

AN INTRODUCTION
TO
ROMAN-DUTCH LAW

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AN

INTRODUCTION

TO

ROMAN-DUTCH LAW

BY

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Gardner*

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—
FOURTH EDITION
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448825
1-7-46

OXFORD
AT THE CLARENDON PRESS

1946

OXFORD UNIVERSITY PRESS
AMEN HOUSE, E.C. 4
London Edinburgh Glasgow New York
Toronto Melbourne Cape Town Bombay
Calcutta Madras
GEOFFREY CUMBERLEGE
PUBLISHER TO THE UNIVERSITY



PRINTED IN GREAT BRITAIN

PREFACE

I

(ADAPTED FROM 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 of thirty years which has elapsed since the first edition, legislation of the Union Parliament and decisions of the Appellate Division of the Supreme Court of South Africa have been active in consolidating the law of the Union. To the extent to which these influences operate the old law either takes a new shape or fades into the background. Even today 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 The Roman-Dutch Law will have been superseded in South Africa, not *per saltum*, as in British Guiana, but by a gradual process of disintegration and re-statement.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 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 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, or seemed till lately, 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 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 postnuptial deed. Is it significant of a trend of opinion in the Union that a Private Member's Bill proposing extensive changes in the common law was introduced in the 1945 Session of Parliament (62 *S.A.L.J.*, p. 333) ?

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. Donations between spouses are still ineffectual until confirmed by death, and the Appellate Division has recently decided that it is incompetent to a husband married out of community and with exclusion of the marital power to make a valid conveyance of immovable property to his wife. Modern codes repudiate such hoary archaisms. The process of tying up property through successive generations by what is called 'fideicommissary substitutions' is another 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. 386). 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. 408) has been more indulgent to a surviving father or mother, the old law is still effectual to exclude a surviving grandparent (p. 411). A recent Union statute, following the example of Natal and Southern Rhodesia, has introduced a succession *unde vir et uxor* unknown to the common law (p. 412).

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 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 a 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.

II

A LEGAL text-book which passes into successive editions is apt to expand, and often changes its character in doing so. It is therefore a relief to find that the text of this edition has not been enlarged by more than twelve pages, and, of these, four are occupied by new appendices, one on *Inheritance ab intestato in Ceylon*, the other a short note on *Conflict of Laws*. Some space has been saved by cutting out dead matter, in particular the disused tacit hypothecs. On the other hand, the Law of Sale, of Delict, and of Testamentary Succession have been more fully stated than in the last edition. This has been done for the convenience of students in order that they may have a completer picture of the whole law. I have moved some footnotes into the text, but I regret that these parasitic additions are as numerous as ever. After all, they afford an author a means of escape from the temptation to overload his text. Besides, this book, I have been told, has been found useful by practising lawyers and their needs are not the same as those of students approaching the subject with a view to an examination (though I would not recommend a student wholly to neglect the footnotes).

The author of this book cannot be sufficiently grateful for the indulgent reception which it has met with from the legal profession in South Africa and Ceylon since its first publication. He is very sensible of the disadvantage under which he has laboured in being out of touch with the daily *disputatio fori*. Distance may lend detachment to

the view, but it tends to blur the details and even the principal features of the landscape.

Dr. T. W. Price of Trinity Hall, Cambridge, has very kindly compiled the list of cases and given much valuable help in every part of the book.

Previous editions of this book have been dedicated 'To 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'. I dedicate this volume to his beloved and honoured memory.

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ALL SOULS COLLEGE, OXFORD

All Souls Day, 1945

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ADDENDA

- p. 234, n. 3, *in fine*. In *Botha v. Assad* [1945] T.P.D. 1 the Court (Schreiner J. and Brebner A. J.) held that the doctrine of *laesio enormis* does not apply to contracts of letting and hiring.
- p. 266, n. 2. Add *Jockie v. Meyer* [1945] A.D. 354.
- p. 326, n. 3. Add *Pierce v. Hau Mon* [1944] A.D. 175.

CORRIGENDUM

- p. 381 n. 1 *in fine*, for
Est. Welsford v. Est. Welsford read *Est. Welsford v. Est. Wright*.

GENERAL INTRODUCTION

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 *Paratitla 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 Holland² 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 (p. 5, n. 4). 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 seldom of practical interest in the land of their origin.¹

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 been anticipated 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 customary laws 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 the Universities and the Courts of law 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

For many centuries after the dissolution of the Frankish Empire (c. 900) 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.⁵ In such a

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 This has been aptly described as the 'infiltration', in contrast with the 'reception', of the Roman Law.

⁵ This was particularly the case when, as usually happened, the towns enjoyed the privilege of making local regulations (*keuren*). Wessels, *History of the Roman-Dutch Law*, p. 210.

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.¹ 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.² Later, under Spanish rule, came an era of constructive legislation; but by that time the reception 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 Mechlin³ in the year 1473 with jurisdiction over the provinces of the Netherlands then subject to the Duke of Burgundy. This Court, which continued to exist until the War of Independence,⁴ 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,⁵ one of our earliest authorities for the Roman-Dutch Law, was President of this Court in 1528.⁶ Perhaps we shall not be wrong if we select the year of the institution of this tri-

¹ Sir John Kotzé in 26 *S.A.L.J.* (1909), pp. 407-8, and Kotzé, *Van Leeuwen*, vol. i, Appendix, pp. 459-60.

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

³ The Great Council (*De Grootte 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. For a short history of these Courts see Kotzé, *op. cit.*, pp. 478 ff.

⁴ 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 1581. Zeeland submitted to its jurisdiction in 1587.

⁵ Kotzé, 27 *S.A.L.J.* (1910), p. 29.

⁶ He had previously been President of the Court of Holland from 1509.

bunal as, approximately, the starting-point of the system which we know by the name of the Roman-Dutch Law;¹ but it was not until a century later that the Roman Law established itself in the inferior Courts.²

The reception of the Roman Law was by no means equally complete in all the provinces of the Dutch Netherlands.³ It was most far-reaching in Friesland, least so in Overijssel and Drente.⁴ 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 the principal provinces exhibited a general resemblance, and the law-books of one province are frequently cited as authority for the law of another. But when 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.

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 get different answers from the partisans of rival schools.⁵ There are those who regard Grotius, Van Leeuwen, Voet, and the other romanists as traitors to the

unequal
in the
various
provinces.

The extent of the
reception
matter of
contro-
versy.

¹ Bijnkershoek (*Observationes Juris Romani, in praefat.*) and Sir John Kotzé attribute the definite reception of the Roman Law in the Province of Holland to a legislative enactment of Charles the Bold of the year 1462 (*Instructie voor den Stadhouder ende Luyden van de Kamer van den Rade, Art. 42, 3 G.P.B. 635*), but this relates to procedure only and cannot carry the burden which has been put upon it. Dr. P. van Heijnsbergen, *Verspreide Opstellen*, Amsterdam, 1929, p. 295.

² Kotzé, op. cit., p. 464.

³ Kotzé, op. cit., p. 467.

⁴ Drente 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. The reception of the Roman Law was very largely due to the establishment of Courts of the modern type with academically trained judges. This condition was wanting in Overijssel and Drente.

⁵ See, on the whole subject, Modderman, *De Receptie van het Romeinsche Recht* (Groningen, 1874); Kotzé, 26 *S.A.L.J.* (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); A. S. de Blécourt, *Kort Begrip van het Oud-Vaderlandsch Burgerlijk Recht* (vijfde druk), pp. 31 ff.

law of their country, which, it is inferred, they enslaved to an alien system. But they must have the credit of bringing some order into chaos. No one disputes the fact of the reception of the Roman Law. What is questioned is the degree to which the reception went. Van der Linden supplies the answer: '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 any 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.'¹ The limits of this acceptance are defined by Van der Keessel in a series of theses² which the late Professor Fockema Andreae accepted as substantially correct.³

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, 1529,⁴ relating to the transfer and hypothecation of immovable property, and the Perpetual Edict of October 4, 1540.⁵ In 1570 his son Philip II issued a Code of Criminal Procedure,⁶ which regulated the practice of the Dutch Colonies until superseded by the humaner provisions of the English Law.⁷ The Political Ordinance of April 1, 1580,⁸ must also be mentioned as one of the formative elements of the modern law. The Civil Procedure of the Courts was regulated by another Ordinance of the same year and day.⁹

¹ Van der Linden, *Handboek* (Juta's translation), p. 2. See also Gr. 1. 2. 22; Van Leeuwen, 1. 1. 11.

² V.d.K. 6-23.

³ *Inleidinge tot de Hollandsche Rechts-geleerdheid, beschreven bij Hugo de Groot, met aantekeningen van Mr. S. J. Fockema Andreae, Hoogleraar te Leiden* (derde uitgave), Arnhem, 1926, vol. ii, p. 12; Kotzé, *ubi sup.* at p. 508.

⁴ 1 *G.P.B.* 374.

⁵ 1 *G.P.B.* 311. Wessels (p. 218) summarizes its contents.

⁶ 2 *G.P.B.* 1007; Wessels, p. 373.

⁷ 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.

⁸ 1 *G.P.B.* 330. Wessels (p. 222) summarizes its contents.

⁹ 2 *G.P.B.* 695. See Wessels, p. 186.

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 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.

The
Roman-
Dutch
Law in
Holland.

Having said thus much of the Roman-Dutch Law in general, we go on to speak more particularly of its history in the Dutch Colonies and in those parts of the world where this system still obtains. After that we shall speak of the sources from which our knowledge of the Roman-Dutch Law is derived.

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 Riebeeck 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 statutes of the mother country were in force in these Colonies the evidence hardly allows us to say. On prin-

The
Roman
Dutch
Law in
the Dutch
Colonies.

How far
the Dutch
Statute
Law was
in force.

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 Koninkrijk Holland* (Amsterdam, 1809) and other works.

ciple they would not apply unless expressly declared to be applicable, or at least unless locally promulgated;¹ but some may have been accepted by custom as part of the common law.² As regards laws of the *patria* passed subsequently to the date of settlement it may be thought that the burden of proof lies on him who alleges their application. The States of Holland (i.e. the Provincial Legislature) were not competent to legislate for the Colonies.³ The States-General (i.e. the Federal Legislature of the United Netherlands) seldom did so. The two Chartered Companies of East and West acted through their Executive Committees, the Council of XVII and the Council of X respectively, which, no doubt, influenced the course of legislation in the several Colonies, but formally, the legislative authority in each case was the Governor-in-Council, and, in the East Indies, the Governor-General, who from Batavia issued rules for the government of the various stations, which, if locally promulgated, had binding force until superseded or forgotten.⁴ Failing 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.⁵ It may be supposed, since the Dutch

¹ 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. 1.

² See Appendix to this chapter (*infra*, p. 26).

³ This does not exclude the acceptance of some enactments of the States of Holland and their incorporation in the common law of South Africa. *Est. Heinemann v. Est. Heinemann* [1919] A.D. at p. 114 (de Villiers A.J.A.); *Rex v. Harrison* [1922] A.D. at p. 330 (Innes C.J.); *Rex v. Sacks* [1943] A.D. at p. 422.

⁴ 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, 32 *S.A.L.J.* (1915), p. 328.) Neither of these collections was published under the old regime. The law in force in the West Indies was defined by the *Orde 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.).

⁵ Burge, vol. i, p. 116.

Colonies stood in no peculiar relation to the province of Holland more than to any other province of the United Netherlands, 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.¹

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.² 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.³ 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

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

¹ *Per* Kotzé J.P., in *Fitzgerald v. Green* [1911], E.D.L. at p. 493. Dr. Bisschop (Burge, 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'. *Law Quarterly Review*, vol. xxiv, p. 169.

² The definitive cession to Great Britain was effected by the Convention of London, 13 August 1814. *British and Foreign State Papers, 1814-15*, p. 37.

³ 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, ubi sup.*

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, or by mere disuse, the laws which obtained under the 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 Cape statutes (1862) contains nine enactments prior to 1806, the latest edition (1895) five, and now there is a partial retention of two.² The remainder of the Dutch *placaten* (whether emanating from Batavia, or locally enacted) have been abrogated by disuse. We are speaking, of course, of statute law subsequent to 1652, the date of the Dutch occupation of the Cape. The home legislation prior to that date, unless inapplicable or abrogated by disuse, may be regarded as forming part of the common law of the Colony.

(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, 'according to the laws and institutions that subsisted

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; *Machattie 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.

² Act No. 25 of 1934.

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, and Berbice surrendered on the same terms a few days later. 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.

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 upon a substructure of Dutch laws and usages having authority in the settlements of Essequibo, Demerara, and Berbice in the year 1803. General
result.

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 Legislature 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.

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

Southern Rhodesia.

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.

Transvaal and Orange Free State.

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

Swaziland.

By the South Africa Act, 1909 (9 Edw. VII, c. 9), which took effect on May 31, 1910, the four Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony⁴ 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 under

The Union of South Africa.

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 have since been 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.

the names of Cape of Good Hope, Natal, Transvaal, and Orange Free State respectively. Subject to the provisions of the Act, all laws¹ 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 Protectorate of South-West Africa. By the Administration of Justice Proclamation (No. 21 of) 1919, issued by the Administrator of the Protectorate 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. | 4. Opinions of Jurists. |
| 2. Statute Law. | 5. Custom. |
| 3. Decisions of the Courts. | |

I. Treatises.

I. *Treatises*.³ The numerous works of the Dutch jurists,

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 raised difficult questions. See *Rex v. Christian* [1924] A.D. 101.

³ For a bibliography of the principal Roman-Dutch law books

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 textbook 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 best 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.

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

Writers of
the
seven-
teenth
century.

SEVENTEENTH CENTURY

H. DE GROOT (1583-1645). *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).¹ This is the best old

see *The Commercial Laws of the World*, vol. xv—South Africa—pp. 14 ff. The *South African Legal Bibliography* of Mr. A. A. Roberts, K.C. (Pretoria, 1942) is a mine of information and a monument of industry.

¹ 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 manu duct. 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 'Inleyding' published at Amsterdam by Jan Boom in 1727.

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. Maasdoorp (3rd ed. 1903), and R. W. Lee (1926).

ARNOLDUS VINNIUS (1588–1657).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 (1613–52) 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 Corpus Juris by book and title and considers how far it has been received or disused in the modern law.

SIMON VAN LEEUWEN (1625–82) 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 *Paratitla 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 the late Sir John Kotzé.³

ULRIK HUBER (1636–94) 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

¹ Wessels, *History of the Roman-Dutch Law*, p. 294.

² The title-pages of this work and of its precursor, the *Paratitla*, afford an interesting indication of the uncertainty of seventeenth century spelling. The first edition of the *Paratitla* 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-Reght*. 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.

on the Digest 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^o treatise entitled *Heedens-daegse Rechtsgeleertheyt, soo elders als in Frieslandt gebruykelyk*. 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.¹

JOHANNES VOET (1647–1713). *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.² 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

CORNELIS VAN BIJNKERSHOEK (1673–1743) is beyond controversy the most eminent Dutch jurist of the eighteenth century. He was President of the Supreme Court

Writers
of the
eigh-
teenth
century.

¹ Translated into English by Mr. Justice Gane of the Supreme Court of South Africa (Butterworth & Co., 1939).

² There is an Italian translation printed in parallel columns with the Latin text (Venezia, 1846). It is understood that Mr. Justice Gane is making a translation into English of the whole work,

of Holland, Zeeland, and West Friesland from 1724 until his death. 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. Of his notes on decided cases entitled *Observationes Tumultuariæ* two volumes have been published.¹

Mention has 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 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 Observatiën, 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 (1738-1816), 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 Keesel, 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 Cape Town by the late Dr. C. H. van Zyl.

JOANNES VAN DER LINDEN (1756-1835) is the last of the old text-writers. In 1781 he published his *Verhandeling over de judicieele practijcq*, which is still consulted. But

¹ See 39 *S.A.L.J.* (1922), p. 291. The first volume, edited by Professors Meijers and de Blécourt of Leyden and Bodenstern of Stellenbosch, was published in 1926. A second volume appeared in 1934.

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 enjoyed favour among students, particularly in the translations of Sir Henry Juta and 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 Kramp¹ 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*. The enactments of the States-General and of the States of Holland and West Friesland² 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*. 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*

¹ As to the authorship of the *Aanhangsel* to Kersteman's *Woorden-Boek* see *Journ. Comp. Leg.*, N.S., vol. xii, p. 549. It consists largely of translations from Voet's Commentary.

² This is the official description of the legislature of the Province of Holland. West Friesland was annexed to Holland in the thirteenth century.

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 Frisiorum Curia judicatarum libri V* of JOHANNES A 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. Opin-
ions 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*), first published by Naeranus at Rotterdam from 1645 to 1666,³ containing

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 2 (*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 Sir John Kotzé's article on 'Judicial Precedent' in 34 *S.A.L.J.* (1917), p. 280, and to Kotzé, *Van Leeuwen*, vol. i, p. 484. See also *Moti & Co. v. Cassim's Trustee* [1924] A.D. at p. 741.

³ Wessels, p. 243. There are two separate third volumes of the *Hollandsche Consultatien*, known respectively as the *Rotterdamsche derde deel* and the *Amsterdamsche derde deel* (the work of an interloping publisher), commonly distinguished as iii (1) and iii (2) (but Voet inverts the order). The additional *consultatien* contained in the Amsterdam volume were included by Naeranus in vol. vi.

the opinions of Grotius and other eminent lawyers. The opinions of Grotius, in particular, have been translated and edited by 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*. This is in every country a source of law.¹ V. Custom. It is mentioned here more particularly because, as observed above, it is through custom that the Roman Law found its way into Holland,² and it is as custom that it continues to exist in the modern law. Without attempting a bibliography of the *jus civile* we may perhaps be allowed to recommend the student to supply himself with the Momm- sen-Krüger-Schoell edition of the *Corpus Juris*. For a law lexicon he will consult the older works of Calvin³ or Vicat⁴ or Heumann's *Handlexicon*,⁵ or the exhaustive *Vocabularium Jurisprudentiæ Romanæ* in course of publication under the auspices of the Savigny Foundation.

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 the sources of the modern law, supplemented by enactments of the local legislatures, decisions of the Courts of law, 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.

Amongst works on the modern law of South Africa the following may be particularly mentioned: *The Common* and in later editions are incorporated in vol. iii. (A. A. Roberts, *Legal Bibliography*, p. 157.)

¹ Gr. 1. 2. 21; Voet, 1. 3. 27 ff.; *Van Breda v. Jacobs* [1921] A.D. 330. For the cognate topic of 'trade usage' or 'trade custom' see *Coutts v. Jacob* [1927] E.D.L. 120; *Crook v. Pedersen Ltd.* [1927] W.L.D. 62; *Barnabas Plein & Co. v. Sol Jacobson & Son* [1928] A.D. 25.

² Gr. 1. 2. 22 (door gewoonte als wetten aengenomen).

³ Calvinus J., *Lexicon juridicum juris Caesarei simul et Canonici*, Geneva, 1670.

⁴ B. Philip Vicat, *Vocabularium Juris utriusque*, Lausanne, 1759.

⁵ Heumanns *Handlexicon zu den Quellen des römischen Rechts* (9th ed., edited by Dr. E. Seckel), Jena, 1907, reprinted 1926.

Law of South Africa, by Dr. MANFRED NATHAN; *The Institutes of South African Law*, by Sir A. F. S. MAASDORP; *English and Roman-Dutch Law*, by GEORGE T. MORICE; *The Law of Contract in South Africa*, by Chief Justice Sir JOHN WESSELS, edited by Mr. Advocate A. A. ROBERTS; *Principles of South African Law*, by Professor GEORGE WILLE. In recent years there has been an increasing number of monographs on various branches of the law, many of which are cited in this book.

For the Law of Ceylon the student may refer to *The Laws of Ceylon*, by Mr. Justice PEREIRA (2nd ed., Colombo, 1913); *The Laws of Ceylon* by K. BALASINGHAM (1929-37) in course of publication; 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 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 re-
sult of
(a) express
enact-
ment,

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.

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. No. 5 of 1852 *pro tanto*.

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.¹ But (s. 3) English statutes passed subsequently to the date of the Act do not apply.

It would occupy too much space to speak of the numerous statutes which follow more or less closely the language of English Acts of Parliament, and through this channel admit rules and principles of the law of England. As examples may be cited the Ceylon Sale of Goods Ordinance No. 11 of 1896, the Ceylon Married Women's Property Ordinance No. 18 of 1923, 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.

Judicial decisions, whether of the local 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.

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.² But the student may better be left to draw

¹ This section was made applicable to the O. F. S. by Ord. No. 5 of 1902.

² 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,' 32 *S.A.L.J.* (1915), p. 337; and to C. Graham Botha, 'Early Influence of the English Law upon the Roman-Dutch Law in South Africa,' 40 *S.A.L.J.* (1923), p. 396.

or imitation of English statute law;

(b) judicial decisions;

(c) tacit acceptance.

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. Isolated from one another and wholly disconnected from their common source in the Netherlands, the legal systems 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, at last, 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. 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 into oblivion. Voet is the authority most frequently cited. English Law has exercised a preponderating influence even in departments where in South Africa the old law has maintained its ground.² Though Ceylon shows no disposition to follow the example of British Guiana, it will not be denied that the future of Roman-Dutch Law lies principally in South Africa.

The fu-
ture of the
Roman-
Dutch
system
of Law.

What will that future be? At present we get our knowledge of the law from statutes, from the decisions of the

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, 36 *S.A.L.J.* (1919), p. 4; and 'Roman-Dutch Law in British Guiana' by J. E. Ledlie, *Journ. Comp. Leg.*, N.S., vol. xvii, p. 210.

² Reference may be made to 'The Roman-Dutch Law in Ceylon under the British Régime' by the late Sir A. Wood Renton, in 49 *S.A.L.J.* (1932), p. 161.

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 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 Rhodesia¹ and from the Mandated Territory 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 consolidated and developed. It may be anticipated that under such auspices the Roman-Dutch Law will assume a completeness and a symmetry which it has not attained in previous ages. Meanwhile, unless codification is resorted to as a preferable alternative, it is to be expected that the law of South Africa will follow the same course as the law of Scotland and that recourse to the old authorities will become increasingly infrequent as the ground is more and more occupied by statute law and decided cases.²

¹ (Union) Act No. 18 of 1931.

² Sir John Wessels, 'The Future of Roman-Dutch Law in South Africa', 37 *S.A.L.J.* (1920) at p. 284; R. W. Lee, 'Roman-Dutch Law in South Africa', 40 *L.Q.R.* (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, 1677 (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 Chief

Justice 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 parts 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, though, it seems, both of these enactments 'may fairly be said to have been incorporated into the common law of South Africa', *per de Villiers A.J.A.* at p. 114. 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* [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 *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.

In *Rex v. Sacks* [1943] A.D. at p. 422 Tindall J.A. said: 'The question whether the Placaat of 1715 (*Placaat teegens neemen van giften en gaven, den 10 December, 1715*, 5 *G.P.B.* 686) forms part of the Roman-Dutch law in South Africa was not raised before us; counsel on both sides assumed that it does . . . the Placaat of 1715 was passed by the States-General and it is obviously one of general and not merely local application. It will be noted that it makes special mention of the Dutch East India Company. However [in any event] . . . the Placaat of 1 July 1651 of the States-General (1 *G.P.B.* 402) . . . having

been promulgated before 1652 was part of the law of the Cape of Good Hope.'

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 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 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. 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. The subject will be treated in chapters dealing with:

1. Birth, Sex, Legitimacy.
2. Parentage.
3. Minority.
4. Marriage.
5. Guardianship.
6. Unsoundness of mind—Prodigality.
7. Juristic persons.

I

BIRTH, SEX, LEGITIMACY

SECTION 1.—BIRTH

LEGAL personality, and with it capacity to have rights and Birth. to be subject to duties, begins with the completion of birth, subject however to the qualification that a child in the womb is deemed already born when such a fiction is for its advantage.¹ Thus an unborn child may take under a will,² inherits *ab intestato*, and may have a right of action in respect of his father's death.³

SECTION 2.—SEX

Sex, as such, is not a factor of importance in the sphere Sex. 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. 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

SECTION 3.—LEGITIMACY

A child is presumed to be legitimate, if conceived during Legiti- marriage, or born during marriage (no matter how soon macy. after its celebration), or if the mother was pregnant of the child at any time during marriage.⁵ This presumption is expressed in the maxim *Pater is est quem nuptiæ demonstrant*.⁶ The presumption of legitimacy is not irrebuttable,⁷

¹ Dig. 1. 5. 7; Gr. 1. 3. 4; Voet, 1. 5. 5; *Elliot v. Lord Joicey* [1935] A.C. 209; 53 *L.Q.R.* (1937), p. 19 (note by McGregor J.).

² Gr. 2. 16. 2; Voet, 28. 5. 12; *Holl. Cons.* i. 98. Or by gift, as in French law (C.C. Art. 906)?

³ *Chisholm v. East Rand Mines* [1909] T. H. 297.

⁴ *Infra*, p. 315.

⁵ Gr. 1. 12. 3; Van Leeuwen, 1. 7. 2; Voet, 1. 6. 5 and 7; V.d.K. 169.

⁶ Dig. 2. 4. 5; Voet, 1. 6. 6; *Richter v. Wagenaar* (1829), 1 *Menz.* 262; *Surmon v. Surmon* [1926] A.D. 47; *Stigling v. Melck* [1935] C.P.D. 228; (Ceylon) *Amina Umma v. Nuhu Lebbe* (1926) 30 N.L.R. 220.

⁷ The presumption in favour of legitimacy may be rebutted by 'clear and unimpeachable evidence'. *Fitzgerald v. Green* [1911] E.D.L. at p. 462; *Louw v. Louw* [1933] C.P.D. 407.

Pater is est quem nuptiæ demonstrant.

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 than when the facts point to conception before marriage. In the first case neither husband nor wife will be heard to say that the husband was not the father, 'unless (to quote Grotius) there is evidence of incapacity to generate or of an absence inconsistent with the period of gestation.'¹ In the second case the husband's evidence is admissible to prove non-access before marriage.² 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 and the beginning of the eleventh month after its dissolution by death or divorce.³ Reckoned in days this means born not less than 180 days after the celebration of the marriage and not more than 300 days after its dissolution, the month being arbitrarily taken to be equivalent to thirty days.⁴ But the tendency of modern cases, at least as

¹ Gr. 1. 12. 3; *Surmon v. Surmon* [1926] A.D. at p. 53. This is what is meant when it is said that neither spouse may bastardize the issue. But, now, the General Law Amendment Act, 1935, sec. 101, subsec. 3, provides that 'for the purpose of rebutting the presumption that a child to which a married woman has given birth is the offspring of her husband' either spouse may give evidence of non-access in any proceedings civil or criminal. This abrogates *Surmon v. Surmon*, in which the Court reluctantly followed *Russell v. Russell* [1924] A.C. 687 owing to a statutory provision incorporating by reference English rules of evidence. The Southern Rhodesia statute (Matrimonial Causes Act, No. 20 of 1943, sec. 14), says 'in any proceedings for divorce'.

² 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.

³ Dig. 1. 5. 12; 38. 16. 3, 12; Gr. 1. 12. 3; Voet, 1. 6. 4; de Haas, *Nieuwe Holl. Cons.*, Nos. 35, 36; Girard, p. 185.

⁴ Savigny, *System*, iv. 340; Windscheid, i. 103 (c); V.d.K. 170 (Lee, *Commentary*, p. 56). These periods are adopted by the French Code (Arts. 312, 315) and the Dutch Code (Arts. 305 ff.). The German Code, Art. 1592, defines the period of conception as extending from the 181st to the 302nd day (in each case inclusive) before the day of birth,

regards the maximum period, is to rely mainly upon medical evidence.¹ It must be noted that though birth 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.² To prevent difficult questions as to paternity, the Dutch Law, following the Roman Law,³ prohibited re-marriage within a certain time after a first husband's death.⁴ 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.⁵ In the Roman Law re-marriage within the year of mourning entailed penal consequences. This was not the case in the Dutch Law, and in the modern law the institution itself has passed out of use.⁶ If a widow remarries within the period of mourning and issue is born which may be attributed to

Annus
luctus.

¹ *Williams v. Williams* [1925] T.P.D. at p. 542. 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. In the English case of *Gaskill v. Gaskill* [1921] P. 425 the period of gestation was 331 days. For Ceylon, see the Evidence Ordinance, 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.

² 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; *Smith v. Smith* [1936] C.P.D. 125. It was not so in English Law. *Moss v. Moss* [1897] P. 263. But the law has been brought into line with the R.D.L. by the Matrimonial Causes Act, 1937, sec. 7 (d). *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.

³ Cod. 5. 9. 2.

⁴ Gr. 1. 5. 3.

⁵ Fock. Andr. *Bijdragen*, vol. i, p. 167; V.d.K. 67.

⁶ A shadow of it remains in O.F.S. 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).

either father, it is presumed to be the child of the second husband.¹

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.² Such was the opinion of Grotius, though as regards these last Van der Linden inclines to a contrary view.³

Legiti-
mation.

Illegitimate issue may be legitimated: (1) by subsequent marriage; (2) by an act of grace on the part of the Sovereign.⁴ The first of these modes alone obtains at the present day.

In the Roman Law legitimation by subsequent marriage was limited to the issue of concubinage. The Canon Law allowed it in the case of all illegitimate children other than the issue of adultery and incest, and this was followed by the Roman-Dutch Law.⁵

¹ Voet, 1. 6. 9; who gives amongst other reasons because 'ipse incertitudinis auctor et causa est'. German Law (*B.G.B.* Art. 1600) assigns the child to the first husband, if born within 270 days of the dissolution of the first marriage.

² Gr. 2. 27. 28; Van Leeuwen, 1. 7. 4; Anton. Matthaeus, *Proemiale*, 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. 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.

³ V.d.L. 1. 10. 3. The question was much debated. See *against* Grotius, Bijnkershoeck, *Quaest. Jur. Priv.* lib. iii, cap. xi and *O.T.* ii. 2017; *for* Grotius, Van der Vorm (*Versterfrecht*, ed. Blondeel, pp. 212 ff.), and V.d.K. 342-5. The Cape Court has adopted the more liberal view. *Mogamat Jassiem v. The Master* (1891) 8 S.C. 259; *In re Russo* (1896) 13 S.C. 185. As to succession to bastards see Van der Vorm, *ubi sup.*, p. 237.

⁴ Gr. 1. 12. 9; Van Leeuwen, 1. 7. 5; Voet, 25. 7. 6 and 13; V.d.K. 171-2.

⁵ Gr. 1. 12. 5; Van Leeuwen, 1. 7. 7; Voet, 25. 7. 8; V.d.L. 1. 4. 2. Writers on the modern Civil Law are not agreed in refusing legitimation to the issue of an adulterous union (*Windscheid*, iii. 522; *Vangerow*, i. 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 Koninkrijk der Nederlanden* of 1820 (Art. 543), and the Dutch Civil Code (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. Est. Mechau* [1922] C.P.D. at p. 185, adopt the latter, and the English Legitimacy Act, 1926, contains the proviso (sec. 1, subsec. 2): '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.' But the (Union of South Africa) Births, Marriages and Deaths Registration Amendment Act, 1924, sec. 4, allows a child to be registered as the legitimate child of parents who subsequently marry 'whether [the parents] could or could not have legally married each other at the time of his birth'. In Ceylon illegitimate children procreated between the same parties are legitimated by subsequent marriage unless procreated in adultery (Ord. 19 of 1907, sec. 22). Incest is not mentioned, no doubt because marriage is out of the question.

II

PARENTAGE

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

A. *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 Roman Law. 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 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

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. 44.

death to the person named in his will.¹ Failing such, the mother takes the place of the father unless the Court sees fit to direct otherwise.² Re-marriage is not in itself a ground of exclusion.³

2. *Administration.* During the lifetime of both parents, and in the modern law until the father's death,⁴ the management of a minor child's property belongs to the father as natural guardian, 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,⁵ or the Court for special reasons may have taken the administration out of his hands,⁶ and as a general rule payment to the father as natural guardian of moneys due to the child is a good payment.⁷ 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.⁸ The father may

2. Administration;

¹ 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; but the law has been modified by the Administration of Estates Act, 1913); *Woods v. Woods* [1922] N.P.D. 367 (conflicting claims of parents); *Calitz v. Calitz* [1939] A.D. 56 (paramount right of father to custody).

² *In re Dolphin* (1894) 15 N.L.R. 343.

³ Voet, *ubi sup.*

⁴ In the old law the father's natural guardianship only partially survived the death of the mother. He might 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 a 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. But to-day 'the father is the natural guardian of his legitimate children until they attain majority'. *Van Rooyen v. Werner, ubi sup.* at p. 428.

⁵ Gr. 1. 6. 1. and Schorer ad loc.

⁶ *The Master v. Castellani* [1911] T.P.D. 763; *Ex parte Humphreys* [1921] W.L.D. 74.

⁷ *Rossiter v. Barclays Bank* [1933] T.P.D. at p. 383.

⁸ Gr. *ubi sup.*; V.d.K. 103. In S.A. the general rule is that an executor must 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

apply the income of property belonging to the child for his maintenance, education, and other like purposes, invest the surplus, and conclude contracts in due course of administration.¹ If the father is dead and has not appointed a testamentary guardian, the mother normally takes his place as natural guardian,² and the mother is natural guardian of her illegitimate child.³ A minor child, while unemancipated, is unable to contract without his father's consent.⁴ Any contract concluded by him without such consent is *ipso jure* void, and will not bind either the child or the father⁵ except 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 allows the minor to make a contract in the father's name or ratifies a contract so made, the father is bound. This is simply a question of the general law of principal and agent. So far and so far only may a minor son bind his father by his contracts.⁶

A father may indeed be held liable for necessities supplied to his child and this liability is not affected by divorce. But it is a liability imposed by law and does not imply a contractual obligation either of child or parent.⁷

A father may represent his son in Court and sue and defend in the son's name,⁸ but if he does so without leave from the Court he will be personally liable for costs if the

such sum has been secured by bond to the satisfaction of the Master'. Administration of Estates Act, 1913, sec. 54.

¹ Van Leeuwen, 1. 13. 2; *Van der Byl & Co. v. Solomon* [1877] Buch. at p. 27; *Wood v. Davies* [1934] C.P.D. at p. 256.

² *Ex parte Fitzgerald* [1923] W.L.D. 187.

³ *Dhanabakium v. Subramanian* [1943] A.D. at p. 166.

⁴ V.d.L. 1. 4. 1.

⁵ Gr. 3. 1. 34. But as to *ipso jure* void see below p. 48. Nor is a father liable for his son's delicts unless made so by statute. V.d.K. *Dictat.* ad loc.; Lee, *Commentary*, p. 226.

⁶ Voet, 15. 1. 11. This case must be carefully distinguished from the case in which the father 'authorizes' (in the technical sense) or subsequently ratifies the minor's contract (*infra*, pp. 46, 47).

⁷ *Fillis v. Joubert Park Private Hospital* [1939] T.P.D. 234.

⁸ Gr. 1. 6. 1; 3. 48. 10; *Van Rooyen v. Werner, ubi sup.* at p. 430; *Traub v. Bloomberg* [1917] T.P.D. 276.

suit proves unsuccessful.¹ Even the leave of the Court affords no more than a *prima facie* protection.²

3. *Consent to marriage of minor children.* The consent of parents, or of a surviving parent, is necessary to the marriage of minor children,³ and without it the marriage is null and void.⁴ 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.⁵ Strictly, the mother's consent is also necessary, but in case of disagreement the father's will prevails.⁶ Publication of banns is presumptive evidence of consent, and a marriage celebrated after publication of banns without objection by the father is, in general, neither void nor voidable. But a marriage celebrated after special licence without the father's consent may be set aside at his instance,⁷ perhaps only before the minor spouse attains majority.⁸ The consent of grandparents is in no case necessary,⁹ nor is any consent necessary to a second marriage under the age of majority.¹⁰ The marriage cannot be impeached by a minor spouse on the ground of absence of parental consent.¹¹

3. Consent to marriage of minor children;

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

4. Right to appoint guardians;

¹ *Bayne N. O. v. Kanthack* [1934] W.L.D. 13; *Ex parte Bloemfontein Town Council* [1934] O.P.D. 11; *Bellstedt v. South African Railways* [1936] C.P.D. at p. 412. But 'a father who assists his minor child to bring an action is not a party to the action, and, if it fails, he cannot be ordered to pay the costs'. *Sharp v. Dales* [1935] N.P.D. 392.

² *Taylor N. O. v. Lucas N. O.* [1937] T.P.D. 405.

³ Gr. 1. 5. 15, and Schorer, ad loc.; Van Leeuwen, 1. 14. 6.

⁴ Voet, 23. 2. 11; V.d.K. 75; V.d.L. 1. 3. 6. More precisely it is voidable at the suit of the aggrieved parent. *Infra*, p. 58.

⁵ Voet, 23. 2. 8.

⁶ 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.

⁷ *Johnson v. McIntyre* (1893) 10 S.C. 318.

⁸ 28 S.A.L.J. (1911), p. 478.

⁹ Voet, 23. 2. 15; V.d.L. 1. 3. 6.

¹⁰ Van Leeuwen, 1. 14. 9; V.d.L., 1. 4. 3.

¹¹ *Willenburg v. Willenburg* (1909) 3 Buch. A.C. 409.

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

5. *Rights in respect of minor children's property.* Voet and other writers, following the Roman Law, distinguish peculium profecticium and peculium adventicium. The first included property derived from the father or given to the son with the intention of conferring a benefit on the father. The second included any other property which came to the son from an external source. By the Roman Law the first belonged wholly to the father; of the second, which belonged to the son, the father had the usufruct. But to-day contrary to the Roman Law a father may make an effective gift of property to his unemancipated son, thus putting it out of the reach of the father's creditors,¹ and the father has no usufruct of the adventitious property unless this has been given to him by the person from whom the property is derived or unless it is necessary to use the property and apply its proceeds for the maintenance and upbringing of the child.² Voet refers to the head of peculium profecticium 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.³ This may be still law.

The distinction of peculium profecticium and peculium adventicium is not wholly unimportant. It has been said that 'the Court has always assumed greater powers in dealing with the profectitious property of minors than in the case of property accruing to a minor from some stranger or for value'. Accordingly, in the case from which this *dictum* is taken the Court authorized a re-settlement of property varying the terms of a deed of donation made by parents in favour of minor children.⁴

¹ *Infra*, p. 288.

² Van Leeuwen, 1. 13. 2; Voet, 15. 1. 6; V.d.K. 105.

³ Gr. 1. 6. 1. and Schorer *ad loc.*; Van Leeuwen, 2. 7. 7; Voet, 15. 1. 4; 25. 3. 14; V.d.K. 104; *Chinnia v. Dunna* [1940] N.P.D. 384. But see Groen., *de leg. abr. ad Inst.* 2. 9. 2.

⁴ *Ex parte Est. Gates* [1919] C.P.D. 162.

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

Parental power is acquired by: (1) birth in lawful wedlock; (2) legitimation by subsequent marriage;¹ but not, as amongst the Romans, by adoption.² A child born out of wedlock is in the power of the mother³ (eene moeder maakt geen bastaard).

How parental power is acquired.

Parental power is determined by: (1) the death of parent or child; (2) majority;⁴ (3) marriage;⁵ (4) emancipation. This, Grotius says, 'takes place either in Court, or tacitly, when a child is permitted to have a home of his own and do business'.⁶ The first of these methods, which may be described as express emancipation, consisted in a declaration made by the father before the Court.⁷ It was already disused in the eighteenth century, being replaced by *venia aetatis*.⁸ Tacit emancipation remains in use,⁹ but, as interpreted by recent decisions of the Courts, is merely a general and revocable licence of parent or guardian authorizing contracts incidental to a particular trade or business.¹⁰ This is not properly speaking emancipation, and is not what the old writers mean when they speak of tacit emancipation.

How determined.

If a father becomes insane, his parental authority is in suspense and passes to the mother or to a tutor or curator

Effect of parent's insanity, &c.

¹ *Supra*, p. 34.

² Gr. 1. 6. 1; Voet, 1. 7. 7; V.d.L. 1. 4. 2. The Children's Act, 1937, replacing Act No. 25 of 1923, permits the adoption of children under the conditions therein stated. For S.Rh. see Revised Statutes, cap. 155, for Ceylon Ord. No. 24 of 1941 (amended by Ord. No. 54 of 1943).

³ V.d.L. 1. 4. 2.

⁴ Voet, 1. 7. 15.

⁵ Gr. 1. 6. 4; Voet, 1. 7. 13.

⁶ Gr. *ibid.*

⁷ Voet, 1. 7. 11; Fock. And. *Bijdragen*, i. 28.

⁸ Deeker *ad* Van Leeuwen, 1. 13. 5; V.d.K. 107; V.d.L. 1. 4. 3, n. 4; *infra*, p. 44.

⁹ *Dama v. Bera* [1910] T.P.D. 928; *Venter v. De Burghersdorp Stores* [1915] C.P.D. 252; *Pleat v. van Staden* [1921] O.P.D. 91. The two conditions mentioned by Gr. need not coexist. V.d.K. *Dictat. ad* Gr. 1. 6. 4; Lee, *Commentary*, p. 37.

¹⁰ *Ambaker v. African Meat Co.* [1927] C.P.D. 326; *Ex parte Keeve* [1929] O.P.D. 19; *Ochberg v. Ochberg's Est.* [1941] C.P.D. at p. 37; *Ahmed v. Coovadia*, 1944 (1) P.H., M. 17 [T.P.D.]. See Appendix B.

appointed by the Court. The same applies if the parent is sentenced to a long term of imprisonment. Interdiction for prodigality terminates or suspends the father's natural guardianship for most purposes, but he remains competent to give an effective consent to the marriage of minor children. An insane parent is replaced for this purpose by the Court.¹

B. *The reciprocal duty of support*

The duty
of sup-
port.

A father must support his children, i.e. must supply them with necessary food, clothing, shelter, medicine and instruction.²

The duty extends to illegitimate³ as well as to legitimate children. 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.⁴

The mother likewise is liable together with the father during his lifetime and solely after his death.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, but may revive even after full age, if their means again become insufficient.⁷ The burden of proving that the child cannot support himself and that the parent has sufficient means lies upon the child.⁸ The old writers differ on the question whether the duty of maintenance ends with the death

¹ Gr. 1. 6. 5; V.d.K. *Dictat. ad loc.*; Lee, *Commentary*, p. 37; *infra*, p. 59, n. 5.

² Gr. 1. 9. 9; Van Leeuwen, 1. 13. 7 and 8; Voet, 25. 3. 4 and 5.

³ Voet, 25. 3. 5; *Van der Westhuizen v. Rex* [1924] T.P.D. at p. 373, including incestuous and adulterine issue. As to assessment of maintenance see *A. v. M.* [1930] W.L.D., 292. Is a husband bound to maintain an illegitimate child born to his wife before marriage? *Rex v. Fitzgerald* [1926] N.P.D. 445.

⁴ Voet, 25. 3. 5.

⁵ Voet, 25. 3. 6; *Union Govt. v. Warneke* [1911] A.D. at p. 668.

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

⁷ Voet, 25. 3. 14 and 15; *In re Knoop* [1893] 10 S.C. 198; *Ex parte Jordaan's Curator* [1929] O.P.D. 168.

⁸ *Grobler v. Union Govt.* [1923] T.P.D. 429.

of the parent or is transmitted to the heirs.¹ The South African Courts have preferred the latter view, holding that the duty of educating and maintaining minor children is 'a debt resting upon the estate' of either parent postponed to other debts but preferred to legacies.² If parents have not adequate means the burden of maintenance passes to grandparents, but if the grandchild is illegitimate, to maternal grandparents alone.³

The duty of support is reciprocal. Children must maintain their indigent parents,⁴ and if they are minors or insane the Court may charge the cost of maintenance upon their estate.⁵ All this must be understood to be subject to the primary duty of a husband to support his wife. 'Primarily the duty falls upon the husband, and it is only when he is dead or unable to provide support that a right to claim support from a parent, grandparent, child or brother arises.'⁶

¹ Voet, 25. 3. 18; Groen., *de leg. abr. ad Dig.* 34. 1. 15.

² *Ritchken's Exors. v. Ritchken* [1924] W.L.D. 17; *Davis' Tutor v. Est. Davis* [1925] W.L.D. 168; *Goldman N.O. v. Est. Goldman* [1937] W.L.D. 64. The decisions seem to be limited (so far) to W.L.D. 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.

³ Voet, 25. 3. 7; *Motan v. Joosub* [1930] A.D. 61.

⁴ Voet, 25. 3. 8; *Oosthuizen v. Stanley* [1938] A.D. at pp. 327-8. A stepmother is not entitled to be supported by a stepson. *Jacobs v. Cape Town Munic.* [1935] C.P.D. 474. Is a husband bound to support his wife's indigent parents? *Ford v. Allen* [1925] T.P.D. 5. As to support of brothers and sisters see *Oosthuizen v. Stanley* at p. 331 and *Miller v. Miller* [1940] C.P.D. at p. 469.

⁵ *In re Knoop, ubi sup.*

⁶ *Miller v. Miller, ubi sup.*

III MINORITY

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, when 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*, majority is not deemed to be attained until the very minute arrives corresponding with the time of birth.⁴

Majority is accelerated by: (1) *Venia aetatis*;
(2) Marriage.

Venia aetatis is an anticipation of full age granted to a petitioner by the Sovereign authority in the State.⁵ The effect of *venia aetatis* (which is not given to males under twenty or to females under eighteen years of age)⁶ is to

¹ Dig. 4. 4. 1; Gr. 1. 7. 3; Voet, 4. 4. 1.

² Cape Ord. 62, 1829, sec. 1; Natal Ord. No. 4 of 1846, sec. 2; Transv. Volksraad Resolution of December, 1853, Art. 123; O.F.S. Law Book of 1901, chap. 89, sec. 14; Southern Rhodesia, R.S. cap. 26; Ceylon Ord. No. 7 of 1865, sec. 1.

³ Voet, 4. 4. 1.

⁴ Dig. 4. 4. 3, 3; Gr. 3. 48. 9; Cens. For. 1. 4. 43. 11; Voet 4. 4. 1; 44. 3. 1. 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), not so in Roman Law. Savigny, *System*, iv. 184. As to calculation of time in general and particularly in contracts see *Joubert v. Enslin* [1910] A.D. 6; *Tiopaizi v. Bulawayo Munic.* [1923] A.D. 317; *Standard Bldg. Society v. Cartoulis* [1939] A.D. 510. For French Law see Planiol, i. 1616, for German Law, *B.G.B.*, Art. 187.

⁵ Voet 4. 4. 4; V.d.L. 1. 4. 3.

⁶ Cod. 2. 44 (45). 2; V.d.L., *ubi sup.* But see Van Leeuwen, 1. 16. 11. By the O.F.S. Law Book of 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.

put an end to all the incapacities and privileges of minority except that the alienation or hypothecation of immovables, unless expressly included in the grant, can only be effected after leave obtained from the Court. In this respect alone minors who have obtained *venia aetatis* remain in the position of other minors.¹

Up to the present in South Africa the grant of *venia aetatis* has been confined to the Orange Free State, where it rests on statute. There seems to be no reason why this useful institution should not be extended to the other Provinces.² It has remained in use in Ceylon.³

It is the practice to refer a petition for *venia aetatis* to the Court for its report. But the Court has no independent right to make the grant.⁴ At the Cape, however, the Court has in several cases released a minor from tutelage and authorized a payment to him from the Guardians' Fund.⁵ In Holland similar powers were often vested in the *weesmeesters* by the local *keuren*.⁶ This is not *venia aetatis*, though it seems to come very near it.

Marriage puts an end to minority for all purposes,⁷ (2) Marriage. and it does not revive in the event of the dissolution of the marriage before the ordinary age of majority.⁸ This applies to both sexes indifferently.⁹

The next matter for consideration is the legal status and capacity of a minor. The subject is inadequately treated in the text-books, but the following rules may be extracted from them.¹⁰

Legal
status of
minors.

1. If the child is so young that he does not know what he is about, he is absolutely incapable of contracting at all,

¹ Voet, 4. 4. 5.

² *Tydscrijf*, i. 197.

³ For form of grant now in use see Appendix A.

⁴ *Non obstante*, Gr. 1. 10. 3 (Lee, *Commentary ad loc.*); *Ex parte Moolman* [1903] T.S. 159.

⁵ *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.

⁶ V.d.K. 161.

⁷ Voet, 4. 4. 6.

⁸ Voet, 4. 4. 9.

⁹ So advised by advocates practising at The Hague in 1711. de Haas, *Nieuwe Hollandsche Consultatien*, no. 34. See V.d.K. 879 and *Dictat. ad loc.*; Lee, *Commentary*, p. 359.

¹⁰ See further Appendix B and L. R. Caney, *Minors' Contracts*, 47 *S.A.L.J.* (1930), p. 180.

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.'¹

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 incur a valid obligation without his parent's or guardian's consent. 'Municipal law', says Grotius,² 'considers all obligations of minors³ 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*.⁴ The phrase '*ipso jure* void' must not, however, be taken too literally, for as will be seen, such obligations are not so much void as voidable at the minor's option.⁵

3. A minor is bound by contracts duly made with the consent of his parent or guardian,⁶ subject to his right in

Cases in which a minor is bound by contract.

¹ Van Leeuwen, 4. 2. 2 (Kotzé's Transl., vol. ii, p. 12). Voet says (26. 8. 9): 'si infans seu septennio minor sit sic ut nullum omnino queat consensum adhibere.' *Arg. Dig.* 23. 1. 14.

² Gr. 3. 1. 26.

³ i.e. unassisted.

⁴ *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 *Senatusconsultum Macedonianum* forbidding loans of money to filii-familias see below, p. 314, n. 4.

⁵ For Ceylon law herein see Pereira, *The Laws of Ceylon*, p. 185, and *Fernando v. Fernando* (1916) 19 N. L. R. 193.

⁶ V.d.K. 128 and *Dictat. ad loc.*; Lee, *Commentary*, p. 45; *Moolman v. Erasmus* [1910] C.P.D. 79; *Sked v. Colonial Banking & Trust Co.* [1924] T.P.D. 497. It makes no difference, says Voet (26. 8. 1 *in fn.*), 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. What if a guardian unreasonably withholds his consent? Voet says (26. 8. 8) that he can be compelled to give it. Perhaps this means to-day that the Court as upper guardian will authorize the contract.

a fit case to claim relief by way of *restitutio in integrum*. Ratification is equivalent to consent.¹ 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.²

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.³ To this head may be referred a minor's liability for necessaries, or for money borrowed and expended on necessaries.⁴ The liability is quasi-contractual,⁵ and rests upon the principle stated by Pomponius: 'Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiore.'⁶

5. A contract entered into by a minor is good without the tutor's consent, if the advantage is all on his side, and there is no corresponding disadvantage or burden. This results from the principle that without the authority of his tutor a minor may improve his position, but cannot make it worse.⁷ By an extension of this principle or of the principle of enrichment minors have sometimes been held liable *ex contractu* when the contract was plainly beneficial, e.g. a contract of employment.⁸ But it is perhaps safer to say that with one statutory exception⁹ a minor can never unassisted bind himself by contract.¹⁰

¹ Voet, 26. 8. 1 *ad fin.*; *Fouche v. Battenhausen & Co.* [1939] C.P.D. 228.

² Gr. 3. 1. 28; 1. 8. 8; 3. 48. 10; V.d.K. 133; *Van der Byl & Co. v. Solomon* [1877] Buch. 25; *Wood v. Davies* [1934] C.P.D. 250; *infra*, p. 113.

³ Gr. 1. 8. 5; 3. 1. 26; 3. 6. 9; 3. 30. 3; Voet, 26. 8. 2; Van Leeuwen, 1. 16. 8; *Nel v. Divine, Hall & Co.* (1890) 8 S.C. 16; *De Beer v. Est. De Beer* [1916] C.P.D. at p. 127; *Tanne v. Foggitt* [1938] T.P.D. 43.

⁴ Dig. 46. 3. 47, 1: Si necessariam sibi rem emit, quam necessario de suo erat empturus.

⁵ Gr. 3. 30. 3.

⁶ Dig. 12. 6. 14; 23. 3. 6, 2; 50. 17. 206.

⁷ Inst. 1. 21 pr.; Gr. 1. 8. 5; Voet, 26. 8. 2.

⁸ *Queen v. Koning* (1900) 17 S.C. 541; *Fick v. Rex* [1904] O.R.C. 25; *Silberman v. Hodgkinson* [1927] T.P.D. at p. 570.

⁹ By the Insurance Act, 1923, sec. 20 (a), a minor who has attained the age of eighteen years may effect a policy on his own life.

¹⁰ *Tanne v. Foggitt, ubi sup.*

Are the contracts of an unassisted minor void or merely 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.¹ In other words, a contract entered into by a minor, unassisted, may be ratified either during his minority with his tutor's assistance,² or after its determination.³ 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.⁴ He further points out that an unassisted contract of a minor always creates a natural obligation,⁵ 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 exclude the *condictio indebiti*.⁶ 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, and he must perform his part of the contract.⁷

Liability for delicts and crimes.

7. A minor above the age of seven years is liable for his delicts and crimes.⁸ 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*.⁹

¹ Gr. 3. 6. 9; Voet, 26. 8. 3. Conversely a father or guardian has the right to repudiate a contract entered into by a minor without his knowledge or consent, *Rhode v. Minister of Defence* [1943] C.P.D. 40.

² Voet, 26. 8. 1 *ad fin.*

³ Voet, 26. 8. 4 *ad fin.* and 4. 4. 44; *Van der Byl & Co. v. Solomon* [1877] Buch. 25. Ratification may be inferred from conduct. *Stuttaford & Co. v. Oberholzer* [1921] C.P.D. 855.

⁴ Voet, 26. 8. 3.

⁵ Windscheid, ii. 289; Girard, p. 682.

⁶ Dig. 12. 6. 29 and 41.

⁷ Voet, 26. 8. 4.

⁸ Gr. 1. 4. 1; 3. 1. 26; 3. 32. 19 (and Groen., *ad loc.*); 3. 48. 11.

⁹ Voet. 4. 4. 45.

8. In the sphere of property-law there is nothing to prevent a minor from acquiring ownership,¹ but he cannot alienate or charge his property² without his parent's or tutor's authority; which in the case of the alienation or hypothecation of immovables is not sufficient without an order of Court.³ Property.

Minors under the age of puberty are incompetent to make⁴ or to witness a will.⁵

9. Restitutio in integrum, which has been already mentioned, is an extraordinary remedy, by which the Court so far as possible restores the *status quo ante*. It is granted to minors when it appears that they have suffered prejudice in consequence of their own acts,⁶ or of acts done by their parents or guardians on their behalf.⁷ The burden of proving prejudice rests, as a rule, upon the minor.⁸ This remedy is given in respect not only of contracts, but also of alienation of property by donation or otherwise; of compromises; of judicial proceedings (e.g. when the minor has failed to put in his pleadings in time),⁹ and even in case of alienations sanctioned by the Court.¹⁰ The benefit of restitution accorded to a minor devolves on death,¹¹ but does not generally avail persons who have bound

Restitutio in integrum.

¹ Inst. 2. 8. 2; Dig. 41. 1. 11.

² 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.).

³ Voet, 26. 8. 5; 27. 9. 1 and 4; *Breytenbach v. Frankel* [1913] A.D. 390.

⁴ *Infra*, p. 363.

⁵ *Infra*, p. 367.

⁶ 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. For Ceylon see *Bandara v. Elapatha* (1922), 23 N.L.R. 411.

⁷ Gr. *ubi sup.*; *Van der Byl & Co. v. Solomon* [1877] Buch. at p. 29; *Wood v. Davies* [1934] C.P.D. 250.

⁸ Voet, 4. 4. 13.

⁹ Voet, 4. 4. 14 ff.

¹⁰ *In re Nooitgedacht* (1902) 23 N.L.R. 81; *De Wet v. Bouver* [1919] C.P.D. 43.

¹¹ Voet, 4. 4. 38.

themselves as sureties for a minor, therein differing from other cases of restitution.¹ Restitution is refused when a minor has fraudulently misrepresented his age.² It is waived by ratification after full age, which may be express or implied.³ It is barred by the lapse of four⁴ (now three⁵) years after majority, or from the time after full age when the late minor knew, or might have known, of the *laesio* which entitled him to relief.⁶ A minor cannot obtain restitution against marriage on the ground of minority alone,⁷ nor against liability for crime or serious delicts.⁸

¹ Voet, 4. 4. 39.

² Cod. 2. 42 (43); Voet, 4. 4. 43. *Fouche v. Battenhausen & Co.* [1939] C.P.D. 228; (Ceylon) *Wijesooria v. Ibrahimsa* (1910) 13 N.L.R. 195. In this case the Court refused to set aside a sale of immovable property, though made without sanction of the court. See *Shorter & Co. v. Mohamed* (1937) 39 N.L.R. 113.

³ Voet, 4. 4. 44; *Van der Byl & Co. v. Solcmon* [1877] Buch. 25.

⁴ Gr. 3. 48. 13; V.d.K. 900.

⁵ Prescription Act, 1943, sec. 3 (2); (Ceylon) Ord. No. 22 of 1871, sec. 11, *Silva v. Mahammadu* (1916) 19 N.L.R. 426.

⁶ Voet, 4. 1. 20.

⁷ Voet, 4. 4. 45; *Haupt v. Haupt* (1897) 14 S.C. 39.

⁸ Voet, *ibid.*

IV

MARRIAGE

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

SECTION 1—THE CONTRACT TO MARRY

Marriage¹ is commonly preceded by espousals (*sponsalia-trouwbeloften*), which constitute a binding contract between the parties. No form is prescribed for the contract.² Any persons competent to marry may validly engage themselves.³ Conversely persons not competent to marry cannot contract a valid engagement.⁴ This excludes boys and girls below the age of marriage.⁵ If they have reached that age but have not attained the age of majority they may engage themselves with the consent of parents or guardians.⁶ Failing such consent the engagement is invalid.⁷ With it, the engagement is valid, subject however in this case, as in other contracts of minors, to *restitutio in integrum* on the ground of lesion;⁸ from which it follows that the engagements of minors are in no case conclusively binding unless and until ratified after full age.⁹ By the common law of Holland the consent of tutors was not required, the place of the deceased parents in this

The promise to marry.

¹ On the whole of this subject 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 Blécourt, *Kort Begrip van het Oud-Vaderlandsch Recht*, chap. ii; Wessels, *History of the Roman-Dutch Law*, Part ii, chap. iii.

² Voet, 23. 1. 1. In Ceylon writing is required. Ord. No. 19 of 1907, sec. 21.

⁴ Voet, 23. 1. 2.

⁶ *Greef v. Verraux* (1829) 1 Menz. 151.

⁷ Voet, 23. 1. 20; Bijnk., *O.T.* i. 348.

⁸ Voet, 23. 1. 17; V.d.K. 61; *supra*, p. 49.

⁹ *Cens. For.* 1. 1. 11. 13.

³ V.d.L. 1. 3. 2.

⁵ V.d.K. 52.

matter being taken by the relatives of the 'four quarters';¹ but in the later law the want of consent of tutors, no less than of parents, was a sufficient ground for repudiation of the contract by either party.²

An engagement lawfully contracted with the necessary consents cannot be broken off without just cause.³ Under the Roman-Dutch Law the Courts would decree specific performance of the marriage contract,⁴ and even declare a reluctant party married in absence.⁵ This practice is disused in the modern law,⁶ but an action lies for damages for breach of the contract to marry.⁷ 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.⁸

SECTION 2—THE LEGAL REQUISITES OF MARRIAGE

Essentials
of mar-
riage.

Assuming the consent of the parties to be a necessary condition of marriage as of contracts in general we may state the essentials of a valid marriage to be: (A) Capacity to marry and to intermarry; (B) Consent of parents; (C) Due observance of ceremonies. We deal with these in order.

¹ *Infra*, p. 102.

² Loenius, *Decis.* 4; V.d.K. 53.

³ V.d.K. 60; V.d.L. 1. 3. 2.

⁴ The law was the same in England before Lord Hardwicke's Act (1753).

⁵ Voet, 23. 1. 12; V.d.K. 57; (Cape) *Richter v. Wagenaar* (1829) 1 Menz. 262; (Ceylon) *Dormiux v. Kriekenbeek* (1821) Ramana- than, 1820-33, p. 23. 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'.

⁶ (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.

⁷ *Radlof v. Ralph* [1917] E.D.L. 168; *Smit v. Jacobs* [1918] O.P.D. 30; *McCalman v. Thorne* [1934] N.P.D. 86 (measure of damages). If the defendant was married at the time of the promise the innocent party has an action not for breach of contract but for injuria, *Viljoen v. Viljoen* [1944] C.P.D. 137.

⁸ *Schnaar v. Jansen* [1924] N.P.D. 218.

A. *Capacity to marry and to intermarry.* The following cannot contract a valid marriage:¹ viz. those who are (1) already married, (2) under marriageable age, (3) insane, (4) impotent.

A. Capacity to marry.

1. A man can have only one wife, a woman one husband.² The Courts refuse to recognize a foreign polygamous marriage, i.e. a marriage the nature of which is consistent with the husband marrying another wife during its continuance. Whether he does so or not is beside the question. But though such a marriage is invalid the children will be held to be legitimate if they were so by the law of their domicile at the time of birth.³

2. The age of marriage as by the Roman Law and the Canon Law was the age of puberty, which was taken to be fourteen for males, twelve for females. But now in South Africa no boy under the age of eighteen years and no girl under the age of sixteen years is capable of contracting a valid marriage except with permission in writing of the Minister of the Interior.⁴ In Ceylon the ages are sixteen and twelve (for a daughter of European and burgher parents fourteen).⁵ In England the age is now sixteen for both sexes.⁶ The canonical age is now sixteen for males and fourteen for females.⁷

3. Insanity is not a status. It is a question of fact in each case whether a party to a marriage understood the nature of the contract and was able to appreciate properly its duties and responsibilities.⁸

4. Impotence renders the contract of marriage voidable, not void.⁹

¹ A valid marriage is a marriage which is neither void nor voidable.

² Gr. 1. 5. 2.

³ *Seedats Exors. v. The Master (Natal)* [1917] A.D. 302; Cheshire, *Private International Law* (2), p. 381.

⁴ Marriage Law Amendment Act, 1935.

⁵ Ord. No. 2 of 1895, see 16.

⁶ Age of Marriage Act, 1929. This extends to Scotland, not to Northern Ireland.

⁷ *Cod. Jur. Can.* c. 1067.

⁸ *Prinsloo's Curators v. Crafford* [1905] T.S. 669; *Vermaak v. Vermaak* [1929] O.P.D. 13.

⁹ *Wells v. Dean-Willcocks* [1924] C.P.D. 89.

Capacity
to inter-
marry.

Intermarriage is forbidden between persons related to one another within the prohibited degrees. By the law of Holland, as by the Canon Law, persons who had previously committed adultery together might not intermarry,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 Law³ 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 Bijkershoek,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 religion⁸ are obsolete.

Marriage
not per-
mitted
within the
prohibited
degrees.

The law of prohibited degrees was defined for Holland by the Political Ordinance of April 1, 1580,⁹ which forbids marriage between: (1) ascendants and descendants,¹⁰ whether related by legitimate or illegitimate birth;¹¹ (2) col-

¹ V.d.K. 70; V.d.L. 1. 3. 6.

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

³ Dig. 23. 2. 62 and 64; Cod. lib. 5, tit. 6. 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 Bijkershoek, *Quaest. Jur. Priv.* lib. ii, cap. iii, p. 219; V.d.K. 74; V.d.L. 1. 3. 6.

⁶ 1 Maasdorp, p. 22.

⁷ Cod. 9. 13. 1, 2; Voet, 23. 2. 26; *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.* Not so now by canon law. *Cod. jur. Can.* c. 1074.

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

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

¹⁰ *P.O.*, Art. 5; Gr. 1. 5. 6; Voet, 23. 2. 30.

¹¹ Groen. *de leg. abr. ad Dig.* 38. 10. 8; V.d.K. *Dictat. ad Gr.* 1. 5. 6.

laterals 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.¹ 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;² 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 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.³ Thus by the Dutch law a man might not marry his deceased wife's sister,⁴ but there was no reason why he should not marry his deceased wife's brother's widow. In South Africa and Ceylon the matter of prohibited degrees has in part or in whole been regulated by statute.⁵

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.'⁶ In Holland a case is cited as late as the year 1422 in which the parents incurred a penalty for having given their minor daughter in marriage without the consent of relatives and of the authorities of

B. Consent of parents

¹ P.O., Arts. 6-7; Gr. 1. 5. 7-8; Voet, 23. 2. 31-2. In the Transvaal only if the parties are within the third degree of relationship. Law No. 3 of 1871, sec. 4. This coincides with English Law. Blackst. *Comm.* i. 435 (Christian's note). But it is believed that men do not often marry their great-aunts.

² P.O., Art. 8; Gr. 1. 5. 9. See on the whole subject, Loenius, *Decis.*, Cas. 7, pp. 39-62; *Rechts. Obs.*, pt. 4, no. 3; *Fuchs v. Whiley N. O.* [1934] C.P.D. 130.

³ In other words, my wife's *affines* are not my *affines* so as to bring them within the prohibited degrees. Voet, 23. 2. 33. These *impedimenta secundi generis*, as they were called, were abolished as early as 1215 by the fourth Lateran Council.

⁴ P.O., Art. 10.

⁵ See Appendix C.

⁶ Tacitus, *Germania*, cap. 18.

the town.¹ In the sixteenth century the matter was regulated by two 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:—²

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,³ in case she had no father 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 sijnde*), 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 matter. 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

¹ Van Mieris, *Groot Charterboek*, vol. iv, p. 660.

² 1 *G.P.B.* 319; 1 *Maasdorp*, p. 363.

³ 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. 102). 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.

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 (*nae 't huwelick gheconsummeert*),¹ 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 Caroli or other severe punishment in the discretion of the Court. We forbid also all Notaries to receive any antenuptial 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 contraveners of the same without favour or dissimulation.'

The above enactment, it will be noticed, penalizes marriages contracted without the necessary consents, without, however, annulling them, which would have been (as it still is²) contrary to the law of the Church. This further step was taken by the Political Ordinance of April 1, 1580, which by Art. 3³ provides that banns shall not be granted or proclaimed if those who 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.⁴ With regard

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

¹ See V.d.K. 50, Lee, *Commentary*, p. 8.

² *Cod. jur. Can.* c. 1034.

³ 1 *G.P.B.* 331; Gr. 1. 5. 14-15; Voet, 23. 2. 11.

⁴ 1 *G.P.B.* 334.

The combined effect of these enactments:
 (a) As regards consent of parents;

to the interpretation of these two enactments and their combined effect 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 themselves¹ nor contract a valid marriage² without the consent of parents or parent.³ If both parents are living the consent of both is required, but in case of difference between them the will of the father as the head of the family prevails over that of the mother.⁴ If the father is dead the mother's consent is necessary, and sufficient,⁵ even though she has contracted a second marriage.⁶ Consent may be express or tacit, the latter when a parent knows of the intended marriage and does not forbid it.⁷ 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 parents may in fact not have consented to the marriage or even have known of it.⁸ 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 marriage⁹ can relieve from the penalties imposed by the Perpetual Edict, this being expressly excluded by the terms of the Edict.¹⁰ In the absence of consent or ratification the marriage will be declared void at the instance of the aggrieved parent, if he chooses to insist upon his

¹ Voet, 23. 1. 20; V.d.L. 1. 3. 2.

² Van Leeuwen, 1. 14. 6; V.d.K. 75; *Willenburg v. Willenburg* (2) (1908) 25 S.C. at p. 910; (1909) 3 Buch. A.C. 409.

³ Grandparents are not included. V.d.K. 77.

⁴ Voet, 23. 2. 13.

⁵ *Ibid.*

⁶ Voet, 23. 2. 14.

⁷ *Foy v. Morkel* [1929] W.L.D. 174.

⁸ Voet, 23. 2. 18 *ad fin.*; *Johnson v. McIntyre* (1893) 10 S.C. 318. The presumption is not irrebuttable. *Secus*, when banns have been proclaimed by a magistrate under (Cape) Act 16 of 1860. *Sikiti v. Foley* [1929] E.D.L. 286.

⁹ After consummation of the marriage? *Perpet. Ed.* Art. 17; *supra*, p. 57.

¹⁰ Voet, 23. 2. 19; V.d.K. 75.

right.¹ But the marriage is not a void *ab initio*, and cannot be avoided by the spouses or either of them merely on the ground of the want of parental consent, nor (perhaps) by a parent after the child has reached full age.² Parental consent once given may be withdrawn before marriage.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. But only very peculiar circumstances would justify overriding the parental authority.⁴ An insane parent, so far as concerns consent, is treated as non-existent, and the same consent, if any, is required and sufficient as would be sufficient if he or she were already dead.⁵

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 males and females alike.⁶

Thus far we have spoken of the consent of parents or of or other relatives.

¹ Si rigido jure uti velit, Voet, 23. 2. 11; *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). *Owen v. Fine*, 1943 (1) P.H., B. 34 [W.L.D.].

² *Van der Westhuizen v. Engelbrecht* [1942] O.P.D. 191, dissenting from *McKabe v. Moore* [1909] E.D.C. 161.

³ Subject to appeal to the Court. *Schoeman v. Rafferty* [1918] C.P.D. 485; *Sipondo v. Nongauza* [1927] E.D.L. 255.

⁴ Voet, 23. 2. 22; Schorer *ad Gr.* 1. 5. 16; V.d.K. 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.

⁵ V.d.K. 82. 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; *Ex parte Kropf* [1936] W.L.D. 28.

⁶ Voet, 23. 2. 17; V.d.K. *Dictat. ad Gr.* 1. 5. 15; Lee, *Commentary*, p. 15; *supra*, p. 45, n. 9. The *Echt-Reglement* of March 18, 1656 (2 *G.P.B.* 2439) contains an express provision to this effect for the Generaliteyts Landen.

a surviving parent. But what if both parents are dead? The Political Ordinance (Art. 3) does not require the consent of relatives.¹ 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 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 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 says that the marriage of minors is not void by reason of its being prohibited by their guardians or relatives.² 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 as regards the consent of guardians, for the Edict does not penalize marriages contracted without such consent. In view of this fact it cannot be said that the common law of Holland made the consent of guardians a necessary condition of a valid marriage of a minor whose parents were dead,³ nor, apart from general or local legislation or custom having the force of law, can the penalty of the Edict be extended to a case to which it does not in terms apply.⁴ It is plain, however, from Van der Keessel, 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. 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 In South Africa a mar-

¹ Voet, 23. 2. 16; V.d.K. 77.

² Gr. 1. 8. 3.

³ 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.

⁴ Van Leeuwen (*ubi sup.*) applies it, but with hesitation. In any event consent of guardians will be easily inferred. *Ibid.*

⁵ V.d.K. 125-6.

riage contracted without consent of guardians has the usual penal consequences, but is not void, or voidable at the suit of the guardian.¹

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 antenuptial contract;² and he acquires no right of control or administration over the property of the wife, who retains the administration in her own hands.³ But the minor spouse is not penalized,⁴ so that the proprietary consequences of the marriage will not be disturbed where they are for the minor spouse's benefit.⁵ In the modern law minority in

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

¹ *Mostert v. The Master* [1878] Buch. 83; *Willenburg v. Willenburg* (1) (1909) 26 S.C. at p. 453. 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. Interdicted prodigals are in most respects in the same position as minors (Voet, 27. 10. 9), but they can marry without the consent of their curators (*Mitchell v. Mitchell* [1930] A.D. 217), and can give the required consent to the marriage of their children. *Supra*, p. 55.

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

³ *Mostert's Trustees v. Mostert* (1885) 4 S.C. 35; *Wessels N. O. v. Uys* [1924] O.P.D. 329; *Ex parte Nahass* [1939] C.P.D. 173. 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 postnuptial 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 and Bijnk *O.T.* ii. 1047, may be consulted.

⁴ Voet, 23. 2. 20.

⁵ Groen. *de leg. abr. ubi sup.*

this connexion terminates for the male at twenty-one and for the female, apparently, at the same age.¹ If both parties are minors, presumably the Court will try to find out which of the two was the more guilty. Failing this the community will stand.

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.² 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.* Until the sixteenth century the Canon Law, adopting the Roman rule *Consensus facit nuptias*, did not require any formal celebration of the marriage.³ It was enough that the parties *per verba de praesenti* declared their intention here and now to be husband and wife. The law of the Church was changed by the Council of Trent (1545-63), which required that marriage should be contracted in the presence of a parish priest and at least two witnesses. This decree had no authority in Holland⁴ after the adoption of the reformed religion, but the legislature followed the example set by the Church. The Political Ordinance of 1580 by Art. 3,⁵ besides giving statutory authority to the canonical practice of publication of banns (first enjoined by the fourth Lateran Council in 1215), required further that the marriage should be celebrated by a Minister of religion, or by the Magistrate.

The text of the Political Ordinance runs as follows:

Political Ordinance, Art. 3.

‘Those who after the publication of these presents shall desire to enter upon marriage shall be bound to appear before

¹ 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 23 *S.A.L.J.* (1906), p. 249.

² *P.O.*, Art. 3; 1 *Maasd.*, p. 356.

³ *Gr.* 1. 5. 16; Van Leeuwen, 1. 14. 3.

⁴ *Fock. And.*, vol. ii, p. 137.

⁵ 1 *G.P.B.* 331.

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. Provided, however, that the said banns shall not be granted or made, if those who desire them are under age, that is to say young men beneath the age of twenty-five, and young women beneath the age of twenty, unless they show to the Magistrates or Ministers the consent of their parents or of the survivor of them (if they have any). . . . The said banns being made, if no lawful objection has been offered to them, the parties shall be married by the magistrates or Ministers according to the ordinances in use in the Churches and which shall be communicated to the Magistrates by the States aforesaid.¹

The later Dutch Law, following the example of the French, made a civil marriage indispensable, a religious ceremony being left to the option of the parties.² The principle that marriage is concluded by mere consent still persists in many of the States of the American Union, and persisted until 1940 in Scotland.³

The modern law.

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.⁴

It may happen that two persons contract marriage under the belief that they are free to do so, while in fact one or both of them is married already, or for some other reason, such as near relationship, the conditions required

Putative marriage.

¹ i.e. the Provincial legislature, the States of Holland and West Friesland.

² V.d.K. 84; V.d.L. 1. 3. 6 (*ad fin.*).

³ Marriage (Scotland) Act, 1939.

⁴ South Africa, 1 Maasdorp, chap. iv; Ceylon, Ord. No. 19 of 1907. As to presumption of marriage from cohabitation and repute see *Fitzgerald v. Green* [1911] E.D.L. at pp. 449, 454-9; *Hairman v. Crawley* [1923] O.P.D. 3; *Nyokana v. Nyokana* [1925] N.P.D. 227; *Ex parte Azar* [1932] O.P.D. 107; *Gavenas v. Gavenas* [1936] C.P.D. 132; *Levine v. Levine* [1939] C.P.D. 246.

for a valid marriage do not exist. Such a marriage is termed a putative marriage, which, by the law of South Africa and of many other countries, but not of England, has some of the effects of a valid marriage, and, in particular, the consequence that children born of the marriage are deemed to be legitimate. If there is good faith on the part of one of the parties only, the consequences of a putative marriage enure for the benefit of that party only and of the issue of the marriage.¹ Thus, if persons within the prohibited degrees innocently intermarry without an antenuptial contract, they are deemed to be married in community with the usual consequences so long as they are ignorant of their relationship. If it is known to one, unknown to the other, community continues so far as it is advantageous to the innocent party.²

SECTION 3—THE LEGAL CONSEQUENCES OF MARRIAGE

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.

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,³ with its consequences, which are as follows:

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 domicile.⁴

¹ V.d.K. 64, Lee, *Commentary*, p. 11; *In re Booysen* (1880) Foord at p. 190; *Berthiaume v. Dastous* [1930] A.C. 79, appealed to P.C. from the Province of Quebec. For Scots Law see Gloag and Henderson (2), p. 529. As to the legitimacy of the children see *H. (wrongly called C.) v. C.* [1929] T.P.D. 992. In later cases the Court has declined to make a declaration of legitimacy when the children were not represented. *Lionel v. Hepworth* [1933] C.P.D. 481; *Clarke v. Soffiantini*, 1939 (1) P.H., B. 30 [C.P.D.]; *Potgieter v. Bellingan* [1940] E.D.L. 264.

² Matthaëus, *Paroem.* ii, sec. 73; Voet, 23. 2. 89.

³ V.d.L. 1. 3. 7.

⁴ Voet, 23. 2. 40.

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.¹ Like a minor she has, in general, no independent *persona standi in judicio*. She 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. In the matter of contract a married woman is in much the same position as a minor. She cannot, in general, bind herself except by her husband's authority.³ But she can incur a natural obligation which is a good foundation for a contract of suretyship and excludes the *condictio indebiti* in case she has paid money in discharge of such obligation after her husband's death.⁴ 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 has the same effect as antecedent authority, and so, it seems, has tacit acquiescence in the contract.⁵ The wife may confirm the contract after her husband's death.⁶

4. There are cases in which a married woman's contracts have full legal effect.⁷ Thus: (a) She may enter into a unilateral contract which is solely to her advantage. Her husband takes the benefit, and payment must be made to him, not to his wife without his knowledge.⁸

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 huwelijk *minderjarig*.' Grotius more correctly says: 'werd ghehouden voor *onmondig*.' As to husband's duty to support wife see *Gammon v. McClure* [1925] C.P.D. 137; *Miller v. Miller* [1940] C.P.D. at p. 469.

² Gr. 1. 5. 22, 23; van Leeuwen, *ubi sup.*; Voet, 5. 1. 14; 23. 2. 41; V.d.K. 95; 1 Maasdorp, p. 47. See Appendix D. In Ceylon (Ord. No. 18 of 1923) a married woman may sue or be sued in all respects as if she were a *feme sole*. The Ordinance is modelled upon the English M.W.P. Acts.

³ Gr. 1. 5. 23; Voet, 23. 2. 42; *Pretorius v. Hack* [1925] T.P.D. 643.

⁴ V.d.K. 96. But see Voet, 12. 6. 19.

⁵ Voet, 23. 2. 42. A wife may contract as agent for her husband, but that is another matter.

⁶ Voet, 23. 2. 43.

⁸ Voet, 23. 2. 44.

(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 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 (where there is community of goods or, at least, of profit and loss) 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 merely the bare necessities of life) the modern law has enlarged the conception of contracts incidental to the household to cover any reasonable expenses or liabilities. It is for the judge to say whether a particular contract falls within the permitted

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. Foster* [1914] C.P.D. 919.

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. See Appendix D. This is an old Germanic institution—*Schlüsseltgewalt*. - Stobbe, *Deutsches Privatrecht*, iv. 188.

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 hujusmodi rei domesticae cura, ac circa eam contrahendi licentia, ad mariti desiderium uxori publica magistratus auctoritate justas ob causas interdicta sit. Does this hold good to-day?

class.¹ Much depends upon the custom 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.²

(e) If the husband has deserted his wife and is absent from the jurisdiction she may apply to the Court for leave to acquire and hold property and to contract in her own name.³

(f) In matrimonial causes a wife may in her own name take proceedings against her husband or defend proceedings taken by him against her. She may incur liability for the cost of such proceedings and for incidental expenses, and may defend in her own name an action brought against her to enforce such liability.⁴

(g) 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.⁵

5. During the marriage the husband (if the marital power is not excluded by antenuptial contract) administers the joint property and property of the wife which has been kept out of community. He may alienate it even by way of gift or encumber it, as he pleases.⁶ The only limitation which the law places upon his administration is that gifts made in fraud of the wife or her estate may be called in question.⁷ He is not accountable for his marital administration, nor can he be required to indemnify his wife or

¹ *Reloomel v. Ramsay* [1920] T.P.D. 371.

² Voet, *ubi sup.*

³ Sande, *Decis. Fris.* 2. 4. 4; *Ex parte Hagemann* (1909) 26 S.C. 503; *Ex parte Male* (1910) 20 C.T.R. 941; *In re Beart* [1912] N.P.D. 65; *Ex parte Abbott* [1915] C.P.D. 544. The cases relate principally to permission to take transfer of immovable property.

⁴ *Van Eeden v. Kirstein* (1880) Kotzé, at p. 184; *Barnett v. Milnes* [1928] N.P.D. 1.

⁵ *Infra*, p. 81.

⁶ Gr. 1. 5. 22; Schorer *ad* Gr. 2. 48. 2; Van Leeuwen 1. 6. 7; Voet, 23. 5. 7; V.d.K. 92; Bijnk *O.T.* i. 727; power to lease, Voet, 19. 2. 17.

⁷ Voet, 23. 2. 54; Van Leeuwen, *ubi sup.*; *Kemsley v. Kemsley* [1936] C.P.D. 518.

her heirs for his negligence.¹ The wife, on the other hand, may not alienate or encumber her property without her husband's consent unless in due course of trade or for household expenses.²

6. Where there is community of goods, or at least of profit and loss, the husband's contracts fall into the community and so far benefit or burden the wife.³ After the dissolution of the marriage she is entitled *pro semisse*, and liable *pro semisse* after recourse first had to the common estate, and, if the common estate has been distributed, to the estate of the husband.⁴ Similarly, the wife's contracts, so far as she can validly contract, benefit and burden the community. In this case it will be the husband who is liable *pro semisse* after the dissolution of the marriage.⁵

7. Though, in general, a married woman is in the position of a minor, in some respects she is not so favourably situated. Thus, as remarked above, she cannot hold her husband to account or claim restitutio in integrum from contracts concluded by herself or by her husband in her name.⁶

B. Effect of marriage on the property of the spouses.
Community of goods.

B. *Effect of marriage in respect of the property of the spouses.* By the law of Holland, in the absence of contract to the contrary, marriage created *ipso jure* a community of goods (*communio bonorum—gemeenschap van goederen*) between the parties.⁷ The books describe it as a statutory community, which means, in effect, that it was an institution of native origin not derived from Roman Law.⁸ It is

¹ Sande, *Decis. Fris.* 2. 4. 1; V.d.K. 91.

² Gr. 1. 5. 23; Van Leeuwen, 2. 7. 8.

³ *Infra*, pp. 77 ff.

⁴ Gr. 2. 11. 17; 3. 1. 38, V.d.K. *Dictat. ad loc.*, Lee, *Commentary*, p. 227; *Stevenson v. Alberts* [1912] C.P.D. 698.

⁵ Appendix D.

⁶ V.d.K. *Dictat. ad Gr.* 1. 5. 21 (citing Voet 4. 4. 51; 23. 2. 63); Lee, *Commentary*, p. 22.

⁷ Gr. 2. 11. 8; Voet, 23. 4. 1; V.d.K. 216; *Mograbi v. Mograbi* [1921] A.D. 274.

⁸ The medieval lawyers were in the habit of describing the particular law of a town as its statute. Hence the intricate theory of statutes in the Conflict of Laws. Expanding this usage, 'By statutes the civilians mean . . . the whole municipal law of the particular state from whatever cause arising . . . in contradiction

also described as universal, for, with exceptions to be mentioned, it covered all the property of the spouses and was not limited as in other countries to acquired property (to the exclusion of inherited property), or to a community of profits, which is the form in which matrimonial community first comes into view in early Saxon and Frankish sources.¹

Community might be excluded in whole or in part by antenuptial contract, and was excluded by law in the case of minors marrying without the required consents. There were besides certain kinds of property which did not fall into community. In the Union of South Africa the law remains substantially unaltered. In the absence of proof of the contrary every marriage is presumed to be in community.² In Ceylon and in Southern Rhodesia community of goods is no longer a consequence of marriage.³

The following kinds of property are (or were) excluded from community, viz. (i) (by the old law) lands held by feudal tenure; (ii) property burdened with a fideicommiss- How ex-
cluded.

to the Roman Law which they are accustomed to style by way of eminence the common law, since it constitutes the general basis of the jurisprudence of all continental Europe³. Story, *Conflict of Laws*, sec. 12.

¹ There were three principal types of community, together with many varieties, viz. 1. Community of postnuptial acquisitions—the Dutch community of profit and loss (*infra*, p. 76); 2. Community of movables (brought into marriage and after acquired); 3. Universal community. In the Northern Netherlands this last (*algeheele gemeenschap*) prevailed in Holland, Zeeland, Utrecht, Gelderland and most of Overijsel. It also occurred in many parts of Germany and in Flanders. It is thought to have originated in the towns in the later Middle Ages. Fock. *And. O.N.B.R.* ii. 170; *Bijdragen*, ii. 109 ff.; de Blécourt (5), pp. 106 ff. It was re-introduced into the Law of Holland (the Kingdom of the Netherlands) by Art. 174 of the *Burgerlijk Wetboek* of 1838, now in force, which put an end to the domination of the French Code (*supra*, p. 7).

² *Faure v. Tulbagh Divisional Council* (1890) 8 S.C. 72.

³ Ceylon, Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876, sec. 8; Southern Rhodesia Married Persons, Property Act, 1928 (*R.S.* cap. 151). 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. *Brown v. Brown* [1921] A.D. 478. Not ap-
plied to
certain
kinds of
property.

sum. The property itself does not fall into community though the rents and profits accruing from it do so.¹ The same applies to property held in usufruct.² (iii) It has been said that jewels and other such things given by a bridegroom to the bride on marriage³ and the clothes of the spouses⁴ are (within limits) exempt from community, but, however reasonable this proposition may be, there is little, if any, authority for it. (iv) Finally, any person who gives or bequeaths property to either spouse may expressly exclude it from community.⁵ Similarly, any specific property may be kept out of community by antenuptial contract, but in the absence of stipulation to the contrary the proceeds of the sale of such property fall into community.⁶

What universal community includes.

With these exceptions the community comprises all the property of the spouses,⁷ present and future, movable and immovable, wherever situate,⁸ *jura in personam* as well as *jura in rem*. The whole is under the administration of the husband, who is described as head of the community. Conversely, the liabilities of the spouses, whether antenuptial or postnuptial, are charged upon the community

¹ Gr. 2. 11. 10; Voet, 23. 2. 71; V.d.K. 221; *Barnett v. Rudman* [1934] A.D. 203.

² *Van der Merwe v. Van Wyk N.O.* [1921] E.D.L. 298.

³ Van Leeuwen, 4. 24. 13; Voet, 23. 2. 78; but see *Reddy v. Chinasamy* [1932] N.P.D. 461.

⁴ Arntzenius, *Inst. Jur. Civil. Belg.* pt. 2, tit. 4, sec. 18, refers only to local statutes. Van Leeuwen (4. 24. 14) cites *Costum. van Antwerpen*, xli. 53-4; Lee, *Commentary*, p. 100.

⁵ *Erasmus v. Erasmus* [1942] A.D. 265; *Cuming v. Cuming*, 1945 (1) P.H., G. 13 [A.D.]—a gift to the wife 'absolutely' held in the circumstances to exclude community.

⁶ Voet, 23. 2. 79; *Clement N.O. v. Banks* [1920] E.D.L. 362. Another case of relatively small importance is that in an action by the wife for judicial separation and in proceedings to enforce the order the husband's marital power is in abeyance and costs awarded to the wife fall out of community. *Comerma v. Comerma* [1938] T.P.D. 220.

⁷ Voet, 23. 4. 30; V.d.L. 1. 3. 8. The proverb says: 'Man ende Wijf hebben geen verscheyden goet.' Matthaëus, *Paroem*, no. 2.

⁸ Voet, 23. 2. 85; unless the *lex situs* requires a formal mode of transfer in which case a personal action lies to compel transfer accordingly. *Chiwell v. Carlyon* (1897) 14 S.C. at p. 66.

and diminish the joint estate,¹ and an antenuptial stipulation to the contrary is void in law unless community of goods is also excluded.² A married woman, therefore, may be utterly ruined by her husband's extravagance, but the remedy is in her own hands, viz. to ask the Court to interdict the husband from the administration of the estate.³

Boedel-
scheiding.

Community begins when marriage begins, i.e. so soon as the necessary rites or ceremonies have been performed;⁴ 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.⁵ On the dissolution of the community outstanding postnuptial liabilities attach to the extent of one-half to each moiety of the now divided estate.⁶ Antenuptial liabilities, on the

When
com-
munity
begins
and ends.

¹ Die den man of de vrouw trouwt, trouwt ook de schulden. Gr. 2. 11. 12; V.d.K. 222.

² Voet, 23. 2. 80.

³ Gr. 1. 5. 24; Voet, 23. 2. 52; *Rechts. Obs.*, pt. 4, no. 8; V.d.L. 1. 3. 7 (*in fin.*); *Ex parte Papendorp* [1932] C.P.D. 167. Grotius speaks of boedelscheiding, but it is not now the practice to decree a formal separation of goods. In the event of insanity the marital power is suspended, not determined. V.d.K. 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.*

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

⁵ 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. 223; *Jooste v. Jooste's Exors.* (1891) 8 S.C. 288; 1 Maasdorp, chap. xix; *infra*, p. 358.

⁶ Gr. 1. 5. 22; V.d.K. 93 and 223. Creditors may sue the husband or his heirs for the whole debt, the wife or her heirs for half. *Laing v. Le Roux* [1921] C.P.D. at p. 748. But proceedings may not be taken by creditors of the husband against the wife until they have endeavoured to recover what is due to them from the husband or his representatives. *Stevenson v. Alberts* [1912] C.P.D. 698. The husband (or his heirs) may recover from the wife (or her heirs) to the extent of one half. Gr. 2. 11. 17; Voet, 23. 2. 52 and 80.

other hand, which have not been discharged during the marriage, revert to the side from which they came.¹

Apart from the events which put an end to the marriage, community may be determined in Natal and Southern Rhodesia, by postnuptial contract.² In many places in Holland, as in Germany,³ a married woman was allowed on her husband's death to renounce the community and thereby to escape further liability for his debts. It was customary for her to lay her keys on the coffin and to go out before the bier with nothing about her but her everyday clothes (some say in borrowed clothes).⁴ This was something like the *beneficium separationis* allowed to the *necessarius heres* in Roman Law.⁵ Reft of its ceremonial this repudiation of the community has been recognized as an existing institution in South Africa.⁶

SECTION 4—ANTENUPTIAL CONTRACTS

No persons need marry in community unless they wish to do so. It is always open to the spouses to exclude or modify the common law by antenuptial contract.⁷ 'Ante-

¹ Gr. 2. 11. 15; Van Leeuwen, 4. 23. 6; V.d.K. 224. According to Voet (23. 2. 80), if the husband (or his heirs) has discharged the whole of an antenuptial debt, 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; *Liquidators of Union Bank v. Kiver* (1891) 8 S.C. at p. 150.

² In Natal (by Law No. 22 of 1863, sec. 7, as explained and extended by Law 14 of 1882) the spouses may depart from the community by postnuptial contract duly executed and registered, *Buller N.O. v. Linder* [1925] N.P.D. 9; but this does not permit a postnuptial exclusion of the *ius mariti*, *Holdgate v. Moodley* [1934] N.P.D. 356. Similar provision in Southern Rhodesia. Married Persons' Property Act, 1928, sec. 2; *R.S.* cap. 151, sec. 3.

³ Grimm, *Deutsche Rechtsaltertümer* (4), i. 243.

⁴ Gr. 2. 11. 18 and V.d.K. *Dictat. ad loc.*; Lee, *Commentary*, p. 105.

⁵ *Inst.* 2. 19. 1.

⁶ *Brink v. Louw* (1842) 1 Menz. 210; *Hern & Co. v. De Beer* [1913] T.P.D. at p. 726.

⁷ Gr. 2. 11. 8; V.d.K. 227; R. C. Elliott, *Antenuptial Contracts*, 45 *S.A.L.J.* (1928), pp. 181 and 320.

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.'¹ By the law of Holland it was not absolutely necessary that the contract should be in writing, but satisfactory proof and, therefore, the presence, at the least, of competent witnesses was necessary if it was to affect creditors.²

Antenuptial 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 antenuptial 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 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.

Registration of antenuptial contracts.

This Act and similar legislation in the other Provinces are now superseded by the (Union) Deeds Registries Act No. 47 of 1937 (replacing Act No. 13 of 1918), which provides:

Sec. 86. An antenuptial contract . . . executed after the commencement of this Act, shall be registered in the manner and within the time mentioned in section *eighty-seven*, and unless so registered shall be of no force or effect as against any person who is not a party thereto.

Sec. 87 (1). An antenuptial contract executed in the Union shall not be registered unless it has been attested by a notary public and unless it has been tendered for registration in a deeds registry within two months after the date of its execution or within such extended period as the Court may on application allow.

(2). An antenuptial contract executed outside the Union shall not be registered unless it has been attested

¹ V.d.K. 228.

² V.d.K. 229; *Holl. Cons.* iv. 35; *Fisher v. Malherbe & Rigg* [1912] W.L.D. 15.

by a notary public or has been otherwise entered into in accordance with the law of the place of execution and unless it has been tendered for registration in a deeds registry within six months after the date of its execution . . . or within such extended period as the Court may on application allow.

Sec. 88. Notwithstanding the provisions of sections *eighty-six* and *eighty-seven* the court may, subject to such conditions as it may deem desirable, authorize postnuptial execution of a notarial contract having the effect of an antenuptial contract, if the terms thereof were agreed upon between the intended spouses before the marriage, and may order the registration, within a specified period, of any contract so executed.¹

The provisions of secs. 86 and 87 (*supra*) *mutatis mutandis* apply in respect of the registration of postnuptial contracts in the province of Natal (sec. 89).

It is to be noted that the absence of registration only affects the validity of an antenuptial 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 antenuptial 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

Who
may be
parties.

¹ *Ex parte Orford* [1920] C.P.D. 367. Recent cases. *Ex parte Young* [1938] E.D.L. 300 (leave refused); *Ex parte Karbe* [1939] W.L.D. 351 (granted); *Ex parte Witz* [1941] W.L.D. 74 (granted); *Ex parte Bajie*, 1941 (2), P.H. B. 66 [W.L.D.] (granted); *Ex parte Evans*, 1942 (2), P.H. B. 73 [O.P.D.] (granted); *Ex parte Chater* [1942] O.P.D. 106 (refused); *Ex parte Jaffar*, 1944 (1), P.H. B. 30 [C.P.D.] (granted).

² Voet, 23. 4. 2 and 4.

³ Voet, 23. 4. 10-11.

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.

Generally speaking, any condition may be introduced into a marriage contract provided that it is not contrary to law or good morals.¹ Some stipulations are disallowed as contrary to the legal nature of marriage; for example a provision that donations shall be permitted or legacies not permitted between the spouses.² Provisions to the effect: that the husband shall not change his domicile without his wife's consent;³ or 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 Keessel.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

What terms may be inserted.

Certain stipulations are not permitted.

A stipulation that a wife shall share in profits but not in losses, though condemned by Grotius,⁷ is in Van der Keessel's⁸ opinion free from objection.

To undertake a detailed discussion of the various antenuptial stipulations which may be made is beyond our scope. We shall indicate, however, the principles which govern the interpretation of such agreements, and mention

Permitted stipulations fall into certain defined classes,

¹ Voet, 23. 4. 19; V.d.K. 228; V.d.L. 1. 3. 4.

² Voet, *ubi sup.*; *Hall v. Hall's Trustee* (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. 228 and *Dictat. ad Gr.* 2. 12. 3; Lee, *Commentary*, p. 107.

⁶ *Boyes v. Versigman* [1879] Buch. 229. *Infra*, p. 81.

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

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

the objects 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 antenuptial 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.¹

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 acquisitions² and profits), and the marital power. Any or all of these consequences may be excluded by antenuptial contract. Thus the parties may:

of narrower or wider extent.

1. Exclude (*a*) community in respect of goods brought into the marriage, leaving it unimpaired as regards (*b*) postnuptial acquisitions, (*c*) profit and loss, 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'.³

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.⁴

¹ Gr. 2. 12. 11; V.d.K. 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.).

² By 'subsequent acquisitions' is here meant 'subsequent acquisitions' not referable to the head of profits. This will be explained below.

³ Voet, 23. 4. 46.

⁴ 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

In speaking of the legal consequences of marriage (p. 68, *supra*) we used the phrase 'community of goods' in the sense of the universal community of the common law with all its consequences. This exists independently of contract. But in antenuptial contracts the phrase acquires a narrower meaning, viz. community of goods whether (a) brought into the marriage, or (b) after-acquired (other than 'profits'), but not (c) community of profit and loss. Accordingly, where community of goods (alone) is excluded, the phrase is understood in the narrower sense, and community of profit and loss is tacitly reserved;¹ and, conversely, where community of profit and loss is expressly reserved, community of goods (in the narrower sense) is tacitly excluded.² It is necessary, therefore, to determine with some precision the meaning of 'profits' or 'acquests', as they are also called. Briefly, the phrase includes all postnuptial acquisitions, which the law does not attribute to one spouse alone. Thus it comprises: (1) the fruits³ and other profits of property belonging to the community or to either spouse severally, whether originally brought into the marriage or acquired subsequently; (2) profits accruing from the work, labour, industry, or skill of either spouse;⁴ (3) official and other salaries; (4) rights under contracts concluded by the husband, or by the wife within the limits which the law allows;⁵ (5) property purchased *stante matrimonio* with common moneys,⁶ and even with the money (including proceeds of the sale of the property) of

In antenuptial contracts 'community of goods' is contrasted with 'community of profit and loss'.

The meaning of 'profits'; what the term includes;

marital power . . . cannot be entirely excluded by an antenuptial 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 antenuptial contract, Appendix A.

¹ Gr. 2. 12. 11; Voet, 23. 4. 28.

² Voet, *ibid*.

³ Gr. 2. 12. 12; Voet, 23. 4. 32; *Clement N.O. v. Banks* [1920] E.D.L. 362; *Muttunayagam v. Brito* [1918] A.C. 895. The profits of goods subject to fideicommissum are included under the term 'fruits' (Gr. 2. 11. 10); also the benefit of a usufruct. V.d.K. 253.

⁴ Voet, *ubi sup*.

⁵ Voet, 23. 4. 30; Sande, *Decis. Fris.* 2. 5. 6.

⁶ Voet, 23. 4. 33.

one of the spouses; except that in the last case the matter must be adjusted between the spouses on the dissolution of the marriage.¹

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;² (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.³ With regard to this last group difference of opinion existed whether it fell within the definition of 'profits' or not. Most jurists answered the question in the negative. 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 antenuptial contract falls within the second or the third of the four classes mentioned above.

Community of profits involves 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. But such

¹ Voet, 23. 4. 35; i.e. the thing purchased is owned in common, but the spouse with whose money it was purchased is credited as against the other spouse with the money so expended. However, property purchased *stante matrimonio* will not become common if the husband intended to acquire it exclusively for himself or for his wife. V.d.K. 254. Clothes are a case in point. Van Leeuwen, 4. 24. 14. See Bijnk. *O.T.* i. 727, where the question is discussed *utrum res stante matrimonio pecunia dotali emptā censenda sit totalis necne*.

² Voet, 23. 4. 39; e.g. bought before marriage, delivered after marriage. V.d.K. 254.

³ Anton. Matthaëus, *Paroemiae*, no. 3 (Erfnis is geen winste); V.d.K. 252; Lee, *Commentary*, p. 113.

⁴ Voet, 23. 4. 43. Matthaëus (*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.

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.¹

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 that it includes commercial losses which do not attach to the separate property of one of the spouses only;² and liabilities arising out of the postnuptial contracts of the husband,³ and of the wife so far as she is competent to contract.⁴ But the term 'losses' does not cover the antenuptial debts or liabilities of either spouse,⁵ nor liabilities ex delicto,⁶ nor loss or deterioration of the separate property of either spouse;⁷ nor necessary expenses of an unusual character.⁸

What is included under 'losses'.

Various terms in

The above explanation will enable the reader to distinguish the effect of a clause excluding community of

¹ *Cens. For.* 1. 1. 12. 11.

² Voet, 23. 4. 49.

³ V.d.K. 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. 94, 225, and Lorenz *ad V.d.K.* 94; Nathan, *Common Law of S.A.*, vol. iii, pp. 1547-8; *infra*, p. 339. 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 delicts.

⁷ Voet, 23. 4. 49; V.d.K. 257; *Vervolg op de Holl. Cons.* vol. ii, no. 19 (*contra*, no. 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. 257, *non obstante* Gr. 2. 12. 15. Any excess of value over outlay is reckoned as profit and accrues to the joint account of the spouses, if community of profits is not excluded. Voet, *ibid.*

⁸ *Impensae necessariae graviore.* 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. 1-4; *Lechoana v. Cloete* [1925] A.D. at p. 547.

antenuptial contracts distinguished as regards their effects. (a) Exclusion of 'community of goods' only;

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 antenuptial 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* his or her 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 postnuptial 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, but not more, directly from the wife.⁴

But a creditor who proceeds against the wife must aver and prove that the claim has been duly lodged with the person charged with the administration and distribution of the common estate and has not been satisfied.⁵

If during the marriage the husband has applied his wife's property in paying his own antenuptial debts, the money so applied constitutes as between the spouses a first charge⁶ 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 postnuptial creditors have been fully satisfied.⁷

¹ Voet, 23. 4. 50 (because postnuptial debts count as 'damnum', antenuptial not); V.d.K. 255.

² Gr. 2. 12. 14; Voet, 23. 4. 31; V.d.K. 256.

³ Voet, 23. 4. 48.

⁴ Gr. 1. 5. 22.

⁵ *Faure v. Tulbagh Divisional Council* (1890) 8 S.C. 72; and see *Sichel v. De Wet* (1885) 5 E.D.C. 58.

⁶ 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 antenuptial 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.

⁷ Voet, 24. 3. 21. But she may resume such of her property as

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.

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

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

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

From what has been said it is evident that nothing short of the exclusion of all community and of the marital power affords a married woman an adequate protection against her husband's liabilities, and this is in fact the only form of antenuptial contract in use at the present day. A woman is either married in community or stipulates for the completest freedom.⁴

Present day practice.

The antenuptial pacts above described have all been directed to the exclusion or modification of the common exists *in specie* on the dissolution of the marriage, subject to the obligation of satisfying postnuptial 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 contracted by her husband (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. 99. See Appendix D.

² *Kent v. Salmond* [1910] T.S. at p. 642. So where the wife reserved to herself free control over her property 'as fully and effectually as if no marriage had taken place'. *Ruperti's Trustee v. Ruperti* (1885) 4 S.C. 22. But a proviso that the wife shall retain and possess all her estate as fully and effectually as if the marriage did not take place does not exclude the marital power. "Possess" is not equivalent to "control". *Salz v. Waiggowsky* [1919] W.L.D. 90; *Du Toit v. Renison* [1939] E.D.L. 101.

³ Voet, 23. 4. 21 and 23. 5. 7.

⁴ Approximately 70 per cent. of the European marriages in the Union are still in community. The proportion of 'free' marriages would no doubt be higher but for the cost of executing and registering the contract.

Marriage
settle-
ments.

law consequences of marriage. It remains to speak of stipulations of another kind, namely, those which may be 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 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.

Morgen-
gave.

To gifts of the first kind the 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 on the death of the husband or wife was known as 'douarie'.² *Prima facie* there is no legal objection to any such gift. The antenuptial 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 statutory enactment her claim in this regard was only allowed to take effect when her husband's creditors had been satisfied. The law on this subject was con-

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

tained in the Perpetual Edict of Charles V of October 4, 1540, Art. 6, which runs as follows:³

'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

¹ Wessels, 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. 258.

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

³ 1 *G.P.B.* 316.

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 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

The effect of the Placaat was: (1) that, in general, no antenuptial contract could secure to a wife any property of the husband in competition with creditors; but (2) that, if she was content, by antenuptial contract, to forgo all advantage from the husband's estate, she might keep her own property secure and unimpaired and enjoy in respect of it a preference over creditors and a hypothec over her husband's goods.³ But she could not have it both ways. If she claimed to benefit financially by the marriage, she must also take her 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 of 'merchants', it was never held to be so limited in its application.⁴

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.⁵ Accordingly, the law was in some of the colonies

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 *Infra*, p. 197.

⁴ V.d.K. 262.

⁵ Wessels, *History*, p. 464.

Legislation on marriage settlements in South Africa.

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.¹ It was withdrawn from operation in all the Provinces of the Union by sec. 1 of the Insolvency Act, 1916, and now the Insolvency Act, 1936 provides:

Sec. 27. No immediate benefit under a duly registered antenuptial contract given in good faith by a man to his wife or any child to be born of the marriage shall be set aside as a disposition without value, unless that man's estate was sequestrated within two years of the registration of that antenuptial contract.

An 'immediate benefit' shall mean a benefit given by a transfer, delivery, payment, cession, pledge, or special mortgage of property completed before the expiration of a period of three months as from the date of the marriage.²

Sec. 28 (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, but not beyond the amount of two thousand pounds, together with any bonus claimable in respect thereof.³

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.⁴ These, as pointed out by Voet, may relate either: (1) to the succession of the

¹ 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.

² See Mars, *The Law of Insolvency*, pp. 199 ff.

³ See also the *Insurance Act, no. 37 of 1923*, secs. 23 ff. and 45 *S.A.L.J.* (1928), p. 190, where the effect of these statutes is considered.

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

spouses to each other;¹ or (2) to the succession of a third party to the spouses;² or (3) to the succession to the children of the marriage (particularly in the event of their dying in childhood and therefore intestate);³ or (4) to the succession to a third person who has become a party to the antenuptial contract.⁴ Such agreements, though condemned by the Roman Law, were permitted by the law of Holland, if they formed part of an antenuptial settlement,⁵ but not of any other act *inter vivos*.⁶

This brings us to another topic. How far, if at all, can antenuptial 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;⁷ by testament, within limits, they may, provided such an intention is clearly expressed or implied by the will.⁸ 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 to another specified person, it cannot be affected by the testamentary dispositions of the spouses.⁹ When the question relates to property brought into the marriage by the spouses, and the antenuptial con-

Can antenuptial contracts be revoked or modified by the parties?

¹ V.d.K. 236-8.

² V.d.K. 239-40.

³ V.d.K. 241-3.

⁴ V.d.K. 244-6.

⁵ Voet, 2. 14. 16.

⁶ Voet, 23. 4. 59 (60); *infra*, p. 241.

⁷ Neostad., *de pact. antenupt.* Obs. 4 (*in notis*); Voet, *ubi sup.*; V.d.K. 264. *Ex parte Smuts* [1914] C.P.D. at p. 1037; *Union Govt. 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 antenuptial contract through a judgment of the Court. . . . Antenuptial 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* 1930 (1) P.H., B. 5 [O.P.D.]. But see *Ex parte Balsillie* [1928] C.P.D. 218; *Ex parte Sills* [1928] E.D.L. 278.

⁸ Voet, 23. 4. 60 (61); *Holl. Cons.* iii. 185 (Grotius); *Union Govt. v. Leask's Exors.* [1918] A.D. at p. 449.

⁹ Voet, 23. 4. 61 (62). *Secus* if it is merely to revert 'to the side whence it came'.

Only by
mutual
will.

tract 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 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 antenuptial 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 antenuptial contract and acquired a contractual right under it.³ When the future succession to children was the subject of the antenuptial 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 vivos*. This must be understood, of course, only where there was no fideicommissum in favour

¹ Voet, 23. 4. 62 (63); Van Leeuwen, 4. 24. 12; V.d.K. 265; Bijnk. *O.T.* i. 341; *Vervolg op de Holl. Cons.* ii. 80; *infra*, p. 392.

² Voet, 23. 4. 63 (64). 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 consent (*Ex parte Exors. Est. Everard* [1938] T.P.D. 190; *Bull v. Executrix Est. Bull* [1940] W.L.D. 133). But a clause providing for the succession of a third party has merely the effect of a testamentary disposition, 'cum in ordinandis successionebus 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.

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

SECTION 5—DISSOLUTION OF MARRIAGE—NULLITY

Divorce a vinculo matrimonii is decreed by the Court at the suit of one or other spouse on the ground of: (1) adultery;³ or (2) malicious desertion;⁴ to which some authorities, by an extensive interpretation, add (3) sodomy;⁵ and (4) perpetual imprisonment.⁶ Relief will be refused if the Court finds that: (a) the petitioner has during the marriage been accessory to or connived at the adultery complained of;⁷ or (b) the petitioner has condoned the adultery complained of;⁸ or (c) the petition is presented or prosecuted in collusion with either of the respondents;⁹ and is usually refused (d) if the Court finds that the petitioner has been guilty of adultery during the marriage.¹⁰

Divorce a
vinculo
matri-
monii.

¹ Gr. 2. 29. 3; Voet, 23. 4. 66 (67).

² Voet, 23. 4. 67 (68).

³ Gr. 1. 5. 18; Van Leeuwen, 1. 15. 1; Voet. 24. 2. 5.

⁴ Voet, 24. 2. 9; *Webber v. Webber* [1915] A.D. 239; *Morton v. Morton* [1934] C.P.D. 51; *Ledimo v. Ledimo* [1940] O.P.D. 65; (Ceylon) *Ramalingam v. Ramalingam* (1933) 35 N.L.R. 174.

⁵ Schorer *ad Gr. ubi sup.*; V.d.K. 88; V.d.L. 1. 3. 9; *McGill v. McGill* [1926] N.P.D. 398.

⁶ V.d.K. 89; V.d.L. loc. cit.; *Jooste v. Jooste* (1907) 24 S.C. 329; *Smith v. Smith* [1943] C.P.D. 50; 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.

⁷ *Hasler v. Hasler* (1896) 13 S.C. 377; *Bevan v. Bevan* [1908] T.H. 193.

⁸ *Bell v. Bell* [1909] T.S. 500; *Rowe v. Rowe* [1922] W.L.D. 43; *Elliott v. Elliott* [1925] C.P.D. 286; *C. v. C.*, 1943 (1) P.H., B. 26 [E.D.L.]; *Henderson v. Henderson* [1944] A.C. 49.

⁹ *Malcolm v. Malcolm* [1926] C.P.D. 235.

¹⁰ Voet, 24. 2. 6; *Newood v. Newood* [1939] C.P.D. 414; *Muller v. Muller* [1941] C.P.D. 332. The Court has discretion to condone plaintiff's adultery, but plaintiff must present a very strong case, *Chong v. Chong* [1942] C.P.D. 192; *Fernandez v. Fernandez* [1943] C.P.D. 363; *Brownjohn v. Brownjohn* 1944 (1) P.H., B. 15 [W.L.D.]; *Zelie v. Zelie* [1944] C.P.D. 209.

Undue delay in taking proceedings may justify the inference that the adultery has been condoned, but is not in itself a ground for withholding relief.¹

The Divorce Laws Amendment Act, 1935, adds two further grounds of divorce, viz. (5) incurable insanity which has continued for a period of not less than seven years;² and (6) imprisonment for not less than five years after the prisoner has been declared an habitual criminal under Act No. 31 of 1917, sec. 344.³

It must be noted that cruelty is not in South Africa (as it now is in England)⁴ a ground for a decree of divorce, but is an element to be taken into account in determining whether the conduct of the defendant amounts to what is called constructive desertion.⁵

When an action is brought for divorce on the ground of malicious desertion the practice is to ask for an order for restitution of conjugal rights, failing which for divorce.⁶ The Court has no power to dispense with the preliminary order.⁷

¹ *Carey v. Carey* [1931] C.P.D. 465.

² In English Law five years. Matrimonial Causes Act, 1937, sec. 2. In S. Rhodesia five years within the ten years immediately preceding the commencement of the action for divorce. Matrimonial Causes Act, 1943, sec. 4.

³ S. Rhodesia for five years within the last ten years. *Ibid.*

⁴ And in S. Rhodesia. *Ibid.*

⁵ i.e. conduct on the part of either spouse compelling the other to go away. 44 *S.A.L.J.* (1927), p. 32; *Whelan v. Whelan* [1925] W.L.D. 162; *Solomon v. Solomon* [1927] W.L.D. 330; *Otto v. Otto* [1930] W.L.D. 251; *O'Brien v. O'Brien* [1938] W.L.D. 221; *Collins v. Collins* [1939] W.L.D. 48; *Post v. Post* [1931] N.P.D. 117. Persistent refusal to cohabit. *Quadling v. Quadling* [1937] N.P.D. 319.

⁶ Cape Rules of Court, 371 (Ingram and de Villiers, p. 98).

⁷ *Aldred v. Aldred* [1929] A.D. 356. 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*

In Natal a petition for divorce is not maintainable until desertion has continued uninterruptedly for eighteen months,¹ and there are other peculiarities in the divorce law of this Province.² In the other Provinces 'length of absence, although an ingredient in the case is not essential, the Cape Supreme Court having in one case granted a divorce after an absence of only six days'.³ In England a petition for divorce may be presented to the High Court on the ground that the respondent has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition.⁴

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 antenuptial contract, including all benefits derived or to be derived from the marriage by the guilty party,⁵ and the Court has no discretion to refuse such an order, if demanded by the injured spouse.⁶

Rooyen [1927] C.P.D. 266; *Murchie v. Murchie* [1923] S.R. 116; *Duncan v. Duncan* [1937] A.D. 310. As to malicious desertion in general see 41 *S.A.L.J.* (1924), p. 38.

¹ Law No. 13 of 1883 sec. 1; *Breeds v. Breeds* [1929] N.P.D. 122.

² *Mitchell v. Mitchell, ubi sup.* at pp. 443-4.

³ 1 *Maasdorp*, p. 106, citing *Mostert v. Mostert* (1854) 2 *Searle* 128 and *Brown v. Brown* [1905] T.S. 415.

⁴ Matrimonial Causes Act 1937, sec. 2; *Bennett v. Bennett* [1939] P. 274. In S.Rh. a final order of divorce on this ground may not be granted unless three years have elapsed since the date of the marriage, and desertion has been continuous for six months. For Ceylon see *Goonewardene v. Wickremasinghe* (1932) 34 N.L.R. 5; *Ramalingam v. Ramalingam* (1933) 35 N.L.R. 174.

⁵ V.d.K. 88; *Dawson v. Dawson* (1892) 9 S.C. 446; *Wessels v. Wessels* (1895) 12 S.C. at p. 470. When forfeiture is asked for the proper order is division of the joint estate and forfeiture of all benefits accruing from the side of the plaintiff by virtue of the marriage in community; which means that the defendant's moiety will be reduced, and the plaintiff's moiety increased, by any excess that the plaintiff may have contributed over the contribution of the defendant. Contributions made during the marriage are taken into account including the result of industry and investment as well as benefactions from third persons. *Smith v. Smith* [1937] W.L.D. 126 *per* Schreiner J. citing *Ogle v. Ogle* [1910] N.P.D. 87 and other cases.

⁶ *Murison v. Murison* [1930] A.D. 157. *Secus* in S.Rh. Matrimonial Causes Act, 1943, sec. 7.

But the Court will not deprive the guilty party of the share of the joint estate which he or she may have contributed.¹ The innocent spouse is as a general rule entitled to the custody of minor children, but the Court has a wide discretion and may grant the custody to the guilty party if the welfare of the children requires it.² The spouse who is not awarded the custody has a right of reasonable access³ and may invoke the Court's intervention if it is alleged that the right of control is not being exercised in the interest of the children.⁴

The Court (*semble*) has no power to order a guilty husband to maintain an innocent wife who has obtained a decree of divorce against him.⁵

Divorced persons are free to marry again subject only to statutory restrictions on marriage with a divorced wife's sister and a divorced husband's brother.⁶

Prolonged
absence.

In general, no absence of one of the spouses, however prolonged, entitles the other spouse to contract another marriage, even though for purposes of administration the Court may have presumed the absent spouse's death.⁷ If the other spouse re-marries, there is always the risk that the marriage may be pronounced invalid in the event

¹ *Celliers v. Celliers* [1904] T.S. 926; (Ceylon) *De Silva v. De Silva* (1925) 27 N.L.R. 289.

² *Cronje v. Cronje* [1907] T.S. 871; *Klass v. Klass* [1924] W.L.D. 136; *Cook v. Cook* [1937] A.D. 154.

³ *Lecler v. Grossman* [1939] W.L.D. at p. 44 *per* Schreiner J.

⁴ *Simleit v. Cunliffe* [1940] T.P.D. 67.

⁵ *Schultz v. Schultz* [1928] O.P.D. 155; *Taylor v. Taylor* [1928] W.L.D. 215; (Ceylon) *Ebert v. Ebert* (1939) 40 N.L.R. 388; 1 Maasdorp, p. 128. The order has, however, been made on several occasions. *Toms v. Toms* [1920] C.P.D. 455; *Miller v. Miller* [1925] E.D.L. at p. 126. The law of S.Rh. permits it. Matrimonial Causes Act, 1943, sec. 9.

⁶ Appendix C.

⁷ *In re Booysen* (1880) Foord 187. As to the circumstances in which the Court will make an order presuming death see *In re Widdicombe* [1929] N.P.D. 311. In *In re Cuthbert* [1932] N.P.D. 615 a person had not been heard of for thirty years. The Court declined to presume his death, but authorized the Master to pay the children the shares which would have come to them *ab intestato*, conditionally upon their giving security *de restituendo*. For *commorientes* see Windscheid, i. 53; *Ex parte Martienssen* [1944] C.P.D. 139.

of the absent spouse's return. This was the law in Holland, with the qualification that the Court might with the consent of all the parties concerned declare the first marriage dissolved and permit the first husband to contract another marriage.¹ But for the *Generaliteitslanden* (that is the lands under the control of the States-General and not of any one of the Provinces) the *Echt-Reglement* of March 18, 1656, sec. 90, allowed a spouse whose husband or wife had been absent for five years to apply to the Court for leave to re-marry.² It has been said that this enactment 'may fairly be said to have been incorporated into the common law of South Africa',³ but whether this article in particular has been so incorporated remains undecided.⁴ It will be remarked that this licence to re-marry does not proceed upon a presumption of death and is distinct from a decree of divorce on the ground of malicious desertion.⁵

Judicial separation a mensa et thoro is decreed by the Court on the ground of cruelty or other unlawful conduct of the defendant rendering continued cohabitation dangerous or intolerable,⁶ or of malicious desertion.⁷ The

Judicial
separa-
tion.

¹ Voet 23.2.99 *in fin.*; Kersteman, *Woordenboek sub voce Dissolutie*; Lee, *Commentary*, p. 11.

² 2 *G.P.B.* 2444.

³ *Supra*, p. 27.

⁴ See *Est. Heinamann v. Est. Heinamann* [1919] A.D. at p. 114; *Ex parte Kerkhof* [1924] T.P.D. 711; 12 *Cape Law Journal* (1895), p. 165; Burge, 1st ed., vol. i, p. 151.

⁵ This appears clearly from the *Ontwerp* of 1920, sec. 422, which says that a marriage is determined by: 1. The absence of one of the spouses during ten years followed by another marriage of the other spouse consequent upon a judicial decree. 2. Divorce. 3. Death. But in English Law the Court is now empowered (Matrimonial Causes Act 1937, sec. 8) in such circumstances to make a decree of presumption of death and of dissolution of the marriage.

⁶ Gr. 1. 5. 20; Van Leeuwen, 1. 15. 3; Voet, 24. 2. 16; V.d.L. 1. 3. 9; *Wentzel v. Wentzel* [1913] A.D. 55; *Theron v. Theron* [1924] A.D. 244 (pre-nuptial misconduct of such a character as to render cohabitation unbearable); *Ainsbury v. Ainsbury* [1929] A.D. 109; *Cheek v. Cheek* [1935] A.D. 336; *Henry v. Henry* [1935] C.P.D. 224; *Allen v. Allen* [1935] C.P.D. 557.

⁷ 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.*

result is to relieve the parties from the personal consequences of marriage, but not to dissolve the marriage. As regards the effect of such a decree upon the proprietary rights of the spouses the Dutch authorities are by no means agreed.¹ In the modern practice the matter is very much in the discretion of the Court. 'The marriage remains in force with all its consequences except in so far as any of them may be modified by the decree. . . . The Court may determine as many of the incidents of the marriage contract as the justice of the case requires.'² An order is usually made, if asked for, directing a division of the common estate,³ or a rescission of any antenuptial 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 either spouse from liability for the other's debts subsequently contracted.⁵ Further, if the husband becomes insolvent, the wife ranks as a preferred creditor for half of the common estate.⁶ A decree of alimony for the wife lies in the discretion of the Court.⁷

Johnstone [1917] A.D. 292; *Aldred v. Aldred* [1929] A.D. 356; *Duncan v. Duncan* [1937] A.D. 310.

¹ Schorer *ad Gr.* 1. 5. 20; Voet, 24. 2. 17; V.d.K. 90; 1 Maasdorp, p. 88.

² *Wessels v. Wessels* (1895) 12 S.C. at pp. 470-1.

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

⁴ *Wessels v. Wessels*, *ubi sup.* at p. 469; 1 Maasdorp, p. 89. Forfeiture will be decreed of benefits not yet accrued, but not of benefits already accrued such as a completed gift. *Wessels v. Wessels*, at p. 470; *Muller v. Muller* [1929] W.L.D. 161; even though the contract has provided for the forfeiture of all benefits in the event of the spouses becoming separated or living apart. *Gordon v. Gordon* [1929] W.L.D. 165.

⁵ *Neale v. Neale* (1903) 20 S.C. 198; *Levin v. Levin* [1911] C.P.D. 1026; *Vincent v. Vincent* [1914] A.D. 379; *Banks v. Clement N.O.* [1921] C.P.D. 197.

⁶ *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.*

⁷ Voet, 24. 2. 15; 24. 4. 18.

An order for separation is sometimes made in terms of a consent paper to which the spouses are parties. But a decree will not be granted unless there is evidence which satisfies the Court that there are adequate grounds for the separation.¹ The better view seems to be that an extra-judicial agreement to live apart has no legal effect, unless, perhaps, to exclude an action for restitution of conjugal rights until the agreement has been annulled by a competent Court.² But if such agreement has been made for just cause, or if the Court has decreed a separation a mensa et thoro without giving any direction as to property, an incidental or subsequent agreement may be approved by the Court at the instance of the parties or in later contentious proceedings, although it involves a donation between the spouses or an alteration of their proprietary relations. Just cause means a cause which at the time of the agreement would have been sufficient to ground a decree for judicial separation.³ Until such agreement is absorbed in a decree of judicial separation it is effective only *inter partes*. It does not affect the rights of creditors.⁴

There is, no doubt, some inconvenience in determining retrospectively, it may be many years later, whether a just cause existed at the time of the agreement to separate, and in some Transvaal cases the question has been excluded as irrelevant.⁵ Apparently, in this Province an agreement to separate is *prima facie* valid, and will be sustained, if, and so far as, it does not constitute a prohibited donation between spouses⁶ or purport to alter 'the mutual proprietary relation whether of community

Separation by agreement.

¹ *Du Preez v. Du Preez* (1901) 18 S.C. 438; *De Villiers v. De Villiers* [1920] C.P.D. 301.

² *Botha v. Botha* (1848) 1 Menz. 259; *Stone v. Stone* [1917] C.P.D. 143.

³ V.d.K. 90; *Albertus v. Albertus' Exors.* (1859) 3 Searle at pp. 212-13; *Ex parte Roscoe* [1938] C.P.D. 126; *Lobley v. Lobley* [1940] C.P.D. 420.

⁴ Voet, 24. 2. 19; *Ziedeman v. Ziedeman* (1838) 1 Menz. 238.

⁵ *Pugh v. Pugh* [1910] T.S. 792; *De Beer v. De Beer* [1940] T.P.D. 230.

⁶ Voet, 23. 4. 59; *Albertus v. Albertus' Exors., ubi sup.* at p. 212; *Pugh v. Pugh, ubi sup.* at p. 802.

of goods or the reverse fixed as at the time of marriage'.¹ But it cannot be said that any consistent doctrine is yet established by the decisions.²

Perhaps the better view is that a judicial order of separation must be set aside by the Court before either party can sue for a restitution of conjugal rights;³ that no order for restitution may be made during the subsistence of an extra-judicial agreement of separation; and that claims for cancellation of the agreement and for restitution cannot be entertained in the same action.⁴

Spes
reconcili-
ationis.

A decree of separation with or without division of property is always provisional, being made, as the phrase is, sub spe reconciliationis, in the hope that the parties will be reconciled and come together again.⁵ This is why a South African Court refused to recognize a Scottish decree of separation expressed to take effect 'in all time coming'.⁶ If the spouses resume cohabitation the decree ceases to operate.⁷

The
Court's
power to
recall a
decree.

The Court must recall a decree of separation if the parties desire it,⁸ and may do so in its discretion for any sufficient cause. Thus, if one of the spouses has committed adultery and the innocent party desires a divorce, the Court has power to set aside a previous decree of separation together with any order as to the division of the joint estate. This may be more advantageous to the innocent

¹ *Per Murray J., De Beer v. De Beer* at p. 233; V.d.K. *Dictat. ad Gr. 3. 21. 11.*

² *Danovich v. Danovich's Exors.* [1919] T.P.D. 198 is inconclusive; *De Beer v. De Beer* to some extent leaves the question open.

³ *De Kock v. De Kock* [1942] O.P.D. 140 (*Yeld v. Yeld* [1919] C.P.D. 103 not followed).

⁴ *Grobler v. Grobler* [1943] O.P.D. 192. See also—judicial separation, *Smit v. Smit* [1909] T.S. 1067; *Slez v. Slez* [1913] W.L.D. 109; *Grinker v. Grinker* [1940] W.L.D. 236—voluntary separation, *Stone v. Stone* [1917] C.P.D. 143; *Crisp v. Crisp* [1934] W.L.D. 26; *Moses v. Moses* [1935] C.P.D. 24.

⁵ *Schorer ad Gr. 1. 5. 20*; *Lee, Commentary*, p. 20; *Banks v. Clement N.O.* [1921] C.P.D. 197; *Vincent v. Vincent* [1914] A.D. 379; *Levine v. Levine* [1939] C.P.D. 97.

⁶ *McNaught v. McNaught* [1937] W.L.D. 103.

⁷ *De Villiers v. De Villiers* [1938] C.P.D. 565.

⁸ *Van Zyl v. Van Zyl* [1925] T.P.D. 130.

spouse, who is entitled to ask for an order of forfeiture by the guilty spouse of any proprietary benefits derived from the marriage.¹

The Court will make a decree of nullity when the essential conditions of a valid marriage are wanting and the apparent 'marriage' was, therefore, void *ab initio*, or when the marriage is voidable at the suit of one of the parties to it or of a third party. Decree of nullity.

In particular the following grounds of nullity may be specified: (1) mistake as to the nature of the ceremony, as for example when one of the parties supposed it to be a ceremony of espousals, not of marriage;² (2) mistake as to the identity of the other party to the contract;³ (3) fraud or duress, if of a character to exclude genuine and free consent;⁴ (4) insanity or arrested mental development existing at the time of the ceremony;⁵ (5) immaturity (one or other parties below the age of marriage); (6) relationship within the prohibited degrees; (7) serious irregularity in the publication of banns, the issue of a licence, or the celebration of the marriage;⁶ (8) if the marriage was bigamous.⁷

In the above cases the marriage is void *ab initio*. There are other cases in which the marriage is not void, but voidable, viz. (9) in case of impotency existing antecedently to the marriage and since continuing;⁸ (10) in case

¹ *Yeld v. Yeld* [1919] C.P.D. 103; *Levine v. Levine, ubi sup.*

² *Benjamin v. Salkinder* (1908) 25 S.C. 512; *Rubens v. Rubens* (1909) 26 S.C. 617; *Kanatopsky v. Kanatopsky* [1935] E.D.L. 308.

³ Voet, 23. 2. 6. *Cod. jur. can. c.* 1083.

⁴ *Cod. jur. can. c.* 1087. For English Law see *Scott v. Sebright* (1886) 12 P.D. 21; *Cooper v. Crane* [1891] P. 369.

⁵ *Prinsloo's Curators v. Crafford* [1905] T.S. 669; *Cowan v. Beckworth*, 1932 (1) P.H., B. 1 (D. & C.L.D.); *Lange v. Lange*, 1945 (1) P.H., B. 8 [A.D.]. Voet adds (23. 2. 6) *si quis dum nuptias contrahit per ebrietatem plane mentis impos sit.* Cf. *Sullivan v. Sullivan* (1818) 2 Hagg. Con. at p. 246 *per* Lord Stowell.

⁶ *Foy v. Morkel* [1929] W.L.D. 174.

⁷ *Wells v. Dean-Willcocks* [1924] C.P.D. at p. 90.

⁸ Voet 24. 2. 15 and 16; *Wells v. Dean-Willcocks* [1924] C.P.D. 89; *Hunt v. Hunt* [1940] W.L.D. 55; (Ceylon) *Gunatileke v. Mille Nona* (1936) 38 N.L.R. 291; refusal to consummate, *Burgers v. Knight* [1916] N.P.D. 399.

of antenuptial stuprum followed by pregnancy of the wife unknown to the husband at the time of marriage and not subsequently condoned ;¹ (11) at the suit of a parent when a minor has married without parental consent.²

SECTION 6—MISCELLANEOUS MATTERS RELATING TO MARRIAGE

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

A. Dona-
tions be-
tween
spouses.

(A) *Donations between spouses.* In the Roman Law such gifts were prohibited by custom, and were regulated by a senatusconsultum of A.D. 206.³ The rule passed into the Roman-Dutch Law.⁴ It follows that a spouse-donee has no dominium and cannot give a valid title to third parties.⁵ But the prohibition does not affect reciprocal or remuneratory gifts⁶ and must not be harshly and unreasonably construed so as to apply to simple offices of affection ;⁷ and any gift between spouses if validly

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. 33.

² *Supra*, p. 58. For the grounds of a decree of nullity in S.Rh. see Matrimonial Causes Act, 1943, sec. 12.

³ Dig. 24. 1. 1 and 32 pr.

⁴ Gr. 3. 2. 9; Van Leeuwen, 4. 24. 14; Voet, 24. 1. 17; V.d.K. 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. Bodenstern, 34 *S.A.L.J.* (1917), p. 11 (commented upon 46 *S.A.L.J.* (1929), p. 149). Donations between spouses are permitted in Ceylon.

⁵ Voet, 24. 1. 3.

⁶ Voet, 24. 1. 10; Schorer *ad* Gr. 3. 2. 9; *Ex parte Bruton* [1938] C.P.D. 548.

⁷ Dig. 24. 1. 28, 2: non amare nec tanquam inter infestos jus prohibita 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.

executed, is confirmed by the death of the donor.¹ 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,² or the marriage has been dissolved by divorce.³

(B) *Boedelhouderschap*. In ancient times the community which existed between spouses was sometimes continued between a surviving spouse and the issue of the marriage, usually until the youngest child came of age. This institution, known as *boedelhouderschap*, depended upon local custom. It effected a general community between the surviving parent on the one side and the children on the other, but to the exclusion (generally) of acquisitions by way of inheritance or gift.⁴

B. Boedelhouderschap.

With the development of the system of Orphan Chambers in the fifteenth and sixteenth centuries this automatic community fell into disuse though it continued possible (as it still is in South Africa)⁵ to produce the same result by antenuptial contract, or by mutual will or by the separate will of the predeceasing spouse. It must be remarked, however, that in South Africa it is the practice to describe as *boedelhouder*—*boedelhoudster*—a surviving spouse, whom the first dying has appointed guardian of the minor children and administrator of the joint estate during their minority. But this, without more, does not amount to a continuation of the community or *boedelhouderschap* properly so-called.⁶

In Holland another type of *boedelhouderschap* some-

¹ Dig. 24. 1. 32, 2; Cod. 5. 16. 1; Voet, 24. 1. 4; if the donor dies solvent, *ibid.* see 6. As to confirmation see Lee, *Commentary*, p. 234; *Est. Phillips v. Comm. for Inland Revenue* [1942] A.D. 35; *Ex parte Est. Paterson* [1942] C.P.D. 541.

² Dig. 34. 5. 8 (9).

³ *Est. Curtis v. Gronningsaeter* [1942] C.P.D. 531.

⁴ Gr. 2. 13. 2; Lee, *Commentary*, p. 131; de Blécourt, pp. 118 ff.

⁵ *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.

⁶ *Weyer v. Est. Weyer* [1939] A.D. 126.

times occurred. It was penal in character and one-sided in operation, and took place if the surviving parent being at the same time guardian of the children failed to draw up an inventory or make to them an assignment or buy out their interest (noch aan dezelfven bewijs, vertigting of uitkoop doet). The consequence was that the community continued between the survivor and the children for the advantage of the latter who shared in profit, while all loss fell upon the surviving parent.¹

This penal boedelhouderschap is unknown to the law of South Africa.

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.² 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*.³ It is an enactment of Leo and Anthemius of the year A.D. 472, providing 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.⁴ A gift contrary to this law is void to the extent of the excess, and the excess must be equally divided among the children of the prior marriage or marriages alone.

This enactment need not detain us further, since in the modern law it has either never been received or has been repealed by statute.⁵

The penal boedelhouderschap mentioned above was one

¹ V.d.L. 1. 5. 4; *Maxwell & Earp v. Est. Dreyer* (1908) 25 S.C. at p. 730; *Vermaak's Exor. v. Vermaak's Heirs* [1909] T.S. 679.

² V.d.L. 1. 3. 10; and see Bijnk. O.T. i. 325.

³ Cod. 5. 9. 6 (*de secundis nuptiis*).

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

⁵ 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, 1863, sec. 3 (A); No. 7, 1885, sec. 3. In Ceylon the *lex hac edictali* has, apparently, never been recognized.

application of a general rule 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

In South Africa this security took the form of a notarial general bond over movables known as a *kinderbewijs*,² but now this is only used, when the surviving parent is unable to furnish the special hypothecation of immovable property required by statute.³ A defaulting parent 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.⁴

¹ Gr. 1. 9. 6-7; Voet, 23. 2. 100; V.d.K. 142 ff.; V.d.L. 1. 5. 4. *Rechts. Obs.*, part 1, no. 15; Boey, *Woordentolk, ad verb. Vertigting*.

² 2 Maasdoorp, p. 291; *Maxwell & Earp v. Est. Dreyer, ubi sup.*

³ Howard, *Administration of Estates* (6), p. 127.

⁴ Administration of Estates Act, 1913, sec. 56. Payment or security is not required if the estate is of less value than one hundred pounds. The duty of giving security cannot be remitted by the will of the deceased spouse. *Ex parte Pretorius* [1920] T.P.D. 297.

GUARDIANSHIP

Guar-
dianship.

IN the Institutes of Justinian under the titles of tutela and cura are considered two 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 (or twelfth) to the twenty-fifth birthday, and was also applicable to the case of insane persons and prodigals.

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 of minors has therefore disappeared.¹ But the terms tutor and curator are still retained to denote various cases of control.

In this chapter we 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

The
kinds of
guardians.

In the Roman Law three principal kinds of guardian were recognized: (1) *Tutores testamentarii*, i.e. guardians appointed to minors in power by the father or other male ascendant; (2) *Tutores legitimi*, i.e. the nearest agnatic (afterwards cognatic²) 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.

¹ Gr. 1. 7. 3 and Schorer ad loc.; Voet, 27. 10. 1; V.d.K. 111.

² Nov. 118, capp. 4-5 (A.D. 543).

In early Germanic Law testamentary guardians were unknown, but fathers sometimes, before their death, committed the care of their minor children to persons in whom they confided;¹ failing these, near 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 sovereign authority, 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 at the present day is vested in the Court.

Tutors
testamen-
tary.

The Roman-Dutch Law here, as elsewhere, has worked the principles of the Roman Law into the original 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

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 together⁴ with such testamentary guardian, or in substitution for him, particularly in the event of his death.⁵

Tutors
assumed.

¹ *Rechts. Obs.* pt. 4, no. 9; Fock. And., *O.N.B.R.*, vol. ii, pp. 221ff.

² 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*).

⁵ *Magt van surrogatie of substitutie*. Vide Boey, *Woordentolk*, *sub voce* Voogdye; V.d.L. 1. 5. 7; Administration of Estates Act, 1913, sec. 77.

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 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.¹ '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 consult the nearest relatives, and to choose the guardian from among 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 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 about 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

¹ Gr. 1. 7. 10. Sic vocantur quia ex quattuor avis et aviabus descendunt. V.d.K. *Dictat.* ad loc. But anciently the *vier vieren-deelen* were the groups constituted by the four pairs of great-grandparents and their descendants; de Blécourt, p. 475.

² Gr. 1. 7. 8; Voet, 26. 4. 4; V.d.K. 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 Fock. And. *O.N.B.R.* ii, 242; de Blécourt, p. 128.

functions were variously defined by the *keuren* of the towns. Strictly speaking, their authority was co-ordinate merely with that of the testamentary guardian, but they constantly tended to supervise,¹ and sometimes to encroach upon,² 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.³ 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.⁴ Even this did not always produce the desired result.⁵

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. Guardianship certainly does not exclude the parental power,⁶ but neither is it excluded by it. A surviving parent was not, as such, guardian of the property of his or her minor children,⁷ however much parental power might imply control of the person. Accordingly such parent, unless appointed by the deceased

Is a surviving parent ipso jure guardian?

¹ Gr. 1. 9. 2.

² Van Leeuwen, 1. 16. 3.

³ 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), except that a father or mother does not require letters of confirmation (sec. 73).

⁴ V.d.L. 1. 5. 2-3; V.d.K. 120.

⁵ 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.

⁶ Gr. 1. 7. 8.

⁷ Gr. *ubi sup.*; Voet, 26. 4. 4. But the parents had a prior claim to be appointed, and usually were appointed, to act concurrently with one or two other tutors dative. Gr. 1. 7. 11-12.

spouse¹ or by the Orphan Chamber or Court,² could not lawfully intermeddle with the estate.³ This seems somewhat harsh in the case of the father, who having been sole administrator of the minor's property during 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 lifetime⁵ 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

In South Africa the appointment of tutors dative is vested in the Master of the Supreme Court, subject to review by the Court.⁸ The same official confirms testa-

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. 37) 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), 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 *Van Rooyen v. Werner, ubi sup.*; *Joffe & Co. v. Hoskins* [1941] A.D. 431.

⁸ Administration of Estates Act, 1913, secs. 76 and 107.

mentary tutors,¹ and supplies casual vacancies in case of death, incapacity, or removal.²

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.³ A person so appointed is termed a curator nominate,⁴ and if a curator nominate is expressly empowered to appoint another to act in that capacity, such other becomes (after confirmation) a curator assumed.⁵

Curators
nominate.

Curators
assumed.

Curators dative are appointed by the Court (in South Africa upon the application of the Master or of some person interested) to insane persons or prodigals,⁶ and the master appoints curators dative to administer the property of persons absent from the Union and not otherwise represented.⁷ In case of minor disqualifications such as deafness, dumbness, or the like,⁸ the Court may appoint curators bonis whose functions will be limited by the requirements of the particular case.⁹

Curators
dative.

Curators
bonis.

¹ Administration of Estates Act, 1913, sec. 73.

² Ibid., sec. 78. ³ Voet, 26. 2. 5; V.d.K. 118; V.d.L. 1. 5. 2.

⁴ Ibid., sec. 71.

⁵ Ibid., sec. 77 (1).

⁶ 1 Maasdorp, pp. 309, 311. 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. 164-5) or as *Hofs- or Stads-kinderen* (V.d.L. 1. 5. 8).

⁷ Administration of Estates Act, 1913, sec. 80.

⁸ Gr. 1. 11. 2; *In re Rens* (1880) Foord 92; *Ex parte Van Dyk* [1939] C.P.D. 202; *Ex parte De Villiers* [1943] W.L.D. 16. 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. 168. *In re De Jager* [1876] Buch. 228; *Venter v. Venter* [1935] C.P.D. 27; *Bloomfield v. Bloomfield* [1942] C.P.D. 251. The marital power is suspended by the husband's insanity. V.d.K. 101.

⁹ Voet, 27. 10. 13; 1 Maasdorp, p. 311. 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 his 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 (Mental Disorders Act), sec. 62 (1).

Curators
ad litem.

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.¹

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 described.

SECTION 2—WHO MAY BE GUARDIANS

Some
persons
are dis-
qualified
from
being
guardians.

Van der Linden says that some persons are prohibited from being guardians, others may excuse themselves.² To the first class he assigns: (1) persons who are themselves subject to tutela or cura,³ with whom must be included all persons less than twenty-five (now twenty-one) years of age, although majority may have been anticipated by marriage or *venia aetatis*;⁴ (2) women, except a mother and grandmother, and they only so long as they have not contracted a second marriage;⁵ (3) creditors and debtors of the minor, if the debt is considerable and the Court sees fit to exclude them.⁶

To these the modern law adds: (4) any person who as witness has attested the execution of a will which appoints

¹ Van der Linden, *Judic. Prac.* 1. 8. 3.

² V.d.L. 1. 5. 1.

³ Gr. 1. 7. 6.

⁴ Voet, 26. 1. 5; V.d.K. 112. *Dhanabakium v. Subramanian* [1943] A.D. at p. 166. 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.

⁵ Gr. 1. 7. 6 and 11; Voet, 26. 1. 2; V.d.K. 114. In South Africa, by the Administration of Estates Act, 1913, sec. 83: (1) The provisions of this Act in regard to the election and appointments 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.

⁶ Grotius is silent on this point. Voet (26. 1. 5), 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.

such person guardian, and the wife or husband of such person.¹

The second class includes: (1) soldiers;² (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 could anyone claim exemption as of right. In fact, the whole matter lay in the discretion of the Court.³ In South Africa excuses are unnecessary, for guardianship is at the present day a voluntary office, which no one can be compelled to undertake against his will.⁴ This marks a departure from the Roman-Dutch common law, according to which anyone who was named guardian was bound to accept the office, unless excused, and in case of unwillingness could be compelled to undertake it by civil imprisonment.⁵

others may excuse themselves;

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:⁶ ‘The practice of guardians finding security is in our law fairly out of use, though where there are weighty reasons for doing so

(1) To find security;

¹ 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).

² 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.

³ Gr. 1. 7. 14; Voet, 27. 1. 12; V.d.K. 124.

⁴ 1 Maasdorp, p. 313; Administration of Estates Act, 1913, sec. 73 (2).

⁵ Gr. 1. 7. 15; Van Leeuwen, 1. 16. 5; V.d.L. 1. 5. 1.

⁶ V.d.L. 1. 5. 3. Cf. Gr. 1. 9. 1; Voet, 26. 7. 2; V. d.K. 134.

the Court may demand it.' But in South Africa, by the Administration of Estates Act, 1913, sec. 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.

(2) to
make an
inventory;

2. *Inventory.* Guardians must make a full inventory of the estate which they are to administer, or demand an inventory from a surviving parent.¹ In South Africa every tutor and every curator must make such inventory within thirty days² of the date of his entering on office. If a guardian fails herein, he is liable (besides other penalties)³ to removal; as he is, also, if he wilfully omits items of credit or inserts false items of debt.⁴ A surviving parent who, in preparing the inventory, fraudulently conceals any property forfeits his or her interest therein.⁵ 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.⁶ The inventory when complete must be delivered to the Orphan Chamber,⁷ the place of which is taken in South Africa by the Master of the Supreme Court.

(3) to
secure

3. *Securing minors' portions.* The next duty of the

¹ Gr. 1. 9. 3 and 8; Van Leeuwen, 1. 16. 6; Voet, 26. 7. 4; V.d.K. 135 ff.; V.d.L. *ubi sup.* The first dying parent may not dispense the survivor from the duty of preparing an inventory. V.d.K. 137.

² Administration of Estates Act, 1913, sec. 85.

³ *Ibid.*, secs. 108-9.

⁴ Voet, 26. 7. 5.

⁵ Gr. 1. 9. 4; V.d.K. 139; Administration of Estates Act, 1913, sec. 110.

⁶ 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. 140.

⁷ Gr. 1. 9. 3 and 8; V.d.K. 135 ff.

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,¹ or at all events gives security for future payment. 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 law.²

minors' portions;

4. *Maintenance and education.* All preliminaries being properly settled, it is the duty of the guardian to provide for the maintenance and education³ of the ward according to the directions of the father or mother, and failing such, to make suitable arrangements.⁴

(4) to maintain and educate the minors

The guardian must take care that his expenditure in this regard keeps 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.⁵

¹ Gr. 1. 9. 6; Voet, 23. 2. 100; *supra*, p. 99.

² In S.A. moneys must be paid over to the Master, if not required for the immediate payment of the debts of the estate or the immediate maintenance of the person to whom the money belongs, and in the case of a tutor testamentary or curator nominate subject to the terms of the will or deed. Administration of Estates Act, 1913, sec. 88. 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 Misdorp* [1928] 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. 114), notwithstanding a remarriage (Voet, 27. 2. 1).

⁴ Gr. *ubi sup.*; Voet, 27. 2. 1.

⁵ Voet, 27. 2. 2.

(5) to administer the property;

5. *Administration of the ward's property.*¹ 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*.² 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.³ He must preserve and secure the property,⁴ call in and enforce debts,⁵ invest in good securities,⁶ and meet the minor's liabilities as they fall due.⁷ When the guardianship comes to an end, the guardian must wind up the business of his office, and is deemed to remain guardian for the purpose.⁸ Where there are more guardians than one, they need not all act; but, whether he acts or not, each is responsible for the acts of every other.⁹

(6) not to alienate immovables without leave of Court.

6. *Alienation of property.* A guardian may, in due course of administration, sell¹⁰ or mortgage any movable property under his charge. But the alienation or hypothecation of immovable property, except by leave of the Court,¹¹ is prohibited. Such leave is only given after full

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

² 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. 157.

³ Voet, 26. 7. 6; 27. 2. 2.

⁴ Voet, 26. 7. 8.

⁵ Voet, *ibid*.

⁶ Gr. 1. 9. 10; 3. 26. 7; Van Leeuwen, 1. 16. 8; Voet, 26. 7. 10; V.d.K. 153-5; *Van der Byl & Co. v. Solomon* [1877] Buch. at p. 27 *per de Villiers C.J.* But now investments are usually made by the Public Debt Commissioners under Act 18 of 1911. *Ex parte The Master* [1927] T.P.D. 117; *Ex parte Lorentz N.O.* [1928] S.W.A. 153. The power of investment of natural guardians remains unaffected. *Wood v. Davies* [1934] C.P.D. at p. 256.

⁷ Voet, 26. 7. 7.

⁸ 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. 159.

⁹ Gr. 1. 9. 11; Voet, 26. 7. 1; V.d.L. 1. 5. 3 (*ad fin.*). Remuneration of guardians, *infra*, p. 115.

¹⁰ 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. 129.

¹¹ Gr. 1. 8. 6; Voet, 27. 9. 1. Application must be made in the first instance to the Court of the minor's domicile; if the property

inquiry, and it was usual to consult the nearest relatives.¹ The measures proposed must be necessary for payment of debts, maintenance, or marriage of the ward, or otherwise to his manifest advantage.² 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.³ Alienation includes any act of the guardian whereby a real right of the ward is in any way diminished, lost, or abandoned.⁴ 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.⁵ The same applies if the decree is shown to have been obtained from the Court by fraud.⁶

The prohibition of the sale of immovables is stated by Grotius to extend to money put out at interest and rents.⁷ Van der Keessel says that the same rule ought to be laid down in respect of public Dutch or foreign securities.⁸ Voet goes further and adds to the list all movables which are not perishable in their nature (*quae servando servari possunt*),⁹ as gold, silver, and jewellery, whereas perishable movables the guardian not only may sell, but must.¹⁰ 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).¹¹

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; *Ex parte Ford* [1940] W.L.D. 155. In Ceylon it has been held that a power to mortgage cannot be conferred by will. *Girigorishamy v. Lebbe Marikar* (1928) 30 N.L.R. 209.

¹ Voet, 27. 9. 7; and the weeskamer. V.d.K. 131.

² Voet, 27. 9. 7-8.

³ Voet, 27. 9. 2.

⁴ 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. at p. 402. But short leases are permitted and bind the ward even after majority. Sande, *Decis. Fris.* 2. 9. 22; Voet, 19. 2. 17.

⁵ Gr. 1. 8. 6.

⁶ Voet, 27. 9. 9.

⁷ Renten ende pachten. Gr. 1. 8. 6.

⁸ V.d.K. 130.

⁹ Cf. Cod. 5. 37. 22, 6.

¹⁰ Voet, 27. 9. 1.

¹¹ Gr. 1. 8. 5; Van Leeuwen, 1. 16. 8; V.d.K. 129; *Rechts. Obs.* ii. 13.

In the case of immovables too the sale must be by public auction.¹

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.

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 time 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.² 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.³

Ratification of void alienations.

An alienation void *ab initio* may be ratified on full age. Ratification is express or tacit.⁴ When ratification has

¹ Gr. I. 8. 6; Van Leeuwen, I. 16. 9.

² Voet, 27. 9. 10.

³ Voet, 27. 9. 13 (*ad fin.*).

⁴ Voet, 27. 9. 14.

taken place the transaction may, in Roman-Dutch Law, still be rescinded on the ground of *laesio enormis*,¹ but in the Cape Province and in the Orange Free State this is no longer law.²

7. *Accounts.* The guardian must render annual or other periodical accounts as required by law to the proper authority.³ If the testator has remitted this duty, the Court or other authority may none the less in its discretion insist upon it.⁴

(7) Guardian renders accounts;

8. *Representing the minor in Court.* A minor has no *persona standi in judicio*.⁵ He must therefore be represented or assisted by his guardian in any proceedings to which he is a party, whether as plaintiff or defendant.⁶ If the guardian is himself a party to the proceedings the ward obtains a *curator ad litem*.⁷ No doubtful action may be brought by a guardian in the name of the ward without previous sanction of the Court;⁸ otherwise, if the ward fails in the suit, the guardian will be ordered to pay the costs himself.⁹ In all other matters of importance too, says Van der Linden,¹⁰ the Court should be consulted.

(8) represents the minor in Court;

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.¹¹ By such contracts the wards acquire rights and incur liabilities. They may sue and be sued on the contracts entered into by their guardians,¹² saving,

(9) contracts in the name of the minor;

¹ Voet, *ibid.* (*ad fin.*); Cod. 4. 44. 2 and 8.

² See below, p. 234, n. 3.

³ Gr. 1. 9. 12; V.d.K. 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'.

⁴ Van Leeuwen, I. 16. 6.

⁵ Gr. 1. 7. 8; V.d.K. 127; V.d.L. 1. 5. 5.

⁶ Gr. 1. 8. 4; Voet, 26. 7. 12.

⁷ Gr. *ubi sup.*

⁸ Subsequent allowance affords the same protection. *Botha N.O. v. Tunbridge N.O.* [1933] E.D.L. at p. 108.

⁹ Voet, *ubi sup.*

¹⁰ V.d.L. 1. 5. 3. Cf. Gr. 1. 9. 2.

¹¹ Gr. 1. 8. 7; 3. 1. 30; Voet, 26. 9. 1-2.

¹² Gr. 1. 8. 8; V.d.K. 133; and see Cod. 5. 39. *Semble*, if a guardian contracting on behalf of his ward, has acted fraudulently (or

however, their right to *restitutio in integrum*, if they have been prejudiced thereby; which right they must prosecute within four (now three) years after attaining majority.¹ It seems that a guardian who has contracted *nomine pupilli* is himself alternatively liable to the other contracting party;² 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.³

(10)
authorizes
the
minor's
acts.

10. *Authorizing the minor's acts.* Finally, the guardian 'interposes his authority', that is, assists and represents the minor in all transactions, and in particular, as has been seen, represents 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.⁴ Where there are several co-tutors the authority of one alone is generally sufficient.⁵ If the guardian withholds his authority the Court will in a fit case compel it.⁶ A male or female minor upwards of fourteen or twelve years of age requires no authority to make a will,⁷ nor is a marriage contracted without authority of the guardian invalid.⁸

Thus far the powers, rights, and duties of the guardians of minors. Since the functions of the curators of lunatics

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.

¹ Cod. 2. 52 (53). 7 pr.; Voet, 44. 3. 6-7; *supra*, p. 49.

² Voet, 26. 9. 3; but generally only during the continuance of the guardianship. Cf. Cod. 5. 39. 1.

³ 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) and may compromise on behalf of their wards provided they do not thereby effect an alienation of the wards' property. V.d.K. 517.

⁴ Voet, 26. 8. 1.

⁵ Voet, 26. 8. 7.

⁶ Voet, 26. 8. 8, i.e. *moribus*. It was otherwise *jure civili*. Dig. 26. 8. 17.

⁷ Gr. 1. 8. 2.

⁸ Gr. 1. 8. 3; *supra*, p. 61.

and interdicted prodigals are generally similar,¹ 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 heirs² against the guardian and his heirs,³ and against each guardian *in solidum* (saving that on satisfaction by one the others are released), requiring him to render an account of his administration,⁴ to transfer everything which by virtue of the guardianship has come under his control,⁵ and to make good all losses caused to the minor by his bad management.

The *actio tutelae directa* and *contraria*.

The contrary action lies for the guardian and his heirs⁶ against the ward and his heirs to be indemnified for expenses and loss incidental to his office,⁷ and to recover a reasonable recompense for his time and trouble.⁸

In the Roman Law these actions lay only after the termination of the guardianship,⁹ but in the modern law they may be brought during its continuance.¹⁰

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*.

Extent of guardians' liability.

¹ Gr. 1. 11. 5; Voet, 27. 10. 5 ff.

² Voet, 27. 3. 4; also to the husband of a minor against her former guardians and in some cases to creditors.

³ Voet, 27. 3. 5; or other successors.

⁴ Voet, 27. 3. 7.

⁵ Voet, 27. 3. 8; including claims arising *ex contractu*. Gr. 3. 1. 38. 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.

⁶ Voet, 27. 4. 2.

⁷ Gr. 3. 26. 10; Voet, 27. 4. 3-7.

⁸ 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. 156.

⁹ Dig. 27. 3. 4 pr. and 27. 4. 1. 3.

¹⁰ Groen. *de leg. abr. ad* Dig. 27. 3. 4.

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.¹

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) an action 'for separation of accounts' (*rationibus distrahendis*);² (2) an action against the magistrate by whom the guardian had been appointed;³ (3) the *crimen suspecti*⁴ for the removal of guardians on the ground of misconduct actual or anticipated; (4) a tacit hypothec upon the guardian's estate.⁵

The action '*rationibus distrahendis*', which was as old as the Twelve Tables,⁶ applied only to those who during their administration had carried off something from the ward's estate.⁷ 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.⁸

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.⁹ Whether this action subsisted in the Roman-Dutch Law was much debated. Voet and others¹⁰ allowed it in case

¹ 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. 334; *Niekerk v. Niekerk* (1830) 1 Menz. 452.

² Dig. 27. 3. 1. 19; 27. 3. 2.

³ Dig. 27. 8. 1; Cod. 5. 75. 5.

⁴ Inst. 1. 26 pr.

⁵ Cod. 5. 37. 20 (Constantine, A.D. 314).

⁶ Dig. 26. 7. 55, 1.

⁷ Dig. 27. 3. 2.

⁸ Groen. *de leg. abr. ad* Dig. 27. 3. 2 and Cod. 9. 47 (*rubric*).

⁹ Inst. 1. 24. 2.

¹⁰ 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. 770.

of fraud or gross negligence. But the Orphan Chamber, at all events, was answerable for the moneys of minors committed to its keeping.¹

With regard to the removal of guardians the Court, as the upper guardian, has a wide discretion,² which it may exercise of its own motion or on the complaint of a co-guardian or near relatives of the ward.³ 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.⁴

Removal
of guar-
dians.

Lastly, wards had 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.⁵ By statute this legal hypothec was 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.⁶

The
ward's
tacit hy-
pothec.

SECTION 5—HOW GUARDIANSHIP ENDS

Guardianship is determined by the following events: viz. (1) the death of the minor; (2) the death of the guardian,⁷ in which case an assumed tutor (curator) (if any) or tutor (curator) dative replaces him; (3) majority, unless the Court decides that the ward is to remain under guardianship for some time longer;⁸ (4) marriage, unless the Court for weighty reasons orders that the guardianship is to con-

How
guardian-
ship ends.

¹ Decker *ad* Van Leeuwen, 1. 16. 4.

² Voet, 26. 10. 2.

³ Gr. 1. 10. 4; *The Master v. Edgecombe's Exors.* [1910] T.S. at p. 272.

⁴ Administration of Estates Act, 1913, sec. 84.

⁵ Gr. 2. 48. 16; Voet, 20. 2. 11 ff.; V.d.L. 1. 12. 2.

⁶ *Infra*, p. 197.

⁷ Gr. 1. 10. 1.

⁸ 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. 110.

tinue either absolutely or with respect to the immovable property of the ward;¹ (5) *venia aetatis*;² (6) arrival of time or cessation of purpose, when the guardianship was created for a limited time or purpose;³ (7) removal⁴ or release of the guardian by the Court; (8) absence of the ward⁵ for a prolonged period, such as furnishes a presumption of death, in which case his property is divided amongst testamentary or intestate heirs, security being given for its return in the event of the ward's reappearance;⁶ (9) (in South Africa) the insolvency of the guardian⁷ and, so far as concerns the property, of the ward.⁸

¹ 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 curatorship was not determined by her marriage in community.

² Gr. 1. 10. 3. But this does not carry the right to alienate immovables except by leave of the Court. *Supra*, p. 45. 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. 45.

³ Gr. 1. 10. 6.

⁴ Gr. 1. 10. 4; Voet, 26. 10. 1-4; V.d.K. 162; *The Master v. Edgecombe's Exors.* [1910] T.S. 263.

⁵ Gr. 1. 10. 5, and Schorer's note; V.d.K. 163.

⁶ *Supra*, p. 90, n. 7.

⁷ *Supra*, p. 117.

⁸ 1 Maasdorp, p. 340.

VI

UNSOUNDNESS OF MIND—PRODIGALITY

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 negative the transaction stands. This has been applied to a marriage contracted by a man against whom a lunacy order was still in force, who was found to have been at the time of marriage of sound mind and full understanding.² In the contrary event the transaction is wholly void³ for 'furiosus nullum negotium gerere potest, quia non intelligit quid agit'. 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

Unsoundness of mind.

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; *Est. Rehne v. Rehne* [1930] O.P.D. 80; *Pienaar v. Pienaar's Curator* [1930] O.P.D. 171.

² *Prinsloo's Curators v. Crafford, ubi sup.* In English law a lunatic so found by inquisition is incapable of marriage. Hailsham xvi, sec. 844. This is perhaps the only case in which the law recognizes a status of insanity.

³ Inst. 3. 19. 8; Gr. 3. 1. 19; (Ceylon) *Soysa v. Soysa* (1916) 19 N.L.R. 314.

⁴ As to drunkenness see Gr. 3. 14. 5; Voet, 18. 1. 4; *Manning & Wax v. Heathcote's Trustee* [1915] E.D.L. 81; *Essakow v. Galbraith* [1917] O.P.D. 53.

behalf of a lunatic to have his expenses recouped.’¹ (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 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.’²

Inter-
dicted
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.³

¹ *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.

² *Ibid.* at p. 563. The P.C. judgment in Appeal is reproduced in 26 N.L.R. 423.

³ Gr. 1. 11. 4; Voet, 27. 10. 6 *seq.* As to marriage and consent to the marriage of their children *vide supra*, p. 61, n. 1.

VII

JURISTIC PERSONS

To enter upon a detailed discussion of this topic lies outside our scope. Not to speak of the *fiscus* (imperial treasury) and municipalities, which belong principally to the sphere of public law, the later Roman Law, more or less consciously, attributed an artificial personality to: (1) Corporations (*corpora* and *universitates*); (2) Foundations (*piae causae*).¹ These reappear in the Law of Holland.² In the modern law we no longer attribute personality to unincorporated foundations, the only personality which comes in question being that of the trustees in whom the trust property is vested;³ while the rights, duties, and powers of corporations are most often defined by the terms of some general or special statute.⁴ 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 persons, on the other hand this general proposition receives a necessary limitation both from the mere fact of their artificial personality and 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 a body

Juristic persons.

Corporations: their nature and capacity;

¹ Goudsmit, *Pandecten-Systeem*, vol. i, pp. 61 ff.; Buckland, *Textbook of Roman Law*, p. 307; P. W. Duff, *Personality in Roman Law*.

² Fock. And., vol. i, p. 140; de Blécourt, pp. 89 ff.

³ In Ceylon the English law of corporations was introduced by Ord. No. 22 of 1866. This left no place for the *pia causa* as a distinct juristic entity. See *Sadhananda Terunanse v. Sumanatissa* (1934) 36 Ceylon N.L.R. 422, where the statement in the text was accepted as correct. For *piae causae* in the old law see Fock. And., *O.N.B.R.*, vol. i, p. 147; and de Blécourt, p. 92. A legal *persona* of this character constituted under German Law 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.

⁴ See for S.A. The Companies Act (46 of) 1926, amended by Acts No. 11 of 1932 and 23 of 1939.

how
created;

of individuals (its governing body) or through other persons or groups of persons properly authorized, whether permanently or for the particular work in hand. Corporations derive their existence from the State, through 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; or through being recognized by the Legislature without special creation.¹

how dis-
solved.

A corporation 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;² (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.

¹ The decision in *Morrison v. Standard Building Society* [1932] A.D. 229 does not go further than this. (Registered Building Societies are now incorporated by the Building Societies Act, 1934, and no unregistered society may carry on business.) There are, no doubt, other cases in which the Court has attributed some of the consequences of juristic individuality to unincorporated bodies, not too happily termed 'voluntary corporations'; thus, lately, to 'The Salem Party of Settlers' (*Ex parte Gardner* [1940] E.D.L. 175). In the present state of the law it is not possible to say when an association is a 'voluntary corporation'. Prof. Wille says that it becomes such 'by virtue of its having exercised, for a substantial period, the essential characteristics of a corporation' (*Principles*, p. 113). But I have not found any suggestion of this in *Morrison's Case*. See, further, *Leschin v. Kovno Sick Benefit Society* [1936] W.L.D. 9.

² Dig. 3. 4. 7, 2.

BOOK II
THE LAW OF PROPERTY

BOOK II

INTRODUCTION

The 'Law
of Things'.

THE Roman institutional writers make the Law of Things the second division of the *Jus Privatum*. Under this head are included: (1) Ownership, and Modes of Acquisition; (2) Proprietary rights less than ownership, such as Servitudes; (3) Inheritance; (4) Obligations. What the common element is which makes these topics all referable to one 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 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 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 of: 1. The meaning of ownership; 2. The classification of things; 3. How ownership is acquired; 4. The incidents and kinds of ownership; 5. Possession; 6. Servitudes; 7. Mortgage or Hypothec.

¹ Moyle, *Justinian's Institutes*, 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.*

I

THE MEANING OF 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 others he is sole owner.⁴ Where all these rights are vested in two or more persons to the exclusion of 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 far, vested not in me but in you. But since to speak of us both as owners

Dominion
or Owner-
ship.

Full
ownership
and
qualified
owner-
ship.

¹ Holland, *Jurisprudence*, 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 re aliena* (servitudes, hypothec, &c.) and *jura in personam* (obligations).

⁴ Gr. 2. 3. 10.

⁵ Gr. 2. 3. 11; 2. 33. 1.

Jura in re
aliena.

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 *dominium* remains in me, but in the two last, being reduced to a mere shadow, at all events for the time, it is 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 a wider sense; for he includes under it both *dominium* (*stricto sensu*) which he distinguishes as *volle eigendom—dominium plenum*, and *jura in re aliena* which he distinguishes as *gebreckelicke*

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.

*eigendom—dominium minus plenum.*¹ In the following pages when we use the word 'ownership' we 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

THE 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 cannot be owned either by individuals or by corporations. Thus, the air is not susceptible 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

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 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

Rivers are either public or private. Public rivers are such as flow perennially;⁶ rivers which do not flow perennially are private. But a public river does not become private merely from having dried up in one summer.⁷ Private rivers are matter of private right and call for no further reference in this place. Public rivers are *publici juris*. As

¹ Inst. 2. 1. 1.

² Dig. 43. 8. 3 pr.

³ *Surveyor-General (Cape) v. Est. De Villiers* [1923] A.D. at p. 594 *per Innes C.J.* In South Africa the Sea-shore Act, 1935, sec. 3 (1) declares the Governor-General to be the owner of the sea-shore. Sec. 13 reserves the rights of the public. 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; *Pharo v. Stephan* [1917] A.D. 1; (Ceylon) *Fernando v. The Kalutara Police* (1943) 45 N.L.R. 49; and now in S.A. by statute: 'Sea-shore means the land situated between low-water mark and high-water mark.' 'High-water mark means the highest line reached by the sea during ordinary storms occurring during the most stormy period of the year, excluding exceptional or abnormal floods.' 'Low-water mark means the lowest line to which the sea recedes during periods of ordinary spring tides.' Sea-shore Act, 1935, sec. 1.

⁶ Dig. 43. 12. 1, 3.

⁷ 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. 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 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 v. Carter* [1917] A.D. at p. 377.

Regalia.

such they cannot be privately owned, but may be used and enjoyed by all members of the community for navigation or fishing.¹ Amongst public rivers the Roman-Dutch Law, following the feudal law, distinguished further between: (1) navigable rivers and their tributaries, (2) other public rivers.² The former class fell under the head of regalia,³ with the result that fishing in navigable rivers and other inland navigable waters was not permitted without licence from Government.⁴ This distinction is of little or no importance at the present time, for in the modern law the prerogative of the Crown extends to all public rivers and streams.⁵ 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.⁶

¹ Voet, 1. 8. 8.

² This distinction appears already in the Roman Law in connexion with the topic of leading water. Dig. 43. 12. 2; Voet, 1. 8. 9 (*ad fin.*).

³ Lib. Feud. II. 55 (56) (constitution of Frederick I of 1158); Gudelinus, *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 Rechtsgeleertheit*, 2. 1. 17-19; Voet, 1. 8. 8 and 9 (*ad fin.*); 49. 14. 3.

⁴ 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 F. A. Holleman, *Rechtsgeschiedenis der Heerlijke Veren in Holland*, a thesis presented for the degree of *doctor juris*, Leiden, 1928.

⁵ This seems a legitimate inference from *Van Niekerk's case*. By Dutch Law *regalia*, speaking generally, were inalienable (*Resolutie van de Staten van Hollandt*, 15 September, 1620, 3 *G.P.B.* 734); 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).

⁶ Dig. 43, *tits.* 12 and 13.

The phrase *res nullius* is used in the Roman Law in three distinct senses:¹ (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*;² (3) Things ownable, but unowned, are *res nullius*³ 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 individuals or by the State.⁴

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.⁵ 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.

THINGS ACCORDING TO THEIR NATURE. Things are further classified according to their nature as corporeal and incorporeal.⁶ Corporeal things can be touched, e.g. land, houses, cattle, clothes.⁷ Incorporeal things consist in a right, as servitude, inheritance, obligations, debts, actions, rents.⁸

Again, things are divided into immovables and movables.⁹ This is properly a classification of corporeal things; but in law most incorporeal things are deemed

¹ See Kotzé's *Van Leeuwen*, vol. i, p. 148 (translator's note).

² Voet, 1. 8. 1.

³ Inst. 2. 1. 12; Gr. 2. 1. 50-2.

⁴ Gr. 2. 1. 15; Van Leeuwen, 2. 1. 9; Groen. *de leg. abr. ad Inst.* 2. 1. 8 and 9; *Cape Town Waterworks Co. v. Elders' Exors.* (1890) 8 S.C. 9.

⁵ 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.

⁶ Gr. 2. 1. 9; Voet, 1. 8. 11.

⁷ Gr. 2. 1. 10.

⁸ Gr. 2. 1. 14; Voet, 1. 8. 18.

⁹ Gr. 2. 1. 10; Voet, 1. 8. 11.

What things are classed as immovables.

to be comprised under immovables or movables.¹ 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.² 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. Immovable³ things and things deemed to be immovable are: (1) land and houses;⁴ (2) things naturally or artificially annexed to or associated with land and houses⁵ (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);⁶ (3) praedial servitudes;⁷ (4) personal servitudes over immovables;⁸ (5) actions in rem directed to the recovery of immovables;⁹ (6) annual rents charged on land;¹⁰ and (7) in the modern law, leases of immovable property so far as they create rights in rem;¹¹ (8) other real rights over land

¹ Voet, 1. 8. 18; *Ex parte Master of the Supreme Court* [1906] T.S. 563.

² Voet, 1. 8. 29; V.d.K. 178-9; *Ex parte Cronwright's Exors.* [1938] C.P.D. 236.

³ Ontilbaer ofte onroerbaer; res immobiles.

⁴ Gr. 2. 1. 12.

⁵ Gr. 2. 1. 13: Wat aerd- ofte naghel- vast is, werd ghehouden als een gevolg van het ontillbare; 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.

⁶ Voet, *ubi sup.*

⁷ Voet, 1. 8. 20.

⁸ Voet, *ibid.*

⁹ Voet, 1. 8. 21.

¹⁰ Voet, 1. 8. 24.

¹¹ *Collins v. Hugo* (1893) Hertzog 176 *per* Kotzé J.; *Ex parte Master of the Supreme Court* [1906] T.S. 563; *infra*, p. 161. By the Deeds Registries Act No. 47 of 1937, sec. 102, 'immovable property' includes:

(a) Any registered lease of rights to minerals; and (b) any registered lease of land which, when entered into, was for a period of not less than ten years or for the natural life of the lessee or any other person mentioned in the lease, or which is renewable from

and houses.¹ Mortgages, even of land, are classed as movables, the mortgage being considered as merely accessory to a principal and personal obligation, whose nature it, therefore, follows.²

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 due³ (this includes money destined to be laid out in land,⁴ or arising from the sale of land);⁵ (3) securities for money (including mortgages of immovable property);⁶ (4) personal servitudes over movables;⁷ (5) actions in personam and actions in rem directed to the recovery of movables;⁸ (6) annual rents not charged on land;⁹ (7) shares in a company;¹⁰ (8) 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.

What things are classed as movables.

The legal consequences and therefore also the importance of the distinction of things as immovable or movable are principally the following:¹¹ (1) in relation to the Conflict of Laws immovables generally follow the *lex loci rei sitae*, movables generally following the *lex domicilii*;¹² (2) immovables require special formalities of alienation or hypothecation;¹³ (3) special rules apply to the alienation

The importance of the distinction between immovables and movables.

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.

¹ *Rosen v. Rand Townships* [1939] W.L.D. 5.

² Voet, 1. 8. 27. *Eaton v. Registrar of Deeds* (1890) 7 S.C. at p. 255—perhaps not always. *Union Govt.; v. Fisher's Executrix* [1921] T.P.D. 328.

³ Voet, 1. 8. 22.

⁴ Voet, 1. 8. 15.

⁵ Voet, 1. 8. 16.

⁶ Voet, 1. 8. 27.

⁷ Voet, 1. 8. 20.

⁸ Voet, 1. 8. 21. According to Van der Keessel (*Th.* 179) an action on a kusting-brief (*infra*, p. 203) is an immovable.

⁹ Voet, 1. 8. 24.

¹⁰ Act 46 of 1926, sec. 32 (1).

¹¹ Voet, 1. 8. 30.

¹² Paul Voet, *De mobil. et immobil. natura*, cap. xxiii, secs. 1 and 3.

¹³ *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.

of the immovable property of minors;¹ (4) the process of execution upon immovables differs from the process of execution upon movables.²

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,³ but is, nevertheless, as we have seen, in other respects classed with movables.

Fixtures.

As to things annexed to land or houses, or what are commonly called fixtures, the question whether they have become immovable through annexation by human agency depends upon the circumstances of each case. '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'; and 'the intention required (in conjunction with annexation) to destroy the identity, to merge the title, or to transfer the *dominium* of movable property must surely be the intention of the owner'.⁴

¹ *Op. cit.*, cap. xviii, sec. 1; *supra*, pp. 49, 110.

² *Op. cit.*, cap. xx, sec. 7; Van der Linden, *Verhandeling over de Judicieele Practijc*, 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; *Hart v. Lennox* [1926] W.L.D. 219. As to the incapacity of a guardian to take immovable property under the will of his ward see below, p. 364. The distinction is also of importance in insolvency, in construing wills, contracts and mortgages, and in determining the incidence of transfer duty, rates and taxes.

³ Voet, l. 8. 27.

⁴ *Macdonald Ltd. v. Radin N. O. & Potchefstroom Dairies* [1915] A.D. at pp. 466-7 *per* Innes C.J.; *Gault v. Behrman* [1936] T.P.D. 37; (*Ceylon*) *Tissera v. Tissera* (1940) 42 N.L.R. 60.

III

HOW OWNERSHIP IS ACQUIRED

IN this chapter we 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 now concerned—are principally the following: viz. (1) occupation; (2) accession; (3) specification; (4) tradition or delivery; (5) prescription. We shall speak of these in order. Since the Dutch treatment 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 the attention to some particulars in which the Roman-Dutch Law presents features of peculiar interest.

Modes of acquisition of corporeal things.

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 *inter alia* to: (1) wild beasts, birds, and fishes;² (2) enemy goods;³ (3) abandoned things (*res derelictae*);⁴ and, in short, to every ownable thing which either never has been owned or having once been owned is owned no longer.⁵

Occupation.

With regard to wild animals the Dutch Law departed

Wild animals.

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; *Lamont v. Heyns* [1938] T.P.D. 22. 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; *Mshwakezele v. Guduka* (1903) 18 S.C. 167.

⁴ *Inst.* 2. 1. 47.

⁵ *Gr.* 2. 1. 50.

in many particulars from the law of Rome. It is, however, unnecessary to recall the obsolete feudal customs and game laws which formed part of the old law.¹ Such matters are now regulated by 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 suggest that the rule 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 If after proper inquiry the owner is not found, the finder of a thing may retain it, but the full prescriptive period of thirty years must elapse before he can claim to remain in possession as owner.⁷ Wreckage is separately treated.

Lost
property.

Wreckage.

This 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 within a year and six weeks,⁹ and the owner must bear

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), 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. For the Union see Blaine's *Consolidated Index to Statute Law, sub voce* 'Game', and for Southern Rhodesia *Revised Statutes*, cap. 187.

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.* Modern Codes (*B.G.B.* 960, *Code Civil Suisse* 719) follow the Roman Law. ⁵ Voet, 41. 1. 9; V.d.K. 189; V.d.L. 1. 7. 2.

⁶ Inst. 2. 1. 48 (*ad fin.*).

⁷ Voet, *ubi sup.*; V.d.k. 189.

⁸ Gr. 2. 4. 36. There was much legislation. Lee, *Commentary*, *ad loc.*

⁹ 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

the cost of salvage.¹ If the wreckage remains unclaimed, it belongs not to the finder, but to the fiscus.²

Treasure in Roman Law went, as a rule, half to the finder, half to the owner of the land where it was found,³ and, therefore, if found by the owner of the land, wholly to the finder. In Holland it was matter of controversy whether treasure followed the rules of the Roman Law or went to the Count or public chest. Grotius,⁴ who is charged with official bias,⁵ leaves the question open. Groenewegen decides against the Treasury;⁶ and this view has prevailed.⁷

Where several persons are interested in the same land, e.g. as dominus and usufructuarius, mortgagor and mortgagee, vendor and purchaser (before delivery), the question may well arise who is entitled to the owner's share.⁸ The reader will find the matter considered by Voet in his commentary, lib. xli, tit. 1.

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,

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. 45; *Crooks & Co. v. Agricultural Co-op. Union* [1922] A.D. 423. ¹ V.d.L. 1. 7. 2 (*bergloon*).

² Grotius (*ubi sup.*) adds 'but may easily be redeemed'. See also V.d.K. 193-7. For Ceylon Law see Ord. No. 4 of 1862, sec. 2; *Pereira*, p. 343.

³ Inst. 2. 1. 39; Dig. 41. 1. 31, 1; 49. 14. 3, 10; Cod. lib. x, tit. 15.

⁴ Gr. 2. 4. 38.

⁵ He was appointed advocate fiscal in 1607 and pensionaris of Rotterdam in 1613.

⁶ Groen. *de leg. abr. ad* Inst. 2. 1. 39, sec. 4.

⁷ Voet, 41. 1. 11; *Vinnius ad* Inst. 2. 1. 39 *in fine*; V.d.K. 198. In Ceylon by Ord. No. 17 of 1887, sec. 2, all 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.

⁸ Voet, 41. 1. 12.

with no certain voice.¹ In the modern law such matters are regulated by statute.²

Accession. II. Accession is a mode of acquiring ownership whereby a thing becomes the property of a person by being physically or intellectually associated with some other thing of which such person is already owner.³ 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'.⁴ 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';⁵ so that, e.g. precious stones adhere to a silver plate in which they are set; or we may say that the principal thing is the thing which maintains its independent existence whether the other thing is joined to it or not.⁶

Cases of accession. Accession comprises *inter alia* the following modes of acquisition: viz. (1) alluvion;⁷ (2) island rising in a river;⁸ (3) change of river-bed;⁹ (4) industrial attachment (*ad-junctio*);¹⁰ (5) planting¹¹ and sowing.¹² Details will be noticed only so far as the Roman-Dutch Law presents features of peculiar interest.

Alluvion. Alluvion is defined as a 'latent increment, whereby something is added to land so slowly that it is impossible

¹ Voet, 41. 1. 13, and see 49. 14. 3.

² For Ceylon Law see Ord. No. 5. of 1890 and Pereira, p. 286.

³ Voet, 41. 1. 14; V.d.L. 1. 7. 2.

⁴ Gr. 2. 9. 1; *Aldine Timber Co. v. Hlatwayo* [1932] T.P.D. 337.
⁵ Dig. 34. 2. 19, 13.

⁶ Dig. 6. 1. 23, 5; 41. 1. 26 pr.

⁷ Inst. 2. 1. 20.

⁸ Inst. 2. 1. 22.

⁹ Inst. 2. 1. 23.

¹⁰ 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*); *Cooper v. Jordan* (1884) 4 E.D.C. 181 (wheels annexed to wagon).

¹¹ Inst. 2. 1. 31; *Secretary for Lands v. Jerome* [1922] A.D. at p. 117.

¹² Inst. 2. 1. 32.

to say how much is added at any one moment'.¹ 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.²

In the Netherlands the law of alluvion was very unsettled, and varied from province to province.³ According to one view alluvion, being an incident of rivers, fell under the head of *regalia*.⁴ '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.'⁵ On principle the claim of prerogative must be limited to navigable public rivers, these alone falling under the head of *regalia*.⁶ 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,⁷ or by Voet⁸ except in the case of *agri limitati*.⁹ Grotius declares the claim of the Count in this case to be undoubted.¹⁰ Beyond this he expresses no certain opinion.

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.¹¹ The result is the same when a navigable public river wholly abandons its course. The deserted river-bed belongs to the Crown.¹²

¹ Inst. 2. 1. 20.

² Gr. 2. 9. 13; Voet, 41. 1. 15.

³ Gr. 2. 9. 18 ff.; Van Leeuwen, 2. 4. 2.

⁴ *Cens. For.* 1. 2. 4. 12; Groen. *de leg. abr. ad Inst.* 2. 1. 23; Bort, *Tractaet van de Domeynen van Hollandt*, cap. 5, secs. 16 ff.

⁵ Vinnius *ad Inst.* 2. 1. 20, sec. 2, following Gr. 2. 9. 26; Van Leeuwen, 2. 4. 4.

⁶ But see above, p. 130.

⁷ *Cens. For. ubi sup.*

⁸ Voet, 41. 1. 28.

⁹ i.e. 'defined by straight lines, having no necessary relation to natural features, as was usual in grants by the State.' Buckland, p. 211.

¹⁰ Gr. 2. 9. 25.

¹¹ Voet, 41. 1. 17; Vinnius *ad Inst.* 2. 1. 22, sec. 7; Schorer *ad Gr.* 2. 9. 24; Van Leeuwen, 2. 4. 2.

¹² Voet, 41. 1. 18: *moribus nostris magis est ut alveus fluminis desertus fisco cedat*. The same holds good of the beds of public

But a partially abandoned river-bed accedes to riparian owners provided that they have the right of alluvion.¹

Inunda-
tion.

If land is covered by flood it does not therefore cease to belong to its owner, who may resume possession when the flood abates.² 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,³ he might do by fishing merely), the land was held to be abandoned and to go to the Count.⁴ It is scarcely necessary to add that intermittent floods do not affect the ownership of property without evidence of abandonment.⁵ 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

Sand
drift.

lakes. Voet, 41. 1. 18. Cf. 1 *G.P.B.* 1252; and see Bort, *Domeynen van Hollandt*, cap. 5, secs. 38 ff.

¹ 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. 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 (*supra*, p. 130, n. 5). It is interesting to note that 'the Roman-Dutch Law that riparian owners only own to the edge of the stream is the present law of New York. . . . The survival of this law has resulted in litigation with reference to the bed of the Hudson River.' Prof. H. Milton Colvin in *Mémoires de l'Académie internationale de Droit comparé* (Sirey, Paris, 1934, vol. ii, pt. ii, p. 136). The Dutch were in occupation from 1624 to 1664.

² *Inst.* 2. 1. 24.

³ *Dig.* 7. 4. 23. The text is not altogether in point, but it is cited in this connexion.

⁴ *Gr.* 2. 9. 7; Voet, 41. 1. 19; Vinnius *ad Inst.* 2. 1. 24, sec. 2.

⁵ *Gr.* 2. 9. 8.

accession the property of the owner of the adjoining waste and sand-hills, i.e. usually the property of the fiscus.¹

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 house.² By a rule which dates from the XII Tables, the last-named person, at all events if the material was *res furtiva*, was answerable to the owner for double value (*actio de tigno juncto*).³ In Dutch Law the double penalty was not admitted, but the owner of the material had his action for damages.⁴

Inaedificatio.

Voet brings acquisition of fruits under the general head of accessio. It is more often treated as a distinct title. But on a careful analysis it appears that the various cases of acquisition of fruits cannot be referred to a single principle. The usufructuary acquires by perceptio, i.e. by taking, the emphyteuta and bona fide possessor by separatio, the lessee by a kind of traditio.⁵

Acquisition of fruits.

III. Specification is a separate mode of acquisition. The *media sententia* adopted by Justinian⁶ is an unsatisfactory solution. The French code does better by discarding the test of reducibility, and assigning the ownership to the specifier, when the value of the work far exceeds the value of the material.⁷

Specification.

IV. Tradition or Delivery⁸ 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.⁹ 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

Tradition or delivery.

¹ Gr. 2. 9. 6; Voet, 41. 1. 20. No ultimate authority has been found for this statement.

² Inst. 2. 1. 29-30.

³ Dig. 47. 3. 1; 24. 1. 63; 6. 1. 23, 6; 10. 4. 6.

⁴ Gr. 2. 10. 7; Groen. *de leg. abr. ad Inst.* 2. 1. 29; Voet, 47. 3. 2.

⁵ Girard, p. 344; Buckland, *Textbook*, p. 221.

⁶ Inst. 2. 1. 25.

⁷ C.O. Arts. 570, 571.

⁸ *Leevering ofte opdrachte*. Gr. 2. 5. 2.

⁹ Voet, 41. 1. 34.

you.¹ 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'.² The same consequence follows if an agent who holds goods for A receives directions to hold them for B. 'The effect of such change of custody is to constitute delivery to such third person.'³ 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'.⁴ An alleged agreement of the sort is regarded by the Courts with some suspicion and disfavour. 'A process by which a change of *dominium* may depend upon a mere change of mental attitude is one the application of which should be carefully scrutinized.'⁵ In both the above cases the tradition is said to be 'feigned' or 'fictitious'; and so it is too

'Fictitious'
tradition.

¹ Inst. 2. 1. 44; Dig. 41. 2. 9, 5. Cf. Dig. 12. 1. 9, 9; 12. 1. 10.

² Gr. 2. 5. 11; Voet, 41. 1. 34; *Meintjes v. Wilson* [1927] O.P.D. 183.

³ *Court v. Mosenthal & Co.* (1896) 13 S.C. at p. 153; *B.G.B.* 931.

⁴ This is still recognized 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.

⁵ *per Innes C.J. in Goldinger's Trustee v. Whitelaw & Son, ubi sup.* at p. 74.

⁶ Dig. 46. 3. 79; *Groenewald v. Van der Merwe, ubi sup.* at p. 239; *Xapa v. Ntsoko* [1919] E.D.L. 177; *Kaal Valley Supply Stores v. Louw* [1923] O.P.D. 60.

⁷ Inst. 2. 1. 45; Dig. 41. 1. 9, 6. Papinian (Dig. 18. 1. 74) says 'apud horrea'.

process, for handing over the keys is the best means of giving control over and therefore possession of the warehouse and its contents.¹ In other words, the possessor of the keys is *prima facie* also possessor of the building.

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.² Ratification is equivalent to antecedent authority.

2. The transferor must have the intention of transferring ownership³ *ex justa causa*.⁴ Such intention is absent when a person transfers his own property in error, supposing that it is the property of another person.⁵

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.⁶

¹ Savigny, *Das Recht des Besizes*, book ii, sec. 16; C. H. Monro on Dig. xli, 1, Appendix 1.

² 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.

³ Inst. 2. 1. 40.

⁴ 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. 3 pr.: *Nunquam nuda traditio transfert dominium sed ita si venditio aut aliqua justa causa praecesserit propter quam traditio sequeretur*. See *Beyers v. McKenzie* (1880) Ford at p. 127. The *causa* need not literally precede. It may be simultaneous with the tradition.

⁵ Dig. 41. 1. 35: *nemo errans rem suam amittit*.

⁶ *Supra*, pp. 49 and 115. 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. 199-200; and the learned judgment of Berwick D.J. (Ceylon), in Ramanathan, 1872-6, 7, p. 89 (repeated in 3 N.L.R. 282). More recent cases—*Punchi Banda v. Perera* (1928) 30 N.L.R. 355; *Deutrom v. Deutrom* (1935) 37 N.L.R. 91. 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. 220.

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.¹

5. The transferee must have the intention of becoming, and must be competent to become, owner in consequence of the transfer.²

Transfer
of immov-
ables 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 delivery.³ But in Roman-Dutch Law it was otherwise. Custom, in its many varieties, demanded something more to perfect a title to land.⁴ In parts of Holland, as of Germany,⁵ the conveyance was required by local law to be passed before the Court of the district in which the land was situated.⁶ This practice was made general and obligatory by a *placaat* of

¹ *Res incorporales*. Dig. 41. 1. 43, 1.

² 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. The special rules of law relating to the transfer of ownership in things sold are considered in a later chapter.

³ i.e. when *traditio* superseded *mancipatio* in sale of lands. But publicity was required and, in practice, a written instrument. Buckland, *Textbook*, p. 231.

⁴ Fock. And., vol. i, pp. 192 ff.; de Blécourt (5), pp. 225 ff.

⁵ Gierke, *Deutsches Privatrecht*, ii. 271.

⁶ Gr. 2. 5. 13; Voet, 41. 1. 38; V.d.K. 202; *Rechts. Obs.*, pt. 3, no. 32. In the old law the person making cession of the land symbolizing 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. 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.

the Emperor Charles V of May 10, 1529,¹ 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. 157), 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 the case of feuds, which may be granted in the feudal Court according to ancient custom. Later placaaats of the States of Holland imposed a duty of the fortieth penny (2½ per cent.) on all transfers for value² (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.³ Failing compliance with either of these conditions, the transaction was null and void.⁴ 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 at the present day.⁵ In South Africa the only important change that has taken place consists in the creation of a Deeds Registry, which supervises all transfers of land and exercises the functions formally vested in the Court.⁶

Placaat of Charles V of May 10, 1529.

The duty of the 40th penny.

Registration.

The Deeds Registry in South Africa.

It should be noted that, though transfers which fail to

¹ 1 *G.P.B.* 374; Gr. *ubi sup.*; *Cens. For.* 1. 2. 7. 6; Voet, 41. 1. 38-42.

² 1 *G.P.B.* 1953.

³ 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 1961. Registration seems to have been first enjoined by a Placaat of May 9, 1560 (2 *G.P.B.* 759 and 1402).

⁴ Art. 13 of the Placaat (reissue of 6 March, 1612). 1 *G.P.B.* 1957.

⁵ British Guiana, together with other archaic usages, retained the practice of transfer coram judice. For Ceylon see Registration of Documents Ordinance, No. 23 of 1927, by sec. 7 of which an unregistered instrument is void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument, which is duly registered. As to the effect of an unregistered deed see *Ceylon Exports Ltd. v. Abey-sundere* (1933) 35 N.L.R. at p. 430.

⁶ 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, *History*, pp. 498-9.

Between the parties an informal transfer holds good.

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,¹ and the risk passes to the purchaser,² but until the solemn conveyance takes place the ownership remains where it was.³ In South Africa ownership 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'.⁴

Prescription: in the latest Roman Law;

V. Prescription. This means acquisition of ownership by long-continued possession. It will be remembered that Justinian fused the civil law institution of usucapion and the provincial institution of long-time-possession or prescription, and provided that possession of movables for three years, of immovables for ten years *inter praesentes*, for twenty years *inter absentes* (this meant that so long as the parties were not resident in the same district the prescriptive period was doubled), if originating in just title and acquired in good faith made the possessor owner. The thing possessed must not have been stolen or possessed by violence. Possession for thirty years of movables or immovables, if accompanied in its inception by good faith, though not originating in a just title, made the possessor owner, even of a *res furtiva*, but not of a *res vi possessa*. The commentators call this *longissimi temporis praescriptio*.

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.⁵ The situation was further complicated by the

¹ Neostad, *Supr. Cur. Decis.*, no. 70; 2 Maasdorp, p. 87.

² Neostad, *Decis. van den Hove*, no. 32.

³ Bijnk, *O.T.* i. 764, 810; *Harris v. Buissinne's Trustee, ubi sup.*; Lee, *Commentary*, p. 82.

⁴ *Breytenbach v. Van Wijk* [1923] A.D. at p. 547. But registration is not necessarily conclusive as to ownership, e.g. in case of marriage in community, or where a statute regulates the ownership of land. *Collin v. Toffie* [1944] A.D. at p. 463.

⁵ Gr. 2. 7. 5; Fock. And., vol. ii, pp. 123 ff.

presence of two new terms of prescription,¹ a shorter period of a year and a day (which meant in practice a year and six weeks),² and a longer period of a third of a century (which meant in practice thirty-three years and four months and, as some add, three or four days).³

The first of these was of Germanic origin.⁴ We shall meet with it again in connexion with the possessory remedy known as 'complainte'.⁵ Independently of this it fell out of use after the middle of the seventeenth century.⁶

The period of a year and a day.

The prescription of a third of a century—in origin, it would seem, merely a variant from the thirty years' prescription of the Theodosian Code⁷—came eventually to be the usual term of prescription, at all events for immovable property.⁸ The 'Great Privilege' granted by Mary of Burgundy of March 14, 1476⁹ (Art. 47), fixes the period of prescription for immovables (*leenen ende erfelijcke goeden*)

The period of a third of a century for immovables.

at a third of a century,¹⁰ 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. After Grotius pronounced in its favour it was generally accepted as the proper term of prescription for immovables.¹¹

With regard to movables Grotius expresses no final opinion. Groenewegen, whose book was published in 1649, says that the period of prescription is a third of a century for immovables, but thirty years for movables.¹²

The period of thirty years for movables.

At the Cape the period of prescription was thirty years alike for movable and immovable property, the first by common law, the second by statute, and this is now general throughout the Union.¹³

Prescription in South Africa.

¹ Gr. 2. 7. 6 ff.

² Voet, 44. 3. 4.

³ Matthaeus, *Paroemiae*, no. 9, sec. 1.

⁴ Fock. And., vol. ii, p. 124.

⁵ *Infra*, p. 163.

⁶ Voet, 44. 3. 8 (*ad fin.*); V.d.K. 208.

⁷ 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.

⁸ Gr. 2. 7. 8; Groen. *de leg. abr. ad Cod.* liv. vii, tit. 39; Van Leeuwen, 2. 8. 5; *Cens. For.* 1. 2. 10. 11.

⁹ 2 *G.P.B.* 671.

¹⁰ See Gr. 2. 7. 8.

¹¹ V.d.K. 206.

¹² Groen. *de leg. abr. ad Cod.* 7. 39, sec. 3.

¹³ Cape Act 7 of 1865, sec. 106; 2 Maasdorp, p. 93; Prescription

Good
faith and
just title
unneces-
sary;

but
possession
must be
undis-
turbed.

Against
whom pre-
scription
runs.

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.¹ All that is required is that the possession or quasi-possession of the person claiming by prescription shall be 'peaceable, open and as of right' (*nec vi nec clam, nec precario*),² and uninterrupted.² Interruption (*usurpatio*)³ is either: (1) natural, i.e. physical, or (2) judicial, i.e. by instituting proceedings to enforce an adverse claim.⁴ Physical interruption, as negating continued possession, is an absolute bar to prescription; judicial interruption prevents its running against the person who institutes the proceedings.⁵ 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.⁶ Prescription generally runs against the Crown, provided that the property claimed by this mode of acquisition is such as the Crown can alienate and a private person can own.⁷ Time does not run against minors or madmen and other such persons, who are deemed to be minors and are subjected to guardianship; nor against persons who are absent

Act, 1943, sec. 2 (1); and in Southern Rhodesia (*R.S.* cap. 27, sec. 14). 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.

¹ Voet, 44. 3. 9; Anton. Matthaeus, *Paroemiae*, no. 9, secs. 2-3; V.d.K. 207.

² *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.

³ *Van Schalkwyk v. Hugo* (1880) Foord 89; *De Klerk v. Pienaar* (1899) 16 S.C. 370.

⁴ Voet, 41. 3. 17. Extrajudicial demand is insufficient for the purpose. *Ibid.*, sec. 20.

⁵ Voet, 41. 3. 20: *tantum in eorum cedit utilitatem qui litem movendo vigilarunt sibi; cum res inter alios acta aliis nec prosit nec noceat.*

⁶ Voet, 44. 3. 9.

⁷ Voet, 44. 3. 11; *Union Govt. v. Estate Whittaker* [1916] A.D. 194; *Union Govt. v. Tonkin* [1918] A.D. 533; Prescription Act, 1943, sec. 13.

because of war or on other public business;¹ nor against those who are disqualified from asserting their rights; and therefore not against a fideicommissary whose right is suspended by a condition, if the fiduciary alienates the property which is the subject of the fideicommissum before the condition is fulfilled;² nor against a married woman whose husband has improperly alienated dotal property.³

The effect of prescription is to vest the ownership of the property in question in the possessor, so that he can vindicate it, if he subsequently loses possession, from the original owner as well as from third parties.

Effect of prescription or limitation.

From the acquisitive prescription above described the reader must distinguish what is called extinctive prescription, i.e. the rendering unenforceable of a right by the lapse of time,⁴ in other words, limitation of actions. If an owner seeks to recover his property, the possessor may contest his claim *in limine* by pleading that he has not brought his action in time. The time is the same as that required for acquisitive prescription (now thirty years); so that in relation to property the same period bars the remedy, and when the conditions of acquisitive prescription are present, transfers the right.⁵

Extinctive prescription or limitation of actions.

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*;⁶ 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;⁷ and 6. Forfeiture for

How ownership is lost.

¹ Gr. 2. 7. 2; Voet, 44. 3. 9, citing Anton. Matthaeus, *Paroemiae*, no. 9, secs. 22-3; *Schein v. Schein* [1924] W.L.D. 283.

² See *De Jager v. Scheepers* (1880) Foord, 120.

³ Voet, 44. 3. 11. The Prescription Act, 1943, like the Southern Rhodesia Act (*R.S.* cap. 27), has nothing to say on the subject of suspension of acquisitive prescription.

⁴ Prescription Act, 1943, sec. 3 (1).

⁵ For limitation of actions see below, pp. 281 ff.

⁶ Gr. 2. 32. 3-4; V.d.L. 1. 7. 4.

⁷ Gr. 2. 32. 7.

crime. In the time of Grotius property might be declared forfeit by judicial sentence.¹ But all forfeitures for crime were abolished in Holland by Resolution of the States of Holland of May 1, 1732,² and in the Colonies by Publication of the States-General of August 10, 1778.³

¹ Gr. 2. 32. 6.

² 6 *G.P.B.* 577; *Rechts. Obs.*, pt. 1, no. 50.

³ 9 *G.P.B.* 458; *Cape Statutes*, vol. i, p. 2.

IV

THE INCIDENTS AND KINDS OF OWNERSHIP

WE have 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 speak of the incidents of ownership and more particularly of the kinds of ownership in land.

Subject-matter of this chapter.

SECTION I. 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'.

The incidents of ownership in general.

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

What is the landowner's duty towards his neighbour?

¹ *Supra*, p. 125.

² Dig. 39. 2. 24, 12; Gr. 2. 34. 27; Voet, 8. 3. 6; *Struben v. Cape Town Waterworks Co.* (1892) 9 S.C. 68; *Smith v. Smith* [1914] A.D. 257; *Union Govt. 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) not to disturb his possession; (2) not to interfere wrongfully with his enjoyment; (3) not to cause a subsidence of his land or interrupt the accustomed flow of a stream.

1. Not to disturb his possession;

(1) I must not disturb my neighbour's possession. This I should do, for example, if I constructed a building on my land so that some part of it projected above his 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. 120; Juta, *Water Rights*, pp. 5 ff.; *Breyten Collieries Ltd. v. Dennil* [1913] T.P.D. at p. 269.

² Gr. 2. 1. 23 and 2. 34, secs. 4, 8, 11, 19, 23. 'Quia ejus est caelum ejus est solum', Schorer *ad* Gr. 2. 1. 23.

³ Voet, lib. xliii, tit. 27. The same principle applies to intruding roots. *Bingham v. Johannesburg City Council* [1934] W.L.D. 180. As to the ownership of 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 decedentes*. Huber (2. 6. 20, 5. 6. 10), for Friesland, denies the right.

In like manner I may not, apart from servitude, allow the drip from my eaves to fall on another's land (Gr. 2. 34. 11), nor discharge water over another's land, Gr. 2. 34. 16.

(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.¹ 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

2. not to interfere wrongfully with his enjoyment;

(3) I must not cause a subsidence of my neighbour's land or interrupt the accustomed flow of a stream² 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

3. not to cause subsidence or interrupt flow of stream.

¹ 'Such an act is known as a nuisance, a term adopted from the English law, which in this respect is practically the same as our law', Wille, *Principles*, p. 156; McKerron, *The Law of Delict*, p. 215; *infra*, p. 328. In Roman Law the owner's remedy was the *actio negatoria* denying the servitude. Windscheid, i. 198, n. 8. 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. 338, n. 4.

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. *Coronation Collieries Co. v. Malan* [1911] T.P.D. at pp. 591-2. In *United Building Soc. v. Lennon* [1934] A.D. 149, damages were claimed in consequence of the demolition of a neighbouring building, but no right of support was asserted or proved. Right of support for buildings (*semble*) is not known in Ceylon. *Pedris v. Batcha* (1924) 26 N.L.R. 89.

Water-
rights.

With respect to the flow of a stream whether above or under ground¹ 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

These rules, it must be remembered, apply only to public streams. The owner of a private stream may arrest it on his own land and diminish its volume to any extent he pleases. The same may be said of rainwater.⁴ But an owner may not divert it from its course to the prejudice of a lower proprietor. If he does so he may be sued in the *actio aquae pluviae arcendae* (the action 'for keeping off rainwater').⁵ The maxim *dien water deert die water keert*—'if water hurts you, you may turn it away'⁶—must be understood subject to this important limitation. Indeed, the phrase is misleading, for it merely means that water may be allowed to take its natural course.⁷

When
a private
stream
becomes
public.

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

¹ 2 Maasdorp, p. 131.

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. 136 ff.

⁴ Gr. 2. 34. 14.

⁵ *Cape Town Council v. Benning* [1917] A.D. 315.

⁶ Gr. 2. 35. 17.

⁷ Dig. 39. 3. 1, 11.

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.¹

Just as a lower proprietor has rights against an upper proprietor, so he owes him duties. He must receive such water as in the ordinary course of nature flows on to it from the upper level,² and must not by turning it off or in any other way injure the upper proprietor's user of his land.

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 practical importance relates to the limits which the law places upon an owner's right of recovering his lost possession, his *ius 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 *ius vindicandi* is an incident of ownership. In the Roman Law the principle was general and applied alike to immovable and to movable property—*ubi rem meam invenio, ibi vindico*. 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 some 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*.³ In the law of Holland, according to the prevailing

The limits of the *ius vindicandi*.

¹ 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*, p. 130.

² *De Villiers v. Galloway* [1943] A.D. at p. 444.

³ 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. de Blécourt (*Kort Begrip* (5), p. 207) concludes: Veiliger

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,¹ but again subject to exceptions, which, as might be expected, are not the same as 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 was questioned whether sales in a public market fell 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.²

SECTION II. THE KINDS OF OWNERSHIP OF LAND

In what different ways land may be owned.

Feudal and allodial ownership in Holland.

In this section we 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'.³ 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 (*leen-recht*), which was administered by feudal Courts (*leen-gerechten*). Allodial lands were owned according to the ordinary principles
 gaat men met te zeggen dat men in de germaansche landen zeer uiteenloopende regelingen aantrof.

¹ As to what must be proved by a plaintiff in a vindicatory action see *Gruenewald v. Mathias* [1925] S.W.A. 117.

² Appendix E.

³ 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* (4th ed.), p. 72.

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.

In Dutch law feuds (*leenen*) were always held on con- Leenen.
dition of military service.¹ This continued in theory to be the case until the end of the Republic, except where the land had been allodialized.² 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 Cijnsrecht
lease), *erfhuur* (hereditary hire), and by other like names.³ or quit-
rent
tenure.
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.⁴ 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. This mode of land tenure was not identical with the

¹ Fock. And., vol. i, pp. 309–10.

² Ibid., 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.

³ Fock. And., vol. i, p. 320.

⁴ It tended to become, and in the sixteenth century usually was, hereditary and perpetual. Ibid., p. 325. Grotius (2. 40. 2) describes *erfpacht-recht* as 'erffelicke tocht'.

Not the same as emphyteusis.

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 the rules of 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

Villein tenure in Holland.

In addition to the above-mentioned modes of landholding, 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.

Usufruct.

The life-interest in land (*lijf-tocht*—*usufruct*) will be considered in a later chapter.

Lease of land,

It remains to speak of the contract of hire of land, so far as it affects the proprietary rights of the parties. In the Roman Law a lease of land was purely contractual in character, and gave no right against third parties. Thus, if the lessor sold the land, the purchaser, though aware of the lease, was not bound by it. This principle prevailed in some parts of Holland (at all events as regards short leases) and found expression in the proverb, *Koop breekt huur* (Sale breaks hire).⁴ The reason was that leases, being mere contracts, required no solemnity and consequently did not transfer any proprietary interest or affect third parties.⁵ Elsewhere and later the rule was reversed,

in early law was merely contractual.

Koop breekt huur.

But, later, conferred a real right.

Breekt koop geen huur (Sale breaks no hire), *Huur gaat voor koop* (Hire goes before sale); with the result that the hirer

¹ Gr. 2. 40. 2.

² e.g. Van Leeuwen, 2. 10. 2.

³ Fock. And., vol. i, p. 52.

⁴ Ibid., p. 345.

⁵ Cf. Voet, 19. 2. 1. No general rule can be laid down as regards Holland and the other Provinces of the Netherlands. Custom varied both before and after the reception; de Blécourt (5), p. 271. For Germany see Gierke, *Deutsches Privatrecht*, ii. 200, n. 55; iii. 512 ff. The maxim *huur gaat voor koop* does not apply to all contracts of letting and hiring. It is 'a concise statement of the effect of custom and legislation upon leases of lands and houses'. *Graham v. Local and Overseas Investments (Pty) Ltd.* [1942] A.D. at p. 110, per Watermeyer J.A.

could make good his right to the land against any third person to whom his 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 lands⁴ (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 of land or houses holds good against a purchaser if executed *coram lege loci*, otherwise not.⁸ In South Africa, with

Huur gaat voor koop.

Groenewegen's statement of the law of leases.

¹ Gr. 2. 44. 9; Van Leeuwen, 4. 21. 7; Voet, 19. 2. 17; *De Wet v. Union Govt.* [1934] A.D. 59.

² Gr. *ubi sup.* and 3. 19. 3.

³ 'By publijcke instrumenten ofte d' eygen handt van den Eygenaer' 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. 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 Groen., *loc. cit.* 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.

statutory exceptions, the validity of a lease as between the parties 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.³ Such is the general law, but there are statutory variations. In the Transvaal a lease of land for ten years or upwards has no effect even between the parties, unless notarially executed,⁴ and the law is the same in the Free State except that the period has been held to be twenty-five years.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

Court of the place where the property is situated.' For Ceylon see Ord. No. 7 of 1840, sec. 2.

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 *Herbert v. Anderson* (1839) 2 Menz. 166; *Green v. Griffiths* (1886) 4 S.C. 346; *De Wet v. Union Govt.* [1934] A.D. 59; whether the purchaser knew of the lease or not. *Ibid.* at p. 73.

³ An unregistered lease in *longum tempus* holds good, in any event, up to ten years. *Komen v. De Heer, ubi sup.*

⁴ Procl. No. 8 of 1902, sec. 29 (1). The reader should consult the section. See *Cohen v. Van der Westhuizen* [1912] A.D. 519.

⁵ Ord. 12 of 1906, sec. 51; *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., ubi sup.*); in Natal (*Exor. Est. Komen v. De Heer, ubi sup.*). 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, 1937 (*supra*, p. 132, n. 11).

⁶ Law No. 12, 1884, secs. 1(c) and 2; *Cole v. Stuart* [1940] A.D. 399.

no distinction exists as to requirements of form and of registration between leases of land and leases of houses.

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 justified, therefore, in regarding a lease as a species of ownership in land.¹

In the modern law a lease is a kind of tenure.

It does not fall within the scope of this work to describe in detail the systems of land tenure existing at the present day. We will merely observe that in South Africa besides (1) freehold, and (2) leasehold, (3) perpetual quitrent 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 Recent statutes have extinguished the liability to pay quitrent, while leaving the nature of the tenure unaffected.³

Land tenure.

¹ *Green v. Griffiths* (1886) 4 S.C. at p. 350. In *Johannesburg Municipal Council v. Rand Townships Registrar* [1910] T.P.D. at p. 1320, Wessels J. said: 'The lessee, therefore, by the Roman-Dutch law acquired a *jus in re alienâ* and also a *jus in rem* to the land leased; but that *jus in rem* was not of the nature of ownership, for it only lasted so long as the lease existed.' Perhaps this is a question of words rather than of substance. A lease is at all events *gebreckelicke eigendom*. The 'effect [of a lease *in longum tempus*] is to dispose of a portion of the *dominium*'. Solomon J. in *Breytenbach v. Frankel* [1913] A.D. at p. 402.

² See *Van Niekerk and Union Govt. v. Carter*, 1917 A.D. at p. 379. Quitrent 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 quitrent tenure at the Cape is traced in *De Villiers v. Cape Divis. Council* [1875] Buch. 50, and further elucidated in *Cape Govt. v. Freer* (1886) 4 S.C. 313, where the learned C.J. said 'the grantee really became the owner of the land. . . . The Crown ceased to have any proprietary rights.' For O.F.S. see *Webb v. Giddy* (1878) 3 A.C. 908; for Natal, *Odendaal v. Registrar of Deeds* [1939] N.P.D. 327; for Ceylon, *Podisingho v. Jaguhamy* (1923) 26 N.L.R. 87.

³ Abolition of Quitrent Act, 1934; Abolition of Quitrent (Towns and Villages Act) 1937. In Southern Rhodesia quitrent was abolished by Act, No. 16 of 1935 with the same reservation.

POSSESSION

The
theory of
possession.

WHATEVER theory of possession may have existed in the native law of the Netherlands, the Roman-Dutch writers repeat the Roman Law doctrine as they understood it. The short chapter which Grotius devotes to the subject reflects merely the views of the civilians.¹ Since they are accessible from other sources it is unnecessary to recall them. But the case is different with the remedies which the Law of Holland afforded for the protection of possession. These, though they present some necessary analogies with the Roman interdicts, were remotely, if at all, connected with them. The text-book writers, none the less, commonly assign to them a Roman origin and distinguish them as directed to obtaining, retaining, and recovering possession, applying the Roman classification to which they do not readily lend themselves. In the modern law they have ceased to exist as separate institutions. Their historical importance, however, entitles them to some brief attention.

Possessory
remedies.

The Dutch Law afforded three principal remedies for the protection of possession (with some others of less general application). These were *Maintenue*, *Complainte*, and *Spolie*. They came into Holland from France by way of Flanders under the influence of Burgundian jurists of the fifteenth century.² The process of the Court which the plaintiff invoked was called a *mandament* or writ, and the various remedies are distinguished as *mandament van maintenue*, *mandament van complainte*, and *mandament van spolie*. This last has a remoter origin in the *actio spoliei* of the Canon Law.³ We shall give a short account of each of these possessory actions.⁴

¹ Gr. lib. ii, cap. ii.

² de Blécourt, p. 200.

³ *Decretum Gratiani*, c. 3, cap. 3, qu. 1: *redintegranda sunt omnia expoliatis vel ejectis episcopis*. Hence the name '*redintegranda*' by which this action was also known.

⁴ For fuller discussion see Fock. *And.*, vol. i, pp. 218 ff.; de Blécourt, pp. 200 ff.

1. *Maintenue*. Any person disturbed in his possession might address a petition either to the Hof or to the Hooge Raad praying for a mandament whereby he should be maintained, confirmed, and (so far as necessary) let into the possession or quasi-possession of the Lands and other Goods in question, and ordering the defendant to indemnify him for all past disturbance and to abstain from the like in future.¹ In case of opposition suppliant asked for *interim* possession (*rei creditia—recreditie*), which was granted in the discretion of the Court subject to his giving security to compensate the other party for mesne profits in the event of the case being ultimately decided in the other party's favour.² To entitle the suppliant to the mandament two conditions alone were necessary: (a) possession, (b) disturbance.³ The defendant might defeat the plaintiff's case by showing that his possession was *aut vi aut clam aut precario ab adversario* (the plea of vicious possession). Proof of positive disturbance was not essential. 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 was not so much a possessory remedy as a procedure with a criminal sanction designed for the protection of person or property against apprehended violence.

2. *Complainte*. This was a summary process designed to afford provisional relief. The conditions of the writ were more stringent than in the case of *maintenue*. The suppliant must show: (a) that he had possessed, (b) quietly and peaceably, (c) for a year and a day, (d) ouster or disturbance within the year next before action brought. According to circumstances he prayed to be maintained in, or

¹ For the formula of request see *Papegay*, chap. xv (ed. 1740, vol. i, p. 113).

² *Bijnk, O.T.* i. 276, 305.

³ *Fock. And.*, vol. i, p. 218; *V.d.L. Judic. Pract.*, book ii, chap. xx.

⁴ *Bort, Tractaet van Complainte*, tit. 1, sec. 32.

⁵ *Bort*, loc. cit., secs. 26–30; *V.d.L.*, op. cit., 4. 5. 21.

restored to possession.¹ The *vitia possessionis* might be pleaded as a defence.

The procedure took the form of an inquiry *in loco* conducted by one or two Judges delegated for the purpose. If they were satisfied that the plaintiff had established his case, they ordered *restablissement*, that is restoration of the *status quo*. If not so satisfied they made no order. This, properly speaking, concluded the procedure in *complainte*. If the defeated party carried the matter no further, the controversy was at an end. The further proceedings, if any, were in *maintenue*. De Blécourt says that *maintenue* was the last stage in the procedure of *complainte*.² It would, perhaps, be more informative to say that *complainte* was a preliminary, but not a necessary preliminary, of proceedings in *maintenue*. It was a prelude to a drama. Often the performance ended with the prelude. More often the prelude was omitted.

Spolie.

3. *Spolie*. This was a process directed to recovery of possession. The plaintiff had to prove: (a) possession, (b) dis-possession. The only defence was denial of the facts alleged, for *spoliatus ante omnia restituendus est*.³ The plea of vicious possession was not admitted. The remedy asked for was restoration and compensation and to be reinstated in possession.⁴ In spite of its apparent attractiveness this remedy was seldom invoked, perhaps because it merely promised reinstatement and did not decide even provisionally the right to remain in possession.

Immissie.

There was another possessory remedy of more limited application. This was the *mandament van immissie*, by which an heir or legatee obtained possession of the whole or part of a deceased person's estate. The procedure was the same as in *maintenue*, with which it was commonly combined in a petition for *maintenue* and 'if need be' for

¹ Fock. And., vol. i, p. 219; de Blécourt, p. 201; V.d.L., op. cit., book ii, chap. 21.

² de Blécourt, p. 203.

³ Fock. And., vol. i, p. 218; de Blécourt, p. 201; V.d.L., op. cit., book ii, chap. 22.

⁴ *Papegay*, chap. xiv (vol. i, p. 112).

immissie.¹ In the lower Courts there was a similar procedure termed *inleiding*.²

From what has been said it is apparent that *maintenue* alone, or in combination with other remedies, occupied a cardinal position in possessory procedure. In practice all these proceedings were confined to claims relating to the possession of land or the quasi-possession of rights appurtenant to immovable property. They were not in general a means of getting or retaining possession of movables.³ Such questions were litigated in the lower Courts.

The question remains, what was the character of the possession which the law undertook to protect? It is not clear whether possessory remedies were available to one who possessed *nomine alieno*, for example, as depositary, mandatory, or lessee. But it is certain that in some cases they were given to protect possession which did not satisfy the conditions of possession *ad interdicta* in the sense of the Roman Law.

In the modern law of South Africa possession is secured by interdict and by the so-called spoliation order, based upon the principle *spoliatus ante omnia restituendus est*, which, however, seems to have more analogy with *maintenue* than with *spolie*. It is given not merely to the possessor in the strictest sense, but to a trustee,⁴ or lessee,⁵ and to any other person who holds by lawful title 'with the intention of securing some benefit for himself as against the owner',⁶ such as a borrower, and, perhaps, to any other person in actual control.⁷ But in any case the Court will require

¹ V.d.L., op. cit., book ii, chap. 20.

² de Blécourt, p. 203.

³ de Blécourt, p. 202, no. 1; Bijnk, *O.T.* ii. 1059.

⁴ *Abdul Azeez v. Abdul Rahiman* [1911] A.C. 746.

⁵ *Swanepoel v. Van der Hoeven* [1878] Buch. 4; *Nino Bonino v. De Lange* [1906] T.S. 120. So in Ceylon, *Perera v. Sobana* (1884) 6 S.C.C. 61; *Pereira*, pp. 544 ff.

⁶ *Scholtz v. Faifer* [1910] T.P.D. 243; *Meyer v. Glendinning* [1939] C.P.D. 84. Cf. *Mandelkoorn v. Strauss* [1942] C.P.D. at p. 497.

⁷ *Thatsachliche Gewalt*, B.G.B. 854, 860; *maîtrise effective*, *Code Civil Suisse*, 919. In *Meyer v. Glendinning*, *ubi sup.*, at p. 95, Davis, J., after referring to Savigny, who says (*On Possession*,

clear proof of possession. It is not enough to make out a *prima facie* case which might justify an interdict.¹

In the alternative a plaintiff may bring an action to recover possession and damages or damages for disturbance.²

Perry's translation, p. 409) that the true purpose of this summary remedy is 'to prevent breaches of the peace', and to Menochius (*De Recup. Poss. Remed.* Tit. 17, par. 21), continued: 'the author does not, as many of the moderns would appear to do, extend in this passage even this form of action to any and every *detentor*. As to whether they are right in so doing I particularly desire to decide nothing.'

¹ *Mandelkoorn v. Strauss, ubi sup.*

² *Pentz v. Col. Govt.* (1891) 8 S.C. 34; *Koenigsberg & Co. v. Robinson G.M. Co.* [1905] T.H. 90; *Miller v. Harris* [1912] C.P.D. 203; *Omar v. Sahib* (1907) 28 N.L.R. 625.

[Dr. T. W. Price of Trinity Hall has given me valuable assistance in revising this chapter, but, of course, I am solely responsible for what is said. It is to be hoped that his thesis on *The Possessory Remedies in Roman-Dutch Law* will soon be published.]

VI

SERVITUDES

THE next class of *jura in re* are Servitudes.¹ A servitude Servitudes. 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. 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. But all servitudes, real or personal, are real rights, which can be made good against all the world.²

In the case of real servitudes, the land in respect of which Real or praedial servitudes. the right is enjoyed is termed the *praedium dominans*, the land over which the right is exercised is termed the *praedium serviens*. 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. When the word servitude is used without qualification it is usually a real servitude that is meant.

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

¹ For a fuller treatment of the subject of servitudes the recently published work of C. G. Hall and E. A. Kellaway, *Juta & Co.*, Cape Town, may be consulted; and see the valuable note in Kotzé, *Van Leeuwen*, vol. i, pp. 302 ff.

² *Ex parte Geldenhuis* [1926] O.P.D. at p. 163; *Galant v. Mahonga* [1922] E.D.L. at p. 79.

immovable. Though ownership is thus divided and vested 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 of the usual type 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
servi-
tudes.

The following are the principal rustic servitudes³ (*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.⁹ The right to use a trek-path over the land

¹ Gr. 2. 33. 1.

² Voet, 8. 1. 3-4; Girard, p. 387; Buckland, p. 262. Is a right of way attached to a house rustic or urban? Opinions differ. See Lee, *Elements of Roman Law*, sec. 227.

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.* *Peacock v. Hodges* [1876] Buch. 65; *Van Schalkwijk v. Du Plessis* (1900) 17 S.C. 454; *Neilson v. Mahoud* [1925] E.D.L. 26; *Ramperasad v. Goberdun* [1929] N.P.D. 32; *Wilhelm v. Norton* [1935] E.D.L. 143; (Ceylon) *Fernando v. Fernando* (1929) 31 N.L.R. 107.

of another is a larger right than any of the above and is peculiar to South Africa.¹

All rights of way must be exercised so as to burden the servient property as little as possible,² and the owner of the dominant property must keep strictly within the terms of the servitude.³ On the other hand the grant of a right of way (as of any other servitude) implies a grant of everything which is necessary for its reasonable exercise.⁴

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.⁵ If he has once exercised his election, he cannot afterwards change. But the owner of the servient tenement has the right to do so, provided the new route is as convenient as the old one.' The case is otherwise when the servitude has been precisely defined *ab initio*. In this case it can only be altered by mutual consent.⁶

2. WATER RIGHTS: viz. right of leading water over or out of another's land (*aquae ductus*—*water-leiding*);⁷ right of discharging water on to another's land (*water-lozing*);⁸ right of drawing water from another's private stream, well, or cistern (*aquae haustus*—*water-haling*);⁹ right of watering

¹ *Van Heerden v. Pretorius* [1914] A.D. 69. For public ways (which are either *via publica* or *via vicinalis*) see *Peacock v. Hodges, ubi sup.*; *Rampersad v. Goberdun, ubi sup.*; (Ceylon) *Samarasinghe v. Chairman V.C. Matara* (1932) 34 N.L.R. 39; *Peiris v. Village Committee, Paluwa* (1938) 40 N.L.R. 54.

² '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.

³ *Van Heerden v. Coetzee* [1914] A.D. at p. 172.

⁴ *Voet* 8. 4. 16; *Lategan v. Union Govt.* [1937] C.P.D. at p. 202.

⁵ *Dig.* 8. 1. 9.

⁶ *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.

⁷ *Gr. 2. 35. 14*; *Voet*, 8. 3. 6.

⁸ *Gr. 2. 35. 16*; *Van Leeuwen*, 2. 21. 15.

⁹ *Gr. 2. 35. 13*; *Voet*, 8. 3. 7. The person who enjoys such right may by usage be required to join in keeping the well, &c., in repair.

cattle (*pecoris ad aquam appulsus*);¹ right of access to water over another's land (*water-gang*).²

3. Right of taking sand out of another's soil or of taking lime and having a lime-kiln on another's land.³

4. Right of pasture.⁴

The above list is not exhaustive. Other real servitudes may be created in any of the 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.⁵

The following are urban servitudes:

Urban
servi-
tudes.

1. My right to require my neighbour to support the weight of my house or wall (*jus oneris ferendi—muurbe-zwaring*).⁶ 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*).⁷

3. My right to have a balcony or other thing projecting over my neighbour's land (*jus tigni projiciendi vel protegendi*).⁸ This case differs from the last in respect of the

¹ Gr. 2. 35. 19; Van Leeuwen, 2. 21. 14; Voet, 8. 3. 11, and see *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.

² Van Leeuwen, 2. 21. 13.

³ *Jus arenae fodiendae, jus calcis coquendae, &c.* Voet, 8. 3. 11.

⁴ 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.*

⁵ Voet, 8. 3. 12. Such as a right to use a threshing floor (*Ceylon*) *Weerasinghe v. Perera* (1943) 43 N.L.R., 575. Restrictive covenants entered into by a purchaser of land may operate by way of servitude after registration. *Alexander v. Johns* [1912] A.D. 393; *Flats Ltd. v. Transvaal Consolidated Land Co.* [1920] T.P.D. 146; *Tonkin v. Van Heerden* [1935] N.P.D. 589.

⁶ Gr. 2. 34. 3; Van Leeuwen, 2. 20. 2; Voet, 8. 2. 1.

⁷ Gr. 2. 34. 7; Van Leeuwen, 2. 20. 6; Voet, 8. 2. 2.

⁸ Van Leeuwen, 2. 20. 7; Voet, 8. 2. 3.

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.¹

4. My right to require you not to raise the height of your buildings (*jus altius non tollendi*—*belet van hoger timmering*).² Scarcely distinguishable from this is my right that you shall not interfere with my lights (*servitus ne luminibus officiat*—*vrij licht*).³ 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 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.⁴ Another allied right is the right of prospect⁵ (*vrij gezicht*), which seems, in Roman Law, to have implied access of light not only to upper but to lower windows as well.⁶ 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

¹ Dig. 9. 2. 29, 1; Voet, 8. 1. 4.

² 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.

³ Gr. 2. 34. 20; Van Leeuwen, 2. 20. 13; Voet, 8. 2. 11. 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.

⁴ A neighbour may cut overhanging branches. Gr. 2. 34. 21; *supra*, p. 152.

⁵ 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.

⁶ *Latior pleniorque de prospectu quam de luminibus servitus*. Voet, 8. 2. 12.

spout on to your land (*jus stillicidii vel fluminis—drop*);¹ or my contrary right to require you to discharge such water on to my land (*drop-vang*).²

6. My right to have an artificial drain passing through or over your land (*jus cloacae mittendae—goot-recht*).³

How
servi-
tudes are
acquired.

We pass to the modes of acquiring servitudes. Grotius says that servitudes are acquired by: (1) agreement followed by acquiescence on the part of the owner of the servient property;⁴ (2) last will;⁵ (3) prescription;⁶ (4) implied grant;⁷ and Voet adds (5) judicial decree.⁸

For the modern law it will be more convenient to distinguish titles and modes of acquisition. A person may become entitled to a servitude: (a) by grant or contract; (b) by last will; (c) by judicial decree. A servitude is acquired principally by registered grant or by prescription.

1. Regis-
tered
grant.

I. *Registered grant*. When Grotius speaks of 'agreement followed by acquiescence' he evidently has in view the quasi-tradition of the later Roman Law. *Traditio plane et patientia servitutium inducet officium praetoris*⁹—'There is no doubt that delivery of servitudes and acquiescence in them will constitute sufficient ground for the aid of the praetor.' Consistently with this he advised in an opinion reported in the *Hollandsche Consultatien* that by the general usage of Holland servitudes were constituted underhand and not before the Court.¹⁰ But later commentators on the Law of Holland maintained against Grotius that the constitution of a servitude required the same solemnities as a transfer of land,¹¹ and this is the modern law:

¹ Gr. 2. 34. 10; Van Leeuwen, 2. 20. 8.

² Gr. 2. 34. 13; Van Leeuwen, 2. 20. 9; Voet, 8. 2. 13. This supposed servitude seems to rest upon a misinterpretation of the texts of the Roman Law.

³ Gr. 2. 34. 24; Goot-recht—'t recht om een goot te hebben legghende 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.

⁴ Gr. 2. 36. 2.

⁵ Gr. 2. 36. 3.

⁶ Gr. 2. 36. 4.

⁷ Gr. 2. 36. 6.

⁸ Voet, 8. 4. 2.

⁹ Dig. 8. 3. 1, 2.

¹⁰ *Holl. Cons.* iii. 316.

¹¹ Groen. *ad* Gr. 2. 36. 2; Voet, 8. 4. 1; Van Leeuwen, 2. 19. 2; V.d.K. 369.

'Now a servitude, like any other real right, may be acquired by agreement. Such an agreement, however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary, any more than a contract of sale of land passes the *dominium* to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected *coram lege loci* by an entry made in the Register and endorsed upon the title deeds of the servient property.¹

Another way in which a person may be entitled to a servitude is under a last will. The will does not create the servitude but gives the beneficiary the right to require the executor to constitute a servitude in his favour.²

Right or title to a servitude.

Perhaps the same may be said of a judicial decree. The Court having ascertained that a litigant is entitled to a servitude will usually order registration. It is the registration which constitutes the servitude.³

Pending registration, the right of the beneficiary under the will in the first case or of the successful litigant in the second case, is inchoate, a *jus ad rem*, not a *jus in re*.

Though, however, registration is necessary to constitute a servitude, an unregistered title to a servitude is effective not merely between the parties immediately concerned, but also against any person who acquires the property or a right over it with knowledge of the unregistered title, or by lucrative title.⁴ But knowledge must be clearly proved. It is not enough to show that the registered owner may have been put upon inquiry. It must be shown that in the circumstances it would be a fraud on his part to retain the property free of the servitude.⁵ 'The doctrine of constructive notice must be adopted, if at all, with very great caution.'⁶ The Courts have been very properly

Unregistered rights.

¹ *Willoughby's Consolidated Co. v. Copthall's Stores Ltd.* [1918] A.D. at p. 16 *per* Innes, C.J.

² 2 Maasd., p. 254.

³ *Ibid.* 253.

⁴ *Willoughby's Consolidated Co. v. Copthall's Stores Ltd.*, *ubi sup.*; *Heidelberg Munic. v. Uys* (1898) 15 S.C. 156; *Ridler v. Gartner* [1920] T.P.D. 249; *Oliver v. Matzner* [1942] T.P.D. at p. 330.

⁵ *Judd v. Fourie* (1881) 2 E.D.C. 41; *Ridler v. Gartner* at p. 260; *Snyman v. Mugglestone* [1935] C.P.D. at p. 569.

⁶ *Erasmus v. Du Toit*, [1910] T.P.D. 1037 *per* de Villiers, J.P.

reluctant to admit any derogation from the principle that real rights are created and transferred by registered deed.

The same considerations apply to a judgment creditor proceeding to a sale in execution of the servient property. An unregistered servitude affords no protection, if the creditor has given credit to his debtor in ignorance of its existence.¹

Grant of
servitude;
how
made.

A grant of a servitude is effected by means of a deed executed by the owners of the dominant and servient tenements and attested by a notary public.² It may also be an incident of a transfer of land, when a servitude is imposed on³ or in favour of the land transferred in favour of or on other land registered in the name of the transferor.⁴ The registration against the title of the servient land constitutes the servitude.

Crown
grants.

A Crown grant of a servitude is *sui generis*. Since Crown lands are not on the register it lies with the Crown to create a servitude over them in any way it pleases.⁵

Servitudes
in Ceylon.

In Ceylon a servitude is constituted by a notarial instrument which must be registered, but there is no provision for registering the servitude against the title to the servient land.⁶

2. Pre-
scription.

II. *Prescription*. A servitude may be acquired by uncontested open enjoyment adverse to the owner (*nec vi, nec clam, nec precario*) and continuous for the period defined by law.

(1) *Uncontested*, i.e. without resistance or protest on the part of the owner (*nec vi*); (2) *Open (nec clam)*. The owner need not have known that the servitude was being exercised against him,⁷ but he must have had the means

¹ Voet, 8. 4. 1; *Judd v. Fourie* (1881) 2 E.D.C. 41.

² Deeds Registries Act, 1937, sec. 75 (1).

³ This is the so-called *deductio servitutis* of Roman Law. Sohm, ed. Ledlie, p. 343, n. 1.

⁴ Deeds Registries Act, 1937, sec. 76.

⁵ *Braunschweig V.M. Board v. Union Govt.* [1917] E.D.L. 186.

⁶ Ords. No. 7 of 1840, sec. 2; No. 23 of 1927, sec. 16.

⁷ Voet, 8. 4. 4; *Secus Vinnius, Select. Quaest.* i. 31.

of knowing. A right of servitude to an underground drain cannot be acquired without proof of knowledge.¹

(3) *Adverse (nec precario)*. Clearly the enjoyment would not be adverse if exercised by permission. But, further, the enjoyment must from its nature be adverse.² Suppose you have for many years refrained from building on your land, and I have in consequence enjoyed an access of light. This gives me no right to demand that you shall not build. My enjoyment has been *merae facultatis*—matter of fact, not of law. You were free to build or not as you pleased. 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.³ 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 exercised.

(4) *Continuous*. The enjoyment of the servitude must be uninterrupted. Thus a claim to a servitude of grazing was held to fail when it appeared that it had been interrupted by *vis major* for a period of three months.⁴ What constitutes an interruption depends upon 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'.⁵

¹ Cf. *Dalton v. Angus* (1881) 6 App. Cas. at p. 827; *Union Lighterage Co. v. London Graving Dock Co.* [1902] 2 Ch. 557; *Liverpool Corp. v. Coghill* [1918] 1 Ch. 307; Halsbury, xi. 537.

² *De Beer v. Van der Merwe* [1923] A.D. at p. 384.

³ *Jordaan v. Winkelman* [1879] Buch. 79.

⁴ *Boshoff v. Reinhold* [1920] A.D. 29; *De Beer v. Van der Merwe* [1923] A.D. 378.

⁵ Voet, 8. 4. 17; *Boshoff v. Reinhold, ubi sup.* at p. 33; *Head v. Du Toit* [1932] C.P.D. 287.

5. *For the period defined by law.* In the Dutch Law this was a third of a century.¹ A Cape Act (No. 7 of 1865, sec. 106) substituted thirty years, and this is now general throughout the Union.²

Though the full period of prescription is necessary to constitute a servitude, it does not follow that the Court will always order 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 day³ without protest (*onbeklaagt*) was thereby sufficiently prescribed, i.e. its removal would not be decreed; but the owner of the land was entitled to compensation in damages.⁴ In the modern law the Court will, in its discretion, order removal or require the encroaching party to take transfer of the encroached upon land and of so much more as may have been rendered useless to the owner by the encroachment and to pay a reasonable sum as damages.⁵

According to Voet, to make good a claim to a servitude by prescription, *bona fides* is necessary, though *justus titulus* is not.⁶ But the analogy of the general law of prescription suggests that neither the one nor the other is needed.⁷

Vetustas. Closely resembling prescription, but distinguishable from it is immemorial user (*vetustas*), which notwithstanding Maasdorp's statement to the contrary⁸ may constitute a claim to a private servitude. For particulars reference may be made to the writer's edition of Grotius.⁹

¹ Gr. 2. 36. 4.

² Prescription Act, 1943, sec. 2.

³ i.e. for a year, six weeks and three days. Anton. Matthaeus, *Paroem.* No. ix, sec. 17.

⁴ Gr. 2. 36. 5 and Groen. ad loc.; Groen. *de leg. abr. ad Cod.* 3. 34. 1-2. Bijnkershoek (*O.T.* ii. 1695) insists that such *keuren* do not make *jus commune*.

⁵ *Cape Town Munic. v. Fletcher* [1936] C.P.D. at p. 352; (*Ceylon*) *Gnanaprakasam v. Mariapillai* (1937) 39 N.L.R. 406.

⁶ Voet, 8. 4. 4.

⁷ Cf. Anton. Matthaeus, *Paroem.* no. ix, secs. 2, 3.

⁸ Vol. 2, p. 252.

⁹ Vol. ii, pp. 190 ff.

For the reasons given above we do not include last will and judicial decree in the list of modes of acquisition of servitudes. Be it added, for the sake of completeness, that servitudes may be created by statute.¹

Another possibility is an 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.² Voet does not admit this consequence, unless a servitude is constituted, expressly or by the use of some formula which has the same effect, and this view has prevailed.³ The controversy is as old as the glossators. A servitude of this character is said to be constituted *destinatione patris-familias*. The phrase has passed into the French, and the principle into the Dutch, Code.⁴

A way of necessity, or at least the right to demand it, may be said to arise by operation of law. If the parties cannot come to an agreement it will be determined by the Court or other competent authority, as in Natal by the Road Board.⁵

In South Africa rights commonly described as public servitudes were formerly reserved in Government grants in favour of the public generally, or some portion of it. Such are rights of outspan, of cutting fuel, and of using trek-paths. They have been recognized in many cases as binding upon the grantee and his successors in title.⁶

¹ Wille, *Principles*, p. 173.

² Gr. 2. 36. 6.

³ e.g. *uti nunc sunt*, Voet, 19. 1. 6. See Bijnk. *O.T.* i. 482, and the exhaustive discussion of Kotzé, J.P. (adopting Voet's view) in *Salmon v. Lamb's Exor.* [1906] E.D.C. 351.

⁴ La destination du père de famille vaut titre à l'égard des servitudes continues et apparentes. *C.C.* Art. 692; *B.W.B.* Art. 747.

⁵ Voet, 8. 3. 4; *Van Schalkwyk v. Du Plessis* (1900) 17 S.C. 454; *Rampersad v. Goberdun* [1929] N.P.D. 32; *Wilhelm v. Norton* [1935] E.D.L. 143; *Mazista Slate Quarries Ltd. v. Oosthuizen* [1943] T.P.D. 28.

⁶ *Meintjes v. Oberholzer* (1859) 3 Searle 265; *Van Niekerk v. Wimble* [1878] Buch. 190; 2 Maasdorp, pp. 231 ff.; Deeds Registries Act, 1937, sec. 65 (1).

Dedication to the public.

In English Law public rights of way may be created by dedication to the public.¹ This is probably unknown to the law of South Africa,² as it is to the law of Ceylon unless effected by deed of grant.³

How praedial servitudes are lost.

Praedial servitudes are lost by:

1. Merger,⁴ when the servient and the dominant land meet in the same hand; in accordance with the maxim 'nulli res sua servit'.⁵ 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.⁶

2. Release,⁷ 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.⁸

3. Determination of the grantor's interest in the servient land.⁹

4. Non-user for the third of a hundred years.¹⁰

5. 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.¹¹

¹ Halsbury, xvi. 217.

² *London & S. A. Exploration Co. v. Kimberley Town Council* (1882) 1 H.C.G. 136; *Lissack & Co. v. Sigma Building Co.* (1897) 4 O.R. 213; *Tauber v. Venter* [1938] E.D.L. 82.

³ *Sandrasegra v. Sinnatamby* (1923) 25 N.L.R. 139.

⁴ Dig. 8. 6. 1; Gr. 2. 37. 2; Van Leeuwen, 2. 22. 1; Voet, 8. 6. 2.

⁵ Dig. 8. 2. 26; *Secus B.G.B.* 889; Swiss C.C. 733, 735.

⁶ Schorer, *ad* Gr. 2. 36. 6; Voet, 8. 6. 3; 19. 1. 6; *Salmon v. Lamb's Exor., ubi sup.*

⁷ Gr. 2. 37. 3; Voet, 8. 6. 5.
⁸ 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.

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.

¹¹ Voet, 8. 8. 14; *Holl. Cons.*, ii, 6.

6. Destruction of the dominant or servient property, e.g. if either is swept away by the sea. But land is generally indestructible, and if buildings are rebuilt a servitude revives, even if the prescriptive period has meanwhile elapsed.¹

Certain rules apply to all praedial servitudes:

Rules of general application to praedial servitudes.

1. 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.²

2. There cannot be a servitude over a servitude.³ 'Servitus servitutis esse non potest.'⁴

3. The extent of the servitude may not exceed what is required for the convenience of the dominant land.⁵

4. The duty laid upon the owner of the servient land must, with the 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 amoeniorum prospectum praestet, aut in hoc ut in suo pingat, sed ut aliquid patiat aut non faciat.'⁶ But modern codes depart from the principle in the sense that an active duty may be attached to the servitude.⁷

5. A servitude must be capable of perpetual duration. Therefore, a lessee of land (even if the lease is for a long term of years) cannot acquire a servitude by prescription. It can only be acquired by a dominus, or by an *emphyteuta* or *superficiarius*, who, though not owners, have an

¹ Gr. 2. 37. 5; Van Leeuwen 2. 22. 6; Voet, 8. 6. 4.

² Voet, 8. 4. 19.

³ Voet, 8. 4. 7.

⁴ Dig. 33. 2. 1.

⁵ Voet, 8. 4. 13. Hence a real servitude cannot consist in a mere amenity or personal enjoyment. Dig. 8. 1. 8 pr.: *Ut pomum decerpere liceat et ut spatium et ut cenare in alieno possimus servitus imponi non potest.* Cf. Voet, 8. 4. 15.

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 e.g. *Code Civil Suisse*, Art. 730.

interest which, if nothing occurs to destroy it, may last for ever, or by a bona fide possessor.¹ The allied rule that a servitude must have a perpetual cause 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.²

PERSONAL SERVITUDES

Personal
servi-
tudes.

Place in
the legal
system as
arranged
by
Grotius.

The principal personal servitudes 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'.³ These, again, are either connected with the ownership of land or not so connected.⁴ To the first of these sub-classes alone he accords the name of servitudes (*erfdienstbaerheden*).⁵ For the second sub-class he has no distinctive name. It includes such various rights as: (1) usufruct;⁶ (2) use;⁷ (3) feuds;⁸ (4) hereditary leases;⁹ (5) tithes;¹⁰ (6) mortgages;¹¹ and some others.¹² 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

¹ *City Deep Ltd. v. McCalgan* [1924] W.L.D. 276.

² Dig. 8. 2. 28: Omnes servitutes praediorum perpetuas causas habere debent. See illustrations given in the text; and for the modern law Voet, 8. 4. 17; Groen., *de leg. abr. ad Dig.*, ad loc.; Windscheid, i, 209, n. 7. 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 5, 1.

³ Gr. 2. 33. 1-2, and see Table iv to lib. ii, cap. i.

⁴ *Erfaenhangig, onerfaenhangig.*

⁶ Gr., lib. ii, cap. xxxix.

⁸ Capp. xli-xliii.

¹¹ Cap. xlviii.

⁹ Cap. xl.

⁵ Gr. 2. 33. 3.

⁷ Cap. xlv.

¹⁰ Cap. xlv.

¹² Capp. xlvi-xlvii.

under the head of ownership of land. Tithes we omit as having no place in the modern law. Mortgages form the subject of our next chapter. Of the above-mentioned rights, therefore, usufruct and use alone remain to be considered in this place.

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 immovable or movable property or both.⁴ Things which are consumed in the use are not, properly speaking, the subject of usufruct, but may be the subject of a quasi-usufruct.⁵ The same may be said of a usufruct of debts (*nomina*). The usufructuary may call in the debt, and use the money, but the capital sum must be made good when the usufruct expires.⁶ A usufruct may be constituted of the whole of the grantor's estate.⁷ In this event it is usually created by testament or antenuptial contract.

The rights and powers of a usufructuary are:

1. As the name indicates, to use the property and to take its fruits⁸ as owner;
2. To possess the property and to recover possession from the dominus or from a third party;⁹
3. To alienate the right of use and enjoyment, but only

Rights
and
powers
of the
usufruc-
tuary.

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 Inst. 2. 4. 2; Gr. 2. 39. 20.

⁶ Dig. 7. 5. 3; Girard, p. 390.

⁷ Voet, *ubi sup.*

⁸ Fructus are distinguished as natural, industrial, and civil; and as *pendentes* (*nequid a solo separati*), *exstantes* (*qui jam a solo separati asservantur*), *consumpti* and *percipiendi* (*qui licet percepti non sint, honeste tamen a diligente patrefamilias percipi potuerunt*). Voet, 41. 1. 28. *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.

⁹ Dig. 7. 1. 60; Voet, 7. 1. 32. The usufructuary had not possession in the strict 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.

for the term of the usufruct.¹ If, however, the property 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;²

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.³

In the absence of special circumstances a usufructuary is not entitled to claim compensation for improvements.⁴

The duties of the usufructuary are:

Duties of
the usu-
fructuary.

1. To frame an inventory of the property comprised in the usufruct. In Roman Law this was advisable, but not compulsory.⁵ In Roman-Dutch Law it may be compelled;⁶

2. To give security to the dominus: (a) for the use and cultivation of the property in a husbandlike manner; (b) for its restoration in proper condition upon the termination of the usufruct.⁷

The duty of giving security cannot be remitted to the usufructuary by the last will of the settlor;⁸ though it

¹ Dig. 7. 1. 12, 2; Voet, loc. cit. This seems clear, though the text in the Institutes (2. 4. 3) 'nam extraneo cedendo nihil 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 N.O.* [1912] E.D.L. 298, and 40 *S.A.L.J.* (1923), p. 148.

² Voet, loc. cit.; *Holl. Cons.* iv. 51.

³ Voet, loc. cit.

⁴ *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.

⁵ Dig. 7. 9. 1, 4.

⁶ Voet, 7. 9. 2.

⁷ *Gr.* 2. 39. 3; Van Leeuwen, 2. 9. 10; V.d.L. 1. 11. 5; 1. 14. 10; Dig. 7. 9. 1 pr.; *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.* vi. 326; V.d.K. *Dictat. ad Gr.* loc. cit.

⁸ *Gr.*, *ubi sup.* and Schorer's note (*Dissent. Groen. de leg. abr. ad Cod.* 3. 33. 4); Voet, *ubi sup.*; V.d.K. 371. Why not? The reasons given are irrelevant, or extremely feeble, as that the usufructuary may be tempted to waste the property (Gail, ii. 145, § 2). In any event, parents are not bound to find security for property given to their children by last will or act *inter vivos* subject to a usufruct in their favour. Voet, 7. 9. 7; *Ex parte Pistorius* [1920] T.P.D. 297; *Ex parte Newberry* [1924] O.P.D. 219.

may be remitted by one who grants a usufruct by act *inter vivos*, and by the heir of a testator, who has constituted a usufruct by his will.¹ The security may be demanded by the dominus at any time during the currency of the usufruct;²

3. To keep in repair at his own cost and to meet all ordinary expenses, but extraordinary expenses may be charged against the dominus;³

4. To pay all usual taxes and outgoings charged on the land;⁴

5. Not to commit waste by felling timber,⁵ destroying houses,⁶ and the like. The permitted uses of timber are similar to those recognized by English Law. Undergrowth may be cut. Trees may be felled on timber estates in due course of husbandry,⁷ 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;⁸

6. Generally, to exercise all his rights with the care of a *bonus paterfamilias*.⁹

The duties and rights of the dominus are the counterpart of the rights and duties of the usufructuary. Thus, on the

The duties and rights of the dominus.

¹ Voet, 7. 9. 9.

² Voet, 7. 9. 11.

³ 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.

⁴ Van Leeuwen, 2. 9. 11; Voet, 7. 1. 37.

⁵ 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, must restore to the dominus the value of the minerals taken and may be required to give security for such restoration. Van Leeuwen, 2. 9. 4; *The Master v. African Mines Corp. Ltd.* [1907] T.S. 925. In the Transvaal this right no longer exists in consequence of the Precious and Base Metals Act (35 of 1908) *Ex parte Venter* [1934] T.P.D. 69. Apparently it is not waste to change the course of husbandry. Voet, 7. 1. 24; Dig. 7. 1. 13, 5, and Gothofredus, ad loc.

⁶ Voet, 7. 1. 21. Ameliorating waste. *Ibid.*

⁷ Schorer ad Gr., *ubi sup.*

⁸ Voet, 7. 1. 22; and therefore the usufructuary was not bound to replace them. Dig. 7. 1. 59 pr.; Voet, *ibid.*

⁹ Voet, 7. 1. 41.

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.¹ On the other hand, he retains all such rights as are properly incident to his reversion, such as the right of alienating the property, by sale or gift, subject, of course, to the usufruct.²

How usufruct is acquired.

Grotius says that usufruct is acquired by: (1) Agreement followed by acquiescence on the part of the dominus;³ (2) last will;⁴ (3) prescription of a third of a century;⁵ (4) judicial decree.⁶

For the first we should perhaps substitute delivery of movables and registration of immovables, for as Van der Keessel points out, there is no need here to have recourse to quasi-tradition (as in the case of praedial servitudes), for usufruct *per se* entitles the usufructuary to the actual possession of the subject-matter.⁷ A last will does not vest the usufruct in the legatee, but entitles him to call for it.⁸ A usufruct may also be reserved in a deed of transfer of land.⁹

How determined.

Usufruct is determined by: (1) death of the usufructuary,¹⁰ or during his life-time by the expiry of the time for which the usufruct was granted, or by a resolutive condition.¹¹ 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.¹² The heirs of the usufructuary have no right to remove standing crops, but

¹ Voet, 7. 1. 20. But 'jure civili nec consentiente fructuario'.

² Voet, *ubi sup.*

³ Gr. 2. 39. 8; Voet, 7. 1. 7.

⁴ Gr. 2. 39. 9.

⁵ Gr. 2. 39. 11; (Ceylon) *Selohamy v. Goonewardene* (1928) 30 N.L.R. 112. In South Africa now thirty years, Prescription Act, 1943, sec. 2.

⁶ Gr. 2. 39. 12. Jure civili also in certain cases (5) by operation of law. Voet, 7. 1. 6.

⁷ V.d.K. Dictat. *ad* Gr. 2. 39. 8; Lee, *Commentary*, p. 199.

⁸ *Supra*, p. 173.

⁹ Deeds Registries Act, 1937, sec. 67.

¹⁰ Gr. 2. 39. 13; Voet, 7. 4. 1.

¹¹ Voet, 7. 4. 11-13.

¹² Gr. 3. 39. 15; Voet, 7. 4. 1; *Johannesburg Municipality v. Transvaal Cold Storage Co.* [1907] T.S. at p. 729.

are entitled to be re-imbursed the cost of sowing and cultivation.¹ Rents are apportioned between the heirs of the usufructuary (or the usufructuary) and the dominus;² (2) merger; when the usufructuary becomes owner (consolidatio), or the usufruct reverts to the owner by cession, or abandonment;³ (3) non-user for one-third of a century or, as some say, thirty years;⁴ (4) complete, but not partial, destruction or change of form of the subject-matter of the usufruct.⁵

Usus or *bruick* is a lesser right than usufruct, but, like Usus, it, is usually a life interest.⁶ 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.⁷

Grotius refers to the same legal category the right of grazing on common-lands and the hereditary right of fishing in another's water.⁸

Use, in general, is constituted and determined by the same modes as usufruct.⁹

In addition to the above there are what the commentators call irregular or anomalous personal servitudes,¹⁰

Anomalous personal servitudes.

¹ Voet, 7. 1. 28 *in fine*.

² Gr. 2. 39. 13; Lee, *Commentary*, p. 200; Voet, 7. 1. 30.

³ Inst. 2. 4. 3; Gr. 2. 39. 16, 17; Voet, 7. 4. 2. 3; Dig. 7. 1. 64 and 65.

⁴ Gr. 2. 39. 18; Voet, 7. 4. 6. 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 forfeited 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.

⁵ Gr. 2. 39. 14; Voet, 7. 4. 8 and 9. But may revive: Voet, 7. 4. 10.

⁶ Gr. 2. 44. 6; Voet, 7. 8. 3; *Potgieter v. Zietsman* [1914] E.D.L. 32.

⁷ Gr. 2. 44. 8; *Galant v. Mahonga* [1922] E.D.L. 69; *Arend v. Est. Nakiba* [1927] C.P.D. 8. These rights are seldom met with at the present day, 2 Maasdorp, p. 197.

⁸ Gr. 2. 44. 7.

⁹ Gr. 2. 44. 10; Voet, 7. 8. 3.

¹⁰ Glück, ix. 19. They are not touched by the Deeds Registries Act, 1937, sec. 63 (1).

which are created when a right of way or other normally praedial servitude is granted to a person as such for life and not to the owner of adjoining property in perpetuity.¹ Such rights are generally inalienable. But a grant of mineral rights 'constituted in favour of the beneficiary personally, and not in his capacity as owner of another property, would be in the nature of a personal servitude, but freely assignable and passing to his heirs'.² These rights 'are peculiar to the circumstances of the country, and do not readily fall under any of the classes of real rights discussed by the commentators'.³

¹ Voet, 8. 1. 4; *Willoughby's Consolidated Co. v. Cophall Stores* [1913] A.D. at p. 281; *Texas Co. (S. A.) Ltd. v. Cape Town Munic.* [1926] A.D. 467.

² *Van Vuren v. Registrar of Deeds* [1907] T.S. at p. 294.

³ *Lazarus & Jackson v. Wessels* [1903] T.S. at p. 510. As to the relation of the grantee of mineral rights to the owner of the surface see *Nolte v. Johannesburg Consolidated Investment Co. Ltd.* [1943] A.D. 295.

VII

MORTGAGE OR HYPOTHEC

MORTGAGE¹ is defined by Grotius as a 'right over another's property which serves to secure an obligation'.² The person who creates the mortgage is termed the mortgagor, the person in whose favour it is created is termed the mortgagee. 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 disapproves.³ A person may create a mortgage to secure his own obligation or anyone else's, but there can be no mortgage where there is no principal obligation.⁴ Anything may be mortgaged which belongs to the mortgagor whether in full or qualified ownership,⁵ and whether such property be movable or immovable, corporeal or incorporeal, in possession or consisting in a right of action.⁶ A mortgage of a specific thing imports a mortgage of the fruits⁷ and other accessories.⁸ Generally speaking, a man cannot mortgage what does not belong to him,⁹ but a

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*.

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*, 1937, sec. 51, and Wille, *Mortgage and Pledge in South Africa*, p. 92; and for Ceylon, Ord. No. 21 of 1927, sec. 17.

⁴ *Kilburn v. Est. Kilburn* [1931] A.D. 501.

⁵ Gr. 2. 48. 2. Grotius (sec. 3), founding on the Roman Law, says that the mortgage of urban servitudes and of agricultural instruments is forbidden, but Schorer dissents.

⁶ 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.

⁷ Voet, 20. 1. 3; *Barclay's Bank v. The Master* [1934] C.P.D. 413.

⁸ Voet, 20. 1. 4.

⁹ Voet, 20. 3. 3. As between mortgagor and mortgagee the

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, were 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.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 a judicial decree.⁵

Classifica-
tion of
mort-
gages.

Mortgages are either: (1) conventional (or express), or (2) legal (or tacit);⁶ and each of these may be either general or special, according as the mortgage attaches to all the mortgagor's property (immovable or movable or both), future as well as present, or to some specific thing or collection of things, as a flock of sheep or all the goods in a shop.⁷ In this last case the mortgage covers the flock or stock in trade as it may from time to time be constituted. Conventional mortgages, as the name implies, are created by agreement. Tacit mortgages arise by operation of law. The phrase judicial mortgage (*pignus praetorium vel*

transaction holds good, but not to the prejudice of the owner. V.d.K. 539.

¹ Voet, 20. 3. 7; *Holl. Cons.* i. 151.

² Voet, *ubi sup.*; Schorer *ad Gr.* 2. 48. 2; Van Leeuwen, 4. 13. 4; Groen. *de leg. abr. ad Cod.* 8. 16. But see *Muller v. Chadwick & Co.* [1906] T.S. 30.

³ Dig. 13. 7. 41; Voet, 20. 3. 4. For other cases see Voet, 20. 3. 7.

⁴ Voet, 20. 3. 6. In the modern law 'the mortgage of immovable property without the consent of the owner is rendered practically impossible by our system of registration'. Wille, *Mortgage and Pledge*, p. 56.

⁵ Decker *ad Van Leeuwen*, 4. 12. 4; Administration of Estates Act, 1913, sec. 87; *supra*, p. 49. For other cases in which mortgage is not permitted see Decker's note.

⁶ Gr. 2. 48. 7.

⁷ Voet, 20. 1. 2.

judiciale) is also in use, meaning an attachment of goods in execution of a judgment.¹

In Roman Law a mortgage was created by agreement with or without transfer of possession. If, to secure a debt, a thing, movable or immovable, was transferred into the possession of the creditor, the transaction was a pledge (pignus). If a charge over property was created without transfer of possession, the transaction was properly described as a hypothec. But in common usage these terms were interchangeable.² No formal words were required to create a mortgage. All that was needed was the agreement of the parties, which might be expressed verbally or in writing. In the later law an instrument executed publicly or subscribed by three witnesses was preferred to other mortgages.³

Mortgage
in Roman
Law.

In the Roman-Dutch Law the matter was not so simple. We must distinguish: (a) special mortgages of immovables; (b) special mortgages of movables accompanied by delivery (pledges); (c) general mortgages and special mortgages of movables unaccompanied by delivery; (d) mortgages of rights (res incorporales).

Mortgage
in Roman-
Dutch
Law.

(a) Special mortgages of immovables were required by a 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 situate'.⁴ There was a duty of 2½ per cent. of the amount of the loan (duty of the fortieth penny);⁵ and the transaction had to be registered in the land-book.⁶ All these conditions were indispensable, if the

Special
mortgage
of im-
movables.

¹ Kotzé, *Van Leeuwen*, vol. ii, p. 656; *Liquidators Union and Rhodesia Wholesale Ltd. v. Brown & Co.* [1922] A.D. 549; *Humphreys v. Pickles* [1925] A.D. 471.

² Dig. 20. 1. 5, 1 (Marcianus): Inter pignus et hypothecam tantum nominis sonus differt.

³ Cod. 8. 17 (18). 11, 1.

⁴ 1 *G.P.B.* 374; *supra*, p. 145.

⁵ *Placaat der 40^{ste} Penning*, December 22, 1598, as reissued 1632 (1 *G.P.B.* 1953). The duty was, however, 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.

⁶ *P.O.*, 1580, Art. 37 (1 *G.P.B.* 339). It should be noted that the

mortgage was to affect third parties, i.e. to bind the property.¹ It was immaterial whether possession was or was not transferred to the creditor.²

Pledge of movables.

(b) A special mortgage of movables accompanied by delivery, i.e. a pledge (*pignus—pand ter minne*) was effected by handing over the property to the creditor to hold as a security.³ To the validity of a pledge transfer of possession was essential.⁴ An agreement, therefore, which allowed the pledgor to retain the thing *precario* or as a loan or deposit, or on hire from the pledgee, rendered the pledge invalid, being looked upon as a fraud upon the law, which insists upon delivery as an essential element in the transaction.⁵

General mortgages.

(c) A general mortgage was constituted either by a general clause added to a special mortgage, or by a general bond. If the general bond related to immovables the law required it to be passed before a Judge, who might be any Judge in the Province of Holland.⁶

Mortgage of movables without delivery.

A general bond of movables was generally executed before a notary. The same applied to a special bond of movables unaccompanied by delivery.⁷

Mortgage of rights.

(d) Mortgages of rights (*res incorporales*) were effected by agreement, which might, or might not, be accompanied by cession of the right to the creditor.⁸

Mortgages in South Africa;

In South Africa the law remains substantially the same. A special mortgage of immovables is constituted by a reference in that article is to the *Placaat* of May 9, 1560 (2 *G.P.B.* 759 and 1402), not to the *Placaat* of 1529.

¹ Gr. 2. 48. 30. *V.d.K. ad loc.* (Lee, *Commentary*, p. 215) holds that omission of registration did not entail the penalty of nullity.

² Gr. 2. 48. 33.

³ Gr. 2. 48. 27; *V.d.L.* 1. 12. 3.

⁴ But *brevi manu traditio* may be sufficient. *O'Callaghan's Assignees v. Cavanagh* (1882) 2 *S.C.* 122.

⁵ *Voet*, 20. 1. 12; *Holl. Cons.* iii. 174, 470; *V.d.K.* 536; *Goldinger's Trustee v. Whitelaw* [1917] *A.D.* at pp. 79, 89; *Goosen's Trustees v. Goosen* (1884) 3 *E.D.C.* at p. 387.

⁶ *P.O.* Art. 35; Gr. 2. 48. 23; *Voet*, 20. 1. 10; *V.d.K.* 428.

⁷ Gr. 2. 48. 23 and 28; *V.d.K. ad loc.* (Lee, *Commentary*, p. 212); *Van Leeuwen*, 4. 13. 20 and *Kotzé*, *ad loc.*

⁸ *Voet*, 20. 3. 1; 20. 1. 17; *National Bank of S. A. Ltd. v. Cohen's Trustee* [1911] *A.D.* at p. 250.

bond, known as a 'mortgage bond',¹ executed before, and attested by, the Registrar of Deeds, who has replaced the Judge for the purpose, and registered against the title deeds of the property.² General mortgages of immovables are no longer in use. Mortgages of movables (apart from pledge), special or general, are effected by notarial bond, and to give them a preference in insolvency must be registered.³ A mortgage of a *res incorporalis*, such as a right of action, 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 holding it as a security.'⁴

In Ceylon conventional general mortgages have been in Ceylon. abolished by statute.⁵ A special mortgage of immovables must be executed before a notary and two witnesses or a District Judge, &c., and be registered.⁶ A special mortgage of movables must be effected by actual delivery or by writing duly registered (bill of sale).⁷

Before leaving this branch of our subject it is to be remarked that no special form of words is necessary for the creation of a mortgage. Whether the words used are apt to create a mortgage is a question of 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,

No special form of words required.

Disguised mortgages.

¹ Deeds Registries Act, 1937, sec. 102.

² *Harris v. Buisinne's Trustee* (1840) 2 Menz. at p. 108; Deeds Registries Act, 1937, sec. 50.

³ *Francis v. Savage & Hill* (1882) 1 S.A.R. 33; *Hare v. Heaths Trustee* (1884) 3 S.C. 32; 2 Maasdorp, p. 281.

⁴ *Smith v. Farrelly's Trustee* [1904] T.S. at p. 955; *National Bank of S. A. Ltd. v. Cohen's Trustee* [1911] A.D. at p. 251; *Robert v. Ettlinger* [1937] W.L.D. 28. As to what is necessary to constitute a cession of a right, see p. 247 *infra*.

⁵ Ord. No. 8 of 1871, sec. 1; re-enacted, Ord. No. 21 of 1927, sec. 3.

⁶ Ord. No. 7 of 1840, sec. 2; Ord. No. 17 of 1852, sec. 1.

⁷ Ord. No. 21 of 1871; Ord. No. 23 of 1927, sec. 18; *Mohamad v. Eastern Bank* (1931) 33 N.L.R. 73. For the older law of Ceylon see *Tatham v. Andree* (1863) 1 Moo. P.C.C. (N.S.) 386.

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 maxim—Plus valet quod agitur quam quod simulate concipitur.¹

Contract
to create
a mort-
gage in
futuro.

An agreement to constitute a mortgage *in futuro*, e.g. to give a movable as a pledge to secure a present or future debt, bears the same relation to a mortgage as a contract to sell bears to a sale perfected by delivery. If such an agreement satisfies the requirements of the law as to form and in all other respects the Courts will give effect to it directly, by decreeing specific performance, or indirectly, by interdict, and in any event by an action for damages against the party in default. This is part of the general law of contract, and does not call for any further notice in this place. It must be remarked, however, that an alienee with notice is in no better position than if the mortgage had been actually implemented.²

Tacit
hypo-
thecs.

We pass to tacit hypothecs. Many such are mentioned in the books, of which some were peculiar to the law of Holland, but most were a legacy from the Roman Law, which in the later Empire, and particularly under Justinian, multiplied these embarrassing clogs on property: some of these are inapplicable to modern conditions. Many were abolished by pre-Union legislation in one or other of the colonies, and to-day none of them except the landlord's hypothec confers a preference in insolvency. This provision of the Insolvency Act³ does not positively abolish tacit hypothecs in general, for the statute leaves untouched the hypothecary creditor's right (if it still exists) of following the property into third hands⁴ and his right of preference where there is no insolvency, as in an

¹ Cod. 4. 22; Voet, 13. 7. 1; *Zandberg v. van Zyl* [1910] A.D. at p. 309; *National Bank of S. A. v. Cohen's Trustee* [1911] A.D. at p. 242; *Anderson v. Kaplan* [1931] C.P.D. 50; *Bhaijee v. Khoja* [1937] A.D. 246; *Commrs. of Customs v. Randles Bros.* [1941] A.D. 369.

² *Cato v. Alion & Helps* [1922] N.P.D. 469; *De Jager v. Sisana* [1930] A.D. at p. 84.

³ Insolvency Act, 1936, sec. 85 (1).

⁴ *Infra*, p. 200.

Admiralty action *in rem*.¹ But in practice these hypothecs have little, if any value, except the landlord's hypothec, which calls for particular attention.

In the later Roman Law a landlord, to secure the rent due to him, had a tacit hypothec over movables brought on to the leased premises (*invecta et illata*) in the case of a house, and in the case of an agricultural tenancy over the fruits and crops.² The Roman-Dutch Law took this over, extending the tacit hypothec over *invecta et illata* to every description of tenancy.³ This hypothec in principle requires two conditions: (1) the goods must be on the premises; (2) they must be the property of the tenant. But each of these conditions admits of some qualification.

The landlord's hypothec.

Two conditions.

1. As regards the first, the removal of the goods from the premises usually extinguishes the hypothec. The only way to prevent this is for the landlord to obtain from the Court a judicial sequestration of the property while it is on the premises, or an arrest of the property in the very act of removal. The law as stated by Voet in the following passage still holds good:—

1. The goods must be on the premises.

‘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 (*praeccludantur*) 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 (*praclusio*) by our usages not only confirms (*firmit*) 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.’⁴

¹ *Crooks & Co. v. Agricultural Coop. Union* [1922] A.D. 423.

² Dig. 2. 14. 4 pr.; 20. 4. and 7; also for waste to a house—*si deteriorem habitationem fecerit culpa sua inquilinus*. Dig. 20. 2. 2.

³ Gr. 2. 48. 17; Voet, 20. 2. 2-3; V.d.K. 423.

⁴ Voet, 20. 2. 3 (Berwick's translation); (*Ceylon Perera v. Silva* (1935) 37 N.L.R. 157.

Quick
pursuit.

In this passage Voet speaks of the possibility of seizure in the very act of removal; and Grotius says that the lessor preserves his right if he proceeds against the property 'immediately, while it is being removed from the ground'. The limits which the law puts upon this right were considered in *Webster v. Elison* [1911] A.D. 73. The Natal Court had developed a doctrine of so-called 'quick pursuit', according to which 'if the landlord proceeds expeditiously, or with sufficient celerity, he is entitled to an order for the attachment and return of the goods to the leased premises'. But the Appellate Division refused to endorse this doctrine. By the law of South Africa the utmost indulgence allowed to the landlord is to arrest the goods 'in process of removal or while in transit to their new destination' (Innes J. at p. 90). If the tenant has removed the goods *after* an order of attachment, the Court will order him to return them to the premises for the purpose of giving effect to the attachment.¹ But even in this case (it seems) a *bona fide* purchaser will have acquired a good title.²

The land-
lord's pre-
ference.

It is not the case, however, according to modern practice, that the landlord's hypothec requires a judicial arrest to make it effectual over movables remaining upon the premises; for over such property 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.³ 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 arrears of rent.⁴

2. The
goods
must
(gener-
ally)
belong to

2. The hypothec in principle attaches to movables upon the premises belonging to the tenant; or to a sub-tenant, but only to the extent of rent due from the sub-tenant to his immediate landlord.⁵ The property of third parties is

¹ *Greeff v. Pretorius* (1895) 12 S.C. 104.

² Voet, 20. 2. 3, *in fine*.

³ *In re Stilwell* (1831) 1 Menz. 537; 2 Maasdorp, p. 313.

⁴ *Columbia Furnishing Co. v. Goldblatt* [1929] A.D. 27.

⁵ Voet, 20. 2. 6, *in fine*; *Smith v. Dierks* (1884) 3 S.C. 142;

not bound unless it has been brought upon the premises with the knowledge and consent, express or implied, of the owner for the permanent or indefinite use of the tenant and the landlord is unaware that the goods do not belong to the tenant.¹ Goods supplied under a hire-purchase agreement usually satisfy this condition.² Consent is implied if the owner being in a position to give notice of his ownership to the landlord has failed to do so.³ So soon as the goods cease to belong to the tenant, e.g. by being sold and delivered to a *bona fide* purchaser, they cease to be affected by the hypothec even before their removal from the land.⁴ On the other hand, if the goods have in fact been brought on to the premises for the permanent or indefinite use of the tenant, it is immaterial that the landlord did not know that they were there.⁵ The landlord's hypothec does not extend to goods placed in the hands of the tenant to be worked by him in the course of his trade.⁶ It is not lost if the landlord has accepted a surety or a conventional mortgage to secure his rent, for no one should be prejudiced by excess of caution.⁷

The Insolvency Act, 1916, sec. 86 (as amended by Act No. 29 of 1926, sec. 29) provided that the landlord's

Ex parte Aegis Assurance Co. [1909] E.D.C. 363; *Reinhold & Co. v. Van Oudtshoorn* [1931] T.P.D. 382. *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* (3rd ed.), p. 184.

¹ *Dig.* 20. 2. 7; *Groen. ad Gr.* 2. 48. 17; *Voet*, 20. 2. 5; *Bloemfontein Munic. v. Jackson's Ltd.* [1929] A.D. at p. 276; *Phillips v. Hearne & Co.* [1937] C.P.D. 61; *Van den Bergh v. Polliack & Co.* [1940] T.P.D. 237.

² *Bloemfontein Munic. v. Jackson's Ltd., ubi sup.*

³ *Ibid.* at p. 277; *Sercombe v. Colonial Motors (Natal) Ltd.* [1929] N.P.D. 58; *Rand Furnishing Co. v. Heydenrych* [1929] T.P.D. 583; *Fresh Meat Supply Co. v. Standard Trading Co.* [1933] C.P.D. 550.

⁴ *Webster v. Ellison* [1911] A.D. at p. 84 *per* Lord De Villiers C.J. The same consequence follows if goods are attached on the leased premises at the instance of a judgment creditor of the lessee. *Ibid.*

⁵ *Mackay Bros. v. Eaglestone* [1932] T.P.D. 301.

⁶ *Van Leeuwen*, 4. 13. 12.

⁷ *Voet*, 20. 6. 12; *Schorer ad Gr. ubi sup.*

hypothec should give a preference for all rent in respect of the period current with and up to the sequestration, and for arrear rent not exceeding three months in respect of the period immediately prior thereto. The latest Insolvency Act gives a preference for rent due in respect of any period immediately prior to and up to the date of sequestration for periods extending from three to fifteen months according as the rent is payable at longer or shorter intervals.¹

A statutory hypothec.

The same Act by sec. 84 in case of a sale of goods under a suspensive condition or of a hire-purchase agreement creates a statutory hypothec. The trustee of the debtor's insolvent estate may be required by the creditor to deliver the property to him, and thereupon the creditor is deemed to be holding the property as security for his claim.

Other tacit hypothecs.

As explained above, there were many other tacit hypothecs which have little, if any, value at the present day. Some were special, affecting particular things, such as the hypothec of one who lent money or supplied materials for repairing a house or ship, or expended labour in doing so over the house or ship in question;² or the hypothec of an agricultural tenant, who had quitted possession on the determination of his lease, over the leased property to cover his right to be compensated for structures set up with the landlord's consent.³ Others were general, attaching to all the property of the debtor, such as the hypothec of the fiscus over the property of administrators and receivers of public funds⁴ and of persons liable for taxes

¹ viz. three months if the rent is payable monthly or at shorter intervals; six months if at intervals exceeding one month, but not exceeding three months; nine months, if at intervals exceeding three months, but not exceeding six months; and fifteen months if at any longer interval. Insolvency Act, 1936, sec. 85 (2).

² Gr. 2. 48. 13; Voet, 20. 2. 28-9; 20. 4. 19; *Crooks & Co. v. Agricultural Coop. Union* [1922] A.D. 423.

³ Placaet van de Staten van Hollandt of 26 September, 1658, Art. 11 (2 *G.P.B.* 2515). For text and translation see Lee, *Commentary*, p. 93.

⁴ Gr. 2. 48. 15; Voet, 20. 2. 8; V.d.K. 420; *In re Insolvent Est. Buisinn* (1828) 1 Menz. 318; *Chase v. Du Toit's Trustees* (1858) 3 Searle 78; (*Ceylon*) *Attorney General v. Pana Adappa Chetty* (1928) 29 N.L.R. 431.

and dues,¹ of the ward over his guardian's estate,² of legatees and fideicommissaries over the estate of the deceased testator or intestate,³ of the wife, when all community of goods had been excluded, over her husband's estate, in security of her *dos*.⁴ Many of these tacit hypothecs, as Professor Wille points out,⁵ have been rendered unnecessary by the fact that the legislature has provided other ways of securing the same result. Others have degenerated into liens. Any reader who may wish to have more detailed information will find it in earlier editions of this book.

A tacit hypothec is not the same as a lien.⁶ This is a Liens. 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 retained⁷ and are not assignable, whereas a tacit hypothec does not generally depend upon possession, and, like most other hypothecs, may be ceded to a third party together with the claim secured by it. In some respects a lien is more analogous to a pledge of a movable perfected by delivery. Thus, a right to hold a pledge as a security cannot be ceded without the consent of the debtor and so far resembles a lien. On the other hand the pledge gives a right of sale, which a lien does not.⁸

Liens fall into one of two classes, which have been Classifica-
tion and
legal
effect.

¹ Voet, *ubi sup.*; V.d.K. 419; *Cape Govt. v. Liquidators Balmoral Diamond Co.* [1908] T.S. at p. 688.

² Gr. 2. 48. 16; Voet, 20. 2. 11; V.d.K. 421.

³ Gr. 2. 23. 19; Voet, 20. 2. 21; V.d.L. 1. 12. 2.

⁴ Voet, 20. 2. 20; 23. 4. 52; *Rupert's Trustee v. Rupert* (1885) 4 S.C. 22.

⁵ Wille, *Principles of South African Law*, p. 187.

⁶ 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).

⁷ *United Building Soc. v. Smookler's Trustees* [1906] T.S. at p. 627; *Savory v. Baldochi* [1907] T.S. 523.

⁸ *Deutschmann v. Mpetu* [1917] C.P.D. 79.

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. The first is good against all the world, the second only against the other party to the contract and persons claiming through him, or acquiring the property with knowledge of the lien,² not against an owner who is not a party to the contract, unless it has been made by his authority express or implied, or relates to necessary or useful expenses.³ Instances of the first are the rights of retention which the law gives to possessors and occupiers of land in respect of improvements,⁴ and perhaps to a finder of lost property in respect of necessary expenses.⁵ Instances of the second are the rights of retention enjoyed by builders,⁶ by artificers, e.g. when cloth has been delivered to a tailor to make up into clothes,⁷ by livery stable keepers,⁸ by carters and warehousemen.⁹ By an extension of the same principle attorneys and other legal practitioners have a right to retain documents until paid

¹ *United Building Soc. v. Smooklers Trustees, ubi sup.*; *Colonial Manufacturing Co. v. Wiid* [1927] C.P.D. 198.

² *Nieman v. Scrivenor N. O.* [1922] O.P.D. 101; *Levy v. Tyler* [1933] C.P.D. 377.

³ *Ford v. Reed Bros.* [1922] T.P.D. 266 at p. 278; *Reed Bros. v. Ford* [1923] T.P.D. 150; *Colonial Cabinet Manufacturing Co. v. Wiid, ubi sup.*; *United Building Soc. v. Smookler's Trustees* at p. 628.

⁴ *Infra*, p. 451.

⁵ *Killian v. Reilly* (1908) 18 C.T.R. 159.

⁶ *United Building Society v. Smookler's Trustees, ubi sup.*; *Scholtz v. Faijer* [1910] T.P.D. 243; *Phillips & Gordon v. Adams* [1923] E.D.L. 104.

⁷ Voet, 16. 2. 20; 20. 2. 28 (*in fin.*); *Spurrier v. Coxwell N.O.* [1914] C.P.D. at p. 88.

⁸ *Ford v. Reed Bros. ubi sup.*; *Reed Bros. v. Ford ubi sup.* 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 debtor. *Ibid. Contra, Longpan Salt Co. Ltd. v. Blumenfeld & Co.* [1922] N.P.D. 177. For agistor's lien see *Land Bank v. Mans* [1933] C.P.D. 16.

⁹ *Anderson & Co. v. Pienaar & Co.* [1922] T.P.D. 435.

their charges in connexion with legal proceedings to which the documents relate.¹ The innkeeper's lien may perhaps be referred to the same general class.²

The Court reserves to itself the discretion, where equity demands it, to order a lien-holder to surrender the property against adequate security.³

It remains to speak of the effect of a mortgage in relation to third parties, i.e. how far it creates a real security. In Roman Law a mortgage, whether general or special, whether of movables or immovables, whether express or tacit, bound the mortgaged property, no matter into whose hands it might come.⁴ In the Roman-Dutch Law the consequences are not so simple. We must distinguish the various kinds of mortgage and shall speak first of conventional mortgages.

How far a mortgage affords a real security.

(a) A special mortgage of an immovable binds the property so long as it is registered against the mortgagor's title.⁵ (b) A pledge of a movable depends in principle, as in Roman Law, upon retention of possession by the pledgee.⁶ Loss of possession destroys, or, at best, imperils the security.⁷ (c) A general mortgage of movables affects the property so long as it remains in the possession of the

1. Conventional mortgages.

¹ Van Leeuwen, 4. 40. 2; *Queen's Town Assurance Co. v. Wood's Trustee* (1887) 5 S.C. 327. But this right of retention does not afford any security or preference in insolvency. Insolvency Act, 1936, sec. 47. 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-keepers' lien, *Nieman v. Scrivenor N. O.* [1922] O.P.D. 101; Wille, p. 157.

² Van Leeuwen, loc. cit. See *Holmes Garage Ltd. v. Levin* [1924] G.W.L.D. 58, where the English Law is contrasted.

³ *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 Insolvency Act, 1936, sec. 33; Mars, *Insolvency* (3), p. 362.

⁴ Voet, 20. 1. 14-15.

⁵ For procedure in Registrar's Office see Registry of Deeds Act, 1937, secs. 56, 57.

⁶ *Supra*, p. 190; Voet, 20. 1. 13; *Heydenrych v. Fourie* (1896) 13 S.C. 371. For a qualification of this principle see p. 201.

⁷ Cf. *Deutschmann v. Mpeta* [1917] C.P.D. 79. A German adage says: Mit der Hand stirbt das Pfand.

mortgagor. It is ineffectual against an alienee by onerous or lucrative title with or without notice,¹ or a subsequent pledgee, or a creditor who gets an execution against any part of the property.² A creditor who has a special mortgage of movables unaccompanied by delivery is in no better position³ than one who has a general bond of movables, except that he can assert his right against a subsequent alienee or encumbrancer who has notice of his claim.⁴ (d) The effect of the mortgage of a right would depend, it may be suggested, upon the nature of the right and the character of the cession. If the cession, though intended merely to be 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.⁵

(2) *tacit.* The effect of tacit hypothecs may be shortly stated. A tacit hypothec of immovables follows the property into the hands *cujusvis possessoris*, as in Roman Law.⁶ A tacit hypothec of movables attaches to the property only so long as the debtor or creditor remains in possession. It is extinguished by transfer to a third party whether by onerous or by lucrative title; and if a third party acquires a special hypothec accompanied by delivery, or a right of retention over goods included in the security he is

¹ Gr. 2. 48. 23 and 24; Voet, 20. 1. 14; 20. 6. 5; 2 Maasdorp (6), p. 321.

² Gr. 2. 48. 23 and 29; Voet, 20. 6. 6, *ad fin.*; 20. 1. 14; V.d.K. 432; 2 Maasdorp, p. 319.

³ In Natal a special hypothecation of movables by notarial bond had the same effect as if the movables had been delivered as a pledge. This is so no longer. The Notarial Bonds (Natal) Act, 1932; *Parak v. Reynhardt & Co.* [1930] N.P.D. at p. 258; *In re Umlaas Wool Washing Co.* [1934] N.P.D. 18.

⁴ *Coaton v. Alexander* [1879] Buch. 17; *Meyer v. Botha & Hergenröder* (1882) 1 S.A.R. 47; *Cato v. Alion & Helps* [1922] N.P.D. 469; *De Jager v. Sisana* [1930] A.D. at p. 84. This does not apply to a general bond. 2 Maasdorp, p. 321.

⁵ This may be inferred from the language of Lord De Villiers C.J. in *Nat. Bk. of S. A. v. Cohen's Trustee* [1911] A.D. at p. 244. 'There is no question [here] as to third parties being misled by the form of the cession.' See *Hartogh v. Nat. Bk.* [1907] T.S. 1092; [1907] T.H. 207.

⁶ Voet, 20. 1. 14.

preferred to the creditor under the earlier hypothec.¹ This is an illustration of the maxim—*mobilia non habent sequelam*—*meubelen en hebben geen gevolg*—or as the French Law puts it with reference to this specific case—*Les meubles n'ont pas de suite par hypothèque*.²

From what has been said above it is apparent that a general mortgage and a special mortgage of movables unaccompanied by delivery afford a very imperfect security since the mortgagee's right is easily destroyed by alienation. The mortgagee had one valuable right, namely preference over unsecured creditors in the event of insolvency. But this has been taken from him by the Insolvency Acts,³ except in the case of a general bond of movables, which is the only general mortgage now in use.⁴

In one particular the law as stated above requires qualification. It was said that a pledge loses its effect if the pledgee ceases to possess. But this rule sometimes yields to 'the exigencies of commercial transactions'.⁵ Thus, a merchant who was a dealer in wool and also a wool-washer pledged to a bank certain bales of wool, some of them in his own hands, others in the hands of a third party, and retained or received them back in his capacity of wool-washer. Shortly afterwards he became insolvent. It was held that there was a valid pledge to the bank and that nothing had occurred to deprive the bank of its security.⁶ Similarly, in a Scottish case, a pledgee with a power of sale employed the pledgor as his broker to sell the goods on his behalf. It was held that he retained the benefit of the pledge against an execution levied upon the goods while in the possession of the pledgor.⁷

General mortgages a poor security.

Qualification of rule that loss of possession means loss of security.

Exigencies of commerce.

¹ Voet, loc. cit. Voet is speaking of general hypothecs, but the same rule would apply also to a special tacit hypothec. V.d.K. *Dictat. ad Gr.* 2. 49. 29 (Lee, *Commentary*, p. 214).

² C. C. 2119; Planiol-Ripert, ii. 2704.

³ Insolvency Act, 1916, sec. 87 (i); 1936, sec. 86.

⁴ Deeds Registries Act, 1937, sec. 53 (i); and see definitions of 'mortgage bond', and 'notarial bond'.

⁵ *Heydenrych v. Fourie* (1896) 13 S.C. 371.

⁶ *Stratford's Trustees v. London & S. A. Bank* (1874) 3 E.D.C. 439.

⁷ *North Western Bank v. Poynter* [1895] A.C. 56.

Wrongful
dispossession.

The principle that loss of possession entails loss of security must be further qualified in the sense that if a pledgee is wrongfully dispossessed, the law will help him to recover possession even from an innocent third party¹ and an alienee or subsequent pledgee with notice takes subject to the pledge.²

Priorities.

It may happen that the same property is affected with more than one mortgage. In that event a question arises as to preference or priority between the various encumbrances upon the property. In principle all mortgages, however constituted, rank in order of time—*Praevalet jure qui praeventit tempore*—*Qui prior est tempore potior est jure*.³ In the case of conventional mortgages this means from the date of execution, and in modern practice from the date of registration when registration is required by law.⁴ Tacit hypothecs took effect from the moment when the circumstances existed which gave birth to them. Thus the minor's hypothec over his guardian's estate took effect from the moment at which the relationship of guardian and ward came into existence.⁵

Preferred
securities.

But some securities from their nature are preferred to others. Thus a mortgage of movable property perfected by delivery (pledge) gives the creditor an inexpugnable right to retain the property against all rival claimants until his own claim is satisfied.⁶ The same applies to liens or rights of retention, which, as explained above, are not mortgages, but in this respect confer the same advantage. The landlord's hypothec⁷ and the *pignus praetorium*⁸

¹ *Theron v. Gerber* [1918] E.D.L. 288.

² *Coaton v. Alexander* [1879] Buch. 17; *Meyer v. Botha & Hergenröder* (1882) 1 S.A.R. 47.

³ Cod. 8. 17 (18). 2; Gr. 2. 48. 34-6; Voet, 20. 4. 16.

⁴ Voet, 20. 4. 29; Insolvency Act, 1916, sec. 87 (2) (abrogating the effect of *Standard Bk. v. Heydenrych* [1907] A.C. 336, 3 Buch. A.C. 145); Insolvency Act, 1936, sec. 87.

⁵ Voet, 20. 2. 17; *Schutte v. Meyer's Assignee* [1927] C.P.D. 371.

⁶ Voet, 20. 1. 12; 20. 4. 9; V.d.K. 437.

⁷ Voet, 20. 4. 19; V.d.K. *ubi sup.*; Pothier: *Contrat de Louage*, § 252.

⁸ *In re Woelke* (1832) 1 Menz. 554. But by the Insolvency Act, 1936, sec. 98 (repeating the Act of 1916, sec. 84) the preference of

belong to the same class. Within this group no question of priority arises, for the simple question is who is in actual possession or control of the property.¹ 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 possession, against a judgment creditor, who seeks to attach the property under an execution.

By the Political Ordinance of 1580, Art. 35, general conventional mortgages of immovables were postponed to special conventional mortgages, though of later date.² This did not apply to tacits, but vendors used to retain a charge upon the land for unpaid purchase money by a special mortgage executed contemporaneously with the transfer called a *Kustingbrief*.³ This was preferred to any general tacit, which might be lurking in the background ready to seize upon the property in the hands of the purchaser. It resembled the unpaid vendor's (so-called) lien in English Law, which, however, arises by operation of law without express agreement.⁴ This institution changed its character in the course of the nineteenth century,⁵ and the disuse of general tacit hypothecs has deprived it of any importance.

A mortgagee seems in principle to be entitled to possession, not like the English mortgagee since the Law of Property Act 1925, *qua* tenant,⁶ but because the right to possess is a consequence of the right of hypothec. By the

the execution creditor is limited to the taxed costs of execution. See *Union and Rhodesia Wholesale Ltd. (in Liquidation) v. Brown & Co.* [1922] A.D. 549.

¹ It seems, however, that such a question of priority may arise as between the landlord's hypothec and the statutory hypothec of the seller under a hire-purchase agreement. *Supra*, p. 196.

² 1 *G.P.B.* 338; Gr. 2. 48. 34; Voet, 20. 1. 14; V.d.K. 436.

³ Gr. 2. 48. 40; 3. 14. 25; Voet, 20. 4. 18; V.d.K. 437; *In re Buisinne* (1828) 1 Menz. 326; *United Bldg. Soc. v. Smookler's Trustees* [1906] T.S. 623; *Est. Ghislin v. Fagan* [1925] C.P.D. 206.

⁴ Halsbury, vol. xx, sec. 715.

⁵ *The Kustingbrief* by Mr. Geo. Denoon, 61 *S.A.L.J.* (1944), p. 277.

⁶ *Cheshire* (5), p. 607.

P.O.
Art. 35.

Kusting-
brieven.

Rights of
mortgagee
and mort-
gagor.

actio hypothecaria the mortgagee asserted his right to possess against the mortgagor and anyone else who could not show a better title.¹ But it is questionable whether this right is admitted in the modern law.² Not being owner the mortgagee cannot grant leases unless he is in possession on the terms of an antichresis,³ which entitles him to take the profits of the land in lieu of interest.

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.⁴ A mortgagor is not prohibited from granting a lease, subject to the mortgage.⁵ The imposition of a servitude, being plainly prejudicial to the mortgagee, is not permitted.⁶

Special
covenants
contained
in mort-
gages.

Any covenants which are lawful and not contrary to public policy may be annexed to the contract,⁷ e.g. (1) that the destruction of the pledge without fault on his part shall free the debtor; (2) that the creditor shall take the profits in lieu of interest (*antichresis*);⁸ (3) or in satisfaction of his claim; (4) that the pledge shall not be redeemed for a certain time (invalid if annexed to *antichresis*?)⁹ (5) that if the debt is not paid within a certain time the creditor may *propria auctoritate* enter into possession of the mortgaged land; (6) that if the debt is not paid the

¹ Dig. 20. 1. 16, 3; Girard, p. 825.

² *Rodepoort G.M.Co.v. Du Toit N. O.* [1928] A.D. at p. 71. As to the rights and duties of a mortgagee in possession see *Judes v. S. A. Breweries Ltd.* [1922] W.L.D. 1.

³ Voet, 19. 2. 4.

⁴ Deeds Registries Act, 1937, secs. 56, 57.

⁵ *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.

⁶ *Stewart's Trustee v. Uniondale Municipality* (1889) 7 S.C. 110.

⁷ Voet, 20. 1. 21.

⁸ Voet, 20. 1. 23; (Ceylon) *Wijeyesinghe v. Velohamy* (1928) 29 N.L.R. 349.

⁹ *Sande, Decis. Fris.* 3. 12. 11; *McCullough & Whitehead v. Whiteaway & Co.* [1914] A.D. at p. 626; (Ceylon) *Gabrial v. Adikaran* (1941) 42 N.L.R. 146.

creditor (or a surety who pays) may buy the property at a fair price; (7) that the creditor may sell the pledge.¹

An agreement for forfeiture in the event of non-payment (*pactum commissorium—lex commissoria*) is not permitted.²

In the Roman Law a 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.³ He could also, in certain cases, obtain an order of foreclosure (*impetratio domini*).⁴ 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 normal mode of realizing a mortgage is by obtaining a judgment of the Court and taking out a writ of execution.⁵ In South Africa, if the mortgaged property is immovable, an order of Court is required declaring the property executable.

The mortgaged property may be sold without an order of Court with the consent of the debtor; but, according to Voet, an agreement 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.⁶ Judicial decisions in South Africa have recognized the validity of an agreement for extra-judicial sale (*parate executie*) of movables:—

Parate
executie.

‘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

¹ Voet, 20. 1. 21.

² Cod. 8. 34 (35) 3 pr.; Voet, 20. 1. 25; *Mapenduka v. Ashington* [1919] A.D. 343; *Sun Life Insurance Co. of Canada v. Kuranda* [1924] A.D. 20; (Ceylon) *Saminathan Chetty v. Van der Poorten* (1932) 34 N.L.R. 287; [1933] A.C. 178. For *lex commissoria* in contract see *Cloete v. Union Corp. Ltd.* [1929] T.P.D. 508.

³ Cod. 8. 17 (18). 8; Girard, p. 830.

⁴ Girard, p. 831.

⁵ 2 Maasdorp, p. 352.

⁶ Voet, 20. 5. 6; *Compendium*, 20. 5. 8. V.d.K. (*Th.* 439) says that a pledgee may sell a pledge which has been delivered to him, if so agreed *ab initio*.

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.¹

It seems that parate executie is not allowed by the law of Ceylon.²

If the debtor is insolvent the mortgaged property is sold not by the mortgagee, but by the trustee of the insolvent estate.³

In the Roman-Dutch Law, differing herein from the Roman Law,⁴ a later mortgagee cannot⁵ redeem or buy out an earlier mortgagee against his will so as to step into his place.⁶ 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 anyone else⁷ of making a bid for the purchase of the mortgaged property,⁸ and is entitled to have his bond set off against the purchase price.⁹ The sale in execution gives him a clean title to the property even though the price does not cover the amount of the bond.¹⁰ But it is usual in the first instance to offer the property for sale at a reserve price.

A mortgage may be extinguished in the following ways:¹¹ viz. by:

1. Extinction of the principal debt or liability (book iii, part i, chap. iv).¹² But a mortgagee in possession may,

¹ Kotzé J. in *Osry v. Hirsch, Loubser & Co.* [1922] C.P.D. at p. 547. In *Paruk v. Glendale Est. Co.* [1924] N.P.D. 1 Tatham J. found no distinction between movables and immovables. But see L. E. Krause, *The History of Parate Executie*, 41 *S.A.L.J.* (1924), pp. 20, 185.

² *Hong Kong and Shanghai Bk. v. Krishnapillai* (1932) 33 N.L.R. 249. ³ Maasdorp, *ubi sup.*

⁴ Cod. 8. 17 (18). 1 *et passim*.

⁵ Van der Keessel (*Th.* 441) merely says 'an possit, non sine caussa dubitari potest'.

⁶ But he (or anyone else) may, by agreement, take an assignment of the mortgage. *Gr.* 2. 48. 43; *Voet*, 20. 4. 35.

⁷ *Secus*, jure civili. *Voet*, 20. 5. 3.

⁸ 2 Maasdorp, p. 326.

⁹ *Smiles' Trustee v. Smiles* [1913] C.P.D. 739.

¹⁰ *Voet*, 20. 5. 11; *S. A. Association v. Van Staden* (1892) 9.S.C. 95; *United Building Soc. v. Law* [1910] T.P.D. 369. *Secus* in Ceylon, *Kristnappa Chetty v. Horatala* (1923) 25 N.L.R. 39.

¹¹ Wille, *Mortgage and Pledge in South Africa*, chap. viii; 2 Maasdorp, chap. xxxv. ¹² *Voet*, 20. 6. 2.

notwithstanding the discharge of the mortgage, retain the property until an unsecured debt due to him from the mortgagor has been satisfied;¹

2. Renunciation of the mortgage (a) express;² (b) implied, as by restoring a pledge or allowing the mortgagor to alienate the mortgaged property;³ but knowledge of or consent to sale of the property does not necessarily imply a remission of the mortgage. It is a question of intention;⁴
3. Confusion or merger, i.e. when the titles of mortgagor and mortgagee meet in the same person;⁵
4. Alienation of the mortgaged property by the mortgagor in the cases in which alienation passes the property free of the mortgage (*supra*, pp. 199–200);
5. Complete destruction of the mortgaged property;⁶
6. Expiry of time or operation of condition when the mortgage was expressed to be temporary or conditional;⁷
7. Extinction of the mortgagor's title, e.g. by death, if his interest was for his life; or, in the case of a sub-mortgage (i.e. a mortgage of the mortgagee's interest), by the determination of the principal mortgage;⁸
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,⁹ or by no title at all. Others writers express a preference for the general

¹ Cod. 8. 26; V.d.K. 435; Lee, *Commentary*, p. 216; *Smith v. Farrelly's Trustee* [1904] T.S. at p. 962; but against the debtor only, not against his creditors, *ibid.*

² Voet, 20. 6. 5, including novation of the mortgage by substituting another right in its place. Wille, p. 290.

³ Voet, 20. 6. 6–7.

⁴ V.d.K. 442; *Swanepoel v. Van Heerden* [1928] A.D. 15.

⁵ Voet, 20. 6. 1.

⁶ Voet, 20. 6. 4.

⁷ Voet, 20. 6. 10.

⁸ Voet, 20. 6. 2 (*in fine*).

⁹ Gr. 2. 48. 44; V.d.K. 443; V.d.L. 1. 12. 6.

common law term of a third of a century.¹ In South Africa the period is fixed by statute at thirty years;²

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, 1936, secs. 26, 29, and 30, as a disposition without value, or a voidable or undue preference;
10. Judicial sale, or sale in insolvency, of the mortgaged property.

Keeping
first
mortgage
alive.

Where there is a first and a second mortgage on the same property and any event occurs which extinguishes the first mortgage without extinguishing the second, normally the second mortgage is promoted to higher rank. But if the first mortgagee has purchased the property from the mortgagor by private contract, he may, if he pleases, keep the first mortgage alive as against a second mortgagee, who is proceeding to a judicial sale of the property.³

¹ Voet, 20. 4. 9; Matthaeus, *Paroem.* no. 9, sec. 6 (7).

² Prescription Act, 1943, sec. 3.

³ Cod. 8. 19 (20). 1; Voet, 20. 5. 10. The Germans call this *Eigentümerhypothek*. See Ennecerus-Kipp-Wolff, *Lehrbuch des Bürgerlichen Rechts*, iii. 530.

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 of an obligation,² provided only that it be something possible and not contrary to law.³ From legal 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 other consequences in the field of positive law.⁵ This distinction is not without importance at the present day. Thus it is generally held that the unassisted contract of a minor creates a natural obligation and is a good foundation for a third

Obligations are civil and natural.

¹ Inst. 3. 13 pr. The term 'obligation' is not understood to include personal relations arising from status.

² Voet, 44. 7. 1.

³ Voet, 2. 14. 16.

⁴ Voet, 44. 7. 3.

⁵ Voet, *ubi sup.*

party's contract of suretyship. Another case is a statute-barred debt. The debtor is not bound to pay, but if he pays he cannot reclaim the money on the ground that it was not owed (*condictio indebiti*).¹

A legal bond or obligation between two persons may arise in 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*.² According to this, obligations arise: (1) from agreement; (2) from wrongdoing; (3) from various other causes. We shall discuss these severally under the three heads of Contractual, Delictual, and Miscellaneous or Quasi-contractual.

¹ Voet, 12. 6. 2; Wessels, i. 1271. Wessels examines some other (doubtful) cases of natural obligation.

² *Obligaciones 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 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 legal consequence attaches to words spoken and under-

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*, Art. 196). 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. 220, n. 1.

stood 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

In discussing the law of contract we shall consider: (a) Divisions of the law of contract; (b) its operation or effect; (c) its interpretation; (d) its determination. These topics 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. In Roman-Dutch Law

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 (*infra*, p. 216); 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.

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

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 and 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 fine*.

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'. As to the effect of tender see *Union Govt. v. Vianini* [1938] A.D. 560.

⁶ Gr. 3. 3. 45. Since the decision in *Conradie v. Rossouw* [1919] A.D. 279 (*infra*, p. 226, n. 2) 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. 102; *Robinson v. Randfontein Ests. G. M. Co.* [1921] A.D. at pp. 188, 237; *Edwards (Waaikraal) G. M. Co. Ltd. v. Mamogale* [1927] T.P.D. at p. 295; *Sher v. Allan* [1929] O.P.D. 137; *Rainforth v. Brown* [1937] S.R. 269.

in the manner, 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 offeror² 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 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 and the Appellate Division has pronounced in favour of this solution, provided of course, that the purported acceptance is not inconsistent with the terms of the offer.⁵

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.⁶ Sometimes it is agreed between the parties that their contract shall be reduced to writing. Whether they are

Effect of agreement to

¹ *Laws v. Rutherford* [1924] A.D. 261.

² Voet, 5. 1. 73. See *Stofberg v. Est. Van Rooyen* [1928] O.P.D. 38; Buckland, *Textbook*, p. 413, n. 8.

³ Jenks, *Digest*, Art. 211; *Watermeyer v. Murray* [1911] A.D. 61; *Houston v. Blechly* [1926] E.D.L. 305.

⁴ Anson, *Law of Contract*, p. 25.

⁵ *Kerguelen Sealing and Whaling Co. v. Commrs. for Inland Revenue* [1939] A.D. 487, approving Kotzé J.P.'s decision in *Cape Explosive Works Ltd. v. S. A. Oil and Fat Industries Ltd.* [1921] C.P.D. 244. See also *Woolmer v. Rees* [1935] T.P.D. 319 (offer and acceptance by telephone); *Yates v. Dalton* [1938] E.D.L. 177 (by telegram).

⁶ *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; Wessels, i. 107 ff.

bound independently of the writing or not before the contract has been written down is in each case a question of intention.¹ 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 may affect a 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 Mistake of law. 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

¹ Gr. 3. 14. 26; Voet, *ubi sup.*; *Goldblatt v. Fremantle* [1920] A.D. 123; *Woods v. Walters* [1921] A.D. 303; *Cole v. Stuart* [1940] A.D. 399.

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; Wessels, i. 1314.

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. 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

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 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 essential 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, according to a widely accepted view, it is not every

Kotzé C.J.'s learned judgment; *Heydenrych v. Standard Bk. of S. A.* [1924] C.P.D. 335; 33 *S.A.L.J.* (1916), p. 45. Error of fact and error of law distinguished. *Sampson v. Union & Rhodesia Wholesale Ltd.* [1929] A.D. at p. 479.

¹ Whether mistake as to private rights is a mistake of law? *Rooth v. The State, ubi sup.*, at p. 267; *Umhlebi v. Umhlebi's 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 Pothier, *op. cit.*; *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.

mistake as to persons which will be fatal to a contract; where the individuality of the party 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. But another view, which seems more in accordance with principle, is that if the goods are retained there is a quasi-contractual duty to pay for 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’, or ‘these plated 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. This is a case of *mutual* error. It must be distinguished from common error, i.e. when both parties labour under the same mistake.⁵

¹ Pothier, sec. 19; Anson, p. 151; *C.C.* 1110.

² Wessels, i. 935 ff.

³ Dig. 18. 1. 41 pr.

⁴ *Morisset v. Brochu* (1883) 10 Quebec Law Reports, 104.

⁵ Pothier, sec. 18; Prof. Cheshire in 60 *L.Q.R.* (1944), p. 175. *Infra*, p. 221.

The
objective
theory of
contract.

Even where a material misapprehension exists, it does not necessarily follow 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.¹ In estimating the consequences of mistake the question which is asked is not so much what a person intends as what he says;² 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';³ 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.⁴ 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;⁵ but the result will be different, if there was something in the circumstances to make the mistake excusable.⁶

We have spoken of cases in which mistake may have

¹ 'Cases arise in which, although there is in fact no mutual 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.

² *S. A. Rlwys. v. Nat. Bk. of S. A.* [1924] A.D. at p. 716 *per* Wessels J.A.

³ *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, ubi sup.*; *Irvin & Johnson (S. A.) Ltd. v. Kapla* [1940] C.P.D. 647.

⁴ Voet, 12. 6. 7; 22. 6. 6; *Logan v. Beit* (1890) 7 S.C. at p. 216.

⁵ *Merrington v. Davidson* [1905] 22 S.C. 148; *De Villiers v. Parys Town Council* [1910] O.P.D. 55.

⁶ *Maritz v. Pratley* [1894] 11 S.C. 345; and see the English case of *Scriven v. Hindley* [1913] 3 K.B. 564; Anson, p. 157.

the effect of excluding agreement. There are other cases in which the parties are in fact agreed but entertain 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,¹ or where there is a common error as to a substantial quality.² 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 a case the Court will decree rectification of the instrument.³

Mistake common to both parties.

From what has been said it is plain that the fact that a party has been induced to contract by misapprehension (as to a fact or state of things), for which the other party is not responsible and which is not of such a nature as to prevent the supposed contract from coming into existence, does not affect the liability of the mistaken party. It is no defence to an action on a contract to say 'If I had known the truth I would not have entered into it'. For as Lord Atkin said in *Bell v. Lever Bros. Ltd.* [1932] A.C. at p. 224: 'It seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the bargain.' Salmond terms mistake of this kind, error in *causa contrahendi*, which he contrasts with error in *consensu*, where there is no contract at all.⁴

Error in causa or motive.

A contract procured by the fraud of a third party is

Mistake induced by fraud.

¹ Gr. 3. 1. 42; *Scrutton v. Ehrlich* [1908] T.S. 300; and see *Theron Ltd. (In liquidation) v. Gross* [1929] C.P.D. 345.

² *Si aes pro auro veneat, non valet*, Dig. 18. 1. 14; Moyle, *Contract of Sale in the Civil Law*, p. 55; de Zulueta, *The Roman Law of Sale*, p. 25.

³ *Port Elizabeth Harbour Board v. Mackie, Dunn & Co.* (1897) 14 S.C. *per de Villiers* C.J. at p. 479; *Bushby v. Guardian Assurance Co. Ltd.* [1916] A.D. 488; *Weinerlein v. Goch Buildings Ltd.* [1925] A.D. 282; *Meyer v. Merchants Trust Ltd.* [1942] A.D. 244; and on the question whether the error need be *justus* see 44 *S.A.L.J.* (1927), p. 31, and *Tshoba Colliery (Natal) Ltd. v. Tshoba Coal Syndicate Ltd.* [1926] N.P.D. 526.

⁴ Salmond, *Contracts*, ed. Winfield (1927), p. 190.

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; 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.'¹

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 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. It is not enough to offer to return an equivalent number of shares.²

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

¹ *Standard Bank v. Du Plooy* (1899) 16 S.C. at p. 172 *per* Maasdorp J.; Mackeurtan, *Sale of Goods in South Africa*, p. 130. 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. 162.

² *Logan v. Beit* (1890) 7 S.C. 197.

agreement does not create a legal obligation.¹ 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,² 'it becomes all the more important that the evidence should establish clearly that the intention of the parties was to create a legal obligation'.³ 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.⁴

SECTION C

The object of the agreement must be physically and legally possible

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. Physical and legal possibility.

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 'nulli res sua servit'.

SECTION D

The requisite forms or modes of agreement (if any) must be observed

The historical development of the law of contract follows substantially the same course in the various legal systems. Requirements of form.

¹ Van Leeuwen, 4. 1. 3; Vinnius *ad Inst.* 3. 14. 2, sec. 11.

² *Infra*, p. 226.

³ *Robinson v. Randfontein G. M. Co.* [1921] A.D. at p. 237 *per* Solomon J.A.

⁴ 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.

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 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 enforcing all agreements. In Justinian's system only the following classes of agreement were actionable, viz.: (1) real contracts; (2) stipulations; (3) the four consensual contracts; (4) the so-called innominate contracts; (5) 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.² 'Nuda pactio obligationem non parit sed parit exceptionem.'³ 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 and was intended to create a legal obligation, but other agreements only if they fell within certain known classes, or if one party had

¹ Maine, *Ancient Law*, p. 327.

² Gr. 3. 1. 51.

³ (Ulpian) Dig. 2. 14. 7, 4.

performed his part and was demanding performance from the other.

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,¹ 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.²

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,³ 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 contracts are consensual,⁴ and any pact whatever is enforceable,⁵ 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,⁶ 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.’⁷

¹ Gr. 3. 1. 52: Heineccius, *Elem. Jur. Germ.*, lib. ii, secs. 330–1.

² Fock. And., vol. ii, pp. 1 ff.; de Blécourt, p. 393; Gierke, *Deutsches Privatrecht*, vol. iii, p. 325.

³ Vinnius, *De pactis*, cap. vii, sec. 6; Voet, 2. 14. 9.

⁴ Heineccius, *Elem. Jur. Germ.*, lib. ii, sec. 345; Decker *ad* Van Leeuwen, 4. 2. 1, n. 1.

⁵ ‘Moribus hodiernis ex nudo pacto datur actio.’ Groenewegen, *de leg. abr. ad* Inst. 3. 20 (19). 19; Gr. 3. 1. 52; Voet, *ubi sup.*

⁶ Van Leeuwen, 4. 2. 1, n. 1 (Kotzé’s translation, vol. ii, p. 11).

⁷ Decker, it will be observed, identifies reasonable cause with physical and moral possibility. But perhaps (strictly understood)

Roman-Dutch Law requires neither form nor consideration.

The doctrine of *causa* or *redelijk oorzaak*.

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 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.¹ But this identification has now been rejected by the highest judicial authority.² It may, indeed, be doubted whether the doctrine of *causa* really occupied the important place in the Roman-Dutch Law which has been assigned to it in modern 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 requirement of a reasonable cause does not add to or take away much from our idea of a contract.'³

The modern law in

It was said above that even in a developed legal system form may sometimes be required in particular cases. Thus

it corresponds rather with the second term in his series, viz. a serious and deliberate intention. See Appendix F.

¹ 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.

² *Jayawickreme v. Amasuriya* [1918] A.C. 869; *Conradie v. Rossouw* [1919] A.D. 279; *Robinson v. Randfontein Ests. G. M. Co.* [1921] A.D. at p. 236.

³ Wessels, i. 72.

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 antenuptial contract must be in writing, but Van der Keessel² 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, antenuptial contracts do not affect third parties unless registered in the office of the Registrar of Deeds.⁴ Gifts in excess of £500, unless registered or (of movables) notarially executed, are invalid to the extent of the excess.⁵

some cases requires that contracts should be in writing.

SECTION E

The agreement must not be impeachable on the ground of Fraud, Fear, Misrepresentation, Undue Influence, or Lesion

All contracts derive their validity from the free consent of the contracting parties. Free consent is absent when a contract has been procured by fraud or fear.

Agreement must be free.

Fraud is defined by Labeo as 'omnis calliditas, fallacia, machinatio, ad circumveniendum, fallendum, decipiendum alterum adhibita'⁶—'any craft, deceit, or contrivance

Fraud.

¹ V.d.L. 1. 3. 3.

² *Supra*, p. 73.

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; for Natal, Law No. 12 of 1884, sec. 1 (*Royston v. Radebé* [1914] A.D. 430; *Cole v. Stuart* [1940] A.D. 399), 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* (18th ed., p. 63). There is no such legislation in the Cape Province.

⁴ *Supra*, p. 73.

⁵ *Infra*, p. 289.

⁶ 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.

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 as ground of action or of defence (without special plea) in the action appropriate to the transaction in question, e.g. sale or deposit;¹ (3) If no other remedy was available it grounded a special action called the *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;² (b) sue for damages;³ (c) take steps to have the contract set aside.⁴ This he did by applying to the Hooge Raad for a writ directing a Court of first instance to inquire into the truth of his allegations and, if they were well founded, to grant relief.

In the modern law the procedure has been simplified, but the remedies are substantially the same.⁵

Dolus
dans
locum
contractui
and dolus
incidens
in con-
tractum.

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.⁶ This distinction, which seems to have no solid foundation in Roman Law,⁷ has been adopted in many

¹ Girard, p. 492.

² Gr. 3. 48. 7; Van Leeuwen, 5. 17. 13.

³ Decker *ad* Van Leeuwen, 4. 2. 2 (Kotzé's translation, vol. ii, p. 14).

⁴ Gr. 3. 48. 5; Van Leeuwen, 4. 42. 2 and 4.

⁵ *Frost v. Leslie* [1923] A.D. 276; *Kleynhans Bros. v. Wessel's Trustee* [1927] A.D. at p. 277.

⁶ Voet, 4. 3. 3; Vinnius, *Select. Quaest.* lib. i, cap. xii; Van der Linden, *Supplement. ad Pandect.* 4. 3. 3.

⁷ Girard, p. 493, n. 4; Cuq, *Manuel des Institutions Juridiques des Romains*, p. 392, n. 11.

modern codes,¹ though the more recent codes reject it. It is recognized in South Africa, but not precisely in the sense above stated. In the modern law the victim of deceit is not required to prove that he would not have contracted if he had not been deceived:—

‘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.’²

This amounts to saying that the test to-day is objective and not subjective.³

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 merely voidable. Grotius in one passage says in absolute terms that a person is not bound by anything he does when misled by fraud;⁴ 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.’⁵ This amounts to saying that the contract is not void, but voidable. There can be no doubt that this is the modern law. Sir John 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.’⁶ No doubt

Are contracts induced by fraud void or merely voidable?

¹ C.C. Art. 1116, Colin & Capitant (8), vol. 2, § 44; B.W.B. Art. 1364.

² *Woodstock, &c. Councils v. Smith* [1909] 26 S.C. at p. 701 per De Villiers C.J.; *Schultz N. O. v. Myerson* [1933] W.L.D. 199. 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; *Sampson v. Union & Rhodesia Wholesale Ltd.* [1929] A.D. at p. 481.

³ Mackeurtan (2), p. 129.

⁴ Gr. 3. 1. 19.

⁵ Gr. 3. 17. 3.

⁶ Kotzé, *Van Leeuwen*, vol. ii, p. 14. Cf. *United Shoe Machinery*

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.¹ But a case of this kind may more properly be referred to the topic of mistake than of fraud.²

Importance of the distinction.

As between defrauded and defrauder the distinction of void and voidable is of no great importance; except that in the latter case the victim of the fraud must be more alert to assert his rights,³ 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.⁴ If the transaction is merely voidable the innocent possessor is in the better position.⁵

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, 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.⁶

Co. of Canada v. Brunet [1909] A.C. 330 (P.C. in appeal from Quebec).

¹ *Standard Bank v. Du Plooy* (1899) 16 S.C. at p. 172.

² *Supra*, p. 222.

³ Wessels, i. 1135 ff.

⁴ Voet, 4. 3. 3. This is expressly stated also by Groenewegen *ad Gr.* 3. 48. 7 citing Neostad. *Supr. Cur. Decis.* no. 5.

⁵ Wessels, i. 1141. In *Beyers v. McKenzie* (1880) Foord 125 there was no contract at all, and the innocent purchaser acquired no title. Cf. *Cundy v. Lindsay* (1878) 3 App. Ca. 459; *Philips v. Brooks* [1919] 2 K.B. 243; Anson, p. 152.

⁶ *Bowditch v. Peel & Magill* [1921] A.D. 561; *Frost v. Leslie* [1923] A.D. 276; *Pathescoppe Union of S. A. v. Mallinick* [1927] A.D. 292.

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.¹

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.²

Innocent misrepresentation.

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.³

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

Duty of disclosure: Contracts *uberrimae fidei*.

¹ *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.*

² 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 & Rhodesia Wholesale Ltd.* [1929] A.D. at p. 480.

³ *Steyn v. Davis & Darlow* [1927] T.P.D. 651. Whether an action lies in delict? *Infra*, p. 337. Note that misrepresentation of 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.

you, whether you thought it material or not, avoids the policy'.¹

Fear or
Duress.

Fear or Duress is another ground of invalidity in contract. 'Quod metus causa gestum erit ratum non habebō,' said the Roman Praetor in his Edict.² Ulpian defines fear as 'a disturbance of mind caused by instant or apprehended 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. No doubt, if a contract is procured by physical compulsion it is wholly void.⁶ But in case of what is sometimes called moral violence or duress the view now generally accepted is that the contract is not void, but voidable. This accords with the well-known dictum of Paulus 'coactus volui',⁷ to which the glossator adds the explanation 'voluntas coacta est voluntas'. Accordingly a contract induced by fear remains good until repudiated or rescinded,⁸ and may be ratified expressly or tacitly when the fear is removed.⁹ 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'¹⁰—(regard being had, however, to the age, sex, and condition of the person intimidated),¹¹ and a fear of unlawful not of

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 p. 350.

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 Wessels, i. 1168. It is not easy to imagine a case in which there is the semblance of a contract, but no volition.

⁷ Dig. 4. 2. 21, 5; Gr. *ubi sup.*; Voet, 4. 2. 1; Pothier, *Traité des Obligations*, sec. 22, with V.d.L.'s note in the Dutch translation; Van der Linden, *Supplement. ad Pandect.* 4. 2. 2.

⁸ Voet, 4. 2. 2.

⁹ Voet, 4. 2. 16.

¹⁰ Dig. 4. 2. 6; Voet, 4. 2. 11; V.d.L. 1. 14. 2; C.C. Art. 1112.

¹¹ Voet, *ubi sup.*

lawful violence.¹ Mere threats are not enough, unless they are of a serious character and are likely to take effect.² The action 'quod metus causa' lies against the intimidator, and against any other person into whose hands the proceeds of the intimidation³ have come, or who has otherwise benefited by it,⁴ at the expense of the plaintiff.⁵ 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.⁶ 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 intimidation is prescribed in thirty years.⁷

The topic of undue influence, as distinct from metus, Undue
influence. is not developed in the Roman-Dutch writers,⁸ though the books contain hints which might have been worked out by judicial decisions without the aid of English precedents.⁹ In South Africa the law on this subject has been inspired by the decisions of English Courts of Equity,¹⁰ and the

¹ Voet, 4. 2. 10.

² Voet, 4. 2. 13.

³ Voet, 4. 2. 4.

⁴ Voet, 4. 2. 5-6.

⁵ In the Roman Law the action lay *intra annum* 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 *simpulum*. Voet, 4. 2. 18.

⁶ Voet, 4. 1. 22; 4. 2. 9.

⁷ Gr. 3. 48. 13; *Cens. For.* 1. 4. 41. 8; Voet, 4. 2. 18. If it is to be regarded as a proceeding at common law for restitution in *integrum* the period of prescription is now three years. Prescription Act, 1943, sec. 3 (2).

⁸ 'Roman-Dutch authority upon the question of undue influence as distinguished from *metus* would appear to be somewhat scanty' (*Van Pletzen v. Henning* [1913] A.D. at p. 94 (*per Innes J.*) and see MacKeurtan, *Sale of goods in South Africa*, pp. 134 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; *Benning v. Union Government* [1914] A.D. 420; *Union Government v. Gowar* [1915] A.D. 426; *Lilienfeld v. Bourke* [1921] T.P.D. at p. 370. The topic seems to fall under the head of undue influence rather than of *metus* properly so called.

⁹ Voet, 2. 14. 19; 4. 2. 11; V.d.L. 1. 15. 1 (gift by patient to medical attendant).

¹⁰ Wessels, i. 208; *Armstrong v. Magid* [1937] A.D. 260.

English law of undue influence has become part of the law of Ceylon.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 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 lawful object. An object is unlawful if it is condemned by common law or by statute.⁴ In all mature legal systems the principal heads of illegality are 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

¹ *Perera v. Tissera* (1933) 35 N.L.R. 257.

² *Supra*, 48, 114; *infra*, Appendix B.

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 Maximian (A.D. 285 and 293), but perhaps was of later origin. Girard, p. 575. In the Dutch 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 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 (Southern Rhodesia follows the Cape), and in the Free State by Ord. No. 5. of 1902, sec. 6. It still obtains in the Transvaal, *McGee v. Mignon* [1903] T.S. 89; *Kingsley v. African Land Corp. Ltd.* [1914] T.P.D. 666; *Roff & Co. v. Mosely* [1925] T.P.D. 101; *Hoffman v. Prinsloo & Hoffman* [1928] T.P.D. 621; in Natal, *Mfunda v. Brammage* [1913] N.P.D. 477; *Briggs v. Hughes* [1933] N.P.D. 618 (general principles discussed); and 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.

modern law quite the same as they were in the Roman Law or in the Dutch Law of the eighteenth century.

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 to the case of a plaintiff guilty, but not equally guilty with the defendant, as for instance if he entered upon the transaction

Effect of
illegality.

Condictio
ob turpem
causam.

¹ Voet, *ubi sup.*

² *Supra*, p. 225.

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; (Ceylon) *Silva v. Ratnayake* (1935) 37 N.L.R. 245.

⁶ Voet, 12. 5. 1, *condictio ob turpem causam est actio personalis stricti juris, qua repetitur quod datum est ob factum continens 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.

under the influence of compulsion or menace, and to cases in which the contract remains substantially unperformed. But in every case the Court will grant or withhold relief with regard to the paramount consideration of public policy and justice between the parties.¹

Partial
illegality—
severance.

When a contract contains several agreements and is in part lawful, in part unlawful, the Court will sometimes sever the lawful agreement from the unlawful agreement, giving effect to the first and not to the second.² It has been said that 'whatever the Roman Law may have been, our South African Courts have followed the English decisions in this branch of the law of contract'.³ But the limits within which severance is admissible are still not very precisely defined.⁴

Collateral
trans-
actions.

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.⁵ 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

¹ See *Wells v. Du Preez* (1906) 23 S.C. 284; *R. v. Seebloem* [1912] T.P.D. at p. 34; *Jajbhay v. Cassim* [1939] A.D. 537; *Petersen v. Jajbhay* [1940] T.P.D. 182. Since these last cases the authority of earlier decisions may be open to question.

² *Eastwood v. Shepstone* [1902] T.S. at p. 303.

³ Wessels, i. 609.

⁴ Anson, p. 239. For a recent discussion see *Brooks & Wynberg v. New United Yeast Distributors Ltd.* [1936] T.P.D. 296.

⁵ *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. But see *Schuster v. Guether* [1933] S.W.A. 19, and *Kennedy v. Steenkamp* [1936] C.P.D. 113.

them, the obligation sought to be enforced is separable from the immoral [or illegal] transaction and is not itself tainted with illegality.¹

A contract is not illegal, merely because to the knowledge of the parties it is entered upon in breach of a contract subsisting between one of the parties and some other person.²

The principal categories of illegality in contract are the following:—

What contracts are illegal:

I. *Contracts made in breach of statute*

If a contract is prohibited by law, or is directed to an object condemned by a statute, expressly or by implication, there can be no question that the whole transaction is illegal and void. 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, is in each case matter of construction.³ This last will usually be the consequence when the protection of the revenue is the object of the statute.⁴ Likewise, apart from any question of penalty, a contract may be rendered void by law without being therefore necessarily illegal.⁵

Contracts made in breach of statute.

II. *Contracts prohibited by the common law*

Such are: 1. Agreements to commit a crime or civil wrong;⁶ promises inducing the commission of a crime or civil wrong; promises made as an inducement to the promisee to abstain from such wrongful acts.⁷

Contracts prohibited by the common law.

2. Agreements which tend to pervert the course of

¹ *Vuurman v. Universal Enterprises Ltd.* [1924] T.P.D. at p. 496 per Mason J.P.

² *Isaacman v. Miller* [1922] T.P.D. 56.

³ *McLoughlin N. O. v. Turner* [1921] A.D. at p. 549; *Schierhout v. Minister of Justice* [1926] 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* [1926] C.P.D. 370; *Lubbe v. Trollip* [1926] E.D.L. 239.

⁴ *Williams v. Rondebosch Fountain Garage Co.* [1929] C.P.D. 439; Voet, 1. 3. 16; *Standard Bk. v. Est. van Rhyn* [1925] A.D. 266; *Worthington v. Shagam* [1937] N.P.D. 376.

⁵ Anson, *Contract*, p. 243.

⁶ Inst. 3. 19. 24; Gr. 3. 1. 42; Voet, 2. 14. 16.

⁷ Dig. 12. 5. 2 pr.

justice, e.g. to stifle a prosecution,¹ to condone the commission of a future crime,² to prevent a person seeking redress in a court of justice for a future injury or wrong,³ to pay a witness a fee for attendance larger than the amount fixed by law,⁴ agreements purporting to authorize one of the contracting parties to take the law into his own hands.⁵ 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.⁶ 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.⁷ Cession of actions is, however, in general, free from objection, unless of a speculative character, or for other reasons contrary to the policy of the law; and 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.⁸

3. Agreements for the sale or procurement of public offices or otherwise tending to injure the public service.⁹

¹ V.d.K. 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.

² Gr. 3. 1. 42; Voet, *ubi sup.*

³ *Schierhout v. Minister of Justice* [1925] A.D. at p. 424 per Kotzé J.; *Wells v. S. African Alumenite Co.* [1927] A.D. at p. 72.

⁴ *Knox v. Koch* (1883) 2 S.C. 382.

⁵ *Blomson v. Boshoff* [1905] T.S. 429; *Nino Bonino v. De Lange* [1906] T.S. 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).

⁶ Gr. 3. 1. 41; *Incorporated Law Soc. v. Reid* (1908) 25 S.C. 612; *Campbell v. Welverdiend Diamonds Ltd.* [1930] T.P.D. 287.

⁷ 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.

⁸ *Patz v. Salzburg* [1907] T.S. at p. 527 per Innes C.J. Cf. *Fellows-Smith v. Shanks* [1925] N.P.D. 168.

⁹ Van Leeuwen, 4. 14. 6; V.d.K. *Dictat. ad Gr.* 3. 1. 42.

4. Agreements tending to injure the State in its foreign relations, including agreements with alien enemies.¹

5. Agreements directed to a fraud upon the public.²

6. Agreements tending to sexual immorality.³

7. Agreements in restraint of marriage,⁴ or otherwise contrary to the policy of the law in the matter of marriage; e.g. an arrangement between two persons that whichever of the two marries first shall pay a sum of money to the other;⁵ agreement between husband and wife for future voluntary separation;⁶ agreement to live apart made at the time of marriage;⁷ agreement to pay a sum of money to a person, if a divorce is granted on evidence procured by that person;⁸ promise by a married man (or woman) to marry (generally or when his (or her) existing marriage shall have been dissolved by death or divorce).⁹ But agreements to procure marriage for reward (marriage brocage contracts) are not illegal by Roman-Dutch Law, as they are by English Law.¹⁰

8. Agreements in undue restraint of trade.¹¹

9. Agreements in fraud of creditors.¹²

¹ *Janson v. Driefontein Consolidated Mines* [1902] A.C. 484.

² *St. Marc v. Harvey* (1893) 10 S.C. 267; *Robinson v. Randfontein Ests. G. M. Co.* [1925] A.D. 173.

³ Voet, 12. 5. 6; *Louisa v. Van den Berg* (1830) 1 Menz. 471; *Aburrow v. Wallis* (1893) 10 S.C. 214.

⁴ Voet, 2. 14. 21; *Holl. Cons.* v. 23.

⁵ Voet, loc. cit.

⁶ *Braude v. Braude* (1899) 16 S.C. 565.

⁷ *Van Oosten v. Van Oosten* [1923] C.P.D. 409.

⁸ *Kieley v. Dreyer* [1916] C.P.D. 603.

⁹ *Staples v. Marquard* [1919] C.P.D. 181; *Friedman v. Harris* [1928] C.P.D. 43; *Fender v. St. John-Mildmay* [1938] A.C. 1; *Viljoen v. Viljoen* [1944] C.P.D. 137.

¹⁰ Wessels, i. 530. In *King v. Gray* (1907) 24 S.C. 554, however, the Court adopted the decision in 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. 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.

¹¹ Wessels, i. 538 ff. and cases cited.

¹² 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 ubi sup.* at p. 579; *supra*, p. 143, n. 6); as well as under the Insolvency Act.

10. Agreements in fraud of a statute (*in fraudem legis*).¹

11. Knock-out agreements at a sale by auction.²

12. Agreements relating to a future right of succession or limiting freedom of testation.³

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 as involving a dangerous speculation on a person's death and tending to restrict the freedom of testamentary disposition.⁴ Consequently, a person cannot contract to make another his heir;⁵ nor can two person's mutually agree that they shall succeed to one another.⁶ But if two persons contract as to the succession to a third, and such third person assents and does not subsequently revoke his assent, the contract is allowed to be good.⁷

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.⁸ An agreement, however, relating to the estate of an uncertain

¹ *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; *Comm. of Customs v. Randles Bros.* [1941] A.D. 369.

² *Neugebauer & Co. v. Hermann* [1923] A.D. 564. In England this head of illegality is statutory. Auctions (Bidding Agreements) Act 1927.

³ Dig. 45. 1. 61; Cod. 2. 3. 15; 8. 38 (39). 4; Gr. 3. 1. 41; Lee, *Commentary*, ad loc.; V.d.K. 479; Voet, 2. 14. 16; *Cens. For.* 1. 4. 3. 15; Bijnk. *O.T.* i. 295, 360; unless such agreement is contained in an antenuptial contract. V.d.K. 235 ff. For South Africa 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. But in *Van Jaarsveld v. Van Jaarsveld's Est.* [1938] T.P.D. 343 Greenberg J.P. and Schreiner J. held that a promise to leave property by will, though unenforceable, is not illegal or contra bonos mores. *Contra*, *James v. James' Est.* [1941] E.D.L. 67.

⁴ Cod. 2. 3. 30; Voet, *ubi sup.*

⁵ *Holl. Cons.* iv. 30.

⁶ Voet, *ubi sup.* But see Schorer *ad* Gr. 3. 14. 11. Mutual wills are free from objection, because wills are not contracts.

⁷ Cod. *ubi sup.*; Voet, *ubi sup.*

⁸ Voet, loc. cit., ad fin.; *Niewenhuis v. Schoeman's Est.*, *ubi sup.*

person still alive, or of a deceased person, is free from objection.¹ Agreements in antenuptial 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,² 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,³ and promises which are merely silly and foolish,⁴ though not illegal in the sense of being contrary to law, are devoid of legal effect.⁵

Gaming and wagering contracts occupy a peculiar position, for, though not positively illegal, it is the policy of the law to discourage them.⁶ Whether by the Roman-Dutch common law wagers were or were not illegal or invalid is a question which, in view of the great variety of opinion expressed by different writers, must be considered to be quite unsettled.⁷ 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, that the Court should not enforce contracts in the nature of wagers.'⁸ On the other hand, money paid under a wager cannot be recovered by the loser, and a new promise by the loser to pay the amount of a lost bet is enforceable.⁹ One who has deposited money or any other thing to abide the result of a wager or contest may reclaim it from the stakeholder

Gaming
and
wagering
contracts.

¹ Voet, 2. 14. 17.

² Voet, 2. 14. 16; V.d.K. 235 seq.

³ Voet, 2. 14. 20.

⁴ Voet, 2. 14. 16.

⁵ Grotius adds: Contracts relating to *res extra commercium*. The sale of a *res litigiosa* is not forbidden. Gr. 3. 14. 10; V.d.K. 630; *Hall v. Howe* [1929] T.P.D. 591; *Walker v. Materson* [1936] N.P.D. 495. *Secus* in Ceylon? *Ibrahim Saibo v. Pallaku Lebbe* (1928) 29 N.L.R. 347.

⁶ *Est. Wege v. Strauss* [1932] A.D. 76.

⁷ See Gr. 3. 3. 49; Van Leeuwen, 4. 14. 5; V.d.K. 514.

⁸ *Dodd v. Hadley* [1905] T.S. at p. 442. In Ceylon the view has prevailed that wagers are unlawful as contrary to public policy. *Tarrant v. Marikar* (1934) 36 N.L.R. 145.

⁹ *Rudolph v. Lyons* [1930] T.P.D. 85.

before or after the determination of the event before it has been paid over to the winner¹ and, if the stakeholder nevertheless hands it over to the winner, may maintain an action for its value.² A person who has made bets for me as my agent must hand over the winnings;³ and money lent to make⁴ or to pay⁵ bets can be recovered. 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.’

¹ Even if the wager or contest is illegal. Voet, 11. 5. 9; *Clarke v. Bruning* [1905] T.S. 295.

² *Sloman v. Berkovitz* (1891) 12 N.L.R. 216; Voet, loc. cit.

³ *Dodd v. Hadley*, *ubi sup.*

⁴ 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. ‘The case, of course, is very different if by statute the particular kind of wagering is made illegal and criminal’ (*per* Dove Wilson J.P.). This seems to distinguish the case from *Sandeman v. Solomon* (1907) 28 N.L.R. 140, in which money lent for the purpose of discharging a cheque given in payment of a gambling debt was held to be irrecoverable. In *Glaser v. Blotnick* [1941] C.P.D. 403 Sutton J. following Voet, 11. 5. 5 held that money lent by a winning player to the loser for the purpose of the game could not be recovered.

⁵ This may be inferred from *Dodd v. Hadley* and *Biljoen v. Petersen*. The point does not seem to be absolutely covered by decision.

SECTION G

The parties must be competent to contract

Incapacity to contract attaches in greater or less degree to the following classes of persons:— Capacity of parties.

1. Minors. 2. Married Women. 3. Insane Persons.
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:—

‘Although insolvency imposes many disabilities upon the debtor he is not deprived of his contractual capacity. Such capacity is, however, limited in several respects and is sometimes made subject to conditions and obligations. . . . Generally speaking, the insolvent may make a valid contract if he does not purport thereby to dispose of any property of his insolvent estate.’¹

¹ Mars, *The Law of Insolvency in South Africa* (3), p. 291; *Fairlie v. Raubenheimer* [1935] A.D. 135; *Priest v. Charles* [1935] A.D. 147; *George v. Lewe* [1935] A.D. 249.

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

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

Nemo promittere potest pro altero.

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

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 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 or less measure the

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; *Aronowitz v. Atkinson* [1936] S.R. 45.

⁵ Van Leeuwen, 4. 2. 6-7.

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 but this seems only to mean that they can enter into contracts incidental to their powers of administration. This is no real exception from the rule.

*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 principal⁷ and is also modified in favour of wife,⁸ ward,⁹ parent,¹⁰ and child,¹¹ who may be benefited by the contracts respectively of husband, guardian, child, or parent, made on their behalf.

But does the rule itself hold good in the Roman-Dutch Law? The contrary is asserted *inter alios* by Voet,¹² Groenewegen,¹³ and Decker,¹⁴ and this view was adopted by Sir Henry De Villiers, in the case of *Tradesmen's Benefit Society v. Du Preez*,¹⁵ subject, however, to the qualification

Is this law at the present day?

¹ Gr. 1. 5. 22; Rodenburg, *De jure conjugum*, 2. 1. 3; Fock. And. *Bijdragen*, ii. 115.

² Gr. 3. 1. 30, *supra*, p. 113.

³ Gr. 3. 1. 28. V.d.K. says (*Dictat. ad loc.*) that 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. This is certainly not law to-day. A minor may enter into a contract of apprenticeship, but he does so in his own name, assisted by his parent or guardian.

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. 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. 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 Decker *ad Van Leeuwen*, 4. 2. 5 (Kotzé's translation, vol. ii, p. 17).

¹⁵ (1887) 5 S.C. 269.

that there must be some consideration moving from the original promisee. But this qualification must be rejected, since consideration in the English sense of the word does not form part of the law of South Africa.¹ Apart from this the principle that a third party may take the benefit of a stipulation made in his favour, if it was the intention of the contracting parties that he should do so,² is now firmly established by judicial decision.³ 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.⁴

Cession
and
trans-
mission 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.

Assign-
ment of
contract-
tual
duties.

Contractual duties cannot be transferred except in consequence of a substituted contract (*novation*), which requires the consent of the original parties and of the substituted debtor. The effect is to discharge the original debtor from further liability, the substituted debtor taking his place.

Assign-
ment of
con-
tractual
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

¹ *Supra*, p. 226.

² Wessels, i. 1755; *Baikie v. Pretoria Munic.* [1921] T.P.D. 376; *Goldfoot v. Myerson* [1926] T.P.D. 242.

³ English Law seems to be moving in the same direction. *Law Revision Committee*, Sixth Interim Report (1937) Cmd. 5449.

⁴ See Appendix G. For Ceylon see *Jinadasa v. Silva* (1932) 34 N.L.R. 344.

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

This doubt does not exist in the modern law, for now: in the
Roman-
Dutch
Law.

1. Contractual rights and rights arising from breach of contract, exceptions apart, may be ceded without the consent and against the will of the debtor.²

2. The cession can generally be effected by bare agreement without formality,³ and without notice to the debtor;⁴ 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.⁵

¹ Moyle, *Institutes of Justinian*, pp. 482-3.

² Sande, *De actionum cessione*, cap. ix, sec. 5; *Paterson's Exors. v. Webster, Steel & Co.* (1881) 1 S.C. at p. 355 per De Villiers C.J. Can a portion of a debt be ceded? 54 *S.A.L.J.* (1937), p. 40; yes, *Bezuidenhout v. Van Graan* [1938] T.P.D. 331; no, *Spies v. Hansford* [1940] T.P.D. 1; and see *Hiddingh v. Commissioner for Inland Revenue* [1941] A.D. at p. 120.

³ Sande, cap. ii, sec. 1; *Wright & Co. v. Colonial Govt.* (1891) 8 S.C. at p. 269; *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; *Jeffery v. Pollak* [1938] A.D. at p. 22.

⁴ Voet, 18. 4. 5; *Jacobsohn's Trustee v. Standard Bank* (1899) 16 S.C. at p. 203; *Lovell v. Paxinos* [1937] W.L.D. 84.

⁵ *Mills & Sons v. Benjamin Bros.' Trustees* [1876] Buch. 115; *Wright & Co. v. Colonial Government, ubi sup.*; *McGregor's Trustees v. Silberbauer* (1891) 9 S.C. 36; *Van de Merwe v. Franck* (1885) 2 S.A.R. 26; *Graaf-Reinet Board of Exors. v. Est. Erlank* [1933] C.P.D. 41; *Jeffery v. Pollak, ubi sup.* at p. 24.

‘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 obligation 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 or knowledge of the cession, the debtor must

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. The *lex Anastasiana* has been declared to be obsolete in South Africa. *Seaville v. Colley* (1891) 9 S.C. 39 (Cape); *Machattie v. Fülmer* (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. 278), 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. 837–8.

³ Voet, 18. 4. 15; *Fick v. Bierman*, *ubi sup.*

satisfy the cessionary and not the cedent,¹ whose right of action is extinguished by the cession.² If after notice, or knowledge,³ 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 from,⁴ the claim of the cedent, his liability is at an end.⁵ For this reason, at all events, it is matter of prudence for the cessionary at the earliest possible moment to acquaint the debtor with the fact of the cession.

6. Whether, in the event of the creditor ceding the same debt to successive cessionaries, a second cessionary who had anticipated a first cessionary in giving notice to the debtor would be preferred to the first cessionary was a disputed question. Opinion now inclines to a negative answer; *viz.* that priorities are determined not by date of notice but by date of cession.⁶ But a debtor who has in good faith satisfied a claim of which he had notice is not liable to a prior assignee of whose right he was ignorant.

¹ V.d.L. 1. 18. 1. Knowledge is enough without notice. *Van der Heever's Est. v. Greyling* (1907) 24 S.C. 414.

² *Keeler v. Butcher & Sons* (1907) 28 N.L.R. at p. 48.

³ *Van der Heever's Est. v. Greyling, ubi sup.*

⁴ *Bijnk, O.T., I. 51.*

⁵ *Voet, ubi sup.*; *Morkel v. Holm* (1882) 2 S.C. at p. 65; *Keeler v. Butcher & Sons, ubi sup.* 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 cessas actiones magis placuit jus omne cedentis cessione extinctum esse.'

⁶ 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 *Hanan & 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.

7. A cessionary cannot, generally, be in a better position than his cedent.¹ Therefore all defences which might have been pleaded against the cedent at the date of cession may equally be pleaded against the cessionary.²

8. Generally speaking, any right may be ceded which is transmitted by the death of the party entitled. This rule excludes penal actions *ex delicto*, in particular the *actio injuriarum*, but there is no rule that actions *ex delicto* in general are not assignable.³ It 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*).⁴ A creditor may disable himself by the terms of the contract from ceding his right (*pactum de non cedendo*), so that 'the right which the creditor obtains, being circumscribed by the terms of his agreement with the debtor, becomes by the agreement between the parties a strictly personal right, and cannot be ceded'.⁵ Nor can a right to aliments, i.e. an allowance for maintenance and support, be ceded.⁶ With these

¹ *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. Auckland Park Sporting Club & Roberts* [1915] W.L.D. 55; *Sampson v. Union and Rhodesia Wholesale Ltd.* [1929] A.D. at p. 482.

² 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 the debt was illiquid and therefore there was no compensation.

³ 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. Cophall Stores* [1913] A.D. at pp. 282-3 *per* Innes J.

⁴ *Cullinan v. Pistorius* [1903] O.R.C. at p. 38; *Deutschmann v. Mpeta* [1917] C.P.D. at p. 81.

⁵ *Paiges v. Van Ryn Gold Mines Estates Ltd.* [1920] A.D. at p. 616. In this case the Court held that an agreement, whereby an employee undertook not to cede or assign wages due to him without the consent of his employer, could 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.

⁶ *Schierhout v. Union Govt.* [1926] A.D. at p. 291.

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. Contrary to the Roman Law, the Roman-Dutch Law permits the transfer of a thing in litigation (*res litigiosa*).¹

9. A cession may be absolute or by way of charge. If a cession is intended to take effect merely in *securitatem debiti*, it will be so construed, though in terms absolute, and dominium will remain with the cedent.²

It has been said that, exceptions apart, a cession of action can be effected by bare agreement. The principal exceptions are: (1) negotiable instruments (which are transferred by delivery, or, if not payable to bearer, by delivery and endorsement); and (2) the transfer of shares in companies which are commonly regulated by statute.

By operation of law, contractual rights are transmitted on insolvency and death.³ The effect of sequestration of the estate of an insolvent is 'to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and upon the appointment of a trustee to vest the estate in him';⁴ and every satisfaction in whole or in part of any obligation the fulfilment whereof was due or the cause of which arose before the sequestration of the debtor's estate, if made to the insolvent after such sequestration, is void, unless the debtor proves that it was made in good faith and without knowledge of the sequestration.⁵ With regard to the effect of death on contract, it may be said that all contractual rights and duties, 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.

Formalities
required
in some
cases.

Trans-
mission of
actions.

¹ *Supra*, p. 241, n. 5.

² *National Bank of S. A. v. Cohen's Trustee* [1911] A.D. 235.

³ Also by marriage in community, for which see above, p. 70.

⁴ Insolvency Act, 1936, sec. 20 (1) (a).

⁵ *Ibid.*, sec. 22.

SECTION II

The Duty of Performance

'Stare
pactis.'

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.

Generally
the parties
make
their own
terms.

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.

But the
law may
impose
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 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 at their 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
agree-
ment.

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

¹ Gr. 3. 39. 8; V.d.L. 1. 14. 6; Pothier, *Traité des Obligations*, sec. 53.

these duties may be incumbent upon the same person under the same contract. Thus, if I agree to make a cabinet according to specifications and to deliver it when made to a purchaser, I incur an obligation first to do and then to give. 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.¹

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.'² The use of the Dutch 'betaling'³ and 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.

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.⁴ 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.⁵ A person under disability cannot discharge a legal debt without his tutor's

Perform-
ance.

By whom
perform-
ance may
be made.

Persons
under
disability:

¹ Voet, 46. 3. 8.

² Dig. 50. 16. 176: Solutio est naturalis praestatio ejus quod debetur. Voet, 46. 3. 1.

³ V.d.L. 1. 18. 1: Betaaling, dat is de dadelijke vervulling van het geen men zig verplicht heeft te geven of te doen.

⁴ Gr. 3. 39. 10; Voet, 46. 3. 1; *Rolfes Nebel & Co. v. Zweigenhaft* [1903] 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.

⁵ V.d.L. *ubi sup.*

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.¹ This only applies, however, if the debt in question springs from a valid civil obligation. If a minor has contracted without his tutor's authority, the thing delivered, or its value, can always be recovered.² A married woman, being in law a minor and unable to contract³ 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 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.⁴

minors,
married
women.

To whom
perform-
ance 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.⁵ Payment may in any case be made to the creditor's agent, if to receive payment falls within the scope of his authority, or fell within it and the debtor has not received notice that the authority is revoked.⁶ 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.⁷ Payment to servants is valid, if it is within their authority to receive it.⁸ 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.⁹ If the minor's father

¹ Gr. 3. 39. 11; Voet, 4. 4. 21 and 46. 3. 1.

² Voet, loc. cit.

³ This is the general rule. For exceptions see *supra*, pp. 65 ff. and *infra*, Appendix D.

⁴ Voet, 12. 6. 19.

⁵ 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.

⁶ Voet, 46. 3. 3.

⁷ V.d.L. *ubi sup.*

⁸ Voet, 46. 3. 4.

⁹ Gr. 3. 39. 14; Voet, 4. 4. 22 (*ad fin.*); *Holl. Cons.* i. 167; vi. 127.

is alive, payment to him as natural guardian may be made without having him first confirmed as guardian by the Court.¹ 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 supposed to have been applied by the wife to the purposes of the household.² Payment may safely be made to a fiduciary pending the condition of a fideicommissum.³ In the event of the creditor's death payment must be made to (his heirs⁴ and now to) his personal representatives. 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 effects a discharge.⁶

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 Obligatio generis.

When a sum to be paid under a contract is stated in foreign currency, in the absence of provision to the contrary, payment may (must?) be made in the currency of

¹ See *Van Rooyen v. Werner* (1892) 9 S.C. at p. 430; *supra*, p. 37.

² Groen, *ad Gr.* 3. 39. 14; Voet, 23. 2. 50 and 46. 3. 5; Neostadius, *Supr. Cur. Decis.*, no. 88. Of course, if the marital power is excluded, a married woman is competent to receive payment of a debt due to herself.

³ Voet, 36. 1. 63 and 46. 3. 5.

⁴ V.d.L. *ubi sup.*

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.'

the locus solutionis at the rate of exchange ruling when payment falls due.¹

The creditor may, if he chooses, demand, but the debtor is not compellable to render, nor the creditor to accept, part performance.² Part performance, if accepted, *pro tanto* extinguishes the debt and in the case of a money debt prevents *pro tanto* the further accrual of interest.³

When one of two performances is agreed to be rendered in the alternative, the choice rests with the debtor, unless it has been expressly given to the creditor.⁴

Substituted performance may be made with the consent of the creditor, but not otherwise.⁵ It has the same effect as performance of the thing originally agreed to be done.

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.⁶ But if one of several co-debtors, or a surety, pays the debt, he may demand from the creditor a cession of actions against other parties liable and thus keep the debt alive.⁷ 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.⁸

Payment may be proved by any lawful evidence and,

¹ *Barry Colne & Co. v. Jackson's Ltd.* [1922] C.P.D. 372; *Bassa Ltd. v. East Asiatic (S. A.) Co. Ltd.* [1932] N.P.D. 386; *Joffe v. African Life Assurance Ltd.* [1933] T.P.D. 189. May payment be made in the foreign currency? *Barry Colne & Co. v. Jackson's Ltd.* leaves the question open. See Dicey (5), Rule 181. Legal tender in South Africa is defined by Act No. 31 of 1922, sec. 3, and in Southern Rhodesia by Act No. 32 of 1938, secs. 13, 15.

² Gr. 3. 39. 9; Voet, 46. 3. 11; V.d.L. *ubi sup.*

³ V.d.L. 1. 18. 1.

⁴ 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.

⁵ Gr. 3. 42. 4-5; Voet, 46. 3. 10.

⁶ Voet, 46. 3. 13; V.d.L. 1. 18. 1.

⁷ V.d.L. *ubi sup.*

⁸ Voet, *ubi sup.*

in particular, by producing a receipt for the money, signed by the creditor or his agent.¹ A creditor is bound to give a receipt, and a debtor is not otherwise compellable to pay.² 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.³

When several distinct debts are due from the same debtor to the same creditor, questions may arise as to the appropriation of payments. The rules relating to this subject are stated by Voet⁴ as follows: (1) The debtor may, in general, appropriate the payment to any debt he chooses, but not to capital before interest, because capital and interest constitute a single debt and (unless so agreed) a creditor cannot be required to accept payment by instalments.⁵ Failing appropriation by the debtor—(2) the creditor appropriates;⁶ but he must do so as he would were he himself the debtor,⁷ 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.⁸ Appropriation must be made in *re praesenti*,⁹ 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.¹⁰

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

¹ *Welch v. Harris* [1925] E.D.L. 298; Voet, 46. 3. 15.

² Voet, *ubi sup.*; *Van Noorden v. De Jongh* (1892) 9 S.C. 296; *Liebenberg v. Loubser* [1938] T.P.D. 414; *Secus*, English Law, Jenks, Art. 256.

³ Voet, 46. 3. 14.

⁴ Voet, 46. 3. 16; Gr. 3. 39. 15; V.d.L. 1. 18. 1 (*ad fin.*); Wessels, i. 2284 ff.

⁵ Wessels, i. 2290.

⁶ *Stiglingh v. French* (1892) 9 S.C. 386; *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.*

⁷ Dig. 46. 3. 1-2.

⁸ Gr. *ubi sup.*

⁹ *Statim atque solutum est, seu dum solvitur.* Voet, *ubi sup.*

¹⁰ Dig. 46. 3. 2; Cod. 8. 42 (43). 1; *Stiglingh v. French, ubi sup.*

absence of expression to the contrary the payee is supposed to apply the payment to his own claim, for charity begins at home—'dum ordinata charitas a se ipsa incipit';¹ (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 rather than to a merely natural obligation; 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;² and subject thereto (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;³ and in case of debts of equal date, finally (f) to all such debts proportionately to their amount.⁴

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 were allowed to stipulate for one-sixteenth, i.e. $6\frac{1}{4}$ per cent. per annum.⁵ Merchants, by the Perpetual Edict of 1540 (Art. 8), enjoyed the privilege of stipulating for interest up to twelve per cent.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 now the

¹ Voet, *ubi sup.*

² *Watermeyer's Exors. v. Watermeyer's Exor.* [1870] Buch. 69; *Wilhelm's Trustee v. Shepstone* (1878) 6 N.L.R. (O.S.) 1; *Van Wyk v. Leo* [1909] T.S. at p. 795.

³ Voet, *ubi sup.*; *Scott v. Sytner* (1891) 9 S.C. 50.

⁴ Gr. 3. 39. 15; Voet, *ubi sup.*

⁵ Gr. 3. 10. 10 (*ad fin.*); Loen. *Decis. Cas.* 21; Voet, 22. 1. 3; V.d.K. 545.

⁶ 1 *G.P.B.* 317. Van der Keessel (*Th.* 547) says that this privilege was disused so early as 1590.

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

Usury Act, 1926, defines the permitted rates of interest on loans of money and the sum recoverable upon any such contract. The rule of the Roman-Dutch Law prohibiting compound interest¹ is no longer in force;² but it is still law that the amount of interest recoverable in any one action (*simul et semel*) cannot under any circumstances exceed the amount of the principal.³

Compound interest.

In the absence of agreement, no interest can be claimed except when the law allows interest by way of damages.⁴ Where interest has been agreed to be paid, but no specific rate of interest has been fixed, the current rate of interest is payable. This is determined, Voet says, *prima facie*, by the *lex loci contractus*.⁵ 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.⁶ A continued payment of less than the agreed interest may be construed as a tacit agreement for the lesser amount, but non-payment is not evidence of an agreement not to pay.⁷

No interest payable except by agreement.

The obligation to pay interest is determined: (1) by release;⁸ (2) by payment of the principal debt (but without

How the obligation to pay

Ceylon. *Pulle v. Candoe* (1875) Ramanathan, 1872-6, p. 189; *Peria Carpen v. Herft* (1886) 7 S.C.C. 182.

¹ Gr. 3. 10. 10 (*ad fin.*); Voet, 22. 1. 20.

² *Natal Bk. v. Kuranda* [1907] T.H. 155; *Ryan & Burton v. Thornton* [1912] E.D.L. at p. 173. In a recent case the Supreme Court of Ceylon arrived at the same conclusion by a majority of three to two. *Marikar v. Supramanian Chelliar* (1943) 43 N.L.R. 409.

³ Voet, 22. 1. 19; V.d.K. 549; *Roberts v. Booy* (1884) 4 E.D.C. 22; *Van Diggelen v. Triggs* [1911] S.R. 154. See now the Union Usury Act 1926, sec. 2, for Southern Rhodesia, *R.S. cap. 228*, and for Ceylon, *R.S. capp. 66, 67*. 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. See also *Solomon v. Jearey* [1921] C.P.D. 108. *Sed quaere*. Groen., *de leg. abr. ad Cod.* 4. 32. 27. 1; Voet, *ubi sup.*; V.d.K., *Dictat. ad Gr.* 3. 10. 10.

⁴ *Havemann v. Oldacre Bros.* (1905) 26 N.L.R. 56.

⁵ Voet, 22. 1. 8: *ad eam quantitatem obligatio usurarum contracta intelligitur, quae ex more regionis in qua conventio celebrata praestari solet.*

⁶ Voet, 22. 1. 13.

⁷ Voet, 22. 1. 14.

⁸ Voet, 22. 1. 15. By the Roman-Dutch common law rent is *ipso jure* remitted in case of hostile incursion and other calamities, but

interest is determined. prejudice to the right to recover interest already accrued due);¹ (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.²

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'.³ Voet says that a mere tender of principal and interest does not prevent interest continuing to run unless accompanied by consignation and deposit.⁴ 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.⁵

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.⁶ 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 others think differently.⁷ It follows that in the absence of agreement or clear proof of custom to the contrary it is incumbent on the creditor, even when the parties are living in the same place, to seek out the debtor for payment,⁸ and the place for delivery of goods the law does not, as a rule, give a similar indulgence in the matter of interest.

¹ *Cens. For.* 1. 4. 4. 30.

² Voet, 22. 1. 16.

³ 4 Maasdorp, p. 171; Wessels, i. 2332 ff.; *infra*, p. 273.

⁴ Voet, 22. 1. 17. For consignation vide *infra*, p. 274.

⁵ *Infra*, p. 273.

⁶ Gr. 3. 39. 9, and Schorer *ad loc.*; Voet, 46. 3. 12; Windscheid, ii. 282; *Collet v. Eva* [1926] C.P.D. 187; *Walker v. Taylor* [1934] W.L.D. at p. 114; *Hazis v. Transvaal & Delagoa Bay Investment Co.* [1939] A.D. at p. 391 (*per* Stratford C.J.); (Ceylon) *Haniffa v. Ocean Accident Corp.* (1933) 35 N.L.R. 216.

⁷ Voet, *ubi sup.* See also Schorer *ad Grot. loc. cit.*, and Van Leeuwen, 4. 40. 6; *Cens. For.* 1. 4. 32. 14-15; *Segal v. Mazzur* [1920] C.P.D. at p. 640.

⁸ *Shapiro v. Kotler & Rabinowitz* [1935] W.L.D. 60. But see

sold is the place where they were when sold,¹ and if goods are to be manufactured is the place of manufacture.² In the absence of agreement to the contrary services must be paid for in the place in which they are rendered.³

Next as regards *time*: if no time for performance is expressly or impliedly agreed, performance falls due immediately,⁴ i.e. after a reasonable time.⁵ 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.⁶ 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 performance⁷ (within business hours?)⁸ The same principle applies when a thing is to be done in a named month or year.⁹ *Some-Northmore v. Scala Cinemas (Pty) Ltd.* [1936] T.P.D. 280. The books are much divided on the question whether it is the duty of the debtor to seek out the creditor or *vice versa*.

(b) time
of pay-
ment.

¹ *Gilson v. Payn* (1899) 16 S.C. 286.

² *Richards, Slater & Co. v. Fuller & Co.* (1880) 1 E.D.C. 1; *Goldblatt v. Merwe* (1902) 19 S.C. 373.

³ *Horne v. Williams & Co.* [1940] T.P.D. 106.

⁴ Dig. 45. 1. 41, 1; Gr. 3. 3. 51; Voet, 45. 1. 19; 46. 3. 8; V.d.L. 1. 14. 9.

⁵ Dig. 46. 3. 105: quod dicimus . . . debere statim solvere, cum aliquo scilicet temperamento temporis intellegendum est; nec enim cum sacco adire debet. *Federal Tobacco Works v. Barron & Co.* [1904] T.S. at p. 485; *Meyerowitz v. Annetts* [1937] N.P.D. 140; and ordinarily it rests on the debtor to advance the reasons for the granting of delay. *Fluxman v. Brittain* [1941] A.D. at p. 296 per Tindall J.A.

⁶ Voet, 46. 3. 12.

⁷ Gr. 3. 3. 50; Voet, 45. 1. 19 (*ad init.*).

⁸ *Davies v. Lawlor* [1941] E.D.L. at p. 132.

⁹ Dig. 45. 1. 42. When a contract provides that something is to be done, or take place, within e.g. fourteen days from date, the day of date is included 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. But in interpreting Acts of Parliament, &c., the first day is excluded. Interpretation Act, 1910, sec. 5.

times a stipulation as to time is implied from an agreement as to place;¹ for if a place is named for performance enough time is understood to be allowed to enable the promisor conveniently to reach the place destined for performance,² 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.³ 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.⁴ This second alternative is usually intended in mercantile contracts.⁵

May performance be made before it is due?

Just as a debtor cannot be compelled to perform before performance falls due,⁶ 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 Digest⁷ which seems to imply the contrary, for Venuleius says: 'quod in diem debetur ante solvi potest, licet peti non potest'. Voet 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.⁸ It would not apply, for instance, where money had been lent at interest for a fixed period.⁹ Schorer¹⁰ admits prepayment in this case also, but it must include payment of future interest as well as of interest already accrued due. Where there is an agreement for payment by instalments

¹ Gr. 3. 3. 53.

² Dig. 45. 1. 73 pr.

³ Dig. 45. 1. 141, 4; Voet, 45. 1. 19.

⁴ *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; Wessels, i. 2247 ff.

⁵ *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.

⁶ Voet, 46. 3. 12.

⁷ Dig. 45. 1. 137. 2 (*ad fin.*); Sande, *Decis. Fris.* 3. 16. 1.

⁸ Dig. 50. 17. 17: in stipulationibus promissoris gratia tempus adicitur. So V.d.L. (1. 14. 9).

⁹ Voet, 12. 1. 20; Van Leeuwen, 4. 40. 5; *Cens. For.* 1. 4. 32. 16; V.d.K. 542; *Kelly v. Holmes Bros. Ltd.* [1927] O.P.D. 29; *McCabe v. Burisch* [1930] T.P.D. at p. 265.

¹⁰ *Ad Grot.* 3. 39.

a purchaser is not entitled to make premature payments unless, possibly, together with interest on future instalments.¹

SECTION III

The Consequences of Non-performance

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.

In what cases failure to perform is justified.

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,² illegality; voidable (e.g.) on the ground 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.³

¹ *Bernitz v. Euvrard* [1943] A.D. 595.

² *Impossibilium nulla obligatio est*, Dig. 50. 17. 185. Impossibility cannot be assigned 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. 213, 223); or may operate to make the contract void *ab initio* (*supra*, p. 223); or may arise subsequently to the contract, in which case it will sometimes discharge the promisor from liability (*infra*, p. 221). 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 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, ii. 264.

³ Unless he himself deliberately and in bad faith prevents the fulfilment of the condition. Dig. 45. 1. 85, 7: *Quicumque sub*

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, the duty of 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 the duty 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.¹ 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 on your side make it 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.² If you do not wholly decline to perform, but perform badly or incompletely, it is a question of fact in each case whether

condicione obligatus curaverit ne condicio existeret nihilo minus obligatur. *Bowan v. Gowan* [1924] A.D. 550; *Macduff & Co. v. Johannesburg Consolidated Investment Co.* [1924] A.D. 573; *Mowlem v. Morris* [1930] E.D.L. at p. 97; *Lorenz v. Rabinowitz* [1933] C.P.D. at p. 148; *Koenig v. Johnson & Co.* [1935] A.D. 262.

¹ *Trichardt v. Muller* [1915] T.P.D. at p. 178; cf. *Wolpert v. Steenkamp* [1917] A.D. 493; *Landau v. City Auction Mart* [1940] A.D. 284. But in South Africa the general principle is tempered by the equitable doctrine 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; *Kam N. O. v. Udurn* [1939] W.L.D. 339; [1940] W.L.D. 137.

² *Bergl & Co. v. Trott Bros.* (1903) 24 N.L.R. at p. 515; *McCabe v. Burisch* [1930] T.P.D. 261. Repudiation before performance

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;¹ or, to use the language of English Law (not unknown to the Law of South Africa), unless the breach of contract is a breach of a condition, not merely a breach of warranty.²

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 incurs the consequences which the law attaches to his default.

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 carry out his contract (specific performance). We deal with these in order.

1. Damages.³ 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 (*utilitas amissa—damnum acceptum*);

falls due is sometimes called an 'anticipatory breach of contract', as in the English case of *Hochtster v. De la Tour* (1853) 2 E. & B. 678; *Heyman v. Darwins Ltd.* [1942] A.C. at p. 379; Wessels, ii. 2939.

¹ *Strachan v. Prinsloo* [1925] T.P.D. 709.

² *Foster v. Hillman Bros.* [1932] W.L.D. 222. For other cases see Wessels, ii. 2930, 2939.

³ For the Roman Law see Windscheid, 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 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*

¹ *Kotzé v. Johnson* [1928] A.D. 313.

² Voet, 45. 1. 9; *Meyer v. Jockie* P.H. 1944 (2) J. 14 [E.D.L.].

³ [1915] A.D. at p. 22.

Merchants, Ltd., 1908, E.D.C., p. 82, &c.).¹ Moreover, it is the duty of the complainant to take all legal steps to mitigate 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.²

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.²

It may happen 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.³ In others they have refused to entertain the action except on proof of actual damage.⁴ This seems to be more in accordance with the principles of the Roman-Dutch Law. A plaintiff must furnish reasonably sufficient proof that he has suffered some damage. It is often exceedingly difficult to value the damage in terms of money, 'but that does not relieve the Court of the duty of doing so upon the evidence placed before it';⁵ and 'when a plaintiff is in a position to lead evidence which will enable the Court to assess the figure he should do so, and not leave the Court to guess at the amount'.⁶

If the parties to a contract have agreed for a penalty Penalty

¹ See also *Lavery & Co. v. Jungheinrich* [1931] A.D. 156.

² *Becker v. Strusser* [1910] C.P.D. at p. 294; *Koch v. Panovska* [1934] N.P.D. 776.

³ *Sauer mann v. English and Scottish Law Life Assurance Association* (1898) 15 S.C. at p. 88; *Lord v. Gillwald* [1907] E.D.C. 64.

⁴ *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.

⁵ *Sandler v. Wholesale Coal Suppliers Ltd.* [1941] A.D. at p. 198.

⁶ *Klopper v. Maloko* [1930] T.P.D. at p. 865 *per* Tindall J. 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.

and liquidated damages.

in the event of non-performance, the penalty is incurred by the party in default. Such at least was the rule in the Dutch Law, with the qualification that if the penalty was much larger than the actual loss it was within the competence of the Court to reduce it;¹ on the other hand, if the penalty proved insufficient to cover the damages the aggrieved party might fall back on his original cause of action.² The modern law has taken over the English distinction between Penalties and Liquidated Damages.³

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*.⁴ In the period of the *extraordinaria cognitio* this was changed, and the Court would in certain cases order that an act should be done and employ the armed force at its disposal to see that its orders were obeyed.⁵ 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 do so amounts

(b) Dutch Law.

¹ Groen, *de leg. abr. ad Cod.* 7. 47, § 10; Voet, 45. 1. 13 (*in fine*) and see Bijnkershoeck, *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. 481 and *Dictat. ad Gr.* 3. 1. 42.

² Voet, 46. 2. 4.

³ (South Africa) *Pearl Assurance Co. v. Union Govt.* [1933] A.D. 277; *Pearl Assurance Co. v. Govt. of the Union of South Africa* [1934] A.C. 570; [1934] A.D. 560; *Durban Corp. v. McNeil* [1940] A.D. 66; Wessels, ii. 974 (editor's note); (Ceylon) *Webster v. Bosanquet* [1912] A.C. 394. The forfeiture clause in a contract of sale (*lex commissoria*), e.g. of instalments in the event of failure to complete, belongs to a different category, and the question whether it is in the nature of penalty or liquidated damages is irrelevant. *Arbor Properties v. Bailey* [1937] W.L.D. 116.

⁴ Girard, p. 1085.

⁵ Girard, p. 1145.

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:¹ '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 in case of failure to perform.'² 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,³ and Van der Linden admits, reluctantly, that it was in accordance with the practice of his time.⁴ So far as the law of South Africa is concerned the remedy by way of decree of specific performance is firmly established. In *Farmers' (c)Modern Co-operative Society v. Berry*⁵ Innes J.A. said: 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.

¹ Gr. 3. 3. 41.

² 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. ³ *Th.* 512. ⁴ V.d.L. 1. 14. 7.

⁵ [1912] A.D. at p. 350. See also *Moffat v. Touyz & Co.* [1918] E.D.L. 316; *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.

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.'

Com-
parison
with
English
Law.

From the above passage we shall, perhaps, be justified in concluding that the theory of specific performance 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

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, where the subject is developed in greater detail.

III

INTERPRETATION 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 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 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 (within limits), the parties are their own interpreters, 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, and even sometimes from the conduct of the parties, showing the construction which they agreed to place upon it.¹

The following rules of construction are taken from Vander Linden's *Institutes*.²

¹ *Breed v. Van den Berg* [1932] A.D. at p. 292; *Shill v. Milner* [1937] A.D. at p. 110. Cf. Greer L.J. in *W. T. Lamb & Sons v. Goring Brick Co.* [1932] 1 K.B. at p. 721.

² V.d.L. 1. 14. 4. (Juta's translation). These rules are almost identical with the language of the French Code (Arts. 1156-64), which the Dutch Code follows (Arts. 1379-87).

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 should rather be construed 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.³

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.⁴

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.⁵

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; *Annamma v. Moodley* [1943] A.D. at p. 539.

² *West Rand Estates Ltd. v. New Zealand Insurance Co.* [1925] A.D. at p. 261.

³ Dig. 50. 17. 34.

⁴ 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 Pletzen v. Henning* [1913] A.D. at p. 102; *Bon Accord Irrigation Board v. Braine* [1923] A.D. at p. 486; *Cohen v. Rapidol Ltd.* [1934] A.D. 137.

⁵ *Est. Sharp v. Scheepers* [1919] C.P.D. 26; *Lanfear v. Du Toit* [1943] A.D. 59.

IV

DETERMINATION OF CONTRACT

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 deal with these in order.

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 is an offer of performance. If the debtor's duty consists in something to be done or given, it is not his fault if he duly offers performance and the creditor refuses to accept it. 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. But if the performance due from the debtor consists in making a money payment, 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.

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 the

¹ Voet, 46. 3. 28.

² Voet, 22. 1. 17; Groen. *de leg. abr. ad Cod.* 4. 32. 6; Wessels, i. 3340. As to mora and its consequences see Appendix H.

course of interest unless it took the form of consignation and deposit.¹

Consignation and deposit.

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

Confusion or Merger.

Confusion or 'merger'⁴ takes place when by succeeding to the claim or liability of another, a person who owes to that other a duty or has 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 happened 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.⁶ 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 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

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 Wessels, i. 2335. 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. The nature and effect of tender in the modern law is discussed in *Odendaal v. Du Plessis, ubi sup.*; and see *Harris v. Pieters* [1920] A.D. 644; *Levisieur v. Scott* [1922] O.P.D. 138; *Ayob & Co. v. Clouts* [1925] W.L.D. 199; *Neville v. Plasket* [1935] C.P.D. 115.

³ Gr. 3. 40. 3; Voet, 46. 3. 29.

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.

⁶ 4 Maasdorp, p. 234; (Ceylon) *Dias v. Silva* (1937) 39 N.L.R. 358.

debtor, in respect of the same debt, with the result that the accessory obligation is extinguished.¹

Compensation or set-off² takes place when a debtor has a counter-claim against his creditor. If the creditor sues his debtor and the debtor pleads compensation, 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, i.e. capable of speedy and easy proof,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 natural debt is available as a set-off⁷ 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 the opposing claims existed at the date of sequestration.⁹

¹ Voet, 46. 3. 20; not if secured by mortgage. Dig. 46. 3. 38, 5.

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; *Whelan v. Oosthuizen* [1937] T.P.D. 304. (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 & Barnett v. Barnard* [1928] C.P.D. 58; *Petersen Ltd. v. Inag African Industrial Co.* [1934] C.P.D. 141.

⁵ Cod. 4. 31. 14. 1; Gr. 3. 40. 8; Van Leeuwen, *Cens. For.* 1. 4. 36. 3; Voet, 16. 2. 17.

⁶ Voet, 16. 2. 18.

⁷ Voet, 16. 2. 13; as to prescribed debts see below, p. 281.

⁸ Gr. 3. 40. 11; Voet, 2. 16. 16. In the Roman Law compensation could not be pleaded to an *actio depositi directa*. This does not hold good in the modern law. 4 Maasdorp, p. 226.

⁹ *National Bank of S. A. v. Cohen's Trustee* [1911] A.D. at p. 254.

Effect of
compensa-
tion.

The effect of compensation (which, however, must be specially pleaded¹) is to extinguish the creditor's claim in whole or in part,² 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 compensation has vested before the date when payment would, but for the compensation, have fallen due.³ Further, if a debtor has paid his creditor without claiming compensation he may get his money back to the extent of the compensation by the *condictio indebiti*.⁴ Where a right of action has been ceded, the debtor may set up against the cessionary any compensation 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 set-off from the moment when the right to assert it first vested in the debtor.⁵ 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.⁶

2. Release. **2. Release.**⁷ A debt may be released by way of gift,⁸ i.e. as an act of liberality on the part of the creditor, or in exchange for some advantage.⁹ In the absence of proof to

¹ Gr. 3. 40. 7; Van Leeuwen, 4. 40. 2; Voet, 16. 2. 2; V.d.L. 1. 18. 4; *Still v. Norton* (1838) 2 Menz. 209; 4 Maasdorp, p. 232.

² 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.*

³ Voet, *ubi sup.*

⁴ Dig. 16. 2. 10. 1; Voet, *ubi sup.*; V.d.L. *ubi sup.*; unless the payment was made in obedience to a judicial decree.

⁵ Voet, 16. 2. 4. The principle that compensation takes effect *ipso jure*, though formally accepted by the French and Dutch Codes (*C.C.* 1290, *B.W.B.* 1462) is inexact. It would be more correct to say that, if pleaded, it has retro-active effect. Wessels, i. 2493. Cf. Dig. 16. 2. 2: *Unusquisque creditorem suum eundemque debitorem petentem summovet, si paratus est compensare.*

⁶ *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.

⁷ *Quijtschelding—Acceptilatio—Liberatio.* Wessels, i. 2342 ff.

⁸ Gr. 3. 41. 5.

⁹ Voet, 46. 4. 1.

the contrary a release is presumed to be gratuitous.¹ No form of words is required.² It is enough that the creditor by words or conduct³ declares his intention to abandon his right, and that this is accepted by the debtor or by some one on his behalf. It is indifferent that the law required writing to establish the contract.⁴ No one can release a debt who is not competent to alienate his property.⁵ A promise not to sue⁶ 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.⁷ With this reservation a promise not to sue releases co-debtors and sureties;⁸ but a promise not to sue a surety does not release his principal, unless it was clearly intended to have that effect.⁹ If an instrument of debt is returned to the debtor, the debt is presumed to be discharged.¹⁰

Promise
not to sue.

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.¹¹

Mutual
release.

3. Novation.¹² The parties to a contract may, if they

3. Nova-
tion.

¹ Gr. 3. 41. 6.

² *Secus*, jure civili, Inst. 3. 29. 1.

³ Gr. 3. 41. 7; V.d.L. 1. 18. 3.

⁴ Wessels, i. 2346.

⁵ Gr. 3. 41. 8; nor persons charged with the administration of another's property without power of alienation. *Ibid.*

⁶ *Pactum de non petendo*. Van Leeuwen, 4. 40. 7, and Decker, *ad loc.*

⁷ Gr. 3. 41. 9.

⁸ Gr. *ubi sup.*; Voet, 46. 4. 4; V.d.K. 828; V.d.L. 1. 18. 3; *C.C.* 1285, 1287. 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.

⁹ 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.

¹⁰ Gr. 3. 41. 10; V.d.L. *ubi sup.*

¹¹ *Handelbraeck—Recessio a contractu*. Gr. 3. 42. 2; V.d.K. 833.

¹² *Schuldvernieuwing—Novatie*. Gr. 3. 43. 1; Voet, 46. 2. 1; V.d.L. 1. 18. 2; Wessels, i. 2365 ff.; Caney, *A Treatise on the Law relating to Novation* (Juta & Co. 1938); *Electric Process Engraving Co. v. Irwin* [1940] A.D. 220.

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. It may assume one of three forms, viz. an agreement: (1) to extinguish an existing debt and to substitute a new debt in its place; (2) to substitute a new debtor; (3) to substitute a new creditor.¹ Any agreement in that behalf express or tacit is sufficient;² but in case of doubt an intention to novate is not presumed.³ 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 discharge a mortgage.⁴ 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 perished⁵ 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.⁶ 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.⁷ Novation may consist, as mentioned above, not only 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.⁸ The consent of all three parties is required;⁹ 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, the law does not allow the debtor to make over his liability to a third party, unless the creditor, and, of course, the third party,¹⁰ agree. In this

Delegation.

¹ Wessels, i. 2375.

² Gr. 3. 43. 3; Voet, 46. 2. 2-3; 4 Maasdorp, p. 201.

³ Gr. 3. 43. 4; V.d.K. 835; *Brenner v. Hart* [1913] T.P.D. at p. 616; *Bhana Nana v. Patel* [1929] W.L.D. 234.

⁴ Gr. 3. 43. 4; V.d.K. 836; nor does a subsequent stipulation for a penalty (Voet, 46. 2. 4), or for payment in kind and not in money, or for interest, or for a higher rate of interest (Voet, 46. 2. 5).

⁵ Voet, 46. 2. 7.

⁶ Voet, 46. 2. 9-10.

⁷ Voet, 46. 2. 10; *Holl. Cons.* ii. 126.

⁸ Overzetting—Delegatie. Gr. 3. 44. 2.

⁹ Voet, 46. 2. 11.

¹⁰ Gr. 3. 44. 3.

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 consents, does not in itself effect a novation. The substitution by novation of a new creditor (the third kind of novation mentioned above) will seldom be necessary, for, generally, assignment, which does not require the consent of the debtor, serves the same purpose.

The above are all cases of 'voluntary novation'. Another case of novation, to which the commentators have given the name of 'necessary novation', was incidental to judicial proceedings¹ and took place at the moment of *litis contestatio*. This, though admitted by Grotius,² did not entail the usual consequences of novation,³ and may therefore be left out of account.

From delegation properly so called must be distinguished assignation,⁴ which takes place when A requests B to pay C, or refers C to B for payment. If A is C's debtor, his debt to C is discharged, if, and only if, C is paid by B,⁵ unless, of course, C agrees to accept the assignation in full discharge.⁶ 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 drawn on his banker or other such instrument in payment of a pre-existing debt.⁷

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.⁸ The English law on this subject

¹ Gaius, iii. 180; Dig. 46. 2. 29.

² Gr. 3. 43. 3.

³ Voet, 46. 2. 1.

⁴ Aenwijzing—Assignatie. Gr. 3. 45. 1; *Brenner v. Hart* [1913] T.P.D. at p. 612.

⁵ Gr. 3. 44. 5.

⁶ Van Leeuwen, 4. 40. 10; Voet, 46. 2. 13.

⁷ *Kaplan v. Schulman* [1933] C.P.D. 544; *Milner v. Webster* [1938] T.P.D. 598.

⁸ *Hersman v. Shapiro & Co.* [1926] T.P.D. 367.

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.’¹

Such a condition exempting a party from liability, when through no fault of his own a contract has become impossible of performance, has been taken to be implied in the event of the destruction of some specific thing which in terms of the contract he was bound to deliver;² or 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):³ or when a party is disabled by illness, or prevented by vis major or casus fortuitus.⁴ Mere difficulty of performance furnishes no excuse for non-performance.⁵ But a contract is discharged if performance becomes legally impossible (e.g. if the thing to be given passes extra commercium),⁶ or illegal.

5. Condition subsequent.

5. Condition Subsequent. A contract may include, either expressly or by implication, a provision for its

¹ *Taylor v. Caldwell* (1863) 3 B. & S. at p. 833, adopted by Maasdoorp J.A. in *Algoa Milling Co. v. Arkell & Douglas* [1918] A.D. at p. 171.

² Dig. 45. 1. 23 and 33; Gr. 3. 47. 1. In these cases the distinction between absolute and relative impossibility (*supra*, p. 263, n. 2) does not apply. Moyle, p. 411; Windscheid, ii. 264.

³ *African Realty Trust v. Holmes* [1922] A.D. at p. 400; *Constantine (Joseph) Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.* [1942] A.C. 154; *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.* [1944] A.C. 265.

⁴ *Peters, Flamman & Co. v. Kokstad Municipality* [1919] A.D. 427; *Schlegemann v. Meyer, Bridgens & Co.* [1920] C.P.D. 494. For the effect of mora see Appendix H.

⁵ Dig. 45. 1. 2. 2. (*ad fin.*): Non facit inutilem stipulationem difficultas praestationis; *Algoa Milling Co. v. Arkell & Douglas*, *ubi sup.* at pp. 170–1.

⁶ Gr. 3. 47. 1 and 4.

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 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 a 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 an 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. Grotius treats prescription as a release of a debt effected by operation of law in consequence of the lapse of a certain period of time.² 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 it was said that '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 The late Sir John Wessels wrote: 'Prescription is said to be one of the methods by which an obligation is extinguished. This is probably true with regard to the prescription of a third of a century or of thirty years (*praescriptio longissimi temporis*), but it is not true of that form of prescription which is equivalent to a limitation of actions. The latter form of prescription does not extinguish the debt, it only bars the remedy.'⁶ Substantially this is the view endorsed by the Prescription Act, 1943. For, if on the one hand 'a debt prescribed by extinctive prescription—(i) may

6. Prescription.

Does it extinguish the right or merely bar the remedy?

¹ Pothier, secs. 224-5, 672.

² Quijtschelding door verjarung. Gr. 3. 46. 1.

³ Gr. 3. 46. 2; Voet, 44. 3. 10.

⁴ Maasdorp, p. 194.

⁴ V.d.K. 874.

⁶ Wessels, i. 2748.

be set off against a debt which came into existence after the lapse of the period of prescription;¹ and (ii) is sufficient to support a contract of suretyship', nevertheless 'after the lapse of thirty years from the date on which the right of action in respect thereof first came into existence' it no longer has these effects.²

The periods of prescription (or limitation) of actions fixed by the Roman and the Roman-Dutch Law varied greatly.³ In the latter, in the absence of provision to the contrary, the term of prescription was a third of a century or, as some said, thirty years. The second alternative is now statutory, but usually the terms are much shorter. Thus, to select a few instances from the South African statute, actions for defamation, the *actio redhibitoria* and the *actio quanti minoris* are prescribed in one year, oral contracts in three years, written contracts, including bills of exchange, in six.⁴

When the creditor is a person under disability (minors, persons under curatorship, &c.) prescription does not begin to run until the date on which disability ceases, and when the debtor is absent from the Union not until the date of his return.⁵ Prescription is suspended during disability of the creditor, absence of the debtor from the Union for a period exceeding six months, and in some other cases.⁶ Prescription is interrupted, that is to say the time which has already run is blotted out, by acknowledgment of the debt, service on the debtor of any process by which action is instituted, and in some other cases.⁷ Interruption against a principal debtor is deemed to be an interruption as against a surety.⁸ When a principal debt is prescribed, interest on the debt is prescribed with it.⁹

¹ Abrogating *Swanepoel v. Van der Westhuizen* [1930] T.P.D. 806; and *Pentecost v. Cape Meat Supply Co.* [1933] C.P.D. 472.

² Prescription Act, 1943, sec. 3 (5). ³ Voet, 44. 3. 5-7.

⁴ Prescription Act, 1943, sec. 3. For Ceylon see Ord. No. 22 of 1871 and *Cadija Umma v. S. Don Manis Appu* [1939] A.C. 136.

⁵ Voet, 44. 3. 9 (*ad fin.*); Prescription Act, secs. 9, 10.

⁶ Prescription Act, sec. 7.

⁷ Voet, *ubi sup.* (*in med.*); Prescription Act, sec. 6. ⁸ *Ibid.*

⁹ Voet, 22. 1. 16; *Est. Obermeyer v. Est. Wolhuter* [1928] C.P.D. 32.

A two years' term of prescription for certain claims was ordained by Art. 16 of the Perpetual Edict of 1540.¹ Though already in the seventeenth century Van Leeuwen thought that this article was abolished by disuse,² it remained to embarrass the law of South Africa. Repealed in Cape Colony in 1861³ and withdrawn from operation in the Transvaal in 1908⁴ it has been finally eliminated by the Prescription Act, 1943.⁵

¹ 1 *G.P.B.* 319; Gr. 3. 46. 7; *Loteryman & Co. v. Cowie* [1904] T.S. 599. A translation will be found in earlier editions of this book.

² Van Leeuwen, 2. 8. 11.

³ Act No. 6 of 1861, sec. 4.

⁴ Act No. 26.

⁵ Sec. 15.

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 them is liable only for one-third

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, extended to two or more joint principal debtors. Van Leeuwen, 4. 4. 1; V.d.K. 494; *Trucker v. Carruthers* [1941] A.D. at p. 254.

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. Where a solidary obligation is 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

The principle stated above with regard to co-debtors 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.⁴

Plurality
of credi-
tors.

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 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,

Excepted
cases.

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; co-lessees, *Miller v. De Bussy* [1904] T.S. 655; co-lessors, *Kistan v. Komarasamy* [1940] N.P.D. 56.

² V.d.L. 1. 14. 9.

³ But co-debtors are taken to have renounced the benefit of division if they bind themselves 'each one for all and the one for the other', or 'each for all as principal debtors', or to like effect; Gr. 3. 3. 29 and Lee, *Commentary*, ad loc.; Van Leeuwen, 4. 4. 1; V.d.K. 494; Wessels, i. 1517. 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.

⁴ *De Pass v. Colonial Government* (1886) 4 S.C. at p. 390.

discharges the whole liability,¹ for 'in utraque obligatione una res vertitur; et vel alter debitum accipiendo vel alter solvendo omnium perimit obligationem et omnes liberat'.² 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,³ except that their liability is proportionately reduced, i.e. to the extent to which they have lost their right to claim contribution from the debtor released.⁴ 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 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.

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. In the Roman Law no action for contribution lay except between partners and in some other cases.⁵

¹ Voet, 45. 2. 4.

² Inst. 3. 16. 1.

³ Gr. 3. 3. 8. A judicial demand by one co-creditor or against one co-debtor interrupts prescription in favour of every co-creditor or against every co-debtor. Voet, 45. 2. 6. By the Prescription Act, 1943, sec. 8: 'Prescription shall not be affected in respect of one joint debtor by any fact which would affect prescription in respect of any other joint debtor, except in the case of debtors liable *in solidum*.' Joint creditors?

⁴ *Dwyer v. Goldseller* [1906] T.S. at p. 129; *De Charmoy & St. Pol v. Dhookoo* [1924] N.P.D. 254; Wessels, i. 1527.

⁵ Gr. 3. 3. 8; Voet, 45. 2. 7; Wessels, i. 1581.

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 nude 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.

In this chapter we describe in brief 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. It must be remembered that, in general, the rules given bind the parties only so far as they have not seen fit to depart from them by express agreement.

1. Donation or Gift¹ is regarded in Roman-Dutch Law as a contract. A distinction is drawn, as in the case of sale, between the contract, which binds the parties, and the

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.

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 is the same, generally, 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 invalid⁷ until confirmed by

¹ Gr. 3. 2. 14. Donation is an act of liberality which may assume a great variety of forms. In this chapter we speak only of the normal case, gift of a corporeal thing.

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 the 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. 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 accepts on his behalf by doing some act which puts it out of his power to revoke the gift. See *Slabber's Trustee v. Neezer's Exor.* (1895) 12 S.C. 163. For Ceylon see *Wellappu v. Mudalihami* (1903) 6 N.L.R. 233; *Silva v. Silva* (1908) 11 N.L.R. 161; *Babaihamy v. Marcinahamy* (1908) 11 N.L.R. 232.

⁷ 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; Lee, *Commentary*, p. 233. The Roman-Dutch writers experienced difficulty in deciding whether a gift to a concubine was valid. See de Haas *ad Cens. For.* 1. 3. 4. 41.

death.¹ This rule was received in the Roman-Dutch Law,² which also, as we have seen above, rendered wholly void gifts, whether antenuptial or postnuptial, made by a minor, who contracted marriage without the necessary consents, in favour of the other spouse.³

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, the aureus being taken as equivalent to the pound sterling.⁶ Unregistered gifts in excess of the permitted value are void to the extent of the excess.⁷ In the case of a donation of immovable property transfer of the property in the Deeds Office satisfies the requirements of registration. In the case of any donation other than a donation of immovable property, or of a promise to give immovable property if the property has not been transferred to the donee, it is sufficient for the donation to be embodied in a deed notarially executed.⁸ Reciprocal and remuneratory gifts do not fall within the rule,⁹ provided, says Voet, that in the latter case the gift does not exceed the value of the service rendered by more than £500.¹⁰ But this has been

Registration of gifts.

For S.A. see *Louisa & Protector of Slaves v. Van den Berg* (1830) 1 Menz. 471; *Aburrow v. Wallis* (1893) 10 S.C. 214; (Ceylon) *Wanigaratne v. Selohamy* (1941) 42 N.L.R. 353 (valid).

¹ Dig. 24. 1. 32. 2; Girard, p. 1000; *Est. Phillips v. Commr. for Inland Revenue* [1942] A.D. 35; *Potter and Potter v. Rand Townships Registrar* P.H. 1945 (1). B. 7 [A.D.].

² *Supra*, p. 96.

³ Gr. 3. 2. 10; *supra*, p. 57.

⁴ Cod. 8. 53 (54) 36. 3; Inst. 2. 7. 2.

⁵ Voet, 39. 5. 18. But Grotius says (3. 2. 15): waer van ick in onzes lands wetten niet en vinde, misschien om dat de mildheid hier niet te groot en is geweest. See Lee, *Commentary*, ad loc.

⁶ *Thorpe's Executors v. Thorpe's Tutor* (1886) 4 S.C. 488; *Coronel's Curator v. Est. Coronel* [1941] A.D. at p. 340.

⁷ Cod. 8. 53 (54). 34, 1; *Est. Phillips v. Commr. for Inland Revenue*, *ubi sup.* at p. 47.

⁸ *Commr. for Inland Revenue v. Est. Graaff* [1935] A.D. 210; *Est. Phillips v. Commr. for Inland Revenue*, at p. 47.

⁹ *Fichardt Ltd. v. Faustmann* [1910] A.D. 168 (promise to pay a pension); *Avis v. Verseput* [1943] A.D. 331.

¹⁰ Voet, 39. 5. 17.

described as an 'impracticable suggestion',¹ and it is not easy to say when gifts can properly be described as remuneratory. Apparently they may be so described whenever 'they are not inspired solely by a disinterested benevolence, but are, as a rule, made in recognition of, or in recompense for, benefits or services received, and therefore are akin to an exchange or discharge of a moral obligation'.² It is said that registration is required when several gifts are made by the same person at the same time to different persons, which in the aggregate exceed the limit below which registration is unnecessary.³

Removing doubts raised by some earlier cases the Appellate Division has decided that the rule requiring registration exists for the protection not merely of creditors, but also, or principally, of the donor, so that: (a) it holds good between donor and donee, and (b) applies to a gift of movables perfected by delivery.⁴ An unregistered gift between husband and wife is not confirmed by death.⁵

A gift being gratuitous, there is no implied guarantee against eviction or against latent defects.⁶ If the property given does not belong to the giver, the gift is void.⁷ Gifts as a rule are irrevocable.⁸ Therefore, if a donor fails to hand over property promised by way of gift he may be sued for breach of contract;⁹ and if property has been handed over by the donor, he cannot reclaim it. But both these statements admit of some qualification. In the first case, the donor may defend an action on the ground of want of means (*beneficium competentiae*), and the claims of creditors by onerous title are preferred to the claim of the donee.¹⁰ In the second case the gift may be revoked

No implied guarantees.

In what cases gifts may be revoked.

¹ *Avis v. Versepout, ubi sup.* at p. 352 per Watermeyer A.C.J.

² *Ibid.* at p. 353.

³ Voet, 39. 5. 16.

⁴ *Coronel's Curator v. Est. Coronel* [1941] A.D. at p. 342.

⁵ *Haines' Exor. v. Haines* [1917] E.D.L. 40.

⁶ Voet, 39. 5. 10.

⁷ Dig. 39. 5. 9, 3; Gr. 3. 2. 5.

⁸ Gr. 3. 2. 16.

⁹ *Stephens v. Liebner* [1938] W.L.D. 95. The measure of damages is (as in the case of sale) the value of the property on the day when delivery should have been made. *Ibid.*

¹⁰ Dig. 39. 5. 12: Qui ex donatione se obligavit, ex rescripto divi Pii in quantum facere potest convenitur. Sed enim id quod credi-

and the property reclaimed:¹—(1) if the donee fails to give effect to a direction as to its application (*donatio sub modo*);² (2) on the ground of the donee's gross ingratitude;³ (3) if at the time of the gift the donor was childless, and afterwards became the father of a legitimate child by birth or legitimation.⁴ In the Roman Law this ground of revocation was limited to the case of gifts made by patrons to freedmen.⁵ In the Roman-Dutch Law, according to the prevailing opinion, it was available to all donors,⁶ but not to the donor's children or heirs.⁷

These two last grounds of revocation do not apply to remuneratory gifts, nor to gifts in marriage settlements.⁸

A special kind of gift is the *donatio mortis causa*,⁹ Donatio
mortis
causa. 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 *toribus debetur erit detrahendum; haec vero, de quibus ex eadem causa [scil. donationis] quis obstrictus est, non debet detrahere.* Voet, 35. 9. 19.

¹ No doubt the grounds of revocation would be equally available as a defence to an action on the contract.

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. See Buckland, *Textbook*, p. 254. Under some modern Codes (e.g. *B.G.B.* Art. 527) the donor is not entitled to revoke the gift, but may claim from the donee the amount by which he has been unjustly enriched by his failure to give effect to the *modus*. For a *modus* imposed by will see *Ex parte The Dutch Reformed Church of Dewetsdorp* [1938] O.P.D. 136.

³ What amounts to ingratitude is specified in Cod. 8. 55 (56). 10. 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. For Ceylon see *Sivarasipillai v. Anthonypillai* (1937) 39 N.L.R. 47.

⁴ Voet, 39. 5. 27.

⁵ Cod. 8. 55 (56). 8.

⁶ Gr. 3. 2. 18; Lee, *Commentary*, ad loc.; Voet, 39. 5. 26 (*ad fin.*); (Ceylon) *Guneratne v. Yapa* (1926) 28 N.L.R. 397.

⁷ Voet, 39. 5. 31; V.d.K. 490.

⁸ Voet, 39. 5. 25 and 34; *Avis v. Verseput* [1943] A.D. 331.

⁹ Gr. 3. 2. 22 ff.; Voet, lib. 39, tit. 6; V.d.K. 492-3; 1 Maasdorp, chap. 31; (Ceylon) *Parampalam v. Arunachalam* (1927) 29 N.L.R. 289. Buckland (*Textbook*, p. 257) 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'.

intends to give, the other to accept what is given;¹ and, as in the case of ordinary contracts, the property does not pass until delivery.²

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.³ In form too it must comply with the requirements of testamentary disposition,⁴ which in the modern law usually implies execution by the donor in the presence of at least two witnesses.⁵ 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,⁶ nor is a gift made by a dying man necessarily a gift *mortis causa*.⁷ 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.⁸

A gift *mortis causa* may consist either in a promise to give accepted by the donee, which, of course, leaves the property in the donor; or in actual delivery to the donee,⁹

¹ 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.*

² 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, p. 258.

³ Voet, 39. 6. 4. *Brink's Trustees v. Mehan* (1864) 1 Roscoe at p. 212.

⁴ Voet, *ibid.*

⁵ *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.

⁶ Voet, 39. 6. 1; Voet adds: 'ac necesse videtur ut aliqua in donando mortalitatis aut redhibitionis mentio fiat.'

⁷ Dig. 39. 6. 42. 1 (*in fine*), Papinianus: respondi . . . eum qui absolute donaret non tam *mortis causa* quam *morientem* donare.

⁸ Voet, 39. 5. 4; 39. 6. 2.

⁹ Gr. 3. 2. 22; *Komen's Exor. v. De Heer* (1908), *ubi sup.*

in which case the gift is 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 reverts in the donor if he revokes the gift or if the donee predeceases him.

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;¹ according to Grotius neither of these is competent.² It may be that the distinction turns upon the question whether the gift is merely promissory or purports to effect an alienation of property.³

A gift *mortis causa* is rendered inoperative:⁴ (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;⁵ (4) if the donor becomes insolvent. If there is not enough money in the estate to meet all the gifts *mortis causa* they abate rateably like legacies, without regard to priority of creation.⁶

2. Sale.⁷ The Roman-Dutch Law on this subject is 2. Sale. 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 (*R.S.* cap. 70) follows the English Sale of Goods Act, 1893.

¹ Voet, 39. 6. 5.

² Gr. 3. 2. 23; 1. 5. 23.

³ Sande, *Decis. Fris.* (2. 4. 4), agrees that a married woman is incapable; *contra*, Schorer *ad* Gr. 3. 2. 23, and V.d.K. 100, 'si rei donatae post mortem demum transferatur dominium'.

⁴ Gr. 3. 2. 23; Voet, 39. 6. 7.

⁵ If they die simultaneously and the property has passed, the gift stands. Dig. 39. 6. 26.

⁶ Voet, *loc. cit.*

⁷ *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 Maasdoorp, chaps. 11–16; Wille & Millin, *Mercantile Law of South Africa*, chap. 2; Morice, *Sale in Roman-Dutch Law* (1919); Norman, *Purchase and Sale in South Africa* (2nd ed. 1939); Mackeurtan, *The Sale of Goods in South Africa*; Wessels, vol. ii, chaps. xxvii ff.

When the contract of sale is complete.

The contract of sale is complete so soon as the parties are agreed as to the price;¹ 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.² 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.³ It follows that an unpaid vendor, who has reason to fear that he will not get his money from the purchaser, may reclaim the property even in the hands of a third person to whom the purchaser has resold it, or to whom the vendor may have consigned it at the purchaser's request.⁴ But he must do so within a reasonable time,⁵ which is usually, but not necessarily, understood to be ten days. This is the period which is allowed by the Insolvency Act in the parallel case of the unpaid vendor under a contract for payment against delivery, reclaiming his property in the event of the purchaser's insolvency.⁶ It must be noted that a sale may be a cash sale though not expressly stated to be so, and the mere delivery

¹ Inst. 3. 23 pr.: *Emptio et venditio contrahitur simul atque de pretio convenerit*. 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.

² Gr. 3. 14. 1 and 23.

³ Inst. 2. 1. 41; Gr. 2. 5. 14; Voet, 19. 1. 11; *Newmark Ltd. v. Cereal Manufacturing Co. Ltd.* [1921] C.P.D. 52.

⁴ Van Leeuwen, 2. 7. 3; 4. 17. 3; *Laing v. S. A. Milling Co.* [1921] A.D. 387.

⁵ Groen. *ad* Gr. 2. 5. 14; V.d.L. 1. 7. 2; *Daniels v. Cooper* (1880) 1 E.D.C. 174; *Sadie v. Standard Bk.* (1889) 7 S.C. 87; Mackeurtan, p. 262.

⁶ Insolvency Act, 1936, sec. 36.

of goods raises no presumption that credit has been given.¹

Property sold is at the purchaser's risk from the moment that 'the sale is perfect'. Generally this means, when the contract is concluded so as to bind the parties.² But this is not necessarily so. The contract may have been concluded subject to a suspensive condition, or something may remain to be done to determine the price or what is sold; for instance, if the price is to be fixed by a third person and the third person has not fixed it, or bales are sold at so much *per bale* and the bales have not been counted, or a hundred bales are sold from the stock in a warehouse and the bales have not been appropriated to the contract. These requirements are summed up in a passage in the Digest where Paulus says:—

It is necessary that we should know when a sale is perfect, for then we shall know whose is the risk, for when the sale is perfect the risk will attach to the purchaser. Should it appear what is sold, of what quality and in what quantity, and the price is fixed, and the sale is unconditional, the sale is perfect.³

So long as any one of these requirements is not satisfied, the sale is 'imperfect' and the risk does not pass. '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.'⁴ The right to the fruits and other advantages of the property, including rents accruing due under an existing lease,⁵ accompanies the risk.⁶

¹ V.d.K. 203; *Sadie v. Standard Bank* (1889) 7 S.C. 87.

² Inst. 3. 23. 3; Voet, 18. 6. 1; V.d.K. 639; *Horne v. Hutt* [1915] C.P.D. 331.

³ Dig. 18. 6. 8 pr.: *Necessario sciendum est, quando perfecta sit emptio: tunc enim sciemus, ejus periculum sit: nam perfecta emptione periculum ad emptorem respiciet. et si id quod venierit appareat quid quale quantum sit, sit et pretium, et pure venit, perfecta est emptio.*

⁴ Moyle, *Contract of Sale in the Civil Law*, p. 76.

⁵ *De Kock v. Fincham* (1902) 19 S.C. 136; *Walker v. Wales* [1922] C.P.D. 49; *Kidney v. Garner* [1929] C.P.D. at p. 169.

⁶ Gr. 3. 14. 34; 3. 15. 6.

Warranty
against
eviction.

It is not an implied condition in the contract of sale that a vendor should make a good title.¹ A man may contract to sell *res aliena* no less than *res sua*.² But he must give vacant possession to the purchaser.³ If he fails to do so, or if after delivery the purchaser is evicted by superior title, the vendor is liable in damages. However, a sale by a vendor of what, to his knowledge, does not belong to him to a purchaser who is ignorant of the fact, is regarded as a fraud upon the purchaser, who may at once maintain an action on the contract without waiting for eviction.⁴

Remedies
in case of
eviction.

In case of eviction the purchaser may claim a refund of the price, or damages (if the price has not been paid, damages only) measured by the value of the property at the date of eviction,⁵ less any compensation which the purchaser as *bona fide* possessor may be entitled and able to recover from the true owner.⁶ Mackeurtan in his book *The Sale of Goods in South Africa* adds a further qualification. The property may have increased in value owing to a fortuitous event, e.g. in the case of the sale of land if gold has been discovered upon it, or a railway brought to it. It would be unfair to charge the vendor with this increase in value. Damages, therefore, should be limited to such damage as would necessarily flow from the breach irrespective of accidental circumstances. This excludes an increase in value which the seller did not contemplate or could not reasonably have contemplated at the time of the sale.⁷ If the purchaser has knowingly bought a thing which did not belong to the vendor (*res aliena*) in the absence

¹ Mackeurtan, pp. 2, 193.

² Gr. 3. 14. 9.

³ *Theron v. Schoombie* (1897) 14 S.C. 192; *Lourenson v. Swart* [1928] C.P.D. 402; *Sauerlander v. Townsend* [1930] C.P.D. 55.

⁴ Dig. 19. 1. 30, 1; *Kleynhans Bros. v. Wessels' Trustee* [1927] A.D. at p. 290.

⁵ If the price has not been paid and the value has fallen the damages will be *nil*.

⁶ Gr. 3. 15. 4; Mackeurtan, p. 377.

⁷ Mackeurtan's opinion is based upon Dig. 19. 1. 43 (*in fine*): *plane si in tantum pretium excedisse proponas, ut non sit cogitatum a venditore de tanta summa . . . iniquum videtur in magnam quantitatem obligari venditorem.*

of an express warranty against eviction, he cannot claim damages or even a refund of the price.¹

There is no implied warranty against eviction if a purchaser sells a thing 'good or bad for what it is worth', 'as it stands', 'with all its faults', or, according to the common phrase, *voetstoots*.² It seems that in this case too the purchaser cannot recover the price.³

Selling
voetstoots.

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. The principal case is sale in a 'free market'.⁴ But this has no equivalent in the modern law.⁵

Nemo dat
quod non
habet.

In the absence of contrary agreement (which would be another case of *voetstoots*) the vendor is understood to warrant the purchaser against any defect in the thing sold unfitting it for its ordinary use, or for any special purpose communicated to the vendor, or for which he warrants or represents it to be fit.⁶ Thus, where food is sold for human consumption it is an implied condition that it is reasonably fit for the purpose.⁷ The warranty does not extend to defects which a purchaser who has inspected the property saw or should have seen.⁸ If the defect is such that a purchaser⁹ with knowledge of it would not have

Warranty
against
defects.

¹ V.d.K. 641; Lee, *Commentary*, p. 299.

² Gr. 3. 14. 12: zoo goed ende quaet als 't is, zonder daer voor in te staen, 't welck men noemt met de voet stoten. The idea is that the vendor kicks the thing from him.

³ V.d.K. *Dictat. ad Gr. 3. 14. 12*; Lee, *Commentary*, ad loc.

⁴ Gr. 2. 3. 6. A free market was one which enjoyed special privileges, e.g. those resorting to it were free from arrest for debt. It was by no means the case that every public market was a free market.

⁵ Appendix E; Lee, *Commentary*, p. 72.

⁶ *Bosman Bros. v. Van Niekerk* [1928] C.P.D. 67; *Cohen & Klein v. Duncan Gray & Co.* [1936] C.P.D. 490; Mackeurtan, pp. 213, 218.

⁷ *Kroomer v. Hess & Co.* [1919] A.D. 204.

⁸ Mackeurtan, pp. 211, 212. With this qualification the warranty extends to all defects latent or patent. *Ibid.*

⁹ A purchaser, not *the* purchaser. In the modern law 'the test is not the purchaser's view at all, but that of the reasonable man'. Mackeurtan, p. 303.

The aedilitian actions.

concluded the contract, he may, by the actio redhibitoria, rescind the sale restoring the property and recover the purchase money with interest from the date of payment¹ and any expenses necessarily incurred about the thing sold,² but not damages for loss of profit.³ Defects which are serious enough to give rise to this remedy are termed redhibitory defects. In the alternative the purchaser may sue for reduction of the price in the actio aestimatoria or quanti minoris. These actions are known as the aedilitian actions because they came into the Roman Law through the edict of the curule aediles.

Restitutory not compensatory.

The aedilitian actions were restitutory, not compensatory, in character, and were supplementary to the purchaser's civil law remedy, the actio empti or ex empto. This lay for damages for breach of the contract, but gave no damages for defects in the thing sold unless the seller either: (1) knew of the defect, or at least had reasonable ground for suspecting it, and did not make it known to the purchaser;⁴ or (2) expressly warranted the absence of defects.⁵ In these two cases, besides requiring the vendor to take back the thing and refund the price, the purchaser could sue for consequential damages. In other cases he could not. In *Erasmus v. Russell's Exor.* which came before the Transvaal Supreme Court in 1904, it was held that a purchaser with an express warranty was in no better position than one who had bought without warranty. The argument was that the express warranty gave him no more than was already given him by the warranty implied by law. Consequently, when a purchaser bought cattle with an express warranty against disease and the beasts

When damages may be claimed.

¹ Voet, 21. 1. 4; *Jones v. Cotts & Co.* (1902) 23 N.L.R. 269 (defective rickshaw tyres); *Cohen & Klein v. Duncan, Gray & Co., ubi sup.* (cash register machine which frequently jammed).

² *Nourse v. Malan* [1909] T.S. at p. 205; *Kirsten v. Niland* [1920] E.D.L. 87; Mackeurtan, p. 321.

³ *Seggie v. Philip Bros.* [1915] C.P.D. 292.

⁴ Dig. 19. 1. 13 pr.; Pothier, *Contrat de Vente*, sec. 213; *Erasmus v. Russell's Exor.* [1904] T.S. at p. 373.

⁵ Dig. 19. 1. 6, 4; *Evans & Plows v. Willis & Co.* [1923] C.P.D. 496.

were in fact infected with tick-fever, which was communicated to the rest of the purchaser's herd with heavy consequential loss, it was held that he was entitled to a refund of what he had paid, but not to damages.¹ But this does not represent the present state of the law. 'Erasmus's case must now be taken to be bad law in so far as it deals with the measure of damages on breach of an express warranty.'²

On the other hand there are particular circumstances in which damages may be recovered for breach of an implied warranty; viz. when the seller is the manufacturer of the defective article,³ or is a merchant selling goods in which he makes it his business to deal.⁴ Thus a provision-dealer was held liable for the sale of a defective tongue in a tin which he sold to a customer in the state in which he had received it from the manufacturer.⁵

The aedilician actions are limited by short periods of prescription. By the Dutch Law the *actio redhibitoria* must be brought within six months of the date of the sale, the *actio quanti minoris* within twelve months, unless in either case the Court saw fit to prolong the term.⁶ The period is now one year for both actions.⁷ The purchaser may plead an *exceptio quanti minoris* in answer to the vendor's action for the price. This is not subject to the short prescription which bars the action.⁸

The question may be asked what is the measure of reduction in the *actio quanti minoris*. The Roman texts speak indifferently of the less price the purchaser would have given (*quanto minoris empturus fuerit*)⁹ and the less

¹ *Erasmus v. Russell's Exor.* [1904] T.S. 365.

² Mackeurtan, p. 217, n. 80.

³ *Seggie v. Philip Bros.* [1915] C.P.D. at p. 306.

⁴ Pothier, *Contrat de Vente*, sec. 214; Mackeurtan, pp. 321, 324; *Marais v. Commercial General Agency Ltd.* [1922] T.P.D. at p. 444.

⁵ *Young's Provision Stores v. Van Ryneveld* [1936] C.P.D. 87.

⁶ Voet, 21. 1. 6; *Nourse v. Malan* [1909] T.S. 203.

⁷ Prescription Act, 1943, sec. 3 (2) following Transvaal Act 26 of 1908, sec. 3. Under this Act it was held that the Court had no discretion to allow an extension. *Cluley v. Muller* [1924] T.P.D. 720.

⁸ *McDaid v. De Villiers* [1942] C.P.D. 220.

⁹ Dig. 19. 1. 13 pr.; 21. 2. 32, 1.

value (*quanti minoris res fuerit*).¹ South African practice has adopted another standard, viz. the difference between the purchase price and the value of the thing in its defective condition at the date of sale (or delivery?).²

Pre-emption. In Holland, by general custom, the Count 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*.³ It has no equivalent in the modern law, but a right of pre-emption may be the subject of express stipulation (conventional *retractus*).⁴

Laesio enormis. The subject of *laesio enormis* (which in the Roman-Dutch Law is not limited to the contract of sale) has been mentioned in an earlier chapter.⁵

3. Exchange. 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*.⁷ In the Roman Law the property exchanged must be *res sua*, not *res aliena*, and in this respect exchange differed from sale.⁸ 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.⁹ In the Roman Law, the contract *locatio*

¹ Dig. 21. 1. 38 pr. and 13.

² *S. A. Oil & Fat Industries v. Park Rynie Whaling Co.* [1916] A.D. at p. 413; Mackeurtan, pp. 338, 382.

³ Gr. lib. iii, cap. xvi; Voet, 18. 3. 9 ff.

⁴ 3 Maasdorp, p. 148; *Robinson v. Randfontein Ests. G. M. Co.* [1921] A.D. at p. 188; *Sher v. Allan* [1929] O.P.D. 137.

⁵ *Supra*, p. 234.

⁶ *Permutatio*—Ruiling. Gr. 3. 31. 6; Voet, lib. xix, tit. 4.

⁷ *Worcester Municipality v. Colonial Govt.* (1909) 3 Buch. App. Cas. at p. 553.

⁸ Voet, 19. 4. 2.

⁹ *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). For hire-purchase see the Hire-Purchase Act, 1942 and M. A. Diemont, *The Law of Hire-Purchase in South Africa* (Juta & Co. Ltd.).

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*).¹ 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.²

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.

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. Hire of land:

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.³ in relation to the law of property;

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 in some jurisdictions the law requires that leases for shorter periods should be in writing.⁴ as regards form.

The landlord's lien has been mentioned in the chapter on Mortgage or Hypothec.⁵ Landlord's lien.

In its 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. Hire of land in relation to the law of contract.

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.

¹ Lee, *Elements of Roman Law*, p. 314.

² Girard, p. 607.

³ *Supra*, p. 161.

⁴ *Ibid.*

⁵ *Supra*, pp. 193 ff.

Duties of
lessor.

The duties of the lessor are: (1) to deliver the subject of the lease to the lessee;¹ (2) after delivery to abstain from interfering with the lessee's occupation and enjoyment, and to guarantee him against justifiable interference by others;² (3) to deliver and maintain the subject of the lease in such a state of repair that it may be conveniently used by the lessee for the purpose contemplated by the lease.³ When a landlord refuses to execute those reasonable repairs which the common law requires him to do, the tenant may effect such repairs himself and deduct the necessary cost from the rent;⁴ (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;⁵ (5) to pay all taxes imposed upon the property.⁶

Duties of
lessee.

The duties of the lessee are: (1) to pay the agreed rent in terms of the contract;⁷ (2) to take proper care of the property leased—thus, not to injure or destroy it;⁸ (3) not to use it for any purpose other than that for which it was leased;⁹ (4) to retain the leased property until the lease expires;¹⁰ (5) to restore it to the lessor in a proper state of repair on the expiry of the lease.¹¹

¹ Voet, 19. 2. 26; V.d.L. 1. 15. 12.

² V.d.L. *ibid.*; Wille, *Landlord & Tenant*, pp. 132 ff.

³ Gr. 3. 19. 12; Voet, 19. 2. 14; V.d.L. *ubi sup.*; *Poynton v. Cran* [1910] A.D. at p. 221; *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.

⁴ Gr. *ubi sup.*; *Poynton v. Cran, ubi sup.*

⁵ *Hannay v. Parfitt* [1927] T.P.D. 111.

⁶ Gr. 3. 19. 15. *Secus* if charged upon the fruits. Van Leeuwen, 4. 21. 5.

⁷ 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.*).

⁸ 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. 680 (mis-translated by Lorenz).
⁹ V.d.L. *ubi sup.*

¹⁰ Gr. 3. 19. 11 (*in fin.*). Is the lessee bound to take possession? Not in French or German law. For Roman Law there is no authority. Lee, *Elements of Roman Law*, p. 317, n. 34.

¹¹ Voet, 19. 2. 32.

Generally speaking, neither party to the contract is liable unless he has been guilty of *dolus* or *culpa*. Thus the lessor of a house is not answerable for accidental destruction by fire and is not bound to rebuild.¹ Similarly a lessor is not in principle answerable for undisclosed defects of which he neither knew nor ought to have known; but if the thing is in such a state that it does not serve for the ordinary uses of such things, the lessor is responsible, 'not on the ground of negligence, but for not supplying what he contracted to supply'.²

No liability without *dolus* or *culpa*.

As regards the lessee's liability for injury to the property, apart from minor cases of disrepair, such as arise ordinarily from the fault of the lessees, of their families, or of persons whom they introduce into the house and which do not arise from the age or bad quality of the deteriorated articles, a lessee will not be answerable, unless the disrepair is shown to be the result of his wrongful act or negligence.³

If a 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).⁴ In the case of a yearly tenancy of a rustic tenement the renewal will usually be for a year.⁵ 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

Tacit relocation.

¹ Windscheid, ii. 400, n. 5.

² Voet, 19. 2. 14 *in fine*; Buckl., p. 500, citing Dig. 19. 1. 6, 4.

³ *A. B. Reid & Co. v. Federal Supply Co.* (1907) 24 S.C. 102 (broken plate glass window—no inference of negligence); *Bresky v. Vivier* [1928] C.P.D. 202. 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.

⁴ Voet, 19. 2. 9; *Tiopaizi v. Bulawayo Munic.* [1923] A.D. at p. 325; *Tshabalala v. Van der Merwe* [1926] N.P.D. at p. 79.

⁵ *Semble*, Dig. 19. 2. 13, 11; Gr. 3. 19. 8; Voet, 19. 2. 10; *Japhtha v. Mill's Excors.* [1910] E.D.C. at p. 155; Lee, *Commentary*, pp. 303-4.

monthly tenancy terminable on a month's notice, whether the original lease was for a year, three years, six years, or some other period.¹

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;² (2) if the lessee is evicted,³ or if his use or enjoyment is interfered with, either by the lessor,⁴ or by some third person⁵ in the exercise of a legal right;⁶ (3) if the lessor fails to keep in repair;⁷ (4) if the lessor fails to see that the thing leased is free from defects;⁸ (5) if the property leased has been destroyed completely,⁹ or to such an extent as to be useless for the purpose for which it was let; (6) if the lessee has abandoned possession for just cause,¹⁰ or if his enjoyment of the property has been seriously interrupted by fire, flood, or foe or other causes

¹ Wille, p. 50.

² 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.

³ Voet, 19. 2. 26; *Donniger v. Thorpe* [1930] T.P.D. 839.

⁴ *Baum v. Rode* [1905] T.S. 66.

⁵ 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 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. 723.

⁶ *Rex v. Stamp* (1878) 1 Kotzé, 63.

⁷ Gr. 3. 19, 12; Voet, 19. 2. 23.

⁸ Dig. 19. 2. 19, 1; Voet, 19. 2. 14 (*ad fin.*).

⁹ Dig. 19. 2. 9, 1; V.d.L. 1. 15. 12; *North Western Hotel Co. v. Rolfes, Nebel & Co.* [1902] T.S. at p. 331.

¹⁰ Such as ghosts—spectra in aedibus dominantia (*Rex v. Zillah* [1911] C.P.D. at p. 647); or if the house becomes ruinous or dangerous. Voet, 19. 2. 23.

beyond his control (*vis major-casus fortuitus*);¹ (7) if there has been an extraordinary failure of crops, due to tempest or any of the above mentioned causes.²

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 at the Cape 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)'.³ By judicial interpretation the phrase 'unavoidable misfortune' has been extended to acts of war.⁴ There is a similar provision in the Free State.⁵

State of
the law in
the Cape
Province.

In the Roman Law a lessee was entitled to compensation for necessary and useful expenses,⁶ being in this respect assimilated to the *bona fide* possessor.⁷ Grotius, following the Roman Law, makes no distinction between the two cases.⁸ But, after his time, a Placaat of September 26, 1658, contained provisions very inimical to lessees.⁹ By this enactment a lessee is entitled to compensation for

Compensation
for
improvements.

¹ *Zweigenhaft v. Rolfes, Nebel & Co.* [1903] T.H. 242; *Sheffield v. Hart* [1903] T.H. 469; *Hansen, Schrader & Co. v. Kopelowitz* [1903] T.S. 707 (lessee of licensed premises). There must be a direct relation of cause and effect between the *vis major*, &c., and the loss of enjoyment. *Ibid.*

² 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)?

³ See below, p. 310, n. 6.

⁴ 3 Maasdorp, p. 245.

⁵ 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.

⁶ Dig. 19. 2. 55. 1.

⁷ See Appendix J.

⁸ Gr. 2. 10. 8.

⁹ *Placaet van de Staten van Hollandt tegens de Pachtters ende Bruyckers van de Landen* (2 G.P.B. 2515), re-enacted by Placaat of February 24, 1696 (4 G.P.B. 465). For text and translation see Lee, *Commentary*, pp. 92, 93.

structures (*getimmer*) annexed to the land with the lessor's consent, and for ploughing, tilling, sowing, and seed-corn.¹ 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.²

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'.³ In other words, the lessee gets what the materials would be worth to a housebreaker after destruction and removal. He is entitled to no compensation whatever if a structure was erected without the landlord's consent or if an improvement cannot be brought under the description of a structure. He may remove any fixture annexed to the land with or without consent⁴ before, but not after, the determination of the lease. This is limited to cases in which removal can be effected without serious injury to the premises,⁵ and subject to the duty of restoring them to their original condition.⁶ 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.⁷

¹ *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.

² *Placaat*, Arts. 10 and 11.

³ *Placaat*, Art. 11; *De Beers Consolidated Mines v. London & S. A. Exploration Co.* (1893) 10 S.C. at p. 368; *Steinbach v. Schmidt* [1930] S.W.A. 8.

⁴ *De Beers* at pp. 370-3. Has the landlord the option to retain it paying compensation? *Windscheid*, ii. 400; *Barnard v. Col. Govt.* (1887) 5 S.C. 122.

⁵ *Dig.* 19. 2. 19, 4.

⁶ *De Beers*, loc. cit.

⁷ *Abrahams v. Isaacs & Co.* (1887) 5 S.C. 183; *McIntyre v. Johnston* (1895) 2 Off. Rep. 202; *Wille*, p. 263.

The above considerations do not apply to necessary improvements, as to which the Placaat is silent. In this case the common law applies and the lessee is entitled to compensation¹ on the same basis as a bona fide possessor, and has, perhaps, a right of retaining possession until his claim is satisfied, but no right of removal. It seems that compensation is due whether such improvements were made with or without the landlord's consent. The measure of compensation for improvements 'depends not upon the cost of erection, nor upon the value of the materials annexed, but upon the extent to which the value of the land has been enhanced'.²

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.³

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 entitled to be compensated only for the cost of the trees at the time of planting⁴ and for the labour of planting.⁵ Once planted the trees accede to the soil and may not be removed or cut down.⁶

Compensation for trees planted by lessee.

¹ *De Beers* at p. 369.

² *Willoughby's Consold. Co. v. Cophall Stores* [1918] A.D. at p. 20.

³ *De Beers* (1893) 10 S.C. 359, affirmed in appeal to P.C. 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.*

⁴ *Placaat*, Art. 13; *Oosthuizen v. Oosthuizen's Est.* [1903] T.S. at pp. 692-3; *Lee, Commentary*, p. 95.

⁵ *Ras v. Vermeulen* [1927] O.P.D. 5.

⁶ *De Beers* at p. 369. But a lessee may cut *silva caedua*, i.e. trees which sprout anew from the roots, such as blue gum trees, *Houghton Est. Co. v. McHattie & Barrat* (1894) 1 Off. Rep. at p. 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 proceræ*. *Christinaeus, ad legg. Mechl.* xv. 4. 8). *Van der Keessel* says in general terms (*Th.* 215): *Plantatae in*

Assign-
ment and
sublease.

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 sublease has no such effect. It is a contract whereby the original lessee lets the property to a third party for the whole³ or for a part of the unexpired term of the original lease. As between lessee and sublessee 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,⁴ nor does the sublessee become liable to, or acquire any rights against, the lessor. As between lessor and sublessee there is no privity of contract.⁵

Is the
consent of
the lessor
necessary
in case of
assign-
ment,

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 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.⁶ But if the lease is expressed to be made with

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. But see *De Wet v. Union Govt.* [1934] A.D. 59 and Wille (3), p. 166.

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 has established itself in South African usage. The word 'cession' is used in the same sense.

³ *Secus* in English Law. Wharton's *Law Lexicon sub voce Under-lease*.

⁴ *Dunman v. Trautman* (1891) 9 S.C. at p. 17 *per de Villiers C.J.*

⁵ Voet, 19. 2. 21; *Green v. Griffiths* (1886) 4 S.C. 346; Wille, p. 103.

⁶ *Rolfes, Nebel & Co. v. Zweigenhaft* [1903] T.S. 185; *Jassat v. Lewis, ubi sup.* There seems to be no sufficient reason for distinguishing in this respect between short leases and long leases. Wessels, however, does so (i. 1739); nor between rural and urban tenements. De Villiers C.J., however, does so. *Green v. Griffiths, ubi sup.* at p. 350.

the lessor 'and his assigns' the lessor's consent is not required.¹

Different considerations apply to a sublease. 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 Cape Courts have held consent in writing to be necessary.² The Courts of the Transvaal have held consent to be unnecessary.³

The effect of assignment by the lessor has received little attention from the Courts. Does a sale of the property relieve him from further responsibility to the lessee?⁴

The contract of letting and hiring is determined: (1) by expiration of the term fixed or implied for its duration,⁵ and in the case of a lease at will by a declaration of intention by, or by the death of, either party;⁶ (2) by the determination of the lessor's interest,⁷ e.g. if he is merely a

How the contract of hire is determined.

¹ *Reeders & Wepener v. Johannesburg Town Council, ubi sup.*

² *De Vries v. Alexander* (1880) Foord 43; *Friedlander v. Croxford* (1867) 5 S. 395; *Nieuwoudt v. Slavin* (1896) 13 S.C. at p. 63; *Du Preez v. M'Kwambi* [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). But see *Bester v. Taylor* [1912] O.P.D. 60.

³ *Eckhardt v. Nolte* (1885) 2 S.A.R. 48. Prof. Wille (p. 107) considers the first view to be 'distinctly preferable'. There is a somewhat ill-defined rule that a lessor may object to a sublocation which he deems to be prejudicial to his interest, e.g. if the sublessee 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 primus, aut aliis usibus rem locatam destinaturus. See *Rolfes, Nebel & Co. v. Zweigenhaft* [1903] T.S. 185. 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*; Morice, *English and Roman-Dutch Law, Dutch Law*, p. 172.

⁴ *Boshoff v. Theron* [1940] T.P.D. 299. ⁵ V.d.L. 1. 15. 12.

⁶ Gr. 3. 19. 9; Voet, 19. 2. 9. But a lease may be validly made 'for as long as the lessee pleases'. In such case the landlord is not entitled to determine the lease by notice. *Friedman v. Friedman* [1917] C.P.D. 268.

⁷ 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.

usufructuary¹ or fiduciary; (3) by destruction of the subject-matter; (4) by merger of the titles of lessor and lessee in one person;² (5) by mutual agreement; (6) by renunciation by either party for just cause; in which case the party renouncing may, if he thinks fit, apply to the Court for cancellation of the lease.³ 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,⁴ or, on the part of the lessee⁵ acts of waste or a contumacious refusal of rent.⁶ It is safer, however, instead of leaving the law to determine whether a cause of forfeiture has occurred, to provide for the event by express agreement.⁷ But in no case may the lessor (or any other person who wishes to eject the lessee) take the law into his own hands. He must apply to the Court to declare the lease forfeited, and to replace him in possession.⁸ It has been held that a South African Court has no equitable jurisdiction to relieve against a cancellation stipulated for in the lease, but the Court will be guided by considerations of equity in determining whether a breach entitling a party

No relief
against
forfeiture.

¹ Voet, 19. 2. 17.

² V.d.L. *ubi sup.*; *Grootchwaing Salt Works Ltd. v. Van Tonder* [1920] A.D. 492.

³ 3 Maasdorp, p. 270.

⁴ Gr. 3. 19. 12; *Bliden v. Carasov* [1927] C.P.D. 2; *Shapiro v. Yutar* [1930] C.P.D. 92.

⁵ Voet, 19. 2. 16-18.

⁶ Grotius (3. 9. 11) and Decker *ad Van Leeuwen, ubi sup.*, say, 'if the rent is more than two years in arrear'. Dig. 19. 2. 54, 1; 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., Ord. 5 of 1902, sec. 5.

⁷ 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.

⁸ Voet, 19. 2. 18.

to cancellation has or has not in fact been committed.¹ A lessee who has been evicted may sue for cancellation, but a mere apprehension that he may be evicted does not justify a repudiation of the lease.²

The effect of the insolvency of lessor or lessee according to Van der Keessel, who cites a number of local *keuren*, was to bring the lease to an end at the next ensuing date at which people commonly changed house.³ In South Africa 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), and is deemed to have done so at the end of three months from his appointment, if in the interval he has not notified the lessor of his intention to keep it alive on behalf of the estate.⁴ A stipulation in a lease that the lease shall terminate or be varied upon the sequestration of the estate of either party to the lease is null and void.⁵

5. Mandate or Agency.⁶ 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, while the word 'agency' points rather to the juristic relation established by the agent between his principal and third parties.⁷ 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

Insol-
vency of
lessor or
lessee.

5. Man-
date or
agency.

¹ *Est. Thomas v. Kerr* (1903) 20 S.C. 354; *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.

² *Donniger v. Thorpe* [1930] T.P.D. 839.

³ V.d.K. 676.

⁴ Insolvency Act, 1936, sec. 37.

⁵ *Ibid.*, sec. 37 (5).

⁶ 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; De Villiers and Macintosh, *The Law of Agency in South Africa* (Juta & Co., 1933).

⁷ 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). See V.d.K. 478, 572.

been substantially adopted and followed.¹ Such differences as 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. Part-
nership.

Compari-
son of
English
and
Roman-
Dutch
partner-
ship law.

6. Partnership.² In Ceylon the English law of partnership for the time being in force has been introduced by statute.³ 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. 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.'⁴

Kinds of
partner-

The law of South Africa recognizes various kinds of partnership, in addition to joint-stock companies, which

¹ In Ceylon Ord. No. 22 of 1866 introduces the English law of principals and agents for the time being in force.

² *Societas* — *Societeit* — *Compagnieschap* — *Maetschap* — *Vennootschap*. Gr. lib. iii, cap. xxi; Van Leeuwen, lib. iv, cap. xxiii; Voet, lib. xvii, tit. 2; V.d.K. 698 ff.; V.d.L. 4 .1. 11; 3 Maasdorp, chaps. 26-8; Wille & Millin, chap. 8. The essentials of a partnership are considered in *Joubert v. Tarry & Co.* [1915] T.P.D. 277; *Wulfsohn v. Taylor* [1928] T.P.D. 99; *Rhodesia Rhwys. v. Comm. of Taxes* [1925] A.D. at p. 465. A colonus partiarus 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.

³ Ord. No. 22 of 1866. By Ord. No. 7 of 1840, sec. 21, writing and signature of the parties are required for establishing a partnership when the capital exceeds £100. *Pate v. Pate* [1915] A.C. 1100.

⁴ *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 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.'

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 is 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 The creditor's remedy is to obtain judgment against the partnership property; if the writ is not satisfied he may levy execution upon the private assets of the individual partners.⁴ In the Transvaal actions may be brought by or against a registered partnership in the registered business style of the partnership without setting forth the names of the individual partners.⁵

ship in
South
Africa:
(a) Ordi-
nary;

Extraordinary partnerships are: (a) anonymous partnerships; (b) partnerships *en commandite*; ^{(b) Extra-ordinary.} and (c) in the Cape Province and Natal, statutory limited partnerships created by Cape Act No. 24 of 1861 and Natal Law No. 1 of 1865. 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 of the capital contributed. In the first case it is unlimited.⁷ In the first two cases, but not in the last, there are partners in the background, whose names are not made public. In the last a certificate must be registered in the office of the Registrar of Deeds

¹ See the Companies Act No. 46 of 1926 as amended by Act No. 23 of 1939, and for Ceylon The Companies Ordinance No. 51 of 1938 amended by Ords. Nos. 6 of 1939 and 19 of 1942.

² V.d.K. 703.

³ *Commercial Laws of the World*, vol. xv, *ubi sup.*; Morice, 2nd ed., p. 199.

⁴ *Olifant's Vlei Gold Mining Co. v. Wolff* (1898) 15 S.C. 344; Wille & Millin (9), p. 342. Note also the provisions of the Magistrates Courts Acts (*ibid.*).

⁵ Act No. 36 of 1909, sec. 8 (1).

⁶ V.d.K. 704.

⁷ Morice, p. 193.

containing (*inter alia*) the names and residences of all the general and special partners. A non-active partner may not, in any event, compete with the creditors of the firm in respect of debts due to him from the other partners.¹

7, 8. Loan
for con-
sumption
—Loan
for use.

7 & 8. Loan for Consumption²—Loan for Use.³ All this is Roman law. Some matters connected with money-loans and the permitted rate of interest have been considered in the chapter on Operation of Contract.⁴

9. De-
posit.

9. Deposit.⁵ This too is essentially Roman Law. But the double penalty in case of depositum miserabile is no longer in use.⁶ A so-called deposit with a bank is not deposit but loan.⁷

10. Pledge.

10. Pledge.⁸ The contract of pledge, which defines the personal relations between pledgor and pledgee, is

¹ *Watermeyer v. Kerdel's Trustees* (1834) 3 Menz. 424; *Sellar Bros. v. Clark* (1893) 10 S.C. 168.

² Mutuum—Verbruickleening. Gr. lib. iii, cap. x; Van Leeuwen, lib. iv, cap. vi; V.d.L. 1. 15. 2; 3 Maasdorp, chap. 10.

³ Commodatum—Bruickleening. Gr. lib. iii, cap. ix; Van 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* (1892) 7 E.D.C. 60; *Enslin v. Meyer* [1925] O.P.D. 125; 3 Maasdorp, chap. 9.

⁴ *Supra*, p. 258. The S.C. Macedonianum of the reign of Vespasian forbade loans of money to filiifamilias. 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. Groen. *de leg. abr. ad Cod.* lib. iv, tit. 28; Voet, 14. 6. 5 (*ad fin.*); and *Compendium*, 14. 6. 5; *Cens. For.* 1. 4. 3. 12; V.d.K. 475, and *Dictat. ad Gr.* 3. 1. 26.

⁵ 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. 274) are varieties of deposit. Gr. 3. 7. 12; V.d.L. 1. 15. 6, loc. cit.; *Thornton v. Priest's Trustee* [1932] C.P.D. 296.

⁶ Groen. *de leg. abr. ad Dig.* 16. 3. 1; Voet, 16. 3. 11.

⁷ 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.

⁸ 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 South Africa*.

governed by the rules of Roman Law. The real rights created by pledge have been discussed in Book II.¹

11. Suretyship or Guarantee.² A contract of suretyship is a contract whereby one person undertakes a secondary or collateral liability for the debt³ or delict⁴ of another person who is primarily liable. The principal debt may be civil or natural, but must not be void or illegal.⁵ Any male person capable of contracting may conclude a contract of suretyship.⁶ But by the well-known enactments, *Senatusconsultum Velleianum* and *Authentica si qua mulier*, women are prohibited from binding themselves as sureties, and, in particular, married women are prohibited from binding themselves as sureties for their husbands.⁷ 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.⁸ 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,⁹ and even sub-sureties, i.e. persons who have bound themselves as sureties for the female surety, may plead them as a defence.¹⁰ There are, however, some exceptions from the

11. Suretyship or guarantee.

Special rules as to women sureties.

¹ *Supra*, pp. 190, 199.

² *Fidejussio*—*Borgtoegt*. 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; Wessels, ii, chap. xxi ff.; Caney, *The Law of Suretyship in South Africa*.

³ Gr. 3. 3. 12.

⁴ Gr. 3. 3. 21; Voet, 46. 1. 7.

⁵ Gr. 3. 3. 22; Voet, 46. 1. 10–11.

⁶ Even minors with the authority of their guardians. Voet, 46. 1. 5.

⁷ The *senatusconsultum* was passed in the consulship of Marcus Silanus and Velleius Tutor (A.D. 46), Dig. 16. 1. 2. The *authentica* is a gloss on Cod. 4. 29. 22, giving the effect of Nov. 134, c. 8 (A.D. 556). (The supposedly official collection of the Novels was known as the *Authenticum*. Hence the name *Authentica* (*scil. lex* or *constitutio*) given to these summaries.) The rule that a married woman might not 'intercede' for her husband was older than the *senatusconsultum*. Justinian re-enacted it in the Novel. See Kotzé, *Van Leeuwen*, vol. ii, p. 616.

⁸ Van Leeuwen, *ubi sup.*; i.e. it includes both cumulative *intercessio* and privative *intercessio* (Buckland, *Textbook*, p. 448), and some other cases as well. *Standard Building Socy. v. Kellermann* [1930] T.P.D. 796.

⁹ Voet, 16. 1. 12.

¹⁰ Voet, 16. 1. 2.

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;¹ (2) if she has benefited by the principal contract,² or if she has gone surety for her creditor;³ (3) if, after the lapse of two years, she has confirmed her suretyship by a new agreement;⁴ (4) if, being a public trader, she has become surety in relation to her business;⁵ (5) if, expressly and with full knowledge of what she was doing, she has renounced the benefits of the *senatusconsultum* and of the *authentica*.⁶ 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.⁷

These benefits have been abolished in Ceylon⁸ and in the opinion of the late Sir John Wessels C.J. it is high time that they were abolished in South Africa.⁹ 'Women are regarded at present as the equals of men, and we may very

¹ Gr. 3. 3. 15; Voet, 16. 1. 11.

² 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; *African Guarantee Co. v. Rabinowitz* [1934] W.L.D. 151; *Southern Life Association of Africa v. Wright* [1943] C.P.D. 15.

³ Gr. 3. 3. 16.

⁴ Cod. 4. 29. 22. 1; Gr. 3. 3. 17; Voet, 16. 1. 11.

⁵ Voet, *ubi sup.*; Schorer *ad* Gr. 3. 3. 18; *Oak v. Lumsden* (1884) 3 S.C. at p. 148.

⁶ 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); *Knocker v. Standard Bk.* [1933] A.D. 128; *Southern Life Association v. Wright, ubi sup.* It was, and possibly still is, an unsettled question whether the renunciation must be notarially executed. See V.d.K. 496 and translator's note, *ad loc.*; Kotzé, *Van Leeuwen*, vol. ii, p. 617, where all the authorities are collected. In Natal Law 40, 1884 provides a form of renunciation. Caney says (p. 125): 'there seems no question that outside of Natal an underhand renunciation suffices'.

⁷ Gr. 3. 3. 19; Voet, 16. 1. 10.

⁸ Ord. No. 18 of 1923, sec. 29.

⁹ Wessels, ii. 3872. By the Bills of Exchange Acts (e.g. Cape Act 19 of 1893, sec. 54) renunciation of the benefits is not requisite to the validity of a bill accepted or endorsed by a woman. But this does not apply when a woman signs an 'aval' (*Moti & Co. v. Cassim's Trustee* [1924] A.D. 720) or expressly as surety. *National Acceptance Co. v. Robertson* [1938] C.P.D. 175.

well do what Henry IV did in France in 1606—abolish the benefits both of the *senatus consultum Velleianum* and the *authentica si qua*. They hinder trade, interfere with credit, and are often the source of trickery.' It may be added that all modern codes reject them.

By the Roman-Dutch common law a contract of suretyship need not be in writing. But in Ceylon¹ 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'.² This does not mean that the writing must contain all the terms of the contract.³

In Ceylon contracts of suretyship must be in writing.

In the Roman Law up to the time of Justinian a surety might be sued before the principal debtor.⁴ Justinian, however, required the creditor to excuss the principal before pursuing the surety.⁵ 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*.⁶ In the Roman-Dutch, differing from the Roman Law, the surety has the further advantage 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.⁷ In the

The benefits available to sureties:

beneficium ordinis sive excussionis;

¹ Ord. No. 7 of 1840, sec. 21.

² Law 12 of 1884; *supra*, p. 227, n. 3.

³ *Amod v. Parsotham* [1929] N.P.D. 163.

⁴ Girard, pp. 802-3.

⁵ Nov. 4, cap. i (A.D. 535); Van Leeuwen, 4. 4. 7.

⁶ Gr. 3. 3. 27; Voet, 46. 1. 14; V.d.L. 1. 14. 10. *Wolfson v. Crowe* [1904] T.S. 682; *Worthington v. Wilson* [1918] T.P.D. 104.

⁷ Placaat of Philip II, February 21, 1564 (I. *G.P.B.* 379); Gr. 3. 3. 32; V.d.K. 507. Lee, *Commentary*, p. 255; *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).

benefi-
cium divi-
sionis;
benefi-
cium ce-
dendarum
actionum.

Roman-Dutch Law, as in the Roman, sureties may also invoke the beneficium divisionis¹ and the beneficium cedendarum actionum.² All these benefits may be renounced.³ 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.⁴ 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.⁵

How
surety-
ship is
dis-
charged.

A contract of suretyship is discharged—not to speak of incidents which affect any contract such as a time limit or a resolute condition—by any event which extinguishes the principal debt and by any material variation of the principal contract.⁶ If a creditor has released one of several sureties the rest are discharged to the extent to which they are thereby precluded from recovering contribution from the released surety.⁷

¹ Gr. 3. 3. 28; Voet, 46. 1. 21; V.d.L. 1. 14. 10.

² Gr. 3. 3. 31; Voet, 46. 1. 27; V.d.K. 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; *African Guarantee Co. v. Thorpe* [1933] A.D. 330.

³ Gr. 3. 3. 29; V.d.K. 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. 504.

⁴ This is statutory in Natal (Law No. 9 of 1885), but the law is the same in the other Provinces. *Kroon v. Enschede* [1909] T.S. 374; *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; *Moosa v. Mahomed* [1939] T.P.D. 271.

⁵ *Est. Steer v. Steer, ubi sup.*; *Rutowitz's Flour Mills v. The Master* [1934] T.P.D. 163.

⁶ *Brinkman v. McGill* [1931] A.D. 303; *Irwin v. Davies* [1937] C.P.D. 442. As to the effect of an extension of time given by the creditor to the debtor see *Est. Liebenberg v. Standard Bk.* [1927] A.D. 502.

⁷ *Moosa v. Mahomed, ubi sup.*, at p. 285.

12. Carriage by land and by water.¹ In the Roman Law the section of the praetor's edict—*de nautis, stabulariis et cauponibus*—made carriers by water, along with stable-keepers and innkeepers, the insurers of goods entrusted to them.² Except in case of *damnum fatale* or of *vis major* their liability was absolute.³ The language of the edict does not in terms cover the case of carriers by land, but in the modern law they must be taken to be included within its scope.⁴ If it were not so they would be liable as *conductores operis* to show the highest diligence, but not answerable in damages except on proof of *culpa*.⁵

12. Carriage by land and by water.

Carriers, stable-keepers, innkeepers, and keepers of boarding-houses may retain the goods of their customers until their reasonable charges are satisfied.⁶

¹ Gr. 3. 38. 9; Van Leeuwen, 4. 2. 9; Voet, lib. iv, tit. 9; 3 Maasdorp, chap. 22; Wille & Millin, chap. 11.

² Dig. 4. 9. 1 pr. Ait praetor nautae caupones stabularii quod cujusque salvum fore receperint nisi restituant in eos iudicium dabo.

³ Dig. 4. 9. 3, 1. 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 South Africa the Praetors' Edict has been applied to the case of an hotel proprietor in *Davis v. Lockstone, ubi sup.* See also *Glover v. Finch* [1921] C.P.D. 358; *Toy v. Blake* [1923] C.P.D. 98; *Koenig v. Godbold* [1923] C.P.D. 526.

⁴ *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). The South Africa Railway Administration is liable to the extent above-mentioned. Act No. 22 of 1916, sec. 18 (1).

⁵ *Postmaster General v. Van Niekerk* [1918] C.P.D. 378. 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.

⁶ 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); *S. A. Phillips (Pty) Ltd. v. Vermouth* [1932] C.P.D. 377 (boarding-house keeper).

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 delict. 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 different order of ideas derived from Teutonic sources. But the Roman Law drove the native law out of the field. In the textbook writers, and probably also in the practice of the Courts, of the eighteenth century the Roman-Dutch law of delicts was based upon the Roman Law expounded in the Institutes and the Digest.

The Roman theory of delict.

The Roman law of delict, 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 comprehensive 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, in breach of a duty, wilfully 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.

In South Africa and Ceylon 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. The Union of South Africa, here as elsewhere, is most retentive of the Roman-Dutch common law. In Ceylon the reception of the English Law has gone further.

Influence of the English law of torts in the colonies.

The course of events briefly described in the foregoing paragraphs makes it a matter of some difficulty to apply to the law of delict 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 delict 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. In this chapter we shall state shortly the principles of the Roman-Dutch law of delict so far as it is at all applicable to the conditions of modern life, and indicate how far these principles are still in force. The example of modern codes may be pleaded in justification of this summary treatment of the law of delict in general.¹ For the convenience of students the law of defamation will be considered rather more in detail.

Difficulty of a systematic presentation.

Method adopted.

¹ The law of delict occupies in the French Code five articles (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.

The
general
meaning
of injuria.

Injuria
sine
damno.
Damnum
sine
injuria.

Classifica-
tion of
delicts:
in Roman
Law;

in Grotius,
Van
Leeuwen,

and Van
der Lin-
den.

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 a claim for pecuniary compensation (*id quod interest—schade en interesssen—damages*). In some cases there is no injury and 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 pecuniary loss may be proved, and yet no action lies (*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 classification of delicts is a matter of some difficulty. In the Roman Law the principal delicts were four in number: viz. (1) *furtum*; (2) *rapina*; (3) *damnum injuria datum*; (4) *injuria* (specifically so-called). 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.

In writing of delicts proper Grotius and Van Leeuwen adopt a different arrangement.³ In their system delict (*misdaad*) is directed: (1) against life; (2) against the person; (3) against freedom; (4) against honour; and (5) against property. Both these writers treat the subject of wrongs principally from the point of view of crime. Van der Linden⁴ 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.

¹ Inst. 4. 4 pr.

² Thus in *Greyvensteyn v. Hattingh* [1911] A.C. 355; [1911] A.D. 358 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 Gr. 3. 33. 1; Van Leeuwen, 4. 32. 9.

⁴ V.d.L. 1. 16. 1.

Neither the Roman nor the Dutch arrangement is completely satisfactory. In this chapter we shall speak of:—

Classification adopted in this chapter.

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.

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.

General theory of delicts in Roman-Dutch Law.

In the modern law the Roman terminology serves as a general touchstone of liability. The underlying principles of *injuria* and *damnum injuria datum* are applicable to all kinds of delict. Today all delictual liabilities (with few exceptions) are referable to one or other of these two heads.

Dolus and culpa.

I am answerable for wilful aggression on another's right (*injuria*), though it may not cause pecuniary loss. I am answerable for wilful or careless aggression on another's right which causes pecuniary loss (*damnum injuria datum*).

In the first case I am liable for 'sentimental damages', i.e. I must compensate the plaintiff for the affront upon his person, dignity, or reputation,¹ the assessment of the damages being in the discretion of the Court. In the second case I am liable for 'patrimonial damages', i.e. I must compensate the plaintiff for the reduced value of his patrimony (or estate) consequent upon my wrongful act,

Damages sentimental and patrimonial.

whether this consists in positive loss direct or indirect (*damnum emergens*) or in loss of prospective gain (*lucrum cessans*). In addition to this, the Dutch Law, differing from the Roman Law, allowed a plaintiff under the head of *damnum* to claim compensation for physical pain and disfigurement.² From this it is evident that a wilful wrong may give rise to a claim under both heads of liability, and

¹ *Omnemque injuriam [Labeo ait] aut in corpus inferri aut ad dignitatem aut ad infamiam pertinere. Dig. 47. 10. 1. 2.*

² Gr. 3. 34. 2; *Union Govt. v. Warneke* [1911] A.D. at p. 665.

by the modern practice claims under both heads may be asserted in the same action.¹

Ante-
cedent
duty.

It is common to both heads of liability that there must have been an antecedent duty owed by the defendant to the plaintiff, for where there is no duty there is no right, and there can be no invasion of a right. If the wrong is intentional there is little difficulty, because the list of intentional wrongs is fairly accurately defined. But there is more difficulty in determining the scope of the duty to take care. Attempts to find a positive formula have not proved very successful.² The degree of care which a man is called upon to exercise varies with the circumstances, and is the care which in the circumstances would be exercised by the reasonable man.

‘Legal negligence consists in a failure to exercise that degree of care which, under the circumstances, it was the duty of the the person concerned to use towards another. . . . Such a duty may arise in various ways. It may be specially imposed, as by a statute; but, speaking generally, it either springs from a privity of relationship (contractual or other) between the parties concerned, or it is created by the circumstances of the case.’³

‘It has repeatedly been laid down in this Court that accountability for unintentional injury depends upon *culpa*—the failure to observe that degree of care which a reasonable man would have observed. I use the term reasonable man to denote the *diligens paterfamilias* of Roman Law—the average prudent person. . . . Once it is clear that the danger would have been foreseen and guarded against by the *diligens paterfamilias*, the duty to take care is established, and it only remains to ascertain whether it has been discharged.’⁴

English
and
Roman-
Dutch
Law.

It has been said that the duty to take care is wider in Roman-Dutch Law than in English Law. The difference, so far as there is any, consists not in the principle to be applied, for the *bonus paterfamilias* is hardly distinguish-

¹ *Matthews v. Young* [1922] A.D. at p. 505.

² *McKerron*, p. 39.

³ *Union Govt. v. National Bk. of S. A.* [1921] A.D. at p. 128 *per Innes C.J.*

⁴ *Cape Town Municipality v. Paine* [1923] A.D. at pp. 216–17 *per Innes C.J.*; *Stride v. Reddin N.O.*, 1944 (1) P.H., O. 1 [A.D.].

able from 'the reasonable man',¹ but in the consequences derived from it. The South African Courts, for example, have not followed the English Law in distinguishing sharply the duty which an occupier owes to the invitee, the licensee, and the trespasser, and in such cases, as well as in others, have been inclined to go further than the English courts in recognizing a duty of taking care.²

It must be observed that mere omission does not in general constitute culpa, but where there is prior conduct of such a kind as gives rise to a duty to do an act, the omission to do that act may ground an action for negligence.³ Thus a surgeon need not operate, but if he does, he must take reasonable steps to secure the well-being of his patient.⁴ In South Africa a municipality is not bound to repair the roads within its area, but if it does it must not introduce a new source of danger into the street without taking proper precautions to prevent consequent injury to the public.⁵

The burden of proving negligence falls, of course, on the person who alleges it. But there are cases in which the facts speak for themselves (*res ipsa loquitur*), as when a barrel of flour fell from an upper floor of a warehouse and injured a person passing in the street.⁶ In such circumstances the mere fact of the accident is relevant evidence of negligence on the part of the person in control, which the defendant is called upon to rebut 'by giving an

¹ Buckland and McNair, *Roman Law and Common Law*, p. 287; Macintosh, *Negligence in Delict* (2), p. 13.

² *Cape Town Municipality v. Paine* [1923] A.D. at p. 216; *Perlman v. Zoutendyk* [1934] C.P.D. at p. 158. (Contrast *Le Lievre v. Gould* (1893) 1 Q.B.D. 491, but see McKerron's comment, *The Law of Delict*, p. 209.)

³ Voet, 9. 2. 3; *Halliwell v. Johannesburg Munic. Council* [1912] A.D. at p. 670; *Union Govt. v. Nat. Bk. of S. A.* [1921] A.D. at p. 134; *S. A. Rlvys. v. Est. Saunders* [1931] A.D. 276.

⁴ Dig. 9. 2. 8 pr. ⁵ McKerron, p. 23.

⁶ *Byrne v. Boadle* (1863) 2 H. & C. 722; Jenks, sec. 1060. *Mitchell v. Maison Libson* [1937] T.P.D. 13; *Fisher v. Coleman* [1937] T.P.D. 261; *Naude N. O. v. Transv. Boot & Shoe Co.* [1938] A.D. 379. The majority judgment in *Hamilton v. MacKinnon* [1935] A.D. 114, 346, has been much criticized. See Mr. Ian Murray's article in 53 *S.A.L.J.*, p. 8, and McKerron, p. 50.

explanation of the accident, which either excludes negligence on his part or is equally consistent with negligence, or no negligence'.¹ But, as has often been pointed out, there is no shifting of the burden of proof. It is always incumbent on the plaintiff to make out his case.

Contri-
butory
negli-
gence.

The most frequent defence in actions for negligence is that the damage was due wholly or in part to the plaintiff's own negligence. This is what is called the plea of contributory negligence; and the law which has grown up with regard to it is known as the doctrine of contributory negligence. To-day it has few, if any, friends, and should be superseded by the Admiralty rule of apportioned responsibility.² It is unfortunate that this doctrine has been admitted into the law of South Africa.³

Excep-
tions
from the
general
principles
of liabi-
lity.

So far we have considered the general principles of delictual liability in Roman-Dutch Law, which are derived from the delicts *injuria* and *damnum injuria datum* and the corresponding actions. Between them they cover nearly the whole field of delict. But, as will be seen, there are cases in which both *dolus* and *damnum* must be present in order to constitute legal liability and there are a few cases of absolute liability. We now proceed to consider specific delicts as classified above.

Specific
delicts.
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. If the act is unintentional but careless the plaintiff is entitled to compensation for

¹ McKerron, p. 47.

² This has in effect been done for England and Scotland by the Law Reform (Contributory Negligence) Act, 1945.

³ McKerron, pp. 59-75. The following recent cases may be consulted: *Sutherland v. Banwell* [1938] A.D. 476; *Bower v. Hearn* [1938] N.P.D. 399 (contributory negligence of child of tender years); *Pretorius v. African Gate & Fence Works Ltd.* [1939] A.D. 571; *Franco v. Klug* [1940] A.D. 126; *Bona Pierce v. Hau Mon* 1944 (1) P.H., O. 10 [A.D.]; and see 'Causation and Legal Responsibility', by Aquarius, 62 *S.A.L.J.* (1945), p. 126.

actual damage, if proved. In this case the action is usually termed an action for negligence.

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.¹ 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.

The action for seduction (*defloratie*) may be conveniently mentioned under the head of wrongs against the person. Action for seduction. It is an action derived from the Canon Law by which a man who seduced a virgin was required to give her a dower and to marry her—*dotabit eam et habebit uxorem*. By the law of many parts of Germany and of Holland the seducer was given the alternative. *Aut* was substituted for *et*.² By the Dutch Law a virgin who had been seduced might bring an action requiring the defendant to marry her, or, if he would not do so, to compensate her for the loss of her virginity, and if she were with child also for her lying-in expenses (*kraam-kosten*).³ 'The man was bound *aut ducere aut dotare*, the option of choice being his alone.'⁴ In the modern law the action lies for damages only.⁵ 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. But the father may sue for lying-in expenses if he has defrayed or made himself liable for them.⁶

Voet says that the action for seduction does not lie if the

¹ McKerron, p. 124.

² Stobbe, *Deutsches Privatrecht*, iii. 530.

³ Gr. 3. 35. 8; Voet, 48. 5. 3; *Botha v. Peach* [1939] W.L.D. 153.

⁴ *Bensimon v. Barton* [1919] A.D. at p. 17.

⁵ 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. As to the term of prescription in the action for seduction see *Carelse v. Estate De Vries* (1906) 23 S.C. at p. 539. The term is now three years. Prescription Act, 1943, sec. 3 (2), c. (vi).

⁶ *Webb v. Langai* (1884) 4 E.D.C. 68.

woman knew that the man was married, or declined to marry him, or could never lawfully marry him, or had married someone else.¹ In South Africa the Appellate Division has held by a majority that the fact that the plaintiff knew at the time of her seduction that her seducer was a married man is no bar to the action.² The seducer is liable in any event for lying-in expenses, for reasonable maintenance for the child, and for funeral expenses, if the child dies.³ But this liability is a consequence not of seduction but of paternity.⁴

Wrongs
against
property.

2. Wrongs against property. Any wrongful invasion of another's right to own, to possess, or to detain, is actionable.⁵

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.

The law of nuisance has been borrowed from, or coincides with, the English law.⁶

¹ Voet, 48. 5. 4.

² *Bensimon v. Barton* [1919] A.D. 13. The opposite view was taken by the Ceylon S.C. in *Meenadchipillai v. Sanmugam* (1916) 19 N.L.R. 209. It has been held in two cases (*Mulholland v. Smith* (1910) 10 H.C.G. 333; *Delpont v. Ah Yee* [1913] E.D.L. 374) that the Marriage Order in Council 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* at p. 23.

³ Voet, 48. 5. 6; V.d.L. 1. 16. 4; *Kalamie v. Armadien* [1929] C.P.D. 490.

⁴ *Jacobs v. Lorenzi* [1942] C.P.D. 394.

⁵ Gr. 3. 37. 5; Voet, 9. 2. 10; *Maraaisburg Divis. Council v. Waagenaar* [1923] C.P.D. 94. A person in possession of a car under a hire-purchase agreement has sufficient title to sue for damage to the car. *Sulaiman v. Amardien* [1931] C.P.D. 509.

⁶ See for instance *Demerara Electric Co. Ltd. v. White* [1907] A.C. 330 (Brit. Gui.); *Bloemfontein Town Council v. Richter* [1938] A.D. at p. 229; McKerron, p. 215. 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. *Transv. & 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 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 or 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 the defendant, or (b) the act complained of was done in circumstances amounting to contumelia.²

Trespass
to land.

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 dependent 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 Thus, children may sue on account of the death of parents,⁴ or parents on account of the death of children.⁵ A husband may recover patrimonial damages for his wife's death, but not compensation as solatium for the loss of his wife's society.⁶

Action for
loss
caused by
death.

Where an action lies to recover damages for fatal injuries, it may also be brought for injuries which are not fatal, if the plaintiff has suffered pecuniary loss through being deprived of services or maintenance to which he had a legal claim. Thus, a father may sue for the loss of the

Or for
loss of
services
or main-
tenance.

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 discussion of this action, *Union Government v. Warneke* [1911] A.D. 657, and *Union Govt. v. Lee* [1927] A.D. 202.

⁴ *Jameson's Minors v. C.S.A.R.* [1908] T.S. 575 (father); *Young v. Hutton* [1918] W.L.D. 90 (mother).

⁵ *Oosthuizen v. Stanley* [1938] A.D. 322.

⁶ *Steenkamp v. Juriaanse* [1907] T.S. 980; *Union Govt. v. Warneke*, *ubi sup.*

services of his minor child,¹ and a husband for the loss of the services of his wife.² But it has been held that a wife has no corresponding right of action in respect of injuries sustained by her husband, the ground of the decision being that the husband can recover compensation for his diminished earning capacity and the wife would be no worse off than she was before.³ In all these cases it must appear that the person killed or injured owed a legal duty to furnish maintenance or services,⁴ and the plaintiff must allege in his declaration that he was unable to support himself and that there was thus a necessity for the maintenance alleged to be lost.⁵ The measure of damages is the amount by which the resources of the plaintiff, actual and prospective, have been diminished in consequence of the death or injury,⁶ or the cost of replacing the services of which he has been deprived.⁷ Where death is the cause of action it is no defence to show that the negligence of the deceased was a contributory cause of the fatal accident.⁸ (It seems that this does not apply to non-fatal injuries.)⁹ Nor is it any defence that the deceased before his death accepted a sum of money in full satisfaction of his claim for damages.¹⁰

Wrongs
against
reputa-
tion.

3. Wrongs against Reputation. All the authorities agree that an action lies for written or spoken defamation. Grotius devotes a short chapter to *lastering* or *misdaed jegens eer* which he describes as an outrage upon 'the

¹ Gr. 3. 34. 3; Voet, 9. 2. 11; *Abbott v. Bergman* [1922] A.D. at p. 56.

² *Abbott v. Bergman, ubi sup.*

³ *De Waal v. Messing* [1938] T.P.D. 34.

⁴ *Union Govt. v. Warneke, ubi sup.* at p. 666 *per Innes J.A.* In the same case (p. 672) De Villiers J.P. said that a duty *ex pietate* would be enough, but this view has not prevailed.

⁵ *Waterson v. Mayberry* [1934] T.P.D. 210; *Oosthuizen v. Stanley* [1936] W.L.D. 110.

⁶ Voet, 9. 2. 11; *Jameson's Minors v. C.S.A.R., ubi sup.*; *Hulley v. Cox* [1923] A.D. 234; *Smart v. S. A. Rhvys.* [1928] N.P.D. 361.

⁷ *Union Govt. v. Warneke, ubi sup.* at p. 669.

⁸ *Union Govt. v. Lee, ubi sup.*

⁹ *De Waal v. Messing, ubi sup.*

¹⁰ *Ex parte Oliphant* [1940] C.P.D. 537.

good opinion which others have of us'.¹ Van Leeuwen, in his corresponding chapter speaks of outrage upon a man's 'honour and good name'.² 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.³ If this identification is correct the animus injuriandi is of the essence of the delict. This, however, is not the law; for, if the language complained of is clearly defamatory in character, the intention to injure will be presumed,⁴ and proof that a defamatory statement concerning the plaintiff was made with no intention of injuring him is no defence to an action for defamation.⁵ '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.'⁶ In short, the injurious mind, required by the modern Roman-Dutch Law, in cases of defamation amounts to little, if to anything, more than the implied malice of English Law. The essential thing is publication, and 'the wrong of defamation consists in the publication of defamatory matter concerning another without lawful justification'.⁷ In other respects too, the English Law is followed closely, or with variations. But in two important particulars there is a difference between the two systems: (1) the Roman-Dutch Law does not distinguish between spoken and written defamation. Where words are defamatory they are *prima facie* actionable and it is unnecessary, whether they be spoken or written, to give proof of special

The
animus
injuriandi.

¹ Gr. 3. 36. 1.

² Lib. iv, cap. xxxvii. For defamation of the dead and consequent actions see Voet, 4. 10. 5; *Spendiff v. East London Daily Despatch Ltd.* [1929] E.D.L. 113; and Dr. F. P. Walton in *Journ. Comp. Leg.* (1927), vol. ix, pt. i.

³ *Supra*, p. 323.

⁴ Voet, 47. 10. 20.

⁵ *Tothill v. Foster* [1925] T.P.D. 857.

⁶ *Sutter v. Brown* [1926] A.D. at p. 163 *per* Innes C.J. The question whether *Hulton v. Jones* [1910] A.C. 20 can be reconciled with the law of South Africa (McKerron, p. 175) has been reopened by *Newstead v. London Express Newspaper Ltd.* [1940] 1 K.B. 377.

⁷ McKerron, p. 165.

damage;¹ and (2) the truth of a defamatory statement is not (it seems) *per se* a defence in an action for defamation.²

Defences
to action
for defa-
mation.

The principal defences to an action for defamation are the same as in English Law; viz. Justification,³ Privilege,⁴ and Fair⁵ Comment. But there are differences of detail.

1. **Justification.** It is generally held that truth in itself is not a justification. It must be shown that the publication of the truth was for the public benefit.⁶ The law of South Africa may perhaps be taken to be settled in this sense,⁷ though it has been said that 'technically it is still an open question whether "public benefit" is a necessary part of a defence of justification'.⁸ But the truth of a defamatory statement may be pleaded in mitigation of damages.⁹ In Ceylon the question seems to be not merely 'technically' open, for in a case appealed to the Privy Council, Lord Alness, speaking for the Board said, 'The existing law would appear from the argument which their Lordships heard to be far from clear and on it their Lordships offer no opinion'.¹⁰

2. **Privilege.** The only case of absolute privilege certainly admitted by the law of South Africa is the statutory protection extended to speeches in Parliament and to papers published by authority of Parliament and its committees.¹¹ Other cases are cases of qualified privilege, i.e.

¹ 4 Maasdorp, p. 136; (Ceylon) *Wickremanayake v. The Times of Ceylon* (1937) 39 N.L.R. 547.

² McKerron, p. 165.

³ *Johnson v. Rand Daily Mails* [1928] A.D. 190.

⁴ *De Waal v. Ziervogel* [1938] A.D. 112.

⁵ *Moolman v. Cull* [1939] A.D. 213.

⁶ Gr. 3. 36. 2; Voet, 47. 10. 9. *Secus*, V.d.K. 803 (Lee, *Commentary*, p. 342); and see Kotzé, *Van Leeuwen*, vol. 2, p. 296.

⁷ *Botha v. Brink* [1878] Buch. at p. 123; Ceylon law is the same. *Chelliah v. Fernando* (1937) 39 N.L.R. 130.

⁸ *Toerien v. Duncan* [1932] O.P.D. at p. 145 *per de Villiers* J.P.

⁹ *Leibenguth v. Van Straaten* [1910] T.P.D. 1203; *Willoughby v. McWade* [1932] C.P.D. 66.

¹⁰ *Sabapathi v. Huntley* (1937) 39 Ceylon N.L.R., 396.

¹¹ Powers and Privileges of Parliament Act, 1911, secs. 2, 8, 29. There may be other cases. 'If the duty to communicate a third party's statement to another is absolute, then it seems to me, the privilege must be absolute.' *Sather v. Orr* [1938] A.D. at p. 439 *per* Stratford C.J.

they afford a *prima facie* defence which may be displaced by proof of a positive animus injuriandi,¹ the so-called express malice of English Law. Thus, neither advocates,² nor attorneys,³ nor witnesses,⁴ nor, it seems, judges⁵ enjoy more than a qualified privilege. It must further be noted that qualified privilege is not available as a defence to a person who has published defamatory matter beyond what was reasonably required by the exigency of the occasion.⁶ In such case it is not incumbent on the plaintiff to give proof of an animus injuriandi.

3. Fair Comment. The defence of fair comment is the same in South African as in English Law.⁷

There are some other defences of less frequent occurrence, such as *rixa* (quarrel).⁸ This is the plea that the words were spoken in sudden anger without premeditation and in reasonable retaliation for provocation from the side of the plaintiff, and were not persisted in. This seems to come very near to what English lawyers call 'vulgar abuse'.⁹

¹ *Kleynhans v. Usmar* [1929] A.D. at p. 126; *Hazaree v. Kamaludin* [1934] A.D. 108; *Gluckman v. Schneider* [1936] A.D. 151; *Young v. Kemsley* [1940] A.D. 253; *Molepo v. Achterberg* [1943] A.D. at p. 111.

² *Preston v. Luyt* [1911] E.D.L. 298; *Findlay v. Knight* [1935] A.D. 58.

³ *Gluckman v. Schneider, ubi sup.*; *Solomon v. Van Leggelo* [1938] T.P.D. 75.

⁴ *Dippenaar v. Hauman* [1878] Buch. at p. 140; *Goldseller v. Kuranda* [1906] T.H. 185; *MacGregor v. Sayles* [1909] T.S. 553; *Van Rensburg v. Snyman* [1927] O.P.D. 123. *Secus* in Ceylon. *Silva v. Balasuriya* (1911) 14 N.L.R. 452; *Leisa v. Siyatuhamy* (1925) 27 N.L.R. 318.

⁵ Gr. 3. 37. 9 (Lee, *Commentary*, ad loc.); Voet, 47. 10. 2; *Preston v. Luyt, ubi sup.* at p. 311; *Norden v. Oppenheim* (1846) 3 Menz. at p. 54; *Cooper v. The Government* [1906] T.S. 436; *Matthews v. Young* [1922] A.D. at p. 493 (authorities cited by counsel).

⁶ McKerron, p. 192, citing *Adam v. Ward* [1917] A.C. at p. 321; *Molepo v. Achterberg* [1943] A.D. 85; (Ceylon) *Chelliah v. Fernando* (1937) 39 N.L.R. 130.

⁷ *Moolman v. Cull* [1939] A.D. 213; McKerron, p. 192.

⁸ *Glass v. Perl* [1928] T.P.D. 264; *Kirkpatrick v. Bezuidenhout* [1934] T.P.D. 155.

⁹ Gatlley, *Libel and Slander* (3) pp. 56, 141; *Alla v. Thaba* [1939] N.P.D. 231.

Other defences hardly, if at all, distinguishable from *rixa* are retorsion or self-defence,¹ and compensation, which rests upon the principle of 'tit for tat'—*paria delicta mutua compensatione tolluntur*.² But the essence of the thing is that words spoken in anger are not taken seriously by impartial hearers any more than words spoken in jest.³

Publica-
tion the
essence of
defama-
tion.

The question has been raised whether publication is necessary to ground an action for defamation and has been answered affirmatively.⁴ But the question rests upon a misconception. Defamation is an injury to reputation, which necessarily implies publication. I may also have an action for injury to my feelings, but that is another matter to be considered below.

The law of
defama-
tion
largely
English
in
character.

From what has been said it will be apparent that if the foundation of the South African law of defamation is to be sought in the Roman-Dutch Law, the superstructure consists in very large measure of material taken from the Law of England.⁵

Malicious
prosecu-
tion.

Malicious prosecution is akin to 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 English law

¹ *Wilkinson v. Trevett* [1922] C.P.D. 393; *Tietzé v. Woschnitzok* [1929] S.W.A. 39.

² *Holl. Cons. v. 81*; *Lachter v. Glaser* [1914] T.P.D. 461; *Harris v. A. C. White Co. Ltd.* [1926] O.P.D. 104.

³ *McKerron*, p. 198.

⁴ *Hall v. Zietsman* (1899) 16 S.C. 213; *Van Vliet's Collection Agency v. Schreuder* [1939] T.P.D. 265.

⁵ Some more cases relating to special aspects of the law of defamation are collected in an Appendix to this chapter.

of malicious prosecution, which requires the plaintiff to establish not merely the element of malicious intention but also the absence of reasonable cause.¹ The same principles apply to other abuses of legal process such as maliciously instituting civil proceedings.²

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'.³ The first was an apology from the defendant. 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; the action for damages remains.

The action for defamation is only one aspect of the actio injuriarum, which lay also for an outrage upon a person's dignity. This is injuria in the specific sense of contumelia (Dutch *hoon*).⁴ The gist of the action is the affront. In the modern law the action for defamation has pushed the action for affront into the background or out of sight. But it unquestionably exists⁵ as in Scots Law,⁶ though it is not an action which one would wish to see encouraged.

In the Roman Law an injury to wife, child, or servant was construed as an injury to the husband, parent, or master.⁷ 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.⁸

¹ *Corea v. Peiris* [1909] A.C. 549; McKerron, p. 246.

² *Boshoff v. Van Zyl* [1938] C.P.D. 415; *Cole's Est. v. Oliver* [1938] C.P.D. 464; (Ceylon) *Cooray v. Fernando* (1941) 42 N.L.R. 329.

³ Gr. 3. 35. 2; 3. 36. 3; Voet, 47. 10. 17; V.d.L. 1. 16. 4.

⁴ Grotius distinguishes *hoon* and *lastering* (Gr. 3. 35 and 36), Van Leeuwen (4. 37. 1) does not.

⁵ *Whittington v. Bowles* [1934] E.D.L. 142; *Mulock-Bentley v. Curtoys* [1935] O.P.D. 8; *Walker v. Van Wezel* [1940] W.L.D. 66.

⁶ *Mackay v. McCankie*, 1883, 10 R. 537.

⁷ Inst. 4. 4. 2; and see Gr. 3. 35. 6 and Voet, 47. 10. 6.

⁸ *Banks v. Ayres* (1888) 9 N.L.R. 34; *Jacobs v. Macdonald* [1909] T.S. 442. In the Ceylon case of *Appuhami v. Kirihami* (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. See also *Miller v. Abrahams* [1918] C.P.D. 50.

Wrongs
against
the
domestic
relations.

4. Wrongs against the domestic relations. An action for damages lies against an adulterer, which is usually, but not necessarily, combined with the action for divorce against the guilty spouse,¹ but no action for damages lies against a guilty wife or husband.² In the action against the adulterer the husband may claim not only sentimental, but also patrimonial, damages; the first 'on the ground of the injury or *contumelia* inflicted' upon him, the second 'on the ground of the loss of the comfort, society, and services of his wife'. If he condones his wife's adultery and continues to live with her, the second ground of damage falls away, but not necessarily the first. The measure of damages (if any) recoverable under this head depends upon the circumstances.³ Whether an injured wife can maintain an action for damages against a female co-respondent remains uncertain. The decisions are conflicting.⁴

Apart from adultery a husband has an action against one who in bad faith deprives him of the consortium of his wife (abduction—harbouring).⁵ Whether a wife has an action for the loss of the society of her husband must be regarded as an open question.⁶ A father (*semble*) has an action against one who in bad faith takes from him his child.⁷

Breach of
statutory
or com-
mon 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 special damage in consequence.⁸ 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

¹ Gr. 3. 35. 9; *Norton v. Spooner* (1854) 9 Moo. P.C.C. 103; *Sutcliffe v. Sutcliffe* [1913] T.P.D. 686; *Viviers v. Kilian* [1927] A.D. 449. ² *Ex parte A.B.* [1910] T.S. 1332.

³ *Viviers v. Kilian, ubi sup.*

⁴ McKerron, p. 161.

⁵ *Union Govt. v. Warneke* [1911] A.D. at p. 667; (*Ceylon*) *De Silva v. De Silva* (1925) 27 N.L.R. 289.

⁶ McKerron, p. 164; recently decided affirmatively by Blackwell J. in *Rosenbaum v. Margolis*, 1944 (1) P.H., B. 33 [W.L.D.].

⁷ The theft of a filius or of a slave constituted the crime of plagium which was severely punished. Voet, 48. 15. There is a strange want of authority for a civil action.

⁸ *Begemann v. Cirotta* [1923] T.P.D. 270 (action by shopkeeper against hawker for illegal trading in breach of statute).

answerable in damages.¹ The harm in respect of which an action is brought for breach of a statutory duty must be of the kind which the statute was intended to prevent,² and must be the immediate result of the breach of the statute.³ If a statute creates a special obligation and prescribes a special remedy, as a rule no other remedy is available.⁴

6. Miscellaneous wrongs. There are many wrongs which do not come within any of the above-mentioned classes. In Roman Law the *actio doli* lay in any case in which the plaintiff had been cheated by the defendant, and had no other remedy, but nowadays the action for deceit is governed by the same principles as in English Law.⁵ The question remains open whether an action lies for negligent statements which cause damage.⁶ For the rest, it is obvious that the Roman-Dutch Law is inadequate to resolve all the complex situations of modern life. The old writers may suggest an argument, but hardly supply an answer. The Courts in the absence of legislation will be guided, or aided, more by British and American decisions than by text-writers of the seventeenth and eighteenth centuries.⁷

There is a wrong to which Salmond gives the name of 'injurious falsehood', of which slander of title and slander of goods may be regarded as varieties. This consists in the malicious publication of a false statement concerning a man's trade or business, which causes damage. Neither *injuria* alone, nor *damnum* alone is sufficient to ground the action. Both must be proved.⁸ By *injuria* must be

¹ *Sandilands v. Tompkins* [1912] A.D. 171.

² *Chandler v. Middelburg Munic.* [1924] T.P.D. 450.

³ *Bellstedt v. S. A. Rlwys.* [1936] C.P.D. at p. 411.

⁴ *Madrasa v. Johannesburg Munic.* [1917] A.D. 718.

⁵ McKerron, p. 199.

⁶ *Van Zyl v. African Theatres Ltd.* [1931] C.P.D. at p. 66; McKerron, p. 207; answered affirmatively in *Western Alarm System (Pty) Ltd. v. Coini & Co.*, 1944 (1) P.H., J. 9 [C.P.D.].

⁷ Trade competition, &c., 4 Maasdorp, pp. 43 ff. Inducing another to break his contract with a third party, *Solomon v. Du Preez* [1920] C.P.D. 401; *Isaacman v. Miller* [1922] T.P.D. at p. 61. Passing off, *Policansky Bros. v. Policansky* [1935] A.D. 89.

⁸ Salmond's *Law of Torts* (10), ed. Stallybrass, p. 590; McKerron, p. 203.

understood not contumelia, but wrongful intention, as in the *actio legis Aquiliae*.¹ Like the action for malicious prosecution it is an importation from English Law. It is not an *actio injuriarum*.²

Doubtful cases of absolute liability.

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 liability for mischief done by his animals is of this character. If my dog bites you, you may obtain damages without proof of *scienter* or of negligence.³ It is doubtful whether there is any other case of absolute liability.⁴ 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.⁵

¹ *G. A. Fichardt Ltd. v. The Friend Newspapers Ltd.* [1916] A.D. 1; *Van Zyl v. African Theatres Ltd.* [1931] C.P.D. 61.

² *Bredell v. Pienaar* [1924] C.P.D. 203.

³ *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; *Mehnert v. Morrison* [1935] T.P.D. 144; *Smith v. de Smidt* [1937] T.P.D. 8; *Brown v. Laing* [1940] E.D.L. 75; *Batchoo v. Crick* [1941] N.P.D. 19 (*noxa caput sequitur* unknown to the modern law). For the Roman Law see Lee, *Elements of Roman Law*, sec. 626. Note that in *Mowbray v. Syfret* [1935] A.D. 199 the cause of action was negligence, not pauperies.

⁴ The *actio de pastu pecorum* (Voet, 9. 1. 1) may have implied culpa. In any case it has been superseded in South Africa by the Pounds Acts. McKerron, p. 243; *Kock v. Klein* [1933] C.P.D. 194. The Judicial Committee can scarcely be supposed to have incorporated the rule in *Rylands v. Fletcher* into the law of South Africa by *Eastern & S. A. Telegraph Co. Ltd. v. Cape Town Tramways Co. Ltd.* [1902] A.C. 381. See *Union Govt. v. Sykes* [1913] A.D. at pp. 161, 169. In *Bingham v. Johannesburg City Council* [1934] T.P.D. 301 Solomon J. regarded *Rylands v. Fletcher* as a case of nuisance. But nuisance and *Rylands v. Fletcher* are distinguishable. Salmond, p. 602; Winfield, *Torts* (2), p. 538. The rule in *Rylands v. Fletcher* has been held to be in force in Ceylon. *Subaida Umma v. Wadood* (1927) 29 N.L.R. 330.

⁵ Natal Act, No. 3 of 1905, in the case of an action for damages sustained from 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 Gr. 3. 38. 2 and Lee, *Commentary*,

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 insane persons and young children.¹ All persons who have in any way authorized, instigated, or assisted in the commission of a wrongful act are liable.² Masters and principals are answerable for the wrongful acts of their servants or agents authorized by them or committed in the course of their service or employment.³ This applies whether the master or employer is an individual or a corporation.⁴ But an employer is not, as a rule, liable for the delicts of 'an independent contractor'.⁵ Ratification of the act of a subordinate is equivalent to a prior command.⁶ Fathers are not, as such, answerable for the delicts of their children,⁷ nor husbands for the delicts of their wives.⁸

Who are
liable for
delicts.

ad loc.; Voet, 9. 2. 19-21; *McLaughlin v. Koenig* [1928] C.P.D. 102; *Van Reenen v. Glenlily* [1936] C.P.D. 315. Stringent precautions are called for in regard to fire-arms. *Roddy v. Ohlsson's Breweries Ltd.* [1907] T.S. 125.

¹ 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.

² Gr. 3. 32. 11; *McKenzie v. Van der Merwe* [1917] A.D. 41; *Mouton v. Becket* [1918] A.D. at p. 190.

³ *Mkize v. Martens* [1914] A.D. 382; *Est. van der Byl v. Swanepoel* [1927] A.D. 141; *Union Govt. v. Hawkins*, 1944 (2) P.H., J. 10 [A.D.].

⁴ *Houldsworth v. City of Glasgow Bk.* (1880) 5 A.C. at p. 326 *per* Lord Selborne, who adds the words 'provided that the act done is within the scope of the corporate powers'. This raises a controverted question, viz. whether a corporation can be held liable for a delict committed by one of its servants in the course of an undertaking which is *ultra vires* the corporation. See *Tramway Workers Union v. Heading* [1938] A.D. 47; *South African Bazaars Ltd. v. National Union of Distributive Workers* [1939] N.P.D. 79; *McKerron*, p. 116.

⁵ *Colonial Mutual Life Assurance v. Macdonald* [1931] A.D. 412; *Dukes v. Marthinussen* [1937] A.D. 12.

⁶ *Whittaker v. Roos & Bateman* [1912] A.D. at p. 113.

⁷ Gr. 3. 1. 34; Voet, 9. 4. 10; V.d.K. 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; and a father may be liable if a relation of master and servant existed between father and son. *Andrews v. Levy* [1930] S.R. 101.

⁸ V.d.K. 225; *Pretoria Municipality v. Esterhuizen* [1928] T.P.D. at p. 682; (Ceylon) Ord. No. 18 of 1923, sec. 5 (2).

Every co-delinquent is liable *in solidum*,¹ but if one makes satisfaction the others are discharged² and cannot be called upon to contribute.³ An unsatisfied judgment against one is no bar to an action against another.⁴

Who may
sue.

Who may sue. In general, any person who is injured by a delict may maintain an action for damages, but in cases of nuisance which cause inconvenience or discomfort merely without pecuniary damage, the only remedy is by way of interdict.⁵ Corporations may sue for wrongs against property and for defamatory statements which affect them in their trade, business, or property.⁶ No action for delict lies between husband and wife married in community; whether between spouses not so married is not free from doubt.⁷

Personal
incapa-
city.

In litigation insane persons are represented by their curators; minors and married women (when the marital power is not excluded) are represented or assisted by their guardians or husbands.⁸

Trans-
mission of
actions.

An action in delict directed to patrimonial damages is actively and passively transmissible to (heirs or) personal representatives.⁹ An action directed to sentimental damages is not transmissible actively or passively, until

¹ 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 blame, worthiness of the various co-delinquents. *Gray v. Poutsma* [1914] T.P.D. 203.

² Gr. 3. 32. 15; Voet, 9. 2. 12; *Grek v. Jankelowitz* [1918] C.P.D. 140. Voet limits his statement to *actio rei persecutoria* and this seems to accord with modern practice. Cf. *Toerien v. Duncan* [1932] O.P.D. at p. 203.

³ Voet, 9. 2. 20 (*ad fin.*); *Gray v. Poutsma, ubi sup.* at p. 215; *Naude and Du Plessis v. Mercier* [1917] A.D. 32; (Ceylon) *Wahidu Marikar v. Sahidu Marikar* (1930) 32 N.L.R. 111.

⁴ *Natal Trading Co. v. Inglis* [1925] T.P.D. 724.

⁵ McKerron, p. 221.

⁶ *G. A. Fichardt v. The Friend Newspapers Ltd.* [1916] A.D. at p. 5; *Hoogendoorn v. Fouche* [1933] C.P.D. 560; McKerron, p. 169.

⁷ *Mann v. Mann* [1918] C.P.D. 89; McKerron, p. 97.

⁸ McKerron, pp. 96, 97; *Harms v. Malherbe* [1935] C.P.D. 167 (married women).

⁹ Gr. 3. 32. 10; Voet, 9. 2. 12.

it has reached the stage of *litis contestatio*,¹ which in modern practice is reached when the pleadings are closed and matters are at issue between the parties.² The action for seduction is not an action for *injuria*, but *sui generis*.³ It is questionable whether it is transmitted either way before *litis contestatio*,⁴ but the seducer's estate has been held liable for lying-in expenses, for reasonable maintenance of the child born of the seduction, and for the cost of its funeral.⁵

General exceptions from liability. No one is liable for inevitable accident,⁶ or for acts done in the lawful exercise of a right⁷ or performance of a duty.⁸ 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.⁹ No action lies, as a rule, if the plaintiff consented to the alleged

General
except-
tions.

¹ Gr. 3. 35. 4; Voet, 47. 10. 22; Sande, *Decis. Fris.* 5. 8. 4. Grotius says (3. 35. 5) that the action is not passively transmitted 'unless carried through to judgment', but wrongly.

² *Meyer's Exors. v. Gericke* (1880) Foord at p. 18 *per De Villiers C.J.* ³ *Spies Exors. v. Beyers* [1908] T.S. 473.

⁴ McKerron, pp. 160, 161.

⁵ *Spies Exors. v. Beyers, ubi sup.*

⁶ Gr. 3. 34. 4; Voet, 9. 2. 21 and 29; *McKenzie v. Bloemfontein Town Council* [1904] O.R.C. 83 (abnormal flood); *Moffat v. Rawstorne* [1927] T.P.D. 435 (lightning). These are cases of *casus fortuitus*. *Vis major*, if distinguishable at all, is related to *casus fortuitus* as species to genus. But the terms *casus fortuitus*, *vis major*, and *damnum fatale* are used indifferently. Dönges, p. 44.

⁷ e.g. defence of one's person, Gr. 3. 33. 9; 3. 34. 4; Voet, 9. 2. 22—defence of one's property, Dig. 43. 24. 7. 4; Voet, 9. 2. 28; *Schoeman v. Olivier* (1907) 24 S.C. 759; *Du Plessis v. Aswegen* [1931] T.P.D. 332—*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 v. Sykes* [1913] A.D. at p. 169; *Johannesburg Munic. v. African Realty Trust Ltd.* [1927] A.D. 163; *Reddy v. Durban Corpn.* [1939] A.D. 293; *Johannesburg City Council v. Viccinovich* [1940] A.D. 365—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.

⁸ e.g. intervention to stop a breach of the peace. Voet, 9. 2. 29.

⁹ *Supra*, p. 333.

wrong, or accepted a risk with knowledge and appreciation of the circumstances.¹

Measure of damages. The distinction between sentimental and patrimonial damages has been explained above. Exceptionally, the damages awarded are exemplary or nominal. Exemplary damages are sentimental damages enhanced to punish the defendant for particularly injurious misconduct. Nominal damages are damages awarded where a right has been infringed but no actual damage incurred. The South African courts have shown a marked disinclination to give nominal damages except when the plaintiff's right is challenged by the defendant and the action, though in form one for damages, is actually brought to establish a right.² In all cases in which actual damage is the gist of the action it is essential that the damages (or, more precisely, the damage) should not be too remote,³ i.e. that the loss to the plaintiff which forms the basis of the assessment should be connected not too remotely with the wrongful act or omission alleged. Whether the test of remoteness is 'foreseeability' or 'direct consequence' remains for the present an open question.⁴

We have seen that in case of injury to the person physical pain and disfigurement are taken into account in assessing the damages, but no allowance is made for mental suffering and anguish unless it affects the victim's health.⁵ This is in substantial conformity with English Law.

¹ 'Volenti non fit injuria.' Dig. 47. 10. 1, 5; Voet, 47. 10. 2; *Waring & Gillow Ltd. v. Sherborne* [1904] T.S. 340; *National Meat Suppliers (Pty) Ltd. v. Cape Town City Council* [1938] C.P.D. at p. 504.

² *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.

³ Voet, 9. 2. 16 ff.; *Luyt v. Morgan* [1915] E.D.L. 142; *Anderson v. Van der Merwe* [1921] C.P.D. 342.

⁴ *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; *Coetzee v. S. A. Rhwys*. [1933] C.P.D. at p. 574. The implications of *In re Polemis* [1921] 3 K.B. 560 have not yet left their mark on the law of South Africa. See the cases last cited and McKerron, p. 131.

⁵ For recent English cases see Salmond (10), p. 344, and for an interesting Australian case, *Chester v. Munic. Council of Waverley*, see 55 L.Q.R. (1939), p. 495.

*Quasi-delicts.*¹ Under the title of obligationes quasi ex delicto the Institutes of Justinian mentions 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*);² (2) the occupier of a house who keeps something placed or suspended which may fall on someone passing or standing on the road beneath (*actio positi aut suspensi*);³ (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*).⁴ These may be regarded as cases of absolute liability or (which comes to the same thing) as cases in which the law draws an irrebuttable inference of culpa and of consequent liability.⁵

Quasi-delicts.

Actions of this class are actively, but not passively, transmissible.⁶

Limitation of Actions. Actions arising out of delict were usually prescribed by the lapse of thirty years, but actions for verbal or written injuries⁷ 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

Limitation of actions.

¹ Gr. lib. iii, cap. xxxviii; Van Leeuwen, lib. iv, cap. xxxix.

² Inst. 4. 5. 1; Dig. 9. 3. 1; 44. 7. 5. 5; *Transvaal and Rhodesian Estates Ltd. v. Golding* [1917] A.D. at p. 28; cf. *Colman v. Dunbar* [1933] A.D. 141.

³ Inst. loc. cit.; Gr. 3. 38. 5; V.d.K. 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.

⁴ Inst. 4. 5. 3; Gr. 3. 38. 9; V.d.K. 811. In the case of inns the liability extended to the acts of permanent residents. Dig. 47. 5. 1, 6. For all practical 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.

⁵ Buckland, *Textbook*, p. 598, n. 22. Another case of quasi-delict was 'si iudex litem suam fecerit'. Inst. 4. 5 pr. The subject of judicial liability in the modern law has been touched on above.

⁶ Inst. 4. 5. 3 (*ad fin.*).

⁷ 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.

depends for the most part upon statute. By the (Union) Prescription Act, 1943, actions for defamation are prescribed by a period of one year, and actions for damages other than those for which another period is laid down in the Act by a period of three years.¹

APPENDIX

ADDITIONAL CASES ON THE LAW OF DEFAMATION

Privilege. *McLean v. Murray* [1923] A.D. 406 (communication of Town Councillor to Council); *King v. Neale* [1936] E.D.L. 236 (Town Councillor); *Van Leggelo v. Argus Printing Co.* [1935] T.P.D. 230 (newspaper report of judicial proceedings); *Hearson v. Natal Witness Ltd.* [1935] N.P.D. 603 (report of speeches in Parliament); *Molepo v. Achterberg* [1943] A.D. 85 (common interest).

Abuse of privilege. *Middler v. Hamilton* [1923] T.P.D. 441; *Rose v. Brewer* [1933] C.P.D. 49; *Finn v. Joubert* [1940] C.P.D. 130.

Justification—public interest. *Lyon v. Steyn* [1931] T.P.D. 247; *Bayer v. Bayer* [1937] S.W.A. 73.

Rixa. *Conway v. Westwood* [1936] N.P.D. 245.

Retorsion. *Read v. Pyper* [1935] S.W.A. 16.

Assessment of damages. *Salzmann v. Holmes* [1914] A.D. 471.

Mitigation of damages. *Cressey v. African Life Assurance Soc. Ltd.* [1917] A.D. 605; Nathan and Schlosberg, *Law of Damages*, p. 155.

The provinces of judge and jury (or of judge deciding issues of fact). *Richter v. Mack* [1917] A.D. 201; *Middellandsche Nationale Pers v. Stahl* [1917] A.D. 630.

Words defamatory per se. *Holdt v. Meisel* [1927] S.W.A. 45; *Glass v. Perl* [1928] T.P.D. 264; *Yates v. MacRae* [1929] T.P.D. 480. *Helps v. Natal Witness Ltd.* [1937] A.D. 45; *Brill v. Madeley* [1937] T.P.D. 106; *Smith v. Elmore* [1938] T.P.D. 18; *Whitlock v. Smith* [1943] C.P.D. 321 ('you are a liar'); *Moosa v. Duma*, 1944 (1) P.H., J. 4 [T.P.D.] ('bastard').

Words not defamatory per se. *Richter v. Mack*, *ubi sup.*; *Hardaker v. Tjabring* [1927] N.P.D. 145; *Wallach's Ltd. v.*

¹ Sec. 3 (2).

Marsh [1928] T.P.D. 531; *Smith v. Lawrence* [1929] N.P.D. 132; *Haacke v. Deutsche Presse Ltd.* [1934] T.P.D. 191; *Welgemoed v. Cohen* [1937] T.P.D. 134; *Kay v. Argus Printing Co.* [1937] N.P.D. 119; *Unie Volkpers Bpk. v. Rossouw* [1943] A.D. 519.

Newsvendor, dissemination in ordinary course of business. *Trimble v. Central News* [1934] A.D. 43; *Masters v. Central News* [1936] C.P.D. 388.

Publication by reference to other published matter. *African Life Assurance Socy. v. Robinson & Co.* [1938] N.P.D. 277; *African Realty Trust Ltd. v. Robinson & Co.* [1939] T.P.D. 155.

Defamation of a class of persons. *Nasionale Pers Bpkt. v. Long* [1930] A.D. 87; *Knupffer v. London Express Newspaper Ld.* [1944] A.D. 116.

PART III

OBLIGATIONS ARISING FROM SOURCES OTHER THAN CONTRACT AND DELICT

Obligations 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. This 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 locupletiore.*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

¹ See Sohm's *Institutes of Roman Law*, translated by J. C. Ledlie, 3rd ed., p. 308, n. 1, and pp. 358-9.

² Dig. 12. 6. 14; *supra*, p. 47; *Van Rensburg v. Straughan* [1914] A.D. at p. 329; *Urtel v. Jacobs* [1920] C.P.D. at p. 493; *Pretorius v. Van Zyl* [1927] O.P.D. 226; *Gorfinkel v. Miller* [1931] C.P.D. 251. See *The Doctrine of Unjustified Enrichment*, Gutteridge and David, Cambridge Law Journal, 1934, p. 204; *Unjustified Enrichment*, Mr. Justice A. J. McGregor, 55 *S.A.L.J.* (1938) pp. 4, 167.

³ Inst. 3. 27. 6; Gr. 3. 30. 4; Voet, lib. xii, tit. 6; *Union Govt. v. Nat. Bank of S. A.* [1921] A.D. 121; 3 *Maasdorp*, chap. 34.

right¹ (*indebiti solutio*), an action (*condictio indebiti*) lies for its recovery, and there are many other cases, which can be referred to the same general head.² Another case in which an obligation is said to arise *quasi ex contractu* is *negotiorum gestio*,³ 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.⁴ In such case the volunteer (*negotiorum gestor*) is bound: (a) to manage the affairs of his principal with *exacta diligentia*,⁵ 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 obligation 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.⁶

¹ *Union Govt. v. Gowar* [1915] A.D. 426; *Wilken v. Holloway* [1915] C.P.D. 418.

² 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, and now in English Law the Law Reform (Frustrated Contracts) Act, 1943 (6 & 7 Geo. 6, c. 40).

³ Grot. lib. 3, cap. 27; Voet, lib. iii, tit. 5, V.d.L. 1. 15. 15; Buckland, *Textbook*, p. 537; 3 Maasdorp, chap. 33; Klug v. *Penkin* [1932] C.P.D. 401; *Williams' Est. v. Molenschoot* [1939] C.P.D. 360; (Ceylon) *Thangamma v. Ponnambalam* (1943) 43 N.L.R. 265.

⁴ Dig. 10. 3. 14, 1.

⁵ 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. *Laurie v. Union Govt.* [1930] T.P.D. 402.

⁶ *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.

Heres suus.

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 extraneus.

The 'extraneus heres', that is, anyone 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, was, originally, in a better position. So soon as the testator died, the inheritance was said to be 'delated' to the heir,¹ 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 'enter upon' 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 or the heir himself would apply to the praetor to fix a 'spatium deliberandi',² a period within which he must accept, if he meant to do so. If at the end of the time fixed 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 (if any) next entitled. Such was the law until the time of Justinian. But that emperor's legis-

Changed position of the heir in Justinian's system.

lation gave the heir the choice of alternatives.³ (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 a mere executor, with the privilege of being residuary legatee.'⁴ (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. An acceptance or repudiation, once made, was irrevocable except by

¹ i.e. if instituted immediately and unconditionally. Dig. 50. 16. 151: *Delata hereditas intellegitur quam quis possit adeundo consequi.*

² i.e. to give the heir the option of asking for it, or of allowing the creditors to realize the estate. Gaius. 2. 167; Dig. 28. 8. 5 pr.

³ Inst. 2. 19. 5 and 6; Cod. 6. 30. 22, 14 a (gemini tramites).

⁴ Hunter, *Roman Law* (3rd ed.), p. 755.

a minor, who might obtain from the praetor *restitutio in integrum*.

The heir
in the
Dutch
Law.

The Dutch Law followed the Roman Law with modifications. There was no necessary heir and consequently no need to invoke the *beneficium abstinendi*.¹ The benefit of inventory and the *spatium deliberandi* were retained, at least in name.² In the modern law of South Africa and Ceylon these institutions are wholly disused.³

The
Dutch
Law of
testa-
ments.

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.⁴ 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.⁵ In all continental systems of law the heir is still a universal successor. In English Law the universal successor is unknown. In his place we find an executor or administrator charged with the duty of applying the dead man's personalty (now his whole estate) in payment of debts and of making over the surplus to the persons entitled under the will or upon intestacy.

The testa-
mentary
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, in fact, as Van der Keessel⁶ observes, 'procurators appointed by the testator to manage his funeral, to recover what is due to him, to pay legacies and

¹ Groen. *de leg. abr. ad Inst.* 2. 19. 2.

² The *Acte van Beraad* differed materially from the *spatium deliberandi*. V.d.L. 1. 9. 9.

³ *Fischer v. Liquidators Union Bk.* (1890) 8 S.C. at p. 53.

⁴ Tacitus, *Germania*, cap. 20; Fockema Andreae, *Het Oud-Nederlandsch Burgerlijk Recht*, vol. ii, pp. 313 ff.; Gr. 2. 14. 2.

⁵ Gr. 2. 14. 7.

⁶ V.d.K. 323; V.d.L. 1. 9. 10.

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 successor¹ (in every case where he had not obtained benefit of inventory),² 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 against the competing analogy of the English Law.³ 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 [if any] have been paid, and which has to be handed over by the executor to the heir'. A testamentary heir is merely a residuary legatee.⁴ If the deceased dies intestate the estate is liquidated by an executor dative (corresponding to the English adminis-

in the
modern
law.

¹ Gr. 2. 21. 7; *Cens. For.* 1. 3. 1. 3; Fock. And., vol. ii, p. 348.

² 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.

³ 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* (1925) 27 N.L.R. 336. For the history of the office of executor see *Ferguson v. Hucknell* [1903] T.H. at p. 227; *The Master v. Edgewcombe's Exors.* [1910] T.S. at p. 268; *Krige v. Scoble* [1912] T.P.D. at p. 817; *Goosen v. Bosch* [1917] C.P.D. 189.

⁴ 1 Maasdorp, p. 132. For the history of the law and the position of the heir in South Africa see *Oosthuysen v. Oosthuysen* [1868] Buch. 51; *Fischer v. Union Bank Liquidators* (1890) 8 S.C. 46; *Vermaak's Exor. v. Vermaak's Heirs* [1909] T.S. at p. 682; *Snyman v. Basson N.O.* [1915] T.P.D. 368. It may still be material for certain purposes to determine whether a beneficiary takes as heir or legatee. Juta J.A. in *Est. Cato v. Est. Cato* [1915] A.D. at p. 309. But see argument of counsel in *Winstanley v. Barrow* [1937] A.D. 75. For Ceylon see *Pulle v. Pulle* (1893) 2 S.C.R. at p. 106.

trator) appointed by the Master of the Supreme Court,¹ and the heir *ab intestato* is in the same position as if he had been appointed legatee by will. The Master also appoints an executor *dativé*, if the testator has omitted to nominate an executor (the administrator *cum testamento annexo* of English Law), or if for any reason the nominated executor does not act. The estate of the deceased does not vest in the heir, as in Roman Law, but in the executor, testamentary or *dativé*.² Administrators are not unknown to the law of South Africa. Their functions are to some extent those of the English trustee.³ Since the administrators (if any) appointed by a will are usually also the executors, it may be a matter of some difficulty to draw the dividing line between their distinct functions.⁴

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, which was once 'caput et fundamentum testamenti', is no longer a necessary formality.⁵ Consistently with this, again contrary to the Roman Law, a man may die partly testate, partly intestate.⁶ What he fails to dispose of by will goes to his intestate successor.⁷ In Roman Law it would have gone to the instituted heir by accrual.⁸ But there is a presumption

¹ Administration of Estates Act, 1913, sec. 34.

² *Fischer v. Union Bank Liquidators* (1890) 8 S.C. 46; *Krige v. Scoble* [1912] T.S. 814.

³ *Hiddingh v. Denysen* (1885) 3 S.C. at p. 441.

⁴ For the distinct functions of executors and administrators see Administration of Estates Act, 1913, sec. 61; *Registrar of Deeds (Natal) v. Est. Shaw* [1928] A.D. 425; *The Master v. Ocean Accident Corp. Ltd.* [1937] C.P.D. 302.

⁵ V.d.K. 290. This is expressly enacted for Natal by Law, No. 2 of 1868, sec. 4.

⁶ Voet, 28. 1. 1; 28. 5. 26.

⁷ V.d.K. 309, 322.

⁸ 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; V.d.K.

against intestacy, and if a man makes a will disposing of his property, the presumption is that he intends to dispose of all his property.¹ If he disposes of a usufruct of property but not of the corpus there is a presumption that the legatee of the usufruct is also legatee of the corpus.²

It is common to testamentary and to intestate succession that a child or grandchild of the deceased claiming to share in the estate may only do so on condition of bringing into account property received from the deceased during his lifetime 'for the advancement of their marriage, business or merchandise'.³ The Romans call this process of accounting *collatio bonorum*. The Dutch call it *inbreng*.⁴ But the beneficiary was under no obligation to account. If he elected not to claim, he was entitled to retain what he had received. Collation was made for the benefit of the other heirs and of a surviving spouse married in community.⁵ If strangers had been instituted along with descendants they neither made collation nor benefited by a collation made by others, i.e. they took what the will gave them, neither less nor more.⁶ According to Voet, whose view has been adopted by the Appellate Division, the Roman-Dutch Law (contrary to the Roman Law) 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'.⁷

Collatio
bonorum.

326; *Parker v. Est. Fletcher* [1932] C.P.D. 202; *Reid v. Admors. Est. Reid* [1932] W.L.D. 30; *Winstanley v. Barrow* [1937] A.D. 75; *Winn N. O. v. Oppenheimer* [1937] T.S. 91.

¹ *Havemann's Assignee v. Havemann's Exor.* [1927] A.D. at p. 476.

² *Van Colter v. Henny* [1929] C.P.D. 244.

³ P.O. Art. 29 (1 *G.P.B.* 336); Gr. 2. 11. 13; 2. 28. 14; Voet, 37. 6; Van Leeuwen, lib. iii, cap. xvi; *Jooste v. Jooste's Exors.* (1891) 8 S.C. 288; (Ceylon) *Sellamy v. Kalliamma* (1944) 46 N.L.R. 76; 61 T.L.R. 99 (P.C.); *Saram v Thiruchelvam* (1945) 46 N.L.R. 145.

⁴ *Supra*, p. 71, n. 5. In English Law this is called 'bringing into hotchpot'. It only applies *ipso jure* in the event of intestacy.

⁵ Gr. *ubi sup.*

⁶ Voet, 37. 6. 6-8.

⁷ *Est. Van Noorden v. Est. Van Noorden* [1916] A.D. 175. There was a difference of opinion amongst the Dutch jurists. E. M. Meyers in *Tydskrif*, 1939, p. 130. The French Code (Art. 829) retains the collation of debts (*rapport des dettes*). The Dutch Code does not. Veegens-Oppenheim, vol. ii, p. 446.

II

TESTAMENTARY SUCCESSION

Contents
of this
chapter.

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) legacies; (9) codicils; (10) how wills and legacies are revoked; (11) fideicommissa; (12) trusts; (13) mutual wills.

The
different
kinds of
will in
Roman
Law:

(a) written,

1. How wills are made. In the latest period of Roman Law the will commonly in use was the *testamentum tripartitum*, so called because derived from three sources, the civil law, the praetor's edict, and imperial constitutions.¹

(b) nuncupative.

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

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 Law.⁴

How wills
were made
in Hol-
land.

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 prescribed by native custom, viz. wills executed either:

¹ Inst. 2. 10. 3.

² Girard, p. 863; Buckland, p. 286.

³ Inst. 2. 10. 14; Buckland, p. 287.

⁴ Gr. 2. 14. 2; Fock. And. *O.N.B.R.*, vol. ii, pp. 313 ff.; Wessels, *History of the Roman-Dutch Law*, Part II, chap. viii.

⁵ Gr. 2. 17. 16; Voet, 28. 1. 20; V.d.K. 293; V.d.L. 1. 9. 1. The Roman will was an alternative by the common law of South Africa. *De Smidt v. Hoets* (1852) 1 Searle at p. 279.

(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 survived in the law of South Africa, where it continued to exist together with a statutory will of the English type, executed in the presence of two witnesses.

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 The completed will, which

The
notarial
will.

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 A will is not void which fails to express this fact, says Voet (28. 1. 24). But see *Resolutie van de Staten van Hollandt ende West-Vrieslandt* 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. 296; V.d.L. 1. 9. 1. By Cape Act No. 3 of 1878, sec. 1;

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'.¹ Wills of the kind described above are known as 'open wills'.²

The
closed
will.

A special kind of notarial will is the 'closed will' (*besloten testament*).³ This is an instrument written by the testator, or by another by his direction,⁴ 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 testator⁵ and the witnesses (*acte van superscriptie*).⁶

A notarial testament, Voet says, must be dated; otherwise it will be held void, unless the circumstances exclude the risk of fraud.⁷

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 Acts, 1837.⁸

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.

¹ See W. H. Somerset Bell, *South African Legal Dictionary*, sub verbis *Grosse, Prothocol*.

² V.d.L. *ubi sup.*

³ In South Africa also called a 'close will'. Van Leeuwen, 3. 2. 5; Voet, 28. 1. 26; Bijnk. *O.T.* i. 100; *De Smidt v. Hoets* (1852) 1 Searle at p. 281; V.d.L. *ubi sup.*

⁴ Provided such other takes no benefit under the will. V.d.L. *ubi sup.*

⁵ Voet, *ubi sup.*

⁶ When the will was opened it was usual for the notary and 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.*

⁷ Voet, 28. 1. 25; *Holl. Cons.* iii. 328. But see Bijnk. *O.T.* i. 420.

⁸ 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

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);¹ (b) will made in the country—*testamentum ruri conditum*—(five witnesses sufficient);² (c) will by which a parent disposed of his property among his children—*testamentum parentis inter liberos*—(no witnesses necessary, if the will was holograph, i.e. written wholly in the testator's own hand);³ (d) soldier's will—*testamentum militare*—(no formalities required, any indication of testamentary intention sufficient).⁴

To these the Canon Law added: (e) will made for pious causes (churches and charitable institutions)—*testamentum 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),⁵ and they persist in the law of South Africa.⁶ 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,

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 Miller* [1922] W.L.D. 105. There is no such provision in the Natal Act.

¹ Cod. 6. 23. 8. 1.

² Cod. 6. 23. 31. 3.

³ Nov. 107 cap. i (A.D. 541).

⁴ Inst. lib. ii. tit. 11.

⁵ Gr. 2. 17. 28. 29.

⁶ The Cape Act by implication, the Transvaal and 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). The *testamentum ad pias causas* is fully considered by Van der Keessel in *Dictat. ad Gr. 2. 17. 31*, Lee, *Commentary*, p. 152, 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.

requires no witness.¹ It may even be nuncupative (*minus sollemne nuncupativum*), but must, in that case, be proved by two witnesses.² The testator may distribute the property among his children in any proportion he pleases. 'Children' means legitimate children, at all events if the father is the testator,³ in the case of a mother, perhaps illegitimate children may be considered to be on the same footing as legitimate issue.⁴ Children alone come within the privilege. Other people cannot benefit under a will which is not executed with the usual solemnities.⁵ It is essential that the document 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.⁶ All the cases that have been cited show that where a privileged will of 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 der Wall v. Van der Wall's Exors.* (1896) 13 S.C. at p. 321 *per* Buchanan A.C.J.). The question has been raised whether a child should not receive at least 'a substantial share', if a will is to be privileged as a *testamentum parentis inter liberos*.⁷

Testamentum militare.

The military testament, i.e. one made by a soldier or sailor⁸ *in expeditione*, requires no solemnities whatever. It

¹ 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 South Africa 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. *Contra*, Bijnk. O.T. i. 420.

² Gr. 2. 17. 28; Voet, *ubi sup.*; *Cens. For.*, *ubi sup.*; Windscheid, iii. 544. The witnesses may be male or female. Groenewegen, *de leg. abr. ad Inst.* 2. 10. 6; de Haas *ad Cens. For.*, *ubi sup.*

³ *Wilkinson's Est. v. Wilkinson* (1907) 24 S.C. 602.

⁴ Voet, 28. 1. 16.

⁵ *Ex parte Tippett* [1942] C.P.D. 68.

⁶ Voet, 28. 1. 17.

⁷ *In re Ebrahim's Est.* [1936] T.P.D. 60.

⁸ *Holl. Cons.* iv. 209; *Vervolg op de Holl. Cons.* ii. 64.

may be written or oral.¹ Voet, following Grotius, permits the same informal mode of testamentary disposition to ambassadors and their suites residing abroad in the course of duty.²

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,³ 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 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.

The clausule reservatoir⁴ is a clause in which the testa-
Clausule
reserva-
toir.
tor 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.⁵ In South Africa the reservatory clause is admitted by the law of the Cape Province,⁶ probably in the Transvaal and

¹ Inst. lib. ii, tit. 11; Gr. 2. 17. 29; Voet, 29. 1. 11; Van Leeuwen, 3. 2. 14; *In re Leedham* (1901) 18 S.C. 450; *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. 299).

² Voet, 28. 1. 14; Grotius in *Holl. Cons.* iii. 341.

³ See Gr. lib. ii, cap. xxii.

⁴ *Cens. For.* 1. 3. 11. 10; *Holl. Cons.* i, 125; Bynkershoek, *Quaest. Jur. Priv.*, lib. iii, capp. iv-v; V.d.K. 337; V.d.L. 1. 9. 2.

⁵ Voet, 28. 1. 29.

⁶ 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. 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.

the Free State,¹ but not in Natal.² In more than one case it has been required that a codicil should purport to be executed 'under and by virtue of the reservatory clause in the will',³ and Lybreghts, in his book on Notarial Practice, gives a form which contains such an express reference.⁴ In a recent case the need of an express reference to the reservatory clause was questioned.⁵ The validity of a codicil executed under a reservatory clause depends upon the existence of a valid will containing the clause. The codicil cannot revoke the will upon which it depends for its effect.⁶ A codicil executed under the reservatory clause must be signed by the testator. It need not be in his handwriting.⁷

Clausule
deroga-
toir.

The clausule derogatoire (no longer in use) was one in which the testator purported to disable himself by anticipation from departing from the tenor of his will, either by any subsequent disposition whatever, or by any disposition not expressed in a particular form of words or the like.⁸ Voet justly observes that such a clause contains merely a signification of intention and no derogation from a testator's power of changing his will.⁹ Whether he does so or not depends upon the true construction of his subsequent testamentary dispositions.

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

¹ *Ex parte Van Biljon* [1934] O.P.D. 104.

² Steyn, *The Law of Wills in South Africa*, p. 8. In Southern Rhodesia only in a notarial will. *R.S.* cap. 49.

³ *Nelson v. Currey* (1886) 4 S.C. 355; *Erasmus v. Erasmus' Guardians, ubi sup.*

⁴ *Redenerende Practycq over 't Notaris Ampt* (1759), p. 189.

⁵ *Ex parte Pieterse N.O.* [1933] S.W.A. 4.

⁶ *Van Reenen v. Board of Exors.* [1875] Buch. 44; *Ex parte Webber's Exor.* (1902) 19 S.C. 427.

⁷ *Hart v. The Master* [1923] C.P.D. 78.

⁸ Gr. 2. 24. 8; e.g. containing the words 'arma virumque cano' (Voet, 28. 3. 10), or the whole of the credo (*Holl. Cons.* v. 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).

⁹ Voet, 28. 3. 10.

statutory or underhand will; (3) the privileged will; (4) the codicil executed by virtue of the reservatory clause. But the first of these is no longer in use.

In Ceylon a will must be executed either in the presence of a notary and two witnesses, or in the presence of five witnesses¹ if a notary is not present.² The vast majority of wills are notarially executed.

2. What may be disposed of by will. Anything may be disposed of by will which is capable of ownership, whether corporeal or incorporeal,⁴ whether the property of testator⁵ or of his heir⁶ or of any one else;⁷ for the Roman-Dutch Law, following the Roman Law, permits a bequest of a *res aliena* no less than of a *res sua*.⁸

3. Who may make a will. All persons may make a will except: (a) minors under the age of puberty;⁹ (b) persons mentally incapable;¹⁰ (c) interdicted prodigals (*hofs- ofte stads-kinderen*);¹¹ but the wills of these last are upheld so far as their dispositions are just and equitable.¹²

¹ Ord. No. 7 of 1840, sec. 3. 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).

² i.e. if a notary is not present acting in his notarial capacity. *Perera v. Perera* [1901] A.C. 354.

³ Gr. 2. 22. 7.

⁴ Gr. 2. 22. 9.

⁵ Gr. 2. 22. 32.

⁶ Gr. 2. 22. 35.

⁷ Gr. 2. 22. 38.

⁸ *Receiver of Revenue, Pretoria v. Hancke* [1915] A.D. at p. 77.

⁹ Gr. 2. 15. 3; V.d.L. 1. 9. 3. In this case 'ultimus impuberis aetatis dies coeptus pro completo habetur'. Voet, 28. 1. 31. 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.

¹⁰ 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. As to what constitutes mental incapacity see *Tregea v. Godart* [1939] A.D. 16.

¹¹ Gr. 2. 15. 5; Van Leeuwen, 3. 3. 2; Voet, 28. 1. 34.

¹² V.d.K. 281; Lee, *Commentary*, p. 135; *Ex parte F.* [1914] W.L.D. 27.

There seems no reason why a deaf-mute, though born so, if of sufficient understanding, should not make a will at the present day.¹ Married women and minors may make wills without the authority of their husbands² and parents or guardians³ 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.⁴ We return to this subject later.⁵

Passive
testamen-
tary
capacity.

4. Who may take under a will. Except as hereafter stated any person whether native or foreigner,⁶ individual or corporate, born or unborn,⁷ may take under a will, provided such be ascertained or ascertainable.⁸ Exceptions were or are: (1) spiritual persons and houses (*geestelicke luiden ende huizen*) prohibited from taking immovable or movable property;⁹ (2) the curators and tutors 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;¹⁰ (3) a person who has con-

¹ 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 (*land-overheid—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.

² Voet, 28. 1. 38.

³ Gr. 1. 8. 2; Voet, 28. 1. 43.

⁴ Gr. 2. 15. 9.

⁵ *Infra*, p. 392.

⁶ Gr. 2. 16. 1; but not outlaws (*woestballingen*), or those who adhere to the enemy. Van Leeuwen, 3. 3. 9; Voet, 28. 5. 5.

⁷ Voet, 28. 5. 12.

⁸ Gr. 2. 16. 2; Voet, 28. 5. 2.

⁹ 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 South Africa these disabilities exist no longer (Cape Act No. 11 of 1868; Nathan, vol. iii, sec. 1764), and there is no general law of mortmain.

¹⁰ 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. 285-6; Lee, *Commentary*, p. 140; V.d.L. 1. 9. 4. It has been suggested that the reference to godparents is attributable to a mistranslation of a

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 the will of her deceased husband;⁶ (8) a

French draft of the *P.E.*, parâtre and marâtre (= vitricus-noverca) being confounded with parrain and marraine. (Bijnk., *Quaest. Jur. Priv.* lib. iii, cap. iii.) It seems clear that by 'concubines' is meant concubines of the minors, though Van Leeuwen (3. 3. 12) takes it to mean concubines of the tutors, &c.

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. This is still law in France, *C.C.* 908. 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. *Jaya-shamy v. Abey Suriya* (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. 287.

⁴ Voet, 28. 5. 6. So far as adultery is concerned this is no longer law in South Africa. *Est. Heinemann v. Heinemann* [1919] A.D. 99. *Seem* a testamentary gift to a concubine holds good. Voet, loc. cit.; de Haas *ad Cens. For.* 1. 3. 4. 41; Bijnk. *O.T.* i. 414; ii. 1846.

⁵ Cod. 5. 9. 6 (*lex hac edictali*); Gr. 2. 16. 7; this is no longer law. *Supra*, p. 98, n. 5.

⁶ Cod. 5. 9. 1. But the penalties of remarriage within the *annus luctus* are stated by Van Leeuwen to be obsolete. *Cens. For.* 1. 1. 13. 27.

notary prohibited from taking any benefit under a will written by himself.¹ (9) A like disqualification attaches to any other person who writes a will for another and inserts therein a disposition for his own benefit, unless the testator has added a clause confirming the will (*dictavi et recognovi*) or in some other way confirmed the disposition.² The prohibition extends to the mutual will of spouses³ and even (in Roman Law) to the privileged will of soldiers.⁴ This rule is derived from a *senatusconsultum Libonianum* of A.D. 16.⁵ It is an unhappy survival, which might well be abrogated. (10) Finally, in imitation of English Law, modern statutes disqualify an attesting witness to whom or to whose wife or husband a benefit is given by the will.⁶ It has been held that an appointment as executor is a benefit within the meaning of the law.⁷ Of the disqualifications in this list numbered 1-7 some are certainly, others probably, obsolete. A gift to a person incapable of taking a benefit under a will is taken *pro non scripto*.⁸

¹ Lybreghts, *Redenerend Verhoog over 't Notaris Ampt* (4th ed.), vol. i, p. 377. *Holl. Cons.* vi (part 2), 43; *Est. Brown v. Elliott Bros.* [1923] C.P.D. 325. Quaere, does the prohibition extend to the wife or relations of the Notary? *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 Voet, 34. 8. 3; V.d.K. 292; *Benischowitz v. The Master* [1921] A.D. 589; *Mellish v. The Master* [1940] T.P.D. 271; (Ceylon) *Arulampikai v. Thambu* (1944) 45 N.L.R. 457.

³ *Thienhans v. The Master* [1938] C.P.D. 69.

⁴ Dig. 29. 1. 15. 3. ⁵ Dig. 34. 8; 48. 10; Cod. 9. 23.

⁶ 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.

⁷ *Smith v. Clarkson* [1925] A.D. 501.

⁸ 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 fise 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 Count. 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

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 wills;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 will⁷ 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

in the modern law.

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 Grotius (2. 24. 24) says that an innocent substitute direct or fideicommissary is preferred to the Count. 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 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. Voet refers to the view expressed in *Holl. Cons.* i. 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 and in Ceylon (*supra*, p. 366).

⁹ Voet, 28. 1. 22.

to a will,¹ as also the heir.² Further (herein exhibiting a greater stringency than the Roman Law), it excluded as witnesses persons too nearly related to the heir or testator by blood or affinity.³ But in the modern law it may be said to be a general rule that 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 testamentary instrument.⁴

Restrictions on testamentary disposition.
A. The legitim.

6. Restrictions on Freedom of Testation. (A) **THE LEGITIM.** The Roman Law 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*.⁵ 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;⁶ ascendants and brothers and sisters were entitled to one fourth;⁷ unless in each case they were justly disinherited. The portion to which these classes were successively entitled was known as the statutory portion—*legitima portio*—or, as we say, the legitim.

¹ 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.

² Gr. 2. 17. 12; *Joubert v. Exor. of Russouw* [1877] Buch. 21.

³ Voet, 28. 1. 22. 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.

⁴ Cape Act. No. 22 of 1876, sec. 2. Similar provisions in Transvaal (Ord. 14 of 1903, sec. 2), O.F.S. (Ord. 11 of 1904, sec. 2), Southern Rhodesia (RS. cap. 49), 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.'⁵ Inst. lib. ii, tit. 18; Girard, p. 915.

⁶ Nov. 18, cap. i (A.D. 536).

⁷ 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, iii. 580.

The law of legitim was received in Holland,¹ but is unknown to the modern law having been abrogated by statute or disuse.²

Abolished in the modern law.

(B) QUARTA FALCIDIA. In Dutch, as in Roman, law, the heir was entitled to retain, as against legatees, a clear fourth of the estate or of the share in which he was instituted after payment of funeral and other expenses and debts; the legacies were, if necessary, reduced *pro rata*.

B. The Falcidian portion.

(C) QUARTA TREBELLIANA. The principle of the Lex Falcidia was applied by later Roman legislation to the relation of fiduciary and fideicommissary. This also passed into the law of Holland.

C. The Trebellian portion.

The Falcidian and the Trebellian portions have been abolished in South Africa³ and are disused in Ceylon.

7. Institution and Substitution of Heirs. It is unnecessary to linger over the rules relating to this topic, which Grotius⁴ 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.⁵ Vulgar substitution is the same as in the Roman Law.⁶ Pupillary and exemplary substitution in the Roman sense are not in use,⁷ the same result being sufficiently obtained by fideicommissa (so called fideicommissary substitution). In the Roman-Dutch Law, unlike the Roman

Institution and substitution of heirs.

¹ Gr. 2. 18. 5.

² 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.

³ 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; O.F.S. Law Book of 1901, cap. xcii, sec. 2. As to Ceylon there may be (or was) some doubt. Thomson, *Institutes*, vol. ii, p. 225.

⁴ Gr. lib. ii, capp. xviii and xix.

⁵ *Supra*, p. 354.

⁶ V.d.L. 1. 9. 7.

⁷ Gr. 2. 19. 9; Voet, *Compendium*, 28. 6. 16; Van Leeuwen, 3. 7. 5; V.d.K. 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.

Law, 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*).¹

Legacies.

8. 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.² It may be noted that if the assets are insufficient to discharge the debts, all legacies of whatever nature, abate proportionately.³

Codicils.

9. 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, in the presence of at least five witnesses, male or female, who 'subscribed' the instrument. 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 the inheritance, and therefore could not institute or substitute an heir directly nor contain a clause of disinheritance. 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.⁴

¹ Gr. 2. 18. 21; Lee, *Commentary*, ad loc.; V.d.K. 311. See *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. See also *In re Cooper's Est.* [1939] C.P.D. 309 and *Commr. for Inland Revenue v. Est. Crewe* [1943] A.D. at p. 678.

² Gr. lib. i, capp. xxii and xxiii; Van Leeuwen, lib. iii, cap. ix; I Maasdorp, chap. xxv; Steyn, *The Law of Wills in South Africa*, chap. vii.

³ *Ex parte Tarr* [1941] C.P.D. at p. 111.

⁴ Inst. 2. 25. 3; Moyle, ad loc.

Anyone might make or take under a codicil who could make or take under a will.¹

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.² 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 the case of codicils.³

The Dutch jurists discuss at some length whether there was any longer any difference between wills and codicils. Groenewegen says there is none.⁴ Decker argues with much force that the Roman law of codicils is entirely foreign to the law of Holland.⁵ Voet says, 'the law of codicils has been very nearly assimilated to that of testaments'.⁶ Van der Keessel detects some then existing differences.⁷ But today, as in English law, the difference between wills and codicils is one of name merely not of substance,⁸ except that: 'In the ordinary course 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'.⁹

10. How wills and legacies are revoked.¹⁰ A will,

¹ Dig. 29. 7. 6. 3; Voet, 29. 7. 2; Girard, p. 847.

² Ut vim etiam codicillorum scriptura debeat obtinere. Cod. 3. 36. 8. 1.

³ 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.

⁴ *de leg. abr. ad Inst.* 2. 25.

⁵ ad Van Leeuwen, 3. 2. 2.

⁶ 29. 7. 5.

⁷ *Th.* 289.

⁸ *Est. Ebden v. Ebden* [1910] A.D. at p. 332; (Ceylon) *Goonewardene v. Goonewardene* (1929) 31 N.L.R. at p. 15.

⁹ *Kleyn v. Est. Kleyn* [1915] A.D. at p. 537 per Solomon J.A.

¹⁰ For Ceylon, see Ord. No. 7 of 1840, sec. 5. For Natal see Law 2 of 1868, secs. 8-10. In the other provinces there is no statutory provision.

How wills
and
legacies
are
revoked.

validly made, may be revoked: (1) by a subsequent will, revoking the earlier will expressly or by implication. In the Roman Law a later will necessarily revoked an earlier will. But in the modern law it is a question of construction. Voet says, correctly, that there must be an express revocation of the earlier will, otherwise effect will be given, so far as they are not irreconcilable, to both.¹ Grotius,² following the Roman Law,³ 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. But, today, a second privileged will no less than a will executed with the usual formalities will revoke an earlier privileged will, if it bears that construction;⁴ (2) by declaration of intention to revoke in an instrument executed with the formalities proper to a will. This is in effect a subsequent will, declaring the testator's desire that his estate should be distributed as in the case of intestacy. In the Roman Law it would have been invalid for want of the institution of an heir;⁵ (3) by destruction *animo revocandi*.⁶ If the will has been executed in duplicate, destruction of one duplicate *animo revocandi* invalidates the other.⁷ But it seems that the destruction of the grosse or copy of a notarial will leaves the will intact,⁸ at all events unless a contrary intention is proved. 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

¹ Voet, 28. 3. 8; *Re Est. Whiting* [1910] T.P.D. 527; *Ex parte Scheuble* [1918] T.P.D. 158; *Ex parte Tarr* [1941] C.P.D. 104.

² Gr. 2. 24. 18.

³ Nov. 107, cap. 2.

⁴ *Vimpany v. Attridge* [1927] C.P.D. 113; Lee, *Commentary*, p. 175.

⁵ Gr. 2. 24. 16; Voet, 28. 3. 1.; V.d.L. 1. 9. 11; Lee, *Commentary*, p. 174.

⁶ Gr. 2. 24. 15; Voet, 28. 4. 1.

⁷ *Nelson v. Currey* (1886) 4 S.C. 355.

⁸ Groen. *ad Gr.*, *ubi sup.*; Voet, *ubi sup.*; V.d.L., *ubi sup.* *Dissentit Schorer ad Gr.*, loc. cit. V.d.K. (*Th.* 330) says that the will is not revoked, unless it is shown that the testator destroyed the grosse with the intention of dying intestate. Cf. *In re Herron*, *Ex parte Waters* (1840) 2 Menz. 423.

the will was destroyed by him *animo revocandi*.¹ Partial destruction of a will, if intentional, *prima facie* revokes only the part destroyed;² (4) Van der Linden says that a will is revoked by subsequent marriage followed by birth of issue.³ But the statement wants authority, and it does not appear that in the modern law, in the absence of statutory provision, a will is revoked either by marriage alone or by marriage followed by birth of issue.⁴ In Natal a will is generally revoked by marriage, unless expressed to be made in view of a contemplated marriage, or made in exercise of a power of appointment which does not affect the interest of the heirs *ab intestato*. But no joint will is revoked by the marriage of the surviving spouse.⁵ (5) Grotius, following the Roman Law, says that a will is revoked by 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.⁶ This finds no place in the modern law. (6) By the Roman Law a will was always liable to fail owing to non-acceptance of the inheritance. But since in the modern law it is not necessary to institute an heir, it is obvious that failure to accept on the part of an instituted heir leaves the other provisions of the will unaffected.⁷ The same consequence follows if a testator has erased the names of the heirs without intending thereby to revoke the whole will.⁸ (7) Legacies in particular are

¹ *Ex parte Slade* [1922] T.P.D. 220.

² Voet, 28. 4. 3; *Gow v. The Master* [1936] C.P.D. 296.

³ V.d.L. *ubi sup.*

⁴ *Shearer v. Shearer's Exors.* [1911] C.P.D. at p. 821.

⁵ Natal Law 2 of 1868, sec. 8; *Lorenzo v. Rakagiatis* [1938] N.P.D. 68. In Southern Rhodesia a will executed before marriage is usually avoided by marriage unless endorsed after marriage with the formalities required for the execution of a will. Deceased Estates Succession Act, 1929 (*R.S.* cap. 51). In Ceylon (Ord. No. 7 of 1840, sec. 5) a will is revoked by marriage. For English Law see Wills Act, 1837, sec. 18; Law of Property Act, 1925, sec. 177 (1); *Sallis v. Jones* [1936] P. 43.

⁶ Gr. 2. 24. 14; Cod. 6. 23. 27.

⁷ Voet (28. 3. 14) and Schorer (*ad* Gr. 2. 24. 19) attribute this consequence to the codicillary clause, but this is certainly not necessary to-day.

⁸ Voet, 28. 4. 3.

extinguished: (a) by express revocation by will or codicil;¹ (b) by implied revocation, which takes place if the subject-matter of the legacy is given away or except under stress of necessity sold;² (c) if the legatee dies before the testator, or before the condition (if any) of the legacy has been implemented;³ (d) by erasure, &c. in the will *animo revocandi*.⁴

Revival of
revoked
will.

A will which has been revoked by a later will may be revived by another will showing a clear intention to revive it.⁵ If the revoking will is destroyed *animo revocandi* or otherwise revoked, the earlier will is revived if this is clearly shown to have been the testator's intention.⁶

Fideicom-
missa:
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 citizens⁷ 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

¹ Gr. 2. 24. 27; Voet, 34. 4. 3.

² 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.* v. 45.

³ Gr. 2. 24. 29; and Schorer, *ad loc.*; Voet, 34. 4. 9.

⁴ Gr. 2. 24. 27.

⁵ *Re Est. Marks* [1921] T.P.D. 180; *Wood v. Est. Fawcus* [1935] C.P.D. 350; *Ex parte Gillespie* [1943] C.P.D. 58.

⁶ *Nelson v. Currey* (1886) 4 S.C. 355; *Wynne v. Wynne's Est.* (1908) 25 S.C. 951.

⁷ And Latins. Girard, p. 121. *Peregrini poterant fideicommissa capere: et fere haec fuit origo fideicommissorum*, Gaius, ii. 285.

testament; and when, as a rule, the classes disqualified from taking by will were equally disqualified from taking by fideicommissum.¹ 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.² When, therefore, we read the well-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.

employed
to settle
property.

It is not unusual to describe fideicommissa as testamentary trusts.³ 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

Fidei-
commissa
and
trusts.

¹ Girard, p. 977.

² See examples in Hunter, *Roman Law*, p. 823.

³ e.g. Hunter, p. 809.

In the Roman Law fideicommissa usually created by will or codicil; but in the Dutch Law also by act *inter vivos*.

in re neque ad rem',¹ against the *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.² (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,³ 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.⁴ In the law of Holland it was otherwise. Though the books have little to say on the subject, it is clear that fideicommissa were often created by antenuptial settlement or other act *inter vivos*.⁵ As to the modern law there can be no question. The doubt

¹ *Chudleigh's case* (1589) 1 Co. Rep. at 121 b.

² Cod. 6. 43. 3. 3; Voet, 6. 1. 6; 18. 1. 15; 36. 1. 64; V.d.L. 1. 9. 8.; *infra*, p. 383. See *Lange v. Liesching* (1880) Foord at p. 59.

³ Voet, 36. 1. 9; Vinnius, *Tract. de pact.*, cap. xv, nos. 11 and 12.

⁴ Dig. 16. 3. 26 pr.; Dig. lib. xxxii, lex 37. 3; Cod. 8. 54 (55). 3; Dig. lib. xxx, lex 77. 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.

⁵ 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. 319. For an early case, in the modern law, of fideicommissum created by antenuptial 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 *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.* iii. 111. They are irrevocable after acceptance by the fideicommissary without his consent. *Ex parte Orlandini* [1931] O.P.D. 141.

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. We return to this subject later.

Fideicommissa and trusts in the modern law.

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. The student will find no difficulty in applying the rules which we shall proceed to state to dispositions *inter vivos* as well.

Method of treatment.

No particular form of words is needed for the creation of a fideicommissum. All that is required is that the 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 alienation⁴ general or to specified persons,⁵ provided that there is some clear indication of a person or class of persons for whose advantage the prohibition is imposed.⁶ Where there is such an indication, the prohibi-

No form of words required 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. v. Olivier* [1916] A.D. at p. 81; *Moolman v. Est. Moolman* [1927] A.D. at p. 140.

³ Huber, 2. 19. 37.

⁴ Van Leeuwen, 3. 8. 6; Huber, 2. 19. 53.

⁵ Sande, *de prohib. rer. alienat.* 3. 1. 7; Bijnk. *O.T.* i. 50.

⁶ 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.

tion takes effect as a fideicommissum in favour of the person or class of persons indicated.¹ Where there is no such indication, the prohibition is 'nude' and wholly inoperative.² 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,³ so that the heir is not free to dispose of the property out of the family either by act *inter vivos* or by will.⁴ Such was the effect in Holland generally; 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.⁵

Fideicom-
missum
residui.

Nearly, but not quite, the same freedom of alienation is enjoyed by the heir who is given power to diminish or

¹ *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.

² *Ex parte Fulton* [1912] C.P.D. 868; *Ex parte Laas* [1923] N.P.D. 104; *Nelson v. Nelson's Est.* [1932] C.P.D. 395; *Ex parte Badenhorst* [1937] T.P.D. 174; (Ceylon) *Kithirathe v. Salgado* (1932) 34 N.L.R. at p. 77; *Amarasekere v. Podi Menika* (1932) 34 N.L.R. 82.

³ i.e. of the last possessor (usually), not of the settlor. Huber, 2. 19. 68. This is called a *fideicommissum familiae*.

⁴ 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 seq.). (As regards the effect of a judicial sale see below, p. 434.) 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 anyone of the family near or remote. *Secus*, if the property is left to the family (gemaekt aen het geslachte). *Ex parte Est. Odendaal* [1933] O.P.D. 122. For the distinction between a f.c. familiae 'verbis in rem conceptis' and 'verbis in personam conceptis', see Voet, 36. 1. 28; *Union Govt. 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. ⁵ Gr. *ubi sup.*; Voet, 36. 1. 5. See V.d.K. 318.

waste the property, with a direction to make over the residue to some person named by the testator (*fideicommissum residui*).¹ In this case the heir may freely dispose of three quarters² of the estate otherwise than by fraudulent donation or last will,³ leaving one quarter only to the fideicommissary, for which the fiduciary unless absolved by the testator must give security;⁴ if he has alienated more than three quarters, the goods last alienated may be followed in the hands of the alienee.⁵

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.⁶ But the commonest condition is that which provides that the goods are to go over if the first taker dies without children. The formula

Condi-
tional
fideicom-
missa.

¹ Nov. 108, cap. 1; Gr. 2. 20. 13; Van Leeuwen, 3. 8. 9; Huber, 2. 19. 103; V.d.K. 320. *McCarthy v. Newton* (1861) 4 Searle 64; *Est. Moorrees v. Board of Exors., Cape Town* [1939] A.D. 410; *Est. Smith v. Est. Follett* [1942] A.D. 364; (Ceylon) *Veerapillai v. Kantar* (1928) 30 N.L.R. 121; *Fernando v. Alwis* (1935) 37 N.L.R. 201. 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. 372.

² 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.

³ Voet, 36. 1. 54; Van Leeuwen, 3. 8. 9; V.d.K. *Dictat. ad Gr.* 2. 20. 13 and *Th.* 320; Lee, *Commentary*, *ad loc.*

⁴ *Ex parte Berrange* [1938] W.L.D. 39.

⁵ Distinguish the case of a mutual will by which the spouses 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 by donation if not made in fraud of the heirs. Voet, 36. 1. 56; Coren, *Obs.* xi, p. 43; *Holl. Cons.*, 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; *Botha v. Van der Vyver* (1908), 25 S.C. 760. *Ex parte Venter* [1920] O.P.D. 153; *Kemsley v. Kemsley* [1936] C.P.D. 518.

⁶ Huber, 2. 19. 44.

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.¹

The
clause
'si sine
liberis de-
cesserit'.

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.²

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.³ 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

¹ Voet, 36. 1. 13 ff.; Huber, 2. 19. 45-6.

² 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; 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; *Reese v. Registrar of Deeds* [1938] C.P.D. 459.

³ 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.*

the express fideicommissum contained in the testator's will.¹

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 to vest the property in the fideicommissary.² 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.³ 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 old grant to

The effect of fideicommissum as regards the ownership of property subject to it.

Parallel in English Law.

¹ 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.* But see *Est. Welsford v. Est. Welsford* [1930] O.P.D. 162.

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.

² 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.

³ Inst. 2. 20. 2; Cod. 6. 43. 1. 1.

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.¹

Fidei-
commissum
taking
effect:
(a) on
death;

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,² he must give security for the restoration of the property, undiminished in amount and value, to the person entitled to succeed him.³ In the interval he is dominus, and may exercise all rights of dominion not inconsistent with the rights of his successor.⁴ 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 life-
time of
the fidu-
ciary.

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

¹ 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 (2 Maasdoorp, p. 39). But by the law of South Africa his title will be incomplete (and perhaps insecure) until he has obtained transfer. 'It is the transfer which gives the dominium.' Op. cit. p. 82; *supra*, p. 146.

² Huber, 2. 19. 134; V.d.K. 511 (mistranslated by Lorenz), *non obstante* Voet, 36. 3. 6. (*ad fin.*). See also Van Leeuwen, 3. 8. 18.

³ 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.

⁴ *Van der Walt v. Registrar of Deeds* [1935] C.P.D. 463.

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.’¹

That the principles set forth in this law were accepted as part of the law of Holland admits of no doubt. It will be observed that here there is no tender regard for the *bona fide* purchaser, though at an earlier period in the history of Roman Law he was preferred to the fideicommissarius.² The modern law seems to have reached the same result in favour of a purchaser without notice who has obtained registered transfer.³

in Roman-Dutch Law.

Next, let us consider the position if: (a) the fiduciary dies before the testator; (b) the fideicommissary dies before the fiduciary, or before any other event upon which the vesting of the fideicommissum depends. In principle the result in each case is the same; the fideicommissum fails. In the first case there is no one burdened;⁴ in the second

When fideicommissum fails to take effect.

¹ *De Jager v. Scheepers* (1880) Foord at p. 123 per De Villiers C.J. where this passage is cited.

² Paul, *Sent.* 4. 1. 15.

³ *Lange v. Liesching* (1880) Foord at p. 59; *infra*, p. 435; (Ceylon) *De Silva v. Wagapadigedera* (1929) 30 N.L.R. 317; *Kusmawathi v. Weerasinghe* (1932) 33 N.L.R. 265.

⁴ Voet, 36. 1. 69; Huber, 2. 19. 112–21.

case there is no one entitled.¹ But in case (a), since to-day the heir has been replaced by the testamentary executor, the death of the fiduciary before the testator no longer prevents the fideicommissary from claiming under the will;² nor, again, is he excluded from the succession, if the fiduciary repudiates the inheritance.³ In case (b) it is always possible for a testator to make a direct substitution in favour of the children of the fideicommissary, so that they will take his place, and, where the testator has not done so in express terms, an intention to do so will sometimes be inferred *ex conjectura pietatis*.⁴ There are other cases too in which a fideicommissum is not held to fail if the fideicommissary does not survive the fiduciary: 'If, for instance, the fiduciary is a mere trustee to administer a trust for a certain period without any beneficial interest, or according to Voet (36. 1. 67), if the fideicommissum were created by contract, the implication would not ordinarily arise.'⁵ But on this last point opinions varied.⁶ If the fideicommissary disclaims his right, the fiduciary in the absence of a contrary intention has the absolute dominium.⁷

Distinction
between
life
interest
created:

From what has been said it will be seen that 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.⁸ From the point of view of the tenant for life

¹ Voet, 36. 1. 67; Huber, 2. 19. 31 and 50; *Van Dyk v. Van Dyk's Exors.* (1890) 7 S.C. at p. 196.

² *White v. Landsberg's Exors.* [1918] C.P.D. 211; (Ceylon) *Sheriff v. Yoosub* (1944) 46 N.L.R. 1.

³ *Ex parte De Jager* [1907] T.S. 283; *Van der Merwe v. Van der Merwe's Exrix.* [1921] T.P.D. 9.

⁴ Voet, *ubi sup.*; Huber, 2. 19. 38; *Est. Kemp v. McDonald's Trustee* [1915] A.D. at p. 501.

⁵ *Jewish Colonial Trust v. Est. Nathan* [1940] A.D. at p. 177.

⁶ 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.

⁷ Voet, 36. 1. 65.

⁸ *Strydom v. Strydom's Trustee* (1894) 11 S.C. 425; *Commrs. of Inland Rev. v. Est. Hollard* [1925] T.P.D. 154; *Ex parte Cilliers*

the result is, perhaps, much the same in either case.¹ 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,² 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.³ 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 difficulty. A clause forbidding alienation by the life-tenant points to a fideicommissum, but affords merely a presumption, not a positive rule of law.⁴ 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. 'The well-established rule in the Roman-Dutch Law is

(a) by fideicommissum;
(b) by usufruct.

[1927] O.P.D. 65; *De Villiers v. Est. De Villiers* [1929] C.P.D. 106. See Van Winsen, *Usufruct or Fideicommissum* 50 *S.A.L.J.* 147 and Murray J.'s remarks in *Wynn N.O. v. Oppenheimer* [1938] T.P.D. at p. 365.

¹ *Union Govt. v. De Kock N.O.* [1918] A.D. at pp. 32 and 40.

² 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'. *Samaradivakara v. De Saram* [1911] A.C. at p. 765, *per* Lord de Villiers. [This passage is imperfectly reproduced in [1911] A.D. at p. 471.]

³ Bijnk. *O.T.* i. 197.

⁴ Voet, 7. 1. 10; *Samaradivakara 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. 374-5.

that, in case of doubt, the construction should be against a *fideicommissum*.¹

The rule
against
perpetui-
ties in
Roman
and
Dutch
Law.

It has been observed above 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, as interpreted in a later age, 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:²

'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.³

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

¹ *Gordon's Bay Estates v. Smuts* [1923] A.D. at p. 166; *Ex parte Sadie* [1940] A.D. at p. 30. But it has been said that there is no presumption 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.

² Voet, 36. 1. 33.

³ *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 quantum gradum, nisi enixa Testatoris voluntas aliud suadeat.'

of my blood-relations and shall not at any time pass outside my family,¹ these words will not be sufficient to tie up the property beyond the fourth generation inclusive, unless, he goes on to add, 'the fideicommissum shall not at any time or in any event whatsoever come to an end', or other words of like import.² 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.'³

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

Relief from the burden of fideicommissum, when granted.

¹ Huber, 2. 19. 63. Cf. *Ex parte Steenkamp* [1919] C.P.D. 112. In *In re Est. Von Ludwig* [1931] C.P.D. 488 a testator made an unsuccessful attempt to keep a gold snuff-box in the family as a perpetual heirloom.

² 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.

³ 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, and *Union Govt. v. Olivier* [1916] A.D. 74. 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 mère* 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) *Carolus v. Simon* (1929), 30 N.L.R. 266; *Ismail v. Marikar* (1932) 34 N.L.R. 198.

burden which attaches to it, or to authorize exchange or sale or mortgage. But the Court has no general discretionary power to modify the terms of a will,¹ and 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;² and it is only under special circumstances that the Court will grant leave to the fiduciary to raise money on the security of the fideicommissary property.³ 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 or the Court.⁴

Trusts.

12. Trusts. In directing attention above to the fundamental distinctions between fideicommissa and trusts we reserved the question of the place of trusts in the modern law. This must now be considered.

In *Estate Kemp v. McDonald's Trustee* [1915] A.D. 491 the Court had to construe a testamentary trust.

*Estate
Kemp v.
McDonald's
Trustee.*

¹ *Jewish Colonial Trust v. Est. Nathan* [1940] A.D. 163; *Ex parte Burstein* [1941] C.P.D. 87.

² Voet, 36. l. 63 and 70; V.d.K. 317, *Dictat. ad Gr.* 2. 20. 11; V.d.L. 1. 9. 8; *Goldman N.O. v. Exor. Est. Goldman* [1937] W.L.D. 64; *Ex parte Boyd* [1938] C.P.D. 197, 510. The power to relieve property of the burden of f.c. 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 Marks* [1926] T.P.D. 1; *Ex parte Est. Marks* [1927] T.P.D. 316; *Ex parte Senekal* [1934] T.P.D. 131; *Ex parte Blomerus* [1936] C.P.D. 368; *Ex parte Cohen* [1937] T.P.D. 155; *Ex parte Van Vuuren* [1937] T.P.D. 144.

³ *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 granted to mortgage in order to raise money for necessary expenses); *Ex parte Koen* [1930] O.P.D. 154 (leave refused); *Ex parte Visagie* [1940] C.P.D. 42 (leave granted); *Ex parte Hopley's Est.* [1940] C.P.D. 60 (leave granted); *Ex parte Nell* [1941] C.P.D. 314 (leave granted).

⁴ *Ex parte Odendaal, ubi sup.*

Sir James Rose Innes C.J. said (p. 498):—

‘This is a will drawn by an English lawyer and expressed in English legal phraseology: but the testator, both at the date of execution and at the date of his death was domiciled in the Cape Colony; and his dispositions must be interpreted in the light of our own law. . . . 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 law.’

Judgment
of Innes
C.J.

The word [trustee] is familiar in our own practice; trustees under antenuptial contract, for debenture holders, and for public purposes are well known, and the term is also used in connection with testamentary dispositions. The duties of such a trustee are administrative, and he corresponds no doubt in many respects to our administrator; but a testamentary trust is in the phraseology of our law a *fideicommissum* and a testamentary trustee may be regarded as covered by the term fiduciary. In modern practice “fiduciary” is most frequently used to denote an heir or legatee who holds the bequeathed property as owner and for his own benefit subject to its passing to fideicommissaries upon the happening of a certain condition. But it does not follow that the element of personal benefit on the part of the first holder is essential to the constitution of a *fideicommissum*, or to the character of a fiduciary.’

The learned Chief Justice went on to say (p. 502) that ‘it was quite possible, under the Roman-Dutch Law, to separate the legal ownership of property from the right to its beneficial enjoyment’, and (p. 503):—

Separation
of legal
ownership
and benefi-
cial en-
joyment.

‘When a fiduciary is deprived of all beneficial interest in the bequeathed property and is left with the bare *dominium* to be held in trust for others, he becomes a mere administrative peg, from which depend the substantial provisions of the bequest. And in regard to these provisions a testator has a latitude as great as he would possess in making a direct disposition of his estate. Successive beneficiaries or classes of beneficiaries may be nominated as the objects of his bounty; he may substitute some for others; and he may confer upon one benefits which can under no possibility extend beyond a life enjoyment; while to another may be given rights which under certain

eventualities embrace a claim to the *corpus* of the bequest. While the trust continued the *dominium* would remain in the trustee; the beneficiaries would be entitled to call upon him to carry out in their favour the provisions of the trust as and when their rights accrued; but the question of the nature of any right, its vesting and its transmissibility to the heirs of the beneficiary would depend in every instance upon the intention of the testator as expressed in the will.¹

Identifica-
tion of
trust and
fideicom-
missum.

In this account of the matter a trust is a *fideicommissum*, the trustee figures as a fiduciary, and the beneficiaries of the trust as fideicommissaries. But when the trust is in the nature of a settlement, i.e. a disposition by which persons are successively entitled, a question may arise as to the character of the first beneficiary's interest. In Roman-Dutch Law, as explained above (*supra*, p. 384), a life interest may assume the form either of a usufruct or of a fideicommissum, and in the case under consideration the Court had to decide to which of these the life interest given by the will to testator's daughter was to be referred. Strictly speaking, it could not be to either, for the *dominium* was outstanding in the trustee, but it was assumed that interests could be created in the enjoyment of the trust fund (one is tempted to say equitable interests) similar to those which might be created in the property itself so that the question resolved itself into this: 'Was she *vis-à-vis* her descendants in a position analogous to that of a fiduciary or analogous to that of a usufructuary?'¹

Resulting
ambi-
guity.

It must be admitted that there is something unsatisfactory in a terminology which employs the words 'fideicommissary', 'fiduciary' to serve a double purpose, so that the beneficiary under a trust is described as a fideicommissary in relation both to the trustee and to a person entitled previously to him under the trust, while the description 'fiduciary' is applied both to the trustee and to a beneficiary in relation to a person subsequently entitled under the trust.

Judgment
of
Solomon
J.A.

Solomon J.A. in his judgment avoids this difficulty. He says (p. 512):—

¹ *Per Innes, C.J.*

'In considering the legal rights of the beneficiaries under the will, I have studiously avoided the use of any of the technical terms peculiar to our law. For the will itself employs the phraseology of English law, and the cardinal rule in the construction of testamentary documents being to endeavour to discover the intention of the testator, it is, in my opinion, quite possible to do so in the present case without translating English legal terms into the corresponding expressions of our own law. Were it necessary to do this I think that we should have to speak of the trustees as fiduciary heirs or legatees and of [the daughter] as a fideicommissary legatee. In doing so, however, we should be using the terms fiduciary and fideicommissary in a wider sense than they have hitherto been employed [in] in any of our reported cases. For in these cases a fiduciary heir or legatee has invariably meant a person who himself had a beneficial interest, usually a life interest, in the property bequeathed to him, while the fideicommissary has been one in whom the *dominium* of the property has *ipso facto* vested on the death of the fiduciary, or on the happening of any other event which terminates the rights of the fiduciary. In the present case, however, the trustees have no beneficial interest [in the trust property], nor could the *dominium* ever have passed to [the daughter]. . . . It appears to me, however, to be unnecessary for the decision of this case to translate into the language of the Roman-Dutch law the English terms which are used in this will. Nor am I sure that it is desirable to do so, inasmuch as it involves employing the expressions fiduciary and fideicommissary in a much wider sense than they are commonly used [in] in our Courts, while the terms, trusts and trustees are now in general use in South Africa.'

In view of this expression of opinion by so eminent a Judge, afterwards a Chief Justice of the Union, a regret may be permitted that the law of South Africa has not frankly accepted the trust conception, or at least its terminology, as a useful importation from a foreign system.

Fideicom-
missum
and trust.

In an earlier case Innes C.J. said:—

'If by trustee is meant a man occupying some capacity recognized by our law, and undertaking some obligation known to our law, to hold property for another, and not for himself, then the expression is a convenient one and may be safely applied.'¹

¹ *Lucas' Trustee v. Ismail & Amod* [1905] T.S. at p. 244.

To regard the South African trust as a development of the Dutch fideicommissum is historically inexact. In Ceylon the two institutions—fideicommissum and trust—exist side by side.¹

To speak of a trust does not necessarily imply the admission of equitable ownership. This is unknown to the law of South Africa.²

Mutual
wills.

13. 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 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.’

¹ *Sabapathy v. Mohamed Yoosuf* (1935) 37 N.L.R. 70; *Sinnan Chetliar v. Mohideen* (1939) 41 N.L.R. 225; *Ramanathan v. Saleem* (1940) 42 N.L.R. 80. 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*’. It seems that in South Africa a trust is interpreted (or disguised) as a fideicommissum or stipulatio alteri.

² *Lucas’ Trustee v. Ismail & Amod, ubi sup.*, at p. 247; *Princess Est. v. Registrar of Mining Titles* [1911] T.P.D. at p. 1078.

³ *Est. Koopmans v. Est. De Wet* [1912] C.P.D. 1061 (sisters); *Villet’s Est. v. Villet’s Est.* [1939] C.P.D. 152 (sisters); *Bijnk. O.T.* i. 496 (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. 283, 298.

⁵ Van Leeuwen, 3. 2. 4. (Kotzé’s translation).

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.’

The rules 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 has always ^{Massing.} been accepted in South African Courts as an authoritative exposition, so far as it goes, of the law on the subject.’⁴

‘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.’⁵

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

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. Cas. 123 (Ceylon); *Abeysekera v. Tillekeratne* [1897] A.C. 277 (Ceylon); *Natal Bank, Ltd. v. Rood* [1910] A.C. 570 (Transvaal).

⁴ *Receiver of Revenue, Pretoria v. Hancke* [1915] A.D. at p. 78 *per* Solomon J.A.

⁵ *Ibid.* at pp. 71–2 *per* Innes C.J.

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.¹

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 part² of the survivor's share, as well as of 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 spouse.³ 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;⁴ or it may be construed as 'two dispositions of two equal portions of the

¹ *Receiver of Revenue, Pretoria v. Hancke* [1915] A.D. at pp. 71-2 per Innes C.J.

² In Mostert's case itself the massing of the joint estate was only 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.

³ 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.

⁴ *Est. Coaton v. The Master, ubi sup.*

joint patrimony',¹ or (to vary the phrase) as 'two separate wills embodied for convenience in one document'.² Finally, it must be remembered that for the rule to apply actual acceptance or, as it is called, 'adiation' by the survivor is essential. The opinion expressed by Fitzpatrick J. in *S. A. Association v. Mostert*,³ 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.

It remains to consider the effect of a mutual will and acceptance of benefits upon the property of the survivor. In *Rosenberg v. Dry's Exors.*⁴ and *Receiver of Revenue, Pretoria v. Hancke*⁵ the Appellate Division held that the heirs 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.⁶ There was, however, much authority for the proposition that the *dominium* in the survivor's share, as well as in the share of the first dying, passed under the will. In South Africa this second alternative received statutory authority from the Administration of Estates Act, 1913, sec. 115, which provided that:—

Effect of mutual will on property of survivor.

'Where two spouses, married in community of property, have by their mutual will massed the whole or any specific portion of their joint estate, and disposed of it after the death of the survivor, conferring upon the latter a fiduciary, usufructuary or other limited interest therein, then upon the death of either of such spouses after the commencement of this Act,

¹ *Receiver of Revenue, Pretoria v. Hancke, ubi sup.*, at p. 72 per Innes C.J.

² *Warren and Turpin v. The Master and Silberbauer* [1913] C.P.D. at p. 791; *Scheidel v. The Master* [1936] C.P.D. 287; *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).

⁴ [1911] A.D. 679.

⁵ [1915] A.D. 64.

⁶ The Ceylon Court in construing an old will came to the same conclusion. *Sangaramorthy v. Candappa* (1932) 33 N.L.R., p. 361.

adiation¹ and the acceptance by the survivor of benefits under the will shall have the effect of conferring upon the heirs entitled to the said property after the expiry of the said limited interest the same rights in respect of the survivor's half share of such property as they may by law possess in respect of the half share which belonged to the spouse who has died first.'

It will be remarked that this enactment applies only to the case of the mutual will of spouses married in community.

The result is that:—

'When there is a mutual will [of such spouses] made irrevocable by massing and acceptance of benefits . . . this will operates as *one* will and as that of the first dying. . . . The estate is consolidated into one mass and is in every real sense one estate falling under the dispositions of the one will, namely that of the first dying.'²

¹ Adiation means acceptance of an inheritance. The word is a strange perversion of the Latin *aditio hereditatis*.

² *Meyer's Exors. v. Meyer's Exors.* [1927] T.P.D. at pp. 339–40 *per* Stratford J.

III

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.

The law of intestate succession.

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 Schependomsrecht, so called because it was laid down in the dooms or judgments of the local magistrates called Schepenen.³ North of it prevailed a system known as Azingdomsrecht or Aasdomsrecht, because the law was anciently found in the dooms of neighbours presided over by an officer called the *asega* or *azing*⁴ in Friesland and the adjoining districts of Holland. These two systems differed *toto caelo*.⁵ The principal characteristic of each is

Bewildering variety in the Netherlands.

Schependomsrecht.

Aasdomsrecht.

Different theories of these two systems.

¹ Inst. 3. 1. 1 pr. 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; Wessels, *History of the Roman-Dutch Law*, p. 544; de Blécourt, sec. 17.

⁵ Vinnius *ad* Inst. lib. iii, tit. 5, *in appendice* 'forma succedendi ab intestato apud Hollandos et Westfrisios', sec. 1.

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',¹ 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, 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 (*paterna paternis—materna maternis*), 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 representation² in the descending and collateral lines, was the key-note of the old Schependoms Law, which accordingly determined the succession as follows:³

Canons of
succession
under
the Old
Schepen-
doms Law.

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.

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 of the half-blood, with representation as before stated. From this it will be seen that whole brothers and sisters take

¹ Gr. 2. 28. 6; Vinnius, *ubi sup.*, sec. 2; V.d.K. 347.

² Van der Vorm, *Versterfrecht*, ed. Blondeel, p. 34.

³ Van der Vorm, pp. 35-6.

‘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 vieren-deelen*), 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*.

By the Aasdoms Law ‘the nearest blood inherits the goods’.² This rule, together with the preference of descen-

Canons of
succes-
sion under

¹ 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. This conclusion rests upon a misapprehension of the effect of the *Interpretatie* (of the Political Ordinance) of 1594 (*infra*, p. 402). The *Interpretatie* 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. It would make the situation plainer if we might say that the whole blood takes with both hands, the half blood with one hand, right or left, as the case may be.

² Gr. 2. 28. 3; Vinnius, *ubi sup.*, sec. 3; V.d.K. 346.

the Old
Aasdoms
Law.

dants 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.

Accordingly the order of succession is:¹—

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 or remoter degrees equally without representation.

Succession
under the
Political
Ordinance
of April 1,
1580.

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.² The system therein laid down, which came to be known as the New Schependoms Law, departs from the Old Schependoms Law in one particular only, viz. in restricting representation in the collateral line to the fourth degree,³ i.e. it does not go beyond the grandchildren of brothers (sisters), and the children of uncles (aunts).

Succession under the Political Ordinance therefore is as follows:

1. Children⁴ (*ut supra*);
2. Parents⁵ (*ut supra*);

¹ Van der Vorm, pp. 79–80.

² *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.

³ Van der Vorm, p. 37.

⁴ *P.O.* Art. 20.

⁵ *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 degrees⁵ 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. 364.

⁷ V.d.K. 366. 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. 368.

⁸ V.d.K. 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 Schependomsrecht; and is expressed in the maxim 'Het goed klimt niet geern' (the property does not like climbing); 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 Interpretation² 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 intestate (being children of the deceased parent) and to their children and grandchildren 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*, pp. 404, 408.

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.

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 domicile.²

1632-4. The case of Gregorius Cornely.

In 1642 Governor-General 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 particular it provided 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.

1642. The Old Statutes of Batavia.

¹ 2 *G.P.B.* 1322; J. A. Van der Chijs, *Nederlandsch-Indisch Plakaat Boek*, vol. i, p. 365.

² *Supra*, p. 133.

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 of
the East
India
Company;

in what
respect it
differs
from the
Political
Ordin-
ance.

In 1661 the States-General, moved thereto by representations from the Company's officials, issued the 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 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.

1766.
The New
Statutes of
Batavia.

In 1766 Governor-General 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 Van der Chijs informs us—for nearly a century, never received recognition from the highest authority. It had not, therefore, strictly, the force of a statute.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. But it is plain that the Old Statutes of Batavia as regards succession cannot have

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.

continued to remain in force side by side with the Octrooi, which is inconsistent with them. That the Octrooi, and therefore the Schependomsrecht, 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

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.

Intestate succession in Ceylon: conflicting opinions,

For Ceylon we have 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

Today the question is of merely historical interest. The law of intestate 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

now settled by statute.

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.

⁴ The Ordinance itself in its detailed provisions is to a great extent, but with considerable variations, based upon the Placaat of 1599 (for particulars see Appendix K). In particular (community of goods being at the same time abolished as regards marriages contracted after the promulgation of the Ordinance) a surviving spouse in any event inherits one half of the property

Intestate
succe-
sion in
South
Africa:
at the
Cape;

The law of South Africa, like the law of Ceylon, exhibits 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 in the same case, that 'the South Holland law, as included in the *Political Ordinance* of 1580, is the law of inheritance *ab intestato* in this Colony'.

Upon a total failure of blood relations the Crown is entitled to a vacant inheritance,³ but only after a lapse of fifty years.⁴

in Natal;

For Natal the case of *In re the intestate estate of P. K. Gledhill*⁵ decides in favour of the Schependoms Law. *Raubenheimer v. Exors. of Van Breda* was cited and followed. 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 Administration of Estates Act, 1913, sec. 98.

⁵ (1891) 12 N.L.R. 43. See also *In re Gordon's Intestate Estate* (1909) 30 N.L.R. 325.

In the Transvaal and Orange Free State Provinces, in the Transvaal and Free State. intestate succession does not seem to have been the subject of legislation or of judicial decision. The common law on this subject may be assumed to be the same in all four provinces.¹

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.² 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 the least obscurity and alteration'. Thus the settlements in the West Indies were to be governed by the Schependomsrecht, the law of succession of South Holland. Intestate succession in the West Indies.

In the year 1732 a new rule was enacted for the colony of Berbice. The charter of December 6 of that year,³ 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,⁴ 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, 1774,⁵ the States-General enjoined the observance of the Aasdoms Law of North Holland as contained in the Placaat of 1599.

For Southern Rhodesia see The Deceased Estates Succession Act, 1929; 47 *S.A.L.J.* (1930), p. 171.

² *Ordre van Regieringe*, October 13, 1629, Art. 59 (2 *G.P.B.* 1235); Van der Vorm, p. 634.

³ Van der Vorm, p. 637; V.d.K. 352.

⁴ Verkiezing van landrecht. Gr. lib. ii, cap. xxix.

⁵ *The Laws of British Guiana* (ed. 1905), vol. i, p. 1.

Intestate
succe-
sion 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.

The result of our inquiry is that in Ceylon¹ 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 (subject to statutory alterations to be presently mentioned) those of the New Schependoms Law as modified by the Octrooi of 1661, and this was also law for Berbice.

Octrooi of
January
10, 1661.

We conclude this chapter with a translation of the Octrooi¹ 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. Huygens 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 con-

¹ 2 *G.P.B.* 2634; Van der Vorm, p. 631.

sent, 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, whether of the whole or of the half blood, 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 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 Custom of the Provinces, Quarters, or Places, under which the same fixed and immovable goods are situated.²

The combined effect of the Political Ordinance of 1580,

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.

Canons of
succession
in South
Africa.

the Interpretation of 1594, and the Octrooi of 1661 is to establish (subject to legislation in favour of a surviving spouse) the following order of succession as a general law for the Union of South Africa:¹—

1. Children succeed equally, males and females alike, with representation *per stirpes in infinitum*.

2. Failing descendants, 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, or children or grandchildren of deceased brothers or sisters surviving, the whole estate goes to the surviving parent.

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.

5. Failing brothers and sisters, their children and grandchildren on either side the related moiety goes to remoter descendants of such brothers and sisters *per capita* accord-

¹ The late Mr. Justice Scheepers in an unpublished thesis, submitted for the degree of LL.D. at the Cape University, now in the Library of the Appellate Division, maintained that the law of North Holland, not of South Holland, is the law of South Africa. I leave the law as I find it.

ing to proximity of degree without representation; whom failing, to grandparents and so forth, as described below.

6. Failing all descendants of all brothers and sisters, the estate goes 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) 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) goes to the uncles and aunts of the intestate, being the children of the deceased grandmother and to their children (but not grandchildren) by representation; whom failing (in either case), the related portion goes to the remoter descendants of such uncles and aunts *per capita* according to proximity of degree without representation; whom failing, to great-grandparents and their issue.

7. Failing all descendants of all uncles and aunts 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.

9. In default of all² blood relations of the deceased, the estate goes to the fisc as *bona vacantia*.³

¹ In other words, a grandparent never takes any share of the inheritance unless his or her wife or husband is alive. *Caney v. Est. Johnsson* [1928] N.P.D. 13; and see *Bijnk, O.T.* ii. 1379.

² V.d.K. 364, *non obstante* Gr. 2. 30. 1 (*in fine*).

³ *Supra*, p. 401.

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,¹ 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*.²

Statutory
changes.

It remains to notice the changes introduced by statute in the rules of intestate succession in the law of South Africa.

The law of South Holland did not admit the canon of succession *unde vir et uxor*, and by consequence a surviving spouse had no right of succeeding *ab intestato* to a deceased spouse's estate.³ A Natal Law (22 of 1863, sec. 5) gave a surviving wife married out of community the right to succeed to one third of her deceased husband's estate in case there was lawful issue of the marriage, otherwise to one half. This followed the English Statute of Distributions of 1670, now replaced by the Administration of Estates Act, 1925, sec. 46.

The
Succession
Act, 1934.

The Natal Law has been repealed by the Succession Act, No. 13 of 1934, which for the first time introduced throughout the Union a succession *ab intestato* of a surviving spouse. It enacts that a surviving spouse shall be entitled as intestate heir of the deceased spouse to receive: (a) in competition with descendants of the deceased en-

¹ 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).

² V.d.K. 366; *Ex parte Spangenberg* (1907) 24 S.C. 288; *Est. Baker v. Est. Baker* (1908) 25 S.C. 234.

³ *Ex parte Leeuw, ubi sup.*; R. W. Lee, *The Intestate Succession of Husband and Wife in Roman-Dutch Law*, Journ. of Comp. Leg. (N.S.) xii (1911), p. 310.

titled to succeed *ab intestato* a child's share; (b) in competition with a parent, brother or sister of the deceased (whether of the whole or of the half blood) entitled to succeed *ab intestato* a half share; and (c) failing any of the above, the whole of the deceased spouse's estate.

In the alternative the surviving spouse in cases (a) and (b) may claim from the estate so much as does not exceed six hundred pounds in value. In case (a) in computing this amount the survivor's share in the community (where there is community) is taken into account.

For the purposes of the Act any relationship by adoption under the provisions of the Adoption of Children Act, 1923, is declared to be equivalent to blood relationship.¹

By the Children's Act No. 31 of 1937, which takes the place of the above-mentioned Act, an adopted child is for all purposes (with qualifications which do not here concern us) deemed in law to be the legitimate child of the adoptive parent, but not so as to inherit *ab intestato* from any relative of the adoptive parent. On the other hand the adopted child retains the right to inherit *ab intestato* from his natural parents and their relatives.²

¹ Sec. 1 (2).

² Sec. 71, subsecs. 2 and 3.

[Some further observations on the Law of Intestate Succession in South Africa will be found in an article contributed by the author to the *South African Law Journal*, November, 1944, if he may be permitted to refer to it.]

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 ANTENUPTIAL 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 shall 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 . C . D .
 2. I . J . E . F .

Quod Attestor.

A . B .
 Notary Public.

IV

PRECEDENTS OF MUTUAL WILLS

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 where-soever 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 con-signatory witnesses.

As Witnesses

(Sgd.) C. E. J.

(Sgd.) G. P. H. [*Husband*]

(Sgd.) J. J. E.

(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

Pending decisions of the Appellate Division some questions perhaps remain open.

1. Can a minor ever bind himself *ex contractu* without consent of parent or guardian, e.g. by an advantageous contract of employment (apart from statute)? Apparently not. *Tanne v. Foggitt* [1938] T.P.D. 43.

2. A person is tacitly emancipated when he is allowed by

his guardian to carry on business on his own behalf. But he is only tacitly emancipated to the extent of contracts by or in connexion with that particular business. *Ochberg v. Ochberg's Est.* [1941] C.P.D. at pp. 36, 37 *per* Sutton J.

Can a minor who is not carrying on a business be tacitly emancipated? Apparently not.

3. Is a minor who falsely represents himself to be of full age bound by his contract to a party who believes him to be of full age?

The question is quite open. Wessels, i. 830 ff.; *Fouche v. Battenhausen & Co.* [1939] C.P.D. 228.

The books distinguish (a) contracts of minors unassisted by parents or guardians which are *ipso jure* void, in the sense that *restitutio in integrum* is not positively necessary to avoid them (*De Beer v. Est. De Beer* [1916] C.P.D. 125), though it may be matter of prudence to invoke its aid (Voet, 4. 1. 13; *Breytenbach v. Frankel* [1913] A.D. at p. 398 *per* Lord de Villiers C.J.); 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 majorenes.* (Voet, 4. 4. 43.) This distinction was perhaps somewhat overlooked in *Pleat v. Van Staden* [1921] O.P.D. 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.* (1890) 8 S.C. 16), or emancipation (*Venter v. De Burghersdorp Stores* [1915] C.P.D. at p. 255; *Ochberg v. Ochberg's Est., ubi sup.*), 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.

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’.¹

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.’² 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

¹ Nor with his divorced brother’s daughter. *Fuchs v. Whaley N.O.* [1934] C.P.D. 130.

² But persons so related who have sexual relations are not guilty of the common law crime of incest. So held in the case of a similar provision in S.W.A. (Procl. No. 31 of 1920). *Rex v. Blaauw* [1934] S.W.A. 3.

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.'

By the Children's Act No. 31 of 1937, sec. 79, 'the adoption of a person whether under this Act or under the Adoption of Children's Act, 1923, shall not prohibit or permit a marriage between that person and any other person which would not have been prohibited or permitted if the adoption had not taken place, provided that no marriage shall be contracted between an adopted person who is under the age of twenty-one years and his adoptive parent'.

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 LÉGAL CAPACITY OF MARRIED WOMEN

This note is designed to supplement the account of this matter given above, pp. 64 ff. 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 antenuptial 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 Practijcq*, 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': *McCullough 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; *Barnett v. Milnes* [1928] N.P.D. 1.

In South Africa (exceptions apart) when action is brought upon a contract concluded by a woman married in community the practice is for the husband to sue and be sued in his own

name. *Smith v. Bard* [1917] C.P.D. at p. 618; *Olufsen v. Fielder* [1930] N.P.D. 260. The reason is that (exceptions apart) 'a woman married in community cannot contract save as agent for her husband' (*Smith v. Bard*, loc. cit.). It is his contract, and he must sue or be sued upon it. But when action is brought upon a delict the wife may sue or be sued in her own name assisted by her husband. She is the person immediately concerned. *Harms v. Malherbe* [1935] C.P.D. 167 (dissenting from *Buck v. Green* [1932] N.P.D. 425, in which it was held that the wife could not sue in her own name). In the alternative the husband may sue or be sued in his capacity as husband and legal guardian of his wife. *Klette v. Pfitze* (1891) 6 E.D.C. 134; *Harms v. Malherbe*, *ubi sup.* If the husband's assistance is required and he cannot or will not give it, or if he is absent from the jurisdiction, the Court 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. *McCullough 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.

If the husband has deserted his wife and disappeared from the jurisdiction, it may be that she can sue and be sued in her own name without leave from the Court. *Kunne v. De Beer* [1916] C.P.D. 667; *McCullough v. Ross*, *ubi sup.* at p. 396.

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 subsequent ratification of her husband. But this rule is subject to exceptions and may be excluded by antenuptial contract. Further, like minors, a woman can confirm the contract when the disability ceases, i.e. 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 the husband' (1 Maasdorp, p. 48).

(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 individually, since he 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. 71, n. 6).

2. *If she contracts as her husband's agent.* In this case the contract is the husband's contract. It binds him. *Aird v. Hockley's Est.* [1937] E.D.L. at p. 42. 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. Christinaeus *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; *McIntyre v. Goodison* [1877] Buch. 83; *Hill & Co. v. McClure* [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) If the wife contracts as agent for her husband it is his contract, not hers. If the marriage is in community the usual results follow, viz. the community is liable *in solidum*; after the dissolution of the marriage, the wife is liable *pro semisse*. *Grassman v. Hoffman* (1885) 3 S.C. 282; *Copeland & Creed v. Ditton* (1895) 9 E.D.C. 123.

(b) If the wife contracts in her own name so that the other party looks to her credit it is *her contract*, not his. She binds herself and the community (where there is community) as in the case of the woman trader. 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.

(c) It has been said that 'the wife in ordering necessaries 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. This is reminiscent of English Law. In the Dutch Law the husband was liable *pro semisse* for goods supplied for the use of the joint household. This was a consequence of marriage. It had nothing to do with agency and applied indifferently to all marriages whether in or out of community. This proposition rests upon decisions of the Court of Holland cited in the notes to Neostadius, *Observationes de pactis antenuptialibus*, Obs. ix, and is accepted without question by Van Leeuwen (*R.H.R.* 1. 6. 8), Groenewegen (*ad Cod.* 4. 12. 4), Voet (23. 4. 52); van der Keessel (*Th.* 99); and Fockema Andreae (*ad Gr.* 1. 5. 24). For the text of the note to Neostadius see Lee, *Commentary*, p. 105. The rule applies to the wife just as much as to the husband and rests upon the principle that it is fair that the spouses should contribute equally to household expenses. In *Hern & Co. v. De Beer*, *ubi sup.* Mason J. said (at p. 723) 'Even if she has by antenuptial 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'. Lower down (at p. 726) the learned Judge referred to 'the special and equitable provision by which creditors are entitled to recover [from the wife] upon the dissolution of the marriage half of the debts for household necessities of which she has had the benefit'. In *Van Rensburg v. Swersky Bros.* [1923] T.P.D. 255 the Transvaal Court (Stratford and Tindall JJ.) held that this liability attached also during marriage to a wife married with an antenuptial contract which excluded all community and the marital power for half the cost of necessities purchased by the husband in his own name. Stratford J. qualified the generality of the rule by saying (at p. 259): 'It may be that by express terms the husband or wife may assume the whole liability for the purchase of necessities, and if the vendor *agrees* to look only to him or her I do not think he can, thereafter, sue the non-contracting spouse.'

(d) Whether the wife's capacity to pledge her husband's credit for necessities is based upon agency or is, independently of agency, an incident of marriage, gave rise to a difference of judicial opinion in *Reloomel v. Ramsay* [1920] T.P.D. 371.

Gregorowski J. took the first view, Wessels J.P. and Bristowe J. the second, and this has been preferred in later cases: *Frame v. Boyce & Co.* [1925] T.P.D. 353; *Stern v. Schattel* [1935] C.P.D. at p. 80; and (Ceylon) *Lalchand v. Saravanamuttu* (1934) 36 N.L.R. 273. Can the opposing views be reconciled in the sense that the husband is liable in any event *pro semisse*, but only *in solidum* if the wife contracted as his agent? See *Tydskrif*, vol. ii, p. 96 (Lee, *A married woman's contracts in relation to household necessities*).

(e) The question agency or no agency is of crucial importance. If and so far as the husband is liable only because the wife is his agent, he can escape liability (subject to (i) *infra* and apart from estoppel by holding out) by showing that he forebade her to pledge his credit or made her a reasonable allowance. If the husband's liability is an incident of marriage, then according to the old writers (Gr. 1. 5. 23; Voet, 23. 2. 46, &c.) the wife's capacity to bind her husband can be determined only by judicial injunction and publication. It has been judicially suggested that 'a public notice on the part of the husband, or, at any rate, a notice to the individual trader' might be sufficient for the purpose. *Reloomel v. Ramsay, ubi sup.*, at p. 376 *per* Wessels J.P. But can a husband by his unilateral act disembarass himself of a duty imposed by law?

(f) The term 'necessaries' is a useful importation from English Law. It includes goods and services, as of a midwife. *Mason v. Bernstein* (1897) 14 S.C. 504. 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.; and see *Smith v. Philips* [1931] O.P.D. 107.

(g) The wife's capacity to contract *in re oeconomica* and thereby to bind the husband depends, it seems, upon the continued existence of a joint establishment. *Excell v. Douglas* [1924] C.P.D. at p. 484; *Stern v. Schattel* [1935] C.P.D. 78; *MacNaught v. Caledonian Hotel* [1938] T.P.D. 577.

(h) If the spouses are not living together the wife (subject to (j)) cannot pledge her husband's credit unless she is authorized to do so as his agent, expressly or by holding out. There

is no presumption of agency. *Excell v. Douglas, ubi sup.* The presumption is against it.

(j) But, in any event, a husband must provide for his wife, unless she has left him unlawfully. *Bing & Lauer v. Van der Heever* [1922] T.P.D. 279. In all other circumstances the wife is an 'agent of necessity' to pledge her husband's credit for food and clothing, if he leaves her 'destitute or manifestly inadequately supplied with things which are necessary and which she ought reasonably to have'. *Reloomel v. Ramsay, ubi sup.* at p. 388; *Coetzee v. Higgins* (1887) 5 E.D.C. 352. This situation might also arise if the spouses were living together, and the husband gave the wife 'nothing but the shelter of his house'. *Debenham v. Mellon* (1880) 5 Q.B.D. at p. 398 *per* Bramwell L.J.

It will not have escaped notice that the above rules are derived partly from Dutch, partly from English Law. It is not easy to reconcile them.

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 antenuptial 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. 81.

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.

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. They are not all valid in the modern law.

1. *Sales in a free market (op een vrije markt—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; Wasseenaar, *Praxis Judiciaria*, c. ix, num. 4; Christinaeus, *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 commenting upon Grotius (*hoc loc.*), says (author's manuscript): '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, *History of the Roman-Dutch Law*, p. 507, translates a somewhat different version of the above.] Van der Keessel (*Dictat. ad loc.*) hesitates 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.

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), S.A.R. 171; *Kotze v. Prins* (1903) 20 S.C. at p. 161; and *Woodhead, Plant and Co. v. Gunn* (1894) 11 S.C. 4. See further Lee, *Commentary*, p. 72. 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, ubi sup.*

2. *Sales or pledges to licensed 'table-holders' (lombarden)*. Gr. 2. 3. 6; V.d.K. 184. This exception is not admitted in

South Africa. *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.* Gr. and V.d.K. *ubi sup.*; local in Holland, not admitted in South Africa.

4. *Sales to gold- and silver-smiths.* Van Leeuwen, *R.H.R.* 2. 7. 4; V.d.K. *ubi sup.*; statutory in Holland, not admitted in South Africa. *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 South Africa consult *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; *Conradie v. Jones* [1917] O.P.D. 112. By the Magistrates' Courts Act, 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. *Caganoff v. Zacks* [1917] T.P.D. 334. 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.' *Lange v. Liesching* (1880) Foord at p. 62 *per De Villiers C.J.* See Insolvency Act, 1936, sec. 36 (subsecs. 5 and 6).

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. V.d.K. 203; V.d.L. 1. 7. 2; Mackeurtan, p. 262; *supra*, p. 294.

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. As to scrip certificates endorsed in blank see *United S. A. Association Ltd. v. Cohn* [1904] T.S. 733.

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 the goods is entitled to dispose of them'. *Adams v. Mocke, ubi sup.*; *Morum Bros. v. Nepgen* at p. 403. 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—*mobilis non habent sequelam*. Voet, 36. 1. 64. As regards immovables, it cannot be asserted as beyond question that by the law of South Africa 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. '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; *Mare v. Grobler N.O.* [1930] T.P.D. 632. 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, ii. 316.

12. *Sale by executor.* 'Where an executor has sold property belonging to an estate, the property cannot be followed into the hands of a *bona fide* purchaser, who, without knowledge of the rights of the legatees or fideicommissaries, has received transfer or delivery of the property. It is the duty of an executor to pay the debts of the estate and to realize so much of the assets as is required for that purpose. If he unnecessarily sells property which is specifically bequeathed by the testator's will, he renders himself liable to the legatees, but the transfer or delivery made by him to the purchaser cannot be set aside unless such purchaser was aware, or ought to have been aware, of the breach of trust.' *Williams v. Williams* (1896) 13 S.C. at p. 203 *per* De Villiers C.J.

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 handelinge genoemt werd is de eendracht des willes van twe ofte meer luiden tot eens ofte beider nut* (sec. 2).

To some contracts 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 *dominus rei gestae*, 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 *Inleiding* occasional flaws are not surprising. It seems from the above instances that Grotius fully accepts the principle that 'every pactio 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 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 'oneerlijke 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 Code² 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

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 réfléchie' (Henri Capitant, *De la cause des Obligations* (3^{me} éd.), p. 142). Van Leeuwen in his early work, *Paratitla 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 *C.C. Arts.* 1108, 1131.

juristic significance. The element in the situation, whatever it be, which gives vitality to the obligation is termed its 'cause'.¹ 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.² Further, the cause thus understood must be a lawful one. 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. The cause of a contract is one thing; the cause of an obligation is another.

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

¹ La cause est le soutien nécessaire, indispensable qui supporte l'obligation. Capitant, *op. cit.*, p. 31.

² There are variations on the theme into which it is unnecessary to enter.

between *causa contractûs* and *causa obligationis*. Mr. Justice de Villiers adhered to his view, as appears from his article in 39 *S.A.L.J.* (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 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* (3^{me} 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*, 41 *L.Q.R.* (1925), p. 306. For more than a century battle has been joined between causalists and anticausalists. 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, the German Civil Code, and the Japanese Code (largely inspired by the draft German Code), do not follow the French Code in specifying 'une cause licite dans l'obligation' as one of 'the conditions essential for the validity of conventions'. The older Codes of the last century e.g. the Civil Code of the Netherlands 1838, of Italy 1865, of Quebec 1866, do so. Colin & Capitant, *Cours élémentaire de droit civil français* (tome 2^{me}), and Josserand, *Cours de droit civil positif français* (tome 2^{me}, 1930), maintain the traditional doctrine.]

¹ The last formula is repeated *verbatim* with the substitution of 'legal' for 'lawful' by Solomon J.A. in *Robinson v. Randfontein Ests. G.M. Co. Ltd.* [1921] A.D. at pp. 236-7.

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 stipulator, 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, *Textbook*, p. 427.)

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 different 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*.

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.

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; Josseland, *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 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 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, 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.¹ Particular reference may be made to *McCulloch 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

¹ See remarks of Watermeyer C.J. in *Commr. for Inland Revenue v. Est. Crewe* [1943] A.D. at p. 674.

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 was followed, no reference being made to Roman-Dutch Law authorities, was distinguished as a case of purported agency.

The peculiarity of *McCulloch's Case* is that the company was held to be not only entitled, but also liable. 'It may happen that the benefit carries with it a corresponding obligation. And in such a case it follows that the two would go together. The third person could not take advantage of one term of the contract and reject the other' (*per Innes C.J.* at p. 206). This is an unusual application of *stipulatio alteri*, and a doubt suggests 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—*McCulloch 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.

So far as concerns contracts made for the benefit of companies in course of formation the law has been changed by the (Union) Companies Act, 1926, sec. 71, which enacts as follows: 'Any contract made in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly registered as if it had been duly formed, incorporated and registered at the time when the contract was made, and such contract had been made without its authority: Provided that the memorandum contains as one of the objects of such company the adoption or ratification of

or the acquisition of rights and obligations in respect of such contract.' But this section does not exclude the application of the principle of *Tradesmen's Benefit Socy. v. Du Preez* to the case of company promoters contracting for the benefit of a company in course of formation in their own name and not as agents. *Ex parte Vickerman* [1935] C.P.D. 429.

[For the theory of the stipulatio alteri J. P. Moltzer's masterly essay, *De overeenkomst ten behoeve van derden*, remains unsurpassed. A recent work of great merit is *Die Ontwikkeling van die Ooreenkoms ten Behoeve van 'n Derde* door Johannes Christiaan de Wet (Leiden, 1940). 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; *Baikie v. Pretoria Munic.* [1921] T.P.D. 376; *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; *Goldfoot v. Myerson* [1926] T.P.D. 242; *London Chemists and Opticians Ltd. v. Shapiro* [1926] T.P.D. 690; *Commissioner for Inland Revenue v. Est. Crewe* [1943] A.D. at p. 674; *Ex parte Clarke* [1944] W.L.D. 17.]

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. Voet, 22. 1. 24: *mora est solutionis faciendae vel accipiendae frustratoria dilatio. Victoria Falls & Transvaal Power Co. v. Consolidated Langlaagte Mines* [1915] A.D. at p. 31; *Breytenbach v. Van Wijk* [1923] A.D. at p. 549. The definition includes both *mora debitoris* and *mora creditoris*. In French law and other civil law systems *mora debitoris* seems (sometimes, if not always) to occur as a mean term between failure to perform a duty timeously and liability for breach. Speaking generally, one party cannot proceed against the

other for delay in performance 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 by making the delay culpable.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 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: *si rem legitimo modo oblatam non acceptet*. Windscheid, ii. 345. The consequences of *mora debitoris* are to render him liable for *mora*-interest and accrued 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 if there had

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. 550. 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.

been no *mora*. Voet, 22. 1. 28. This is what is meant when it is said that *mora* perpetuates the obligation.¹ The consequences of *mora creditoris* are to transfer to him 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.

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, *Judiciele Practijc*, 1. 8. 8; J. Herbstein, *Demands*, 44 *S.A.L.J.* (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 considered an extra-judicial demand sufficient; others required a judicial demand, i.e. a writ of summons; others postponed 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 been served on the defendant.' Summons is equivalent to a demand and places a debtor *in mora* from the time of service of the summons. *Ridley v. Marais* [1939] A.D. 5. Where the claim is for unliquidated damages the Court will seldom, if ever, award interest previous to judgment. *Victoria Falls and*

¹ *Momsen v. Mostert* (1881) 1 S.C. 185; Wessels, i. 2704.

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. For Ceylon Law see *Fonseka v. Fonseka* (1938) 40 N.L.R. 539.]

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. 268 ff. See also Philip Gross, *Specific performance of contracts in South Africa*, 51 *S.A.L.J.* (1934) p. 347.

In South Africa it is a common practice to add to a prayer for specific performance an alternative prayer for damages or for damages and rescission of the contract. *Duckett v. Ochberg* [1931] C.P.D. 493. On what basis are 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 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. It has been said that, as a rule, damages for delay are not so given. *Philip v. Metropolitan 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 ensure 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); or a contract to withdraw defamatory words spoken of the plaintiff (*Keyter v. Terblanche* [1935] E.D.L. 186); 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; *Geldenhuis & Neethling v. 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 anyone else (*African Theatres Ltd. v. Jewell* [1918] N.P.D. 1), 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, a plaintiff will not be entitled to an alternative decree of damages unless he both claims and proves specific damages; but it is competent to the Court to award

damages even though not specifically claimed in the declaration. *National Butchery Co. v. African Merchants* [1907] E.D.L. 57; *Hertzog v. Wessels Est.* [1925] O.P.D. 141.

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 antenuptial 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. 237 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, and in *Shill v. Milner* [1937] A.D. 101 of export quota certificates. 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, *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 (*jus tollendi*). Dig. 6. 1. 38; 25. 1. 9; Windscheid, i. 195. *Fructus percepti* must be set off against outlay and the possessor's right to compensation is reduced accordingly. Voet, 6. 1. 38; *Fletcher v. Bulawayo Water Works* [1915] A.D. 636; *Burns v. Burns* [1937] N.P.D. 67. But fruits of improvements need not be set off. Voet, 6. 1. 39; *Beebee v. Magid* (1929) (Ceylon) 30 N.L.R., 361.

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). 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).

3. The right to compensation, when it exists, may in the modern law be enforced not only by retention and exception, as in the Roman law, but also by action. Voet, 5. 3. 23 (*ad fin.*); Groen. *de leg. abr. ubi sup.*; *Acton v. Motau* [1909] T.S. at p. 847; *Badroodien v. Van Lier* [1928] C.P.D. 311; and any possessor *bona fide* or *mala fide* may remove what he has

annexed to the soil provided he can do so *sine laesione prioris status rei*. Cod. 3. 32. 5.

3. The case of the lessee has been considered above, pp. 305 ff.

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. 182.

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 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. Cf. *Maharaj v. Maharaj* [1938] N.P.D. 128.

7. For the husband's right to claim compensation for ex-

penses 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. On the whole subject see further Lee, *Commentary*, pp. 96 ff.

APPENDIX K

INHERITANCE AB INTESTATO IN CEYLON

The Matrimonial Rights and Inheritance Ordinance 1876 directs that any property as to which any person dies intestate shall devolve as follows, viz.:—

1. One-half to a surviving spouse (sec. 26) and subject thereto—

2. To descendants, viz. to children equally with representation *in infinitum*¹ (sec. 28); failing whom—

3. To fathers and mothers equally;² and if either parent is dead half to the survivor, half to brothers and sisters (children of the deceased parent related to the deceased by the full or the half blood) and their issue by representation.³ But if there is no such brother or sister alive at the death of the deceased, then wholly to the surviving parent (sec. 29);⁴ and if both parents are dead, then—

4. Half to brothers and sisters, children of the deceased father, and their issue by representation; half to brothers and sisters, children of the deceased mother, and their issue by representation (secs. 30–2). If there are no full brothers and sisters or their issue living, and there are living half brothers and sisters or their issue related to the deceased on one side only they take half, the other half going to the nearest ascendants on the other side. Failing such ascendants, they take the whole (sec. 33).⁵

5. 'Except where otherwise expressly provided, if all those who succeed to the inheritance are equally near in degree to the intestate, they take *per capita* and not *per stirpes*'⁶ (sec. 34).

6. All the persons above enumerated failing, the inheritance goes to the nearest ascendants equally (sec. 35);⁷ failing whom—

¹ Placaat of 1599, Art. 1.

² *Ibid.*, Art. 2.

³ *Ibid.*, Art. 3. The Placaat says 'children and children's children by representation'. The Ordinance has substituted 'issue'.

⁴ *Ibid.*

⁵ *Ibid.*, Arts. 4, 5, 6.

⁶ *Ibid.*, Art. 11.

⁷ *Ibid.*, Art. 7.

7. To uncles and aunts, and the children of deceased uncles and aunts *per stirpes*;¹ but if there are no uncles and aunts living, then to their children and to great-uncles and aunts with their *per capita*² (sec. 35).

8. 'All the persons above enumerated failing, the entire inheritance goes to the surviving spouse, if any, and, if none, then to the next heirs of the intestate *per capita*' (sec. 36).

9. 'Illegitimate children inherit the property of their intestate mother, but not that of their father or that of the relatives of their mother.'³ Where an illegitimate person leaves no surviving spouse or descendants, his or her property will go to the heirs of the mother, so as to exclude the Crown'⁴ (sec. 37).

10. 'If any one dies intestate without heirs, his or her estate escheats to the Crown. If, however, any heirs can be found, even beyond the tenth degree,⁵ they take the inheritance' (sec. 38).

11. 'Children or grandchildren by representation becoming with their brothers and sisters heirs to their deceased parents are bound to bring into hotchpot or collation all that they have received from their deceased parents above the others either on the occasion of their marriage or to advance or establish them in life, unless it can be proved that the deceased parent, either expressly or impliedly, released any property so given from collation'⁶ (sec. 39).

12. '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'⁷ (sec. 40).

¹ Placaat of 1599, Art. 9 *scil.* Children of the first degree, not remoter issue.

² *Ibid.*, Art. 10.

⁴ Gr. 2. 31. 4; V.d.K. 368.

⁶ *Supra*, p. 355.

³ *Supra*, p. 34.

⁵ Gr. 2. 30. 1; V.d.K. 364.

⁷ *Supra*, p. 405.

APPENDIX L

CONFLICT OF LAWS

This short note is intended to serve as a finger-post for readers who may seek direction on this subject. Broadly speaking there is little difference between the law of South Africa (the same may, no doubt, be said of the law of Ceylon) and the law of England in the field of private international law. Thus (to take one example) 'the principles regulating domicile, founded as they are upon the civil law, have been developed in England and in Holland upon very similar lines'. *Webber v. Webber* [1915] A.D. 239 *per* Innes C.J. at p. 242. English cases and English text-books such as Dicey, and more recently, Cheshire, are commonly cited. The classical writers of the seventeenth century, particularly Johannes Voet and his father Paul Voet, and Ulrik Huber, occupy the background. At one point there is a conspicuous divergence from accepted English doctrine (Cheshire (2), p. 493). In a series of cases beginning with *Blatchford v. Blatchford's Exors.* (1861) 1 E.D.C. 365, the Courts have laid down that 'the law of the matrimonial domicile is ubiquitous'; and 'the tacit contract is of equal force with the express as to the regulation of the property of the spouses' (*per* Watermeyer, J. at p. 382), i.e. the original proprietary relation of the spouses persists notwithstanding a subsequent change of domicile, whether the marriage was with or without an antenuptial contract.

The South African Courts recognize wills of movables as formally valid if they satisfy the requirements either of the *lex domicilii* (*Ex parte Alison* [1940] C.P.D. 586), or of the *lex actus*. *In re Robinson* (1866) 1 Roscoe 411. For information as to the jurisdiction of the South African Courts and the recognition of foreign judgments the reader is referred to Walter Pollak, *The South African Law of Jurisdiction*, 1937. Since the publication of Dr. Pollak's book, the Matrimonial Causes Jurisdiction Act, 1939, has given any provincial or local division of the Supreme Court jurisdiction, if the wife has been ordinarily resident within the area of jurisdiction of that division for a period of one year immediately preceding the date on which the proceedings are instituted and if at that date—(a) in the case of an action for divorce or for restitution of conjugal rights, the husband is domiciled within the

Union; or (b) in the case of an action for judicial separation, the husband is domiciled or resident within the Union. The Matrimonial Causes Jurisdiction Act, 1945, gives the Supreme Court temporary jurisdiction in, and in relation to, proceedings for divorce, for restitution of conjugal rights or for nullity of marriage where the husband was domiciled outside the Union and South-West Africa at the time of the marriage, and provides for the recognition of foreign decrees and orders substantially corresponding to those declared by this Act to be competent to the Supreme Court on conditions of reciprocity.

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PRINTED IN
GREAT BRITAIN
AT THE
UNIVERSITY PRESS
OXFORD
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Lee, Robert Warden
An introduction to Roman-Dutch law

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