by action'; Wessels A.A.J.A. says [p. 324]: 'I agree with the conclusion arrived at that a good cause of action can be founded on a promise made seriously and deliberately and with the intention that a lawful obligation should be established.' [1]

[In France and other countries of the Continent of Europe the theory of cause has given rise to an extensive literature. It is sufficient here to refer to Prof. Henri Capitant, *De la cause des Obligations* (3me, éd. 1927), and to Georges Chevrier, *Essai sur L'Histoire de la Cause dans les Obligations, Thèse pour le doctorat en droit*, Sirey, Paris, 1929. See also Prof. E. G. Lorenzen on *Causa and Consideration in the Law of Contracts, Yale Law Journal*, vol. 28, no. 7 (May, 1919), and Dr. F. P. Walton, *Cause and Consideration in Contracts, L. Q. R.*, vol. xli (1925), p. 306. For more than a century battle has been joined between causalists and anti-causalists. Prof. Marcel Planiol (*Traité élémentaire de droit civil*, tome ii, no. 1039) rejects the notion of cause as useless, and many modern codes, such as the Swiss Code of Obligations 1883, the German Civil Code 1900, and the Japanese Code 1898 (largely inspired by the draft German Code), omit all reference to it. The older Codes of the last century e.g. the Civil Code of the Netherlands 1838, of Italy 1865, of Quebec 1866, retain it. Colin & Capitant, *Cours élémentaire de droit civil français* (tome 2me), and Josserand, *Cours de droit civil positif français* (tome 2me, 1930), maintain the traditional doctrine.]

APPENDIX G

STIPULATIONS FOR THE BENEFIT OF A THIRD PERSON

The rule of the Roman Law, alteri stipulari nemo potest (Inst. 3. 19. 19; Dig. 45. 1. 38. 17), prohibited a person [C] who was not a party to a contract from bringing an action to enforce a stipulation in his favour made between the parties [A stipula-

[1] The last formula is repeated verbatim with the substitution of 'legal' for 'lawful' by Solomon, J.A. in *Robinson* v. *Randfontein Est. G. M. Co. Ltd.* [1921] A. D. at pp. 236–7.

tor, B promisor]; and if the stipulation was wholly in favour of such third person the stipulator himself could not sue, for want of interest. (Buckland, *Text-Book*, pp. 423 ff.)

The writers upon the Roman-Dutch Law are generally agreed that the rigid rules of the Roman Law were not in force in their system, but they fail to distinguish between the case in which A contracts with B intending to constitute a contractual relation between B and C, and the entirely different case in which A and B by contract between themselves confer some benefit upon C. The first situation is fully covered by the law of agency taken in connexion with the principle of ratification; the second raises questions of a much more difficult character. It is to this situation only that the phrase 'stipulation for the benefit of a third person' properly applies.

What is the juristic nature of the stipulatio alteri? The question has been much discussed by continental writers, who have propounded different 'systems'. In France the doctrine has passed through various stages. The situation was first analysed into the acceptance of an offer (A or B offeror[1], C offeree and acceptor), next into a negotiorum gestio (A gestor, C dominus rei gestae). But neither of these solutions meets our case. They are both open to the objection that they suppose as a consequence of C's acceptance a contractual relation established between B and C, which is not in accordance with the true juristic aspect of the stipulatio alteri. Consequently the most recent commentators upon the French Civil Code advocate a third 'system', different from either of the above: viz. that the right of C springs directly and immediately from the contract between A and B, but is not a right ex contractu. It results from the unilateral will of one of the parties to the contract [B] who undertakes to do something for a third person [C] (Colin & Capitant, *Cours élémentaire de droit civil français*, t. ii, p. 328; Josserand, *Cours de droit civil positif français*, t. ii, no. 303). The parties to the contract are the stipulator A and the promisor B. The relation between stipulator and third party (unless the object is to extinguish a debt of the former to the latter) approaches most nearly to that of donor and donee; but the transaction is an indirect donation and exempt

[1] On the first hypothesis A offers to C the benefit of the contract which A has made with B; on the second hypothesis B makes an offer direct to C.

from the usual requirements of form (in French law). All this seems to bring us near to the English conception of a declaration of trust; and it is pertinent to notice that in the one case in which English statute law admits the stipulatio alteri, the resulting situation is conceived of as a trust. By the Married Women's Property Act, 1882, sec. 11, a policy of insurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children or any of them [or a corresponding policy executed by a wife] creates a trust in favour of the objects therein named. The value of the analogy is that it shows that English law, so far as it gives effect to the stipulatio alteri, interprets it as creating in favour of the beneficiary a right which though originating in contract is not itself contractual. In the Roman-Dutch system the concept of quasi-contract is quite wide enough to meet the situation. If this is the true doctrine of the stipulatio alteri, many of the *dicta* in South African cases, based upon the older and now rejected theories of offer and acceptance or of negotiorum gestio, may require reconsideration.

It would be interesting, but space does not permit, to extract from the South African cases the principles of law applicable to this topic so far as they can be gathered from the decisions of the Courts. Particular reference may be made to *McCullogh* v. *Fernwood Estate Ltd.* [1920] A. D. 204, in which the effect of a stipulatio alteri was considered in connexion with the question whether a company can take advantage of a contract made for its benefit before it is formed. Innes C.J. referred to Grotius, *de Jure Belli ac Pacis*, 2. 11. 18, where a distinction is drawn between contracts made between principals in favour of third persons and contracts made with agents (negotiorum gestores) purporting to act on behalf of third persons. In his view the case under consideration fell under the first head, and the company was held entitled in accordance with the principle of *Tradesmen's Benefit Society* v. *Du Preez* (1887) 5 S. C. 269. If the contract had been held to have been made with a person purporting to act as agent for an unformed company, the result would have been different, 'because the rule that there can be no ratification by a principal not in existence at the date of the transaction is recognized by our law as well as by the law of England' (p. 207). The P. C. decision in *Natal Land and*

Colonization Co. v. *Pauline Colliery Syndicate* [1904] A. C. 120, 25 N. L. R. 1, in which *Kelner* v. *Baxter* (1866) L. R. 2 C. P. 174, Anson (17th ed.), p. 410, was followed, no reference being made to R.-D. authorities, was distinguished as being a case of purported agency.

A doubt, however, may suggest itself. If in consequence of a transaction between A and B, rights and duties run through A and vest in C, so as to establish a contractual relation between C and B (A falling out of the contract altogether—*McCullogh* v. *Fernwood Estate Ltd.* at p. 217), call it what you will, it is agency and nothing else. The stipulatio alteri is a triangle. It cannot by any manipulation be transformed into a straight line.

[For the theory of the stipulatio alteri J. P. Moltzer's masterly essay, *De overeenkomst ten behoeve van derden*, remains unsurpassed. The French doctrine is to be found in the commentaries on the Civil Code of Planiol, Colin & Capitant, Josserand, &c. The following cases exhibit the treatment of this topic in the law of South Africa. (The most important cases are indicated by an asterisk.) **Louisa & Protector of Slaves* v. *Van den Berg* (1830) 1 Menz. 471; **Tradesmen's Benefit Society* v. *Du Preez* (1887) 5 S. C. 269; *Hyams & Wolf* v. *Simpson* [1908] T. S. 78; **Mutual Life Insurance Co. of New York* v. *Hotz* [1911] A. D. 556; *Van der Plank N. O.* v. *Otto* [1912] A. D. 353; *Wallach's Trustee* v. *Wallach* [1914] A. D. 202; *Brown's Executrix* v. *McAdams* [1914] A. D. 231; **McCullogh* v. *Fernwood Estate Ltd.* [1920] A. D. 204; *Kynochs Ltd.* v. *Transvaal Silver and Base Metals Ltd.* [1922] W. L. D. 71; *Est. Greenberg* v. *Rosenberg & Greenberg* [1925] T. P. D. 924; **African Universal Stores Ltd.* v. *Dean* [1926] C. P. D. 390; *London Chemists and Opticians Ltd.* v. *Shapiro* [1926] T. P. D. 690.]

APPENDIX H

THE THEORY OF MORA

The word *mora* means delay or default. In its technical sense it means a culpable delay in making or accepting performance. Gr. 3. 1. 46; Van Leeuwen, 5. 3. 16; Voet, 22. 1. 24; *Victoria Falls and Transvaal Power Co.* v. *Consolidated Langlaagte Mines* [1915] A. D. at p. 31; *Breytenbach* v. *Van Wijk* [1923] A. D. at p. 549. In French law and other civil law systems *mora* seems (sometimes, if not always) to occur as a mean term between

failure to perform a contract and liability for breach. Speaking generally, one party to a contract cannot proceed against the other for breach of contract until he has with more or less formality, according to the circumstances, called upon the other to perform, and the other has failed to do so. By so doing he 'puts him in default' and, so to say, fixes or crystallizes his right of action against him.[1] When default follows upon demand or requires demand as a condition of its existence it is called *mora ex persona*. Voet, 22. 1. 25 (Si interpellatus opportuno loco et tempore non solverit). But there are cases in which demand is out of the question, e.g. if the obligation is *not to do* something and the thing has already been done, and there may be other cases in which the law does not insist upon demand as a condition of liability. In all such cases *mora* is said to arise by force of circumstances—*mora ex re*. Voet, 22. 1. 26–7. When performance is to take place by a certain time and the time has elapsed without performance, according to one view demand of performance is unnecessary. The time-limit expressed in the contract makes its own demand. 'Dies adjectus interpellat pro homine.' Voet, 22. 1. 26. But this view, which, it seems, cannot be supported by the texts of the Roman law,[2] has, from the time of the glossators onwards, been the subject of controversy. The contrary view is that even in this case demand is necessary to put a party in default.[3]

Mora usually attaches to a debtor, but it may also attach to a creditor who fails to accept performance duly tendered; Voet, 22. 1. 24. The consequences of *mora* to the debtor are to render him liable for *mora-interest* and mesne profits; for an agreed penalty; for damages; for increase in value of a thing to be delivered, if the thing perishes before delivery; and, generally, for accidental destruction, unless the thing would have perished equally in the hands of the creditor; Voet,

[1] The Latin word for demand is *interpellatio*, for which the Dutch use *interpellatie* or *maaning*. The modern equivalents for *mora* are *verzuim*, *verzug*, *demeure*.

[2] Buckland, p. 546. But see Windscheid, who concludes (vol. ii, sec. 278 *in notis*) that *dies adjectus* may have one or other effect according to circumstances.

[3] This, exceptions apart, is the rule in French Law. Dies non interpellat pro homine. Planiol, *Traité élémentaire de droit civil*, vol. ii, sec. 168. The English reader will find a lucid account of the French theory of *mise en demeure* in Dr. F. P. Walton's *The Egyptian Law of Obligations*, 2nd ed., vol. ii, pp. 213 ff.

22. 1. 28.[1] The consequences of *mora* to the creditor are to transfer the risk, and to 'purge' the *mora* of the debtor, i.e. to relieve him of the consequences which would otherwise attach to his default. Voet, 22. 1. 28, 30.

Mora is further distinguished as judicial and extra-judicial. Voet, 22. 1. 11. The first is a consequence of the institution of legal proceedings. The second may exist where there is no demand or where demand is extra-judicial.

The general theory of *mora* forms part of the modern law, but its application and consequences have not received much attention from the Courts. This may be due to the competing influence of English law, which has affected the technology and perhaps, at certain points, the substance of the law.

South African practice admits the principle dies interpellat pro homine. In other cases demand should precede summons. If this is omitted, and upon summons defendant makes an adequate tender, the costs of the summons must be borne by the plaintiff (Van der Linden, *Judicieele Practijcq*, 1. 8. 8; J. Herbstein, *Demands*, *S.A.L.J.*, vol. xliv (1927), p. 6).

The question of *mora-interest* has been elucidated by a decision of the Appellate Division. If B owes A a sum of money and, when payment falls due, fails to pay, A may claim the amount due with interest even where there is no agreement for interest in the contract. This is *mora-interest*. It begins to run from the time when the debtor is in default; and, therefore, where demand is necessary, from the date of demand. But what constitutes demand for this purpose? Some writers consider an extra-judicial demand sufficient; others require a judicial demand, i.e. a writ of summons; others postpone the currency of interest to the moment of *litis contestatio*, which in modern practice is reached when the pleadings are closed and matters are at issue between the parties. *Meyer's Exors.* v. *Gericke* (1880) Foord at p. 18, per de Villiers C.J. So far as concerns South Africa, this doubt has been resolved in *West Rand Estates Ltd.* v. *New Zealand Insurance Co.* [1926] A. D. 173, which established the rule (per Solomon J.A. at p. 183) that '*mora* begins from the date of receipt of the letter of demand. It of course follows that, where there has been no letter of demand, there would be no *mora*, until summons has

[1] This is what is meant when it is said that *mora* perpetuates the obligation.

been served upon the defendant.' Where the claim is for unliquidated damages the Court will seldom, if ever, award interest previous to judgment. *Victoria Falls and Transvaal Power Co.* v. *Consolidated Langlaagte Mines* [1915] A. D. at p. 32.

[Readers of Afrikaans will find Dr. I. Van Zijl Steyn's *Mora Debitoris volgens die Hedendaagse Romeins-Hollandse Reg.* (Nasionale Pers, Kaapstad, 1929) instructive.]

APPENDIX I

THE PRACTICE OF THE SOUTH AFRICAN COURTS WITH REGARD TO SPECIFIC PERFORMANCE

This note is designed to supplement what is stated in the text on pp. 273–5.

In South Africa it is a common practice to add to a prayer for specific performance an alternative prayer for damages. On what basis are such damages to be assessed? In *Van der Westhuizen* v. *Velenski* (1898) 15 S. C. at p. 240, de Villiers C.J. said: 'It is usual to fix an amount as damages in case of refusal to comply with the order of Court. The Court in such cases has never gone very minutely into the question of damages sustained, but has taken a round sum for the purpose of enforcing its own judgment.' This passage suggests that damages are decreed as an indirect means of compelling specific performance. But this suggestion was repudiated by the App. Div. in *Woods* v. *Walters* [1921] A. D. 303 at p. 310 where Innes C.J. said: 'Damages so claimed must, of course, be proved and ascertained in the ordinary way. The authorities do not warrant a punitive assessment.'

Such is the law where damages are asked for as an alternative to specific performance. It has been questioned whether damages may be obtained in addition to a decree of specific performance. There are cases in which it has been said that, as a rule, damages for delay are not so given; *Philip* v. *Metropolitan and Suburban Railway Co.* (1893) 10 S. C. 52; but this supposed rule was rejected by the Transvaal Court in *Silverton Estates Co.* v. *Bellevue Syndicate* [1904] T. S. 462, where Innes C.J. said (p. 470): 'The Court will lay down the rule that where a seller has made default in the delivery of the thing sold, and is *in mora*, the purchaser, in addition to

demanding specific performance, may, where he has sustained damages which the law recognizes and allows, claim those damages in the same action.'

The remedy of specific performance lies very much in the discretion of the Court. *Woods* v. *Walters, ubi sup.* at p. 309. Obviously it will not be given where it is impossible for the defendant to comply, nor where compliance would involve injustice to a third party (*Shakinovsky* v. *Lawson* [1904] T. S. 326); nor where the Court cannot see that the contract is carried out, e.g. to enforce a contract of service (*Ingle Colonial Broom Co.* v. *Hocking* [1914] C. P. D. 495; *Schierhout* v. *Min. of Justice* [1926] A. D. at p. 107), or a contract to build, repair or insure (*Barker* v. *Beckett & Co.* [1911] T. P. D. at p. 164); and it will only be granted to a party who has fulfilled or is ready and able to fulfil his own obligation. *Wolpert* v. *Steenkamp* [1917] A. D. 493; *Geldenhuys* v. *Neethling and Beuthin* [1918] A. D. 426.

There are cases, however, in which though the Court will not grant a decree of specific performance it will indirectly produce the same result by interdict. Thus if the Court cannot order A to serve B, it can at all events interdict A from serving any one else (cf. Anson (17th ed.), p. 394), or again it will grant an interdict to enforce an agreement that licensed premises shall be used by a lessee as a tied house, and that this shall be a condition of any sublease or assignment. *Ohlssons Cape Breweries Ltd.* v. *Cossey* [1905] T. H. 16.

When the Court grants the decree it may either do so without an alternative decree for damages (*Stacy* v. *Sims* [1917] C. P. D. 533), or with the alternative of damages. If the order is strictly alternative the defendant has the option of paying damages in lieu of specific performance. *Payn* v. *Lokwe* [1912] E. D. L. 33. But the case is otherwise if the intention of the order is that the plaintiff should be entitled to the remedy principally sued for, viz. specific performance, 'unless the defendant can show that he is unable to give it, in which case only can the defendant satisfy the judgment by giving the other relief sued for'. *Estel* v. *Novazi* [1919] N. P. D. 406. Generally speaking, plaintiff will not be entitled to an alternative decree of damages unless he both claims and proves specific damages; but in one case, at all events, the Court allowed damages even though damages had not been asked for

as an alternative to specific performance. *National Butchery Co.* v. *African Merchants* [1907] E. D. L. 57.

It is not possible to state exhaustively the classes of cases in which the Court will decree specific performance. The most frequent cases relate to the sale or leasing of land, and in *Worcester Municipality* v. *Colonial Govt.* (1909) 3 Buch. A. C. 538 specific performance was decreed of a contract to exchange immovable properties; specific performance has also been decreed of an informal agreement to enter into a formal contract, e.g. to execute a notarial deed in terms of an ante-nuptial contract, *Twentyman* v. *Hewitt* (1833) 1 Menz. 156; in which case the Court also ordered the defendant to carry out the provisions of the contract thus to be executed; and in *Van der Westhuizen* v. *Velenski* (1898) 15 S. C. 327 specific performance was decreed of an agreement to sign a formal contract in terms of a written memorandum. In *Thompson* v. *Pullinger* (1894) 1 O. R. 298 specific performance was ordered of a contract for the delivery of shares. The Court will not as a rule decree specific performance of a contract to conclude a partnership, but there may be exceptions from this rule. *Flanagan* v. *Flanagan* [1913] N. P. D. 452.

It remains to ask what recourse is open to the plaintiff if defendant fails to obey the decree of the Court.

1. He may apply to the Court, which will thereupon either (*a*) commit the defendant for contempt (civil imprisonment); *Shakinovsky* v. *Lawson, ubi sup.*; or (*b*) in a fit case direct its own officer to attach the property by order of Court and transfer it to the plaintiff, who will acquire a good title by such transfer. *Van der Byl* v. *Hanbury* (1882) 2 S. C. 80.

2. He may acquiesce in the refusal and claim the damages awarded by the Court in default of specific performance, and if the order of the Court is merely alternative he must accept whichever alternative the defendant chooses to give him.

3. Where no such order has been made he may (*semble*) maintain a new action to recover damages for defendant's failure to comply with the order of the Court. *Schein* v. *Joubert* [1903] T. S. 428.

APPENDIX J

COMPENSATION FOR IMPROVEMENTS

The right of a non-owner to be compensated for money expended upon the property of another rests upon the principle neminem cum alterius detrimento et jactura locupletari debere. It has been admitted in the following cases:

1. The *bona fide* possessor is entitled to compensation for necessary and useful improvements (Grot. 2. 10. 8) and for voluptuary improvements, if the landowner elects to retain them, in a case where the possessor would but for such election have the right of removal (justollendi). Dig. 6. 1. 38; 25. 1. 9; Windscheid, i, § 195.

2. The *mala fide* possessor is entitled to compensation for necessary, but not for useful, expenses. So the law is stated by Grotius (loc. cit.) and by Van der Keessel, *Th.* 214. Other authorities, however—as Groenewegen (*de leg. abr. ad* Inst. 2. 1. 30), Van Leeuwen (*Cens. For.* 1. 2. 5. 10; 1. 2. 11. 7 and 8), Schorer (*ad* Gr. 2. 10. 9), and Voet (6. 1. 36, *ad fin.*)—hold that in the modern law the mala fide possessor, no less than the bona fide possessor, is entitled to compensation for impensae utiles. The former view was declared by the Supreme Court of Ceylon to be in conformity with the usage of that Colony (*General Ceylon Tea Estates Co.* v. *Pulle* (1906) 9 N. L. R. 98, dissenting from the dicta of Berwick J. in *Tikiri Banda* v. *Gamagedera Banda* (1879) 3 S. C. C. 31). The case of *Sinnetamby Chetty* v. *De Livera* [1917] A. C. 534 leaves the question undetermined. The more liberal view has been asserted at the Cape (*Bellingham* v. *Bloometje* [1874] Buch. 36; *De Beers Consolidated Mines* v. *London & S.A. Exploration Co.* (1893) 10 S. C. at p. 372.

The right to compensation, when it exists, may in the modern law be enforced not only by exception, as in the Roman law, but also by action. Voet, 5. 3. 23 (*ad fin.*); Groen. *de leg. abr. ubi sup.*

3. The case of the lessee has been considered in the text. *Supra*, pp. 308–9.

4. A fiduciary or his estate can claim as against fideicommissaries for beneficial expenditure upon property, the subject of the fideicommissum. *Du Plessis* v. *Est. Meyer* [1913] C. P. D.

1006. A usufructuary is not entitled to claim compensation for improvements except in special circumstances. *Brunsdon's Est.* v. *Brunsdon's Est.* [1920] C. P. D. 159; *supra*, p. 183.

5. In *Rubin* v. *Botha* [1911] A. D. 568 plaintiff and defendant entered into an agreement for a lease for a period of ten years. Plaintiff was to pay no rent, but to erect a building on the land, which at the expiry of the term was to become the property of the defendant. Plaintiff erected the building and remained in occupation for three years. Thereafter, defendant gave him notice to quit, on the ground that the lease was void for want of notarial execution as required by law. The Court was unanimous in holding that the plaintiff was entitled to compensation (Innes J. differed from de Villiers C.J. and Maasdorp J. on the basis of calculation). This case decided 'that the equitable rule of the Roman-Dutch law that no one should be enriched at the expense of another applied to the case of a bona fide occupier equally with that of a bona fide possessor'. *Fletcher* v. *Bulawayo Waterworks Co.* [1915] A. D. at p. 655, per Solomon J.A. This last was a case in which lessees had inadvertently encroached upon and improved neighbouring land. The same principle has been recently applied to a case of occupation under a contract of purchase, afterwards rescinded. *Brown* v. *Brown* [1929] N. P. D. 41. In *Urtel* v. *Jacobs* [1920] C. P. D. 487 compensation was refused, the improvements having been made by a person who was employed as overseer and had no right of occupancy for a fixed period.

6. The case of the precario tenens was considered but not decided in *Lechoana* v. *Cloete* [1925] A. D. 536. 'The appellant is neither a *bona fide* nor *mala fide* possessor nor a lessee. And whether a person who occupies *precario*, as the appellant does, is entitled to any compensation, under the equitable principles of our common law, is a point which I prefer to leave an open one'; per Kotzé J.A. at p. 553.

7. For the husband's right to claim compensation for expenses incurred in respect of the wife's property kept out of community see Schorer ad Gr. 2. 12. 15; Van der Keessel, *Dictat.* ad loc.; and Voet, Lib. xxv, tit. 1.

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