Notes on the Law of Obligations

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LL.B. III

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The organisation plays a pivotal role in law students' academic and social life at the University of Malta. The organisation has also been responsible for publishing the prestigious *Id-Dritt*, and the *GħSL Online Law Journal*.

Moreover, GħSL boasts its own Thesis Library, located at the GħSL office in the Faculty of Laws. Additionally, GħSL is the only law organisation responsible for the distribution of authoritative law notes and past papers.

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CHETCUTI CAUCHI
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Advice from an Alumna

By Dr Priscilla Mifsud Parker

The law course is a long journey, but one that, if well-travelled, will lead to beautiful destinations. In an industry which is today attracting many young individuals looking to develop their career in law, it is important to stay ON the beaten track and remain focused. It may go without saying that it is of great importance for all students to attain good academic grades, to be dedicated to their work, as well as to be determined in this highly-competitive industry in order to fulfil their dream of becoming lawyers one day. However what is crucial is that as students and later on as professionals we are innovative by being sensitive to the changes around us. These changes might be political, economic, environmental, socio-cultural or others; what is for sure is that they all have an impact on the profession of a lawyer. We are members of a dynamic profession which is very sensitive to its surroundings. The type and 'genre' of advice which is required from us is all affected by what is being experienced by the receivers of this advice.

Work experience is considered as a vital part of the staple diet of any prospective lawyer in order to put into practice and refine the knowledge gained from the theorethical reality of the lecture halls and lawbooks into the skills required for a successful career in law. An internship will not only show future recruiters that you have a genuine interest in pursuing a career in this sector, but that you have the practical knowledge and skills to the succeed in your role.

Here are some personal suggestions that I feel helped me during my journey:

1. *Being Ambitious*

A powerful trait in any competitive industry, ambition will help you in your law course, in your career as a lawyer, as well as in your life. Whilst the law course can be quite intimidating and challenging, an ambitious individual who is dedicated to learning new things has the potential to understand and realize long-term goals. Do not view the journey as one whole insurmountable mountain but focus on the next small goal and once achieved move on to the next and goal by goal you will reach your final target point.

In this respect, gaining valuable work experience through an internship is an important step taken by an ambitious young lawyer who wants to attain certain skillsets, and remain a step ahead of his/her peers. By being inquisitive, analytical and humble enough to accept guidance and mentoring one is guaranteed a fruitful experience in a law firm. It is also not only a means to start focusing on the direction of your career and to build upon your chosen path, but will undoubtedly expose you to the international world. This is crucial, as most of the traditional legal sectors have been intertwined with new areas of legislation and all these together now present much more opportunity for intra-jurisdictional work.

2. Networking

By engaging with counterparty students abroad and in international fora one gains an insight into another reality and is exposed to different cultures, ways of communicating and is able to bridge

the differences between parties to a mundane discussion which will eventually become a transaction or a major project in professional life.

3. *Organisational Skills*

Organisation is key in any industry. Good organisation skills always stand out to a recruiter when considering potential applicants. Such skills can be obtained by gaining experience either through organising one's own work, study plan,student events or cultural/philanthropic events.

Going hand-in-hand with this, is having a study plan. By planning your studies ahead, one will have a sufficient amount of time to meet all the demands, while also being able to participate in productive outside activities. Reviewing notes or case briefs before class can also help you follow and participate in class discussions better , whilst following case-law allows you to apply them for specific situations. In view of the amount of material involved summarising and carving out the most crucial points is essential to then build your argument in papers.

4. *Taking your own class notes*

It is always important to take down your own notes as laws are always evolving and passed-down notes would provide the context but are not ideally used for the detail. Researching the particular topic and comparing Malta's law with that of other jurisdiction gives one a completely different outlook and commenting on these variances in an exam paper, dissertation or assignment would distinguish one student from another. Not to be overlooked are also the consultation papers, commentaries and other official public documents that are issued by local authorities from time to time on different areas of law and industry. Being abreast of what is happening in industry will help putting the particular law or regulation in context.

5. *Participation*

Participation is a main element of the learning process. Being actively involved during seminars and lectures and participating in legal debate sessions, mock trial competitions and moot courts are essential in order to improve your persuasive and presentation skills. If you find this very difficult (all of us have different characters and traits), then try to focus on participation in other events which will expose you to public speaking starting off in smaller groups in a more familiar environment and trying out new experiences and larger audiences as you go along.

6. *Practice is the key to success*

This leads us to our next point – practice. Attaining good grades is undoubtedly an important part of the law course, however, in themselves, they are not enough to show that you have substantial material to succeed. Working within a law firm introduces you to the world of work, and allows you to gainspecific industry-related skills which one will only ever be able to learn in a workplace setting.

Work experience can provide you with valuable insight which will help you decide what your career aspirations are and in which areas you would like to further delve into.

NOTES ON CIVIL LAW

Revised Edition

Compiled by

Prof. V. Caruana

Galizia

THE LAW SOCIETY

for University

GHAQDA STUDENTI TAL-LIGI

3rd Year

OF OBLIGATIONS IN GENERAL.

"Obligatìo est juris vinculum quo necessitate adstringimur slicujus solvendae rei".

This is the definition of obligation given by the Institutes of Justinian, and it still holds good. Obligation is a "vinculum" or a bond, and as such it binds one of the parties towards the other, thus giving rise to the necessity of giving, doing, or not doing something. This necessity is a juridical one, in other words, it is sanctioned by law and it attributes an action to the creditor in order to compel the debtor to fulfil that which he has bound himself to perform.

It necessarily implies two subjects: a creditor* because we cannot imagine a right without a subject to whom it belongs; and a debtor, because the characteràitio feature of personal rights is that they are available against a specified person ("contra certam personam"). Besides these two subjects an object is also necessary, because no right can exist without an object over which it may be exercised. The object, or subject matter of personal rights, is what the Romans used to call "praestatio", namely, "an act or the debtor taken in its wider sense, including both the positive act of doing or giving something, and the negative act of abstaining from doing something.

The subject matter of obligations must be: possible, lawful, "in commercio", specified or such that it may be specified, and useful to the creditor. Strictly speaking these requisites should apply only to the subject matter of contractual obligations.

For the actual and concrete existence of an obligation a cause, which gives rise to such obligation, is necessary; just as a mode of acquisition is necessary for the acquisition of any real right.

We shall divide this thesis into three parts;

1. Causes of obligations;
2. Effects of obligations;
3. Extinction of obligations.

I. Causes of Obligations.

The causes which give rise to obligations under the present law are five:-

1. The Law;
2. Contracts;
3. Quasi-contracts;
4. Delicts or torts:
5. Quasi-delicts or quasi-torts*

A. The Law. The Law is the cause of every single obligation, because if the law does not recognize an obligation which the parties want to create, the obligation would remain without effects; but the law may be either the immediate cause of obligations, when these are the immediate effect of a provision of the law which imposes them, or the mediate cause, when the act of man is necessary to give rise to the obligation and the law simply recognizes such an effect. Besides those which we find in the body of the law itself, those obligations arising from a testament are also regarded as having the law for their immediate cause; in fact, when the inheritance is accepted, the obligation of executing the will of the testator arises in the heir in virtue of the law Itself. This is so only in modern law, since in early Roman law the acceptance of an inheritance was a quasi-contract wherefrom the obligations of the heir arose.

B. Contracts. According to the definition given by Section 1001 "a contract is an agreement or an accord between two or more persons by which an obligation is created, regulated or dissolved".

Contract differs from the other causes of obligations in virtue of the fact that it is created by the free will of the contracting parties, i.e. the debtor and the creditor; on the contrary, quasi-contracts arise from a voluntary and lawful act of one of the parties, the intention of the other being only presumed; delict and quasi-delict arise from a voluntary but unlawful act of the debtor.

Not any kind of agreement amounts to a contract, but only that which constitutes, modifies or dissolves an obligation. Even an agreement meant to dissolve an obligation is a contract: in fact, since two or more persons may agree to create an obligation, it naturally follows that they may also agree to put an end to it or to dissolve it; such an agreement would, if we may say so, create an obligation in opposition to an already existing one.

This definition is generally criticized on the ground that it does not correspond completely to all the functions which a contract may have in modern law. It is in fact common teaching that according to present principles of

law a contract which has for its object the transfer of ownership and other real rights produces this effect directly and in virtue of itself, contrary to the rule of Roman law according to which ownership could not be transferred by contract but by "traditio": "traditionibus (et usucapionibus) non nudis pactis dominia rerum transferentur".

If, therefore, we were to correct the definition given by Section 1001 in conformity with this criticism, we would define contract as an agreement whereby an obligation is created, modified or dissolved, or whereby the right of ownership or other real right is transferred.

Other commentators, however, hold that the transfer of a real right is nothing else but the consequence of the obligation assumed by one of the parties of transferring the real right immediately, which obligation is as a rule fulfilled the very moment it is created, and that, 'therefore, the definition given by law is correct, without the necessity of any addition in connection with real rights.

Classification of Contracts.

1. Bilateral and unilateral contracts.

Bilateral or synallagmatic contracts are those which produce reciprocal obligations in both parties. Unilateral are those whereby one of the parties only binds himself towards the other while the latter assumes no obligation whatsoever; such are the contracts of loan and deposit. The contract of loan binds the borrower towards the lender, but it does not impose any obligation on the latter, since the delivery of the thing lent does not constitute the object of the lender's obligation, but is an essential condition for the very existence of the contract of loan, which, being a real contract, is perfected by the delivery of the thing.

This distinction refers only to the contents of the contract, i.e. to the obligations which the contract includes; from another point of view, however, all contracts are bilateral, in the sense that the intention of the person who wants to bind himself towards another, or to transfer a right, is not sufficient, but it further requires that the person who is to acquire a credit, or ownership, or other real right, should consent thereto.

A contract which was originally unilateral may become bilateral "per accidnes"; this happens when the party who was originally the debtor subsequently becomes

the creditor of his creditor by reason of some fact having no necessary connection with the original contract. Thus, though the depositee, in view of the nature of the contract of deposit, be a mere debtor of the depositor, whilst the latter has no obligation towards him, he may become a creditor of the depositor if he incurs expenses which are necessary for the preservation of the thing.

2. Onerous and Gratuitous or Lucrative Gontracts.

Onerous contracts are those whereby each of the parties aims at deriving a pecuniary advantage for himself or for a third party, i.e. when none of the parties intends to procure a gratuitous advantage for the other as a sign of liberality towards him.

Gratuitous contracts are those whereby one of the parties intends to procure an advantage to the other without receiving anything in return; so that one of the parties does an act of liberality, and the other receives or hopes to receive the said advantage without any consideration. The gratuitous contract "par excellence" is donation, and so also are mandate without wages, loan without interest, commodaturn and suretyship without compensation.

We must not confuse this distinction with the first one, as Section 1003 does when it defines onerous contracts as those in which "each of the parties undertakes an obligation": this is rather the definition of bilateral contracts. It is true that a perfect bilateral contract is necessarily onerous, but not all unilateral contracts are gratuitous; thus mutuum is unilateral but it may be either onerous or gratuitous, according to whether interest is agreed upon or not.

3. Commutative and non-commutative onerous contracts.

Contracts are Commutativa when each party binds himself to give or to do a thing which is considered as the equivalent of that which is given to or done for him (Section 1004). Such is lease, where the enjoyment of the thing is considered as equivalent to the rent.

Contracts are non-commutative when the advantages reciprocally granted or stipulated are not equivalent to one another. Such is emphyteusis, where the quit-rent is not equivalent to the enjoyment of the tenement, but an acknowledgement of tenure.

Aleatory and non-aleatory contracts»

Contracts are aleatory or hazardous when the advantage or loss, whether to both parties or one of them, depends on an uncertain event (Section 1005).
E.g Play, and betting, life annuity, insurance, etc,

5. Principal and accessory contracts.

Principal contracts are those which exist independently of any other contract. Accessory are those the existence of which depends on some other contract or obligation. Such are suretyship, hypothec, pledge, and anticresis.

6. Solemn and non-solemn contracts, according to whether they require certain solemn formalities or not,

7. Nominate and innominate contracts.

Nominate are those which have a special denomination and which form the subject matter of a special title of the Code. Innominate are those which have no particular denomination and which do not form the subject matter of a special title. Both nominate and innominate contracts, however, are subject to the rules of contracts in general (Section 1006). The first are also subject to certain rules of their own which sometimes even modify the general rules; also innominate contracts may, by analogy, be subjected to the special rules of any one of the nominate contracts.

Requisites of Contracts.

Pothier classifies the requisites of contracts into essential, natural and accidental.

Essential are those which are so intimately and necessarily connected with the contract that in their absence the contract is null or degenerates into a contract of a different nature.

Natural are those which are so intimately connected with the contract that they subsist unless and until they are excluded by the parties themselves, but they are not so necessarily related that without them the contract would not subsist or would degenerate into a different contract.

Accidental are those which exist only if they are agreed upon by the parties to the contract.

It is obvious that only the essential requisites should properly be called requisites, because they are required for the essence and validity of the contracts The other so-called requisites, which may be excluded by the parties, are the effects rather than the requisites of the contract.

Another distinction is that between the common requisites which all contracts require, i.e. which are required by contracts in general, and particular requisites which are proper to certain contracts in particular.

The common essential requisites, just as the requisites of any other juridical act, may be external and internal. The internal requisites of contracts in general, which rasult from the very notion of contract, i.e, agreement, are;-

1. Capacity of volition; (capacity)
2. Effective volition; (consent)
3. Object ;
4. Cause.

1. Capacity of the contracting parties.

Although all persons may be subjects of rights, there are persons who are incapable of exercising them, either becuase of a natural cause or because of a legal cause, the latter being also based on natural grounds.

There are, therefore, two kinds of capacity and incapacity: natural, i.e. based on the concourse of those elements which are required by nature, with regard to capacity, - and on the absence of such elements with regard to incapacity;

legal, according to whether the individual is endowed or not with those other elements which are required by law, not arbitrarily but on rational and natural grounds.

The rule is that the capacity of contracting, like any other capacity, is presumed, because generally speaking all persons are capable, and incapacity is the exception. It fellows that only those are incapable who are so either by nature or by law, and that the causes of disability cannot be extended beyond these limits (Section 1008).

The conditions of natural capacity are (a) •intelligence, by means of which a person may give his consent knowingly, and (b) liberty, whereby the will is free from any vice which might deprive it of its independence in choosing between willing and not willing.

The second requisite refers to the moment in which consent to particular contract is given, and we shall therefore deal with it in that part which deals with the vices of consent.

Some codes say nothing about the first requisite, that is intelligence, becuase this is a condition which must necessarily be postulated, and because there is no need to declare an incapacity which comes from human nature itself. However, Section 1009 mentions it expressly by declaring incapable of contracting a person "who has not the use of reason". This incapacity, therefore, refers to infants (under 7 years) and to persons of unsound mind, whether they are interdicted or not, and whether their insanity be habitual or temporary, such as drunkenness and delirium.

As to "lucid intervals", Roman law, doctrine and jurisprudence, furnish us with very accurate texts and teachings in the matter of testaments, in the sense that a person of unsound mind during such intervals is capable of testating, but we cannot argue from this that he is also capable of contracting, because capacity of contracting demands more severe requisites, since contract Is a bilateral and irrevocable act.

As to deaf and dumb persons, doctrine and jurisprudence make a distinction according to whether deafness and dumbness occur during infancy or afterwards. It is generally held that in the first case this natural defect destroys capacity; in the second it is a question of fact which has to be decided by the judge in each particular case, by examining the conditions proper to the person in question.

Legal conditions. — The rule which refers principally to these conditions is that which we have already mentioned, i.e. the cases of incapacity are expressly declared by law, and are to be strictly' interpreted.

The causes of legal disability (Section 1008) are:

1. Minority;
2. Interdiction or incapacitation;

There are no other causes of incapacity in our law, and the disability of persons sentenced to any punishment whatsoever has been abolished (Section 1008, sub-section *2)*.

These causes of legal disability have not been arbitrarily invented by the legislator, but they have a rational foundation.

The disability of minors is due to the fact that though a minor may be old enough to reflect on his actions, his power of reflection is insufficient because he lacks that degree of mental development which is necessary to understand the importance of a contract, and his experience is insufficient to protect his interests, especially against the wiles of crafty people.

The disability of interdicted persons is a sign of respect to the sanction of the law and to the judicial remedies, which, after all, are supposed to be based on grounds of natural incapacity.

1. — Minority — A minor is not always equally incapable throughout the whole period of minority. According to our law there arc three stages: (i) up to nine years; (ii) from nine to fourteen years; (iii) from fourteen to eighteen years.

During the first stage his incapacity is absolute; during the second he is also incapable and obligations contracted by him are therefore null, but those contracted by other persons in his favour are valid and the contract is therefore called lame. The minor may impugn the contract by means of the "actio rescissoria" if the contract has been executed, and by means of the exception of minority if he is called upon to execute it; but the other contracting party cannot avail himself either of the action or of the exception. During the third stage, the law distinguishes according to whether the minor is subject to paternal authority or tutorship, or not: in the first case he remains in the same condition in which he was during the second stage, i.e. the contracts entered into by him are "lame" : in the second he is as a rule capable of contracting, but ho can impugn the contract, whatever it be, on the ground, of lesion. Besides, he is incapable of alienating or hypothecating immovables without the authority of the Court. However, a minor may become capable with regard

to certain causes or to certain contracts:

2) in favour of trade, when a minor who is sixteen years old may be emancipated;

b) in favour of industry in general (Section 1261), with regard to which any contracts entered into by the minor by reason of the trade which he exercises cannot be impugned by him on the ground of minority.

As regards the duration of disability, this lasts as long as minority lasts, and therefore on the attainment of majority the disability of contracting ceases.

2. -- Interdiction or incapacitation - These are generally based on a natural ground and until this lasts two causes of incapacity concur, i.e. a natural and a legal disability. There is a notable difference between the two, because legal disability starts with the issue of the decree and ends with its revocation, whilst natural incapacity lasts as long as the cause of incapacity lasts. So that there may be natural incapacity before legal incapacity is declared, and then acts done by the interdicted or incapacitated person before the issue of the degree may be annulled as being acts of a naturally incapable person if the natural cause of incapacity existed at the time when the act in question was performed (Section 524, Cap. 15); case-law applies this principle also to acts performed by a person interdicted on the ground of prodigality, before the decree of interdiction. On the contrary as long as the state of interdiction lasts, disability subsists, even though the natural cause of interdiction has ceased; and circumstances, such as e.g. lucid intervals, which may interrupt natural incapacity, do not suspend the legal incapacity.

Effects of Incapacity of Contracting, and Burden of Proof. - The effect of this incapacity of contracting is the nullity of the act, which is relative to the disabled person himself. The contract cannot be impugned by the other party in his own favour, because this would turn incapacity to the detriment of him in whose favour it was introduced. There is some doubt in doctrine as regards those acts done by a person who has not the use of reason. The majority hold that such acts are to be considered as completely inexistent; however, even in this case it would be more equitable were such nullity to be available only to the incapable person (Planiol et Ripert, Voi. VI, p. 173).

2. Consent

Consent in the ordinary meaning of the word is the agreement between the wills of two or core persons. With reference to contracts, consent is an agreement between all the contracting parties to create, regulate or dissolve an obligation, or to transfer a real right. Therefore, the wording of Section 1007, which includes among the requisites of contract, "the consent of the party who binds himself" is not correct, because it

among the requisites or contract, "the consent or the party who binds himself", is not correct, because it

implies that the consent of the party who hinds himself is enough to give rise to a contract, even without the consent of the party towards whom he binds himself.

The sole act of volition of the party who binds himself, which is known as "pollicitatio" cannot create an obligation- because we cannot imagine an obligation without a person in whose favour and interest it exists, and who, therefore, may demand its execution. And, on the other hand, we cannot talk of a creditor unless he wants to be a creditor, i.e. unless he accepts the credit A "nuda pollicitatio", therefore, can always be revoked by the person who binds himself, because it does not create any obligation and it does not in any way bind him. Consent, therefore, requires both a promise and its acceptance ; and so long as both exist, it is indifferent whether the promise precedes the acceptance or the acceptance precedes the promise.

We must not confuse promise and acceptance with proposal and answer: the latter are two moments of consent, of which, proposal is that part of consent which precedes the answer. On the contrary, promise need not precede acceptance, nor need acceptance precede the promise, We may therefore have three different combinations :

i. That the proposal, which is chronologically the first part of consent, contains a promise. In that case the answer will include the acceptance.

ii. That the proposal contains the demand of a promise which implies the acceptance of such future promise if this is made, and in this case the promise will be the second part of consent. Such was "stipulatio" in Roman Law. These cases of a mere promise on the one hand, and of a mere acceptance on the other, are proper to unilateral contracts.

iii. In bilateral contracts the proposal is at the same time a promise and a demand of a counter-promise which implies the acceptance of such future promise. In this case, therefore, the answer will contain both the acceptance and the counter-promise.

We may now give a more complete definition of consent: it is the concourse of the identical wills of the contracting parties, duly formed and made known. The agreement must be duly formed and made known, i.e. it must exist both internally and externally, or better, it must be both willed and made manifest. It is not

enough that consent should exist internally in the wills of the parties, but it must furthermore be made known, because men can only understand one another by the reciprocal external manifestation of their intentions. In order to analyse fully the idea of consent, we must consider it under all its aspects and study the usages through which it comes into existence, viz:

i) internally, i.e. in its internal formation;
ii) externally, i.e. in its external manifestation
iii) in the identity between the acts of volition of the contracting parties;
in the concourse of these acts of volition which makes consent perfect and irrevocable.

1. Consent as an internal act. — . Consent as an internal act must be serious, definitive and free. Consent is not serious if the parties intend to joke or to contract an obligation for the mere sake of being courteous. It is not definitive as long as the negotiations which usually precede the signing of a contract are still being conducted. The moment when it can be said .that such negotiations have been concluded, and the definitive consent given, is a question of fact. Consent is not given freely if it is given by mistake or if it is extorted by violence or by fraud.

2. Consent in its external manifestation. — If consent is net made manifest it has no effects at all. The way in which consent is made known is called the form of consent, or the form of contract. These modes of manifestation or forms of contract may be either free or solemn.

Free are all those forms which are naturally apt to manifest the will of man. Solemn are those forms which the law, in certain cases, requires. As a rule manifestation is free, so that the solemn form is only required exceptionally. The free forms may be either express or tacit: express are all those signs assigned by nature for the manifestation and communication of ideas, i.e. words, writing and gestures.

The oral or written manifestation of ideas may be both mediate and immediate. Immediate is that which takes place between' persons who are in each other's presence and who understand each other directly by means of speech. Mediate is that which takes place between absent persons, or even between persons who are in each other's presence but who cannot understand the language spoken by the others. Oral manifestation or communication of ideas is mediate when it takes place

by means of an interpreter, mandatory, or by means of the telephone, telegraph, etc.

Tacit forms of manifestation are all those positive or negative acts, which though they are not so destined for the manifestation of ideas, implicitly how that the person who performs them wants to bind himself or to contract. Whether a positive act implies such intention or not depends on the circumstances of each particular case and the decision is necessarily left to the person who has to judge.

The negative act from which the manifestation of the will may be deduced can only be a reserved silence. On this matter there are two conflicting texts: "qui tacet' non utique fatetur" (Lex li|2, dig. De Regulis Juris, E. *50*, Tit. 17), and "qui tacet consentire vldetur" (Causa 43, De Regulis Juris).

These two texts are reconciled by doctrine in the following proposition: "qui tacet cum locui potuit et debuit consentire videtur". The meaning of silence is therefore a question of fact: in every case it is necessary to see .whether the person could or could not make his consent manifest, and whether he was bound to do so or not.

Consent when made known must conform with the internal act of volition. If it differs we would have a declaration without an effective act of volition to which it should correspond. To determine the consequence of such a difformity it is necessary to distinguish whether such difformity is voluntary or involuntary •. It is voluntary when one or more, of the contracting parties wilfully and deliberately declare an intention which actually does not correspond to their true intention. This would amount to simulation: such a e.g. a person who feigns to enter into a contract and, manifesting an intention of so doing, does not in fact intend to contract at all; or, when the parties intend, to enter into a certain contract, but contract another instead, e.g. when a contract of sale is contracted by the parties which is in fact intended to be a donation.

Involuntary difformity may be due to duress:' i.e, a person under the influence of a "vis" or of "metus" consents externally, but internally he, does not consent. It may be also due to a mistake in the manifestation of the intention. Duress is a vice which destroys consent when the conditions required by law concur. An error consisting in the use of imperfect expressions or signs is not a vice of the will which is presumed to

exist; however, as there is a mistake in the manifestation it is reasonable that such mistake be clarified by means of interpretation, in order to conform the external manifestation with the internal act of volition. If it can thus be ascertained what the time intention of the parties is, the contract holds good; if not, it must remain without effect.

3, Identity between the acts of volition of the contracting parties. — The parties must be of one mind, otherwise the different wills cannot be united. Disagreement is therefore always an obstacle to consent when it refers to some substantial element which is important with regard to the benefit or to the burden which the parties intend to derive or to assume by the contract. If, on the other hand, the disagreement is not apt to increase or diminish such benefit or burden, it is indifferent and does not affect the consent. Therefore, the consequences of disagreement are mainly a question of fact which has to be resolved in each particular case according to the importance of the element on which the parties disagree.

But there are certain disagreements which are a constant obstacle to the formation of consent, because the element to which they refer has a decisive importance on the benefit or burden which the parties have in mind. They are:-

a) Disagreement with regard to the contract, such as if one party intends to give a thing on deposit, and the other intends to receive it on lease;

•b) Disagreement with regard to the performance or performances which are to be the object of the contract: "si de alia re stipulare senserint, de alia promisso, perinde nulla contrahitur obligatio; ac si ad interrogaticnem responsurn non esse" (par. 20. inst. De inutilibus stipulationibus, E, 3 Ch. 20).

c) Disagreement on the quantity of the "praestatio". Ulpian and Paulus hold that in such a case .here is consent for the lesser quantity, because the greater amount includes the lesser. Gaius held that there is no agreement either with regard to the greater or to the lesser quantity, and Justinian confirmed this : "preterea inutilis est stipulatio si quis ad ea quae interrogatus fuerat non respondeat, velut si quis decem aureos a te dari stipulatur et quisque promittas vel contra" (Inst. p.5).

Now-a-days it is common teaching to distinguish according to whether it may be said, while respecting the intention of the parties, that the parties agi as to the lesser quantity or not. In the first case disagreement is no obstacle to the formation of consent; otherwise there is no consent.

d) Disagreement on the juridical modifications of the obligation, such as on solidarity or otherwise or on the modality of the contract, is an obstacle LC consent. "Cum adicit aliquid vel detrahit obligationam semper probandum vitiatam esse obligationem.' (Dé Verborum Obligationem, B. 1, Par. 3, Dig. B. 45, Tit, 1).

e) Disagreement on the number of persons is an obstacle to consent according to whether the parties want individual or partial offers and acceptances, or it is their intention to form a contract between all those who offer and those who accept.

I. Union between the different wills. — This takes place when the will of one party is united to that of the other, because it is only when there is unison between the two wills that consent becomes so binding that it is not lawful for the parties to revoke it. Consequently :

a) A proposal does not bind the person who makes it but can be freely withdrawn as long as it is-not followed by a declaration of acceptance by the person to whom it was made. If the proposal consists in a promise this does not bind the promiser until it is accepted. And during the interval between the proposal and acceptance he can freely revoke it, unless of course the proposer has granted the person to whom it was made a time-limit in which to decide.

b) If the proposer has fixed a term, an acceptance of the proposal, after the lapse of such term is useless because there is no longerany proposal to which it can be united. Similarly, if, though no term was fixed, a long time has elapsed since the proposal was made, it is presumed that the person to whom it was made does not want to accept it.

c) The same thing maybe said with regard to an acceptance made after the death of the proposer, who dies without having revoked his proposal. He dies before his proposal has become binding, and, therefore he dies free from any obligation. Nor in such case

can the person to whom it was made bind the heirs of the proposer by accepting it, because the decujus had no obligations, and, therefore, could not transfer any to his heirs.

d) Similarly, in case the person to whom the proposal was made dies before he accepts it: his heirs cannot accept it in order to bind the proposer, because the heirs succeed in the rights of the decujus, and in this case the decujus had not acquired any right; therefore, the proposer need not revoke his proposal because this ceases to have any effects on the death of the person to whom it was made.

The moment in which the Contract is concluded.

It is very much debated whether, in order that the union between the wills be perfect, the reciprocal knowledge of the will of the other party is necessary; in other words, whether each of the parties must come to know of the intention of the other, in such a way that until this takes place the consent which binds the parties is not irrevocable.

That the will of the proposer must be known to the person to whom the proposal is made, is obvious. The question, therefore, resolves itself into the necessity or otherwise of informing the proposer of the intention of the other party. This question can only arise in case of a contract between absentees, because in case of persons who are present the answer is made known to the proposer as soon as it is given.

According to the prevailing opinion, in order that consent be perfect, such knowledge is necessary, so that a declaration that the proposal is accepted made by the person to whom such proposal is made is not enough, but it must be made known to the proposer. This system is known as the system of information, according to which the proposer must have been informed of the acceptance before consent becomes binding.

• However, there are other systems:

a) System of declaration, according to which the simple manifestation of the intention is enough, *even* though the declaration is not made known to the proposer. The basis of this system is that as soon as the declaration is made there is an objective co-existence and agreement of two wills, and it is this which constitutes consent.

b) Another system (of transmission) requires that the person to whom the offer is made has declared his intention of accepting it and has sent such declaration to the proposer. The fact that he has sent *it*, the followers of this system say, makes his acceptance definitive because he has dispossessed himself of it.

c) System of reception, which requires that the letter or note containing the acceptance be received by the proposer, i.e. that it be consigned to him or to another person in his stead or at his home or in the place where he carries on his business, or at his office, without it being necessary that the proposer know about it. It may be said in favour of this system that it is only such reception which completes the acceptance and which deprives the person who sends it of any power over its communication.

d) The system of Grotius, who distinguished between unilateral and bilateral contracts: he held that in the former a declaration of acceptance is enough, whilst in the latter the proposer must be aware that his offer has been accepted.

e) System of Windscheid, who held that* with regard to the proposer consent is perfect as soon as the other party declares that he accepts, but as to the latter his consent is only perfect when his acceptance is made known to the proposer.

f) System of Giorgi, who made a distinction between three cases according to the contents of the proposal:

(i) if the proposal is a mere promise, so that the answer would be a mere acceptance, the consent is perfect as soon as acceptance is declared. The reason is that in this case the answer does not add any obligation to the proposer.

(ii) if the proposal is a mere acceptance of a future promise, i.e. it is a demand of a promise, so

that the reply would contain such a promise, then the declaration of the offerree is not enough, hut it must be made known to the proposer, on the ground that there cannot be an acceptance before there is a promise.

(iii) in the case of a bilateral contract, Giorgi follows Windscheid, according to whom consent, as to the proposer, is perfect as soon as the offeree declares that he accepts, and as to the offeree it is only perfect when his acceptance is communicated to the proposer. The reason is that a bilateral contract produces obligations in both parties, and in order that an obligation may arise in each of the parties the acceptance of one party must be united to the intention of the other party of binding himself.

The system of information without distinguishing between bilateral and unilateral contracts is theoretically the more correct, because, in order that the wills may be said to be united it is not enough that they have been externally manifested, but it is furthermore necessary that the manifestations themselves be united, and this implies that they must exist externally vis-a-vis the other party, which is not possible unless the intention of each be made known to the other.

However, in practice, this system presents serious obstacles, both because it may lead to consequences detrimental to honest trade and because it gives a longer time to the proposer than to the offeree in which to revoke his declaration, and, moreover, in certain cases, it makes the existence and the perfection of the contract difficult to prove.

The rigour of this system, however, is mitigated by authoritative doctrine and by several legislations (see Art, 30 of the Italian Commercial Code) by imposing on the proposer or on the offeree who revokes his declaration after that the other party has begin to execute the contract, to make good the damages, and by means of the rule that from' the moment in which the communication of the acceptance reaches the residence of the person to whom it is sent all the risks of the delay in becoming aware of it and all risks of the loss are at his charge, or, in other words, it is presumed that he knew of the reception of such communication (Art. 3, para. 5 of the Project of the Franco-Italian Code of Obligations).

Defects of Consent. .

The defects of an act of volition, whether with reference to a contract or to any other voluntary acts, are: error, fraud, and violence. We shall now consider separately the conditions which are necessary in order to invalidate consent in such a way as to render the contract' null or voidable»

1. Error. — Error is the difformity between an idea and Its object: it is a false notion of a thing» In order that error may vitiate consent, it must be determining and excusable,

i) It is determining and substantial when the person who gives his consent would not have given it had he known the truth, i.e. had he a correct idea of the thing. Otherwise, that is if he would have equally consented even if he had a correct idea of the thing, the error is indifferent, since the person who consents cannot say that he would not have done so had he known the truth»

ii) Moreover, it must be excusable, otherwise he would simply have to blame himself, and it should not be lawful for him to evade the execution of the contract and to deprive the other party of the advantages acquired by means of the contract. Besides these conditions, Roman Law required that the error be relative to the act, and, as a rule, error of law was not an excuse: "regula est juris quidem injorantiam juris cuique nocere".(L. IX D, De Juris et facti injorantia). This rule is based on the maxim "nemini licet jura injorare". In the case-law of common law, and in modern Codes, even error of law may vitiate consent if it is determining, i.e, if it is the sole and principal cause (Section 1013),

Let us apply these rules to the most important kinds of error.

Error of fact is any error which does not refer to a provision of the law, and includes errors with regard to the nature of the contract, with regard to the object, to the quality of the object, to the motives which induce a person to enter into a contract, and to the person of the other contracting party.

We have already said that an error which refers to the nature of the contract is an obstacle to consent;

error "in ipso corpore" (on the identity of the object) vitiates consent; for example, if I accept to acquire tenement A when I believe it to be tenement B.

As to error with regard to quantity of the object, according to an old rule of law, we have to distinguish between substantial error ("error in substantia") and accidental error ("error concomitans"), i.e. according to whether the error refers to a substantial or to an accidental quality of the object.

By "error in substantia" the Romans meant a mistake as to tue physical nature of the object, such as if copper were bought instead of gold, or a male instead of a female slave; and it was at first controversial whether such an error vitiated consent; but Ulpian and Paulus decided the question in the affirmative and their decision was approved by Justinian: "quoties in substantia erratur nuilus est consensus" (L. IX, p. II and L. X, Dig. *Vs* Contrahenda emptione, B. 18, Tit. I). "Error concomitans" included any error with regard to all other qualities of the thing: "aliter atque si aurus emit autem quam emptore existimavit tunc enim emptio valet".

This distinction is accepted by Section 1019 : "an error of fact shall not void the contract unless it affects the substance itself pr the thing which is the subject matter of the agreement (or the substantial qualities of the thing). However, the criterion according to which we distinguish between substantial and accidental qualities is not that of Roman Law, because we now adopt a subjective criterion which depends upon the way in which the parties, and especially that party who has been deceived have considered such quality. "The reason is that a quality which is not important for one person may be so for another, and may be also important with regard to the purpose for which such person has acquired the thing.

As to error with regard to the motive, it is an estabished principle that it does not vitiate consent, because it would be prejudicial to the good faith of the parties and detrimental to the stability of contracts if an error of this sort could invalidate a contract.

Error with regard to the person of the other contracting party does not, as a rule, vitiate consent,

because it is as a rule indifferent whether a contract is entered into with one person or with another. However, it does vitiate consent if the consideration of the person of the other contracting party was the sole or the principal inducement to contract (Section 1019).

2, Violence -- Violence may he physical or morale It is physical when it is effected by means of external force; it not only vitiates consent, but it exeludes it altogether, because a person who consents in this way cannot be said to be the author of his own act, but simply an instrument in the hands of another person. The provisions of the law. therefore, refer only to moral violence or duress; because when the law requires consent as an element of contract, it is inferring the principle that physical violence exeludes the possibility of contract.

Moral violence or duress acts upon the mind of the contracting party, and inspires such a fear of a future evil as to deprive him of his liberty of choice. a Duress vitiates consent if three conditions concur; it must be unjust, grave and determining

i) If duress is not unjust but consists simply in a instance of exercising one's right a against another person, it does not cause any damage within the meaning of the law: "qui suo jure utitur non videtur injuram facere".

ii) Duress must alao be grave: "vani timorio justa oxoucatio non est". In Roman Law duress was grave when it was such that it could shake a a dauntless man : "matus qui merito et in hominem constantissimum cadat" (B. VI, Dig. Quod motus causa, B. 4, T. 2). This rule, in intermediate case-law and especially in Canon Law, was not applied "ad litterem", but it was considered that consent was vitiated even if the duresss was such as to affect a person who did not lack courage, but who need not be as dauntless us Roman Law required: " metus qui cadet in constantam virum" It is obvious that this system which regards violence as an abstract thing is not reasonable, because in order to judge whether consent has or has not been the result of duress without which the victim would not have given his consent, we must not consider man in the abstract but should take into consideration the person against whom duress id directed. Otherwise, this rule would betray its own object which is that of protecting those persons who are weaker and more liable to affected by the threats of others. On the other hand,

we cannot likewise take into consideration excessive cowardice. According to Section 1021, duress must be "such as to produce an impression on a reasonable person and to create in such person the fear of having his person or property unjustly exposed to serious injury". However, in applying this criterion, the same Article goes on to say "the age, the sex, and the condition of the person shall be taken into account" (Section 1021, sub-sect. 2).

iii) Duress must be determining, i.e, such that without it the victim would not have consented: "quod si liber esset noluisset".

These are the conditions which are required in order that consent be invalidated through duress, and it is indifferent whether it comes from the other contracting party or from a third person, because in any case the fact still remains that as a result of duress the victim was not free in choosing. The only exception is the case of a promise of remuneration made by the victim to the person who would free him from duress; in this case the promise is valid, because although there has been violence it was not the efficient cause of the promise but only an accidental cause. However, if the premise is excessive, the person who makes it may demand its reduction to a just measure, regard being had to the importance of the help given by the other end of all other circumstances, especially the value of the estate of the promisor. It is hardly necessary to say that this rule does not hold good in case the person to whom the promise is made is an accomplice in the violence.

Duress is a defect of consent not only 'when the threat of serious injury is directed against the person or property of the victim, but also when it is directed against persons dear to him, such as the spouse, ascendants and descendants, or to their property. In case of other relatives or friends it is left to the discretion of the Court to decide 'whether there has been such violence as to vitiate consent- On the contrary, mere reverential fear towards the father, mother or other ascendants, or towards the husband, is not in itself violence (Section 1023)»

3. Fraud or Dolus -- "Dolus malus est omnis calliditas fallacia, machinatio ad circumveniandum, fallendum decipiendum alteram adhibita" (L. 1, Dig. De Dolo malo, B. 4, T. 3). Fraud is, therefore, that artifice, deceipt or simulation which is made use of

by one of the contracting parties in order to deceive the other and to induce him to enter into the contract. In order that it may invalidate consent: i) it must consist in fraudulent artifices or machinations; ii) it must be grave; iii) determining, and iv) practised by the other party,

1) Fraudulent artifices are all those means which are made use of with the knowledge that they are false and which are apt to make an individual mistake one thing for another.

2) Dolus is grave when the machinations are such as to operate on a reasonable person, and they must exceed that sort of simulation and reticence which is usual in commerce and which is therefore allowed.

3) Dolus is determining when it has such an influence on the mind of the contracting party as to deceive him and induce him to consent, when, without these artifices he would not have consented. If the dolus is not apt to have such an effect, it is known as incidental dolus.

4) Differently from violence which vitiates consent if practised by a third party, dolus proceeding from a third party without any participation of the other contracting party is not sufficient to invalidate the contract. The reason for this difference between violence and fraud is controversial ; but it is generally based on social convenience, because violence is always a verv grave violation of social order, whilst dolus is not always so, and it would net be just if the other contracting party who has had nothing to do with the fraud exercised by the third party, were to be deprived of the advantages accruing from the contract. Of course, this does not prevent the contract from being impugned, in case the conditions concur, on the ground of error.

"Fraud is not presumed but must be proved" (Sect. 1024 (2)). The legislator felt the necessity of laying down this principle because in Roman Law dolus was in certain cases presumed, and it was then known as real dolus ("dolus in re Ipsa") to distinguish it from personal dolus, which had to be proven, This distinction has been done away with, and fraud must always be proved: in this sense it is always personal.

Effect of the Defects of Consent.

The effect of the defects of consent is the nullity or the voidability of the contract, which may be impugned either by means of an action or by means of an exception, according to whether it has or has not been executed already.

Simulation — When dealing with the conformity between the internal act of volition and its external manifestation, we stated that a voluntary cause, i.e. a cause due to the will of the parties themselves, may prevent such conformity. This wilful difformity is called dimulaticn, and it is defined as the wilful and deliberate contradiction between the will in its internal formation and in its external manifestation.

With, regard to its extension, simulation may be either absolute or relative:

It is absolute when the parties do not in fact want to constitute any contract whatsoever, but simply feign to enter into a contract externally; such as, e.g. a debtor who, in order to elude the rights of his creditor, sells his property to a third party with the intention that the sale be fictitious: "colorem habeas, substantiam vero nullam".

Simulation is relative when the parties intend to enter into a certain contract, but they give it the appearance of another contract; such as, e.g. if both parties intend to enter into a contract of donation. and they simulate a sale: ''colorem habens, suostantiam vero alteram". The true contract is said to be veiled or concealed or disguised.

With regard to its scope, simulation may be fraudulent or innocent. It is fraudulent when it is intended in order to elude the law or the rights of third parties, such as, e.g. a person about seventy years old who wants to give in donation an object which exceeds £50 in value, who gives to his contract the appearance of a sale.

It is innocent when it is not intended to elude the law or the rights of third parties, such as, e.g. a parent who, on the occasion of his daughter's marriage, bestows on her a dowry of £5,000 simply for purposes of ostentation, when everybody knows that a dowry was never given.

Effects of Simulation. — In case of simulation, the rule is that the truth prevails over appearance: "plus valet quod agitur quam quod simulate concepitur (Cod. L. IV, Tit. 22), In case of absolute simulation, therefore, the contract does not hold good with regard to what is only an appearance because it does not correspond to the will of the parties, and it can neither hold good for any other effect because it contains nothing which exists in reality: "nihil actum est".

Similarly, in case of relative simulation, reality prevails over appearance, and the relations which exist between the parties are those which have been disguised, not those which are apparent. However, this rule does not ensure the validity of the real contract in every case, because this validity depends on other circumstances : in fact, if simulation is fraudulent and the true contract has for its object or cause something which is prohibited by law, it can never subsist as a simulated contract.

3. Object.

Strictly speaking object of contract means that which is given rise to by means of the contract, and since a contract aims at creating, regulating or dissolving an obligation or at transferring a real, right, it is this which should constitute the subject-matter of contracts. But in positive law, by object or subject-matter of contracts we mean that which one of the parties gives or promises to give or to do or not to do in favour of the other party; and in bilateral contracts that which each of the parties gives or promises to give, to do or not to do in favour of the other.

Anything may form the object of contracts, including the act of man whether positive or negative. All things may therefore form the object, whether movable or immovable, corporeal or incorporeal, present or future, and even the use and the possession of a thing may be the object of contract just as the thing itself.

Even future things, such as future produce or trees may form the object of contracts, and in this regard we must distinguish according to whether the object which the parties have in mind is the future thing itself or merely an expectancy of the future

thing? i.e. as the Romans used to say "pactum de re sperata" and "pactum de spe vel alea". , The practical importance of the difference is this: in the "pactum de re sperata" if the future thing does not come into existence the contract remains without an object, and therefore, for example in the case of a sale, the purchaser would not be bound to pay the price, because in this case there is no contract owing to the lack of an object, or, as Section 1421 says, the contract is regarded as conditional, i.e. subject to the suspensive condition consisting in the future existence of the thing.

In case of a "pactum de spe" there is the possibility of the inexistence besides that of the existence, and in this case it is indifferent whether the thing comes into existence in whole or in part or not at all, because even if the thing never comes into existence we cannot-say that there is no contract owing to the lack of object, since the object is only the actual expectancy in the future existence of the thing and the actual risk of its inexistence. The sale, therefore, in this case, is not conditional, but stable from its very outset, i.e. it is a sale of the risk and expectancy in the future thing. In case of doubt as to whether the parties meant to enter into one or the other of the contracts, in case of sale, Section 1421 lays down that it is to be presumed that the object of the sale is the future thing itself, i.e. the sale is presumed to be conditional; extending this principle to all contracts, we may say that in doubtful cases the agreement should be considered to be "de re sperata" and not "de spe".

Requisites of the object of contracts. — As a rule the object or contracts may be anything which is chosen by the parties, because just as the law protects and sanctions the liberty of the citizen in general, it also protects and sanctions this liberty in contracts. Any limitation therefore to the liberty of the contracting parties with regard to the object of the contract is only justified by the necessity of preventing an abuse of such liberty.

The requisites of the object of contracts are the same as those of the object of obligations in general. The object of contracts, therefore, must be: possible, lawful, "in commercio", specified or such that it may be specified, and useful to the creditor.

Possible - means physically possible, so that a thing or an act which- is physically impossible cannot form the object of a contract»

Lawful - means morally, juridically and politically possible: in other words, it must not be something which is prohibited by law, or contrary to morality, or to public policy (Section 1028), Thus, the object of the contract of play and betting is unlawful because it is contrary to morality: such contracts are considered void by the law, and with regard to them the law grants no action. Among the agreements prohibited by law. Sections 1027 and 1029 mention stipulations with regard to a future succession, stipulations "quotae litis", and usury.

Stipulations with regard to future successions are those which' have for their object the future inheritance of a living person. The law has always regarded such agreements as immoral and it has therefore always prohibited them, because it perceives in them the danger that they might kindle the desire of seeing the death of the decujus accelerated, in other words, because they contain what is commonly known as "votum captandae mortis". Any contract having such an object is therefore void, whether it is the decujus himself who binds himself to leave his property to a certain person or it is entered into by two or more persons different from the decujus, with or without his consent, such if a legitirante heir or one who hopes to$_i$ be a testamentary heir, renounces his inheritance in favore' cf a third party.

However, there are other exceptions to this prohibition, namely, renunciations to future successions and certain contracts containing a promise of a future succession, made in contemplation of marriage, and a renunciation to future succession made by a monk on entering into monastic life.

Stipulation "quotae litis" is that agreement by means of which one of the parties in a suit promises to another person extraneous to the suit a part of the benefit deriving from the suit, in case of favourable issue: e.g. a person extraneous to the suit pro-, mises to pay the expenses and the party to the suit promises to give him in return a part of the object of the suit in case he wins. These agreements are regarded as immoral because they provoke litigation.

Usury is an agreement to pay interest at a rate exceeding (illegible); such an agreement is not absolutely void, but the excessive rate of interest may be reduced to the legal limit, i.e. it is null as regards the excess.

The object must be "in commercio", i.e. it must •be apt to form part of the estate of an individual. Things "extra commercium" are those which are destined to be used in a may incompatible with trade; but as soon as such a destination ceases, they become again "in commercio", and they may therefore form the object of a contract.

The object of contracts must be specified, because otherwise the debtor could easily evade his obligations by making an illusory performance. Such specification may refer either to a particular thing or to the class to which the object belongs. In the first case the object is said to be certain and determinate, (in Roman Law it /was called "species") ; in the second case the object is generic (in Roman Lav/ "genus"), and in case of a "genus fungibilis" which in juridical relations is regarded as a certain quantity, it is then known by the name of "quantity". This kind of relative specification is sufficient, because although the "genus" and not the particular thing is laid down in the contract, there are means, either agreed upon by the parties themselves, or, in case they may not have been agreed upon, supplied by law, by which the particular thing to be performed may be determined. When the contract has for its object a part of the thing or a quantity, such part or quantity must be also specified or such that it may be specified by the means established by the parties or by the law.

Finally, the object must be useful to the creditor, because it is obvious that a person is never interested in the performance of an obligation which is not useful to him. This utility need not be material: a thing which is not useful in itself may have a sentimental value, but it must have at least an indirect influence on the estate of the person and be such that it may be valued in money (Giorgi, Delle Obbligazioni, Vol. III, par, 410). However, there is a tendency in foreign doctrine and case-law to regard a moral interest in the thing which is the object of the contract as sufficient, even if it cannot be valued in money (Planiol et Ripert, Voi. VI, para. 221).

4. Cause. — (Consideration) --

Bonfante, in his "Il contratto e la causa del contratto", of which an extract is published in Vol. III of the Collection "Scritti Giuridici Vari", says that this element of contract is the most discussed problem of modern law, and is still unsolved. Bonfante wrote this in I908. but it does not seen that jurisprudence has nude much progress since then; in fact, Planioi et Ripert in their treatise on Civil Law admit that the notion of "causa" and the value and use of this notion are still the object of lively controversy; so much so, that there are writers known as the "anti-causalistes" who hold that, to require this fourth element is to require a fourth side in a triangle. However, we cannot regard this element as inexistent since we are trying to explain positive law, which explicitly requires it (Section 1050); and among the explanations which have been attempted the most reasonable seems to be that suggested by Planiol et Ripert, according to whom the notion of "causa" includes two distinct notions:

i. the consideration of reciprocal performance by each party in onerous contracts, and the spirit of liberality in gratuitous contracts;

ii. the unlawful motive which may render any agreement void.

1. A). Causa as the consideration in onerous contracts.

In onerous contracts "causa" is the consideration in view of which each of the parties binds himself. Such consideration may have already been effected at the moment of conclusion of the contract, such as e.g. if a person binds himself to return a thing or a sum of money which he has already received on loan, or on lease, deposit or pledge.

The consideration may be effected at a future date when it consists in a conditional performance: this is the case in bilateral contracts, with regard to which it is usually said that the obligation of one party has for its "causa" the obligation of the other party.

This fact has induced some writers to maintain that it is useless to talk of "causa" in bilateral contracts, because, whenever we talk of the inexistence

of "causa" or of an unlawful "causa", there is always at the same time an inexistence of object or an unlawful object: thus, if a thing sold does not exist, the inexistence of the object is sufficient to explain the invalidity of the sale both for the seller and for the purchaser. But this criticism does not stand to reason, because the inexistence of the object promised by one of the parties in the sale does not imply that the obligation of the other party is devoid of all the elements necessary for its validity, since the object of the obligation of the purchaser is the price. Moreover, the followers of this theory are compelled to reconsider their own arguments, and they bring forward in further support of their theory the connection between the obligations which arise from bilateral contracts, in which each of the parties only binds himself in view of what he obtains in return. This is the so-called "rule of correlatives", which in the last analysis is no more than the application of the theory of "causa" itself.

1. B). Causa in gratuitous contracts.

In gratuitous contracts the party who binds himself does not stipulate any consideration in his favour, and, therefore, in such contracts the intention of performing an act of liberality or of bounty takes the place of the intention of obtaining such consideration. Generally speaking such intention remains unobserved because it is beyond doubt; but it is of great importance in case of an obligation the "causa" of which is either simulated or found to be false, because in this case if the creditor, in order to justify his claim, asserts that the obligation is a disguised act of liberality, he must prove that the other party had the "animus donandi".

2. Unlawful "causa". — The nullity of obligations having an unlawful object is not sufficient by itself to protect those higher interests the respect of which must be sanctioned by law, because if it is correct to say that the obligation of the party who should perform an unlawful act in view of the remuneration is null because the object is unlawful, on the other hand the obligation of the other party of paying the remuneration promised has no such unlawful object, since payment of a sum of money is not in itself unlawful.

It is true that as long as the obligation of performing the unlawful act is not fulfilled - and its

fulfilment cannot be enforced - the obligation of paying the remuneration cannot arise because it has no "causa"; but the party who had promised the remuneration cannot invoice in his favour the inexistence of the corresponding performance if the unlawful not is effectively performed. Morality, however, cannot tolerate that a person be entitled to demand renuneration for having performed an unlawful act or for having abstained from doing something which he was bound to do by reason of his office.

It follows that obligations of this kind cannot be annulled unless we regard the unlawful character of the scope which the parties have in mind as the ground for nullity. With this as a starting point, and developing the same theory with regard to the nullity of obligations whether it be due to inexistence of "causa" or to unlawful "causa", the "causalistes" perceive in this element the scope which the parties have in mind. But, in order not to allow too easy an access to the action for nullity on the ground of inexistence of "causa" they have distinguished between "causa" of obligations properly called, and the actual motives which may induce the parties to contract; by "causa" in its proper sense they mean the consideration which each of the parties stipulates or receives from the other in onerous contracts and the intention of liberality in gratuitous contracts; and by actual motives they mean the use which each of the parties wants to make of the thing received or of the right stipulated. Thus, for a person who acquires a cutting instrument, the "causa" of his obligation is always and only the acquisition of the instrument, but ,the actual motive may be either that of committing a crime or of cutting a piece of meat.

Taking the "causa" of obligations in this sense, even with regard to unlawful or immoral conditions, it_would follow that obligations of this kind, the annulment of which is required' by morality, cannot be annulled. Thus, a loan made by a person who knows that the sum loaned is to be used by the debtor to acquire a brothel would not be null, because the parties do not intend to subordinate the validity of the loan to this specific use of the sum loaned, and it cannot, therefore, be regarded as the "causa" of the contract.

But in order that the theory relating to unlawful "causa" may have those effects which it should have in conformity with tradition and with the principles of positive law, it must be kept distinct from the theory

relating to the inexistence of "causa", otherwise it would, he wrong to" affirm that the validity of an. obligation is subordinate to the lawfulness of the scope which the parties have in mind.

To conclude, by "causa' in the theory relating to the inexistence of "causa" we must understand the immediate or direct scope which the party who binds himself has in mind, and which is identical for all those who take part in contracts of the same nature: thus, every purchaser intends to acquire a thing, every seller intends to receive a sum of money. In this theory we must therefore exclude any ulterior scope which the parties might have in mind, and also the possibility or otherwise of its attainment.

On the other hand, in the theory relating to unlawful "causa", by "causa" we must understand any unlawful scope which the parties have in mind when they enter into the. contract. As to the question whether a contract may be annulled on this ground only if both parties know that the "causa" is unlawful, we must distinguish between the following hypotheses: the party who aims at an unlawful object cannot refuse to fulfil his obligation to the detriment of the other party who is unaware and who is therefore in good faith. On the contrary, the right of demanding the annulment of the contract must be granted to the party who, after the conclusion of the contract, becomes aware of the unlawful scope of the other party, because in this way another obstacle is made to the realization of unlawful scope.

Theory relating to the inexistence of "causa". — "Causa" may be inexistent either because it never existed or because it was related to some future event which never materialized, or because it ceased to exist.

"Causa" is wanting from the very moment in which the contract is entered into when the particular thing promised by one of the contracting parties does not exist at that moment, or is "extra commercium", or when the promiser binds himself not to perform a given act which had in fact already been performed, or when the promiser binds himself to do something beyond human possibility, or when a person binds himself in view of a performance which he believes already to exist, whilst in fact there has been no such performance or no pre-existing obligation. In hazardous

contracts there is lack of "causa" when there is no risk, in compromise when there is no uncertainty with regard to the issue of the law-suit. "Causa'[1] is related to some future event in the "pacta de re sperata": if the future thing does nos come into existence, so that the party who has promised it cannot fulfil this obligation, the "causa" of the obligation for the other party ceases to exist.

"Causa" may also cease to exist after the conclusion of the contract, in which case it is obvious that the contract cannot be regarded as null ; but the fact that thè obligation is not performed, which implies the inexistence of the consideration of one of the parties, must also entitle the creditor of such consideration not to fulfil his obligation, because justice demands equality between the parties and good faith does not allow one party to demand the fulfilment of the obligation by the other, when he himself does not fulfil his own. This shows that, properly speaking, "causa" is not only the promise of a performance made by the other contracting party, but also the fulfilment on his part of the obligation. So that, in successive contracts such as in lease, or in letting and hiring of labour, or in emphyteusis, the contract remains without "causa" as soon as the object of the contract perishes, or as soon as it becomes impossible for one of the parties to continue the execution of his obligation.

When "causa" is wanting from the very moment in which the contract is concluded, the contract is null with regard to the party whose obligation is left without a consideration. As to "pacta de re sperata", we have already stated that the law regards them as . being subject to the condition of the future existence of the thing, and therefore, they are governed by the rules and conditions of contracts and obligations.

In successive contracts, if the "causa" ceases to exist after the formation of the contract, the contract is dissolved for the future.

In connection with this theory, it is usual to deal also with false "causa" whether it be due to error or to simulation. In this regard the rule laid down by Section 1032 is important: "When the consideration stated is false, the agreement may, nevertheless, be upheld, if another consideration is proved". So that falsity vitiates "causa", and therefore also the

contract, only in so far as there is no true "causa".

Action and Exception of Nullity of a Contract cn the ground of an Inexistent, False or LnlcnyfuL "Causa".

The nullity of a contract on the ground of these vices may he demanded either "by means of an action, known as "action for nullity or of annullability", or by means of an exception which the law sometimes calls exception of nullity and sometimes exception of rescission.

In case the contract has been executed in whole or in part, the effect of rescission consists in the obligation of both contracting parties of returning what they may have received. This rule is modified when applied to the vice of unlawful "causa": here it is necessary to distinguish according to whether the contract having an unlawful "causa" has or has not been executed. If it has not been executed it produces no effects whatsoever, i.e. it does not give rise to any action for demanding execution; if it has been executed only in part it does not give rise to any action for the execution of what remains to be done or be given; and, therefore, in case it has been executed in whole or in part,- the difficulty which arises is whether, after the contract is rescinded, the restitution of what has been given may be demanded.

Both in Roman Law and in our own, a distinction is made according to whether the unlawfulness of the "causa" was only known to the person who receives or also to the person who pays the remuneration : if the "solvens" is innocent, he may claim back what he has given, but if he is an accomplice, i.e. if the violation of the law or of morality or of public order has been committed by him as well, then he cannot claim it becuase "in parti turpitudine melior est conditio possidentis". In this way the accomplice in the act cannot demand the execution, nor can he claim back the remuneration which he may have paid; by this means such agreements are rendered more difficult, because the parties can never be certain that their reciprocal obligations will be fulfilled, since such obligations are not in any way protected by the law and the parties must therefore rely on their reciprocal good faith. Therefore, the payment made to a person who binds himself to fulfil his duty or to abstain himself from committing a crime cannot be claimed back. This rule suffers the following

exceptions :-

i. If the "solvens" is a minor he may recover the sum paid or the thing given even though he knew of the unlawfulness of the "causa". The law has to protect minors from the consequences of their own thoughtless acts.

i. The loser at a game may recover from the winner the sum or thing which he has already paid to him within two months from the day of payment (Section 1810).

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BXTERNAL REQUISITES 0F CONTRACT.

The form of contract is as a rule free, and the parties may make use of any form and degree of solemnity, or even omit all formalities, manifesting their consent merely by word of mouth or even by gestures. However, there are cases in which the law requires certain conditions and certain formalities by which consent is to be expressed. These formalities are called solemn, because they consist in certain solemnities imposed by the law. The reasons for which the law requires them are various, such as, for example to warn the parties of the seriousness and importance of their action, or of the consequences which it may have on their estate.

By imposing these formalities, the law also ensures a greater reflection by the parties and a mere mature deliberation, before they bind themselves by the contract. Another object of the law may be that of ensuring the best evidence both as to the existence and as to the contents of the contract, obligation or right which the parties wanted to create by means of the contract itself; or to provide for the protection of third parties by means of the publicity of the act which has to be registered in the Public Registry, and which, therefore, has to be drawn up in a public form, since this is a prerequisite of inscription. In brief, the solemn form is required in the interest of the parties or of third parties, or of both.

The solemn form which the law requires, is either a public deed or a private writing. Public deed,

according to Section 1276 is not only that instrument drawn up or received by a public notary, but also that which is drawn up or received, with the requisite formalities, by any other public officer lawfully authorized to attribute public faith thereto* Thus, in judicial sales by auction and in limitations of immovables, the adjudication received by the registrar is a public deed which corresponds in all respects to a sale made before a Notary.

The contracts with regard to which the law imposes the most solemn form, i.e. the public deed, are those which effect the transfer of immovables whether ownership or- any other real right over such immovables be transferred, whether the title be sale or exchange, and whether.the contract constitute an annuity, or a donation, or emphyteusis, or usufruct, or right of habitation, praedial servitude, etc. Moreover, donation must always be made by means of a public' deed, even when it has movables for its object; and so also must marriage settlement.

There are other cases in which the law is satisfied with a less solemn form, i.e. with the private writing; of course the parties may even in this case, make use of a public deed. Such are assignment of credits, rights and actions, the constitution of commercial partnership, charter-party contracts, and so on; saving that, for any of these contracts the law may in certain instances require a public deed: thus, e.g. the assignment of hereditary rights and of rights- constituted by a public deed must be made by means of a public deed.

Ordinance XIV of 1913 added a long series of contracts, which are now incorporated in Section 1277, which must, on pain of nullity, be expressed at least in private writing, saving the cases where the law expressly requires that the instrument be a public deed. They are : -

a) Any agreement implying a promise to transfer or acquire, under whatever title, the ownership of immovable property, or any right over such property;

b) Any promise of a loan for consumption or "mutuum";

c) Any suretyship;

d) Any compromise;

e) Any lease for a period exceeding two years in the case of urban tenements, or four years in the case of rural tenements;

f) Any civil partnership; and

g) For the purposes of the Promises of Marriage Law, (chapter 7) any promise, contract or agreement therein referred to.

Agreements implying a promise to transfer or acquire immovables as their object are not contracts which transfer ownership or other rights over immovable but only contracts by which the parties agree to transfer and to receive the immovable or the right over it; they are therefore preliminary contracts which have to be followed by the definitive contract, which, as we have already stated, requires the most solemn form.

Thus, also a promise of a loan for consumption or "mutuum" is a preliminary contract, and the law expressly requires' at least a private writing, whilst the definitive contract, i.e. the loan itself, does not require any such formality. This may seem unreasonable, but no formalities are required in the definitive contract of loan in order to protect the lender, because it would be unjust were the lender to be deprived of the right of demanding restitution of what he had given on loan simply because it had not been made in a public deed or in an private writing. Private writing is also necessary in suretyship, in order to ensure that the surety wants to warrant the obligation of another; and in compromise owing to the importance of the act by which the parties renounce to any protection they may have had. It is to be noted that in certain cases of compromise, such as if the dispute refers to immovables, the law requires a public deed; a public deed is also required for general partnership.

Private writing must be either signed by each of the parties, or attested by an advocate or a notary according to Section *634* of the Code of Organization and Civil Procedure (Cap. 15), which lays down that if a person cannot, or does not know how to write, he must set his mark which must be attested by an advocate or a notary together with a declaration that such mark has been set in his presence and in the presence ,of two witnesses, who must also set their signature, and together with a declaration that he has personally ascertained the identity of the persons setting such signatures or mark.

EFFECTS OF CONTRACTS IN GENERAL.

Here we must distinguish between two kinds of relations, i. e. those which exist between the contracting parties themselves, and those which refer to third parties.

I. The effects of contracts in the relations between the contracting parties are of three kinds:-

i, General effects;
ii. Effects with regard to the obligations which the contract is meant to give rise to;
ii. Effects with regard to the transfer of ownership or other real rights.

1. General Effects.

Contracts entered into according to law have the force of law with respect to the parties. They bind the parties reciprocally in the same way as the law binds all citizens. This principle is based on the theory of the autonomy of the will, which on its own creates rights and obligations. This theory had its, remote origin in Canon Law, which rooted deeply in man's conscience the respect to the word given; it was later confirmed by the philosophers of the natural school of law, and the Code Napoleon consecrated the principle of the omnipotence of contract interpreted as widely as possible by the partisans of Free Individualism of the nineteenth century.

Contract is therefore law for the parties, and just as a law may derogate another law, so may a contract, which may be considered as private law, derogate the ordinary law: "dispositio hominis tollit dispositionem legis". The contracting parties may by their agreement, i.e. by the contractual rule established by them, derogate the legal rule, both by substituting another rule or by not substituting anything; and they may do so as long as the prohibition of the law, or public policy or morality is not an obstacle.

The following are corollaries of this principle:-

(i) That the contract must be faithfully observed by the contracting parties, in the same manner as they are bound to observe the law.

(ii) That the contract cannot be revoked or modified except by the mutual consent of the parties, or on grounds allowed by law (Section 1035). There are cases in which a contract may, according to law, be dissolved by one of the contracting parties only: thus, a contract of letting of work may be dissolved by the employer at will; mandate may be dissolved by the principal or by a renunciation of the agent; partnership contracted without limit of time may be dissolved at any time by any one of the members; bilateral contracts may be dissolved if one of the parties does not fulfil his obligations, in virtue of the "pactum comissiorium".

Contracts must be carried out in good faith, and they are binding not only in regard to the matter therein expressed, but also in regard to any consequence which, by equity, custom, or law, is incidental to the obligation, according to its nature (Section 1036). Once the distinction between contracts "bona fide" and contracts "stricto jure" has been abolished, it follows that in all contracts the guiding norm should be the reciprocal loyalty of the parties; they should never be allowed to evade the faithful performance of the contract by deviating from what their intention is presumed to have been at the moment the contract was concluded.

It is presumed that each of the parties has promised or stipulated for himself and for his heirs and for persons claiming under him, unless the contrary has been expressly established by law or by the parties, or unless it results from the nature of the agreement. The obligation of the debtor holds good not only against him and during his lifetime, but also after his death and against his heirs and persons claiming under him; similarly, the creditor is presumed to have stipulated not only in his own favour in order to enjoy the acquired right, but also in order to be able to transfer it either to his heirs or to persons claiming under him This is a presumption which is conformable to general practice, because men as a rule enter into contracts not only for their own benefit but also for their successors on any title: thus, a seller who is bound by the warrants towards the purchaser, binds also his heirs; so that if eviction takes place after the death of the seller the purchaser may equally avail himself of the warranty against the heirs. The presumption is, therefore, derived "ex eo quod plerumque fit".

But the parties may depart from this general practice either owing to the nature of the contract

itself» or 'because they so choose. Therefore, if the oontrary is expressly established by law or by the parties, or results from the very nature of the agreement, the effects of the contract must be limited to the contracting parties. This rule contrary to the presumption may arise from these three causes:-

i) an express disposition of the law, e.g. partnership is as a rule dissolved on the death of one of the members; similarly, mandate is dissolved by the death of the principal or of the agent;

ii) an express contrary declaration by the parties, who are free to stipulate in any way, and may even derogate the law;

iii) the nature of the agreement, e.g. agreements on legal maintenance, because the right and duty of maintenance do not, as a rule, pass on to the heirs»

2. Effects with regard to obligations given rise to by the contract.

We shall discuss these effects when dealing with* obligations in general, because there are other causes of obligations besides contract, and the rules governing obligations in general are identical, whatever be their cause»

3. Effects with regard to the transfer of ownership and other real rights, and with regard to "periculum rei".

When dealing with the notion of contract we said that this effect is an innovation introduced by modern law: the transition from the old to the new principle was not the effect of sudden legislative enactment, but rather the result of long elaboration, which was started by Roman Law by means of the acknowledgement of modes of transferring ownership without real "traditio", but was only accomplished a relatively short time ago by the Code Napoleon.

However, even before the enactment of this Code, the necessity of "traditio" for the transfer of ownership had been reduced to a mere theoretical principle, and it was generally substituted by the clause known as "dessaissine" or "saisine" or "vest de veste", a clause which became fashionable; so that actually it was the consent of the parties which effected the . transfer of ownership.

This development was quite natural, because if the contract itself (i.e. the manifested consent of the parties) is capable of giving rise to the obligation of the transferor towards the transferee, why should it not also be capable of effecting the transfer of the ownership itself to the transferee ? On careful consideration no reasonable motive can be adduced as to why the sole will of the parties should be sufficient to give rise to the obligation and not sufficient to effect the transfer of the ownership or of other real rights which form the object of such obligation, or as to why the physical act of "traditio" should be required for this purpose once ownership is a right, i.e. an incorporeal thing.

The rules which require this principle in our law are the following : -

1. Section 1037: "Where the subject matter of a contract is the alienation of ownership, or of any other right over a certain and determinate thing, such ownership or other right is transferred and acquired in virtue of the consent of the parties, and the thing remains at the risk of the alienee, even though the delivery thereof has not taken place".

2. Section 1038: (1) "Where the subject matter of a contract is an uncertain or indeterminate thing, the creditor does not become the owner of such thing until it has become certain, or the debtor has specified it, and has given notice to the creditor that he has specified it";

(2) "Until the thing has become certain or has been specified, it remains at the risk of the debtor".

3. Section 1039: (1) "Nevertheless, with regard to third parties any contract conveying the ownership of immovable property, or any right over such property, shall, in no case, commence to be operative until *It* has been registered in the Office of the Public Registry, as provided in Section 367";

(2) "Where the alienation is made by judicial auction, the note for the registration shall be signed by the Registrar of the Court under the authority of which the adjudication of the thing shall have taken place".

4. Section 1040: "Where the thing which a person has by successive agreements undertaken to give or deliver to two or more persons is movable by nature, or a document of title payable to bearer, the person to whom the thing is delivered, and who obtains it in good faith, shall have a prior right of the other or others and shall be entitled to retain it, even though his title is subsequent in date".

5. Section 1397: "A sale is complete between the parties and, as regards the seller, the property of the thing is transferred to the buyer, as soon as the thing and the price have been agreed upon, although the thing has not been yet delivered nor the price paid; and from that moment the thing itself remains at the risk and for the benefit of the buyer".

6. Section 1531: "The assignment or sale of a debt, or of a right or of a cause of action is complete, and the ownership is "ipso jure" acquired by the assignee as soon as the debt, the right or the cause of action, and the price nave been agreed upon, and, except in the case of a right transferable by the delivery of the respective document of title, the deed of assignment is made".

7. Section 1552: "The assignee may not, in regard to third parties, exercise the rights assigned to him except after due notice of the assignment has been given to the debtor, by means of a judicial act, by the assignee himself or by the assignor".

8. Section 1554: "in default of such notice, or until such notice is given, - .... (b) if the creditor, after having assigned the debt to one person, makes a second assignment thereof to another person who is in good faith, such other person, if he has given notice of the assignment made in his favour, shall be preferred to the former assignee".

9. Section 1555: "The notice is not necessary if the debtor has acknowledged the assignment".

Comparing these provisions, we find that Section 1037 establishes the general principle that the transfer of ownership takes place as a direct and immediate effect of the consent which creates the contract. The Transferor in a contract is not only a debtor, i.e a person bound to transfer the ownership or other real right, and the acquirer is not only a creditor of such obligation, but the first is actually a transferor in

virtue of the contract directly and exclusively; and the latter is also the actual acquirer of the ownership or other real right. Therefore, ownership and any other real right is transferred from the transferor to the acquirer by effect only of the contract and from the very moment in which this is entered into, unless, of course, the parties agree otherwise; and from that very moment the thing remains at the risk and for the benefit of the acquirer, because "periculum" always follows ownership: ures perit domino", even if it has not yet been delivered to him; accidental loss, therefore, saving the effect of delay, is suffered by the acquirer.

This general principle is applicable to all contracts, whether onerous or gratuitous, and whatever be the thing which forms the object of the transfer, i.e, whether it be movable or immovable. The conditions for its application are:-

1. The existence of the contract. Ownership or other real rights over immovables, Section 1037 lays down, passes to the acquirer by effect of his consent; and a sale is complete between the parties, (Section 1397)» and the property of the thing is transferred to the buyer, as soon as the thing and the price have been agreed upon. Section 1551 says the same thing with regard to assignment.

In order that consent, and therefore the contract, may be said to exist, it is not enough that it exist internally, but it should also be manifested externally and, when the law requires certain formalities, it is furthermore necessary that it be manifested with such formalities, and before this takes place ownership or other real rights and the relative "periculum rei" is not transferred.

Section 1551 applies this condition to assignment, which must be made by means of a private writing, saving the cases in which a public deed is required. In case of assignment, therefore, the contract does not exist until it be made by private writing, and the assignment of the credit is not effected before this requisite is complied with.

2. That the thing be certain and determinate. That is, the ownership which is to be transferred must be the ownership of a certain and determinate object; and in case of a right, the thing over which the right is to be constituted and transferred must be certain and

determinate. The reason is that what is being transferred is an actual real right, and a real right cannot actually exist except over an actual object. If the object at the time of the contract is uncertain or indeterminate, the transfer of ownership or of other real rights cannot take place, and, consequently, neither can the "periculum rei" be transferred.

Ownership and risk do not pass to the acquirer before the thing from uncertain and indeterminate becomes both certain and determinate. Uncertain is a future thing, because it is not certain whether it will ever come into existence: it only becomes certain when it comes into existence.

Indeterminate is a thing indicated as belonging to a determinate "genus": thus, the sale of a horse, of Arabic breed, or of a quantity of coal or of merchandise has an indeterminate thing for its object. Tills becomes determinate as soon: as the particular thing which is to be given in fulfilment of the contract is established, i.e, as soon as this particular thing is selected and individualised from the numerous things which belong to the same species. As soon as the thing becomes certain and determinate, the obstacle to the transfer of ownership and of the risk is done away with, and such transfer is therefore effected.

Extension of this principle : -- Having already dealt with the extension of this principle with regard to the kinds of contract and to the things to which it is applicable, we shall now deal with its extension with regard to persons, and see if it is available against every one, i.e whether it is available only against the contracting parties or whether it is also available against third parties in their relations with them.

Section 1037 does not make any distinction, but the Sections which follow seem to distinguish the relations between the contracting parties from the relations between the parties and third parties: thus, dealing with immovables, Section 1039 lays down that contracts conveying the ownership of immovable property, or of any right over such property, do not produce this effect with regard to third parties, except from the moment and by effect of registration in the Office of the Public Registry. It seems, therefore, that the principle that ownership passes as soon as consent is perfect applies only in the relations between the contracting parties; but in the relations between the

contracting parties and third parties such a transfer, as regards immovables or rights over such immovables, is only effected when the contract is registered in the Public Registry.,

Then Section 1040 considers the case of a person who has by successive agreements undertaken to give or deliver to two or more persons a movable by nature or a document or title payable to bearer, and it lays down that the person to whom the thing is delivered, and who obtains it in good faith, shall have a prior right over the other or others, and shall be entitled to retain it even though his title is subsequent in date; in other words, if the transferor has delivered the thing to a second or subsequent acquirer who obtains it in good faith, the latter acquires the ownership of it to the exclusion of the first: now the successive acquirers are, with regard to each other, in the position of third parties, and therefore, it does not seem true that with regard to third parties the ownership of movables is acquired by effect of consent alone, because were this principle applicable to successive acquirers, we would have to say that the first acquirer should obtain the ownership.

The same idea is repeated by Section 1397 with regard to sale: "a sale is complete between the parties, and, as regards the seller, the property of the thing is transferred to the buyer, as soon as the thing and the price have been agreed upon..."; and the same distinction results also from Sections 1553 and 1554 with regard to assignment.

In regard to third parties, the ownership of a credit is not transferred by effect of the contract only, but it is necessary that due notice of the assignment be given to the debtor, without which, and before which, the assignee may not exercise the rights assigned to him against third parties.

So much so that in case the creditor has assigned his rights successively to two or more persons, the last person to whom it has been assigned, provided he be in good faith, and provided he give due notice of the assignment, or give notice of it before the former assignee, is preferred to such former assignee who has not given notice or who gives such notice after.

To conclude, it seems that the correct theory is the one which distinguishes between the relations of the contracting parties and the realtions of such

contracting parties in regard to third parties with regard to whom: (1) the ownership of corporeal and incorporeal immovables is only transferred when the contract is registered in the Office of the Public Registry; (2) in case of corporeal movables, by "traditio" ; and in case of incorporeal movables by a notice of the assignment or by the acceptance of the debtor.

Pacifici Mazzoni, however, justly criticizes this general opinion, because ownership and other real rights are absolute rights which should subsist against all, whilst the distinction which we have just made above leads to absurd consequences, namely: at a given time the ownership of a thing belongs and does not belong to the transferee; it belongs to him in regard to the transferor, and it does not belong to him in his relations with third parties, with regard to whom it still belongs to the transferor. In order to avoid this contradiction, Pacifici Mazzoni teaches that the provisions of the law which refer to the relations with third parties, and which seem to bring about such distinction, have no other scope but that of deciding problems which may arise in case of concourse of successive acquirers, in order to establish the order of preference to be kept among them.

According to the modern principle in such a concourse the first acquirer should be preferred, because his acquisition is the effect of the first consent, and consent is sufficient to transfer ownership however, the contrary takes place, and the second or further acquirer is preferred, and he has, according to those provisions; a right of preference which has a different basis according to the different nature of the object transferred: in case of immovables the cause of preference is registration, and therefore the second acquirer who has registered his title or was the first to have it registered is preferred to the first acquirer who does not register it or who is late in having it registered. In case of corporeal movables and of titles to bearer the cause of preference is "traditio", i.e. the acquisition of possession of the thing in good faith. In case of incorporeal movables the assignment made in good faith and the notice of such assignment or its acceptance are the cause of preference.

In the absence of these causes of preference, the first acquirer is preferred, and the rule that ownership is transferred by virtue of consent alone

applies. The transfer holds good even in regard to third parties who have no cause of preference available against the first acquirer, and much more sc in regard to all other persons who have acquired no right over the thing,

Rational basis of the causes of preference. — The rational basis of the causes of preference in the transfer of immovables, is the institute of publicity, and it is the very foundation of this institute that, in case of concourse of more than one acquirer, none of them may make use of his title vis-a-vis the others before registration?

In case of corporeal movables, preference is based on the principle that possession of movables in good faith amounts to title of ownership.

In case of incorporeal movables it is based on the fact that, though the notice of the assignment which is required by law and which takes the place of publicity, the assignment is made known to the debtor and through him to third parties as well: so that the third party to whom the creditor wants to assign his right is in a position to know that such right has already been assigned to another person.

In short, the basis of these causes of preference may be reduced to one principle, viz: the protection of third parties, subject to the condition of good faith in case of corporeal and incorporeal movables. and independently of such a condition in the case of immovables.

II. Effects of contracts with regard to third parties.

With reference to a contract, third parties are all those who do not take part in it either personally or by means of a legitimate representative; and therefore all other persons except the contracting parties and their heirs, who succeed in all the rights and in all the obligations which the contracting parties themselves may have stipulated and contracted.

This order of relations is still governed by the principle of Roman Law that obligation is a strictly personal tie which does not give rise to any relations except between the persons who take part in such obligation. With regard to third parties the contract is a "res inter alios acta", and, therefore, "Tertio

neque prod.est neque nocet". Contracts are the effect of the consent of the contracting parties and cannot therefore produce any effects beyond the relations existing between those who give their consent. This principle is laid down in Section 1042: "a person cannot by a contract entered into in his own name bind or stipulate for any one but himself'; because, if the contracting parties or one of them do not act in their own name, but as agents or representatives of other persons, they do not bind themselves but the person represented by them; they do not stipulate for themselves but in favour of the person represented, the will of whom is implicit in mandate or in lawful representation, and is presumed in "negotiorum gestio".

However, this principle suffers limitations both with regard to promises of the performance of an obligation by a third party, and to stipulations for the benefit of a third party (Sections 1042 and 1043).

(a) Promise of the performance of an obligation by a third party, -- Such a promise has no effects at all; "nevertheless (states Section *1042* (2)) a person can bind himself in favour of another person to the performance of an obligation by a third party; but in any such case, if the third party refuses to perform the obligation, the person who bound himself or promised the ratification shall only be liable to the payment of an indemnity". The effect of such a promise, therefore, is never that of binding the third party who has not consented to the performance of the obligation, nor that of binding the promiser who has now promised something to be done by. him; but a person who promises "de rato" assumes an obligation which must be fulfilled by him, and which consists in procuring effectively what the third party is bound to give; and this is enough to give rise to an obligation against him of indemnifying the damages suffered by the other contracting party in case the third party refuses to perform the obligation. He is responsible for such damages even if the defect of ratification is not due to his fault, because until he obtains the ratification he has not performed his obligation; if then the third party ratifies the obligation, the promiser is freed, because the obligation undertaken by him has been performed.

(b) Stipulations for the benefit of a third party. — In Roman Law the principle "alteri stipulari nemo potest" (para. 4 and 19 of the Inst. de Inutilibus Stipulationibus) did not hold good any longer when the

interest of the contracting party was added to the interest of the third party in whose favour the contracting party had stipulated: "sed et si qui s stipuletur alii cum eius inteuset placuit stipulationem valere in idem". And in Homan Law both the contracting party and the third party had in certain cases an action at law against the promiser. Common Law laid down an exception to the effect that any "prestatio" made by the contracting party to the promiser gave rise to an action in favour of the third party; the principal application of this exception was fideicommissary substitution.

The same principles and the sane exceptions are recognised by present law, because the prohibition in Section 1042 "a person cannot by *a* contract entered into in his own name bind or stipulate for anyone but himself", is followed by Section 1043 "it shall also be lawful for a person to stipulate for the benefit of a third party, when such stipulation constitutes the mode or condition of a stipulation made by him for his own benefit, or of a donation or grant made by him to others". With regard to the meaning of this provision, it is now common teaching that it must not be taken in its literal sense, and that the words "condition" and "donation" are not used in Section 1043 in their technical juridical meaning. There are two cases in which such stipulation constitutes the mode or condition of a stipulation made in one's favour:

(i) When the 'praestatio" to the benefit of a third party figures as a secondary object to the contract, the principal object being the payment of a penalty to the person who stipulates in case the obligation is not performed. Pothier gives the following example: "I can stipulate usefully to the effect that if within a certain time you do not give James the treasure of Mierzmann, you will pay me £20 as compensation for non-fulfilment on your part of our contract: in this case the donation to James is only e condition, - the object of the stipulation is that you will give me the sum of £20, and this sum which I stipulate, I stipulate in my favour, and I therefore have an interest in receiving it",

(ii) All contracts having two considerations, in which the person who stipulates adds to the obligation of the other party towards him another obligation in favour of a third party. For example, in the transfer of an industrial establishment, the transferor binds

the transferee to "treat certain employees in a special way as part of his consideration: the interest of the person who stipulates, in this case, arises from the fact that he agrees to a price lesser than that which he would have agreed to had he not Imposed this oh]iga-tion on the transferee.

We have the mode or condition of a donation made to others whenever there is an alienation of something or the payment of a sum of money by the person who stipulates to the promiser accompanied by some burden imposed on such promiser in favour of a third party. Donations properly called, accompanied by burdens in favour of third parties, are therefore included; but also included are settlements of dowry accompanied by stipulations of reversion, and all bilateral contracts by which the person who stipulates sells, exchanges, grants on lease or in any other way transfers anything to the promiser by imposing, as a total or partial consideration of what he gives, the performance of some obligation for the benefit of a third party. Por example, if he imposes the obligation of paying the price to a third party in whole or in part, to .assign a monthly income, or to grant a servitude or to celebrate masses in the Parish Church, - all cases which are included under the first exception as well.

A very frequent and important application of this exception is life insurance to the benefit of a third person, and also concessions and contracts of public task-works by which the Government stipulates in the interests of the workmen employed by the contractor.

Effects of stipulations for the benefit of a third party. — When a stipulation for the benefit of a third party is not annulled by the provision contained in Section 1042, its effect is that of binding the promiser towards the person who stipulates. The third party, until he accepts the stipulation made for his benefit, does not acquire any right, because "beneficium invito non adquiritur", and, therefore, until such acceptance is forthcoming the person who stipulates has the right to revoke the obligation imposed on the promiser; not only, but if this is the explicit or implicit intention of the person who stipulates, the acceptance does not deprive him of the right of revoking the stipulation in favour of the third party until his death. This happens frequently in life insurance made gratuitously in favour of a third party.

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C_a Quasi-Contracts (in general and in particular),

A quasi-contract is defined by Section 1055 as a ''lawful and voluntary act which creates an obligation towards a third party, or a reciprocal obligation. between the parties".

This definition of quasi-contract is the result of a misunderstanding: owing to the denomination of this third cause of obligations, quasi-contracts were approximated to contracts from the aspect of the agreement between the wills of the parties; and therefore the obligations arising from quasi-contracts were based on the certain will of one of the parties and on the presumed will of the other. This theory is now obsolete, because it does not correspond to reality: the person interested in a "negotiorum gestio" finds himself bound without having done anything, and the person who receives something which is not due certainly has no intention of, binding himself to return it.

The origin of this denomination must not be looked for in the agreement between the parties (in their consent), which is a characteristic element of contract, but in the fact that this cause of obligations reproduces objectively situations analogous to those of particular contracts, namely, of the contracts of mandate and of loan. The basis of the binding tie rather than a presumed intention, is the utility or benefit which the person interested in the "negotiorum gestio" derives, and principles of equity in the erroneous payment of a debt, because it would be unjust to allow a person to enrich himself to the detriment of another. But the rules by which the legislator regulates the two figures of quasi-contract are inspired by the obsolete theory, and in it they find their explanation.

(A). "Negotiorum Gestio".

"Negotiorum gestio" (management of affairs) is the management of one or more affairs of another person assumed by a person without being bound to and without a mandate. "Gestor" or voluntary agent, is he who assumes the management of the affair; "dominus rei gestae" or interested party is the party to whom the affair in question belongs.

The conditions for the existence of this quasi-contract are:-

The agent must be of age and capable of contracting: for him the quasi-contract is a voluntary act, which gives rise to obligations at his charge, and for this reason he must be capable of binding himself voluntarily.

It is only with regard to the agent or manager of the affair that this capacity is required; with regard to the interested party, it is indifferent whether he is capable or not, for although his consent is involved, it is only the presumed and not the real intention which is involved. In case the manager is incapable, the rules governing incapable persons apply, i.e. they are bound only in so far as they enrich themselves.

2. The object of this quasi-contract is the assumption of the management of one or more affairs of another person. The affair must be lawful, because what is unlawful cannot give rise to any right or obligation.

3. The intention of the voluntary agent to bind the interested party; because if he meant to perform an act of liberality towards such interested party, the juridical relation which would exist between the parties would be that of donation, and not of the quasi-contract of "negotorium gestio". Besides other cases, this intention is wanting if the agent believes that he is managing his own affairs; in such case the quasi-contract in question does not arise, and the juridical relations are governed by other rules.

4. The agent must have acted <u>freely</u>, i.e, without being bound to, such is not the case in tutorship or curatorship. - and <u>without a mandate</u>, because in such a case the "gestio" would be the fulfilment and not the cause of the obligation,

5. The agent must not have undertaken the management of the affair notwithstanding the prohibition of the interested party, because the presumption of the consent of the interested party (which, according to our code, is the basis of the binding force of quasi-contracts), is irreconcilable with such prohibition.

<u>Effects of "negotiorum gestio"</u>.

This quasi-contract is similar to mandate, and the rules which govern it are an application of those of mandate, saving certain exceptions with regard to

the obligations of the agent and of the interested party,

(a) The obligations of the agent or "gestor" are:-

1, He is bound to continue the management of the business which he has begun, and to carry it out until the interested party is in a position to take charge of such management himself. He is free to interfere or not in the affairs of the third party, but once he has undertaken the management he must continue it until it is completed, because interruption may be detrimental to the interested party. This is also the rule of mandate: the mandatory is free not to accept the mandate, but if he accepts it he is bound to execute it. This obligation of the agent or manager holds good even in case the party interested dies, until such time as the heir is in a position to assume the management of the affair in question; in the contract of mandate the rule is similar, notwithstanding that the mandate ceases on the death of the mandator.

2. In the management of the business, the agent is bound to use all the diligence of a "bonus paterfamilias" (Section 1058), because every debtor is bound to perform his obligations with the same diligence which a "bonus paterfamilias" uses in the management of his own affairs. The manager or agent therefore is responsible not only for "dolus" but also for "culpa", and even for "culpa laevis".

This general rule of responsibility may be modified either by circumstances which aggravate his responsibility or which attenuate it. Thus both in our law and in Roman Law the fact that the manager has interfered in the affair notwithstanding the prohibition of the interested party is an aggravating circumstance: and in this case his responsibility is more strictly dealt with as a punishment for his undue interference; the same thing may be said if, by reason of his intermeddling, the business was not undertaken by a more competent person, or if the agent himself does not possess the requisite skill, because an interference in the affairs of another without the requisite skill in itself constitutes "culpa": "imperitia culpae adnumeratur".

The causes which attenuate responsibility in the agent "are unforeseen and urgent circumstances which may have induced him to undertake the management of the business; such as, for example, if he undertakes to put in a safe place things belonging to another in cases of fire or other similar accidents. In such cases the

Court may always mitigate the amount of the damages arising from the imprudence or negligence of the agent (Section 1060).

3. The agent is bound to do everything which is incidental to or dependent upon this affair undertaken, and he is liable to all the obligations which would arise from a mandate (section 1056). He must, therefore, on the completion of the business render account to the party interested and return to him all that which he may have received during and on account of his management.

(a) The obligations of the party interested are:-

1. He is bound to perform the obligations contracted on his behalf by the agent (Section 1061). So that if the manager has entered into a contract on behalf of the interested person and in connection with the affair in question, such as if for the reconstruction of a building he enters into a contract of task-work or acquires building material, the party interested is bound to perform such contracts because they are his own contracts rather than the agent's.

2. He is bound to indemnify the agent with regard to any obligation which the agent may have contracted in his own name, either by providing the means required for the performance of the obligations contracted, or by reimbursing the expenses incurred by him if he has already performed them.

3. He is bound to reimburse to the agent all the necessary and useful expenses, with interest from the day on which such expenses shall have been incurred.

In order that the party interested be bound to fulfil these obligations towards the agent, an essential condition is that the affair should have been well managed, even though such management has accidentally failed to benefit the party interested.

Irregular ''negotiorum gestio".

There are figures of irregular "negotiorum gestio", i.e. lacking one or more of the abovementioned elements, as in the following cases:-

1. If the agent was under the impression that he was managing his own affairs (Section 1062), and it cannot, therefore, be presumed that he had any intention

of binding a third person. This notwithstanding, as soon as he becomes aware that the affair belongs to another, he is given, on grounds of equity, the "actio utilis de in rem verso"; he has the right to claim from the party interested an indemnity consisting in reimbursement of expenses incurred but not beyond the benefit which the interested party may have actually derived; whilst m ^ us nudar "negatorium gestio" the agent has the right to claim reimbursement of all necessary and useful expenses. This rule is not unfair on the agent, because had the affair been his own, as he believed it to be when he undertook it, his own estate would have benefitted only by such amount.

2. If the agent intermeddles with the affair against the express prohibition of the interested party. In Roman Law Caius and Papinius were of opinion that even in this case the "actio utilis de in rem verso" should be admitted; but Paulus, Pcmponius, Giulianus and others denied this benefit to such an agent, because they considered him as having the intention of performing an act of liberality, and Justinian confirmed this opinion in his Constitution, XXIV, Cod. "De Negotiis Gestio". The question was again debated in the Middle Ages, and the decision of Justinian was upheld by Bartolus and by the majority of jurists; it is also upheld by foreign commentators, where their laws are silent. Our legislator in Section 1063 has adopted the decision of Justinian: "the agent shall not be entitled to any indemnity", and moreover, as we have } seen, his responsibility is aggravated.

(B). "Indebiti Solutio" (erroneous payment of debt).

This quasi-contract comes into being when a person, through mistake, pays what is not due by him under any civil or natural obligation ("indebitum ex re"), either because there never was any obligation, or because it was already extinguished, or because something different from that which was due was given, or because he pays that which is due but not by him ("indebitum ex persona solventis"), or because he pays that which is due but not to the person who receives it ("indebitum ex persona accipientis").

Owing to the similarity of this quasi-contract with the contract of loan, it is also known by the name "pro mutuo". It is true that only "res fungibiles" can be given on "mutuum", and that "indebiti solutio" may also have "res non fungibiles" for its object, but the analogy between these two figures lies in the fact

that the thing is in the hands of the receiver who makes use of it and is bound to return it, just as the borrower is bound to return to the lender the thing loaned.

The conditions for the existence of this quasi-contract are:-

1. The payment, i.e. the giving of something to a person with the intent of fulfilling an obligation which is believed to exist. It is indifferent whether the object of the payment be a sum of money or something else.

2. The "indebitum", i.e. the absence of a cause of payment. The cause of every payment is necessarily a debt; therefore there is an "indebiti solutio" only if there has been no debt, as in the cases we have mentioned. Even the payment of a conditional debt, during the pendancy of the condition, is an "indebiti solutio", because until the condition verifies itself there is no debt. On the contrary, the performance of an obligation before the lapse of the term to which it is subject is not an "indebiti solutio". In order to talk of "indebitum" the payment must not be due, not only civilly, but also naturally, because natural obligations always have as their characteristic effect the "exceptio soluti retentio": thus, it is not allowed to recover the payment of a debt which had been extinguished by prescription, or the restitution by a "filius familias" of a loan which had been made to him.

3. Mistake in the "solutio", i.e. the person must have paid under the mistaken belief that such debt was due by him. If, on the other hand, he pays the "indebitum" knowingly, there is no quasi-contract and no right for the recovery of what he has paid, because it is to be held that he wanted to make a donation: "cuius per errorem dati repetitio est, eiusdem consulto donatio est" (L. 83, D. de Regulis Juris).

The same thing may be said as to "indebitum ex persona solventis". In order that there be a right Of recovery it is necessary that a person has paid a Debt believing himself to be the debtor, whilst in fact he was not; because if he pays the debt to the creditor with the knowledge that it is not he who owes the debt he had no right to reclaim it, saving his right of resort against the actual debtor.

On the other hand, an error on the part of the "persona accipientis" does not affect the existence of the quasi-contract, saving the consequences, as ee shall see, of had faith in the receiver, i.e. his obligations in case of had faith. The mistake which may be either of fact or of law, must be excusable otherwise it is natural to presume that the debt was paid knowingly and voluntarily. However, there is a right of recovery even though there has been no mistake, in case of rescission, of an obligation the "causa" of which had to take place after payment, but has not actually taken place. Similarly, mistake is not required in case of a payment made for an immoral or unlawful "causa".

Effects of "Indebiti Solutio".

With regard to these effects we must distinguish their relations existing between the person who pays and the receiver, from those between the person who pays and third parties.

(a) Relations between the person who pays and the receiver. These relations are governed by the same rules as those which exist between the owner and the possessor of a thing belonging to others. The effects of this quasi-contract are similar to those of possession of things belonging to others, because the person to whom the thing was given through mistake, possesses a thing which he should not possess, and the person who pays must have the right to recover what he has paid, just as the owner of a thing possessed by another has the right to claim it from such possessor But since the basis of such obligation of returning and of this right of recovering the property is the binding tie which arises from the quasi-contract, the right of the "solvens" is not real but personal, and in this respect "indebiti solutio" is more analogous to loan, because just as this contract produces solely an obligation in virtue of which the lender has only a personal right against the borrower, so also the action which the person who has mistakenly paid a debt may exercise is not the "reivindicetoria", but merely a personal action.

However, apart from this substantial difference between the action in caso of "indebiti solutio" and the "reivendicatoria", the effects between the "solvens" and the "accipiens" in the action for recovery of what may have been unduly given are those of "reivindicatio", and may therefore refer to:-

1) the restitution of the thing, if the object or the "indebitimi" is a sum of money, the receiver must always restore the capital (Section 1066). If the object is any other thing, and it is still in the possession of the receiver, the latter is bound to return it in kind and cannot therefore give an equivalent to it or something in its stead (Section 1067).

If then, the thing is not in his possession, a distinction has to be made between a receiver in good faith and a receiver in bad faith: the former, notwithstanding that the object be a particular thing, differently from a possessor, is always bound to return the value thereof, but only up to the amount of any benefit which, as a result of the alienation of the thing, he may have derived; the reason is equity rather than justice. If, therefore, he has not made any profit out of the alienation, or if ho has lost, destroyed, or given the thing on donation, he is not bound to return anything: and if he has not yet received the subject of the benefit derived from such alienation, he is only bound to assign to the "solvens" his own right of action for the recovery thereof.

If the receiver was in bad faith, he is bound, at the choice of the plaintiff, to restore either the profit he may have derived from the alienation or the greater amount between the value of the thing at the time in which the receiver ceased to possess it and its value at the time of the demand, notwithstanding that he may not have derived any profit from such alienation of the thing. It does not matter whether he ceases to possess it because he lost it, or whether such loss is due to his own fault or to accident: he is equally answerable, unless he can show that the thing would have equally perished had he restored it.

2) Indemnity for deteriorations. Even here we must distinguish between a receiver in good faith, who is always subject to the same rule of equity, namely, that he is only bound to make good such deterioration in case, and up to the amount of any benefit he derives therefrom, from a receiver in bad faith, who is bound to make good all deterioration even though due to accident, unless he can show that the thing would have equally deteriorated had he restored it.

3) Restitution of the fruits. Here also the same distinction applies: a receiver in good faith is only bound to restore those fruits collected after the judicial demand, and he acquires all those which he has

b) Relations between the payer and third parties, —

Third persons with regard to whom a relation may arise from the payment of what is not due, are those to whom the receiver may have alienated the thing on a particular title and also his particular successers, but not his universal heirs, because these succeed in the same juridical position as the decujus, and are not, therefore, third parties.

With regard to third parties Section 1071, following the rule of Roman Law, lays down that the action for recovery cannot, be exercised against them, under whatever title they may have acquired the thing from the receiver. Title must here be taken in the sense of particular title, because, as we have already stated, universal successors are not third parties.

The reason for this rule is that payment is by its very nature a mode of transferring ownership when this has not already been transferred in virtue of a pre-existing fact, e.g. in virtue of the contract itself. Having thus transferred the ownership to the receiver, the payer has no real action but only the personal action against the receiver, which cannot be exèrcìsed against third parties. Foreign laws are generally silent, but the prevalent doctrine holds the opposite view, on the ground that the third party acquires the property with the same vices or defects which it had before the transfer (Planici et fìipert, Vol. 7, para. *746,* Nota 4. — Aubrey et Rau, Vol. 6, para. 317. — Demolombe, Vol. 31, n. 409). Contrary to this opinion is Giorgi (Vol. 5, Delle Obbligazioni, para. 128), who holds that the rule of Roman Law which has never been altered by the Codes, is more convenient and more conformable to the principles of law.

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D. Torts and Quasi-Torts.

The last cause of obligations is tort and quasi-tort (or delict and quasi-delict), that is, an unlawful and unjust act, whether positive or negative, whether due to dolus or culpa, which causes damage to the person or to the property of another individual.

It is a cause of obligations because a person causing damage is bound to make good such damage to the party injured. The basis of this obligation is the precept of natural justice: "neminem laedere".

The concept of tort or delict in civil law is different from that of crime. In Crimes, which are the object of Criminal Law, regard is had to the violation of the law which is provided with a penal sanction and to the damage caused to society; whilst in torts, which are the object of Civil Law, regard is had to the damage caused to the individual; very often, though not always, a crime is at the same time a tort or a quasi-tort but even then the two actions which are given rise to, the penal action and the civil action, must be kept distinct. The first is always public, attributed to society and can only be brought before the criminal courts; the other is always private, can only be exercised by the Individual, and brought before the civil courts: the two actions are instituted, dealt with and judged upon separately and independently one from the other.

Although this cause of obligations (tort and quasi-tort) derives from Roman Law, still, as may be seen from the notion which we have just given, its meaning has changed; for whilst, according to present law, the notion of tort and quasi-tort is generic, i.e. it includes any unjust act which causes damage to another, in Roman Law it was applicable only to certain specified acts. Moreover, in Roman Law not only the civil effects but also the penal effects of torts were regarded as private and formed the object of a private action. The injured party had a right to exercise both the civil and the penal action, and he could exercise them either separately by means of the "actio rei persecutoria" and the "actio poenac persecutoria", or united in one action, the "actio mixta rei et poenae persecutoria".

The system of present codes is that of Pothier, who distinguished between direct responsibility, that is responsibility for one's own acts, which include both torts and quasi-torts according to whether the person causing the injury is in "dolus" or in "culpa", and indirect responsibility, that is responsibility for for acts done by others or for damage caused by animals or by any other object for which one is responsible.

Direct Responsibility.

The elements of tort and quasi tort are:

1. An act which is imputable to a person;
2. Which is unjust;
3. Which causes damage;
4. Through "dolus" or "culpa".

1. An act is imputable to a person when committed by one who knows what he is doing and is free to do so. Therefore the following persons are not responsible for torts or quasi-torts:

(a) Persons of unsound mind, whether interdicted or otherwise;

(b) Children under 9 years of age;

(c) Children over 9, but who have not yet attained the age of fourteen years, unless it is proved that they have acted with mischievous discretion. The burden of proof that they have acted with such mischievous discernment lies on the person who holds that they are responsible. (But, of course, the person injured may, where competent, exercise an action against such persons as may be indirectly responsible according to Section 1077).

The rule which exonerates such persons from responsibility suffers an exception, on the ground of equity, when the conditions contemplated in Section 1079 concur, that is, in case the party injured cannot recover damages from other persons because they are not liable or because they have no means, and the said party injured has not, by his own negligence, want of attention or imprudence, given occasion to the damage. Given these conditions, the Court may, having regard to the circumstances of the case, and particularly to the means of the party causing the damage and of the injured party, order the damages to be made good, wholly or in part, out of the property of the minor or of the person of unsound mind.

Drunkenness does not do away with responsibility, because a person may get drunk with the specific intent of committing the unlawful act, which otherwise he would not commit, and he is then guilty of "dolus"; or, he may not have got drunk with such specific intent, and then he is in fault, because a reasonable person knows that if he gets drunk there is the possibility of his committing unlawful acts and thereby causing damage to others.

2. An act is unjust or unlawful when it is contrary to law, i.e. when a person is guilty of any act or omission constituting a breach of duty Imposed by law

(Section 1076). If an act, although it causes damage, is not unlawful, there is no tort or quasi-tort., "because "nemo videtur injuram facere qui suo jure utitur" (Section 1073).

3. The act must cause damage, because it is for this reason that it becomes a source of obligations. Damage may refer either to the person or to the property, and according to the prevailing doctrine, which is based, on the juridical traditions of Roman Law which included defamation among private delicts, the damage may also be moral. This principle has been implicitly recognized by the judgement delivered by the Court of Appeal in re "Cini versus Townsley", on the 10th November, 1909.

4 The person causing the damage must be either in "dolus" or in "culpa".

"Dolus" consists in the knowledge that one's act Is contrary to a provision of the law, or that one's omission constitutes the breach of a duty imposed by law, and that such an act or omission will cause damage to others.

"Culpa" consists in the omission of due diligence, on account of which one is not aware that one's act is contrary to a provision of the law on that one's omission constitutes the breach of a duty imposed by law.

From this want of diligence responsibility arises, because every person is bound to be diligent when others may have an interest. Whether the intent of injuring is present or not, is indifferent (Section 1076). The "culpa" which we are talking about is usually known, in doctrine, as "culpa aquiliana"

in order to distinguish it from "culpa" in the performance of contracts, which is known as "culpa contractualis". Diligence is here regulated as in all other juridical relations: namely, the ordinary diligence of a "bonus paterfamilias"; so that no one in the absence of an express provision of the law is responsible for damages occasioned through want of prudence, diligence, or attention in a higher degree than normal (Section 1075, subsection 2), and "culpa laevissima" is equivalent to "casus", Here therefore the law has not followed the principle of Roman Law "in lege Aquilia et laevissima culpa venit". Equivalent to "culpa_" is unskillfulness, i.e. incapacity in performing "work or services required: "imperitia culpas adnumeratur". From what we have said the following rules derive:

1. He who by an 'unlawful act or omission, or through unskillfulness causes injury to another, 'whether through "dolus" or "culpa", is bound to make good such damage, and it is indifferent whether he had the intention of causing injury or not(Sections 1074 and 1076).

2. The damage occurring to a person owing to a fortuitous event or "force majeure" or "culpa laevissima" is suffered by such person, notwithstanding that the act of another has intervened, provided such act was not the effect of "dolus" or "culpa": "casus sentit dominus".

Indirect Responsibility.

Indirect responsibility is that which makes a person answerable for acts done by other persons or for damages caused by animals or other things for which such person is responsible. The basis of this responsibility is the omission of due vigilance in preventing acts done by others or in preventing the damage which may be caused by an animal, or any other thing for which one should be responsible. Therefore, rather than a responsibility for acts done by others, it is a responsibility for one's own unlawful omission.

The law enumerates the following cases in which such indirect responsibility arises:

1. Section 1077: "Any person having the charge of a minor or of a person of unsound mind shall be liable for any damage caused by such minor or person of unsound mind, if he fails to exercise the care of a "bonus paterfamilias" in order to prevent the

(3) Section 1082 relates to the liability of hotel keepers. The section was radically changed by Act (ii) of 1966 in order to abide by the terms of an International Convention to which Malta was a party.

The section provides as follows:-

1082.(1) A hotel-keeper shall be liable up to an amount not exceeding seventy five pounds for any damage to or destruction or loss of property brought to the hotel by any guest.

(2) The liability of a hotel-keeper shall be unlimited -

(a) if the property has been deposited with him; or

(b) if he has refused to receive the deposit of property which he is bound under the provision of the next following subsection to receive for safe custody; or

(c) in any case in which the damage to, or destruction or loss of, property has been caused, voluntarily through negligence or lack of skill, even in a slight degree, by him or by a person in his employment or by any person for whose actions he is responsible.

(3) A hotel-keeper shall be bound to receive for safe custody securities, money and valuable articles except dangerous articles and such articles as having regard to the size or standard of the hotel are cumbersome or have an excessive value.

(4) A hotel-keeper shall have the right to require that any articles delivered to him for safe custody shall be in a fastened or sealed container.

(5) The provisions of subsections (1) and (2) of this section shall not apply if the guest, after discovering the damage, destruction or loss, does not inform the hotel-keeper without undue delay, or if the damage to, destruction or loss of, property is due -

(a) to a fortuitous event or to irrestible force ; or

(b) to a reason inherent in the nature of the property damaged, destroyed or lost; or

(c)to an act or omission of the guest by whom it was brought into the hotel, or of any person, other than the hotel-keeper, to whom such guest may have entrusted the said property or of any

Charge is taken here in its wider sense, i.e. actual custody, independently of whether or not it arises from "patria potestas", tutorship, curatorship or some other cause. Therefore, not only the father, the mother, tutor and curator are responsible, but also, for example, domestic staff, during the time in which the minors are in their charge, and in general all those who have in their custody minors or persons of unsound *I* mind.

(2) Section 1080 provides as follows; "Where a person for any work or service whatsoever employs another person who is incompetent, or whom he has not reasonable grounds to consider competent, he shall be liable for any damage which such other person may, through incompetence in the performance of such work or service, cause to others".

Then the Revised Edition of the Laws of Malta were published in 1942, a Note to this section referred to ss. 2 and 3 of proclamation No. 1 of 1815 which run as follows:-

/or affect "2. No Act of any servant of the Crown can vitiate the right of the Crown, unless it be clearly proved that such act proceeded from Government itself, and that the persons so acting had a written authority from Government for such act.

3. The only written authority from Government to considered in any Court of law hereafter, is an authority from the Chief Secretary of Government, in the name and on the behalf of His Excellency the Governor, or, in case of his death or absence, in the name and on the behalf of His Honour the Lieutenant-Governor for the time being".

The said Note proceeded to state that according to the Judgement of the Court of Appeal in Desain vs. Forbes noe of the 7th January 1935, the said sections are still in force.

It must be emphasized that section 1080 afore quoted comes under the heading of Torts and Quasi Torts and cannot be applied to a contractual relationship which is regulated by different principles and in which the employee acts as a "monda manus" of the employer.

(6) Any tacit or express agreement between a hotel-keeper and a guest entered into before any damage to, destruction or loss of, property has occurred and purporting to exclude, reduce or make less onerous the hotel-keeper's liability as established in this section shall be null and void:

Provided that, in the cases referred to in paragraphs (a) and (c) of subsection (2) of this section, where the damage to, or destruction or loss of property has not been caused by a person mentioned in the said paragraph (c) voluntarily or through gross negligence, any agreement signed at any time by the guest whereby the hotel-keeper's liability is reduced to an amount being not less than seventy-five pounds shall be valid.

(7) In this section and in section 2113 of this Code "guest" means a person who stays at the hotel and has sleeping accommodation put at his disposal therein, but is not an employee in the hotel.

(8) In this section, any reference to a "hotel-keeper", except in so far as the liabilities thereby established are imposed on the hotel-keeper, shall be construed as including reference to the person in charge of the hotel or of the reception of guests in the hotel, and any reference to "loss" shall be deemed to include by theft.

4. Section 1083: "The owner of an animal, or any person using an animal, during such time as such person is using it, shall be liable for any damage caused by it, whether the animal was under his charge or had strayed or escaped".

5. Section 1084: "The owner of a building shall be liable for any damage which may be caused by its fall, if such fall is due to want of repairs, or to a defect in its construction, provided the owner was aware of such defect or had reasonable grounds to believe that it existed".

In both cases the owner is at fault, but they are included among acts of indirect responsibility because

it cannot be said that the emission of the owner was contrary to law, since it is within his rights not to undertake the necessary repairs and not to rectify the defect in the construction.

6. Section 1085 sanctions the responsibility of the occupier of a building for damages caused by the fall of a thing suspended or placed in a dangerous position or by a thing or matter thrown or poured from any building, provided such occupier has himself committed the act or contributed thereto; if, therefore, he has not himself committed the act, and has not in any way contributed thereto, he is not liable except in so far as the provisions relating to indirect responsibility, as explained above, concur.

Effects of Torts and Quasi-Torts and of Indirect Responsibility.

The effects of this cause of obligations consist in the liability of making good the damages caused; and debtors of tills liability are:

1) The person or persons who commit the tort or quasi-tort;

2) Those who wilfully contribute thereto with advice, threats, or commands (Section 1087);

3) Those who are indirectly responsible.

In case there is more than one person liable to make good the damage, Section 1092 distinguishes according to whether they are in ''dolus[1]'' or merely in "culpa": when they have maliciously caused the damage, their liability is "in solidum"; if, on the contrary, they have not acted maliciously, each of them is liable to make good such part of the damage as may have been caused by him; if some have acted with malice and others without malice, the former are liable "in solidum" and each of the latter is only bound to make good such part of the damage as he may have caused.

If .the part of the damage which each has caused cannot be ascertained, they are all bound "in solidum" with regard to the injured person, even though all or some of them have not acted maliciously but were only in "culpa". The injured party may claim that the whole damage be made good by any of the persons concerned, even though all or some of them have acted

without malice; but the defendant who is thus called upon to make good all the damage has the right to seek relief from the other or others, by demanding that all such persons causing the damage be joined in the proceedings, and the Court may apportion among them the sum fined by way of damages, in equal or unequal shares according to circumstance (Section 1093). But this applies only to the internal relations between the parties who are liable, and not vis-a-vis the injured party, whose right to claim the whole sum from any one of them remains unprejudiced.

A person who, being liable for damage caused by another, makes good such damage, has no right of seeking relief against the person causing the damage, except where the latter is also answerable for such damage (e.g. in case the person causing the damage is a minor over nine but under fourteen years of age, and who has acted with a mischievous discretion).

The object of the obligation is to make good the damage; and damage consists in the positive or negative loss suffered by a person; therefore we may have either "damnum emergens" or "lucrum cessans".

"Damnum emergens" consists in the loss of part of what a person actually owns. It therefore consists in a direct loss which the act causes to the party injured, and in the expenses which he incurs as a consequence with a corresponding diminution of his actual estate.

"Lucrum cessans" consists in the fact that the actual estate of the party injured has not increased owing to the injury, and it therefore consists in the loss of those earnings by which his estate would have increased were it not for the unlawful act of another person.

As to the measure of damages which may be claimed, both a person causing damage maliciously and a person causing damage negligently are liable, as regards "damnum emergens" for the expenses which the injured party may have been compelled to incur in consequence of the damage, and as regards "lucrum cessans" for the loss of actual wages or other earnings, and for loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused. Up to 1962 as regards the sum to be awarded in respect of such incapacity, a distinction was made between the cause of malicious damage and the cause of negligent damage; in both cases such sum was assessed by the Court, having regard to the circumstances of each case and particularly to the nature and degree of incapacity caused and to the condition of the injured party; but if the damage was not caused maliciously, such sum was never to exceed one thousand two hundred pounds.

In 1962 this provision was amended and the maximum amount awardable deleted with the result that the Court may award any amount which it deems reasonable.

Where in consequence of the act given risen to damages - the Court may, in addition to the "damnum emergens", award to the heirs of the deceased person damages, as in the case of permanent total incapacity. (S.1089).

When a person is deprived of the use of his own money, the damage is made good by the payment of interest at the rate of five per centum per year in the case of "culpa" and six per centum per year in the case of "dolus". Moreover the Court may, according to circumstances grant also to the injured party besides such interest, compensation for any other damage sustained by him including every loss of earnings when it is shown that the party causing the damage, by depriving the party injured of the use of his own money, had particularly the intention of causing him such other damage, or when such damage is the immediate and direct consequence of the injured party having been so deprived of the use of his own money. The sum to be awarded in respect of such loss of earnings is assessed by the Court, having regard to the circumstances of the case (Section 1090).

Extinction of the action for claiming damages

This action is extinguished, apart from the general causes of extinction, by the following causes

1. by prescription, which is of two years, unless the torts or quasi-torts is a crime, in which case the term for prescription of the civil action is the same as that established by the Criminal Code (Chapter 12) for the prescription of the criminal action (Section 2258 and 2259). This rule applies to the action from claiming damages, and it does not extend to the "actio reivendicatoria" i.e. the action for claiming back the thing forming thé object of the crime, namely, the thing stolen or obtained by means of a criminal offence (e.g.Fraud). In this case we have to distinguish between the following cases:

a) with regard to the perpetrators of the crime of theft or of fraud, the "reivindicatio" is not prescribed by the lapse of any time, because it would be repugnant to natural justice and to juridical logic were a person allowed to acquire the ownership of a thing the possession of which he obtained by means of a crime. The same rule

applies with regard to a person who, knowingly, receives or buys the object of theft or of fraud (Section 2259)

b) With regard to a third party who possesses in good faith a thing stolen or lost, the "reivindicatio" is prescripted by the lapse of two years in case of bad faith the previous rule applies i.e. it is never prescribed.

2. If the party injured has by his imprudence, negligance and want of attention contributed or given occasion to the damage. In such case part of the damage remains at his charge; Section 1094 lays down that it is up to the Court, in assessing the amount of damages payable to him, to determine in its discretion, the proportion of which he has so contributed or given occasion to the damage which he has suffered; and the amount of damages payable to him by such other persons as may have maliciously or involuntarily contributed to such damage is reduced accordingly.

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EFFECTS OF OBLIGATIONS IN GENERAL.

These effects will be treated under three headings: -

I. The principal effect of obligations, which refer to the necessity of performing accurately the obligations contracted;

II. Secondary or accessory effects, which consist in the obligation of making good the damages and of paying interest in case of non-performance, and the passage on the risk and peril to the debtor in case of default for delay;

III. Subsidiary or auxiliary effects, which consist in certain rights attributed to the creditor in order to ensure and facilitate the execution of the obligation.

I. Principal effects of obligations.

Obligations must be performed accurately both with regard to their object, and to the place and time of performance. The creditor therefore may refuse to accept a performance which is not accurate, and he has a personal, action against the debtor for a forced andprecise execution of the obligation.

In order to determine better these effects we shall deal separately with obligations of giving, obligations of doing, and obligations of forbearing from doing.

1. In obligations of giving, performance includes the obligation of delivering the thing and of preserving it until it is delivered with the diligence of a bonus paterfamilias. The reason why the debtor is bound to preserve the thing until delivery, is that until that moment it is in his possession, and he is the only person who can preserve it; and therefore if maliciously or otherwise he causes its loss or deterioration, he is regarded as having failed to perform his obligation, and is answerable for such loss or deterioration -(as we shall see when dealing with the secondary effects of obligations). The obligation of giving something is susceptible of a forced execution, i.e. the debtor may be compelled to give that which forms the object of the "praestatio". Thus, if A owes B the horse 6, 5 may compel A to perform "His obligation of consigning the horse by means of a warrant of seizure, by which he deprived the debtor of the possession of the horse and obtains its delivery through the Court's authority.

2. In obligation of doing something, the necessity of performing "the obligation accurately implies that the debtor must perform that act of which he is the debtor. This effect is susceptible of forced execution in the sense that, when it is indifferent for the creditor whether the obligation be performed by the debtor or by another person, he may be authorized by the court to cause the performance "thereof at the expense of the debtor. If, however, the object of the obligation is the industry proper to the debtor, and he persists in not performing it, he cannot be forced to do it, and the extreme remedy which. the law grants to the creditor is that of arresting

the debtor by the warrant "in factum". If, this notwithstanding, the debtor still persists in not performing his obligation, the principle "nemo precise cogi potest ad factum" holds good and in this case what is left to the creditor is his right to sue the debtor for the payment of damages.

3. In obligations of forbearing from doing something, the necessity of performing precisely one's obligations implies that the debtor must forbear from doing that which the obligation binds him to forbear from doing. This obligation is susceptible of forced, execution in in the sense that the creditor may demand that anything done in breach Of the obligation be undone, and he may be authorised to undo it himself "at the expense of the debtor, saving always his right of claiming damages, for which the debtor becomes liable by the mere fact of such infringement.

Whoever has bound himself personally is obliged to fulfil his obligations with all his property, present and future (Section 2098), and if the debtor has more than one obligation towards more than one creditor, all of them has an equal right and all his property is the common guarantee of his creditors unless there exists between them lawful causes of preference (Section 2099). Therefore, each of the creditors may obtain the performance of his obligation, and for this end he may cease, sequestrate and sell by auction the property of the debtor.

Following the system of our laws, the particular rules which govern the performance of obligations will be dealt with under "PAYMENT" which, being one of the causes of extinction of obligations, will be treated under that heading; payment is no more than the performance of an obligation of giving or of doing something, and it is at the same time the most natural and frequent mode of extinction, because once the obligation is performed it is also extinguished.

II. Secondary effects of obligation.

These effects derive from the non-performance of obligations, and they consist in the liability for making good the damages and in burthening the debtor with the risk and peril in case of default for delay. In order to give to these effects, the following conditions must concur:-

i. Non-performance of the obligation, either absolutely or with regard to the time fixed for its performance;

ii. Such non-performance must be imputable to the debtor, i.e. He must have been either in dolo or in culpa;

iii. Such non-performance must be the cause of damages actually sustained.

i. — Non-performance may be of two kinds: proper, or absolute non-performance within the time fixed, which is properly called "mora" or "default".

(a) By absolute non-performance, in case of obligations of giving or of doing something, we mean either that performance is no longer physically possible, or that though it be physically possible it is no longer useful to the creditor. Section 1174 contains an application of this notion of non-performance in the case of an obligation which has for its object something which could only be done or given within a certain time: The obligation is not performed if the debtor suffers such time to expire without giving or doing that thing. In other cases, whether the obligation may still be performed or not, and in case it can, whether it be still of any use to the creditor, is a question of fact to be determined according to the circumstances of each particular case. In obligations of forbearing from doing something, non-performance takes place as soon as the debtor does that which he was bound not to do (Section 1171).

(b) . Non-performance in relation to time, and "mora". Mora or default may only refer to obligations of doing or of giving something, and we cannot imagine delay in obligations of forbearing to do, because the rules relative to "mora" presuppose that the performance of the obligation is still possible and useful, and the latter obligations are susceptible only of absolute non-performance.

"Mora" requires three conditions:

(1) The debt must be determinate, i.e. certain not only with regard to its existence but also with regard to its object and quantity. Until it is so there can be no default for delay, because as

long as the debtor does not know what and how much he is bound to give or to do he cannot be blamed for having delayed the performance of the obligation.

(2) The debt must have fallen due, i.e. either no time is fixed for the performance of the obligation, or if a time is fixed such time has lapsed,

(3) An intimation must be made by the creditor to the debtor by means of a judicial act, in the form required by law, in order to discard a doubt as to the seriousness of the creditor's intentions and to manifest clearly that he has ceased to tolerate the debtor's delay; because as long as the creditor remains silent the debtor may have reason to believe that he is willing to tolerate.

This intimation, however, is not necessary if the debt falls due "ex die", in which case the old adage applies: "dies interpellat pro homine". A time limit is given to the debtor in order that he may prepare himself to pay his debt, and beyond that limit he cannot count on the tolerance of the creditor. However notwithstanding that the obligation be "ex die", intimation is necessary in two cases:

(1) If the time expires after the death of the debtor. In order to put the heir or the curator of an "haereditas jacens" in default, an intimation is necessary, because the heir or curator may be entirely ignorant of the obligation or of the time fixed for its performance (Section 1173);

(2) When the Debt has to be paid outside the domicile of the creditor. It is held in jurisprudence that in this case an intimation is necessary notwithstanding that the obligation be "ex die". In fact, since the debt has to be paid in a place which is not the domicile of the creditor, it is necessary that he makes known to the debtor that he has arrived at the place agreed upon, otherwise the debtor may not be aware of this fact; and he is not bound to enquire whether the creditor has arrived at the place or not.

When performance consists in the payment of a sum of money in which case damages for the delay consist in interest at the rate of five per cent or six per cent according to this case, the debtor is in default without the necessity of being judicially intimated, whenever the obligation is commercial, and whenever the law lays down that interests for delay are to run "ipso jure". In such cases, therefore, the debtor is in default as soon as he has to pay and does not: do so, as soon as the obligation exists if no tern is fixed, and as soon as the term expires if the obligation is "ex die".

This takes place:

a. If the obligation is of a commercial nature, in order to favour trade and in order to ensure rapidity in the performance and execution of commercial obligations;

b. Whenever the law establishes that interest is to run "ipso jure", such as, for example, with regard to the settlement of a dowry which consists in money. Those who promise a dowry to be settled in money, are bound to pay interest at the rate of four per cent, which interest begins to run ipso jure from the day of the marriage, or where a time for payment has been agreed upon, from the expiration of such time (Section 1301).

In all other cases, that is in other cases of performance consisting in payment of a sum of money, judicial intimation is necessary whether a time if fixed or not, and the expiration of such time alone is not enough to put the debtor at fault for the delay.

ii. - Imputability of non-perofrmance to the debtor.

Non-performance must be umputable to the debtor, i.e. it must be due either to an act of his or to his will; because the debtor is answerable for non-performance and for delay whenever he has violated his obligations, and therefore if performance is bound to be impossible without his having violated in any way his obligations, he cannot be deemed responsible. In order that there may be a violation of obligations, non-performance must be due directly, or at least indirectly, to the debtor: in the first case non-performance is fraudulent,

in the latter culpable, in other cases it is accidental or fortuitous. In this regard, i.e. in the matter of non-performance of obligations, "dolus" or as the law calls it bad faith. consists in the knowledge of committing an unlawful act, i.e. in the knowledge of violating an obligation, and therefore, with the knowledge that he has done or omitted to do something which, in order to perform his obligation, he should on the contrary have omitted or done.

Culpa is the omission of due diligence on the part of the debtor, owing to which he is not aware that his act or omission will cause the absolute or relative non-performance of his obligation, when, by exercising such diligence he would have forseen such consequences. If then, notwithstanding such diligence the debtor could not possibly forsee the non-performance of his obligation, he cannot be held responsible, and non-performance cannot be imputed to him because it is fortuitous and accidental and is therefore to be borne by the creditor.

Section 1175 gives us the definition of due diligence: "the degree of diligence to be exercised in the performance of an obligation, whether the object thereof is the benefit only of one of the parties or of both, is, in all cases, that of a bonus paterfamilias as provided in Section 1075". The wording of this Section was meant to abolish expressly what was formerly held to be a Roman distinction with regard to the degree of due diligence according to whether the obligation was useful only to the creditor or to the debtor, or to both. The present system according to which the debtor is only but always responsible for "culpa laevis", is known as Hasse's system. It requires in the performance of obligations the diligence of a bonus paterfamilias in the abstract, i.e. that diligence and care with the majority of men exercised in the management of their own affairs, and not the particular and concrete diligence which the debtor usually observes in the management of his own affairs. If the debtor is a negligent person, i.e. if he does not, as regards his own things exercise that diligence which an ordinary bonus paterfamilias exercises, he does not exonerate himself from the obligation and from its

consequences by merely exercising that amount of diligence which he usually exercises; and on the other hand if the debtor is normally excessively diligent in the management of his affairs, he is not responsible if he does not observe that extraordinary diligence which he usually exercises as regards his own affairs.

This rule, which according to the law in force, is common to "culpa contrattualis" and to "culpa aquiliana" (Section 1075 and 1175) is modified in the following cases:

1. In the contract of deposit, in which the diligence which the depositary must use is that which he usually uses for the custody of his own things (concrete diligence) (Section 2001).

2. There are cases in which the rule with regard to diligence, and therefore with regard to culpa, is more or less rigorously applied; thus, in the quasi-contract of "negotiorum gestio" (as already seen) there are circumstances which aggravate and circumstances which diminish the responsibility of the manager; similarly the beneficiary heir is only responsible for "culpa gravis" in his management of the inheritance vis-a-vis legatees and creditors of the inheritance.

From the condition that non-performance must be imputable to the debtor the following rules derive:

a. the debtor is responsible both for non-performance and for delay, even though he is not guilty of bad faith, i.e. he is responsible not only in case of "dolus" but also in case of "culpa" (Section 1176) .

b. if non-performance or delay is due to a cause extraneous to the debtor and therefore not imputable to him, the debtor is not responsible, and the loss caused by such non-performance is borne by the creditor: "casus sentit dominus" or in this case, "casus sentit creditor", on the ground that the creditor cannot claim damages from the debtor because he is net responsible for such damages. The obligation of the debtor is thus extinguished owing to the impossibility of its execution, and

it does not give rise to any other secondary obligation.

However, the rule "casus sentit creditor" may not hold good:

1. if, by agreement, the debtor has assumed all risks;

2. by law: the only case in which the law derogates this rule is met with in conditional obligations which depend on a suspensive condition. As we shall see later on when (dealing with conditional obligations, the risk of the total loss of the thing whilst the condition is still pending, is at the charge of the debtor.

3. if the debtor is "in mora" or delay: this third case is an application of the preceding exception, because the law lays down that the debtor who is in delay is responsible also for accidental and fortuitous events, i.e. he is responsible for the loss which takes place during the delay even though it be due to accident or "force majeure". This effect of "mora", i.e. the transfer of the "periculum rei" from the creditor to the debtor, is based on the presumption that the fortuitous event which takes place during the delay is determined by the "dolus" or "culpa" of the debtor.

The burden of prood that such loss it due to accident lies on the debtor who alleges it in order toexorate himself of his obligation. Until he produces such evidence he is presumed to be at fault on the ground that this is generally the case and also because it is evident that since it is the debtor who has to perform the obligation he must do his best to perform it and to evade all those obstacles which might prevent or delay its execution.

If, however, the creditor accuses the debtor of dolus in order to claim a greater amount of compensation, it rests with him to prove that the debtor acted maliciously: "qui dolo dicit factum aliquid docere dolum admissum debet" (Lex 18, par. 1 Dig. De probationibus). This rule is based on the presumption that men are to be considered honest until the contrary is proved (Art. 1176 and 1250).

The effects of non-performance, and of delay are of two kinds:

a. They give rise to the obligation of the debtor, who is a defaulter, to make good the damages caused to the creditor through non-performance or the obligation. This effect is common to non-performance in its narrow meaning and to delay. The debtor, in the first case, is bound to make good the damages resulting from absolute non-performance and in this case the obligation of making good the damages takes the place of the original obligation, because the secondary effects of obligations take the place of the primary effects. In the second case, the debtor is bound to make good the damages caused by the delay in the execution of the obligation; in this case, the original obligations holds good, and to it is added the other obligation of making good the damages resulting from the delay; hence the distinction between compensatory or compensative damages (danni compensativi) i.e. those due in the first case and danni moratori", which are due in the second case.

b. A special effect of "mora" is that the "periculum rei" rests with the debtor in default, even though it was previously (as it normally is) with "the creditori' A debtor in default cannot exonerate himself by showing that the loss is due to accident, unless he proves that the thing would have equally perished had he performed his obligation in due time.

For the existence of the obligation of making good compensatory or dilatory (moratori) damages the following conditions are required:-

a. that there be non-performance of delay

b. that such non-performance or delay be imputable to the debtor;

c. that the damages are real; i.e. the proof which the creditor "must make, that he has really sustained damages in consequence of non-performance or of delay. This condition and its relative proof are dispensed with when the parties have already agreed upon and determined in advance the eventual damages to be paid in case of non-

performance or of delay, by means of a penal clause or other accessory agreement of a similar nature, because the will of the parties bar the force of law, and it is presumed that the object of the agreement is exactly this, that in case of absolute or relative non-performance the creditor will be deemed to have suffered damages in the measure previously established. This proof is likewise dispensed with in regard to dilatory damages in pecuniary obligations, in which case the damages are made up of interest, since money is always capable of yielding "fruits".

Ways in which damages are liquidated

Damages may be liquidated

1. By agreement, and the liquidation is said to be conventional.

2. By law and the liquidation is termed legal.

3. By a judgement and the liquidation is called judicial.

1. Conventional liquidation takes place in the case we have just considered i.e. when the parties by means of an accessory agreement foresee and determine the damages beforehand by means of a penal clause, an earnest or other similar "praestatio".

2. Legal liquidation takes place in regard to dilatory damages in pecuniary obligations and the rate of interest established by law is 5% or, if the obligation arises from an agreement of a commercial nature, the rate of interest is 6%.

In former times, according to the Common law influenced by Canon Law, interest, or usury (as it was then called), was a rule forbidden or, at least, looked upon with disfavour by the Moralists, theologians and legislators. However certain exceptions were admitted; on account of the risk inherent in hazardous transactions especially those relating to maritine-trade, and also in regard to "damnum emergens" and "lucrum

cessans" in case of the creditor has sustained a loss owing to non-performance or to dolus, a loss of profit in consequence of non-peformance.

These exceptions were first upheld by jurists; Giovanni Mohedania upheld the case of "damnum emergens" and Paolo Castrense the exception of "lucrum cessans". The supreme Courts supported these theories, because the development of commerce and the importance of capital could not, but convince them that the teachings of the jurists were well-founded.

These exceptions were therefore accepted by the Rote Fiorentina and by the other Courts of Italy including the Rota Romana; however, even when these theories had been accepted by the Courts, it was still necessary to prove the "damnum emergens" or "lucrum cessans - in potentia proxima", that is that it was incumbent upon the creditor to prove that he had the chance of making such profit in the near future.

Nowadays this proof is no longer required

And section 1183 expressly exempts the creditor from bringing evidence of any loss due to "damnum emergens" or "lucrum cessans", because the law always presumes such a loss in respect of pecuniary obligations, once under present economic obligations money may be invested without any difficulty and at any time.

Also the interest due constitutes the object of a pecuniary obligation, and it seems therefore that in case of delay, the delay should give rise to further dilatory interest, that is compound interest But there has always been a certain aversion to compound interest, because it is feared that the creditor may abuse of his position and avail himself of the difficult situation of the debtor. The law therefore, though it does not prohibit absolutely such interest allows it only within the following limits and conditions (Section 1185).

a. the simple interest from which compound interest may arise must have fallen due.

b. it must be due for a period of not less than a year.

c. the creditor must make a judicial demand, or there must be an agreement between him and the debtor. Such demand or agreement must be made after the simple interest falls due.

3 Judicial liquidation is the most frequent, of the three ways; and to it the other rules established by law refer. In judicial liquidation the damage is made good by means of an equivalent in money which is determined by the Court assisted by experts both with regard to the existance of damage and to its amount.

Jurists talk of a indemnification in a specific form which consists in the forced execution the obligation whenever this is possible; because the creditor, if he so chooses, and as long as he can obtain the performance of the obligation in the way in which it was to be performed, should have the right to demand such specific performance and he should not be compelled to receive an equivalent in money. And this holds good also with regard to the debtor, because it is reasonable that once the execution of the original performance is possible and still useful to the creditor, ho should have the right to offer it.

But once the damage cannot be made good in a specific form and indemnification by means of the liquidation of the damage in money is therefore demanded the creditor has to show first of all that ohe damage really exists that is chat i.e has really sustained damage and he must therefore prove its consistency and amount: it is towards this object that evidence tends, and especially that of experts (who are usually appointed in the suits of liquidation).

The law determines the amount of damage which the creditor may claim according to whether the debtor who has failed to fulfil his obligation is "in culpa" or in "dolus" because it is evident that a debtor who maliciously violates his obligations should owe to the creditor a larger compensation than a debtor who is merely guilty of "culpa".

The debtor who fails to perform his obligation maliciously, is bound to make good all the direct damage arising from non-performance without any

distinction between foreseeable and unforeseable damages at the time of the obligation (1180).

Direct or indirect damage is that which is a consequence of non-performance and of non-performance alone without the concurrence of any other cause: "utilitas quae circe ipsam rem- (illegible text) - ".

On the other hand extrinsic is that damage which is not a consequence of non-performance alone, but to, which other causes have contributed; 'so that without the concurrence of such other causes, non-performance on the part of the debtor alone would not have given rise to such damage: "utilitas extra quae venit extrinsecum"-

The debtor, though he acted maliciously, is only responsible for direct damages; and indirect damages is not the result of his actions or ommissions alone, and though he had willfully violated his obligations, he should not be responsible for consequences which derive from causes extraneous to his acts. "Si emptor triticum emerit, at ob earn rem quod non sit traditum familiareius fame laboraverit proetium tritici non servorun fame necaturun consequitur" (Lex. 21, par.2, Dig. De-actione empti et venditi, Lib. 19, Tit. 1).

In case of non-performance through mere "culpa", the debtor is bound for direct damages, which are foreseen or foreseable at the time of the obligation.

Effects of delay

Delay has the effect of burdening the debtor with the "periculum rei" even though it may have been at the charge of the creditor. In this sense it is said that "mora perpetuat obligat ionem", because the debtor in delay remains always bound to make good the damage notwithstanding that the thing perishes by accident during the delay . The reasons for this rule is that it is considered that had the debtor fulfilled his obligation when it was due, that is had he delivered the thing to the creditor in time, the fortuitous event would not have had

such an effect. Therefore though the loss is accidental, it is regarded as determined by the fraudulent or culpable delay of the debtor; and the only way out for him is to bring evidence to show that the thing would have equally perished had he delivered the thing to the creditor when it was due.

Part III

Subsidiary or auxiliary effects of obligations.

These effects consists in certain rights granted by the law to the creditor in order to ensure the performance of the obligation and the payment of damages in case of non-performance. They are therefore known as subsidiary or auxiliary effects because they help the creditor in order to ensure the performance of the obligation.

These effects are

1. the rights of exercising certain precautionary acts.

2. the actio surrogatoria which is also known as "actio indirecta" or "obliqua" or "actio debitor debitoris nei".

3. the actio revocatoria or paulliana.

1. These precautionary rights are regulated by the laws of procedure which lay down the coercive means which the creditor may exercise against the debtor. When the creditor has not a title "paratae executionis" these laws give him the right to exercise the so-called precautionary acts which are meant to preserve the property of the debtor in order that when the creditor obtains a favourable judgement or other execution title, he may proceed with the execution over the property of the debtor which is thus preserved.

2. "Actio surragtoria" - By means of this action established in section 1186, the creditor may, in order to obtain what is due to him,

exercise all rights and actions which appertain in the first place to the debtor, with the exception of those which are exclusively personal. These are rights and actions which appertain to the debtor but if he does not exercise them, they may be made use of by his creditors in virtue of the law. The third party who has juridical relations with the direct debtor is placed in an indirect juridical relation with the latter's creditor; so that the creditor has two debtors: the direct debtor and the indirect one who is the debtor of his debtor. With regard to this action, "third party" includes not only the debtor, properly called, of the direct debtor, but also any person who has relations of a real nature with the direct debtor in virtue of which the direct debtor has some right against him.

The rational basis of this action is that all the property of the debtor constitutes a warranty to the creditor and therefore all property rights and actions of the debtor are included. This action protects the creditors from the consequences of the debtor's inactivity and of his omission to exercise such rights and actions. He may after a time exercise such rights and actions but until he does so and until he makes them a part of his estate, the creditors cannot obtain payment of their credits.

This action was known to the Romans; but in Roman law in conformity with the principle that the exercise of executive measures even by one of the creditors gave rise to the concourse of all the creditors, because the whole property of the debtor was involved; the action was not granted to the individual creditors, but to the creditors collectively represented by the "register" or "curator" who by order of the Magistrate exercised the rights and actions of the debtor. When Roman Law reappeared in the Middle Ages, the interpreters found in it the embryo of a direct and indirect right of every creditor to take action against third parties: "in iuribus debitoria" in accordance with the principle "debitor debitoris mei est meus debitor".

Nature of the Actio Surrogatoria.

The creditors who availed themselves of this right exercise a right or an action which does not belong to them or to their debtor. The creditor who makes use of this right conferred upon him by the law takes action against third parties "in iuribus debitoris" and not "in imre suo". The right of the creditor is not and cannot be less or greater than that of the debtor, and the third person may bring forward all the pleas which he could make use of against his direct creditor.

Limits' of this action.

It has for its object all the rights and actions of the debtor excepting those which are inherent in his person, because these do not form part of the warranty of the creditors. The creditor therefore cannot exercise the right of use or of habitation, or the action for personal separation or actions relating to status, notwithstanding that these actions may have the effect of increasing the estate of the debtor. The creditor may act "in juribus debitoris" in order to obtain what is due to him. The action is therefore limited by the amount of the debt which is due to the person who avails himself of it.'

3.. Actio paulliana.

This action is given to the creditors in their own name in order to impugn any act done by the debtor, which is detrimental to their rights and which is done in order to defraud them. This action aims at impugning those acts done by the debtor in favour of a third person in order to do away with the effects of such acts, in the interest of the creditor who exercises the action; and it thus reinstates the estate of the debtor which had been diminished as a result of the act which is impugned and revoked. This action therefore affects the third person who is thus deprived of what the debtor had transferred to him and which he has to return to the debtor in order that it may be subjected to the rights of the creditor. The action has therefore to be exercised both against the third person and against the debtor;

against the third party because he has to be deprived of what he had acquired and against the debtor because no act can be revoked without the intervention of all those who have taken part in it.

Comparison between the Actio paulliana and the Actio Surrogatoria

The "actio surrogatoria" provides for the inactivity of the debtor and for his omission to exercise his rights and actions against third persons, and it protects the creditors from the consequences of the negligence of their debtor, whilst the "actio paulliana" or "revocatoria" affects those acts done by the debtor which he diminished his estate.

In the "actio surrogatoria" therefore the creditor exercises a right which does not belong to him but to his debtor; the paulliana on the contrary is given to the creditor in his own name because it is evident that this action cannot be granted to the debtor since it is not lawful for a person to impugn his own acts.

The "actio paulliana" has for its rational basis the same principle on which the "surrogatoria" is based that is, the creditor has in security of his credit all the property of the debtor. It presumes, in fact, that the debtor has diminished this security thus prejudicing the creditor in consequence of the act performed in favour of a third person and it is given exactly in order that the creditor may re-instate his security though the recovery of the property transferred by means of the act impugned.

The "actio surrogatoria" does not adequately protect the creditor both because it only refers to those rights and actions which the debtor fails to exercise and because it consists in the exercise of rights which belong to the debtor himself; in the "actio paulliana" on the contrary we do not have rights and actions which the debtor omits to exercise but acts which he has performed and which he cannot impugn and which therefore neither can the creditor impugn "in juribus debitoris".

This action derives from the praetor who introduced it in the "Edictun perpetuila" in the following words handed down to us by Ulpian; "Quae fraudationis causa gesta erunt cum eo qui fraudem non ignoraverit de his actionem dabo" (Lex. 1, princ. Dig. Lib. 42, Tit. 8, "quern in fraudem creditcrun".)

We shall divide this thesis into four parts:

1. elements necessary in order that the "actio paulliana" may be exercised;

2. acts which are subject to it;

3. pleas of which third parties may avail themselves;

4. effects of this action.

1. The necessary elements are:-

a. Prejudice to the creditor: "eventus damni" and

b. Fraud - "consilium fraudis".

The first element looks at the effect (elemento di effetto) and the second looks at the intention (elemento di affetto).

a. The first condition is sub-divided into four simple conditions

1. the act must have diminished the estate of the debtor thus rendering it insufficient or more insufficient than it was to satisfy the debt.2. This prejudice that is the insolvency of the debtor must be the direct effect of the act which the creditor wants to impugn. 3. The debtor must still be insolvent at the time when the action is exercised. 4. The creditor of the plaintiff must be anterior to the act which he wants to impugn.

1. A diminution in the debtor's estate is therefore not enough, but it must be such as to render it insufficient or more insufficient than it was before, .to satisfy the creditor; in other words, such as to determine or increase the debtor's insolvency. If, inspite of the act

to be impugned, the debtor is still in a position to satisfy the creditor's claim, the action may not be exercised because there is no prejudice to the creditor. In such case, the third party may avail himself of the plea of escussion.

2.The insolvency or in the increased insolvency of the debtor must be the direct effect of the act which the creditor wants to impugn and not the ether effect of supervening causes; because the "actio paullianna" aims at depriving the third party of what he may have acquired and it is obvious that, though it is just that he should be deprived of such things by reason of their being the direct consequence of the act performed by him and by the debtor, it is not just that he should bear the consequence of causes with which he had no connesion, such as economic crisis.

3. It is necessary that the debtor be still insolvent at the time when the action is exercised. If, during the interval between the act and the inpugnation therefore, the estate of the debtor becomes sufficient in the same measure as it was at the time when the act was performed, the creditor cannot exercise this action because he is not prejudiced by the act in question.

4. The credit must have existed before the act which the creditor wants to impugn was performed, because the security of the creditor includes the present and future property of the debtor but it does not include past property as well.

b. The second element is "consilium fraudis". Fraud here means the knowledge that prejudice is being caused to the creditor. The debtor is fraudulent, therefore, when he is aware of his debt or, debts when he knows that his act will lead to insolvency or will increase his insolvency even though he does not positively intend to do ham to his creditors or to defraud a given creditor.

The same thing may be said in regard to the third party in case, the element of fraud is necessary also in his regard; he is an accomplice in the fraud if he knows that the debtor has debts and that the act which is envisaged will diminish the debtor's estate to such an extent that it will render him insolvent.

In regard to the debtor, fraud is always required in order that the actio paulliana may be exercised, whatever be the nature of the act, be it onerous or gratuitous. Indeed, in order to authorize the creditors to censure and impugn the debtor's doings it should not be enough that the act be detrimental to them, because the debtor should not, for this reason alone, be deprived of his liberty to dispose of his own property; it is not necessary that he should have acted fraudulently and it is only this factor that can justify the creditors' interference with a view to impugning the acts performed by the debtor.

With regard to the third party, a distinction has been traditionally made by jurists and legislators between gratuitous and onerous acts, and complicity in fraud is only required in the latter case (1187). This distinction is based on the fact that it is the third party who sustained the effects of the "actio paulliana", because he is deprived of what he acquired; now, as he is not a debtor nor is he in any relation liable to produce an obligation in favour of the creditor, Justice and Equity demand that nothing other than his complicity in the fraud or his enrichment to the creditor's detriment should subject him to the consequences of this action; if he an accomplice, it means that he is guilty of a tort with respect to the creditor, because a delict or tort in the civil sense means any unlawful act that causes damage to another; in this case the third party id subjected to the action of the creditor in conformity with the strict dictates of justice. In case of enrichment, the third party is on the contrary subjected to the consequences of the "actio paulliana" on the ground of equity and therefore independently of any participation in the fraud or otherwise. It is contrary to

the dictates of equity that the third party should be allowed to enrich himself, by leans of an acquisition on a gratuitous title to the detriment of the creditor. "Melius est favere ei qui certat de danno vitando, quam ei qui certat "de lucro captando". The burden of proof that there was fraud lies on the creditor because it is an element which is necessary to give life to his action.

3. Acts subject to the Actio paulliana. All acts in the widest sense of the word are included: "haec verba quae fraudationis causa gesta erunt", Ulpian comments, "genaralia sunt et continent in se quodcumque fraudis factum est... qualecumque fuerunt nam late ists verba patent[1]' (Lexl, Dig. tit.l.). Therefore also renunciation to a security of a creditor of the debtor, renunciation to a hypothec, renunciation to acquisitive prescription even after it is completed, are included. All acts are subject to this action excepting those which refer to rights exclusively personal to the debtor because such rights do not form part of the creditor's warranty. Moreover, if the debtor does not avail himself of an opportunity to acquire something such as omission is not subject to the actio paulliana because the acceptance of such an opportunity is the object of a right belonging exclusively to the person to whom it presents itself, and which is at liberty to discard:- "pertinet edictum ad diminuentes patrimonium suorua, non ad eos qui id faciant ne locupletentur". Ulpian applied this proposition to a renunciation of an inheritance: "qui repudiavit haereditatem non est in ea causa ut huic edicto locum faciant; noluit enim adquirere, non suum propriun patrimonium diminuit".

Art. 907 of the Civil Code and the - corresponding articles of foreign Codes provide otherwise for a renunciation of an inheritance. If the debtor renounces to an inheritance which had devolved on him such a renunciation may be impugned by the creditors by means of the actio paulliana and they may be authorised by the Court on their demand to accept the inheritance themselves in their interest in the name of their own debtor.

This notable difference between Roman Law and present law is due to the different import which is; nowadays attributed to the devolution of an inheritance: in Roman law little importance is given to the moment in which devolution takes place and acceptance was regarded as the way in which an inheritance was acquired (haereditatis aditio). However, devolution has now acquired a greater importance; it gives the right to the person called to the inheritance, to make such inheritance his own and acceptance merely turns a potential right into a fact; so that if the person called renounces an inheritance which has already devolved upon him, he would be renouncing a right which he has already acquired and it is not merely the case of an omission to acquire a right.

The case of a refusal of a donation is quite different because donation is a contract and as such it only becomes perfect when the donation is accepted by the offered; therefore the promise of the donor is merely an opportunity of an acquisition which the offeree may accept and the debtor who does not avail himself of such an opportunity does not diminish his estate but he simply omits to increase it; we may say that this is the only case in which the rule applies.

With regard to the payment made by the debtor to one of his creditors a difficulty arises whether it may be impeached by the other creditors that is whether they may by means of the "actio paulliana" compel the creditor whose debt had been satisfied to give, back to the debtor what he has received from him in order that they may exercise their rights over it. Ulpian answered the question in the negative even though the creditor who has been paid may have been aware when he was being paid, that such a payment would have left the debtor without any means at his disposal as regards the satisfaction of the other creditors' claims,. This is also the general rule of modem law with the exception of those special laws relating to payments made by the debtor when he is about to go bankrupt.

4. Pleas which the third party may bring forward.

The third party who is the defendant in an actio paulliana may bring forward the plea of escussion by means of which he compels the creditor to exercise his rights over the remaining property of the debtor and in this way it suspends the proceedings; this plea is based on the fact that this actio presumes that the estate of the debtor is insufficient to satisfy his creditors and it aims exactly at ascertaining the existence of this condition. If the whole debt may be paid by means of such an escussion the creditor cannot proceed with the "actio paulliana" and the third party is free. If the creditor obtains only a part of the payment the action may be continued in order to obtain the rest.

5. Effects of the Actio Paulliana.

The effect of this action, if it is accepted, is the revocation of the act impugned with regard to the prejudice caused to the creditor, but the act is not annulled because it is supposed to be unaffected by vice. With regard to the property forming the object of the act, the act is revoked only in part, that is up to the amount necessary in order to make good the prejudice caused to the creditor.

When the act is revoked, the third party is bound to return in whole or in part, as the case may be, what he may have obtained, because the natural effect of every revocation of an act is that everything is restored to its former state and this is effected by means of restitution.

The effect of this action in its application to miners is modified according to the general principle which governs the effects of obligations undertaken by minors; the action cannot be exercised against minors except up to the amount in which the latter have been enriched (Art. 1167).

Section 1167 only mentions minors but the same thing should be said in regard to interdicted persons and married women who have acted without the authority or intervention of the curator or

of the husband, because it is a general principle which regulates the effects, of obligations undertaken by such persons, that they are not bound to re-imburse what they may have acquired in virtue of an act which is revoked except up to the amount of which they have profited.

With regard to the-debtor, the revocation of the act cannot be of any profit to him, because the action is not given to him but to his creditor in his own name; neither can the other creditors who have not exercised this action derive any benefit, according to the prevailing opinion because with regard to then judgment which revokes the act impugned is a "res inter alios acta".

Prescription of the Actio Paulliana.-

This action is prescribed according to the general rule of prescription of all actions by the lapse of thirty years, because the prescription of five years of the action of rescission is applicable only to the relations between the parties.

Extinction of Obligations.

Saving the effects of a resolutive condition and of prescription, obligations are extinguished by the following causes

1. Payment.
2. Novation.
3. Remission of debt.
4. Compensation.
5. Confusion.
6. By the loss of the thing,
7. Rescission.

1. Payment. - Real offer and deposit

The word payment in its wider sense,

refers to any obligation and to any way in which the debtor frees himself of his obligation; "solutionis verbum pertinet ad omnem liberations quoque nodo factam" (Lex. 54, Dig. De solutions et liberations - lib. 46 tit. 3). In its narrower sense, in the sense in which it is commonly used, payment includes only the payment of a sun of money. Juridically, the word payment means the performance of an obligation in a specific form that is by giving the thing or performing the act which forms the object of the obligation; therefore payment is the performance of an obligation not only when its object is a sum of money but also when it has for its object any other thing or act. Onlv obligations of not doing something are excluded because such obligations are performed by means of an abstention from doing a specific act.

We shall divide this thesis into the following sections

1. Conditions for the validity of payment.

2. Expenses relating to payment.

3. Presumption of payment.

4. Effects of payment.

5. Imputation of payment.

1. Conditions for the validity of -payment.

When dealing with the principal effects of obligations we have said that they consist in the necessity of their being precisely performed and payment is exactly the performance of an obligation to give to do something. Therefore the conditions for its validity are:-

a. the existence of an obligation.

b. the intention of extinguishing it

c. the intervention of the payer and of the receiver.

d. the performance of what is due.

a. the -existence of an obligation. We have, said that the cause of payment is an obligation to give or to do something, and in case there is no obligation, the payment of a thing though it were due made in the erroneous believing that the obligation exists, would give rise to the quasi-contract of "indebiti solutio".

b. the intention of extinguishing an obligation, if payment is not made with this indention but with the intention of creating a new relation it is not an extinctive cause of obligations but it rather creates a new obligation.

c. The intervention of the payer and of the receiver layer may be the debtor or a third party, that is any other person except the debtor who has an interest in the debt or also a third party who has no interest in the debt. An interested third party is one who is involved in the debt that is a co-debtor in an obligation "in solidum" or in an indivisible obligation and the surety. It is obvious that the latter should be allowed to pay the debt since he has an interest to free himself from his obligation and from molestation from the creditor.

Even a third party who has no interest in the debt may pay the debt of another thus freeing the debtor and the creditor cannot refuse such a payment, because it is indifferent to him whether it is the debtor or another person who pays, since he has no right to refuse such a payment made by a third party who has no interest, which, does not affect him in the least and which is a benefit to the debtor.

Similarly it does not matter whether the debtor knows or whether he is opposed to such a payment; "naturaliselim semel anilis ratio suasit alienaim conditioned meliorem quidem etiam ignorantis et inviti nos facere possumus" (lex, 39, Dig. De negotiorun gestione, Lib. III, tit. 5) and therefore the creditor may not refuse to receive payment (1192) tendered by a third party, when from such payment some advantage results to the debtor, provided it be not the interest of the creditor that the obligation be performed by the debtor himself in case the obligation is something which has to be performed by the debtor himself and the

Performance is offered by the third party at The request of the debtor; this last condition Is not found either in the French or in the Italian Civil Code and if has "been taken by our legislator from Art. 2013 of the Code of Louisiana. A third party who is not interested in the debt may pay in two ways;-

1. either in the name of the debtor and in orderr to free him just as m 'negotiorum gestio" or in a payment by intervention in bills of exchange; an agent on the contrary is not a third party but represents the debtor.

2. or in his own name but without succeeding in the rights of the creditor (1191). In this case the third party has no right to claim a subrogation in the rights of the creditor saving the right of the latter to grant him such subrogation, because otherwise the third party could easily invest his money in this way to the detriment of the creditor and without procuring any benefit to the debtor. On the contrary, an interested third party on paying the debt, succeeds "ipso jure" in the rights of the creditor.

From the payment made by a third party a new relation between the payer and the debtor which depends on circumstances arises: thus if the third party has acted as a "negotiorum gestor" he has the right to claim back what he has paid from the debtor by the "actio gotiorum gestomm contraria": if on the contrary he has acted with a spirit of liberality he has no right to claim from the debtor restitution of what he has paid.

The payer must be capable of alienating (1194). The Italian Code in Art. 1240 justly limits this condition to the case in which the fact of payment is the transfer of ownership of the thing given on payment, because if the ownership of the thing due belonged already to the creditor in virtue of the contract alone, the debtor in effecting payment does not transfer ownership but possession.

The sanction to such incapacity is the nullity of the payment in favour of the payer. As to the receiver that is the person to whom payment must be made, he must be either the creditor or his lawful representative, such as a father vested with paternal authority, a curator of an interdicted person or of an

absentee, the tutor or the agent. A tutor or a curator must have been authorised the court whenever such authorization is necessary. If the debtor pays to another person, he pays wrongly and he does not extinguish the debt. He may be compelled to pay again, saving his right of redress against the receiver. However, the nullity of the payment owing to this cause, is remedied in the following cases:-

1. if the creditor ratifies the payment.

2. if the creditor has derived profit from such a payment, such as if he receives what is paid by the debtor to the receiver or if he compensates a debt existing in favour of the receiver with his own credit: this amounts to an implied ratification.

3. if payment is made in good faith to the possessor of a credit, that is to the person who exercises the rights of a creditor without being a creditor. If the debtor pays the debt to its possessor in the belief that he is the creditor, and having no reason to doubt that it is so, the payment is valid, that is it frees the debtor even with regard to the creditor. who cannot claim a new payment saving his right of redress against the possessor.

Moreover, the receiver must be capable to receive payment under the sanction of nullity. The law does not define the degree of capacity and therefore we should say that the capacity of contracting is required, and if this is wanting, payment must be made to the lawful representative of the creditor or to the creditor himself assisted or authorised by the person who is entrusted with such function: Payment may be impeached in case of incapacity but relative nullity may be remedied if the thing paid is applied to the benefit of the creditor, because it would be against the principles of equity if the creditor could avail himself of his incapacity in order to enrich himself at the expense of the debtor.

D The object of payment.

The object of payment is the performance due which must be effected in according with the exact terms of the agreement in regard to substance, time and place. The object of the performance must be the thing which is due and it cannot be substituted by another of an equal or even of a greater value. The creditor has the right to refuse a different object and if he accepts it strictly speaking, it would not be a payment but a new agreement between the parties is reached, that is a kind of "datio in solutum".

The object due must be given in its entirety, and the creditor has the right to refuse a partial payment even though the thing be divisible: division only takes place in case of concourse of several debtors; when there is only one debtor, he is bound to nay the whole debt at one time and may not offer a part of the debt.

If the object of the debt is a certain quantity, (it is determined by its species) (1201) the rules governing the execution of generic or indeterminate obligation are applicable, both in regard to the determination of the object and of its kind.

In the case of a certain and determinate thing, it must be delivered in the state in which it is at the time of delivery, so that even though the thing may have deteriorated during the interval between the creation of the obligation and payment, the creditor has no right to compel the debtor to deliver the thing in the state in which it was before or to restore it to its former state, because the thing due is at the risk of the creditor.

This rule does not hold good in those cases which we have already mentioned when dealing with the effects of obligations in general, namely, if the thing due has deteriorated through "dolus" or "culpa" of the debtor; if the thing has deteriorated during the delay in the performance of the obligation, and if the debtor has assumed the risk.

When payment has for its object the transfer to the creditor of the ownership of the thing paid, it is not valid if it not made by the owner of the thing itself (1193).

Here it is supposed that ownership has not already been transferred to the creditor in virtue of the contract which gave rise to the obligation that the object of payment be a quantity, a fungible and indeterminate thing, the ownership of which is not transferred by the contract, but by delivery.

Sanction to this requisite is that the receiver may refuse the thing offered "a non domino" because he has an interest in acquiring ownership. Also, the debtor who pays the thing which is not his own must, as a rule, be allowed to claim it back because he has an interest in putting himself in a position to return it to the owner, but he has no such right in the case of a sum of money or other thing which is consumed by use and which the creditor may have consumed in good faith, that is, in the belief that he has received it from the owner.

Place of payment.

The performance must be precise also with respect to the place where it is to be effected, if it has been specified, and the agreement must be observed; if there is no agreement but the thing is certain and determinate, payment must be made in the place where the thing was at the time of the contract as it is reasonable to presume since the parties have said nothing that such was their intention. In the case of a sum of money or other object which may be transferred from one place to another, without incurring any expenses and both parties are domiciled in the same island, payment must he made in the house of the creditor; in all other cases, payment must be made at the residence of the debtor.

Time of Payment.

In defect of an express or tacit term, payment is due immediately, but it cannot be made after a warrant of sequestration or other order from a court which directs the debtor not to pay. In this case, he must keep the sum of money or the other thing sequestrated in his possession or deposit it by authority of the Court; and if the debtor pays in contravention to such a warrant or order, the payment made by him, within the limits of the credit included in the warrant or order, and relatively to the person in whose favour the order was given or the warrant issued, is null. The latter may compel the debtor, against whom a garnishee order has been issued, to pay again, saving always his right of redress against the person to whom payment is effected. This nullity does not benefit the "creditor sequestratus" (as far as the "sequester" (sequestratario) is concerned), nor do the other creditors derive any benefit because they cannot exercise rights greater than those which the debtor himself may exercise.

2. Expenses of payment.

The expenses attending the payment are at the charge of the debtor, and therefore if the thing must be paid in a place different from that in which it was at the time of thè contract, the expenses relating to transport are at the charge of the debtor. The debtor, or the party who pays the debt, may require that acquittance be at his own expense, made by a notarial deed.

3. Presumption of payment.

If the debtor summoned for payment pleads that he had already paid, he must prove it by the means admitted by the laws of procedure. But the law formulates two presumptions in his favour, in case the debt consists in periodical performances and in case the parties

have made up general accounts of what each owed to the other.

In the first case, that is in the cases of rent, ground-rent, interest, life and perpetual annuity or other annuities, article 1203 presumes that one or more periodical ' payments have been effected when the following conditions concur:-

a. it is proved by receipts that the debtor paid his debt at three consecutive periods posterior to that of which payment is demanded.

b. these receipts must not contain any reservation regarding sums for previous periods.

The debt is likewise presumed to have been paid when the following circumstances concur:

a. the parties have made up general accounts between themselves, for three times *since* the debt fell due; if the debt had not fallen due, it could not be included in the accounts.

b. such account must have been made without any mention of that debt or any reservation including it.

c. the demand respecting that debt must have been made after the death of the debtor or after a period of not less than three years from the day of the acquittance respecting the last general account.

In both cases we have not an extinctive prescription of the action, but a presumption of payment which is a presumption "juris tantum" that it does not deprive the creditor from bringing evidence to show that payment has not been made. When the creditor tries to bring evidence contrary to this presumption, he may make use not only of direct means, but . also ordinary presumptions or indications, and prove by means of all the circumstances put together that there has never been any payment, or that he has reasonable grounds for not making any reservation as to that debt

and for not mentioning it in the receipts or in the accounts made after it was fallen due.

4. Effects of payment.

The effects of payment are distinguished into normal and abnormal: the first consists in the extinction of the obligation and the consequent discharge of the debtor; the second is that according to which payment extinguishes the obligation of the debtor vis-a-vis his creditor, but it leaves it unaffected vis-a-vis the third party who pays in his stead or who furnishes the goods required in order that he may avail himself of all the rights of the creditor whose credit has been satisfied, for the reimbursement of what he may have paid, or of what he may have given to the debtor in order that he may perform his obligation.

Normal effect. - The normal effect of payment is that of extinguishing the obligation not only in itself but also in its accessories so that the surety is freed, the pledge dissolved and the hypothec extinguished.

In case of more than one debt or of several installments of the same debt or in case capital and interest are due, questions may arise as to which of such debts or installments must be regarded as paid or whether the installments or the interest will be regarded as paid.

The right to declare which debt is discharged belongs, in the first place, to the debtor because he is the one who is most interested in the payment and he may consider himself to be more burdened by one debt than by another. His right is only limited when its exercise may be detrimental to the creditor: it follows therefore that the debtor cannot without the consent of the creditor impute the payment to a debt which has not fallen due in preference to one which has fallen due, in cases where the term of the former debt is presumed to have also been agreed upon in favour of the creditor; and in the case of a

debt for several periodical performances, the debtor may not impute the payment to future periods in preference to previous ones. He may neither impute the payment to the installments in preference to the interest (1211).

If the debtor does not exercise his right of declaring which debt is discharged, the right passes to the creditor in the sense that if the receipt or acquittance he indicates which debt must be deemed to have been paid and the debtor accepts such indication, the latter may not later on require the imputation to be made to a different debt, unless there had been fraud or surprise on the part of the creditor (1213).

In case not even the creditor exercises his right, such imputation is regulated by the law which interprets the intention of the debtor who is the principàl interested party. The rules laid down by law, which are inspired by the principle that regard must be had to the heavier burden of one debt when compared with another because the debtor has an interest in freeing himself from the most burdensome debt "imputatio fit in graviorem causam", are the following:- Art. 1214:

1. the imputation must be made to the debt which is not disputed, in preference to the one which is disputed; because if the debtor disputes the debt, it must be presumed that he had no intention of paying it.

2. in cases of several debts which are not disputed, the imputation must be made to that which at the time of payment had already fallen due, in preference of those which have not yet fallen due; but if there be amongst the latter one with regard to which the debtor was liable to personal arrest, the imputation must be made to such debt, unless the term had not been fixed also in favour of the creditor.

3. among the debts which fallen due imputation is made to that which renders the debtor laible to personal arrest; in the absence of any such debt, to that debt which bears interest in preference to those that product none.

4. if for one of the debts the debtor had given surety and he has given no surety for another debt, the imputation is made to the first in preference to the second, because in this way two debtors are freed. Similarly, in case one of the debts is secured by a hypothec or a privilege and another is not so secured, the imputation is made to the first because in this way, besides the person of the debtor, also his property is freed from "vinculum reale" of the hypothec or privilege.

5. the imputation is made to the debt which the party who had paid, owed as a principal debtor or as bound alone in preference to the debt which he owed as a surety for others, or as one of several debtors "in solidum".

6. in all other cases the imputation is made to the debt which at the time of payment, the debtor has most interest in discharging.

7. when the debtor has no interest in paying any of his debts in preference to the others, the imputation is made to the oldest debt. Among debts contracted on the same day but with different terms, the debt which first falls due is held to be the oldest.

8. "Ceteris paribus", that is if all things are equal, the imputation is made "pro rata" or proportionately.

There is a case in which theses rules are departed from and special rules are observed and from which neither the debtor nor the creditor nor both of them by agreement may depart, because they are established in the interest of third parties. The case is that of a creditor who is paid by the price of an immovable on which he has a right of privilege, or right of hypothecation and which he has caused to be sold by auction i.e. "subhasta", and the third party who has an interest is the person to whom it was adjudicated, that is the one who purchased the immovable; he has an interest that the price be destined to satisfy the "debitum potiore" which enjoys the right

of privilege or of hypothec over the immovable with the object of being subrogated in such hypothec or privilege. For this reason, in such cases, the following rules are observed:-

1. the imputation is made to the privileged or hypothecary debt in preference to others, even though the debtor may have more interest in discharging the latter which may for instance lead to personal arrest.

2. if the thing is subject to two debts, one privileged, the other hypothecary, the imputation is made to the privileged one because between privilege and hypothec the privilege prevails.

3. in case of two privileged debts, the imputation is made to that which is secured by the better of the two privileges, and similarly in case of two hypothecary debts the imputation is made to that debt in regard to which hypothecation is anterior.

4. "Caeteris peribus" the imputation is made "pro rata".

Abnormal effects of payment and payment with subrogation.

Payment, as a rule, extinguishes an obligation together with all its accessories. There is a case, however, in which this effect is considerably modified.

Payment with subrogation takes place when it is made by a third party, for example by surety, or when it is made by the debtor himself but the money with which he pays his debt was provided by a third party. The obligation with regard to the creditor is extinguished, but its effects with regard to the right to the third party to have redress against the debtor subsist. The creditor cannot claim another payment because he has been paid already; but all thr rights, privileges, hypothecs and all actions belonging to the creditor subsist in favour of the

third party in order that he may obtain re-imbursement of what he may have paid for the debtor or what he may have provided with.

The general condition of payment with subrogation are (1) payment made by a third party, namely any person except the debtor or by one who is a co-debtor in an indivisible or in a joint obligation, or an accessory debtor who has a right of redress against the principal debtor and against the other co-debtors.

(2) an agreement or a provision of the law which attributes or sanctions such right of subrogation. Subrogation is therefore either legal, which is attributed by a law to an interested third party; or conventional, when the third party has no interest in the debt.

Conventional subrogation:

Conventional subrogation may take place either "ex parte creditoris" or "ex parte debitoris". The law deals first with conventional subrogation "ex parte creditoris", that is the creditor may subrogate another person from whom he has received payment, notwithstanding any opposition on the part of the debtor who may not prevent the creditor from being paid by a third party.

The rational basis of this act of the creditor is that its exercise does not prejudice the debtor in any way: "quo mihi prodest et tibi non nocet non est impediemdum".

The special conditions for this kind of subrogation are: (1208) it must be express and made simultaneously with payment; it has no effect if it is made after the debt is paid because as soon as payment is made, the obligation is entirely extinguished and subrogation cannot therefore take place: "si post intervallum actiones cessae sunt, nihil ea cessione actum quia nulla actio superfluit" (lex. 76, Dig. De solutionibus).

Subrogation may be consented to by the debtor without it being necessary that the

creditor gives his consent as well; because also the debtor may find a person who is willing to pay his debt with subrogation and such a payment is not detrimental to the creditor whose opposition therefore is not admissible. The special conditions of this subrogation are:-

1. a loan which the debtor obtains from a third party.

2. that the money obtained in this way has been actually made use of to pay the debt.

3. the loan must have been made with the condition that the new creditor is to succeed in the rights of the former creditor.

4. both the loan and the receipt must be made by public deed; there must, besides, be a declaration in the sense that the sum is being harrowed for the purpose of making payment, and the receipt issued by the creditor must contain a declaration that the payment has been made with the money furnished for that purpose by the new creditor.

Legal subrogation.

Legal subrogation is granted "ipso jure" to the third party who pays the debt because he has an interest in it, independently of any agreement or of consent, whether of the debtor or of the creditor. It takes place in the cases enumerated in sec. 1209:

1. for the benefit of him who being himself a creditor has paid another creditor who has a right to be preferred to him by reason of privilege or hypothecation.

2. for the benefit of him or who having acquired any movable property, employs the price in paying the creditors in favour of whom the property was hypothecated. As soon as he pays the price the purchaser succeeds in the privileges and hypothecations belonging

to the creditor who has been paid, so that in case of eviction, he may recover the price which he has paid by means of the same privileges and hypothecations.

3. for the benefit cf him who, being bound together with others, (co-debtor or surety) for the payment cf the debts, had an interest in discharging it.

4. for the benefit of the beneficiary, heir has paid with his own money the hereditary debts.

Effects and limits of subrogation.

The third party succeeds in the rights of the creditor whose credit he has satisfied. He succeeds in all the rights whether real or personal, principal or accesso (1210). However this holds goods only up to the amount of the sum_ paid: if the third party pays only a part of the credit, the creditor remains the creditor of the balance and in case of con-course of creditors over the property of the debtor which is not sufficient to satisfy all, the original creditor is preferred to the third party who has paid a part of the debt (1210) according to the aphorism: "nemo contra se subrogare censetur". According to Italian law, on the contrary, the creditor and the third party are on equal footing and are therefore paid proportionately.

Tender of payment and deposit.

Deposit is a remedy granted by the law to the debtor in case the creditor refuses to receive payment. It is based on the fact that the debtor has a legitimate interest in freeing himself from the debt amd from the custody of the thing, in evading the risks in case it perishes accidintally and, in case the debt produces interest, he has an interest in freeing himself from such a burden. The debtor deposits the sum or the thing due at the expense of the creditor and the right to resort to this remedy belongs not only to the debtor

but also to any person who is entitled to pay, that is to any interested third party. The means and the way in which this right is exercised consists in an actual tender of the sum or of the thing due; hence in a deposit of the thing due "oblatio et obsignatio[n] deposit has not the effect of payment (1217) unless it is preceded by the refusal of a valid tender. Tender means that the thing is presented to the creditor and he is invited to take it. Tender must be valid and the conditions for its validity of payment and a few others namely:

1. the person who makes it must have the capacity of paying.

2. **it** must be made to a person who has the capacity to receive it.

3. it must have for its object the thing due: if a sum of money is due, the whole sum which has fallen due must be tendered namely capital, interest and liquidated costs, and besides a sum towards the costs which are not liquidated and a reservation that any deficiency will be made good.

4. if the debt is conditional the condition must have been verified.

5. if the debt is "ex die" that is if a term has been stipulated in favour of the creditor, the expiration of the term is necessary.

6. the tender must be made at the place where, in terms of the agreement, or in the absence of the agreement, according to law payment must be made.

As to the form in which tender must be made, no condition is prescribed, saving what we have already said namely it must be real.

The tender must have been refused by the creditor, and it is held to be refused when it is not accepted within a reasonable time which is granted to the creditor in order that he may decide whether he accepts it or not. The term is four days if both parties reside in Malta and of 8 days if they reside in different islands. Goso and Gemino are considered as one Island (1217).

Deposit is made in the manner established by the laws of procedure, namely by a schedule of deposit and in the place laid down by those laws at the expense of the creditor, because it is he who has compelled the debtor to make the deposit. So that, in case of a sum of money, the debtor will deposit it after having deducted the expenses relative to the deposit; in case of other things, they are deposited on the condition that the creditor cannot take them until he has paid the expenses.

Effects of tender and denosit.

Deposit takes the place of payment and produces all the effects of payment. Therefore the capital bears no interest from the day in which the deposit is made, the debtor is freed and the obligation is not extinguished in all its relations, namely in regard to all the persons involved and in regard to all the warranties which secure it.

There is however this important difference between payment and deposit: in the former, the wills of the creditor and of the debtor concur, namely payment is a bilateral, perfect, definitive and irrevocable act; on the contrary, deposit is a unilateral act and the creditor takes no part so that until the creditor accepts it, it may be revoked at any time by the debtor. Such acceptance may be voluntary or judicial, namely by means of a sentence which declares the deposit to be valid. When the deposit is accepted, it becomes a bilateral, perfect, definitive and irrevocable act in the same way as payment.

Until it is accepted, therefore, the debtor may withdraw the deposit without the consent of the creditor and the extinction of the debt is not definitive but it may be resolved by the withdrawal of the deposit: in this case, neither the principal debtor not his co-debtors or sureties are free.

When the deposit is accepted, whether voluntarily or judicially, the depositor cannot withdraw it without the consent of the creditor and the extinction of the debt is definitive and irrevocable. If the depositor withdraws

the deposit after it is accepted, with the creditor's consent, the obligation which has been definitively extinguished does not revive because it should not be lawful to him even with the consent of the creditor to withdraw the deposit to the prejudice of his co-debtors sureties who had been definitely freed (1220).

The same thing may be said with regard to privileges and hypothecations which were inherent in the obligation which, having been extinguished by the acceptance of the deposit, do not revive with its withdrawal, because this would work to the prejudice of third parties who in the meantime may have acquired immovable property belonging to the debtor or other privileges or hypothecs against him (1221).

A new obligation may of course arise after the deposit is withdrawn and in fact it arises when the creditor had given his consent to the withdrawal of the deposit with a spirit of liberality; it is obvious that this new obligation is capable of new sureties and of a new hypothecation which result by reason of a new act and which require a new registration (1222).

3. Novation - Delegation

Novation is the substitution by means of a contract of a new debt for an old one which is extinguished "prioris debiti in alteram transfusio atque translatio" (Fram. I, Dig. De novationibus)

There are three kinds of novation:-

1. Objective and real.
2. Subjective and personal "ex parte debitoria".
3. Subjective and personal "ex parte creditoris".

It is objective when it refers to a change in the object of cause of the obligation; it is subjective "ex parte debitoris" or "mutato debitore" when a new debtor is substituted for the old one who is free with regard to the

creditor:- this kind of novation is known as "ex promissio". It is subjective "ex parte creditoris" when a new creditor is substituted for the old one with regard to whom the debtor is freed.

Novation "ex parte debitoris" must be kept distinct from certain analogous figures namely:

1. a mere indication made by debtor of a person who is to pay in his stead; (1224). Here we have simply an understanding or a mandate and not a new obligation of the extinction of the old one.

2. "a promissio" i.e. when a new debtor is added to old one without the latter being freed from his obligation.

3. Imperfect delegation which takes plaoe when the debtor delegates another person to pay the debt and such a person binds himself to pay and is accepted by the creditor. On the contrary, perfect delegation is that in which the creditor not only accepts the person delegated as a new debtor but he also frees the debtor.

Let us now compare novation "mutato creditore" with these other figures:-

1. indication made by the creditor of a person who is to receive the credit in his stead; this too is merely a mandate without any substitution of the creditor.

2. assignment of a credit; it is true, here, that the assignee becomes a creditor instead of the assignor but the obligation is not extinguished but only transferred.

3. with subrogation by means of which a third party who pays instead of the debtor succeeds in the rights of the creditor whose credit has been satisfied. In this case the debtor's obligation is not extinguished, but he remains subject to the same actions in regard to the new creditor who has been subrogated.

Requisites of Novation.

Novation is the substitution by maens of a contract of a new obligation for an old one and therefore besides its own requites, it requires the requisites common to all contracts. The requisites therefore are:

1. capacity in the contracting parties (1223).

2. consent of the parties effecting novation that is in objective novation, the consent of the creditor and the debtor, in novation "exparte debitoris" the consent of the creditor who frees the old debtor and acknowledges the new one and that of the new debtor because a debt is imposed on him: on the contrary the consent of the former debtor who is freed is not required. In novation "ex parte creditoris" the contract requires the consent of the non-creditor because no one may be compelled to accept a credit, that of the former creditor because he is deprived of his credit and **[missing text]** the debtor because he assumes a new obligation.

3. the concourse of two obligations that is the old one which is the basis of the new one which is substituted and if there was no former obligation, novation is null.

4. the intenting of effecting a novation that is of extinguishing an obligation and of creating a new one instead. There is no novation if the obligation is merely modified, but not extinguished, such as if a term is included or the place of payment changed. Therefore there is no novation if an indication is made of a person who is to pay instead of the debtor to receive payment instead of the creditor nor if the debtor leaves negotiable titles which are accepted by the creditor because we have here merely a change in the form of the debt nor is an acknowledgement of the debt by means of a public deed or the securing of a debt by means of hypothec, a novation. The intention of affecting a novation is not presumed but it must plainly result

Effects of Novation.

Novation is a complex transaction which consists in the creation of a new obligation and the extinction of the former one. We shall deal with it here only as an extinctive clause of obligations and in this respect its effect is the extinction of the former obligation in all its relations; consequently:

1. a novation effected by one of the co-debtors and the creditor extinguishes the obligation of all the co-debtors because the obligation of the co-debtors is one saving the right of the debtor who has contracted the new obligation to have redress against the other co-debtors for their share of the old debt discharged by him. (1231).

2. a novation which takes place in regard to the principal debtor discharges the sureties. If the creditor in the former case requires the concurrence of the co-debtors "in solidum" and in the second case the concurrence of the sureties and the co-debtors or the sureties refuse to accede to the new agreement, the novation does not subsist.

4. novation extinguishes the privileges and hypothecations accessory to the former obligation; but this rule may be derogated and the creditor may reserve for the new obligation the same privileges and hypothecations because this rule is not essential to novation. However such rights may not be reserved in case of novation "mutato debitore" because such a reservation would infringe the rights which third parties may have acquired over the property of the new debtor before novation. This exception does not hold good in case the former obligation was "in solidum" when one of the co-debtors is substituted for the other, because in this case third parties are not prejudiced.

Delegation.

Though delegation is not the same thing as novation, still it is very similar to it and the

law deals with it in this section.

Delegation nay be either simple or perfect:-

It is simple when the debtor delegates another person to pay his debt and the latter binds himself to pay and te creditor accepts him without however freeing the debtor. Delegation is perfect when besides the conditions necessary for a simple delegation, the creditor frees the debtor. This kind of delegation is a trye novation and in the majority of cases this is how novation is effected.

Certain difficulties arise:-

1. Suppose the delegated person becomes solvent, may the creditor resort to the debtor?

The creditor has discharged the debtor by whom a delegation has been made (Art. 1227) has no right of redress against the debtor, if the person delegated becomes insolvent exoept in the following cases: - [1]

a. if the creditor has made an express reservation to that effect in the act by which he freed the debtor.

b. if at the time of the delegation the delegated person was already insolvent or bankrupt or about to become because in this case the reservation is presumed.

2. Can the delegated person avail himself of an exception against the creditor of which he could availed himself against the debtor?

Generally speaking the person who delegates is a creditor of the delegated person, and he therefore delegates the debtor to pay his debt. When the delegation accepted the debt due by the delegated person to the debt is extinguished, because the relation existing between them is substituted by another relation in virtue of which the delegated person becomes the debtor of the person to whom he is delegated, that is, the creditor. Therefore the delegated person cannot avail himself of the means of defence which referred to his former relation

with the debtor, saving his right of redress against the debtor. Certain eases, however, are exceptions to this rule:

a. a plea which depends on the condition of a person e.g. a minor subject to patria potestas or tutela and a married woman, if incapacity due to these causes substituted at the time when the delegation was accepted, may be availed of notwithstanding such acceptance which, indeed, is itself tained with the vice owing to incapacity.

b. if the delegated person meant to make a donation to the person who delegates him and not to extinguish a debt because he was not his debtor; this is so on grounds of equity according to the principle: "melius est favere ei qui certat de damno vitando, quam ei qui certat de lucro captando".

Compensation.

Compensation is the elimination of two debts which are due reciprocally by a creditor and a debtor, "debiti et crediti inter se contributio" (Frag. II, Dig. de "compensationibus"). It is known as compensation because it is as if the two debts are weighed and they extinguish one another to the amount in which their weight is equal. Compensation is therefore a reciprocal payment which extinguishes not one but two obligations at the same time: each of the parties as a creditor exacts his own credit by not paying his debt and as a debtor pays his debt by not exacting his credit.

Compensation may be legal, facultative, judicial or conventional.

Legal compensation.

The most important of all is the legal compensation, the conditions for which are the following:-

1. tho-existence of two debts:

it is indifferent whether they be equal or unequal. If they are equal they extinguish one another completely, if they are unequal they extinguish one another up to the lesser of the two amounts.

2. Reciprocity i.e. the two debts and credit must subsist between the same persons each figuring both as debtor and creditor. The law applies this rule in Art. 1244 to the case of a transfer of one of the two credits and it lays down that in case of such a transfer the debtor may not oppose to the transferee the compensation of the debts, which before his acceptance of the assignment he could have set up against the assignor, because it is presumed to have renounced to it when he accepted the transfer. If on the contrary, the debtor had not accepted the assignment, but it had only been notified to him, he is not prejudiced thereby, because notification is not an act of his will amd therefore he may oppose to the transferee the compensation of the credit, existing before the notification.

Art 1243 makes another application of the same principle to the case in which one of several joint debtors is or becomes creditor of the common creditor. The article distinguishes between two hypotheses: if the common creditor demands payment of the debt due to him by that co-debtor who is his creditor, the latter may oppose the extinction of the debt by compensation, saving the co-debtor's right to resort to the other co-debtors for their share of the common debt which he had satisfied by compensation. If, on the other hand, a common creditor demands payment from one of the other co-debtors "in solidum", strictly speaking he could not oppose compensation because there is no reciprocity; however in order to share such a co-debtor from having redress against the other co-debtor who is also co-debtcr, compensation may be opposed also in this case but pnly up to the share of such a co-debtor in the common debt.

If the principal debtor becomes a creditor his surety may avail himself of compensation because when the principal debt is extinguished the security which is accessory to it is extinguished as well. If the surety becomes a creditor, the principal debtor may not oppose

the compensation of what his creditor owed the surety, but the surety may oppose it saving his right of redress against the principal debtor.

3. The two debts must be homogenous, that is they must have for their object money or other fungible thing of the same kind such as coal, wine, wheat. This condition is required in order that it may be truly said that each of the parties as creditor obtains his own credit by not paying his debt and as creditor pays his own debt by not exacting his credit.

4. The two debts must be liquid, that is, certain in themselves as to their object and with respect to quantity. This condition is required in the interest of a person whose credit is liquidated but whose debt has not yet been liquidated. Such a person may claim his credit without being compelled to compensate that is to pay his debt. As the condition is required in his interest he may do away with it and consent to the compensation notwithstanding that his debt is not certain.

5. The two debts must be claimable, that is, they must have fallen due so that if there was a term it must have elapsed because compensation is payment, and just as a debtor is not bound to pay a debt which has not yet fallen due, he can neither be compelled to compensate it. This condition is required in favour of a person whose credit has fallen due but whose debt is most claimable. He may therefore waive this privilege, which besides has the following two exceptions:-

1. if the term is agreed upon in the sole interest of the creditor who wants to avail himself of compensation.

2. in case of a delay granted gratuitously i.e. in case the debt has fallen due but the creditor of his own good will grants a term (1241).

Besides these conditions there are two negative ones:-

a. it must not be prohibited by law

b. it must not be prejudicial to the

rights acquired by third parties.

a. The law prohibits compensation in the following cases:-

1. when a demand is made for the restitution of the thing of which the owner has been unjustly deprived, because it would be immoral if the person who has unjustly deprived the owner of his thing could delay its restitution by alleging compensation.

2. when a demand is made for the restitution of a deposit or of a loan for use (commodatum); when a person refuses to return a deposit or a "commodatum" by alleging compensation, such a refusal is an abuse of trust in case of a deposit and of beneficence in the case of commodatum.

3. in cases of debts having for their cause maintenance not laible to be sequestrated and this "pietatis causa". Maintenance rights not subject to sequestration are those bequests left expressly for maintenance whenever the debtor has no other means of subsistence and the credit which the creditor wants to oppose is not alno for maintenance and sums due for mainte-
nance awarded "officio judicis" whenever the credit itself is not for maintenance (Art. 382 and 383) of the Laws of procedure.

b. The second negative condition is that the prejudice to third parties be no obstacle to compensation. For this reason compensation may not be opposed by a person who, being a debtor, becomes creditor after the issue of a warrant of sequestration, because under these circumstances compensation would prejudice the party who has obtained the issue of the warrant of sequestration. As to the credits existing before the sequestration, these would already been compensated with the debts of the garnishee towards the sequestrated person and in this case sequestration cannot bring such debts into existence again

Effects of Sequestration.

Compensation, qua payment, extinguishes the

obligation, may, it extinguishes two obligations. In case one of the parties has more than one debt, or his debt is divided in two parts and his credit cannot satisfy them all, the rules of imputation of payment are observed.

Compensation extinguishes the obligation "ipso jure" from which two reciprocal debts arise and it takes place even without the knowledge of the debtors and such extinction holds good with regard to all personal and real relations, whether principal or accessory.

If one of the parties, notwithstanding compensation, pays his debt which by law is extinguished, he remains a creditor but he may not avail himself of the privileges or hypothecations that secured his credit, to the prejudice of third parties. These rights were extinguished in virtue of compensation which had taken place "ipso jure" and they may not be revived because that would work to the detriment of third parties. The only exception to this rule is in case of a debtor who pays his debt, because he is unaware of his credit of which he could have opposed compensation, but he must have reasonable grounds for being unaware (1247).

Facultative compensation.

Facultative compensation takes place when one of the parties remits any of the conditions in his favour which is required for legal compensation.

Conventional compensation.

Compensation is conventional when it is agreed upon by the parties. It is not susceptible of legal rules but it depends on the will of the parties, and may be agreed upon in any case even though, for example, the debts have for their object "res infungibili".

4. Remission of debts.

Remission of debts means a renunciation to a credit gratuitously made by the creditor in favour of the debtor; this remission may be granted either by an act "causa mortis" or by an act "inter vivos" in which case it is known as conventional remission or discharge.

Kinds

Remission may be:

1. Real or Personal - This distinction applies only when there are several debtors. It is known as real in an absolute and general way when it is made either without reference to any of the debtors or with reference to all of them; it is personal when it is made with reference to one or some of the debtors.

2. With regard to its form, remission may be either tacit or express. It is tacit when it results from such acts of the creditor which necessarily imply his intention of discharging the debt or and which cannot be otherwise interpreted: whether there is a tacit condonation or not is a question of fact. A case of tacit remission is contemplated in Art 1236, that is when the creditor voluntarily delivers the original writing of the debt to the debtor: it is natural to suppose that the creditor in doing so had the intention of remitting the debt because he has deprived himself of the title from which his credit results. This presumption is "juris tantum" and it requires the concourse of the following conditions:-

1. that the credit results from a ' private writing.

2. that the creditor returns the original writing.

3. that this be delivered by the creditor to the creditor personally.

4. that the creditor has returned it voluntarily.

Conditions for remission

Here the famous question whether remission is a unilateral or a bilateral act presents itself, that is, whether it requires ***or*** not the acceptance of the debtor. The view advocated by Pothier who holds that it is bilateral seems to be more correct because the creditor when he remits the debt has no intention of abandoning his rights, but of giving a donation or of granting a liberality to the debtor himself on condition, therefore, that it be accepted.

As to the other requisites it is in substance subjected to the rules of donation but its form is free.

Tacit remission must result from such acts which necessarily imply remission and consequently if the creditor does not make a reservation of a debt in a receipt relative to another debt, the first debt is not presumed to have been remitted nor does the restitution of the pledge give rise to the presumption that the debt is remitted. (Art. 1237, 1233).

Effects of Conventional Remission

The effect of conventional remission is the extinction of the debt in all its relations whether personal or real and therefore:-

1. a remission in favour of one of the debtors "in solidum" frees his rights against the latter. When such a reservation is made he discharges them up to the amount of the share of the debtor so remitted. Similarly the delivery of the original writing of the debt made to one of the joint debtors discharges the others as well.

2. a remission granted to a principal debtor discharges the surety but not vice versa (1234).

3. a remission granted to one of several sureties discharges the others to the extent of the portion which he must contribute to the debt secured by them. If however in

order to discharge the surety, the creditor has received something, this is imputed to the debt in discharge of the principal debtor and of the other surety. This is laid down in art 1235 in order to prevent a sort of usury; and it must be observed however that the creditor in discharging a surety is depriving himself of a security and what he receives in excess i.e. usury, shall have been regarded as a compensation for what he is depriving himself of.

Remission extinguishes the privileges and hypothecs which secured the obligation.

5. Confusion

Confusion, as a cause of extinction of obligations, takes place when the quality of creditor and debtor are united in one and the same person. The commonest teaching with regard to the nature of confusion is that its extinctive form derives from a supervening impossibility of exercising the right of credit, since a person cannot be a creditor and a debtor himself. Therefore, Giorgi teaches (Voi. VIII pag.98) that though confusion as a mode of extinction of obligation, it must not lead to conclusions which exceed the cause that give rise to it and whenever it is not a case of exactions or payment which have evidently become impossible but of determining the rights and obligations towards third parties of a person who, being a creditor has succeeded to a debtor or being a debtor has succeeded to a creditor, justice and reason do not permit us to do away with such rights and obligations but with regard to such effects the obligation subsists even after confusion, and such right and obligations hold good. Thus, in a liquidation of an inheritance, in order to determine the legitim both the credits and the debts of an inheritance towards the heir are taken into account in order to increase or decrease as the case may be, the amount of the inheritance; they are not, therefore, taken into account in order that the heir may exact the new credit against the inheritance or to pay the new debts but for the purpose of determing the amount of the estate so as to give to those in whose favour a part of the inheritance is reserved, their just share.

Requisites

There is only one requisite, that is there must be something which effects this reunion in one person of the qualities of creditor and debtor, that is either the debtor succeeds to the creditor or the creditor to the debtor by an act "causa mortis/ or "inter vivos", by particular or universal title. If confusion takes place in virtue of a universal succession, this must be pure and simple, because an acceptance with the benefit of inventory keeps the estate or the heir and that of the decujus distinct.

Effects

Its effect is the extinction of the obligation in the sense that the right of credit is rendered impossible and therefore:

1. a confusion which, takes place in the person of one of the debtors "in solidum" when he succeeds the common creditor, avails his co-debtors only for the portion in which he was debtor. The same thing happens if the common creditor succeeds one of the joint-debtors (1249).

2. a confusion between the quality of creditor and of principal debtor, when either of them succeeds the other extinguishes the principal obligation and it therefore works to the advantage of the sureties who may avail themselves of it. A confusion between the duality of creditor and of surety extinguishes the security only but it does not operate the extinction of the principal obligation (1249).

6. Loss of the Thing due

Just as no obligation may come into existence if it has no object, so also it cannot continue to exist without an object. The loss of the thing due takes place according to law, when:-

1. a certain and determinate thing which was the object of an obligation is destroyed

or is lost in such a way that no trace of its existence remains.

2. or the "genus" to which the thing forming the object belongs is rendered "extra commercium".

For the extinction of the obligation, therefore, the following conditions must concur:-

a. that the obligation has for its object a certain and determinate thing and not specified only in regards to the class or "genus" to which it belongs because "genus et quantitas numquam pereunt" saving the case in which the class is rendered "extra commercium".

b. that such thing has been destroyed or rendered "extra commercium" or lost in such a way that its existence is absolutely unknown.

c. that this has happened without the fault of the debtor and before he was in delay because "culpa" rendered the debtor responsible for non-performance, and its relative da mages, when as a result of non-performance the execution of the obligation becomes impossible and "mora" places the risk at the charge of the debtor.

These rules may undergo certain modifications, namely:-

i. a debtor in delay may bring evidence to shew that the thing would have equally perished had he delivered it to the creditor.

ii. a loss even though it be due to accident, does not extinguish the obligation but it subsists with regard to the effect, of responsibility for damages when the debtor has assumed the "periculum rei".

iii. the principle that the loss of the thing extinguishes the obligation suffers an exception with regard to a person who has stolen the thing, because he remains bound to return it notwithstanding it may have perished through accident (1250).

iv. lastly, though an accidental loss of the thing discharges the debtor if he has any

rights or actions for indemnification against the person who may have been responsible for such loss is bound to transfer such rights or actions to the creditor. In the Italian Code, these rights and actions pass over to the creditor in virtue of the law itself, without the necessity of any transfer.

7. Rescission

Several foreign Codes distinguish between nullity and rescission of an act and this distinction exists also in doctrine. There is nullity when the act is wanting of any of the elements essential to its validity whether the nullity is expressly sanctioned by law (express nullity) or it results virtually (virtual nullity). There is rescission when the act, though in itself valid, is injurious to one of the parties.

The Codes which have adopted this distinction provide two distinct remedies: a demand for nullity and a demand for rescission. Our legislator has not followed this system and designates as a demand for the rescission both juridical means by which the nullity of an act is demanded and by which its dissolution is demanded.

Rescission is a juridical means and it therefore necessarily implies a demand made by one who has an interest either by way of action if the contract has already been executed or by way of exception if he is called before the Court for its execution.

Causes of Rescission.

The causes of rescission as we have already said are two:-

1. nullity, whether express or virtual even though it does not amount to lesson, such as owing to incapacity to contract or a vice or consent, want of cause or of object, defect of form (1255).

2. lesion, or the damage which the

obligation gives rise to. With regard to this second cause we must distinguish the case in which it benefits majors from that in which it benefits minors.

In regards to majors, it avails them only in contracts of partition if the lesion is "ultra quartum" and the action is for compensation and not for rescission (s. 551).

In regard to minors lesion gives rise to rescission in any sort of agreement which is not expressly excluded by law, or condition, however, that lesion proceeds from the agreement itself and not from a fortuitous or unforeseen events (1256). The amount of lesion does not matter unless it is of small importance "de minimis non curat praetor".

Therefore, lesion gives rise to rescission:

a. when though it be not proved that the minors has actually sustained a loss, it is however shown that the agreement renders him liable to law-suits or to-considerable expenses or that he may thereby lose any advantage to which he was entitled (1258).

b. even though the other party was also a minor (1259).

c. a mere declaration made by a minor that he is of full age but rot deprive him of the right of action for rescission; he has however no such right if he has made use of fraudulent means in order to induce others to believe that he is of full age and if he has in this manner deceived the other party (1260).

In the following cases rescission may not be demanded by minors, or interdicted persons, on the ground of incapacity and in case of minors on the ground of lesion:-

1. a minor cannot on the ground of his inincapacity to contract, impugn his obligation, if he has mamade use of artifices calculated to induce others to believe that he is capable of contracting and if he has in this manner deceived the other contracting party (1260).

2. minors cannot demand the rescission of a contract except when persons of full age can also demand in cases:-

a. of agreement with respect to which according to Commercial Law minors are considered as being of full age;

b. of agreement made by minors by reason of their art or profession.

c. of obligations arising from delicts and quasi-delicts, when he has completed his ninth year of age and has acted with discernment (1261).

3. The interdicted person may not impugn his obligations arising from delict or quasi-delict saving any other provision relating to insane persons (1264).

4. When the formalities relative to acts done by minors or by interdicted persons or relative to certain acts which concern them have been complied with or when the tutor or the curator has done acts which do not exceed the limits of his administration, the minors or interdicted persons are considered with respect to such acts as though they were not minors or interdicted, saving their right or redress against the tutor or curator if there be room for such right.

Effects of Rescission

These effects derive from the principle that rescission dissolves an obligation and replaces the parties, therefore, in the condition in which they were before the agreement. The parties, therefore, must return reciprocally what

each of them has received from the other by virtue of the contract, together with the fruits and interest which they may have received. Moreover, the Court may order that such fruits and interest received until the demand of rescission be compensated.

This effect is more serious in case of "dolus" or of violence, because the contracting party on whose part there was fraud or by whom the violence was used must restore to the other party not only the fruits received but also those which could have been received and which through his fault or neglect he falied to obtain.

These effects are modified when the cause for rescission is incapacity in the party who demands it: in this case, the other contracting party may not demand the restitution of what he has paid during the period in which the incapacity subsisted, except up to the amount of which the incapable person himself may have profited. "Stricto jure" the incapable person should not be bound to restore anything but in case of enrichment, equity does not allow a person to enrich himself to the detriment of another, "nemini licet locupletari cum aliena jactura". This takes place also in case the other contracting party is a minor as well.

The abovementioned effects are subject to modification in case of rescission of sale or of partition on the ground of lesion.

When rescission of a part of the act is demanded, the defendant may demand the rescission of all other parts which are connected with it, both against the plaintiff himself and, in case in the part which is not included in the plaintiff's demand there are other interested persons, against such persons as well.

Rescission produces its effects even against third possessors. It annuls the rights which were transferred and the burdens which were imposed on the thing which as a consequence of rescission must be restored: "soluto jure dantis solvitur et jus accipientis".

Extinction of the Right to demand

Rescission

This right ceases in two ways:-

1. By prescription
2. By confirmation or ratification of the act.

1. By prescription. Prescription extinguishes this action just as it extinguishes all actions in general. With regard to the time necessary for this prescription, the law distinguishes between various cases according to the ground on which rescission is granted.

a) In case "of vice of consent, minority, interdiction, the term is of two years unless the law in special cases establishes a shorter term.

b) The term is also of two years in case of an obligation without cause of is founded on a false cause (1266) .

This term runs (1267):-

a) in case of a vice of consent if the vice is violent, from the day in which the violence has ceased; and if it is fraud or mistake, from the day in which they are discovered.

b) in case of inexistence of cause; from the day of the contract; in case the cause is false, from the day in which such falsity is discovered.

c) in the case which is omitted by law i.e. minority and interdiction, we have to apply the general rules of prescription, according to which the term runs from the day in which the action may be exercised, ie. from the day of the contract, but it is suspended during minority and interdiction.

In all other cases, the prescription is of five years from the day on which the action may be exercised, irrespectively of the state or condition of those to whom it appertains, saving

any other provision of the law.

The exception of nullity, on the contrary, is not subject to prescription but it can be opposed at any time by the party who is sued for the performance of the contract (1270), because: "quae temporalia sunt ad agendum, perpetua sunt ad excipiendum".

Here the law lays down that both the action (1269) and the exception (1270) of nullity and of rescission are transferable to the heirs; the action however is prescribed within the time which still remained for the persons from whom they derive their title, saving always the cases which interrupt or suspend prescription.

2. By confirmation or ratification.

Confirmation or ratification is that act by means of which a person who has the right to demand rescission, while being aware of the grounds on which he may demand it, voluntarily confirms the act at a time when the vice has ceased to exist. Confirmation or ratification may be either express or tacit:- it takes place tacitly, by the voluntary performance of the obligation against which the law grants the action for rescission or by other acts showing an intention to give effect to the agreement (1273). The conditions of ratification therefore are:-

1. knowledge of the defect which gives rise to such action (1272).

2. ratification must be voluntary because otherwise the ratification itself could be impugned.

3. the defect must have ceased to exist.

It follows that the ratification of an act which is null owing to a defect of formality must result from another act having all the formalities required for the validity of the act which is confirmed or ratified, saving always any other provision of the law (1274). One of the exceptions is contained in art. 1275:- In case of a donation or a testamentary disposition, when the ratification is made after the death of the donor or of the testament by the heirs, tacit confirmation by way of performance of the obligation

is enough. So that, if the donation is null for the lack of form, if the donor wants to ratify it, he must do so by means of a public deed; but after his death it is impossible for him to do so and the only interested persons are his heirs, if they renounce to the action of nullity, which renunciation is implied if they execute the obligation.

Ratification produces its effects between the contracting parties without prejudice to the rights of third parties (1271): so that, if before the act is ratified a third party has acquired some right, he cannot be deprived of it as an effect of ratification.

Obligations "in solidum"

Up to here we have considered the simple type of obligations i.e. having one creditor, one debtor, one object and devoid of any modality.

We shall now have to deal with more complex types and we shall begin with those having more than one active or passive subject, and which are therefore known as multiple obligations in regard to their subjects.

The concourse of several subjects may be original or successive. It is original when the obligation had from the very begining several debtors or several creditors; it is successive when at first the obligation had only one debtor and only one creditor but other debtors or creditors were added later on.

The rules which govern this concourse are inspired by the principle "concursus partes fiunt";
every creditor and debtor is creditor or debtor of a part. The obligation is "pro rata" and "in partes viriles": there are as many credits and as many debts as there are parties. The obligation is apparently one, because it has been contracted in one and the same act and in the same words, but in reality there are as many obligations as there are debtors and creditors.

The effects of this concourse, therefore, are;

1. each of the creditors may not demand and each of the debtor is not bound to pay, but his share.

2. the insolvency of one of the debtors is borne by the creditor.

3. "mora" or fault on the part of one of the debtors does not affect the others.

4. an interruption of prescription obtained by one of the creditors does not avail the other creditors and similarly an interruption obtained by a creditor against one of the debtors is not detrimental to the other debtors.

There are, however, two exceptions to the rule "concursu parte fiunt": one derives from solidarity and the other from the indivisibility of the obligations. The characteristic of these two exceptions is that each of the creditors may demand and each of the debtors is bound to pay the whole debt. They differ from each other because of their different juridical basis: the basis of solidarity is the "vinculum" which governs the parties in their relations with one another, whilst that of indivisibility is the nature of the performance which forms the object of the obligation; we may therefore say that solidarity is the subjective character and indivisibility is the real character of the obligation.

Solidarity

There are three kinds of joint and several obligations: active, passive and mixed.

It is active when there are several creditors; passive when there are several debtors; mixed when there are several creditors and several debtors.

Active solidarity is that binding tie existing between several creditors in the same obligation in virtue of which each of them with regard to their common debtor, is creditor of the whole debt, in respect of the demand for payment and in respect of the acts which preserve the credit itself.

Doctrine usually consider such creditor as reciprocal agent so that each of them represents the others with regard to the exaction of the credit and to the exercise of preservative acts.

Active solidarity is instituted in the interest of the creditors in order that one creditor may alone, without the necessity of demanding the consent of the others, demand payment of the whole debt and exercise precautionary acts. This is so, however, vis-a-vis the common debtor, because in their internal relations every one of the creditors is a creditor of his share and the credit has to be divided between the different creditors.

Owing to its principal characteristics, the law defines active solidarity as follows:- an obligation is "in solidum" in favour of two or more creditors when it expressly vests each of such creditors with the right of demanding the payment of the whole sum due and the payment made to any one of them discharges the debtor even though the damages accruing from the obligation may be divided between the several creditors (1133).

Passive solidarity i.e. between several debtors in one and the same obligation is that in which debtors are all bound to the same thing in such a way that each of them may be compelled to discharge the whole debt and the payment made by one of them operates so as to release the others as against the creditor.

Here, too, doctrine applies the theory of mandate i.e. the debtors are reciprocal agents for the above-mentioned purposes; it is understood that this takes place only vis-a-vis the common creditor because in their internal relations the debt is common and must be divided between them.

The principal characteristic is always the same i.e. each of the debtors may be sued for the whole and therefore the law defines passive solidarity in this manner: "Debtors are jointly and severally liable when they are all bound to the same thing in such a way that each of them may be compelled to discharge the whole debt and payment made by one of them operates so as to release the others as against the creditor" (1137).

Notions common both to active and passive Solidarity.

Nature of solidarity:-

Solidarity consists in the unity of the obligation; though it exists in several subjects, still the obligation which subsists in each of then is one; each of the co-creditors has the same integral credit against the debtor, who owes the same integral debt to each of the creditors, in case of active solidarity; so also in case of passive solidarity, there are not as many obligations as there are co-debtors, but the obligation in all and every one of them is one.

This is true, however, in regard to the object and the contents of the obligation but not with regard to the subjects because in this respect the obligation is multiple: "in cujusque persona propria sirgularum consistit obligatio (lex 9, par. 2 Dig. Lib. 45, tit.2). Objectively an obligation "in solidum" is simple and one but subjectively it is multiple and it may therefore subsist in the various subjects with different modalities, without this being an obstacle to solidarity; thus it may be an obligation with a limited time to one of them and unlimited in regard to another; it may be conditional for one and without any condition for another. This was admitted in Roman Law and it is expressly laid down in our law with reference to solidarity in art. 1138. Though this article refers to passive solidarity, there is no doubt that this rule applies also to active solidarity.

Requisites of solidarity

1. Plurality of subjects; because solidarity is an exception to the rule "corcursu partes fiunt" and it does not therefore apply unless there is a concourse of subjects.

2. One performance. The objects of the obligation in regard to all the debtors and to all the creditors is one because otherwise the objective unity of the obligation, in which the essence of solidarity consists, would be inconceivable.

3. The will of the parties who create the obligation and of the person who imposes it, that is legislator or testator, that the obligation

should be "in solidum", hence the distinction between voluntary and legal solidarity.

Active solidarity is never legal, neither in Roman law nor in our law whether Civil or Commercial. On the contrary we find many cases in which passive solidarity is established by law either because it interprets the intention of the persons interested or because it imposes it as a security for certain interests which are worthy of a particular protection. Thus, if a mother being a tutor contracts a second marriage and she continues to administer the property of her children without being authorized by the Court, her husband becomes responsible "in solidum" with her for such an administration.

Voluntary solidarity is that which takes place either by means of a contract or of a will. It must result explicitly and cannot be presumed; the only exception to this rule is the case of a surety in commercial obligations with regard to which solidarity is presumed. Though solidarity must be expressed, no special formalities are required, nor is a written instrument necessary, but it is enough if it is evident that the parties have agreed upon it and the testator has imposed it.

No other condition is required, especially it is not necessary that there be unity of agreement, nor is it necessary that the modalities of the obligations be similar nor need the obligation be contracted at the same time and in the same place between the different creditors and debtors. In case one of the debtors or one of the creditors "in solidum" dies and leaves several heirs, solidarity does not pass to the heirs taken separately. They represent together the decujus who was a creditor or a debtor "in solidum" in the whole credit or debt together with the other creditor or debtors who are still living, but individually each of the heirs is only a creditor or a debtor of his "pars virilis" of the obligation "in solidum"; each of them represents the dead creditor or debtor "pro rata" according to his hereditary share; **he is not bound jointly** and severally with the co-heirs but he is bound jointly and severally with the surviving debtors or creditors.

Another common characteristic is the partition of the benefits and of the burdens of the obligation between all the co-debtors or

co-creditors in case of a common debt or credit and therefore if one of the creditors has exacted the whole credit, the others have the right to redress against him in order to obtain their share and if one of the co-debtors has paid the whole debt he may resort to the others for their share of the common debt. There is however an exception to the rule when the obligation concerns only one of the co-debtors "in solidum" and the others with regard to him are considered only as his sureties (1152).

Effects of active solidarity relations between creditors "in solidum" and their common debtor.

With regard to these relations the principle is observed that each of the creditors vis-a-vis the common debtor is creditor of the whole in regard to all that concerning the exaction of payment and the preservation of the credit, and therefore the effects of active solidarity with reference to this kind of relation are:-

1. Each of the creditors may exact from the debtor not only his share, but also those of the others even though the credit is divisible, and the debtor is bound to pay the whole debt to the creditor "in solidum" who demands it from him; he cannot oppose the plea of divisibility (1139).

2. The debtor has the right to choose one of the creditors and pay to him the whole debt and if the creditor does not accept the debtor may have recourse to a real tender and deposit, unless he had been already warned by one of the other creditors; the creditor who has forewarned is within his rights and the debtor as so forewarned is bound to pay to him and if he pays to another he may be compelled to pay again; "in duobus reis stipulandi se semel unus egerit alteri promissum offerandam pecuniam nihil agit" (Fram. 16. Dig. De duobus reis constituenlis). However, the debtor must have been forewarned by means of a judicial demand or other judicial act (1134).

3. Payment made to one of the creditors

"in solidum" discharges the debtor with regard to all the creditors, because the obligation is one.

4. Every act which interrupts prescription with regard to one of the creditors "in solidum" avails also the other creditors (1135) and any interruption obtained by one of the heirs of a creditor "in solidum" avails for his hereditary share in the obligation "in solidum" and avails the surviving creditors "in solidum" for that amount. However, the suspension of prescription in favour of one of the creditors "in solidum", is not communicated to the other, because it is based on personal motives in favour of the person to whom the suspension is granted. (1135).

5. If a debtor is constituted "in mora" by one of the creditors "in solidum" this works to the benefit of the other creditors as well because it is an act which preserves the credit.

The effect of solidarity is the function of a reciprocal mandate. It refers only to the exaction and to the preservative acts and not to those which diminish or which extinguish the credit; these have only a partial effect, and they affect only the share of the creditor who has performed them. Thus art. 1136 lays down that if one of the joint and several creditors remits the debt, such a remission discharges the debtor with regard to that creditor only and for the share of that creditor and that the other creditors and each of them may exact the whole credit, less the share which was remitted.

2. Relations between the creditors

All these relations derive from the principle that the credit is a common credit and therefore the other creditors have the right of redress against that creditor who has exacted the payment of the common credit in order that he may render an account and divide the credit with them. This effect therefore does not hold good if one of the creditors proves that he has an exclusive right to the credit. But it takes place whatever be the advantage derived by one of the creditors "in solidum" and therefore not only when he exacts the whole debt, but also if he exacts a part, because it is a part of the common debt.

Active solidarity hardly receives any application at all in civil matters, because the only useful result which it produces, i.e. the possibility for each of the creditors to exact the whole amount may be obtained with equal simplicity and with greater advantages by means of a mandate by which the dangers of this kind of solidarity are avoided, especially those deriving from the insolvency of the creditor who first exacts the credit. Therefore solidarity has only reason to exist when it is demanded by the debtor for his own advantage.

Effects of Passive Solidarity

In the same proportion as active solidarity is useless and almost ignored in practice, solidarity is common in its application. Though, by law, it is an exception, it may in fact be regarded as a rule, because a creditor generally requires it whenever there is more than one debtor. This kind of solidarity always aims at benefitting the creditor, who may demand payment of all that is due from every one of the debtors.

Solidarity extends only to payment and to those acts which make it more secure and it does not extend also to those acts which aggravate the obligation because such acts do not only benefit the creditor but they are also harmful to the debtors and solidarity is meant "ad conservandam obligationem ex perpetuandam, non autem ad augendam". The effects of passive solidarity therefore are:-

1. The creditor may at his option exact whole from any one of the debtors and the debtor who is sued for the payment of the whole cannot plead the benefit of division (1139); but this right does not bind the creditor and "partes a singuli peti posse ne numquam dubium est"(Frag. 3 par. 1. Dig. 'De duobus reis constituendis'). Nor is the creditor barred from exercising this action, because he has sued the debtors for their share. The fact that the creditor has chosen to sue one of the debtors, does not deprive him of the right to sue any of the others, whether "in solidum" or "pro rata" even though in making the first demand he has not expressly reserved to

himself such a right. In Roman law, as we have already had occasion to point out, the contrary principle was improved in practice by a 'formula usus' and this practice was sanctioned by Justinian by law XXVIII 'De Fideiussoribus ' (Codex Lib. VIII, Tit. 40. Cost. 23), and this also took place as an indirect consequence of the obligation and of the consuming effect of the 'litis contestatio'.

2. Payment made by one of the debtors frees the others vis-a-vis-the common creditor. This is the logical effect of unity of the obligation which has been extinguished by one of the debtors and also the effect of the reciprocal mandate in virtue of which each of the co-debtors is regarded as having paid for himself and for the others. So also a partial payment discharges all the co-debtors up to the amount of the part paid.

3. If one of the co-debtors is constituted "in mora" this affects all the co-debtors "in solidum". In fact if a debtor is 'in mora' and the 'periculus rei' is at his charge and thus the extinction of the obligation through a fortuitous loss of the thing is prevented.

4. Similarly if the creditor demands the interest from one of the debtors "in solidum", such a demand makes the interest run also against the others. We are referring here to dilatory interests that is due to delay in making payment, in case of pecuniary obligations which represents the damage suffered by the creditors owing to the delay. According to the rules which we have already studied, these interests are due because of the law itself; in some cases they run "ipso jure" and in others after the debtor is judicially intimated to pay, that Is, after he is put "in mora". In all-these cases the interest runs against all, even though it be demanded from one of the debtors only. Of course, we must make an exception to this rule in regard to any of the debtors who may have bound himself "ex die" or "sub conditione" with regard to whom such interest cannot begin to run before the debt falls due or before the condition is verified. This effect of passive solidarity was an innovation introduced by the Codè Napoleon. Pothier justly held the contrary opinion, because these interests represent

damages, and only the debtor "in mora" may be held responsible for damages, and solidarity cannot according to the principles of law extend such responsibility to the others. Evidently the French legislator, though sacrificing the principles of law, wanted to increase the advantages of solidarity in favour of the creditor.

5. The acts which interrupt prescription including the acknowledgement of the debt with regard to one of the debtors "in solidum", produce an interruption of prescription in regard to all, interruption is one of the preservative acts of a credit, to which therefore the effect of solidarity is extended. In case one of the co-debtors dies and leaves several heirs an act which interrupts prescription with regard to one of the surviving co-debtors, produce the same effect with regard to all the co-debtors; the same thing may be said as to interruption with regard to **all** the heirs. If, however, interruption refers only to one of the heirs, its effects are limited to him and to his share of the joint obligation and, it has no effect against the others axcept with regard to that part of the debt to which the said heir is liable (1144). It has neither any effect with regard to the other co-heirs even though the obligation be hypothecary, if the obligation is not indivisible; if the obligation is indivisible, the interruption has effect also against the other co-heirs, because indivisibility is an objective and real factor in the obligation and the effects of indivisibility are passed on to the heirs, because the nature of the object is unchangeable. The indivisibility of the hypothec which secures the joint obligation does not bring about the indivisibility of the obligation itself and therefore it does not give rise to any modification in the effect of solidarity, and in particular to the division of the debt "in solidum" between several heirs, because hypothec is accessory to the obligation and the qualities of the accessory are not transmitted to the principal.

6. In case the thing due parishes through the fault or during the delay of one of, the debtors, the other co-debtors are also responsible for the value of the thing (1145), but with regard to further damages, the only responsible person is the debtor through whose fault the thing has perished or the debtor who

was in delay; as long as the responsibility consists in paying the value of the thing the effect of solidarity is limited to the preservation of the thing; but extending to all the other co-debtors the responsibility for any further damage would augment the object of the obligation and would be contrary to the very nature of passive solidarity.

7. Another order of effects refers to the exceptions and the means of defence in general which the co-debtors "in solidum" may oppose. In this respect, Art. 1142 distinguises between exceptions which are common to all the debtors and those personal exceptions which are particular to one or to some of them: common are those which are inherent in the debt, such as inexistence or unlawfulness of the object, because the unity of the object is an essential element of solidarity and if the object is one for all the co-debtors, any vice in the object exists in regard to each of them. Such also are the exceptions of payment, novation or remission even though it is granted to one of the co-debtors unless the creditor reserves his right against the others.

Personal are those exceptions which refer to one or some of the co-debtors, e.g. incapacity to contract or a vice of consent which may be met with in one or in some of the co-debtors and not necessarily in all of them. Such are also the exceptions that the debt has not yet fallen due or that the condition stipulated by one of the debtors only, has not yet been verified. These exceptions may be pleaded by the person to whom they belong personally and this is another advantage of solidarity, because the creditor has the right to exact the whole from the other co-debtors, even though these in [missing text] cannot resort to that co-debtor who may avail himself of such exceptions.

Relations between the co-debtors

The debt is common to all the co-debtors and, therefore, in their internal relations it is divided "ipso jure" in equal or unequal shares, as the case may be. The following effects derive from this principle;

1. The right of the co-debtor who has paid the whole debt to resort to the others, and the subrogation in the creditor's rights. This is one of the cases of legal subrogation (1209 no.3) and it is not necessary, therefore, that the creditor should have expressly granted subrogation to such a debtor. The same thing happens also if the debtor pays only a part of the debt, i.e. he may resort to the other co-debtors for their share of the part which may have been paid. Subrogation, however, does not include the action "in solidum" against the other co-debtors, and the debtor who pays cannot demand from each of the other co-debtors the whole sum minus his own share, but he can only demand from each his respective share, i.e. his action is "pro rata". This is a principle of pubic policy meant to prevent the circuit of law-suits, so that any express agreement between the creditor who has been paid and the debtor who pays purporting to subrogate the debtor in the "actio in solidum" has no effect.

2. Besides the right to nave redress against the other co-debtors for their share in the debt, the debtor is entitled also to the interest that runs from the day in which he paid the common debt.

3. In case one of the co-debtors becomes insolvent, the share of the insolvent one is paid by the other co-debtors in proportion to their respective shares.

4. The right of redress, of which we have just made mention, suffers an exception in case one of the co-debtors is the only interested person in the debt, in which case the other co-debtors are actually his sureties, and in the last resort, it is he who has to bear the whole debt. If therefore the debt is paid by another, such a person may have recourse only against the interested person for the whole debt and if the debt is paid by the interested person he cannot have redress against any of the others.

Cessation of Passive Solidarioy

Passive solidarity may cease if the creditor

renounces to solidarity. Such renunciation may be either absolute or relative; it is absolute when it is made in absolute terms without mentioning any of the co-debtors or by mentioning all of them. It is relative when it is made in favour of one or a few of the co-debtors only who become debtors "pro rata". The other debtors, in this case, remain bound "in solidum" for the whole debt, unless the debtor has paid part of the debt, in which case such part is to be deducted.

A renunciation to solidarity is never presumed, but it must result from a definite manifestation of such intention. In particular, such a renunciation is not presumed from the fact that the creditor has received a part of the debt, once or several times from one or more debtors, nor from the fact that he has made a judicial demand against one or more debtors once or more than once, even though the creditor in the act of receiving such part of the debt or in demanding payment has not made an express reservation of his rights, and the sum received or demanded corresponds to the share due by those who have paid or from whom payment was demanded.

These facts do not imply that the creditor has either absolutely or relatively renounced to the tie of solidarity in respect to the payers or defendants, because the sum received or demanded are regarded as having been received of demanded in partial payment or the one debt and not as a payment in full of the share which in the internal relations between the co-debtors, the particular co-debtor who has paid or from whom payment was demanded must bear.

If renunciation is relative, it produces its effects with regard to the debtor freed from solidarity, but it has no effect with regard to the other co-debtors; but as it cannot benefit them so it cannot be detrimental to them and therefore it does not exonerate the debtor who has been freed from solidarity from the right of redress in case another co-debtor pays the debt, not from his obligation of contributing to the loss caused by the insolvency of any of the other co-debtors.

It is to be remembered that the distinction which was usually made in the treatises of Roman

Law between "solidarieta' correale" and "solidarieta' semplice" is due to a misunderstanding arising from insufficiency of certain texts following the Constitution of Justinian which we have already mentioned (cod. Lib. VIII, Tit.46. Const. 28) which abolished the "effetto consumativo" of "litis contestatio".

Indivisible obligations

The second exception to the rule "concursu partes fiunt" is the indivisibility of the obligation. This matter has always been regarded as obscure since the 16th Century when Dumoulin tried to throw some light on the subject in his treatise "extricatio labirinti dividui et individui" of which we find a Precis in Pothier's treatise on obligations. Pothier however does not accept Dumoulin's view completely and his precis contains numerous alterations. The provisions of the French Civil Code are derived from Pot heir's work (1217 to 1235) and they are reproduced in our Civil Code in art. 1135 to 1165 which however are far from clear and have hardly any practical purpose.

The problem of indivisibility arises in case of concourse of several debtors or of several creditors. When there is only one debtor and creditor, it is indifferent whether the performance and therefore the obligation be divisible or indivisible, because it is certain that the debtor is bound to pay the whole debt just as if the obligation were indivisible, even though it be divisible (1151). The effect of indivisibility is similar to that of solidarity: in case of concourse of several subjects the obligation, owing to the nature of the performance which forms the object of the obligation, cannot be divided between them and therefore each of the creditors may demand the entire performance; and the entire performance may be demanded from each of the debtors.

Kinds of in divisibility

Apart from distinctions which are metaphysical rather than juridical, indivisibility is classified with regard to its cause, into

real or natural, which has for its cause the object due and conventional which has for its cause the intention of the parties.

Natural indivisibility

Dumoulin distinguished between two kinds of natural indivisibility according to whether the object be absolutely or relatively indivisible. Absolute indivisibility ("individuum natura seu contracti") takes place when the object of the obligation, regarded from all points of view is indivisible in such a way that it can never be due without rendering the relative obligation indivisible. The objects which are necessarily indivisible are very rare: an obligation to do something, apart from servitudes and hypothecs, there is no other example of absolute natural indivisibility. In obligations of giving something, the object is absolutely, naturally indivisible when it cannot be physically divided as e.g. in case of a sale of a horse by several sellers, the obligation of delivering the horse is indivisible; in obligations of abstaining from doing something, indivisiblity almost always exists, because every act contrary to the promised abstention is a violation of such obligation.

Relative natural indivisibility takes place when the object of the obligation, considered in its natural form is indivisible even though it is not impossible to imagine a partial performance. The best example is that given by Dumoulin and by Pothier, i.e. the obligation of building a house; a house is made up of several parts such as walls, pavement, etc and the construction must necessarily take place gradually, but the form and quality of a house (Potheir: Oblig. No. 252) does not appear before the house is completed and therefore the relative obligation is only performed by building the entire house.

Natural indivisibility is contemplated in art. 1153 and 1154; according to the former an obligation is absolutely indivisible if the object therefore is not susceptible of division, whether material or intellectual; relative natural indivisibility is defined by art. 1154:

as follows: an obligation is indivisible although the thing or fact forming the subject matter thereof is of its nature divisible, the manner in which such thing or fact has been considered in the obligation does not admit of a performance in part.

Conventional indivisibility

This takes place when the thing which is the object of the obligation is from all points of view divisible, but the parties haye agreed that the obligation has to be performed as if it were indivisible.

The law presents this kind of indivisibility merely as an exception to the effect of the division of obligation. Here the law follows Potheir who had called it indivisibility "solutione tantum". It has no other "raison d'etre" but that of completing the effects of solidarity which are insufficient in case several heirs succeed to one of several debtors "in solidum". The cases in which the divisibility of an obligation between the heirs of the debtor is not admissible are indicated in s. 1157. They are:

1. when a determinate object is due

2. when one of the heirs is alone charged by the title with the execution of the obligation.

3. when it results either from the nature of the obligation or from the thing which is its object, or from the end proposed by the contract, that it was the intention of the contracting parties that the debt should not be partially discharged.

The first case is a case of natural indivisibility; in the second we have only conventional indivisibility. It is supposed that the creditor has expressly stipulated that the co-debtors should bind themselves in solidum and indivisibly and then each of the heirs is in virtue of the title charged with the performance of the obligation. According to Planiol et Ripert the title in question is not the testament

but the contract which gives rise to the obligation; Baudry Lacantinerie et Wahl on the other hand hold that the title may also be the testament (Far. 229, Vol II) and they give the following example:- A buys a house and stipulates that in case he dies before he pays the prive, the son should be the only person charged with the payment (in this case the title would be the contract); A leaves the sum of 1000 francs to B and orders that the only person charged with the relative payment shall be the eldest son (the title in this case will be the testament).

The third case provides for accidental indivisibility foreseen by Dumoulin but the wording is very imperfect, because only the last of the three criteria from which indivisibility should result is exact. Tne first criterion (nature of the obligation) can never be applied and the second (nature of the thing) which forms the object of the obligation contemplates the case of natural indivisibility.

Effects of indivisibility "ex parte creditorum":

1. Each of the creditors or heirs of the creditor may demand the entire debt, even though it is not "in solidum" (1155). The reason is that this effect derives from the nature of the object of the obligation so that solidarity or otherwise which is a subjective character is indifferent.

2. An interruption of prescription obtained by one of the creditors of an indivisible obligation avails the others as well, because it preserves the whole obligation, therefore it preserves it in favour of all. So also a suspension of prescription with regard to one of the creditors avails all the others as well, according to the prevailing view which is based on the analogy between this provision and the provision relating to servitudes.

3. As to the internal relations between the creditors, the object of the performance is divided because it is a common credit and therefore the other creditors have the right to resort to that creditor who has exacted the entire debt. For the same reason, none of the creditors may dispose of the entire debt, but only of his share art. 1159 par. 2 applies this rule to a remission of debt made by one of the creditors

and to the case in which one of the creditors receives something different from the thing due and in its stead; in this case the other creditors may, this notwithstanding, demand the performance of the entire obligation, but they are bound to reimburse to the debtor the equivalent in money of the share which in the internal relations between the creditors, belongs to that creditor who had remitted the debt or received payment.

Effect of Indivisibility "ex parte decitorum"

1. Every debtor or heir of the debtor is liable for the whole debt, even though the obligation is not "in solidum".

2. An interruption of prescription extends from debtor to debtor and from heir to heir; therefore, differently from what takes place in joint and several obligations, prescription is interrupted both with regard to the other co-heirs and with regard to the other co-debtors.

3. The debtor who pays the entire debt has the right of redress against the others because the debt is common to all, and Justice demands that it should be divided between them. Just as in solidarity, the debtor who pays is subrogated in the rights of the creditor but this right of redress is only "pro rata" and a subrogation to the indivisible is impossible on the same ground which is of public policy for which subrogation to the action "in solidum" is prohibited.

4. The debtor or heir of the debtor who is due for the payment of the entire debt may call the other co-debtors "in causa" and may ask for a term in order to be able to do so (1160). This right is granted not only in order to obtain from the Court a decision with regard to the right of redress and to the internal relations between the co-debtors, but also in order that the Court may condemn also the other co-debtors. The prevailing doctrine, at least, is of this opinion and it is based on the teaching of

Molineo and of Pothier and on a logical interpretation of the last part of section 1160, where it is said that "if the debt be not of such a nature that it can only be discharged by the heir, so sued," judgement can only be given against him: this means that in other cases judgement can also be given against those called to take part in the suit.

Effects of Conventional Indivisibility and of the Exceptions to Divisibility.

Indivisibility by agreement does not, as a rule, prevent the division of the credit, but only that of the debt, because it is based on the will of the parties who have no interest in preventing the division of the credit.

The effects of such indivisibility, in the various cases contemplated by art. 1157 are the following:-

1. In the first case, that is when a determinate object is due, the possessor of a certain and determinate thing is liable for the whole debt.

2. In the second case the person who, by the title, is charged with the performance of the obligation may be sued for the whole debt.

In both cases the creditor may sue the individual debtors, but each for his share and not for the entire debt, except as we have already said, the person who possesses the certain and determinate object or is the only person charged with the performance.

3. In the three hypotheses of the last case, each of the co-debtors may be sued for the entire debt.

Difference between Solidarity and Indivisibility.

1. Indivisibilityis a real character, while solidarity is a subjective character of the obligation.

2. Indivisibility "transit ad heredes" because it is a quality of the obligation which remains always the same whilst soliadrity "non transit ad heredes".

3. When an indivisible obligation owing to non-performance is changed into an obligation for damages and interest, indivisibility ceases, whilst when an obligation "in solidum" is changed into an obligation for damages and interest, having the same cause, solidarity subsists. In fact, in the first case, the ground for indivisibility ceases, because the object of the obligation becomes a sum of money which is eminently divisible, but in the second caie the ground for solidarity subsists and just as the debtor who were bound "in solidum" for the performance of the original obligation, so they remain bound "in solidum" for the reimbursement of damages and interest. As Molineo says, debtors "in solidum debent totum et totaliter" whilst debtors of an indivisible obligation "debent toturn sed non totaliter".

4. In indivisibility "ex parte debitorum" the debtor who is sued for the payment of an entire debt may call the other co-debtors into suit, whilst in passive solidarity this right is not granted.

Owing to these differences, sec. 1155 justly provides that solidarity does not give to the obligation the character of indivisibility.

Obligations Objectively Multiple

There are three kinds of obligations which are objectively multiple:-

1. Joint obligations when two or more objects included in the obligation are united by the conjunction "and" and the obligation is extinguished by the fulfilment of all the "praestationes".

2. Alternative or disjoint when the several objects included in the obligation are separated by the conjunction "or" and the

obligation is extinguished by the delivery of one of such objects.

3. Optional or Potestative - when a certain performance is due but the debtor is given the right to perform another in its stead.

Joint Obligations

In this kind of obligation, every simple thing included in the obligation is due and there are therefore as many obligations as there are objects and to each of such obligations are applicable the rules of obligations according tó their respective nature. If one of the performances is null because the object is "extra commarcium" or impossible of performance or unlawful, the obligation is null in so far as this performance is concerned but valid in regard to the others. So also an accidental loss of one of the objects of the obligation extinguishes that obligation having that thing for its object, but the other subsist. In joint obligations the debtor is only freed when he has performed all the acts and delivered all the things included in the obligation.

Alternative obligations

The practical purpose of alternative obligations is that of better securing payment to the creditor, because the accidental loss of one of the things included in an alternative obligation does not extinguish the obligation.

The characteristics of alternative obligations are the following:

1. Plurality of performances. Performance here includes not only the act of giving something, although the provisions of the law appear to limit themselves to these performances, but also that of doing something. The obligation may include two or more performances but in order to simplify matters the law supposes that there are only two.

2. The debtor is discharged by the

execution of one only of the two or more "praestationes" agreed upon, as long as it corresponds to the right of option legitimately exercised.

The special rules applicable to these obligations refer to:

1. the choice of the "praestatio" to be executed;

2. the effect of an accidental destruction of the things and the effects of fault on the part of the debtor.

1. The right of option - Both in Roman Law and in our law, if the right of option is not expressly granted to either of the parties it belongs to the debtor, according to the principle that in case of doubt, the debtor should always be preferred. However, the right of option may be expressly granted to the creditor or deferred to a third party (1124).

Once the right of option is validly exercised it may not revoked after that it is notified to the other party and it produces the transfer of ownership and of the "periculum rei" which was hindered by the fact that the object was indeterminate.

If no term for the exercise of this right is agreed upon and the debtor by refusing to choose prevents the performance of the obligation, the creditor may demand that a term be fixed by the Court on the expiration of which, if the debtor has again failed to make use of his right, it devolved on the creditor. Similarly, if the right is expressly granted to the creditor and he refuses to exercise it, the debtor may demand that a term be fixed on the expiration of which the right of option devolves on the debtor. If then a term had been fixed either to the debtor or to the creditor on the expiration of the term, the right of option passes to the other party. When the choice has to be made by a third party chosen by the parties and the third party refuses to make the choice, or is unable to make it, the choice must be made by the Court. This rule is laid down in art. 759 with regard to alternative legacies and by analogy the same rule applies to alternative obligations.

2. "Periculum rei" - The law deals in detail with the question relating to risk in alternative obligations. In brief, the rules laid down by the law are the following:

a. if the two things are destroyed by accident or their performance becomes impossible before any delay on the part of the debtor, the latter is completely discharged and the risk and loss of the thing are borne by the creditor.

b. if only one of the things is destroyed accidentally we must distinguish according to whether the right of option belongs to the debtor or to the creditor. In the first case, the alternative obligation becomes pure and simple, if one of the two promised things is destroyed, even though this happens through the fault of the debtor, and the debtor may not offer instead of the thing which remains, the value of that which was destroyed. If the two things perish and the debtor is "in culpa" even though only with regard to one of them, he must pay the value of the thing which was the last to perish.

In the second case, if only one of the two things perishes without fault on the part of the debtor, the creditor can only claim that which remains; if however the debtor is "in culpa", the creditor may choose the thing which remains or the value of that which perished. If, then, the two things have perished and the debtor is to blame even though with regard to one of them only, the creditor may demand the value of either, at his option.

Potestative Obligations

Potestative obligation is that in which a certain performance is due but the debtor has the right to offer another in its stead, in such a way that the two performances are included but only one of them forms the object of the right of the creditor, and the other forms the object of the right of the debtor, and the creditor has no right over it.

It differs from a joint obligation because in a joint obligation several things are due and all of them must be tendered: "duo res sunt in obligatione et in solutione". It differs from an alternative obligation because here too

all the "praestationes" from the object of the creditor's right and of the obligation of the debtor, even though the execution of one of the performances is sufficient; "duae res sunt in obligatione et una tantum in solutione". In optional obligations, on the contrary, "una res est in obligatione, altera in facultate solitionis".

1. The creditor has only the right to demand the principal thing.

2. If this cannot form the object of the obligation, the obligation is null.

3. If the principal thing is destroyed by accident before the debtor is "in mora" the obligation is extinguished and the creditor cannot demand the accessory thing.

4. If the principal thing is destroyed through the fault of the debtor or during his delay in performing his obligation, the debtor is liable for damages and interests, but the creditor may, in no case, demand the accessory thing.

Generic obligations

Indeterminate or generic obligations are very similar to alternative obligations. The genus may be fungibiles or infungibiles. In these obligations the thing has to be chosen (determined from among the several things belonging to the given genus); the choice, by right, belongs to the debtor but it may be granted to the creditor or delegated to a third party; if the person who has the right to choose, refuses or is not in a position to choose, the rules of alternative obligations are applied.

As to the mode in which the right of option may be exercised, the following rules are observed:

1. the debtor must choose a "res mediae qualitatis" (1211).

2. the third party must choose "cum arbitrio boni viri" and therefore his choice must also refer to a "res mediae qualitatis".

3. if it is the creditor who has the right to choose he may choose even the best thing existing in the estate of the debtor but not the best of its kind (inferred from art. 759, 761 which refer to legacies).

Modalities of Obligations

The principal modalities of obligations are:-

1. Condition.

2. Term.

3. Modus.

4. Penal clause.

Condition

Condition is that future and uncertain event upon which the existence or dissolution of the obligation is made to depend.

Kinds of Condition

With regard to its cause, condition may be:-

1. Casual and it is that which depends on a fortuitous event which is not in the power either of the creditor or of the debtor.

2. Potestative when it depends on an event which it is in the power of one or the other of the contracting parties to bring about or to impede.

3. Mixed when it depends on the will of one of the contracting parties and at the same time on the will of a third party or on chance.

Requisites for the Validity of a Condition

The condition must be possible physically, morally and juridically, and it must also be clear.

With regard to the invalidity of a condition we must distinguish according to whether its invalidity is limited to the condition or whether it affects also the obligation which depends on it. "An vitiatur tantum vel vitiatur et vitiat".

1. An impossible condition "vitiatur et vitiat" (Art. 1097) is to this effect:- any condition which imposes the performance of an impossible thing is void and annuls the agreement dependent thereon; because either the parties were not serious, if they knew that the condition was impossible and therefore had no intention of binding themselves or they were unaware of the impossibility and in any case the obligation cannot exist because the event cannot take place.

2. Unlawful conditions "vitaiantur et vitiant". Every condition repugnant to morals or to public order or prohibited by law is null and renders void the agreement which depends on it (1097). In order to decide on the unlawfulness of a condition it must be looked at not only "per se" but in relation to the agreement to which it is set. Thus in the case given by Papinianus (lex 121, para 1 Dig. De verb. oblig. lib. 45 tit. 1) where a woman was going to get married stipulated with her husband that he would pay her a sum of money in case he returned to his concubine, the condition was not regarded as unlawful.

3. When the condition is unintelligible, since the law says nothing about it with reference to obligations, and the provisions with regard to testaments apply and according to art. 748 an unintelligible condition is considered as if it had not been inserted.

4. As to a negative condition, i.e. a negative an impossible or an unlawful condition, we must distinguish:-

a. the condition not to do a thing which is impossible (1098) does not render void the obligation contracted under that condition. Strictly speaking it should be said that it leaves the agreement pure and simple because once it is certain that it shall take place it does not constitute a condition.

b. the condition not to do a thing contrary

to morals or to public order or to law is valid or invalid according to whether it gives to the agreement a moral or immoral character. Thus an agreement which is subject to a condition "if you do not commit a crime" is null, because it is important to stipulate compensation in order not to commit a crime. If, on the contrary the unlawful event which is placed as a condition is an act of a third party "I will give £100 if the fire does not burn my property" the agreement is valid, because it is remuneration to the contracting party for his vigilance.

5. With regard to a potestative condition, on the part of the debtor, we must distinguish between a mere potestative condition that is metaphysically potestative and a physically potestative condition. The first is merely arbitrary e.g. "if I want" or "if I deem it just" it renders the condition dependent on the debtor's will, and it therefore renders the agreement null.

The second is that does not merely consist in a pure act of the will but "in facto a voluntate pendente" e.g. If I go to Rome, such a potestative condition is valid except in case the condition is so easy to perform that it is illusory; e.g. if I raise my arm.

We must be careful not to confuse the following clauses with potestative conditions:-

1. "cum voluere" such as "I promise you £ 100 but I shall pay them when I want". By means of such clauses only the time of execution depends on the debtor's will (1121). Giorgi teaches the same thing with regard to conditions conceived in an impersonal form "if it is convenient", "if it is possible", because in this case it is up to the Judge to decide as to the convenience or possibility and not to the debtor's whim. Art. 1108 contemplates a clause relative to an event which has actually taken place but is not yet known to the parties: "si navis ex Asia venit". This clause does not constitute a condition because it does not refer to a future and uncertain event and therefore the obligation which is subjected to it, is a pure and simple obligation, but the execution is delayed until the unknown event is ascertained.

Mode of performing the Condition

Having laid down the principle that regard must always be had to the intention of the parties because condition is an accidental element of an agreement which depends on the will of the parties (1100), we may now lay down the following rules:-

1. conditions are indivisible and until, they are verified in their entirety, they cannot be said to have taken place because it is presumed that the parties did not intend to be satisfied with a partial fulfillment.

2. In case of several conditions it is necessary to determine whether they are imposed cumulatively or alternatively; in the first case all of them must be fulfilled and in second it is enough that one be fulfilled.

3. Fulfillment must be real and effective: however in case the person who has prevented or hindered the fulfillment is the debtor who was bound under such condition, the condition is considered as fulfilled in virtue of the law itself. (1113 - LL. 24. 68. 81. Dig. 0e Conditionibus. Lib. 35. tit.1). The reason is that once the condition is prevented by a fraudulent act of the debtor, he becomes responsible for the damage which is consequently caused to the debtor and the fact that the condition is considered as fulfilled is nothing else but a reimbursement of damages in a specific form. It must be therefore due to an act of the debtor "iniuriam factum" and therefore the rule contained in art. 1113 does not hold good when the debtor in preventing the fulfillment of the condition has made use of his rights such as in case the condition was potestative.

When is the condition considered as fulfilled, and when is it considered as unverified.

1. A positive condition is considered as fulfilled when the event which it contemplates takes place. It is regarded as not verified in case there is a term, when on the expiration of such term the event has not taken place, or in case the event cannot possibly take place, even though the term has not expired; in case

there is no term it is considered as broken when it becomes impossible for it to take place. If the condition is potestative on the part of the creditor without any term e.g. I will give you £100 if you get married, it is considered as not verified when the event cannot possibly take place, i.e. on the death of the creditor. In such a case, however, the law has introduced this remedy (1111); the Court may according to circumstances fix a term for the/ fulfillment of the condition and on the expiration of that term without the condition having been fulfilled the obligation ceases, that is the condition is regarded as not having taken place. The Court takes such a step on a demand made by the debtor who has an interest in not remaining indefinitely burdened by an uncertain obligation.

2. A negative condition is regarded as not fulfilled when the event which it contemplates takes place and it is regarded as verified in case there is a term, as soon as the term expires without the condition having been fulfilled. If no term is fixed, it is necessary to wait until it becomes impossible for the condition to take place.

If, then, the negative condition is potestative on the part of the debtor e.g. "I will give you £100 if I do not go to Africa", the Court on a demand made by the creditor (1102) may fix a term for the offer or on the expiration of which, the condition is regarded as verified, if the fact contemplated does not take place, and the debtor is bound to perform what he has undertaken to do.

The effects of condition

In regard to effects, conditions are distinguished into suspensive and resolutive. Suspensive conditions are those which suspend the existence of an obligation. Resolutive are those which, when fulfilled, dissolve the obligation.

1. Effects of suspensive conditions -

(1) "pendente conditione" - there are three kinds of effects:-

a. effects on the obligation.

b. effects on the transfer of real rights, when this is the object of the contract.

c. effects on the "periculum rei"

a. Effects on the obligation -

When the suspensive condition is still pending there is no obligation and therefore no credit (1106) "neque cessit neque venit dies pendente conditione".

However, though there is no debt and no credit, the stipulator holds to become a creditor if the condition takes place and the debtor cannot diminish this hope nor prevent the fulfillment of the condition unless it is potestative on his part. Moreover, the creditor may before the fulfillment of the condition, perform all acts which preserve his rights (1105). Such credit and debt, eventually, form part of the estate of the creditor and of the debtor respectively and they may be transferred to the heirs (1104). This is a notable difference between conventional and testamentary conditions because if the person benefitted by conditional testamentary disposition dies before the condition takes place, he does not transfer any rights to his successors. The reason for this difference is that a testamentary disposition is inspired by a spirit of liberality and is therefore personal, whilst a contracting party is presumed to have contracted for himself and for persons claiming under him.

b. Effects relative to the transfer of real rights.

Ownership and other real rights over a thing are not acquired as long as the condition has not taken place and the debtor remains the owner and may therefore acquire new rights in favour of the thing alienated, such as servitudes in favour of a tenement, and he may also transfer rights over the thing, which, however, are dissolved as soon as the condition takes place.

Moreover though the creditor does not acquire the ownership or other real right, he acquires the hope of acquiring; it follows

therefore that until the condition takes place there is a double ownership, a right of disposal: the right of the obligee is suspended and the right of the obligor is subject to dissolution and it is the fulillment or otherwise of the condition which decides whether it is the creditor or the debtor who becomes owner definitely.

c. Effects relative to the burden of risk and to the "periculum rei".

This problem forms the object of a peculiar theory. As a rule "res debita perit creditori" but if the suspensive condition has not yet taken place Art. 1107 distinguishes between "periculum interitus", that is, total destruction and "periculum deteriorationis", that is, partial destruction; if the thing is destroyed entirely, the agreement has no effect and none of the parties has any obligations towards the other: the debtor is not bound to deliver the thing but can neither claim the consideration. The loss is therefore borne by the debtor who, even though later on the condition id fulfilled, cannot claim the consideration, contrary to what takes place in case of a pure and simple agreement. According to Pothier, the reason for this rule is that the obligation of the debtor cannot arise through lack of object, and that of the creditor through lack of "causa". According to others this is a case of "petirio principii" and that the true reason can be found in tradition, (cfr. Dig. Lib. 23. leg, 68 princ. et lib. 23 tit. 3. frag. 10). It is the presumed intention of the parties and the fact that until the condition takes place, ownership is apparently in the hands of the debtor.

In case of deterioration, the loss is borne by the creditor, and when the condition takes place he must receive the thing in the state in which it is and without diminishing the price.

If the thing is destroyed through the debtor's fault, in case of total loss, the creditor has the right to damages and interest; in case of a partial loss or deterioration, the creditor has the right to dissolve the agreement or to demand the thing in its present state, besides damages which he may claim in both cases.

2. Effects of the fulfillment of the Condition.

When the condition takes place the obligation acquires a definitive existence with retrospective effect (1107). The consequences of such retrospective effect are:-

1. The right which forms the object of the contract is deemed to have formed part of the estate *of* the creditor from the very day of the contract.

2. The contractual responsibility of the debtor for the preservation of the thing dates from the day of the contract.

3. The acts of disposal performed by the debtor, whilst the condition was pending are annulled and those of the creditor become definitely valid.

4. Anything acquired by accession after the day of the contract belongs to the creditor and he has also a right to that part of the treasure-trove which is allotted to the owner.

5. The fruits received whilst the condition was pending according to the prevailing opinion belong also to the creditor, so that the debtor is bound to return them saving of course the obligation of the creditor to pay the debtor the interest on the price or the fruit of any other consideration.

3. Effects of Suspensive Conditions in case it remains unverified.

If the condition is not fulfilled, the agreement does not give rise to any effect; no obligation arises, nor is there any transfer of real rights. In case the parties, whilst the condition was pending, gave a provisional execution to the agreement, the party who had received anything provisionally, or both, as the case may be, are bound to return it.

2. Effects of Resolutive Conditions

It has always been thought since the times of Roman Law that Resolutive conditions are not, strictly speaking, conditions of an obligation,

but rather of its dissolution, so that an obligation subjected to a resolutive condition is a pure and simple obligation saving its resolution in case the condition takes place "pura emptio quae sub conditione resolvitur".

Effects whilst the condition is pending.

a. Effects on the obligation: Until the condition takes place, the contract is regarded as pure and simple and the creditor enjoys all the rights and actions corresponding to his credit; the debtor however hopes in having his dissolved and in obtaining later on restitution of what he now pays and the creditor may not therefore prevent the fulfillment of che condition unless it be potestative. He must, besides, take care of the thing because he may have to return it.

b. Effect on the transfer of real rights: These rights are transferred immediately, when the object is certain and determinate. The debtor, however, entertains the hope of a future restitution: there is therefore a double ownership and both may perform acts of disposal, the validity or otherwise of which depends on the condition.

c. Effects relating to the "periculum rei". The law says nothing; but according to the prevailing doctrine and jurisprudence accidental destruction should be borne by the creditor on the ground that the loss of the thing prevents the fulfillment of the condition and therefore renders the contract definitive and the creditor may no longer claim from the debtor what he has given by alleging dissolution.

Effects of resolutive conditions in case of non-fulfillment.

The contract becomes definitive and the creditor remains the owner of the thing definitely, as if he had always been so without the contrary being possible.

Effects of resolutive conditions in case of fulfillment.

The fulfillment of a resolutive condition dissolves the contract and therefore any obligation deriving there from and gives rise to contrary

obligations (1109) that is the obligation of the creditor to return what he had received and if the contract is bilateral, the obligation of reciprocal restitution.

As a rule, dissolution has a retrospective effect and places the parties and the thing in the state in which they were before as if the obligation had never been contracted. Any right of accession that may have been acquired in the interval belongs to the debtor, because it is considered that he has never transferred the thing and according to rational principles, the fruits should be returned, saving of course the creditor's right to the interest on the consideration paid by him. The provisions of the law in the matter of redemption are to this effect.

The parties may agree that the resolutive condition should not have retrospective effect and in such case, when the condition takes place, dissolution affects only the future. As a rule, this takes place in contracts the execution of which is made up of periodical performances ("di tratto successivo") which are meant to be perpetual or to last for a considerable time, because it is not logical to terminate such contracts also in reference to the past.

When the dissolving condition is express the contract of the fulfillment of the condition is "ipso jure" dissolved; when it is tacit, as in bilateral contracts where the resolutive condition for non-performance on the part of the other party is always presumed, dissolution takes place "officio judicis". In the first case, the Court, if a controversy arises, can only be ascertained, whether the condition has taken place and in case it had, it must dissolve the contract and may not grant any delay to the defendant. In the second case it is up to the Court to declare the dissolution and according to circumstances, grant a moderate term to the defendant ("purgatio morae").

2. Obligations with a Limited Time

The term is The time fixed either for the performance of the obligation (suspensive term) or for determining the duration of a continuous

obligation (extinctive term). We must distinguish between the two kinds of suspensive terms:-

a. when it is simply meant to delay the performance of the obligation, "I become your debtor for £100 payable at the end of the year".

b. when it is meant to increase the number of performances, that is whenever it falls due periodically in such a way that the expiration of each term entitles the creditor to demand performance, e.g. rent in lease.

Term may also be certain and uncertain. It is uncertain when it is fixed by pointing out an even which will certainly, though on an uncertain date, happen, e.g when A fies.

We must also distinguish between a term "de jure" agreed upon by the parties, when the contract is concluded and a term of grace which consists in a delay granted by the creditor without being bound to do so on account of the strained circumstances of the debtor.

The term may be either expressed or tacit. It is tacit, when, though it is not expressly agreed upon, the kind of obligation or the way in which it has to be performed necessarily implies a term for its performance.

Effects of Suspensive term.

Suspensive term delays the execution of the obligation but it does not render its existence uncertain; the creditor may not exact his credit before it falls due, or compensate it with a debt which has already fallen due. He may not demand the issue of executive measures but he may avail himself of precautionary and preservative acts. During the term, prescription does not run because: "contra non valentem agere non currit prescriptio".

Effects of the Expiration of the Term.

On the expiration of the term the debt falls due; "dies venit et pecunia peti potest".

Effects of extinctive term

During the course of the term, the obligation must be performed. On the expiration of the term, the performance of the obligation ceases, but without retrospective effect.

Reckoning of Term

1. The term is reckoned from the day in which the obligation is contracted, but nothing prevents the parties from reckoning it from another day agreed upon by them.

2. "Dies a quo non computatur in termine" (Art. 1118), e.g. a bill of exchange payable within 10 days on the 31st of May falls due on the 10th June the "dies ad quem" which is the last day of the term is included and it belongs to the debtor.

3. The day is reckoned at 24 hours (1117). The month and year are reckoned according to the Calendar. The days are counted from the midnight immediately succeeding the contract, to the midnight of the subsequent day.

4. Holidays do not suspend the course of terms (1119); if therefore the holidays fall on the first day or during the course of the term, they are taken into account, unless it has been expressly agreed upon to the contrary (working days) but when the day on which the term is to end happens to be a holiday, it expires on the next following working day e.g, if the term ends on a Sunday, it is deferred to Monday. Holidays or according to law "public holidays", are those mentioned in art. 717 of the Code of Organisation and Civil Procedure (Chapter 15) i.e. Sundays, holidays of obligations, Good Friday, King's birthday or any other day which is declared to be a public holiday by the Government by means of a notice.

5. A tacit term is fixed by the Court according to circumstances.

6. If the right to fix the term is left to the debtor, the following rules are observed:

a. if the obligation has for its object the payment of a sum of money without interest, it must be executed within two years.

b. if it has for its object òhe payment of a sum of money with interest it must be executed within six years. In all other cases the term is fixed by the Court.

Cessation of the Effects of Suspensive Terms

These effects cease:-

1. by the term's expiration;

2. by renunciation made by the party in whose favour it was stipulated. As a rule, the term is presumed to have been stipulated in favour of the debtor because it is in his interest that he cannot be made to pay except after the lapse of a certain time. But this presumption holds good until the contrary is proved which may arise either from an express stipulation to the contrary or from other particular circumstances of the case (e.g. in case of deposit, the term is presumed to be stipulated in favour of the depositor, in case of a loan with interest the term is in favour of both the lender and the borrower).

3. by the forfeiture on the part of the debtor of the benefit of a term that is when he has become insolvent or when his condition is so altered as to endanger the debt due by him or when through his own act he has lessened the security which according to the contract he has given to the creditor or if he has not given the security promised (1122).

Penal Clause

A penal clause is an accessory agreement whereby a person, for the purpose of securing the performance of an agreement, binds himself for something in the event of non-performance or of delay in the execution of the principal obligation (1161).

As a rule the penalty consists in a sum of money but it may also consist in any other thing. It is a liquidation of the damages and interests

which the creditor may suffer as a consequence of non-performance or delay which is agreed upon beforehand and it is besides a very convenient sanction to the principal obligation.

Its requisites are the general conditions necessary for the existence of obligations and, besides, the validity of the principal obligation. If this is null, the penal clause is also null; but not vice-versa because the principal obligation may stand even without a penal clause.

How and when penalty is incurred

Art. 1164 distinguishes between the following cases:

1. if the obligation consists in forbearing to do something, the penalty is incurred as soon as the contravention takes place;

2. if the obligation consists in giving or doing something, and it is such that it can only be performed at a certain time, the penalty is incurred on the expiration of that time without the debtor having complied with his obligation or even before in case performance becomes impossible.

In any other case there is non-performance that is the penalty is incurred when the debtor is put "in mora" according to general rules (1173).

Effects of the Penal Clause.

1. It is potestative for the creditor who may either avail himself of it or compel the debtor to perform the principal obligation, just as he may choose between the action for the performance of the obligation and the action for damages. He cannot, however, make both demands because he will be obtaining what is due to him twice i.e. specific performance and the equivalent to it. In case of delay, however, the creditor may demand both the performance of the obligation and the penalty for the delay (1163).

2. The creditor may demand the penalty without having to show that he has suffered damages.

As a rule, when reimbursement of damages is demanded, -the creditor must show that he has actually suffered damages and to what they amount, but the penal clause is a liquidation of the damage in itself and- in its quantity which is .agreed upon beforehand.

Characteristics of the penal clause.

Apart from it being an accessory and conditional clause bearing on the performance of the obligation or delay in its execution, a penal clause is also unchangeable. It can in no case be altered i.e. it cannot be increased or diminished or taken away on a demand made by the debtor, because it is the effect of an agreement between the parties which can only be modified by common consent and its purpose is precisely that of avoiding disputes in case of liquidation.

A difficulty arises in case the debtor has performed the obligation in part; as a rule neither in this case has the debtor any rights to a reduction because the creditor is not bound to accept a partial performance; but this rule does not hold good if the creditor has expressly accepted the part performed, and thus renounce to the right of refusing a partial performance or if regard being had to the circumstances of a creditor, the part-performed is evidently useful.

The rule however again holds good if the debtor, when he bound himself to pay the penalty, had expressly renounced to reduction, or if the penalty is stipulated for mere delay, because in this case there is always delay with regard to the part which has not been performed.

When in the aforesaid cases reduction takes place, the penalty is reduced in proportion to the part for which the obligation had been left unperformed (1165).

Divisibility or otherwise of the penal clause

Whenever there are several debtors or creditors, in case of non-performance of the principal

obligation towards one of the creditors or on the part of one of the debtors, it becomes necessary to determine whether the entire penalty or only that part of such creditor or debtor is due; moreover, it becomes necessary to determine whether it is due to all of them or by all of them or only to the creditor whose obligation has not been performed or by the debtor who has failed to perform his obligation; and in case it is due to all or by all, whether it is due "in solidum" or "pro rata".

The best answer to this question is that given by Cato and reported by Paulus in frag. 4. para. 1. Dig. de verb. oblig. who with reference to passive concourse distinguishes according to whether the principal obligation is divisible or otherwise:-

1. if the principal obligation is indivisible "si de quo cautum est individuum sit veluti iter fieri". In this case even though only one of the debtors contravenes, the entire penalty is incurred because the contravention committed by one of them is a contravention against the entire obligation, e.g. the promise of a "servitus itineris" is a promise of an indivisible thing and if one of the debtors bars the way, the exercise of the entire servitude is prevented and the penalty is therefore incurred by all; but "pro rata" because the penalty consists as a rule in a sum of money and is therefore divisible; exception must therefore be made to the case in which the penalty is also indivisible e.g. if it consists in the delivery of a horse.

If then the penalty is secured by a hypothec, the creditor may demand the entire penalty "in solidum" from each of the debtors by means of the "actio hypothecaria" over the property subject to the hypothec.

In any case, those who have not contravened have the right of redress against the contravening parties.

Contrary to this Teaching, Molineo and Pothier hold that the creditor may also demand the entire penalty (1166) from the contravening party because he is bound "ex proprio pacto" and at least indirectly he is bound for the entire penalty because the others have the right of redress against him.

It is convenient therefore to acknowledge the right of the creditor, to demand the entire penalty from the contravening party in order to avoid the circuit of actions of redress.

2. If the principal obligation is perfectly divisible, the penalty is likewise divisible; only the contravening party incurs the penalty and for his share only (1167).

3. Finally, if the principal obligation is indivisible, "solutione tantum", as in this case, the penalty is meant to ensure the total performance of the obligation and to prevent the possibility of payment being made partially, it is indivisible; the debtor at fault is liable for the whole penalty and the other debtors for their share, saving their right of redress (1167).

"Modus"

Modus is an obligation accessory to a contract of a gratuitous nature and which is imposed on the benefitted person. Without such obligation, the contract would be perfectly gratuitous; the "modus" renders it imperfectly onerous. It differs from condition:-

1. because condition never has a coercive effect but merely a suspensive or resolutive effect, whilst modus has a coercive and not a suspensive effect. The benefitted person acquires at once the property granted to him, but once he accepts the liberality, he may be compelled to perform the "modus".

2. because if the condition is unlawful or impossible "vitiatur et vitiat" whilst under similar circumstances the "modus" is null but it does not annul the liberality to which it is attached.

"Multa penitensiale"

It consists in a sum of money or any other thing which, by agreement, may be paid by one of the parties to the other in order to recede from the contract. It differs therefore from a penal

clause because in the case of a penal clause the right to choose between the performance of the principal obligation and the penalty belongs to the creditor. Here, on the contrary, the right of option belongs to the debtor. This sort of "multa" is not provided for by the law but the parties are free to enter into such an agreement because they are free to agree on anything as long as it is not illicit or unlawful.

Earnest

Earnest is the delivery of a thing as a token of a contract which has been concluded and its purpose is that of ensuring the execution of a contract or of furnishing the parties with a means to recede from it. In the first case, it is known as "confirmatory" in the second as "penitential". It differs from the penal clause and from "a fine for repentance" (multa penitenziale") because these are promises of future performances, whilst earnest is a performance which is executed when the contract is concluded.

In order to decide whether earnest is "confirmatory" or "penitential" recent jurisprudence distinguishes according to whether it is given before or after the conclusion of the contract; it is given before in case of preliminary contract e.g. in case of promise of sale; it is given after in case of a [definitive?] contract, e.g. in case of a definitive sale.

In case of a preliminary contract, earnest has a penitential character; each of the parties may recede from the contract by forfeiting the earnest: if on the contrary, it is given in a definitive contract it has a confirmatory character and it is not lawful for any of the parties to evade the execution of the obligation by forfeiting the earnest.

The Code Napoleon deals with earnest in promises of sale and it attributes to it a penitential effect (1590) and says nothing about earnest with reference to sale. Our law has followed this system (1409).

French authors in general attribute a confirmatory character to earnest in case of a definite

contract and a penitential character in case of a promise "de innuendo contractu" unless a different usage is proved to prevail with regard to the particular contract for which earnest is given.

Principles of Transitory Law with regard to Obligations

The main rule in this part of Transitory Law is that the law to be applied is that in force at the time in which the obligation arises, so that no subsequent law may affect it. The right of the creditor corresponds to the obligation of the debtor and from the very moment in which the obligation arises, it becomes a vested right and forms part of the estate of the creditor, so that it must be governed by the law in force at the time when it became a vested right, both in regard to internal and external requisites and to the effects whether they are expressly stipulated by the parties or regulated by the law which interprets the intention of the parties.

Similarly, the effects of quasi-contracts and of delicts and quasi-delicts and of obligations "ex lege" are governed by the law in force at the time in which they arose. That law, therefore, regulates both the principal effects of obligations and secondary effects in case of non-performance, and it regulates also the degree of fault on the debtor's part and the amount of damages to be paid by him.

With regard to suspensive conditions and to conditional credits, in case the law is changed whilst the condition is still pending, it is discussed whether it is the law in force at the time of the contract or that in force at the time when the condition takes place that should apply. The reason for this doubt is that while the condition is still pending, the "creditor" has no credit but only the hope of acquiring one and therefore he does not acquire a vested right, which is only acquired when the condition is fulfilled. It seems therefore that the new law should apply. Gabba, however, ("Teorie della Retroattivita' delle Leggi") observes that though it is true that the obligee vis-a-vis the obligor does not acquire

any right until the condition takes place, he should he protected by the law from any molestation, and in case such molestation takes place, he should be entitled to the credit against the obligor: conditional rights, therefore, arising from an agreement should not be barred by the enactment of a new law.

Title. XII

Contracts of Gaming and Betting

This matter was originally dealt with by Ordinance No. III of 1861.

The contract of "gaming" is that by means of which the parties bind themselves to pay a sum of money or other thing to the winner.

The contract of betting is that by means of which two or more persons who are of contrary opinion in regard to a given object, promise to pay a sum of money or other thing to the person whose opinion is proved correct.

These contracts have always been looked upon with disfavour by the law owing to their evil economic effects. Persons are encouraged to rely on luck rather than on work; moreover, gaming and betting are often the cause of financial disasters to many families, because at times persons are induced to stake even those means which are necessary for their subsistence. To the economic motive, therefore, we must add a moral and social motive, because passion and misery are very grave dangers to society.

In (illegible text) a "senatusconsultum" which is mentioned in the Digest (Lib. II, tit. 4, "de aleatoribus") prohibited games for gain; and a Constitution of Justinian reproduced in the Code (Const. I, "de aleae lusu") confirmed the prohibitation and it extended it to any game, whatever be the thing to be paid to the winning party.

Our law in art. 1807 which is a reproduction of art. 1965 of the French Civil Code, grants no action for a gaming debt, and then in order to solve some of the difficulties that arose in French Jurisprudence, it expressly states that no action is granted for the recovery of sums

lent by any person who knew that such sum was intended for gaming; and also for the recovery of sums lent by any person interested in the game, for the payment of money lost at such game. The reason is that such loans are an incentive to gaming and therefore to the violation of the law. When the loan is made for a gaming debt, recovery is denied only when the lender has an interest in the game, because it must be presumed that he lent the money in view of such interest and with the intention of encouraging the game; this intention, on the contrary, cannot be presumed when the lender gives sums for the payment of a gaming debt and has no interest in the game and therefore the action for the recovery of the sum lent is not denied to him. Art. 1809 adds that any agreement made for the purpose of defeating the provisions of the last two preceding articles is null and void; it follows therefore that any ratification, novation, arbitration, compromise, surety, pledge, relating to gaming debts or to forbidden loans are null.

Also, a voluntary payment made by the loser to the winner is null and the loser may recover what he may have paid. There is no doubt that the payment is null because its cause is unlawful; according to general principles, however, it should not be recoverable because in gaming both parties violate the law and "in pari turpitudine melior est conditio possidentis". For this reason art. 1967 of the French Civil Code does not grant to the loser, who pays, any action for recovery. The reason is not that which is erroneously given by some writers i.e. that a natural obligation arises out of a gaming debt which gives rise to the exception "soluti retentio", because it is contradictory to perceive a natural obligation in a relation which is expressly prohibited by the law.

Our legislator, however, following the rule contained in Const. I Cod. "de aleae lusu" admits in art. 1810 the right of the loser to recover what he may have paid provided that he shall by judicial act call upon the winner to return the sum or thing paid to him within two months to be reckoned from the day of payment. This exception to the rule of law "in pari causa turpitudinis melior est conditio possidentis" relates only to gaming but not also to betting.

Another similar exception is that contained in art. 1811 relating to payment made in these Islands *for* a lottery made here or in another country without having been authorised or permitted by the Police.

The payer may recover the sum or thing paid, notwithstanding that he is guilty of a contravention; he may recover it even from the person to whom payment was made notwithstanding that he was an agent of another person. This is an exception to the rule that the third party who enters into a contract with an attorney has an action against the principal and not against the attorney. This is a sanction to Police laws: a private right which is given as a sanction to a law of public policy.

Art. 1808 contains an exception to these rules in regard to games tending to promote skill, dexterity and agility such as races, the use of arms, tennis, football, etc. the reason being that such games are very useful to the community at large. This exception was also admitted in Roman Jaw by virtue of the "lex Titia, Publicia et Cornelia" (Dig. Tit. II, lib. 5 frag. 2 and 3).

Time transactions on stocks

In our jurisprudence as well as in French and Italian jurisprudence the question has been raised whether such transactions should be considered as contracts of gaming and betting in terms of the abovementioned provisions. These transactions are a sale at the exchange value which is subject to the fluctuations of the market: the parties win or lose according to whether on the lapse of the term the price rises or falls: the seller wins if the price falls and the purchaser wins if it rises.

These transactions, therefore, are similar to betting because they may be made with the object of deriving a profit which depends on an uncertain event. Moreover, experience shows that they may be very harmful to individuals, to families and to society itself. Our jurisprudence, therefore, (cfr. judgement No. 72, Vol. XII) following French and Italian Jurisprudence (before the

enactment of special laws which made an exception in regard to such transactions so as not to hinder transactions made seriously and thus weaken the market of stocks) extends the prohibition relating to gaming and betting to transactions which are from the outset merely bargain transactions, that is when the parties never meant to sell and buy the values which apparently formed the object of the contract and to execute the contract by delivering and receiving the values when they fall due, but they had only the intention of transacting for the difference between the price agreed upon and that at the time of the expiration of the term.

Bargain transactions, as they are known, are not serious transactions, but merely a bet on the rise and fall of prices. When, on the contrary, at the conclusion of the transactions the parties meant really to execute the contract, the prohibition relative to gaming and betting is not applied by our Courts notwithstanding that subsequently the parties may agree to pay and receive the difference instead of delivering and receiving the goods or the stocks.

Similarly, the transaction is not merely differential and the abovementioned prohibitions are not therefore applied when the contract is serious but the debtor is granted the option of discharging himself by paying the difference instead of paying the price and receiving the goods or the stocks.

Title XIII

Compromise

This contract was first dealt with in Ord. Ill of 1851.

Art. 1821 defines compromise as a contract by which the parties, by means of a thing given, promised or retained, put an end to a law-suit which has already commenced or prevent a law-suit which is about to commence.

The definition indicates the cause and the means of compromise: its cause and purpose are those of putting an end to an already existing

suit or of preventing an imminent lawsuit between the parties; the means is a given thing, promised or retained i.e. reciprocal concessions made by the parties, e.g. one of the parties retains a part of the thing which is the object of the lawsuit or one of the parties renounces to his claim on the object of the lawsuit in favour of the other party and in view of another thing which he receives from him. Compromise is favoured by the law because it is advantageous to society in so far as it establishes peace and friendship instead of animosity between the parties; it is advantageous to the parties because they are freed from all anxiety about the issue of the lawsuit. It is true that by means of a compromise the parties renounce the hope of a complete victory and sacrifice some of their claims but it is equally true that the loss sustained is known and certain as to its extent whilst the issue of the lawsuit is always uncertain: it may imply a greater loss and even complete defeat.

Distinctions between compromise and other analogous contracts

Compromise is distinct from acquiescence and from renunciation, which are very similar to compromise in so far as they also put an end to a lawsuit. Compromise, however, implies reciprocal concessions, the sacrifice on the part of both parties of their claims, whilst renunciation implies the unconditional surrender of one's pretensions and acquiescence implies the unconditional acknowledgment of the claim of the other contending parties.

Another contract by which the parties may settle a dispute whether actual or imminent is arbitration, by means of which the parties agree to refer an actual or probable dispute between them to one or more persons (arbiters) chosen by them in order to decide the dispute. In compromise it is the parties themselves who decide the dispute whilst in arbitration it is referred to other persons; compromise puts an end to the law-suit whilst in arbitration the lawsuit is proceeded with not before the Court but before the arbiter who puts an end to it by

means of a judgment which is known as "award" (lodo).

Classification

In Roman Law compromise was originally a "nudum pactum" which was not protected by any action; and in order to give a legal effect to it, it was usually entered into in the form of a "stipulatio". According to our law it is a bilateral contract on an onerous and commutative title, because it is held that in the minds of the parties the concessions made by one of them are equal to those made by the other.

Internal requisites

1. Capacity

The Capacity of contracting is not enough, but that of alienating the objects included in the compromise is required, that is, those things which formed the object of a lawsuit are given by one of the parties to the other in virtue of a compromise. Incapacity may be remedied by judicial authorisation and by other means established by law. Moreover, husband and wife may not effect a compromise except in those cases in which a sale may validly take place between them, saving the authorisation of the Court.

2. **Consent**

General rules of consent apply here.

3. Existence of an actual or possible lawsuit.

This is the cause of compromise which is meant to prevent or to put an end to lawsuits; the lawsuit must be common to the contracting parties, and it must be serious that is the issue of which is actually in doubt. When it is certain that one of the parties has acted within his rights and the pretensions of the other are positively unfounded and this notwithstanding the former renounced to a part of his rights and

admits the claims of his adversary in part, there is no compromise but a liberality and a gratuitous renunciation which is valid or otherwise according to whether the relative conditions concur or not.

By what criterion, however, is the doubt on the issue of the lawsuit to be determined? According to the prevailing opinion the doubt need not be objective, or that it be a new or difficult case on the issue of which even a lawyer may have his doubts, but a subjective doubt is enough that is a doubt existing in the minds of the parties when the compromise is concluded because a lawsuit and the doubt as to its issue are requisites of compromise in so far as they are the motive which induces the parties to a compromise and what affects the will of the parties is the doubt that exists in their minds.

Since a "res dubia" is an essential requisite, its inexistence implies the nullity of the contract in so far as compromise is concerned but the contract may in certain cases hold good as a simulated donation or a renunciation, if the relative requisites concur. A case in which this element is absent is foreseen by Art. 1827 viz. a compromise respecting a suit terminated by a judgment which has become final and absolute: a "res judicata" prevents the law-suit from being decided differently: it even prevents the suit from being decided again. Consequently it should follow that the compromise is null; but art. 1827 declares such a compromise null only in case the parties or at least one of them had no knowledge of the judgment. It would seem therefore that if the judgment is known to both, the compromise is valid and that the existence of a judgment gives rise to nullity not because the cause is lacking but because of mistake which is a vice of consent.

From a legal point of view, however, this is not correct and probably the legislator meant only that when the judgment is known to both parties who have consented to the compromise, they remain bound by the contract because they were not acting under any mistake, but the contract would be a donation or a renunciation and not a compromise. Saving this requisite of doubt on the issue of the law-suit, any lawsuit

may be the object of compromise, except those concerning things "extra-commercium" such as filiation, validity of marriage, patria potestas. The nullity of such compromises extends also to merely pecuniary agreements that depend on them: a pecuniary compromise which rests on an implicit agreement contrary to the inalienability of status is null. Equally null are those compromises which are meant to evade the substantial requirements for the validity of an act imposed under sanction of nullity. Social interest demands that the nullity subsists even against the will of the parties.

If the lawsuit refers to property subject to entail or to future maintenance due either "jure actionis" or "officio judicis", the authority of the competent Court is necessary. In the case of entrai such authority is required in order to protect the interests of those called to the entail. In case of future maintenance, such authority is required on account of the prejudice which may result from the compromise to the detriment of the creditor that is the danger that the compromise be determined by the need in which he finds himself rather than by the creditor's free consent.

If the lawsuit has not yet commenced, the competent Court is the Court of voluntary jurisdiction; if the hearing of the case has commenced, the authority may be granted either by the aforesaid Court or by the Court before whom the suit is pending.

External requisites

If the lawsuit relates to immovables e.g. to an inheritance, or in order to effect the compromise an immovable is promised or transferred, a public deed is necessary. Apart from these cases, the form of compromise was free before Ord. XIV of 1913 which required a private writing except in those cases in which the law requires a public deed.

Effects

Besides the effects common to all contracts

and these which are particular to each compromise, (that may contain agreements of whatever nature), compromise gives rise to certain particular effects both with regard to its authority and to the penal clause which may have been stipulated. With regard to its authority, art. 1823 following Const. 20 "de transactionibus": "transactio rei judicatiae vim habet" enunciates the principle that the compromise has between the parties the authority of a judgment which cannot be appealed from. In other words, it decides the dispute definitely just as a "res judicata". In practice it is said "transactio pro veritate habetur" and this implies that the right is regarded as if it belonged to the person to whom it is assigned by means of the compromise. Consequently, an exception arises from the compromise similar to that in case of a judgment "exceptio litis per transactionem finitae" or in a few words "exceptio transactionis" which prevents the continuation of the suit which has already commenced between the same parties and on the same object.

Compromise and judgment are identical only with regard to this effect; as to all other effects they preserve their own nature and produce their own effects. Thus compromise is a contract and it therefore produces the effects of a contract and may be executed according to the rules governing the execution of contracts. A judgment on the contrary is the act of a Judge and it differs from compromise even with regard to its execution.

The two institutes differ from each other also with regard to the means for impugning them: a judgment may only be impeached by means of the extraordinary remedy of re-hearing which is admitted only in a few expressly established by the law, whilst compromise may be impugned in all those cases in which any other contract may be impugned. As to the authority of compromise, the same subjective and objective limits to a judgment apply. Subjectively such authority is limited to the parties to the compromise and neither avails third parties nor is it harmful to them, although they may have an interest in the object of the compromise (1822); objectively, it is limited to the object of the compromise. Art. 1819, 1820, 1821 contain the following applications of the objective limitation:-

1. a renunciation which is made to all rights, actions and claims extends only to what relates to the differences which have given rise to the compromise (1819).

2. compromise terminates only the differences which have been contemplated whether the parties have manifested their intention by special or general expressions or such intention results as a necessary consequence of what has been expressed (1820).

3. if the party who has compromised concerning a right belonging to himself, acquires afterwards a similar right from another person, he is not bound by the previous compromise so far as his new right (1821).

Declarative effect **of** Compromise

Compromise is also similar to a judgment with regard to its merely declarative effect in respect of the obligations and of the rights of both parties and of the rights of ownership over things, which are the object of the compromise.

It has always been discussed whether compromise produces a transfer of rights or whether it has a merely declarative effect. Once the right of credit or of ownership acknowledged in favour of the parties to the compromise and to the relative obligations, have for their origin a pre-existing relation which is acknowledged but not created by the compromise, the prevailing theory has always been that of the declarative character of compromise: "quilibet transigentium id quod ex transactionem obtinet non dicitur obtinere ob altero sed ex jure suo primiero" (Card. De Luca Sp. No. 9 "De Feudis").

The theory with regard to the declarative effect of compromise just as that with regard to the declarative effect of partition seems to have been devised by feudal jurisprudence in order to free compromise from the obligation of paying a certain sum of money and from the necessity of the approval of the lord which were required for the alienation of feudal tenements. Another argument is the analogy between compromise and a

judgement: it is said, in fact, that compromise is nothing but a judgment given by the parties themselves. This theory has also been accepted by modern doctrine which however acknowledges that it is a fiction which may or may not correspond to reality. The basis of this fiction is that of preventing the suit, (which parties wanted to extinguish by means of a compromise) from arising again in order to determine which rights belonged to each of the parties before the compromise and which are to be considered as created or transferred by the compromise.

The consequences of this character of compromise are the following:-

1. compromise does not imply a novation of the obligations which it acknowledges and therefore their character and securities hold good, unless there is an agreement even though implied to the contrary.

2. compromise is not, as a rule, susceptible of dissolution for non-performance on the part of one of the parties. The reason is that the rights acknowledged by the compromise do not owe their origin to the agreement.

3. when it refers to ownership or other real rights over immovables, it should not be subject to registration in the Public Registry.

4. it does not imply the assumption of any obligation of warranty by any of the parties because it is he who transfers ownership that must warrant peaceful possession, and the parties to a compromise do not transfer the things reciprocally assigned.

5. Compromise cannot serve as a title for acquisitive prescription of 10 years because the title must be an act which is apt to transfer ownership.

Exceptions

This fiction merely interprets the will of the parties who are free to create by means of the contract new obligations and a transfer of rights. The first case takes place when one of the parties renounces to his claim against the

other and the latter assumes a new obligation which has nothing to do with that claim. The second case takes place when the assignments made by the parties or by one of them consists in the transfer of a thing extraneous to the suit and belonging to the transferor. In these cases it is evident that compromise may be dissolved for non-performance and, when it is the case, it is subject to registration and it produces the obligation of warranty and it constitutes a suitable title for prescription.

Penal Clause in Compromise

Art. 1818 lays down:- a penalty clause stipulated in a contract of compromise against the party who fails to fulfill the compromise shall be in lieu of compensation for any damage caused by delay without prejudice to the obligation to fulfill the compromise.

When dealing with the penalty clause in general we have said that it is the intention of the parties (to be argued from the text of the contract and from all other circumstances) that decides whether the penal clause should be interpreted as agreed upon in compensation for damages arising from non-performance or for damages caused by delay. In compromise, on the contrary, the article quoted above lays down the presumption that the penalty clause is to be regarded as agreed upon in compensation for damages caused only by delay.

This presumption is based on the presumed intention of the parties; in a compromise the parties intend to put an end to the lawsuit definitely by means of their reciprocal performances; now, since the penalty clause is regarded as agreed upon is compensation for damages caused by non-performance, this would mean that the dispute is settled in a different way from that in which the parties meant to settle it. Therefore, the penalty clause is presumed to have been agreed upon only in compensation 'for damages' caused by delay and consequently both the penalty and the execution of the compromise may be demanded.

Impeachment of Compromise

The law deals with the nullity of compromise in art. 1823 and in the articles which follow. With regard to capacity, consent, object, cause and form the law makes reference to the general rules governing the nullity of contracts which are applicable also here. However, our law, following the Code Napoleon lays down certain special rules in regard to error as a cause of nullity of compromise on the ground of vice of consent.

The most important rule is that distinguishing between mistake of law and mistake of fact, which lays down that mistake of law is not a cause of nullity. This exception to ordinary rules was based in the Code Napoleon on the consideration that the parties to a compromise are presumed to be assisted by their lawyers. It cannot be said that this is a good reason because the assistance of lawyers does not exclude "a priori" the possibility of error in law.

As to mistake of fact, art. 1824 lays down that it is a cause of nullity of compromise, provided it be the determining factor, both if it refers to the person with whom the contract was made, or to the matter of the controversy which the parties intended to compromise. Art. 1825 applies this rule to the case in which the compromise owing to a mistake of fact was made in execution of a title which was null. The consent of the parties who believed that the title was valid is evidently vitiated by a consent on the substance of the dispute. Of course, it must be a mistake of fact, because if the mistake as to the validity of the title is a mistake of law, it does not annul the compromise.

There is a mistake of fact e.g. if the parties that the testament made by a person who is under 18 years of age is valid, because they erroneously believed that the testator was of full age; if on the contrary the parties know that the testator is a minor but they believe the will to be valid, because they do not know that the law requires full age (except in case of remunerative dispositions) then the mistake is of law.

The said article 1825 provided that compromise is not null in this case, if the parties have expressly taken such nullity into account. It was hardly necessary for the law to say so, because in such a case the parties were aware of the nullity; it must therefore be presumed that the party who could have availed himself of such nullity has renounced to it and that renunciation is one of the reciprocal concessions that form the object of the compromise.

Another application is made to a similar case by art. 1826 which sanctions the nullity of a compromise based on documents which are subsequently found to be false. The mistake in this case refers to the belief that those documents were genuine. In the first case, (Art. 1825) the compromise referred to titles which were believed to be valid and which were subsequently found to be null and in the second (1826) it refers to documents which were believed to be genuine but which were found to be false.

Another similar case is that contemplated by 1830 that is a compromise concerning an inheritance depending upon a will which is not known; such a compromise is declared to be null.

The law seems to consider as cases of nullity on the ground of error those contemplated in art. 1827, 1828. The first case refers to a compromise concerning a dispute terminated by a sentence which has become absolute and final. Strictly speaking, as we have already said, this is a case of inexistence of cause.

The second case refers to a compromise made in ignorance of documents which are subsequently discovered when such documents would have shown that the right belonged to one of the parties to the compromise. If such documents had been concealed by the other party there would be fraud on his part, and fraud is always a cause of nullity. If the parties were aware of the existence of such documents but were unable to discover them, this does not entitle them to impugn the compromise on the discovery of the documents.

Apart from these cases, the law distinguishes according to whether the parties have compromised generally on all the differences which may have existed between them or merely on a single matter

with regard to which it subsequently results from the documents that one of the parties had no right on that object. In the second case the compromise is null and the ground for nullity is not, as the legislator seems to hold, the error with regard to the object but the inexistence or falsity of the cause i.e. of the "res dubia".

In the first case, i.e. in case of general compromise save in the case of fraud, this discovery of the documents is not a cause of nullity because the documents discovered after the compromise could only show that one of the parties had no right over a part of the object of the compromise; but the parties who have compromised generally and all matters that were pending between them show that they wanted to decide all questions indivisibly; and it would be contrary to their intentions to admit that they wanted to leave open the way to impeachment of the compromise on the ground of the discovery of documents relative to a special object and thus endanger the stability of the entire compromise.

And, therefore, in the case omitted by the law that is in case of compromise on several specified questions and when the documents refer only to one or a few of such questions, it is up to the Judge to decide according to the circumstances of the case whether the compromise is to be maintained or annulled, regard being had to the decisive importance of the discovered documents.

Finally, Art. 1829 lays down that "each of the parties has a right to demand the correction of any error of calculation incurred in a compromise". The mistake must be common to the parties and must result from a mathematical application of the principle established in the compromise. Therefore, a misstate incurred by any of the parties in calculating the advantages which they hope to derive from the compromise, does not fall under this article; and the same thing may be said with regard to a mistake relating to something which is really obscure or nor liquidated or which gives rise to a question of law.

Tit. XV, XII, XVII

Contract of Loan

These titles derive from Ord. III of 1861.

Contracts of Loan are those by which one of the parties receives a thing from the other party with the obligation of returning it in kind or an equivalent to it, after having made use of it for a certain time. If the thing must be returned in kind the contract is either "commodatum" or "precarium" according to whether the use has been granted for a certain time or may at any time be revoked by the lender when it pleases him. If the borrower is bound to return the equivalent then we have the contract of "mutuum".

"Commodatum" and "precarium" have for their object "res infungibiles" and since these must be returned in kind, the borrower may use them but not consume them and therefore these contracts are called "loan for use". On the contrary, "mutuum" has for its object "res fmngibiles" that is such things either because of their natural destination or because of the destination intended by the parties cannot be used without being consumed and therefore it is known as loan for consumption. In "mutuum" therefore, the borrower acquires the ownership of the thing lent and the lender is only the creditor of the equivalent.

Common characteristics of Contracts of loan

1. Gratuitous nature. The three contracts belong io the class of gratuitous contracts.

This character is essential to "commodatum" and to "precarium" and it distinguishes them from lease; however, it is only natural to "mutuum" in which case the lender may stipulate interest in his favour.

2. They are also real contracts, because they become perfect only when the thing,

which forms the object, is delivered. This is no bar for the validity of a promise of loan which is binding on the promisor.

"Commodatum"

"Commodatum" is defined by art. 1920 as that contract by which one of the parties delivers a thing to the other to be used by him gratuitously for a specified time or purpose, subject of the obligation of the borrower to restore the thing itself.

Requisites:

As to capacity and consent the general, rules of contracts apply; as to the object Art. 1921 lays dowm that all things which are not "extra commercium" and which are not consumed by use may form the subject of this contract. "Non potest comodari ed quod usu consumitur nisi forte ad pompam vel ostentationem quis recipiat". (Ulp. frag. 3 para. 6 Dig.).

In this respect rather than to the natural destination of the thing, regard must be had to the destination expressly or tacitly agreed upon by the parties who may render fungible what ordinarily is non-fungible and viceversa, e.g. the Strasbourg pie. It is not necessary that the object be the property of the lender, because the function of "commodatum" is not that of transferring the ownership of the thing.

It has been doubted whether immovables may be the object of "commodatum". Labeo thought that only the use of immovables can be granted, but not the commodatum. However, the contrary opinion was already prevalent in Classical law (frag. I Dig.).

The requisites proper to this contract are: that the thing must be granted for a determinate period of time, or for a determinate use and that the contract is perfect only when the thing is delivered. The form of the contract is free.

Effects

A. Obligations of the Borrower

1. He cannot make use of it except for the purpose determined by its nature or by express or tacit agreement (1923). The sanction to this obligation is his responsibility even for fortuitous events, in case the use he makes of it is in violation of the agreement.

2. He is bound to look after the safety and preservation of the thing "uti bonus paterfamilias" (1923); he is liable therefore for "culpa lata" and "levis" according to general principles (1924) but not for "culpa levissima" and mush less for any loss or damage which takes place through a fortuitous event without any fault on his part. These damages are borne by the lender according to the rule "casus sentit dominus". The borrower is neither responsible for any deterioration caused by the lawful use of the thing (1928) because the contract of "commodatum" confers this on the borrower and "qui suo jure utitur non videtur iniuriam facere".

The rule that the borrower is not liable for damages caused by a fortuitous event is subject to exceptions in the following cases:

a. Art. 1925: if the borrower employs the thing for a use other than that agreed upon or retains it for a longer time than that agreed upon, then a fortuitous event is regarded as "culpa vel mora determinatus" and it is presumed that the thing would not have perished had he not employed it for another use or had he restored it in due time. The borrower, therefore, is entitled to rebut this presumption.

b. Art. 1926: if the thing lent perishes through a fortuitous event against which the borrower would have been able to safeguard it, by imperiling his own property or if being able to save only one of the two things, he has preferred to save his own. This obligation of preserving, preferably the thing lent derives from frag. 5 para. 4 and it is based on the obligation of gratitude which the borrower is bound to perform towards the lender who has granted to him the use of the thing gratuitously. But if he sacrifices his own property in order to save the

thing lent, he has the right to be compensated.

c. If the borrower has undertaken responsibility for all damages which may happen; this agreement may be express or tacit but it may be argued from the mere fact that the thing was valued at the time of delivery (1927). Such a valuation has only the effect of establishing beforehand the value of the thing, in any case where the borrower is answerable for damages which may happen. The French (1883) and Italian (1811) Codes infer a tacit assumption of the risk on the part of the borrower from the mere fact of the valuation.

3. He is bound to restore the thing, in kind.

In case the thing is granted on a title of "commodatum" to several persons together, their responsibility is "in solidum".

B. Obligations of the Lender.

1. He must reimburse the borrower for all extraordinary necessary and urgent expenses incurred in order to preserve the thing. Extraordinary expenses are those which do not refer to the enjoyment of the thing, because these are at the charge of the borrower (Art. 1929). The expense must be urgent because otherwise the borrower is bound to notify the lender in order that the latter may provide for the preservation of the thing and incur the expenses himself.

2. He is liable for the damages which the borrower may suffer in consequence of any defect in the thing lent, if the borrower knew of such defect and did not apprize the borrower thereof. This responsibility rather than an effect of the contract is the effect of delict or quasi-delict.

Cessation.

"Commodatum" ceases by the expiration of the term agreed upon or by the employment of the thing for the use for which it was granted. In case the lender is in a pressing and unforeseen need of making use of the thing before the terms agreed upon expires, the Court may at its

discretion compel the borrower to return, it as long as the need is urgent and was unforeseen at the time of the contract. In such a case of anticipated restitution, the lender is bound to reimburse the borrower of any expenses incurred by the latter in order to make use of the thing (1931).

Commodatum ceases also on the death of the borrower, if the use was granted to him personally. Otherwise the general rule of contract, i.e. the presumption that the parties contract for themselves and for their heirs applies and therefore it does not cease on the death of any of the parties.

Proof relating to the nature of the contract.

Commodatum is very similar to lease with the difference that one is gratuitous and the other is onerous. In case of doubt whether the contract is commodatum or lease, the presumption is that it is commodatum And therefore the grantee who alleges that it is a lease must show that the rent was expressly or tacitly agreed upon (1934). A tacit agreement may result from the condition of the parties, from the quality of the thing, from long continued use and from other circumstances.

Precarium

Precarium (Art. 1935) differs from the loan for use in that the party who lends the thing has it in his power to take it back when he pleases.

The rules of commodatum therefore apply with the only difference that the borrower is bound to return the thing to the lender whenever the latter demands such restitution and he may not delay restitution on any ground whatsoever, not even on the ground of the prejudice which he might sustain thereby (1936). It is only in case where it appears that restitution has been demanded with intent to cause injury to the party who has received the thing, that the Court may grant him time, because "malitiis non est indulgendum".

Contract of Marriage or Matrimonial Agreements.

Marriage implies a common life between husband and wife, which, as a rule, is destined to have a long duration, and a common life has as a necessary consequence certain common pecuniary interests which give rise to various questions relating to property. Marriage itself gives rise therefore to the necessity of a matrimonial regime which must have for its object the regulation of the property relations between the spouses, especially the equitable apportionment of the means of both spouses for domestic expenses and the education of the children. So much so that the German Civil Code of 1900, the Swiss Code of 1912 and the Italian Civil Code of 1942, instead of dealing with the matter in the Law of Contracts, as the French and Maltese Legislators have done, consider matrimonial agreements as a part of Family Law.

It is for this reason that, although it is possible to imagine a system which, without taking into account the rights and obligations of a patrimonial character, arising from the status of a married person, would subject them to this effect of Common Law, yet all positive laws establish different matrimonial regimes.

In fact it is necessary to determine by whom and in what proportions the domestic expenses are to be borne; whether the property of the spouses should remain separate or instead form part of a common whole; whether the husband should have a special right over the property of the wife, or whether she should retain its administration end enjoyment; whether the acquests made during marriage should be divided on its dissolution or should be the property of the husband and of the wife. It is also necessary to establish what should be the rights of third parties who might contract with the husband or the wife, and especially whether these rights are available only against the property of that spouse with whom they have contracted or also under certain conditions, and within certain limits, against the property of the other spouse. This reference to the questions which arise in the matter bears out the importance of a matrimonial regime.

Our law, following the example of the French Civil Code, has not, however, established a single regime which is binding on all married persons, but has granted them the faculty of choosing between different systems and of modifying within certain limits, the system chosen.

Up to a certain point, therefore, the spouses are masters of their property relations which they are free to regulate in the way which suits their interests best. For this object it is necessary that they should stipulate their matrimonial agreements and it is evident that in the absence of such a stipulation the system must be established by law. Thus the spouses married without a contract are governed by this system established by law; which has a subsidiary character, because it applies only when there is no contract or when it has not been expressly agreed upon.

The system which is established by our law is that of Community of Acquests, which, as far as we are concerned, derives from the Code de Rohan, Book III, Ch. I, Paras. 17, 18 and 28. The same system has been adopted in Spain, in the U.S.S.R., in several South American Republics and in a few North American States. The system established in France, Belgium and Luxembourg, consists in a more comprehensive community which besides acquests includes also the universality of movables. Holland, Denmark, Norway and Portugal have adopted the system known as Universal Community. In opposition to these more or less comprehensive systems of community there is the separatist system, according to which each of the spouses retains his own property. This system is adopted in Italy, Austria, Rumania, England, Scotland, Czechoslovakia, Yugoslavia, Bulgaria and the majority of the South American States. In these countries the separation is complete both with regard to ownership as well as with regard to usufruct and administration.

In other legislations this system is mitigated. Thus the German and the Swiss Civil Codes give to the husband the enjoyment and the administration of the property of the wife which, as a rule, is dotal property.

The tendency of modern legislations is, therefore, towards the Separatist System, which, from a theoretical point of view, conforms more to modern ideas about the equality of the spouses and the social and economic status of women.

In doctrine, however, there is a strong tendency in favour of the system of Community because it is more suited to the common life created by marriage; and when it is limited to acquests it is even more advantageous to the wife than the system of separation, because under the latter system she would not be called to partake of the acquests made during marriage.

Although the spouses are free to choose between the various systems, still that established by law is of considerable importance because it governs the majority of married persons who do not stipulate marriage agreements. It is for this reason that Planio et Ripert (Cous de Droit Civil, Vol. III, Para.[missing]) held that the adoption of the separation of property as the legal system would result inevitably in the weakening to a great extent of the union between husband and wife and, by doing away with every interest common to them, it would constitute a new menace to the indissolubility of marriage.

On the other hand, however, the system of Universal Community which includes all the property of the spouses and subjects it to the administration of the husband would give him excessive power, would expose the wife to danger and would deprive her of the faculty of disposing of any part of her property "inter vivos", thus rendering her in a certain sense "non domina" of her own property.

For these reasons the conjugal partnership which was a system of universal community in our customary and municipal law gradually fell into disuse and marriages were celebrated by means of private writing in which the community limited to acquests was stipulated. This is why conjugal partnership was abolished as a legal system by Ordinance IV of 1867, which moreover prohibited it for future marriages (Section 1280), This abolition was not retrospective with regard to marriages celebrated before December 18th, 1867, under conjugal partnership or without private writing.

Contract of Marriage.

The specific object of this contract is that of establishing the property regime which is to govern the relations between husband and wife; it is favourably looked upon by positive laws, which grants to the parties the liberty to regulate their relations in the way which is more convenient to them and dispenses them from certain legal conditions.

Like every other contract marriage has its internal requisites, i.e. the capacity of the parties, their consent not vitiated and an object, which must be certain, lawful and possible, and its external requisites, i.e. a public deed. Another requisite proper to marriage is the time in which it is contracted.

Particularly important is the theory relating to the object of the contract of marriage; it is a complex act which is very similar to the act which constitutes partnership and, independently from other incidental agreements, in practice it usually contains:-

1. The marriage agreement properly so called, by which the parties adopt the legal system or a different system by means of clauses which suit them;

2. The donations made to the spouses, i.e. the settlement of dowry made by the parents, by relatives, or third parties, with the necessary conditions regarding the transfer or otherwise of the dotal property to the husband;

3. The gift made by the spouses reciprocally, and, in particular, the promise of the dotarium made by the husband to the wife;

4. The declarations relating to the property possessed by each of the spouses which have a practical importance in the liquidation of the community of acquests.

The Principle of Freedom in Matrimonial Agreements.

The fact that marriage is looked upon favourably by all positive legislations necessarily implies that the contract of marriage is very well looked upon as well. This is evidenced by the liberty of the parties to stipulate any agreements which they think fit, including also certain agreements which are prohibited by common law. In particular the following agreements are valid:

1. An agreement that all the children or some of them be brought up in the religion of the mother (Sect. 1282). This provision, which is an exception to the rule that agreements contrary to "patria-potestas" are not permissible, is meant to facilitate mixed marriages between a non-Catholic husband and a Catholic wife.

which Canon Law allows only under the condition that the parents bind themselves to bring up the children in the Catholic Religion. Now this obligation of the husband and father is sanctioned by this section.

2. The donations of future property and also of all the property which the donor may leave at the time of his death. The validity of these donations is contrary to the rule that donation can only have present property for its object, and if it includes future property it is null as far as future property is concerned (Section 1835); it is also contrary to the other principle which prohibits agreements of future succession. In contemplation of marriage, on the contrary, any person may make to the spouses or to the future issue, a donation of all or of a part of what he may have at the time of his death, which amounts to an "institutio heredis". In fact donations of this kind are called "contractual institution of an heir". Husband and wife may make such a donation to one another during marriage, just as the spouses may in contemplation of marriage (Sections 1900 and 1906).

3. The promise made by a parent to one of the spouses of not leaving to him or her from his estate a smaller portion than would be due by succession "ab intestato"; or of not diminishing such portion by donations in favour of his other children or of other persons; or of not giving or leaving to any of his other children more than what he would give or leave to the spouse (Section 1284).

The first agreement only ensures to the spouse a share of the inheritance and it does not in any way limit the right of the promiser to dispose by acts "inter vivos" under any title. The second agreement is more effective because it limits the right of the promiser to make donations in the sense that the amount of the donations is considered to be included in the inheritance of the promiser in order to calculate the portion of the spouse; and in case the assets of the inheritance are insufficient, the amount of donations is subject to reduction up to the amount necessary for the formation of such portion. The third agreement is known as "pactum de aequandis liberis" or "de aequitate servanda inter liberos", and it prevents the promiser from preferring any one of his children by leaving to him a larger portion than that given or left to the spouse.

Roman Law did not admit this exception to the prohibition of agreements relating to succession (XV. Code de Pactis). Common Law, though contrary to agreements on future succession had, under the influence of future ideas, introduced a very important exception with regard to contracts of marriage which were considered as true family agreements capable of containing any sort of agreement on future successions.

The three kinds of agreements which we have just mentioned above were admitted in our customary law which was subsequently sanctioned by the Municipal Code Bk. III, Ch. V. Para. 13, and were preserved in our present laws for the sake of tradition. Foreign codes have been more rigorous and the French Code does not admit any exception to the prohibition of agreements on future succession other than the "contractual constitution of an heir".

4. The renunciation to the future succession of the parent or other ascendant in view of a dowry or of a donation "propter nuptias" made by such parent or ascendant to the spouse (Section 1284).

Also this kind of renunciation was prohibited in Roman Law (B. III, Code do Collationibus). It was first introduced by custom especially in Italy, in order to concentrate all the property in favour of male children, and Canon Law sanctioned these renunciations when they are confirmed on oath (Ch. III, Quamvis, in the "testo delle Decretati, de Pactis"). Those renunciations were also permitted by our Municipal Code, which, however, did not require the oath (Bk. III, Ch. V, paras. 40 and 44). The renunciation must be made in consideration of the dowry or donation, and it must refer to the inheritance of the parent or other ascendant; moreover, it must be expressed under the sanction of nullity, owing to the serious consequences which it may give rise to.

Restrictions to the Liberty of Marriage Agreements.

These restrictions are laid down in general terms in Sections 1231 and 1282, which prohibit any agreement contrary to morals or inconsistent with the rules contained in the subsequent sections or contrary to any prohibitory rule of law. Besides these restrictions, there are other special ones expressly established by law. These are:

2. The prohibition to contract any partnership or community of property except with regard to acquisitions (Section 1280);

2. The prohibition to enter into any agreement in derogation of any of the rights deriving from paternal authority, or pertaining to husband as the head of the family (Section 1282). It follows that any agreement authorizing the wife to have a separate residence or subjecting to her consent the choice of the conjugal domicile is null.

For the same reason, any derogation to the right of "Patria Potestas" or to the laws of "Tutela", Minority and Emancipation is null. The spouses may not modify the rights and obligations which are attributed to them or imposed upon then by law, with regard to education, correction and maintenance of their children or to the administration of their property.

Equally null are any agreements which tend to modify the respective rights and obligations of the spouses in the Community, such as e.g. an agreement which subordinates to the consent of the wife the acts of administration and of disposal of the common property made by the husband or which subjects the common property to the debts contracted by the wife without her husband's consent.

1. The prohibition to enter into any agreement or to make any waiver tending to vary the legal order of succession either with respect to the spouses themselves with regard to the succession of their children or with respect to the children between themselves.

This provision of Section 1283 is nothing else but an application to the most frequent cases of the principle which prohibits any agreements on future successions sanctioned by Section 1027 and, therefore, it must not be interpreted restrictedly but as relative to any agreement of this kind, saving the exceptions which we have already dealt with. Section 1283 mentions also the testamentary dispositions allowed under the provisions of the Civil Code, and is evidently making reference to the testament "unica Carta" which very often contains provisions in which husband and wife leave property to one another in consideration of

what they receive and has almost the nature of a contract.

The restriction with regard to public policy is nothing else but an application of this principle that any agreement contrary to laws of public policy and to morals is null. The case of a marriage settlement contrary to morals is very rare. Writers give the example of a contract of marriage made in the exclusive interest of the parents, who have in a certain way sold their consent to the marriage. As to the nullity of agreements contrary to any prohibitory rule of law, in the absence of a provision which sanctions nullity expressly, we must apply to each particular case the theory of virtual nullity.

Capacity of the Parties

With regard to capacity, there are the following two special rules:

1. A minor may not enter into a marriage agreement unless he is assisted by the parent exercising paternal authority or when both parents are with the authority of the Court (S. 1285).

2. In case of a person who is incapable of contracting owing to interdiction, the authority of the Court is necessary.

In both cases the reason for this provision is the personal character of these agreements, which therefore require the contracting party to act personally, and it does not allow a minor to be represented by his father nor an inhibited person by his curator.

Form of Marriage Agreements

All marriage agreements, whatever their contents, shall, on rain of nullity, be expressed in a public deed (Section 1289); and in order to be effective vis-à-vis third parties, they must be inscribed in the Public Registry. This requisite of publicity is not an application of the principle of publicity in case of transfer of immovables, but it is based on the same grounds, i.e. the interest of third parties, because the extent of the rights of the creditors over the property of the husband or wife, respectively, with whom they may have contracted, and over the property acquired during marriage as well as the power of the husband of

administration and of disposal and the Civil Capacity of the wife in the matrimonial regime.

The importance of the publicity becomes greater in case one of the spouses is a trader, and it is for this reason that Act XXX of 1927 contains special rules on this matter. These rules impose on the notary receiving a marriage contract, or any deed, varying such contract between persons any one of whom is described in the deed as a trader, the obligation of filing within 15 days an extract thereof with the Registrar of the Commercial Court who shall cause a copy of the extract aforesaid to be posted up at the Exchange and published in the Government Gazette (Section 31, Commercial Code). They further provide that every notary, who fails to comply with the said provisions shall be liable, on conviction, to a penalty not exceeding ten pounds (Section 33, Commercial Code). The same obligation is imposed on the spouse who becomes a trader after marriage under the same penalty; besides in case of bankruptcy the spouse may be declared fraudulent bankrupt if he fails to fulfil this obligation.

Time in which Marriage Agreements may be Contracted.

In Roman Law marriage agreements could be contracted even after the celebration of marriage and the Code de Rohan admitted agreements made after marriage on condition that the Judge intervened in order to ensure that the parties have acted of their own free will: this rule has been preserved in our present laws which requires the authority of the Court of Voluntary Jurisdiction. By means of the same authority the parties may also alter the marriage agreement during marriage. In French Law, on the contrary, in conformity with a usage, dating back to the sixteenth century, marriage agreements can only be contracted before marriage, and cannot be altered afterwards. This principle of unchangeability, is justified by the fact that public interest requires stability in the marriage regime; it is required in the interests of third parties, because no system of publicity could protect them sufficiently if marriage settlements could be altered at any time; stability is also required on account of the fact that marriage agreements even in present laws have maintained the nature of a family agreement; and it is also required as a protection to those heirs of the spouses to whom the law reserves a portion of the inheritance ("heredi reservatari"), because if the spouses could alter the marriage agreement they would be able to simulate reciprocal donations which would violate the rights of legitim and of reserve.

For these reasons the principle of unchangeability has been adopted in Belgium, in Holland and in Italy (1382), in Spain (1321), in Portugal (1105), and in several other legislations.

However, doctrine acknowledges that a change may take place during marriage in the property of the spouses which would justify a change in the matrimonial regime, and it therefore suggests several modifications to the principle of unchangeability, and some modern legislations, such as the German (1432) and the Swiss Civil Code have adopted the opposite principle.

However, if we take into account the exceptions which are generally admitted to the rules of unchangeability and on the other hand the conditions required in order to effect a change in marriage agreements, we shall find that in practice the two systems are not as different as they appear to be in theory.

Thus our law requires the authority of the Court for a post-nuptial marriage agreement in case it had not been entered into before, and in case of a change in the marriage agreement during the marriage, the law requires not only .the authority of the Court but also that there be no prejudice to the rights of the children or of third parties (Section 1238), In both cases, moreover, the public deed is required, and in order that the contract may have effect vis-à-vis third parties it must be inscribed in the Public Registry, and it is subject to special publicity in case one of the spouses is a trader.

In case of a change made before the marriage, the consent of all the persons who had taken part in the contract is required, in conformity with the general rule that a contract can only be modified by the consent of all the parties to it. However, this does not include those persons who were present at the contract merely "honoris causa".

In case of any alteration, whether before or after the marriage, or of a counter declaration (which must always be made by means of a public deed - Section 1290) the notary must make a note in the margin of the original act Section 1291). If the notary who receives the alteration or counter declaration is different from that who had received the original act, he must send to the latter a note of reference. These obligations imposed on notaries are intended to protect third parties

who in this way on reading the original contract may become aware of the relative change. In defect of the note or reference, the change is not rendered ineffective vis-à-vis third parties.

Effects of the Contract of Marriage.

The effects of this contract depend on the system adopted by the parties: once this is established, this contract has the peculiarity of producing its effects "erga omnes" and especially with regard to all those who contract with the spouses during marriage.

This does not constitute an exception to the rule of Section 1044 ("res inter alios acta") because marriage agreements do not give rise to obligations against third parties, nor do they create rights in their favour but they only establish the system governing the property of the spouses, which third parties must therefore respect, and of which they can make use just as if it were a statute of a partnership.

The effects of the contract of marriage as a rule commence only on the day on which the marriage is celebrated (argued from Sections 1364 and 2122), because it is an accessory contract which is meant to regulate the property relations between the spouses, and until there is marriage there are no spouses, and the contract of marriage has the nature of a project.

With regard, however, to donations of present property under title of dowry or any other title made to the spouses, there is nothing, if that be the intention of the parties, to prevent the transfer of the property given on donation being considered as having taken place immediately or the celebration of marriage being regarded as an ordinary condition which as soon as it takes place ought to have a retrospective effect.

Lapse and Nullity of the Contract.

The contract of marriage lapses if the marriage is not celebrated or is annulled. It is an accessory contract which is meant to regulate the property relations between the spouses, and it therefore depends on the marriage between the contracting parties. Lapse affects not only the marriage agreement properly so called but also any donations which the contract contains and which are regarded as having been made "ininuitu matrimonii". However, it takes place only in case it is certain that the intended marriage is not

going to take place; if, therefore, the marriage is celebrated some time after, it is a question of fact whether the parties intended to abandon or to maintain the marriage agreement previously contracted. In favour of the donors it seems that we should admit the right of fixing a term for the spouses, on the expiration of which without the marriage having taken place, the donations are to lapse. A marriage contract which has lapsed does not produce any effect; only when the lapse is a consequence of the annulment of the marriage may the contract serve as a basis for the liquidation which must follow the annulment.

The contract of marriage is null in the absence of any of the internal or external conditions required for its validity. The effect of nullity is that the marriage is to be considered as having been celebrated without a contract and the relations between the spouses are therefore governed by law.

The nullity of the contract is not to be confused with the nullity of any of the clauses which may have been included therein, because there is no indivisibility between the various clauses of the contract of marriage, and therefore the nullity of any one of them does not extend to the other clauses saving the contrary, express or tacit, intention of the parties.

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Dowry.

Section 1292 defines dowry as "the property which the wife or any other person on her behalf brings to the husband to support the burdens of marriage". All that which the wife brings to the husband or which is settled on her by the marriage contract, is dotal unless there is a declaration to the contrary.

The dowry may therefore have for its object either property which already belonged to the wife or property which is donated to her by other person on the occasion of marriage. This is the most frequent case, because the dowry is generally settled by the parents or other ascendants on their daughter or descendant, who receives it in settlement of her rights to the succession of the donor.

The dowry is given in order to support the "onera matrimonii"; it is the husband who must provide for such burden because he is the first person bound to

provide maintenance for the wife and for their children; it is therefore necessary that the dowry be brought to him, and it is also necessary for him to acquire sufficient rights in order to be able to make use of it for that purpose. A bonus paterfamilias provides for the needs of his family from the fruits of his property and from his income and therefore the right of administration and of usufruct over the dotal property are sufficient, whilst the ownership of the property remains with the wife. This is why since the fifteenth century, jurists began to regard the husband as usufructuary and not as owner of the dowry. This teaching was adopted by the Code Napoleon, and also by our law (argued from S.1303 and 1312) because in reality this obligation of the husband to return the dowry is admitted in any case. In Roman Law the ownership which was attributed to the husband was fictitious, and in fact it was acknowledged that the natural ownership of dotal property belonged to the wife "cum eadem res et ab initio uxoris fuerunt et naturaliter in eius permanserint dominium, non enim quod legum subtilitate transitus earum in mariti patrimonium videtur fieri, nec veritas coniusa vel delete est" (Const. XXX, Cod. de jure dotium).

Following the system of the Code, we shall deel with dowry under the following sections:-

1. Of settlement of dowry;
2. Of the rights of the husband over the dowry;
3. Of the inalienability of the dowry;
4. Of restitution of dowry.

Of Settlement of Dowry

According to the definition of Section 1292 dowry is brought to the husband either by the wife herself or by others on her behalf. It may therefore be brought by the wife or by a third party as her attorney or her Negotiorum Gestor (this was very frequent in old times) by means of property belonging to the wife, or by a third party with his own property which he settles as dowry on the wife. In this latter case two juridical relations are created: one with the wife and the other with the husband. The first is a donation in contemplation of marriage, the second is a settlement of dowry which gives to the property given in donation the character of dotal

property, and with regard to them the corresponding rights and duties of the husband arise.

The rules which govern the act in the first relation are those of donation in general and of donations in contemplation of Marriage in particular, with which we shall deal in their proper place. Here we intend merely to give the rules relative to this "donatio propter nuptius" in so far as the property donated is settled as dowry. These rules are the following:-

1. Persons who are bound to settle dowry. In Roman Law as well as in our law the persons bound are, in the first place the father, then the mother and lastly the ascendants, as long as the daughters or descendants had not sufficient property of their own. The other legislations do not impose this obligation not even on parents, but doctrine almost unanimously acknowledges that parents have a natural obligation, towards their daughters which is sanctioned by law.

2. Object of dowry. If the dowry is settled by the wife with her own property (S.1293), it may include all the present and future property of the wife or all her present property only, or a part of her present and future property or one or more determinate things. It may not include future property only because this forms the object of an exception, which may never be verified. A dowry settled in generic terms on all the property of the wife does not include future property.

3. Obligations of the Settler of the Dowry. Since the settlement of dowry is a contract of donation it produces all the effects which civil law attributes to contracts in general and to donations in particular. With regard to the transfer of the ownership of the things granted, in case of a certain and determinate thing, it takes place as soon as the contract is perfect, or, if such is the intention of the parties, as soon as the marriage is celebrated. If the object of the dowry is a genus, e.g. a sum of money, the settler becomes debtor and the donee creditor. In case of delay the settler is liable for dilatory damages which are governed by special rules. If the object of the dowry is a sum of money the promiser owes interest at 4% from the day of the marriage or from the lapse of the term fixed for payment. These interests run ipso iure without the necessity of an intimation, because the legislator did not went to compel children to take judiciary

steps against their parents. The same thing may be said with regard to dotal moveables valued "venditionis causa" the ownership of which, as we shall see later, passes to the husband who becomes debtor in the valve which is attributed to them, because also in this case one may say that the dowry consists in a sum of money. In all other cases the general rules apply, i.e. the damages are those actually sustained (Sects 1301, 1302).

Another special obligation of the settler of a dowry is that he is bound to warrant the property so settled (S.1300). The provision is conceived in general terms and it applies both in case the settler is a third party and in case the property is brought by the wife herself.

The extent of the warranty is the same as that in case of a sale or transfer and the settler must warrant latent defects of the thing, and the existence of the right transferred. The reason why this warranty which as a ruin is not required in donations is imposed, is that dotal property must support the "onera matrimonii", and it is natural to presume that the settler wanted to ensure the dowry to the donee by securing it against any eviction. The action for warranty belongs in case the dowry is settled by a third party, directly to the wife and indirectly also to the husband because he is a person claiming under her.

4. Dowry settled by parents. The dowry is, as a rule, settled by the parents or by one of them; and or law, following the code Napoleon, has laid down several rules in order to solve the following two questions:-

a) who is bound to pay the dowry?
b) who must definitely bear the charge?

The solutions to these two questions has a practical importance both with regard to the compensation which may arise between the community of acquests of the settler of the dowry as well as with regard to the determination of the succession in which the "collatio" of the dowry must be made. The cases foreseen by law are the following:-

1) If the person endowed has property of her own. As a rule this property must not be imputed to the dowry which is settled in her favour and

the dowry is to he taken out of the property of the parents who promised it to her, saving any declaration to the contrary (S.1296).

2) A dowry settled by the surviving father or mother. The rule is that such parent is bound to pay the dowry. But this rule is very often modified by means of clauses to the contrary such as e.g. that mentioned by section 1295 according to which the dowry is settled on the paternal and maternal property, without specifying the respective portion. The meaning of this form of settlement is that the dowry must first of all be imputed to the property of the deceased parent, i.e. the dowry has to be taken first out of the rights pertaining to the daughter over the property of the deceased parent, and the remainder out of the property of the parent making the settlement.

3) If the dowry is settled on by the father, in respect of both paternal and maternal rights. It is only he who is bound to pay the dowry in full; and the mother is not bound at all even though she were present at the contract. The relative "collatio" must only be made in the succession of the father, and if the mother has paid a part of the dowry she had the right to be accredited against her husband. If the dowry was paid out of the property belonging to the community of acquests the latter must be accredited against the particular property of the husband.

4) If the dowry is settled by the father and mother jointly, they are both bound for one half; but the dotal property of the mother cannot be regarded as bound nor in any way prejudiced in defect of the conditions prescribed by law (S.1302 and]340).

None of these rules are of public policy, but they merely interpret the will of the parties, who may therefore derogate to them.

5. Stipulations which may be added to the settlement of dowry. Such is principally a stipulation of reversion mentioned in section 1298, which for a more elaborate treatment of the matter refers us to the title of donation to which this stipulation properly belongs.

In the relations between the settler of the dowry and the person endowed there is a donation and therefore the settlement of dowry may contain a

stipulation of reversion, by which it is agreed that the dowry in the cases foreseen in the contract, shall return to the donor himself or to his heirs and remain thus subtracted from the inheritance of the person on whom it is settled.

The cases in which this stipulation of reversion is possible are:-

a) when the donee dies without issue;
b) when she dies before the donor;
c) when both the donee and her issue predecease the donor.

We shall not deal here with the reasons of these conditions, nor with their purposes or with the effect of this stipulation of reversion because we shall deal with them in full under the title of donations. The law authorises this stipulation in order to favour liberality and for this purpose, in case of donations, it authorises (and at the same time confirms and old tradition and the provisions of the code de Rohan - Bk. III, Ch. para.7-10) the extension of the stipulation to the property belonging to the person in whose favour the dowry is settled under the following conditions:-

i) that the dowry includes also such property

ii) that the person in whose favour the dowry is settled has accepted the inclusion of her own property in the stipulation of reversion;

iii) the knowledge on her part that the stipulation includes her property;

iv) that the acceptance and the knowledge on her part result from the act of settlement of the dowry itself or from another public deed.

The same conditions, sect. 1299 adds, are also required for the validity of any other stipulation in so far as it affects property belonging to the person in whose favour the dowry is settled.

It is clear that as to the property of the person endowed it is not, strictly speaking, a stipulation of reversion but a stipulation on a future succession, which should be null according to the general principles, but is allowed as a favour to marriage.

It is discussed whether a stipulation of reversion may be made by a wife who endows herself, not in her own favour or of her heirs, because this would be useless, but in favour of other person to whom she wants to make a gift, e.g. in favour of those related to her by consanguinity in order to exclude her heirs who are not so related to her. This too would actually be a stipulation of reversion, which is homage to tradition. It was held to be valid by the court of Appeal in be Paris vs Gouder, decided on May 14th, 1881. Later on, however, the same court gave judgment to the contrary in re Magri vs Agius, decided on July 22, 1901, because it held that the law allows the stipulation of reversion in favour of the donor himself and his heirs in general and not in favour of the persons related to him by consanguinity in particular.

As the law stands, there are two cases in which the reversion takes place tacitly, i.e. in adoption with regard to the donation including the dowry made by the adopter in favour of the adopted person and in legitimate succession of ascendants in which case the property given by donation to the child or descendant who dies without issue and intestate, reverts to the parent or ascendant who takes such donation, and does not form part of his succession.

Rights and Obligations of the husband with regard to the Dowry

Our law does not grant to the husband the ownership of the dotal property but only the usufruct and the administration. To this principle there are two exceptions: the first is based on the nature itself of the thing settled as dowry, and the second on the express or tacit intention of the parties.

The first exception takes place when the dowry has for its object "res fungibiles" which cannot be made use of without being consumed (e.g. wheat, a sum of money) . The text of the law does not mention this case expressly, but if the dowry is fungible and must serve for the needs of the family and must therefore be consumed, it is clear that this right must be acknowledged to the husband and that therefore he must be regarded as the owner of the dowry because consumption can only be effected by the owner.

The second exception is based on the express or tacit intention of the parties, to whom we cannot deny the right of giving or receiving as dowry the price of things rather than the things themselves in kind. The parties may agree that the ownership of such things be transferred to the husband, the estimated value of the things being considered as the object of the dowry. The intention is presumed both according to Roman Law (for the purposes of restitution) and our law when the dowry is estimated. In Roman Law a valuation always implied the "venditionis causa", whether it referred to movables or immovables unless the following clause were added "ut soluto matrimonio res restituerentur" (Const,5, Cod. de jure dotium).

Our law, on the contrary, as well as the French and Italian Laws, distinguishes between movables and immovables. In case of movables, a valuation implies the transfer of ownership and it is regarded as made venditionis causa (S.1308). It is to be noted, however, that it is not a sale in the proper sense of the word and that the wife has no privilege for the price but only the dotal credit protected by the relative legal hypothec. In case of immovables the mere valuation is not enough to imply their transfer, but an express agreement is necessary (S.1309).

The reason is that movables are perishable and by the lapse of time they generally diminish in value; whilst with regard to immovables the contrary is generally the case. Now it is a principle of law that the value of the dowry must be preserved, and therefore in case of movables the law regards their valuation as a sufficient motive to bring about the transfer of the ownership, so that the husband is bound to return their value. On the contrary in case of immovables the valuation is not regarded as a sufficient indication of the intention of the parties to bring about the transfer of ownership.

In considering the rights and obligations of the husband with regard to the dowry we shall distinguish the two hypotheses, viz; whether there is a transfer of dotal property to the husband or not.

The dowry which has become the property of the husband. The husband in this case acquires the right of ownership irrevocably and all rights which

derive therefrom; in particular any right relating to such property belongs to the husband, saving the effects of the community of acquests.

Sections 1310 and 1311 contain two applications of this rule:-

a) if the dowry was promised in money but the promiser, instead of money, gives to the husband an immoveable "in solutum" the immovable belongs to the husband because it is acquired by his own money and it is not dotal unless an express declaration to that effect is with the consent of the husband made in the deed by which such property is so given because if the immoveable were to be become dotal there will be a change in the object of the dowry and the ownership would belong to the wife. This agreement must be made in the same act of the "datio in solutum", because otherwise the immovable would become the property of the husband.

b) if immovable property acquired with dotal money shall not become dotal in the absence of an express declaration in the deed of acquisition although the investment of the money in the acquisition of such property may have been imposed in the marriage contract.

It should be emphasized that the husband has no obligations, during marriage; he is only a debtor of the price die, i.e. from the moment in which the marriage is dissolved.

Dowry which does not become the property of the husband. In this case his rights and duties correspond to those of the usufructuary, modified according to the nature of the dowry. The husband has the administration of the dotal property and the right to receive the fruits and the interests, the right to demand the restitution of the capitals, and he is the only person who during marriage has the right to sue the debtors of holders of dotal property.

It is to be noted that the usufruct of the husband is more ample than that of an ordinary usufructuary who cannot manage the property in case he has not given security, or in case the person constituting the usufruct has attributed the administration thereof to a third person. Only the husband may, during marriage, exercise the real actions with regard to the dotal property, whilst in the case

of an ordinary usufruct these actions may be exercised also by the bare owner to whom the usufructuary must give notice of any usurpation committed by third parties.

At the dissolution of marriage the husband shall be entitled to the reimbursement of any expense which he may have incurred with regard to dotal property (S.1306) i.e. to the necessary and extraordinary expenses incurred for the preservation of the dotal property but not to the ordinary expenses which, according to the rules of usufruct are at his charge. The useful expenses must also be paid by him to the extent of the amount by which', by reason of such expenses the value of the property is, at the time of the restitution of the dowry found to be enhanced. He has the rights to claim the expenses of law suits respecting the ownership of such property, at the time of the restitution of the dowry and without interest. Until the reimbursement of such expenses, the husband or his heirs have the "ius retentionis".

As to decorative expenses (S.1307), the husband has only the right to remove the improvements with regard to which these expenses have been made, restoring the thing to the condition in which it was before they were made, provided:-

a) he shows that he can derive some advantage therefrom; and

b) the wife or her heirs do not elect to retain such improvements the value as assessed by experts, regard being had to their condition at the time of the restitution of the dowry.

In ordinary usufruct the rule is that the usufructuary has the right to remove such improvements unless the owner prefers to keep them by paying a sum corresponding to the profits, which the usufructuary would have derived.

The obligations are those of a usufructuary with the only difference that the husband enjoys a better treatment. During the usufruct he must preserve the dotal property with the diligence of a bonus paterfamilias, and is liable for any prescriptions, losses or deteriorations due to his negligence. He is, however, exempted from the obligation of giving security which is imposed on

other usufructuaries saving any other agreements to the contrary.

We shall deal with the obligations of the husband at the time of the cessation of usufruct under the heading of "Restitution of Dowry".

This right of usufruct has for its juridical basis the very nature of the dowry itself which is a contribution brought by the wife 'ad sustinenda onera matrimonii'. It is therefore established in the interests of the family rather than in the interests of the husband. The settlement of the dowry in the relations between husband and wife has not the nature of a gift, but is a commutative contract, and therefore in case of an 'Action Pauliana' the rules relating to acts under onerous title apply.

As this usufruct is inseparable from the obligation of the husband to provide for the household expenses it is inalienable and the creditors cannot demand its sale by auction. According to French jurisprudence also the dotal income is not subject to a warrant of attachment up to the amount in which it is necessary for the needs of the family and article 205 c.v. of the project of the Italian Civil Code, in deciding the question which was being discussed on this matter in Italian doctrine and jurisprudence limits the right of the creditors to the fruits and income of the dotal property up to the amount established in each case by the Court, regard being had to the cause of the credit and to the needs of the family.

Of the inalienability of the dowry

The basis of this inalienability is the destination of the dowry which in order to support the burdens of marriage, must be preserved during marriage. In this regard, Roman Law as well as Our Law distinguishes between movables and immovables and for this reason we shall deal with the matter in the following order:-

a) dotal immovables;
b) dotal movables ;
c) the warranties of the dowry.

A. Dotal immovables. The principles that immovable property is inalienable was first

published by the "lex Julia de adulteriis" under the Chapter 'de fondo dotali'; "Lex Julia de adulteriis cavetur ne dotale praedium in vita muliere maritus alienet" (Paulus, BK II Sent). The prohibition refers to the husband who, in Roman Law, was the owner of the dowry, saving his obligation of returning it.

In our law the alienation of half of the dotal immovables was formerly allowed by custom. The Code de Rohan declared them to be inalienable even with regard to that half, and abolished that custom (Bk VI, Ch. V, para.8 and eh. VI paras 4 and. 5, and relative notes by Micalief, C.J.). The same inalienability extended to the terza materna of conjugal society up to the amount of the property existing at the time of the birth of the first child, since conjugal partnership came into existence on the birth of the first child.

The lex Julia de Adulteriis prohibited the alienation by the husband without the consent of the wife. Justinian prohibited also such alienations on the part of the wife; "lie sexus mulieris fragilitas in periculum substantiae earum rerum convertatur" (Cod. B.V. Tit. XII; Do rei uxoriae actione, paras 1 & 15). The prohibition was in any case made to the husband who was the owner of the dowry.

Our law on the contrary prohibits such alienation by the wife, because she is the owner of dotal immovables (S.1312). Any alienation, any acts of disposal, whether in full ownership or by transferring a real right, and therefore the grant of a usufruct or of emphyteusis or the imposition of a servitude or a hypothec over a dotal tenement are included in the prohibition.

Similarly if the dotal tenement enjoys an active servitude, a waiver to such servitude is prohibited, because this would also amount to an alienation of the dotal tenement. The prohibition extends also ic the obligations contracted by the wife; these obligations will be valid if they are contracted with the consent of the husband or with the authority of the court but the creditor cannot obtain the payment of his credit by exercising his rights over dotal immovables. Moreover, with regard to dotal immovables, prescription does not run, i.e. if the husband fails to recover (rivendicare) the

property, his omission is not prejudicial to the wife unless prescription shall have commenced to ran before marriage (S.I338).

On the other hand the principle that dota], immovables cannot be alienated is limited to voluntary alienation and obligations and it does not apply to compulsory alienations proceeding from the fact that a third party exercises his right since the rights of third parties cannot be prejudiced by the donation of the property as dowry. Therefore this prohibition does not extend to a compulsory expropriation or licitation of an immovable which cannot easily be divided, or a judicial brought about by the creditors in the execution of a hypothec constituted before the donation, or lawfully constituted afterwards.

Cessation of Inalienability. Dotal immovables become alienable:-

i) by authority of the competent court for a just cause;

ii) by means of exceptions in certain cases contemplated by law;

iii) by agreement to the contrary;

iv) by the dissolution of marriage.

1.By authority of the court. Although the causes which require that dotal immovables be inalienable are very urgent, however, during marriage more urgent causes may happen in the affairs of the family which render necessary the alienation of the dotal property or the subjection of the dotal property to debts. It would be absurd if the competent court, after having ascertained the existence of such causes were to maintain the inalienability of such property.

The court which has jurisdiction to grant authority if the husband makes no opposition, either because he consents or because he is absent, interdicted or of unsound mind, or because although capable he does not make any opposition within eight days from the service of the application filed by the wife, is the court of voluntary jurisdiction. If the husband enters an opposition then the competent is the court of contentious Jurisdiction

(S. 1313 and 1314). The opposition of the husband must be made by means of a note presented in the registry of the court of Voluntary Jurisdiction and the wife must then proceed by way of a writ of summons.

Just causes. Our law distinguishes three classes of causes according to their gravity:-

a) causes which are so serious that the court may grant such authority notwithstanding that the husband has not granted his consent or has entered an opposition.

b) causes which are also very serious, so that the Court may grant such authority, notwithstanding the opposition of the husband but the usufruct must be reserved to him.

c) causes with regard to which the court may grant such authority provided the husband gives his consent. These are as we shall see, causes which affect the husband so closely that the law has deemed it fit to depend on his consent.

The causes belonging to the first class are the following

i) the establishing of any of the children of the wife by a former marriage, if she is bound to do so according to law. It must therefore be the case of establishing children with regard to whom the obligation of the mother existed before the settlement of the dowry (S.1315a);

ii) the maintenance of the wife herself, her husband, her children or other descendants, whether of her present marriage or of a former one, her parents or other ascendants or any other person towards whom since before the present marriage she was according to law bound to supply maintenance (S.1315b);

iii) the execution of extraordinary repairs for the preservation of the immovable property proposed to be alienated or charged or of any other immovable dotal property;

iv) the necessity of avoiding the compulsory alienation of the dotal immoveable at the demand of a creditor who may have the right of exercising his

rights over the dotal immoveables, although no judicial demand shall have as yet been made against the wife (S.1315d).

The causes of the second class are:-

i) to release her son by a former marriage, or her ascendant, from personal arrest provided there shall have already been a judgment ordering such arrest (S.1316);

ii) to establish any of the children of the wife by a former marriage in the cases not provided for in the former class of causes, i.e. when she is not bound by law, e.g. to establish a son or to settle a dowry on a daughter who had already property of her own (S.1316).

The causes of the third class are:-

i) to establish the children of the present marriage;

ii) to release her husband or any of the issue of the present marriage from personal arrest provided there shall have been a judgment ordering such arrest;

iii) in any other case in which the court is satisfied of the necessity or considerable utility of the proposed alienation or charge in the interests of the wife herself or of the children.

Discretionary powers of the court to grant or refuse the required authority

1. The Court shall not allow immoveable dotal property to be alienated or charged if the wife has moveable property sufficient for the purpose for which the authority is sought, and the Court, having regard to the circumstances of the case, considers such moveable property to be superfluous (S.1319).

2. Nor shall the court give the said authority if the value of the immovable property proposed to be alienated or charged exceeds the sum required for the purpose for which the authority is sought, and the wife has other immoveable property of a lesser value sufficient for such purpose, the alienation of which would hot in the opinion of the court seriously injure her interests.

3. The court may authorize the wife to alienate immovable dotal property, even though she may possess paraphernal property if the Court is of opinion that the alienation of the latter property would seriously injure her interests. Nevertheless in any such case it shall be competent to the husband to demand that the paraphernal property be, to the amount of the value of the immovable dotal property, so alienated, substituted for such dotal property, provided, where the alienation of such dotal property has taken place with the husband's consent, he has, either before or in giving his consent, reserved his right to demand such substitution (S.1318).

Measures intended to make good the alienation of or the charge on dotal immovable property. Where, after the object for which the sale was made has been met, there remains a surplus out of the proceeds of the sale, such surplus shall be dotal and shall be invested as such, because the surplus is that part of the immoveable which remains (S.1322)

The debtor who must pay such surplus may discharge himself from any liability with regard to the abovementioned investment by paying the said money to the person indicated in the decree of the Court granting the authorization; in the absence of such indication, he must deposit it under the authority of the court to be disposed of as the. Court thinks proper (S.1323).

Where the investment consists in the acquisition of immovable dotal property such property becomes dotal (S.1324) by virtue of the law itself; but according to section 1326 it may in no case be considered as dotal to the prejudice of a third party unless the dotal character of such property has been expressly stated in the deed of acquisition.

The same rules shall apply with regard to the whole sum which comes to the wife from the sale of any immoveable dotal property where such property has been sold to the Government on grounds of public utility or where the dowry consists of an undivided portion of a tenement which has been sold on the grounds that it was found to be incapable of division or in any other similar case (S.1322).

We have so far dealt with the first cause which puts an end to the prohibition relating to the alienation or charge on immoveable dotal property.

2. By exceptions contemplated by law. This prohibition ceases by exception when the dotal immovables in the absence of other property are subject to the following debts (S.1336):-

a) to any claim in respect of judicial costs incurred in connection with any action brought by the wife for separation from bed and board or for separation of property or for the liquidation of the rights pertaining to her;

b) to any claim in respect of registry fees in those cases in which the claim for the fees due to the advocate or legal procurator would be a privileged claim over such property;

c) to any claim against the wife arising out of tort or quasi-tort; provided that, where the husband shall not have been concerned in the commission of the tort or quasi-tort and shall not have derived any advantage therefrom, the creditor may only enforce his claim on the 'nuda preprietas' without prejudice to the right of the husband as to the usufruct.

3. By agreement to the contrary. This happens when an agreement is inserted in the contract by which the dowry is settled to the effect that the alienation or the charge on dotal immovables is to be allowed. The inalienability of the dotal immoveables is not strictly a rule of public policy but may be done away with by agreement in order to favour the circulation of property. The express right to alienate includes that of charging and hypothecating dotal immovables with regard to which prescription is not even suspended during marriage (S. 1337 and 1338).

4. By dissolution of marriage. The last cause of cessation is the dissolution of marriage (S.1342). This was not formerly the law, because the wife could remarry and it was convenient that she should keep an estate of her own in order that she may find a husband. Even under the Code de Rohan (Bk III, Ch.6, para.8) the dowry remained inalienable after the dissolution of marriage.

Ordinance IV of 1867 reformed this part of our former law and laid down that the dowry, becomes alienable when its function ceases. On the contrary inalienability does not cease with the separation of property which docs not put an end to the burdens of married life.

It is to be noted that the fact that the dowry becomes alienable owing to this cause has not a retrospective effect on previous alienations and charges which remain invalid. Therefore a creditor may not by virtue of a contract previous to the dissolution of marriage institute proceedings after the dissolution over the dotal immovables or on fruits thereof or on the money or other things which at the dissolution or marriage are due or paid by the husband or his heirs to the wife or her heirs in restitution of the dowry (S.1343). Sir Adrian Dingli on this point, observes that though he has declared dotal movables to be alienable (S.1339) he has, however, reserved all the rights of the wife against the husband for the restitution of the value of those which may have been alienated by him or with his consent.

Impeachment of alienation of and charges on immoveable dotal property. The sanction to the inalienability of dotal immovables is the action for impeaching any alienation of or charge on such property contrary to the prohibition of the law. There are, however, two important exceptions:-

i) If the alienation of or charge on the immovable dotal property was authorized by the Competent court it may not be impeached on the grounds of the absence of a just cause; this is so as a protection to third parties from whom the authority of the Competent Court must be a sufficient sign that all the requisites for the validity of the transaction concur.

ii) If it is shown that there was a just cause for granting such authority the alienation may not be impeached on the ground that the authority was granted by a court other than the competent Court (S.1321).

In order that impeachment may be allowed N therefore it is necessary that there be either no authority whatsoever or a double condition, i.e. the incompetence of the Court or the absence of a just cause.

Persons who may exercise this action.

1. The action for impeachment may he exercised by the wife or by her heirs even though the immovable was alienated or charged by the wife herself or with her consent. This does not preclude the wife from instituting the action, provided it is an act done in contravention to the law which sanctions nullity expressly. But it can only be exercised by the wife after the dissolution of the marriage because during marriage only the husband has the right to take steps against the debtors and the holders of dotal property; the wife may, however, avail herself of action during marriage after the separation of property by which the administration of dotal property is taken from the husband and attributed to her.

2. This action may also be exercised by the husband, whether the dotal immoveable was alienated by himself or by his wife or by both, notwithstanding that he promised the warranty for quiet possession. This right is given to the husband as a defender of the dowry and he may only exercise it during marriage or before any separation of property.

3. Finally this remedy is also given by our law to the acquirer of the dotal immovable and to the creditor having a hypothec over the dotal immovable. This is a special rule of our law introduced by Sir Adrian Dingli who has given this reason for it: "As the third party may be sued it is just that he should be entitled to forestall the serious consequences of the annulment of the act by taking immediate steps; otherwise he would have to wait until the action of the wife or of the husband is prescribed and during this interval he remains uncertain as to his right".

The action is given to the acquirer or creditor under the following conditions (S.1335):-

a) that he was in good faith at the time of contract, i.e. he was unaware that the immoveable was dotal, otherwise he would only have himself to blame;

b) that the alienation or charge has not been ratified with the authority of the court, because ratification renders the act valid.

The action shall not be competent to any creditor of the husband or the wife. The creditors of the husband may not exercise it because it does not belong to the husband who is not the owner of the dowry and he has therefore no right to exercise it except in his capacity of administrator of the dowry. The creditors of the wife may not exercise it because the dowry is not subject to their rights. According to general principles therefore, they are not entitled to the actio surrogatoria because this is a corollary of the general warranty of the creditor over the property of the debtor. It follows therefore that the creditors who have a right over the dotal immovables which was either acquired before the settlement of the dowry or lawfully constituted during marriage, may exercise this action (V. Planiol et Ripert, Vol. XXIX, p.1131).

Effects of impeachment. The effects of this annulment of the alienation or charge of the dotal immovables are those of the 'Action Rescissoria'. The wife or her heirs and her husband are reinstated in the rights which they had over the immovable which was alienated and the immovable is freed from the charges which were unlawfully contracted. But what will be their obligations towards the acquirer of the immovable from whom it is taken or towards the creditor of the husband or the wife having a warranty over the dotal immovable?

As a rule in case of rescission the rescission gives right to a reciprocal restitution in whole; but in the following case this rule suffers the following modification: the wife or her heirs, even though they are plaintiffs and even though the immovable was alienated by the wife herself or with her express consent are not bound except in case and up to the amount by which they may have benefited regard being had to the time of the separation of property or of the dissolution of marriage.

The husband, if the immovable was alienated or charged by him or with his express consent, or if the price was paid to him or in his presence or with his consense to his wife is bound to return the price even though the rescissory action is brought by the wife. Moreover, he may be bound to make good the damages (S.1327 and 1332).

If the action is exercised by the third party the same rules apply (S.1335).

The third party is deprived of the following rights:-

a) the 'ius rutentionis' of the immovable until the reimbursement of what may be due to him by means of restitution; he may have this right for the expenses incurred with regard to the immovable according to the rules of possession;

b) he has no right to avail himself of the warranty for quiet possession or with regard to the paraphernal property of the wife even though the warranty is made with the consent of the husband (S. 1329). The law evidently wants to prevent any effects against the wife resulting from the unlawful alienation of the dotal immovable. The law, however, makes an exception in case it shall have been expressly stipulated that such warranty was to be operative with regard to paraphernal property (S.1329). The prohibition of the law, it must be noted, is not due to the fact that paraphernal property cannot be charged.

Extinction of the action of impeachment. The action is extinguished by prescription or by ratification.

In case of prescription:-

i) it shall with regard to the wife or her heirs be barred on the expiration of two years from the day of the dissolution of the marriage oven though the immoveable dotal property shall have been alienated or charged to the husband;

ii) with regard, however, to the husband the action shall be barred on the lapse of two years from the date of the contract if the said property was alienated or charged by him or with his consent, or on the lapse of five years from that date if the said property was alienated or charged by the wife without his consent.

With regard to third parties the term of prescription is the same as that established with regard to the husband or to the wife according to the rules laid down above.

The ratification of the alienation or charge must be made by the wife who is the owner of the dotal immoveable, with the authority of the

competent court. After the dissolution of marriage the wife may ratify the act even without such authority (S.1330), because the dotal character - and the obligations which arise therefrom cease on the dissolution of marriage.

Dotal Movables

In Roman Law. the lex Julia de Adulteriis and the 'Constitutio unica de rei uxoriae actione' referred only to immovables and inalienability did not extend to dotal movables. However, in several parts of France it was extended also to movables. After the Code Napoleon which prohibited only the alienation of immovables French case-law acknowledged the right of the husband to dispose of dotal movables as in Roman Law under which the husband was the owner of the dowry.

The alienation of the dowry was considered by this case law as an act of administration; and the wife, who by means of alienation loses the ownership of the thing alienated retains the right against the husband secured by a legal hypothec which right she cannot waive just as she cannot waive her own hypothec. This case-law is, however, universally criticized and the criticism applies equally to our law which in S.1339 expressly allows the alienation of dotal movables without any limitation.

This was understandable in former times when movables had not yet acquired the value which they now-a-days have; if then the husband could alienate movables, he could only alienate corporal movables of little value, subject to depreciation and losses; whilst incorporeal property of some value and in particular annuities were regarded as inmovables. Now-a-days instead, incorporeal property is included among movables; and it is of considerable value and may even constitute the entire wealth of the wife. This notwithstanding, the law allows its alienation, even when it is the sole personal interest of the husband, although it should serve 'ad sustinenda onera matrimonii'.

This is why French doctrine approves that case-law, which, though contrary to the letter of the law, has sanctioned the principle of the alienability of dotal movables on the part of the wife. This is how Planiol et Ripert express themselves on the matter: "If the civil Code has not expressly

protected dotal movables, the reason is that in 1804 movables were not of great economic importance and the maxim 'res mobilia res vilis' was still true. But it appears to be a far too literal concession to-day, now that the greater part of dowries consists of monies or exchange values to allow the wife to alienate her dotal movables whilst she is formally interdicted from alienating a few metres of dotal ground".

The inalienability of the rights especially of file legal hypothec given to the wife for the safety, preservation and restitution of the dowry, whether moveable or immoveable, or for the value of the moveable property alienated

The purpose of this inalienability is that of protecting the wife against the husband mho may unduly insist on their alienation and also because otherwise she may prejudice her rights. Subject to this inalienability are all legal or conventional rights, whether against the husband or any other person who is responsible for the dowry; it owes its origin also to the lex Julia de adulteriis confirmed by the constitution of Justinian, para.15 'de rei uxoriae actione'.

Section 1346 prohibits any act of alienation of these rights and any act which in any way prejudices such rights; and these prejudicial acts are prohibited whether they produce these effects directly or indirectly. The prohibition ceases in the following cases:-

i) with the dissolution of marriage, but the acts performed before the dissolution remain null even after marriage is dissolved;

ii) with the authority of the court which may be granted in the same cases and for the same reasons as for the alienation of dotal immovables;

iii) by law in the cases contemplated in S.1341, that is:-

a) when the wife has a general hypothec in security of property which the husband possesses together with other persons, in case this property is subsequently divided between the different co-partners, the wife may limit her right of the original general hypothec to the share which comes to her husband on division;

b) when the wife has a special hypothec affecting a tenement which is owned in common by the husband and others. If this tenement is allotted to another co-partitioner, the wife may agree that the special hypothec be transferred over to her husband's share.

The reason for this is the right of the other co-partitioners of obtaining their share free from any hypothec; and if the wife refuses to restrict or transfer her hypothec as stated above, they have an action against her to compel her to do so; indeed according to the principles of co-ownership and partition, the hypothec should be automatically transferred to the property coming to the husband. In all cases, however, in order that the wife be not prejudiced it is necessary that the share of the husband constitutes sufficient security.

Of restitution of dowry

We shall consider this title under three headings:-

a) when restitution may take place;
b) by whom and to whom it is due;
c) within what period and in what way it is to be made.

When restitution may take place

In Roman Law the restitution of dowry could take place on the dissolution of marriage, in case of death or divorce.

In our law as a rule it must be made at the dissolution of marriage owing to the death of one of the spouses, but it can also take place in case of personal separation and separation of property.

By whom and to whom it is due

The restitution must be made to the wife or her heirs by the husband or his heirs; their may be also other persons who are responsible by agreement, i.e. suritio.

In Roman Law the father or ascendant as the case may be, was also responsible when the husband was a filiusfamilias, whether the dowry had been paid to the paterfamilias himself or to the filius 'jussu patris'.

The interpreters of the Middle Ages and especially Bartolus, Baldo and Fontanella extended the theory of the 'jussu patris' to the tacit consent of the father who is present and does not make any opposition to the payment of the dowry to his son, even though the son be a major and capable. Our Municipal Code (Bk III, Ch.V, para.35) has accepted this doctrine but on condition that the dowry be passed into the hand3 of the paterfamilias.

Section 1355 foresees the question and requires two conditions in order that the parent or other, ascendant of the husband be responsible for the restitution of the dowry:-

a) that he has expressly bound himself to do sp; this condition is conformable to the general principles that securities are not presumed;

b) that the dowry be paid to him by the-settler, because if he is to be regarded as responsible for restitution he must be given those means and securities which enable him to perform those obligations.

If these conditions concur the parent or other ascendant is bound in solidum with the husband even though this has not been expressly agreed upon; and as the dowry must be paid to the parent or other ascendant for his protection and in view of the responsibility assumed by him, it followed that he is not bound to deliver the dowry to the husband without the express consent of the settlers , and if he does so with such consent he frees himself from any liability (S.1356).

The term within which and the way in which restitution must be made

With regard to the term within which the dowry must be returned our law (S.1344 and 1345) distinguishes according its to whether the dowry had passed in ownership to the husband or remained the property of the wife, in the first case the dowry must be returned within one year from the dissolution of the marriage, because the husband or his heirs may not have at their disposal a sufficient sum of money to pay the value of the dowry all at one time. It is not usual to have a considerable sum of money idle, and if the husband or his heirs were to convert immediately their property into money

in order to be able to pay the required sum they may sustain a serious prejudice. In the second case, on the contrary, does not arise and the restitution must be made without delay, except in case of movables which have been alienated, so that the husband is debtor of their value; in this case as the debt is paid in money the sane benefit of delay (S.1344) is granted.

The delay of one year is granted to the husband and to his heirs on condition that they possess sufficient immovables to ensure restitution or that they produce a sufficient surety or give other security. When restitution is to be made by the heirs of the husband or by any other person who is bound by agreement, if they avail themselves wholly or in part of the delay they must pay interest at the rate of four per cent which run ipso iure from the day of the dissolution of marriage.

Also with regard to the way in which the dowry is to be returned we must make the same distinction. When the ownership of the dowry remained with the wife the things of which the wife is the owner must be returned in kind; if any of these are no longer-in existence, lost or deteriorated, they must be returned in so far as they exist and in the state in which they are, because 'res perit domino' , provided the husband is not in dolus or in culpa, because in this case he would be responsible for the loss or the deterioration just as he is responsible for the value of the things alienated by him or with his express consent (S.1346).

When the dowry has passed into the ownership of the husband, it is returned by paying the value according to the valuation made in the act by which the dowry was settled; this is the way in which 'res fungibiles', movables valued without an agreement contrary to their transfer and all other things settled in dowry and the transfer of which was agreed upon, are returned.

It is indifferent whether such things exist or whether they are in a better or worse condition, because the debt consists not of the things in kind but of a sum of money which is exactly that established in the marriage settlement. This rule is subject to the following two exceptions:-

i) the articles of clothing or other things intended for the domestic use of the spouses

themselves, even though they have been appraised and passed into the ownership of the husband may be returned by him in the state in which they are (S.1346);

ii) the linen and all other things which serve for the apparel of the wife, including any gold and silver articles and any jewellery of which she had the use even though the husband may have been the owner thereof, may be taken back by the wife in kind. She must in such case pay their estimated value at the time of restitution or deduct such value from any claim in respect of the dowry. In fact, by taking back such things she deprives the husband or his heirs of the ownership of such things; she, so to say, buys such objects and must therefore pay their estimated value at the time of restitution whether such value had increased or decreased in comparison with that established in the married settlement. This right is personal to the wife and shall not be competent to her heirs because the reason why it is attributed, that is, the natural affection of the wife to her things of which she had the use is personal to her. The heirs have this right only in case she was the owner of such things.

Having laid down these rules, the law passes on to solve certain questions relating to the restitution of certain kinds of property:-

i) in case of a dowry consisting of capitals or credits we must distinguish between these which passed into the ownership of the husband and those which remained with the wife in the first case the husband must return the price according to their valuation; in the second case he must return the credits or capitals in kind. If hehas exacted such credits he must render an account of the sum received but he is not responsible for losses or diminution of value which have taken, place without dolus or culpa on his part; he is acquitted on returning the relative documents. It is to be noted that a mere statement of the amount of the debt or capital settled as dowry shall not be equivalent to a valuation, but only an indication of the quantity of the thing (S.1348).

ii) in case of dowry consisting in a right of usufruct the fruits received or fell due during marriage are not to be returned; these are fruits of the dowry and constitute the contribution of the

wife towards the burden of marriage; the husband (or rather his heirs) is therefore only bound to return the right of usufruct. The case foreseen in this provision presumes that the husband dies before the wife, because if the wife dies before we cannot talk of the restitution of the usufruct which ceases on the death of the usufructuary.

iii) in case of a dowry consisting in maintenance supplied to the husband or to the wife or to the children, the husband shall not be bound to return the costs of maintenance unless the contra is agreed upon, because the periodical supply of maintenance is regarded as the fruits of a capital (S.1350).

iv) if the dowry consists in marriage legacies, the husband, in accordance with a traditional rule, is not bound to restore the sum obtained from the legacy (S.1351) unless the contrary was agreed upon in the marriage settlement, or this obligation is imposed in the deed creating such legacy.

Division of fruits

As to the division of the fruits at the time of restitution between the wife or her heirs and the husband or his heirs, it would seem that we must apply the rules of usufruct which distinguish between: natural and industrial fruits which are acquired by gathering them, and civil fruits which are acquired 'dietim'. The rule with regard to the dowry, has been handed down to us by Ulpian, Paulus and Papinus (Frag.5, 6, 17, Dig. 'Soluto matrimonio dos quem admodum petatur), and is accepted in section 1354 which lies down that the fruits of any kind and of any sort of property of the last year, i.e. of the year in which the marriage is dissolved are divided between the husband or his heirs and wife or her heirs, in proportion to the duration of the marriage in the last year. The year shall commence from the day corresponding to that on which the marriage was celebrated (S.1354, ss 2). This provision of our lav/ is in accordance with the teachings of Papinian. The reason for this rule is that the fruits of the dowry are destined to support the burdens of marriage and it is just that they should belong to the husband for the duration of the marriage.

In connection with the restitution of the dowry the husband or his heirs may have the following rights:-

a) The right to the re-imbursement of the expenses incurred for the dotal property and in law suits relating to the ownership of such property and the 'ius retentionis' with regard to that property as a security for his credit.

b) If the carriage is dissolved by the death of the wife the husband may deduct from the dowry which he is bound to return the expenses of last illness and of the funeral of the wife, because these expenses are made in her interest.

c) The Municipal Code granted to the husband the right to keep the conjugal bed on condition that he bears such expenses.

Presumption of the payment of dowry

The plaintiff in the action of restitution of the dowry whether it be the wife or her heirs must show that the dowry was paid to the husband by the ordinary means of proof, such as by the receipt left by the husband in the marriage settlement itself or by any other writing or by means of witnesses. In the absence of such proof the law presumes payment (S.1352) if the marriage has subsisted for ten years after the expiry of the time for the payment of the dowry. The reason for this presumption is the lapse of time and the inaction of the husband. The presumption is, however, juris tantum and may be rebutted by the husband or his heirs by showing that he had taken proper steps to obtain payment thereof but without success, or by showing the default of payment by other evidence. It is to be noted that this presumption is established only in favour of the wife or her heirs and net also of the promiser of the dowry who is sued by the husband for its payment. If the dowry has been settled by the wife herself she may invoke this presumption because the probability of payment becomes even stronger in case of relations between husband and wife.

Of dower (dotarium)

Dower is a sun of money which the husband binds himself to pay to his wife in the event of her surviving him (S.1357).

As a rule the promise refers to a sum of money and this is why sec.1357 mentions only money but there is nothing to prevent the dower from having

any other thing for its object. The agreement with regard to the dower may be express or tacit, and, therefore, the dower is conventional or legal. However it is not a necessary element of the marriage contract and may therefore be excluded by agreement.

The right of the wife to dower is conditional or subject to a suspensive condition, i.e. it is payable on condition that the husband die before the wife and, therefore, the wife cannot, pendente conditione, demand the payment of the dower, but she may take all precautionary measures especially the demand for the assurance of the future payment of dower in the judgement for separation of property.

The dower in Malta is still very much in use. It is on institution having a German origin, which was introduced by the Normans in Sicily from where it passed to our Islands. In Italy and in Prance there is in use the so called 'Lucro Dotale' which is stipulated in favour of the surviving husband or wife.

In Sicilian Law the rational basis for this institute was the loss of virginity; "debetur mulieri - Nevita writes - ratione osculi et deflorstae viginitatis". Consequently the dower was due only de jure to a virgin wife and not to a widow and it was neither due in case the marriage was not consummated.

In our Municipal Law the dower was also conventional and statutory; in the absence of agreement it was to be fixed by the Judge at a sum no exceeding 1001 scudi. The same character and basis as in Sicilian Law was preserved and the dower could be stipulated both in the marriages 'ad usum Romanorum' as well as in those 'ad usum Regionis', i.e. celebrated under system of conjugal partnership. In those marriages the 'terza materna' succeeded 'pro dote et quocumque suo iure' including the dower, according to the prevalent opinion acknowledged by the Court of Appeal in "Mifsud v. Bonnici".

Under the present law the dower has lost this character and it is now regarded of promised as a comfort to the widow and as a means of support during her widowhood and this is why the promise of dower shall, be presumed in favour of the wife

even in respect of her second or subsequent marriage (S.1358). The promise of dower shall, in the absence of agreement to the contrary, be presumed and, in such case, the dower shall be fixed by the Court, regard being had to the means of the husband, at a sum not exceeding £200 (S. 1357(2)).

The rights belonging to the wife as a security to the payment of the dower are as inalienable as the rights attributed by law as a security to the restitution of the dowry. The prohibition covers all the rights which the wife may enjoy and which secure the dotarium whether they be conventional or legal (thus the wife cannot renounce to a tacit dotarium); and the word alienation is not taken here in the strict sense of the word such as the renunciation to the dotarium or to the hypothec which secures it, but it includes also any restriction or reduction of such rights, any postponement of the degree of the hypothec and in general any act which directly or indirectly may prejudice the rights of the wife.

This prohibition may cease by authority of the Court and for a just cause, and it ceases also on the dissolution of marriage because then there is no danger that the wife may be persuaded by the husband to prejudice her rights, which danger is the reason for this prohibition.

The dower is subject to a penalty in case the wife passes to a second marriage. Although it is not entirely a gift, because the promise of dower forms part of the other agreements contained in the marriage settlement, however it partakes of the nature of c gift, and in case the wife remarries whilst there are children or descendants of the predeceased husband, she shall forfeit the ownership of the dower which passes to the children saving the usufruct of the widow, unless the husband had disposed otherwise (S. 675).

With regard to the restitution of dowry and the payment of the dower, it is important to bear in mind the rule contained in Section 676 which lays down that, in the absence of a declaration to the contrary, any property which the husband under any title whatsoever, shall have given or bequeathed to his wife shell, in all cases, be deemed to be given or bequeathed on account of her dowry and dower.

Community of Acquests

The community of acquests is a partnership.- of property between the spouses, limited to that property which they acquire with their work and savings. The word 'acquests' must not be taken here in its wide and common meaning, but in the strict end special meaning which it has in partnership. "Questus intelligitur qui ex opera cuiusque discenditi" (Fr. VIII, Dig. Pro Socio). Community of Asquests is that institute according to which all that property which the spouses and each of them acquire with their work or savings during marriage, belongs indivisibly to both of them in certain proportions.

Historical Origin.

Historians do not agree as to the origin of conjugal partnership and of the community of acquests; some of them hold that they owe their origin to Gallic usages, and others to German ones, others finally give them a later origin and attribute it to the influence of Christianity. Both institutes were introduced in Malta since remote times from Sicily where they wore established by the Normans, as Lomentia shows in his work 'Antiche Consuetudini' and 'Storia della Legislazione dei Normanni'. He repudiates all other views such as those which attribute their origin to the laws of the Mussulmans or to certain institutes and usages of the Gauls as described by Julius Caesar.

Juridical Nature.

The community of acquests is very similar to partnership; there are the contributions of the spouses and there is the division of profits and losses. However, unlike the case of partnership in which, in the absence of a contrary agreement, each of the partners has equal rights and powers, the management of the community is regulated completely by law: it has a necessary head, who is the husband, whose powers are defined by law and cannot be restricted or curtailed by agreements between the parties. Moreover, the law establishes the beginning and end of the community and though husband and wife may, by common consent and after having obtained the necessary authority, change

the system during marriage, still it is not lawful for either of them to put an end to it "by means of unilateral waiver. The community is a more liberal system than partnership because the totality of the acquests may be attributed to the surviving spouse and the wife does not contribute to the liabilities beyond her share of the acquests, (S.1367).

From the old maxims 'maritus vivit ut dominus', meritur in socius', 'uxor non est socia sed speratur fore' and from the merger which takes place between the property of the acquests end that belonging lo the husband, some writers infer that acquired property is really the property of the husband. This opinion can' hardly be reconciled with several provisions which restrict the powers of the husband and bind him to compensate the community for the personal profit which he may have derived from the common property.

Community is, therefore, a sort of co-ownership between husband and wife which, however, is something different from a simple incidental state of co-ownership existing between co-heirs, because it is based on a notion of association and on the will, of the parties and has also a purpose of its own.

The traditional rules which govern this kind of co-ownership make it an institute 'sui generis'; the common property belongs collectively to the spouses and it is impossible to determine the respective shares before the dissolution and the liquidation of the community. It is distinct from the property of each of them and, in fact, there are relations between the three estates which presuppose that the community has a distinct individuality.

However, according to an almost unanimous opinion, the community is not a juridical person; the existence of a juridical person distinct from that of husband and wife is in contradiction to the principle that during marriage the common property is merged with that belonging to the husband and that every liability of the community is at the same time necessarily a personal liability of one of the spouses. The rules of community which have a traditional origin independent of the idea of a juridical personality may

be easily explained without the necessity of resorting to the notion which, on the contrary, would lead to consequences which have no legal grounds as, e.g. the consequence that the creditors of the community have also a right of preference over the common property vis-à-vis the personal creditors of the spouses.

Kinds of Community.

The community of acquests may be express or conventional when the parties establish it expressly by a deed before or after marriage; it is tacit or legal or statutory when it is understood by law and considered as tacitly contracted by the parties in the following two cases:-

(1). In marriages celebrated in these Islands whether between Maltese or foreigners.

(2). In marriages celebrated abroad between persons who subsequently establish themselves in these Islands, whether they are Maltese or foreigners. In this case the community is not considered as having arisen except from the day in which they establish their domicile in these Islands.

Although the community of acquests is the system established by law, still it is mot imposed on the parties; who may: (a) exclude the community by means of an express agreement drawn in a public deed and which is to be inscribed in the Public Registry on account of third parties with regard to whom the community would otherwise be regarded as agreed upon; (b) they may also cause the cessation of the community of acquests during marriage, whether it was established by contract or by operation of law; this must also be effected by a public deed and inscribed in the Public Registry on account of third parties, saving all other requisites for the validity of any change in post-nuptial agreements; (c) even though the community was excluded they may later on establish it, even during marriage, under the above-mentioned conditions.

Rules Governing Community.

These may be determined by the parties themselves according to the general principles of

freedom in marriage settlements. In the absence of such agreements, the law lays down the rules which ordinarily govern community, because in the majority of cases either marriage settlements are not stipulated or the community of acquests, as regulated by law, is expressly adopted.

Duration of Community.

The community of acquests shall commence, from the day of the celebration of marriage and terminates on the dissolution thereof. It includes all the acquests made by the spouses during this period. As to marriages celebrated outside these Islands by persons who subsequently establish themselves, in these Islands, the community begins from the day of their arrival with the intention of establishing their domicile here.

Community ends (S.1360):-

(1). By dissolution of marriage;
(2). By express agreement during marriage;
(3). At the demand of the wife after a judgment for separation of property;
(4). At the demand of either of the spouses after a sentence of personal separation (S. 64, Ord. I of 1873).

Consequently the community does not include the property acquired by either of the spouses under any title anterior to marriage or in general previous to the commencement of the community, notwithstanding that such spouse may have been vested with the possession of the property only after the marriage (S.1366). On the contrary, it includes property acquired by either of the spouses under any title which arose during marriage even though the said spouse or his or her heirs began to possess it after the dissolution of the community.

Object of Community.

A. Assets. We have said that the assets of the community include all the property which husband and wife or each of them, acquire during marriage with their work or savings, whether jointly or separately. Hence the enumeration

made by Section 1365 of several kinds of acquests which is based on practice and on former Case-Law. (See notes by Micallef C.J. para 32 B.3 Ch.V Code de Rohan).

In terms of Section 1365, the assets of the Community shall comprise:-

(1). All that is acquired by each of the spouses by the exercise of his or her work or industry. This includes, therefore, the wages of an employment, the fees of a profession, the profits of any kind of industry. On the other hand, it does not include property acquired independently of such industry or savings of the spouses.

(2). The fruits of the property of each of the spouses, whether it is common to both or proper to on of them, and whether possessed before the celebration of marriage or acquired during marriage by donation or succession. This includes therefore, also the fruits of property settled as dowry or subject to entail. All that which is saved from the fruits of any kind of property forms part of the community, because these fruits are more or less consumed by husband and wife for their needs-, and if they save a part of such fruits, such savings would be an acquest and, therefore, included in the assets of the community. The only exception refers to the fruits of that property which is left or granted to one of the spouses on condition that the fruits- shall not form part of the acquests, since the testator or donor is free to impose any condition.

(3). The 'peculium profectitium' and the usufruct of the 'peculium adventitium' that may come to either of the spouses. The words of this provision refer to the time when Ordinance IV of 1865 was promulgated, at which time the institute of patriapotestas had not yet been reformed by Ordinance III of 1869, which abolished the system of the 'peculia' and attributed to the father the legal usufruct over the property of the child, and which may also, in certain cases, appertain to the wife. What in 1867 applied to the 'peculium adventitium', applies to-day to the legal usufruct of the father of the mother.

(4). Any property acquired with money, or other things derived from the acquests even though such property is so acquired in she name of only one

of the spouses, it is indifferent whether the acquest is made by the husband or the wife, because all that which both of them, or the one or the other, acquire with the property of the community must naturally form part of the assets of the community.

(5). Any property acquired with money or other things which either of the spouses possessed since before the marriage, or which, after the celebration of the marriage, have come to him or her, under any donation, succession or other title, even though such property may have been so acquired in the name of such spouse, saving the right of such spouse to deduct the sum disbursed for the acquisition of such property, at the time of the liquidation or division of the community.

(6). Such part of a treasure-trove found by either of the spouses, as is by law assigned to the finder, whether such spouse has found the treasure-trove in his or her own tenement or in the tenement of the other spouse or of a third party, i.e. that part which belongs to that spouse 'jure inventionis'. On the contrary, the part of the treasure trove which may belong to one of the spouses 'iure accessionis', i.e. as the owner of the tenement where the treasure-trove is found, is his or her particular property, because treasure is not fruit of the property.

B. Liabilities. The following debts are at the charge of the community:-

(1). All debts contracted by the husband during marriage, even if arising from any suretyship (1372). However, the following debts are not included: those contracted by the husband to disencumber his own property from the debts to which it may have been subject, or to enhance its value, because such debts are contracted by the husband to his exclusive advantage; and secondly, any indemnity due as a civil remedy in respect of any offence wilfully committed, because it would not be fair if the community were to sustain the consequences of an offence committed by either of the spouses. Saving these exceptions, all other debts of the husband, provided they are contracted during marriage, are at the charge of the community, and the creditor may exercise his rights not only

against the property of the husband, but also against that of the community and not only against such part of that community belonging to the husband but against the entire property.

(2). All debts contracted by the wife with the consent of the husband or in carrying on trade with the consent of the husband (S. 1371). On the contrary, any debt contracted by the wife with the authority of the Court, but without the consent of the husband, shall not be at the charge of the community. An exception is made in the case of debts contracted by the wife for the needs of the family or of establishing common children whilst the husband was absent or incapable of giving his consent. It is a debt common to the spouses and therefore should in all cases be borne by the community even though the husband is not incapable or absent. With regard to agreements entered into by the wife for the ordinary and daily needs of the family, the constant case law based on section 1015 considers the wife as the attorney of the husband.

(3). The ordinary repairs of property of either of the spouses, the limits of which are included in the acquests. The extraordinary repairs, on the contrary, are borne by the owner.

(4). The expenses for maintenance and those of sickness of one of the spouses, including the last illness, are also at the charge of the community (Court of Appeal, "Micallef utrinque Voi. XIII, pp. 42).

Effects of Community

A. Effects with regard to the external relations, ie. between the spouses and third parties.

Up to Act XLVI of 1973 s. 1362 provided as follows:

(1). The administration of the acquests appertains to the husband, who, in regard to third parties, nay dispose of such acquests as of his own property.

(2). Any agreement directly or indirectly contrary to the provisions of this section is null.

The position has been changed by the amendments introduced by the aforementioned Act XLVI of 1973. The statement contained in the previous wording that the husband may, in regard to third parties, dispose of the acquests as of his own property does not appear in the new wording. However, the administration of the acquests is still vested in the husband and such administration is of a special character. It does not include only acts of ordinary administration, but it includes powers of alienation under an onerous title. The provision states that

(i) the administration of the acquests vests in the husband

(ii) the husband may sue and be sued in regard to such acquests

(iii) the husband may alienate or hypothecate the acquests under an onerous title or to satisfy obligations imposed by him by law, without the necessity of having his wife's consent.

(iv) impliedly it is provided that the wife's consent is necessary for any gratuitous alienation
or hypothecation not under an onerous title.

In so far as onerous transactions are concerned, the practical utility of these rules lies in the fact that they favour circulation of property and that third parties need only agree with the husband, without the necessity of obtaining the consent of the wife, whose opposition has no effect. However, care must be taken that the transaction is of an onerous nature, as most transactions are, because if the transaction is gratuitous, the wife's consent is necessary. Certain difficulties may arise in regard to the characterisation of certain contracts, e.g. the entering into a contract of suretyship by the husband with respect to the liabilities of others, when no quid pro quo is received by him. In such instances, it will be the Court's function to determine if the suretyship was entered into owing to the spirit of liberality on the husband's part, which is the hall-mark of a gratuitous transaction, or if it was entered into by reason of the husband's financial interests in the principal debtor or commercial relations with him.

against the property of the husband, but also against that of the community and not only against such part of that community belonging to the husband but against the entire property.

(2) All debts contracted by the wife with the consent of the husband or in carrying on trade with the consent of the husband (S. 1371). On the contrary, any debt contracted by the wife with the authority of the Court, but without the consent of the husband', shall not be at the charge of the community. An exception is made in the case of debts contracted by the wife for the needs of the family or of establishing common children whilst the husband was absent or incapable of giving his consent. It is a debt common to the spouses and therefore should in all cases be borne by the community even though the husband is not incapable or absent. With regard to agreements entered into by the wife for the ordinary and daily needs of the family, the constant case law based on section 1015 considers the wife as the attorney of the husband.

(3) The ordinary repairs of property of either of the spouses, the fruits of which are included in the acquests. The extraordinary repairs, on the contrary, are borne by the owner.

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repealed). S. 1362(3) now provides that any money deposited in a bank to the credit of a married woman may be withdrawn by her without any inquiry on the part of the bank whether such property belongs to the community of acquests or not. The previous special procedure of opposition by means of a judicial letter does not exist any more and any steps by husbands wanting to block withdrawal from such bank deposits must be taken in accordance with the normal rules of the Code of Civil Procedure.

Any agreement directly or indirectly contrary to s. 1362 is null.

B. Effects with regard to the internal relations between husband and wife

The rules which govern the internal relations are the following:

(a) The acqtiests belong to the husband and wife in equal proportions (S. 1367), i.e. when the community is liquidated and divided, the acquests, after deducting the debts, i.e. the net profit, is divided between husband and wife in equal portions. If however, the liabilities exceed the assets, the wife does not contribute to such liabilities beyond her share of the acquests (S.1367). She is not responsible for such liabilities with dotal property and not even with her paraphernal property. This is a rule which has come down to us from traditional law (vide 'Code de Rohan' B. III, Ch. V, paras, 31 and 32) and it constitutes the first means of protection to the interests of the wife by which the absolute power attributed to

the husband is mitigated.

The consequence of this rule is that once the property of the community is exhausted, the creditor may only exercise his rights on the property of the husband, and may not direct himself against the property of the wife, whether for one half or for any other part of the balance of his credit.

It has been stated that the acquests are divided in equal portions, because this is the legal measure of their participation in the absence of agreement to the contrary: it is natural when two persons partake of certain property, to presume that there shares are equal. This presumption is still stronger in the relations between husband and wife.

The law however, allows the following agreements:

(1). Any agreement whereby it is covenanted that the spouses shall have unequal shares in the community of acquests; or

(2). That the acquests shall vest wholly in the surviving spouse. This is a derogation to the common right in partnership in which case an agreement that all the profits are to go to one of the partners only, is invalid. Our legislator has culled this exception to common law from the Code Napoleon in order to favour marriage. It is to be noted that the agreement is hazardous; it favours neither husband nor wife, but only the survivor; or

(3). That in case of the predecease of the one spouse (as, for instance, the husband) the acquests shall vest partly in the surviving spouse and partly in the heirs of the deceased spouse, and in the case of the predecease of the other (as, for example, the wife) they, shall devolve entirely in favour of the surviving spouse. Also this is a hazardous agreement because one cannot knew who will be the first to die.

These are agreements foreseen by Section 1363 which modify the legal rule that the shares in the acquests are equal. Are we to argue 'a contrario sensu' that all other agreements are not

allowed? The question arose in "Camenzuli v. Pace" decided by the Court of Appeal in November 29th, 1912. In the marriage settlement it was agreed that all the accuests were to go to the husband in case he survived the wife and that in case of his predecease one half of the acquests were to go to the wife in Usufruct. The Court of Appeal reversed the sentence of the Court of First Instance, and declared null the agreement which attributed all the acquests to the husband and declared, moreover, that the equal and unequal shares must be in ownership and not in usufruct.

(b) The administration of the acquests appertains to the husband, who is the head of the family (S. 1362) and any agreement to the contrary is null because it tends to derogate from the rights belonging to the husband as head of the family.

The community of acquests consists of the property common to both husband and wife; and the husband who is the administrator is responsible towards the wife like any other manager towards the holder of the rights which he manages. Previously, the husband was liable only if he has mismanaged with the sole purpose of injuring the interests of his wife, but the relative provision (s. 1368) has now been repealed. The normal standards of liability are now applicable to the husband.

The right of management of the husband extends "de jure" also to the paraphernal property of the wife, the fruits of which are included in the acouests (S.1365, ss. 2, & S. 1375).

This rule is very important in the system of community of acquests. It is to be noted, however, that the administration of paraphernal property is given to the husband solely on grounds of expediency. In fact paraphernal property belongs exclusively to the wife. The right of the husband to manage the paraphernal property may be derogated to by agreement (1386); in this case the management of such property belongs to the wife, notwithstanding that the relative fruits and savings may be a part of the acquests.

(c) With regard to liabilities incurred by the husband and/or wife, the law provides the following rules:

(i) all debts contracted by the husband during marriage, even if arising from any suretyship, shall be at the charge of the community, with the exception mentioned in (ii) hereunder.

(ii) debts incurred by the husband to disencumber his own property or to enhance its value shall not be at the charge of the community; however, this rule regulates the internal relations between the spouses and cannot be raised against a third party.

(iii) any indemnity due as a civil remedy in respect of an offence wilfully committed by the husband shall not be at the charge of the community; however, even this rule regulates the internal relations between the spouses and cannot be raised against third parties.

(iv) Any debt contracted by the wife in relation to the administration of the acquests shall be at the charge of the community. This provision applies only in the case in which the wife has been authorised by the Court to administer the acquests in accordance with s. 1362(2).

(v) Any debt incurred by the wife in relation to the administration of property the fruits of which are included in the acquests. This provision refers to the case in which the wife has been authorised to administer such property under s. 1362(2) and also to the case in which the wife administers her paraphernal property, although the income thereof vests in the community, in accordance with s. 1375.

(vi) any debt contracted by the wife for the needs of the family or to supply maintenance according to law. The wife does not need any authorisation by the Court, and in view of the looseness of the wording employed, this provision constitutes a possible source of difficulties. It is the function of the Courts to interpret the concept of "the needs of the family". Reference may be made to earlier doctrine which was based on s. 1015 according to which the wife was presumed to have her husband's consent in respect of ordinary everyday household necessaries. S. 1015 was repealed in 1973 and the wife was authorised to burden the community with any debt she may incur for the needs of the family or for the supply of maintenance due according to law.

(vii) any debt contracted by the wife in carrying on trade shall also be at the charge of the community, unless the trade is carried on notwithstanding the express opposition of the husband signified by means of a declaration registered in the Commercial Court and published in the Government Gazette and in two local daily newspapers.

Liquidation of the Community and Relative Proofs.

On the dissolution of marriage, i.e. on the cessation of the community, the liquidation of the community is proceeded with, and sometimes also that of the property of the deceased husband or wife, or of both if both have died.

Under the system of the community, there are three estates; the common estate, that of the husband and that of the wife. To liquidate is to verify which property belongs to the one or to the other of such estates and which are the respective liabilities.

Section 1366, which reproduces an old rule, contains a presumption relating to the proof of what belongs to the community: in the absence of proof to the contrary, all the property which the spouses or one of then possess, shall be deemed to be part of the acquests. This presumption is based "ex eo quod plerumque accidit" and on the favourable attitude of the law towards the system of community.

The presumption is "juris tantum", because the law has textually reserved proof to the contrary, which can be made by all the means admitted by the ordinary law of evidence, i.e. by means of documents whether public or private, witnesses, confessions, legal and human presumptions. Very frequently in marriage settlements the spouses declare what they possess at the time of the marriage. These declarations, to a certain extent, serve to constitute beforehand, proof of what forms part of the particular estate of each of the spouses. However, as they are generally mere declarations "ex parte", they only constitute an imperfect proof of what forms

part of the particular estate of each of the spouses and they only become full proof if they are accepted by the other party.

In order to arrive at the liquidation of the community, since there may be property of the community, of the husband and of the wife merged together - especially in case of movables - a general description of the property is made, and from it is deducted the property particular to either 6f the spouses; what remains is the estate of the community which is divided equally or according to the shares agreed upon.

There may be credit and debit relations between the community and the particular estates of either husband or wife, e.g. expenses incurred with regard to dotal property met with out of the community. In this case the community must be accredited with the amount of such expenses against the particular estate of the wife, and this estate must be debited for such expenses in favour of the acquisitions.

The final result after that the community is liquidated, will represent the estate of the community, and the particular estates of husband and. wife. The acquests are divided into two between the two estates, and the share belonging to each of such estates is added to them, so that in the end there will only be two estates which are proper to the husband and to the wife.

Of the Separation of Property Between Spouses

Separation of property is a remedy given to the wife during marriage, in case the affairs of the husband are in disorder, or where the husband has mismanaged the acquests, by means of which remedy she may claim the dowry or ensure its future restitution, ensure the future payment of the dower and, finally, obtain dissolution of the community (Sections 1376, 1377).

The nature of this institute is extraordinary, because, properly speaking, and as a rule, the dowry must be returned and the dower paid at the dissolution of marriage and the community of acquests ceases with such dissolution. On the contrary, by means of the separation of

property, the wife may demand the restitution of the dowry, if it exists in kind immediately, and during marriage and may demand that the future restitution of the dowry be secured in case it does not exist in kind or in case of dowry which has passed in ownership to the husband; she may also demand a security for the future payment of the dower and she may finally obtain the dissolution of the community.

The necessity of this remedy is evident in case the husband possesses only movable property which is seized by his creditors who proceed with the relative sale by auction, because were the wife to wait until the dissolution of the marriage to exercise her rights, she would find none at all in the estate of the husband.

The restitution of the dowry and the payment of the dower are ensured by separating as much property as is necessary to secure the rights of the wife. The securement of the dowry or the dower shall be effected primarily by assigning to the wife immovable property of the husband or, in default of immovable property, or as a supplement thereto, movable property which is appraised (S. 1379), because the property to be assigned must be such as to be sufficient to ensure the debt of the husband towards the wife. In the first place immovables are assigned, if there are any, because, in this way, the security given to the wife, has an almost constant value, whilst the value of movables tends to diminish through deterioration and use; in case movables are assigned, the Court may order such movables to be sold, wholly or in part, and the proceeds thereof to be, as dotal, invested in such manner as the Court shall direct, in order to preserve their actual value.

Conditions for the Action of Separation of Property

The only condition which is required in order that this action may be exercised is the husband's mismanagement of the dowry or the danger on the part of the wife of losing her dowry, or, what amounts to the same thing, such a disordered state in the affairs of the husband which gives reason to fear that his property will not be sufficient to satisfy the

rights and claims of the wife at the time of the restitution (S.1376).

This economic state of the husband is known in practice as 'vergenza del marito alla inopia' and it takes place when the husband has no immovables and he squanders his movable property, or where his creditors seize such property and proceed to its relative sale by auction. This is the only condition required, and the wife may exercise this action not only without the consent of the husband but also without any authority of the Court.

The action for separation of property may only be exercised by the wife and it cannot be exercised by her creditors (S.1384) notwithstanding that it is a right which is attributed to the wife to safeguard her pecuniary interests. The reason for this derogation to the ordinary right of 'action surrogatoria', is that the exercise of this remedy may disturb the peace of the family and the law has, therefore, preferred the moral interest of the family to the merely pecuniary interests of the creditors. If, however, the wife dies 'pendente lite', it is generally held that the creditors may continue the action in their interests, because then any moral interest ceases and, in any case, the creditors of the wife have the right to execute the sentence of separation of property obtained by the wife if she omits' to do so, becauae then there is no question òf moral interest.

Forms of Separation of Property.

The restitution of the dowry and the assignment of the property belonging to the husband in securement of the dowry or dower, shall be null if not made by a public deed, and it shall not be operative against third parties except from the day on T7hich such deed shall have been registered in the Public Registry (S. 1383). They have effect, therefore, from the day of such deed and such registration, but the wife may make such effects begin before that time, since the Court may, at the request of the wife, order that the demand for the separation of property be published in the Government Gazette by means of a notice signed by the Registrar and, in such case, the judgment ordering the separation shall be

operative from the day of such publication.

Effects of the Separation of Property.

In Roman Law the separation of property was meant to safeguard the dowry (fr. 24 Dig Dos, soluto matrimonio, quamadmodum adpetatur' Cost.29, Cod. Do jure Dotium, noma 97, Ch. VI).

Our legislator has applied the same remedy also to safeguard the dower and the dissolution of the community. Therefore the effects of the judgment of separation are divided into three categories according as to whether they refer to the dowry, dower or community of acquests.

Dowry. The effects of the separation with regard to dotal property which is returned or to the property assigned in securement of the dowry are:-

(1). The wife has the management of such property.

(2). The wife has also the enjoyment and the fruits of the dowry are divided between husband and wife 'dietim' as in the case of dissolution of marriage.

(3). The wife may sue and be sued with regard to all that which refers to the management of such property without the necessity of the authority or consent of the husband (S. 1380); she is even exempted from marital authority for all judicial acts and not only for those which refer to the management of such property (S.784, Laws of Procedure). It is to be noted, however, that the inalienability of dotal immovables does not cease with the separation of property, nor does the necessity of marital authority cease with regard to extra-judicial acts apart from management,

(4). The wife must contribute to the household expenses and to those of the education of the children of the marriage.

Dower. As to the property assigned in securement of the dower, since the wife has not a certain and actual right, but a future and

uncertain one, depending on whether she survives the husband or not, the management of, this property does not belong 'de jure' to the wife, but is entrusted by the Court at its discretion either to her or to the husband or to another person. For the same reason, the fruits of such property, during marriage, continue to belong to the husband and are, therefore, subject to the action exercised by his creditors (Section 1381 must be interpreted more widely owing to another section of the Laws of Procedure).

According to traditional doctrine accepted by Costantini (Adnotationes ad statuta urbis, No. 31) end by our Court of Appeal in "Borg Depares utrinque", decided on February 9th, I900, the assignment of the property made to the wife in securement of the restitution of the dowry or the payment of the dower, does not produce a transfer of ownership over such property to the wife, to whom is attributed either the management alone or the management and enjoyment of such property, as the case may be.

Community. As to the dissolution of the community of acquests, a demand for this purpose is necessary; the declaration of the separation of property does not, by itself, produce the dissolution of the community. In the demand made, the wife must especially insert the request for such dissolution, which may even constitute the sole object of the action when the wife has neither dowry nor dower.

The dissolution of the community may be obtained, for this reason, even though it is conventional, and its utility appears clearly when the wife may earn acquests by means of her industry or savings, because as the community is dissolved, the fruits of her industry and her property belong exclusively to her.

Subsidiary Remedy granted to the wife by S.1382

Where there is not, in the estate of the husband, sufficient property with which to make the assignment due to the wife, in securement of the dowry and dower, the wife may proceed 'in subsidium' against third parties in possession of

of property acquired from the husband, in the same manner as, upon the_ dissolution of marriage, she may proceed for the restitution of the dowry and the payment of the dower, i.e. by means of the 'actio hypothecaria'.

This provision is derived from Const, XXIX, Cod, 'De Jure Dotium' and from articles 1150 & 1151 of the Codice Albertino. It is a subsidiary action which the wife may not exercise against third parties except in default of property, or of sufficient property, in the estate of the husband, and which always presupposes the hypothesis in which the dowry may be claimed or the securoment demanded during the marriage, i.e, the hypothesis when there is the danger of the loss of the dowry and the dower, and the declaration of the separation of property.

Section 1382, following the rules of Const. XXIX, gives to the third possessor the following special means of defence, besides the exceptions belonging to the third party in possession which is sued by the 'Action hypothecaria':-

(1). He may be allowed to retain the property provided he pays to the wife the interest on the dowry during marriage. This is a special benefit which the third party in possession can only claim in this case. He is bound to pay the interests on the dowry only, and not also those on the dower because the right of the wife to the dower, during marriage, is not certain and actual. After the dissolution of marriage, the third party in possession is no longer entitled to this benefit, but must either relinquish the property or pay the debt.

(2). He may similarly retain the property by paying the debt for the dowry or dower, having his right of relief against the husband and third parties who have acquired after him. This right may appear to be an application of the general rule which attributes to a third party in possession the right to avoid the judicial sale of the property by paying the debt. If he avails himself of this right, the third party in possession must pay a sum corresponding to the amount of the dowry and the dower, and such sum shall be invested in such manner as the Court shall direct in order

to safeguard the rights of the wife. Such payment is not definitive - and here lies the peculiarity of this means of defence.

Annulment of the Separation of Property

As an understanding between husband end wife is possible in order to defraud the creditors of the husband by means of such judgement, the law authorises such creditors to impeach the separation of the property pronounced by the. Court even though it may have been given effect to if such separation has been obtained in fraud of their rights.(S. 1385). This is an application of the 'Actio Pauliana' with all its relative rules. The competent Court is the Civil Court, even though the interests be of a commercial nature.

Particular Property of the Husband and Wife, especially that of the Wife.

Particular Property of the Wife.

This property may be dotal or extra-dotal or paraphernal (S.1386). Paraphernal property, according to certain early jurists, was that which was brought by the wife since marriage, besides her dowry; and extra-dotal, that which devolves on the wife subsequently by succession or under any other gratuitous title. Nowadays extra-dotal and paraphernal property are synonymous. The rules relating to paraphernal property are:-

(1). The enjoyment belongs to the wife; when, however, there is community of acquests, the fruits of such property belong to the community, saving any agreement to the contrary. In the absence of dowry or community, or if the marriage contract does not include any stipulations whereby the wife is to bear a part of the burdens of the marriage, she must contribute thereto a third of her income (S. 1387).

(2). Even the management of paraphernal property shall belong, as rule, to the wife (S. 1388); in case, however, the fruits of such

property are included in the acquests, the management appertains to the husband. If the Court deems proper so to do, it may authorise the wife to assume the management of the property aforesaid in lieu of her husband. The Court may also authorise the wife to assume the enjoyment of such property (S. 1375).

The husband's responsibility as regulated by the following rules:

(1) If the husband has enjoyed and managed them in virtue of a mandate of the wife granted to him under the empress condition of rendering an account of the fruits, he has the same obligations of an ordinary agent. He does not make the fruits his own but he must render an account.

(2) If there was a mandate but not under such express condition, the husband or his heirs, on the dissolution of marriage, are only bound to deliver the existing fruits, and he or they shall not be accountable for the fruits which shall have been consumed up to that time. As the wife has not imposed an express condition that an account of the fruits is to be rendered, it is presumed that she wanted to grant him the enjoyment. The same rule applies if, during marriage, the wife demands the fruits of her property, i.e. the husband is bound to deliver only the existing fruits and is not bound to render an account of those consumed prior to the demand.

(3) If the husband has managed such property without a mandate, but without opposition on the part of the wife, the same rule applies as in the previous case; the husband makes the fruits his until the dissolution of the marriage, or until the demand of the wife, because also in this case the acquiescence of the wife is interpreted in the sense that she has acted with a spirit of benevolence.

(4) If the husband has managed such property in spite of opposition on the part of the wife, he

he is bound to render an account of all the fruits, both existing and consumed.

A general rule applicable to all cases in which the husband has enjoyed paraphernal property of the wife is that he is regarded as a usufructuary, and has the same rights and obligations of a usufructuary which are modified in the same way as with regard to dotal property.

Particular Property of the Husband

There is no necessity to deal with this matter, except in case the wife has had the management and the enjoyment of her husband's property. In the said hypothesis, the wife has the sane rights and obligations of the husband who manages her paraphernal property.

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