SRI LANKA

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PART ONE

INTRODUCTION

The legal system of Sri Lanka has often been likened to a many-coloured mosaic. It represents rather the co-existence of diverse elements than their fusion into one. Laws springing from sources as diverse as England, Arabia and the Gangetic plain stand side by side jostling for recognition with those taking their origin in Rome, in the Netherlands and in indigenous custom.

The law of contract, in common with the general law of the country, represents a mingling of many influences. The first question demanding the attention of a lawyer, confronted with a problem of contract law, is, therefore, the selection of the law that governs the matter in hand.

The systems of law administered in Sri Lanka, all of which in varying measure have some bearing on the law of contract are as follows :

1. Roman-Dutch law[1] which is the common law of Sri Lanka.

The following principles determine the extent of applicability in Sri Lanka of the Roman-Dutch common law :

(a) It is not the entirety of the Roman-Dutch law that has been adopted in Sri Lanka but only so much of it as is suited to our circumstances, for the whole of the Roman-Dutch law was never bodily imported into Sri Lanka.

(b) It is only so much of the Roman-Dutch law as may be shown or presumed to have been introduced into Sri Lanka that is in force here.[2]

(c) The principle that it is only so much of the Roman-Dutch law as may be shown or presumed to have been introduced into Sri Lanka that is in force here, does not apply to fundamental principles regarded as binding wherever the Roman-Dutch law prevails. Although such principles may in course of time become modified in their local application by judicial decisions, it would be only

1. Roman-Dutch law is the system of law built up in the Netherlands upon a foundation of Roman Law. It was introduced into Sri Lanka during the period of Dutch rule, prior to the British occupation.

2. *Lamahamy* v. *Karunawathie* (1921) 22 N.L.R. 289, F.B.

by a series of unbroken and express decisions that such a development could take place.[3]

(d) There is a presumption that every part of the Roman-Dutch law as it "subsisted under the ancient Government of the United Provinces", if not repealed by the local legislature, is still in force.[4]

(e) The Roman-Dutch law has been modified in many directions, both expressly and by necessary implication, by statute law and also by judicial decision.[5]

2. The English law has worked itself into Sri Lanka's law not only by statute but also in a variety of other ways, and has displaced the Roman-Dutch law in special fields of the law of contract. Its principal avenues of entry into the Sri Lanka legal system have been :

(a) through statutes which enact that the law governing the matters they refer to shall be the English law;[6]

(b) through statutes which embody and contain the rules and principles of English law;[7]

(c) by tacit adoption through judicial decision;[8]

(d) by tacit adoption through the use of terms and concepts peculiar to English law.[9]

Outstanding among the statutes directly introducing the English law is Ordinance No. 5 of 1852[10] commonly known as the Civil Law Ordinance. This Ordinance introduces the law of England in maritime[11] and

3. *Samed* v. *Segutamby* (1924) 25 N.L.R. 481, F.B.; *Ambalavanar* v. *Navaratnam* (1955) 56 N.L.R. 422 at 425.
4. *Samed* v. *Segutemby*, *supra*, note 3 at 496.
5. Per Wood Renton, C.J. in *Korossa Rubber Co.* v. *Silva* (1917) 20 N.L.R. 65 at 74-75.
6. As in the Civil Law Ordinance, Cap. 79.
7. As in the Bills of Exchange Ordinance, Cap. 28.
8. As in the law relating to restraint of trade.
9. As through the terms 'account stated', '*chose in action*'.
10. Cap. 79. This Ordinance was the result of a request by the Chamber of Commerce in 1851 for the changes in the laws. This application was referred to the judges of the Supreme Court who recommended the introduction of the law of England in maritime matters and in questions relating to bills and notes and an assimilation of the laws of the Kandyan provinces with those of the maritime provinces. See *Ramasami Pulle* v. *Tamby Candoe* (1875) 1872-76 Ram. 189 at 212.
11. Section 2.

commercial[12] matters[13] unless there is contrary statutory provision in Sri Lanka.

3. The personal laws applying in Sri Lanka today are :

(a) the Kandyan law which applies to all "Kandyan" Sinhalese as distinguished from "Low Country" Sinhalese. The Kandyans constitute the people who lived in the Kandyan Kingdom which was the last province in Sri Lanka to be annexed by the British in 1815. Today they constitute 30% of the country's population. The Kandyan law is basically customary law.

(b) The Thesawalamai was a system of personal law applicable to a class of persons who came within the category of "Malabar inhabitants of the Province of Jaffna", and was codified by the Dutch in 1707. Today the Thesawalamai applies to about 8% of the population who are Ceylon Tamils and who live in the Province of Jaffna which is the northernmost part of the island.

(c) Muslim law which is primarily based on religion applies to the Muslim inhabitants of the country who today number about 6% of the country's population.

None of these personal laws is comprehensive in regard to matters of contract. They merely provide certain particular rules relating to a very limited range of topics. To the extent of their applicability they displace the common law, but where they provide no special rule governing the matter in hand the common law comes into play, even in the case of persons who are subject to the personal laws.

In addition to the above legal systems, in deciding matters of contract law courts must take into account—

4. Sri Lanka statute law which until recently was largely based on English legislation on similar matters.

5. Indigenous custom : custom, variously described as "habit", "practice" or "usage" has been judicially explained[14] as "a particular course of dealing, or line of conduct generally adopted by persons engaged in a particular mode of business; or more fully it is a particular course of dealing or line of conduct which has acquired such notoriety, that where persons enter into a contractual relationship in matters respecting the particular branch of business life where the usage is alleged to exist, those persons must be taken

12. Section 3.

13. In regard to the affinity of the commercial law of England with the Roman-Dutch law through the code of the custom of merchants, see *Verploeg* v. *Mekern* 1820-33 Ram. 10 at 21.

14. Per Dias, J., in *Muttalibu* v. *Hameed* (1950) 52 N.L.R. 97 at 103.

to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary".[15]

It will thus be seen that general adoption and notoriety are of the essence of custom or usage. Custom must further be certain,[16] reasonable,[17] of long duration,[18] enjoy continuity,[19] and be consistent with other customs and general principles of law.[20] It must not be opposed to common law[21] and must be observed as of right.[22] It must further not have been abrogated by disuse.[23]

The court will not hesitate to indicate its disapproval of custom which it considers unsatisfactory or contrary to the public interest.

15. For a discussion of the requisites of custom from the point of view of the Roman-Dutch law see Kotze's edition of van Leeuwen's *Commentaries*. Appendix to vol. 1, pp. 481-484.

16. Voet 1.3.32-35; *Fernando* v. *Fernando* (1940) 42 N.L.R. 279.

17. Digest 1.3.39; Voet 1.3.28; *Baba Appu* v. *Aberan* (1905) 8 N.L.R. 160; *Kitnen Kangany* v. *Young* (1911) 14 N.L.R. 435; *Ernest* v. *Lebbe* (1919) 21 N.L.R. 248; *Madappuli* v. *Patrick* (1952) 54 N.L.R. 365 at 368.

18. Voet 1.3.29 — this is taken to be beyond the memory of living man — *Chinnappa* v. *Kanakar* (1910) 13 N.L.R. 157. See also *Madappuli* v. *Patrick*, *supra* note 17.

19. *Fernando* v. *Fernando* (1940) 42 N.L.R. 279; *Madappuli* v. *Patrick*, *supra* note 17.

20. *Fernando* v. *Fernando* (1920) 22 N.L.R. 260; *Fernando* v. *Fernando* (1940) 42 N.L.R. 279.

21. This seems to be an importation from English law — see *Kandar* v. *Sinnachipillai* (1934) 36 N.L.R. 362.

22. This too appears to be an importation from English law for in Roman-Dutch law it sufficed to prove custom alone — Voet 1.3.32-35; *Vallipuram* v. *Santhanam* (1915) 1 C.W.R. 96.

23. *Kandar* v. *Sinnachipillai* (1934) 36 N.L.R. 362 at 365.

PART TWO

AGREEMENTS REQUIRED TO BE IN WRITING

Statutory provisions relating to form

Contracts void unless in a particular form are rendered so by special statutory provisions prescribing certain essentials of form. Most important among these statutory provisions are the following :

(a) Section 2 of the Prevention of Frauds Ordinance
(b) Sections 2-5 of the Execution of Deeds Ordinance
(c) Section 18 of the Prevention of Frauds Ordinance
(d) Section 17 of the Registration of Documents Ordinance
(e) Section 22 of the Crown Lands Ordinance.

Apart from statutes prescribing certain essentials of form there are also statutes such as the Mortgage Act and the Civil Procedure Code which, in schedules or otherwise, provide the actual form in which particular contracts should be made. The effect of non-compliance with such prescribed form would depend, in each case, on the terms of the statute, and it does not necessarily follow from non-compliance with the prescribed form, that the contract so made is void or even unenforceable.[24]

Other statutes prescribe certain essentials which must be complied with if a contract of a particular type is to be made. They may, for example, require the consent of a stipulated authority as a prerequisite to a sale of land, or may empower a statutory body to enter into certain contracts provided only that the approval of the appropriate Minister has been obtained. In such cases contracts not complying with such requirements are deprived of essential validity.

Where a contract is null and void for non-compliance with stipulated formalities it gives rise to neither a civil nor a natural obligation, and each

24. See, for example, *Moldrich* v. *Cornelis* (1910) 14 N.L.R. 97 where, despite non-compliance with the form of bond prescribed by s. 538 of the Civil Procedure Code (Form 90, Schedule 2), the bond was held to be enforceable. It is well, however, to bear in mind the principle stressed by Basnayake, J., (though not in connection with the form of contract) in *Sivagurunathan* v. *Doresamy* (1951) 52 N.L.R. 207 at 210 that where a statute sets out a prescribed form for the doing of an act, such form should be followed. "A Schedule is as much an enactment as any other part .... In regard to the forms themselves the rule is that they are to be followed implicitly so far as the circumstances of each case may admit".

party would be entitled to retract until the contract is concluded in due form.[25]

(A) SECTION 2 OF THE PRVENTION OF FRAUDS ORDINANCE, CAP. 70

Provisions of section 2

Section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840[26] declares that the following classes of contract shall be of no force or avail in law unless in writing and signed in the presence of a licensed notary public and two or more witnesses, and attested :

(i) any sale, purchase, transfer, assignment or mortgage of land or other immovable property

(ii) and promise, bargain, contract or agreement for effecting any such object, or for establishing[27] any security, interest or encumbrance affecting land or other immovable property

(iii) any contract or agreement for the future sale or purchase of land or other immovable property.[28]

25. See Wessels, s.1249. However, it is doubtful whether this principle would apply in those cases where the parties contract pending the fulfilment of some essential prerequisite. For example, if two parties should enter into an agreement to sell a portion of a large estate subject to the approval of the Fragmentation Board being obtained (under s. 3 of Act No. 2 of 1958 the approval of the Fragmentation Board must be obtained before a divided portion of a large holding is sold), it would be wrong to treat such agreement as null and void. It would be conditionally binding pending satisfaction of the statutory requirements, and both civil and natural obligations would probably attach to it — see *Corondimas* v. *Badat* 1946 A.D. 548. See also the criticism in the *Annual Survey of South African Law*, 1963 at p. 134 of the decision in *Heathcote* v. *Stutterheim Municipality* 1963 (3) S.A. 35 (E) at 42. It would follow also that, in such cases, there would be no right to retract pending the fulfilment of the statutory requirement. See, however, *Ewels* v. *Leach*, 1954 (4) S.A. 62 (E).

26. Prior to the Ordinance similar provisions existed under Regulation No. 4 of 1817.

27. Akbar, J., has analysed the word "establish" as appearing in this section to mean that the section requires (a) an interest affecting land and (b) a nexus connecting a person with that interest — see *Sockalingam Chettiar* v. *Wijeygunawardene* (1934) 36 N.L.R. 110 at 111.

28. For the corresponding provisions in S. Africa see s.1 (1) of Act 68 of 1957 which requires contracts for the sale of land and any interest in land to be reduced to writing.

These provisions are modelled on the English Statute of Frauds, which was passed with the object of preventing fraud and perjury, by making it impossible for certain types of contract to be alleged upon purely oral testimony, by witnesses who might be perjuring themselves.[29]

(B) SECTIONS 2-5 OF THE EXECUTION OF DEEDS ORDINANCE, CAP. 71

Provisions of the Ordinance

Section 2 of the Execution of Deeds Ordinance provides that every writing, deed or instrument which by section 2 of the Prevention of Frauds Ordinance is required to be executed in the manner mentioned in the latter Ordinance, shall be valid and effectual if executed as prescribed in the former Ordinance. The requirements of the former Ordinance are that the deed should be signed by the party making the same or by some person lawfully authorised by him, and by two or more witnesses present at the same time, in the presence of some District Judge or Commissioner of a Court of Requests in the district in which the party making such writing, deed or instrument, or the person signing the same as such attorney, resides; or in the presence of some Justice of the Peace of any such district specially authorised by the Minister of Justice to act in that behalf and of whose appointment notice shall be given in the gazette. The execution of such writing, deed or instrument is further required to be certified at the foot or end thereof under the hand or hand and seal of such Judge or Commissioner, or of such Justice authorised as aforesaid notwithstanding anything to the contrary contained in the Prevention of Frauds Ordinance.

Every such writing, deed or instrument is required *inter alia*, to be read over and explained to the party making the same and to the witnesses thereto by or in the presence of Judge, Commissioner or Justice. The party making such writing, deed or instrument should be known to the Judge, Commissioner or Justice or to at least two of the attesting witnesses, who shall make a declaration to that effect before him.[30]

The Ordinance also provides that certain particulars should be inserted in the certificate of execution of such writing, deed or instrument and

29. Megarry and Wade, *The Law of Real Property*, 2nd ed., p. 539. So also : "In Ceylon two of the evils to be prevented were forgery and perjury. Confidence was placed in the integrity of notaries public; the Legislature enacted that no writing permanently affecting immovable property should be valid unless executed before a notary", per Lawrie, J., in *Perera* v. *Perera* (1898) 3 N.L.R. 306 at 313.

30. Section 4.

provides further the form of such certificate. The instrument so executed may not be drawn up, written or engrossed by such Judge, Commissioner or Justice or by the Secretary, Clerk, Interpreter or other officer of any court presided over by such Judge or Commissioner.[31]

(C) SECTION 18 OF THE PREVENTION OF FRAUDS ORDINANCE, CAP. 70

Provisions of section 18

Section 18[32] (formerly s. 21) of the Prevention of Frauds Ordinance provides that no promise, contract, bargain or agreement, unless it be in writing[33] and signed by the party making the same or some person authorised by him, shall be of force or avail in law for any of the following purposes :-

(a) for charging any person with the debt, default, or miscarriage of another,

(b) for pledging movable property unless the same shall have been actually delivered to the person to whom it is alleged to have been pledged.

(D) SECTIONS 17 AND 18 OF THE REGISTRATION OF DOCUMENTS ORDINANCE

Provisions of sections 17 and 18

Section 17[34] of the Registration of Documents Ordinance[35] states that no pledge, mortgage or bill of sale of movable property shall be of any force or effect in law or give the pledgee, mortgagee or transferee any lien, charge, claim, right or priority to, over or in respect of such property unless —

(a) such property is actually delivered into the possession and custody of the pledgee, mortgagee or transferee or some person on his

31. Sections 5 and 7.
32. The section, as it was originally passed, referred also to contracts for the sale or purchase of movable property where there was no delivery of the property or part payment of the price by the purchaser. This provision was repealed by s. 57 of the Sale of Goods Ordinance (Cap. 84) as the necessary law with regard to contracts for the sale of movable property was re-enacted in section 5 of that Ordinance — see *Noorul Hatchika* v. *Noor Hameem* (1950) 51 N.L.R. 134 at 137-8.
33. In regard to the requirement of writing, where a limited company is a party, see s. 30 (1), Companies Ordinance (Cap. 145).
34. This provision was formerly contained in s.2 of Ordinance No. 8 of 1871.
35. Cap. 117.

behalf and continues to remain actually, ostensibly and bona fide in such possession and custody,[36] or

(b) such pledge, mortgage or bill of sale is created by an instrument in writing signed by the person effecting the same or by some person authorised by him, and duly registered within twenty-one days in the office of the Registrar of Lands.

Transfers or assignments of pledges, mortgages and bills of sale are also required by section 18 to be in writing and similarly registered.[37] Section 18 invalidates a pledge of movable property, whether executed in writing or not, which does not comply with the provisions of the section.[37a]

For the purposes of the Ordinance a "bill of sale" includes any assignment, transfer, declaration of trust without transfer and any other assurance of movable property. It also includes powers of attorney but does not include a marriage settlement or assignment of a marriage settlement.[38]

The provisions of the Ordinance do not apply to contracts for the sale of goods, bills of sale of ships registered under the Merchant Shipping Acts of the United Kingdom, property represented by bills of lading, dock warrants, warehouse keeper's certificates, warrants or orders for the delivery of goods, shares or interests in the stock funds or securities of any Government, or in the capital or property of any incorporated or joint stock company, *choses in action*, other than book debts as defined in section 89 of the Mortgage Act, or to any crops or produce growing or to be grown on any lands or plantations.[39]

36. The phrase "ostensibly and bona fide in such possession and custody" means that the possession of the person possessing should be not only bona fide but also of such a nature as to make it apparent to others that such person is in possession — *Indian Bank Ltd.* v. *Chartered Bank* (1941) 43 N.L.R 49.

37. An assignment of a *chose in action* requires no formalities — *Hong Kong & Shanghai Bank* v. *British Equitable Assurance Company Ltd.* (1934) 36 N.L.R. 431 at 438; *Mohamed* v. *Warind* (1919) 21 N.L.R. 225.

37a. *Indian Bank Ltd.* v. *Chartered Bank* (1941) 43 N.L.R. 49.

38. Section 16.

39. Section 16(2). In regard to choses in action, see *The Chartered Bank* v. *Rodrigo* (1940) 41 N.L.R. 448 at 451.

(E) SECTION 22 OF THE CROWN LANDS ORDINANCE, CAP. 454

Requirements of the Ordinance

Sections 21-26 of the Crown Lands Ordinance[40] provide that every grant, sale or lease of land for a term exceeding the prescribed period[41] should be under the signature[42] of the Governor-General. The test of whether there is such a grant or lease is whether upon a true construction of the document its effect is to give exclusive possession to the recipient. By this test, for example, a permit to tap and take the produce of rubber trees within a defined area, together with such rights of occupation and possession and other ancillary rights as are necessary to make the primary right effective, but without excluding the Crown or its officers from entering upon the land, is a licence and not a lease.[43] The Ordinance dispenses with the necessity of affixing the Public Seal of the Island except in such case and in such circumstances as may be prescribed.

CONTRACTS UNENFORCEABLE UNLESS IN A PARTICULAR FORM

Types of contracts requiring writing for enforceability

By the law of Sri Lanka many types of contract require writing[44] to render them enforceable. A diversity of ordinances such as the *Cheetus* Ordinance,[45] the Estate Labour (Indian) Ordinance,[46] the Contracts for Hire

40. Formerly "Regulations relating to sales and leases of Crown lands approved by the Secretary of State's despatch of June 5, 1926", and thereafter embodied in the Authentication of Crown Grants Ordinance No. 12 of 1927. This was in its turn replaced by the Crown Lands Ordinance, Cap. 454.
41. The prescribed period is 50 years — *vide* Regulation 4(1) of the Crown Lands Regulations, 1948, appearing in Gazette 9912 of 15th October 1948.
42. The Governor-General may, if he thinks fit, instead of signing the original of any instrument of disposition, cause a facsimile of his signature to be stamped thereon, and any instrument so stamped shall be deemed to be signed by the Governor-General — s. 23(1).
43. *Wijesuriya* v. *Attorney-General* (1950) 51 N.L.R. 361 at 367, P.C. reversing S.C. judgment (1946) 47 N.L.R. 385. It has not so far been suggested that the law of Sri Lanka upon the question whether an instrument is a "lease" within the meaning of the Regulations differs from the English law — *ibid.*
44. In considering the requirement of writing in contracts to which a limited liability company is a party, regard should be had to section 30 (1) of the Companies Ordinance, Cap. 145. A similar provision appears in s. 41 of the Bank of Ceylon Ordinance, Cap. 397, in regard to contracts entered into by the Bank of Ceylon.
45. Cap. 159.
46. Cap. 133.

and Service Ordinance[47] and the Money Lending Ordinance[48] contain special requirements in regard to form, in the absence of which certain contracts will not be enforced. Further, other ordinances such as the Prescription Ordinance[49] deprive unwritten contracts of some of the attributes of enforceability.[50]

Three of the most important provisions depriving unwritten contracts of enforceability, relate to

A. Contracts for the sale of goods
B. Promises to marry
C. Partnership agreements.

A. CONTRACTS FOR THE SALE OF GOODS[51]

Section 5 of the Sale of Goods Ordinance

By section 5 of the Sale of Goods Ordinance a contract for the sale[52] of any goods shall not be enforceable by action unless,

1. the buyer shall accept part of the goods so sold and actually receive the same, or
2. pay the price or a part thereof, or
3. some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent.

The object of the Statute is to ensure that where there is no contract in writing, there is some overt act to render the bargain binding.[53]

47. Cap. 72.
48. Cap. 80.
49. Cap. 68.
50. *Vide* s.12 by which no promise by words only is sufficient evidence of a new or continuing contract whereby to take the case out of the operation of certain sections of the Ordinance or to deprive any party of the benefit thereof.
51. There are no formalities prescribed by the law of South Africa for the sale of corporeal movables in general, though the disposal of certain special commodities (e.g., firearms, poisons, etc.) is regulated by particulars tatutes — Mackeurtan, *The Law of Sale of Goods in South Africa*, 3rd ed., p.144.
52. A contract of sale must be distinguished from an agreement to sell. The former is an executed contract and the latter executory. The former involves both a contract and a conveyance of the goods, the latter is a contract pure and simple. On the distinction, see Halsbary, 3rd ed., vol. 34, pp. 20-21; Benjamin on *Sale*, 8th. ed., p. 7. See also *Mischeff* v. *Springett* (1942) 2 K.B. 331.
53. *Kibble* v. *Gough* (1878) 38 L.J. at 206, cited in *Watakdas* v. *Suppramaniam Chetty* (1917) 20 N.L.R. 23.

Consequently, in the absence of writing, the effect of acceptance of part of the goods or of payment of the price or a part thereof, is to establish the existence of any enforceable contract of sale between the parties.[54]

B. PROMISES TO MARRY

Provisions of section 19

Promises to marry[55] constitute the next major class of contracts unenforceable[56] in Sri Lanka law unless in writing.[57]

The proviso in section 19 of the General Marriages Ordinance provides that no action shall lie for the recovery of damages for breach of promise of marriage unless such promise of marriage shall have been made in writing.

C. PARTNERSHIP AGREEMENTS

Requirement of writing

Section 18 of the Prevention of Frauds Ordinance provides that no promise, contract, bargain or agreement, unless it be in writing and signed by the party making the same or some person authorised by him, shall be of force or avail in law for establishing a partnership where the capital exceeds one thousand rupees.

54. *Watakdas* v. *Suppramaniam Chetty, supra* note 53; *Tomkinson* v. *Staight* (1856) 17 C.B. 697.

55. It is well to remember that an action for breach of promise of marriage grounds, in Sri Lanka law, an action *ex delicto* as well as an action *ex contractu*, thus enabling the plaint to be framed in the alternative. See *Muthukuda* v. *Sumanawathie* (1962) 65 N.L.R. 205 at 209; see also Hahlo, *The South African Law of Husband and Wife*, 2nd ed., pp. 46-50.

56. Promises to marry, whether unwritten or written, are in any event unenforceable in so far as specific performance is concerned. The word unenforceable is here used in the limited sense that an action for damages will not be available for breach of the promise unless the promise be in writing.

57. Under the Roman-Dutch law espousals did not require any formalities, and could be contracted orally or by letter — Hahlo, *The South African Law of Husband and Wife*, 2nd ed., p. 37. The English law too requires no formalities, and even conduct justifying an inference of mutual promises is sufficient — Halsbury, 3rd ed., vol. 11, p. 768. cf. the position in America, where contracts in which the consideration is marriage or a promise to marry, except contracts consisting only of mutual promises by two persons to marry each other, are unenforceable unless there is a written memorandum thereof signed by the party against whom enforcement is sought, or by some person thereunto authorised by him — see the *American Restatement* s. 178(1).

A proviso to the section explains that the section is not to be construed to prevent third parties from suing partners or persons acting as such, and offering in evidence circumstances to prove a partnership existing between such persons, or to exclude parol testimony concerning transactions by or the settlement of any account between partners.

QUASI-CONTRACT

There has been considerable development in the law of Sri Lanka recently in regard to quasi-contract.

This section of the law deals with that large group of cases sounding neither in contract nor in delict, in which the law considers that A is under a legal obligation to make good to B a benefit received from the latter. They differ from contract in that they are not based on consent expressed or implied, but still bear a strong resemblance to contractual obligations.

Although the Roman law attempted to pick out certain specific types of situation giving rise to quasi-contractual obligations (such as *negotiorum gestio*, where one person rendered a service to another without mandate or legal obligation; and *indebiti solutio* where payment was made in error of that which was not due), the Dutch lawyers took a broader view, and were in general not content to compartmentalise cases of quasi-contract in the Roman fashion.

However, recent South African developments in the Roman-Dutch law and in particular the case of *Nortje en 'n ander* v. *Pool N. O.*[58] seem to have reverted to the view that relief in quasi-contract is available only if the plaintiff can bring himself within one or other of certain set forms of action. In Sri Lanka in the case of *De Costa* v. *Bank of Ceylon*,[58a] the view was advanced that the South African decision should not be considered to be law in Sri Lanka, on the basis that the development of the law of quasi-contract required a broader view than that indicated in the judgment of the South African court. This view suggested by the Ceylon Supreme Court has in fact received the approval of South African academic writers on the subject.[58b]

Sri Lanka law has also drawn on English law in its development of quasi-contractual principles.

58. 1966 (3) S. A. 96 (A).

58a. (1970) 72 N. L.R. 457.

58b. See W. De Vos, *Verrykingsaanspreekliheid in die Suid-Afrikaanse Reg*, Juta 1971, pp.

It will suffice for present purposes to restrict our study of quasi-contractual remedies to *negotiorum gestio* and unjust enrichment, where the law is based on Roman-Dutch notions, and to *quantum meruit* which, though originating in English law, has found its way into the modern law of South Africa and Shri Lanka.

A) *Negotiorum gestio* took its origin in Roman law in the grant by the praetor of an action for indemnity to a person who had undertaken another's defence in judicial proceedings during that other's absence. Juristic development of this principle so widened its scope as to afford relief in the case of services of any kind rendered by one person to another without mandate or legal obligation, and it was in this sense that the concept was taken over by the Roman-Dutch law. The term 'unauthorised management' is commonly used in the modern Roman-Dutch law as an equivalent of the term *negotiorum gestio*. Voet defines the *gestor* or manager of affairs as "one who without mandate manages the affairs of one who is absent or unaware."[58c] The typical case of *negotiorum gestio* was the case of a person taking it upon himself to look after another's affairs during the latter's absence on a journey.

Other common examples of *negotiorum gestio* are the storing of the goods of a person whose shop has been broken into in his absence, the sale of perishable produce belonging to an absent person, the salvaging of a vessel in peril at sea and the extinguishing by a fire brigade of a fire which has broken out in a building.[59] Attending to the funeral of a deceased person which it was primarily somebody else's duty to have seen to, would be another example.[60]

Some of the principles applicable[61] to *negotiorum gestio* are the following:

(a) The work should be undertaken without the knowledge of the owner,[62] for if the owner is aware of the transaction and consents to it either expressly or impliedly, the transaction is not one of *negotiorum gestio* but of mandate or agency.[63]

58c. 3.5.1. in Gane's translation.

59. Wille, Principles, 5th ed., p. 481.

60. Maasdorp, vol. 3. 7th ed., p. 350.

61. For a critical examination of the law of *negotiorum gestio* see the judgment of de Kretser, J. in *Thangamma* v. *Ponnambalam* (1943) 44 N. L. R. 265 at 268-270. The principles governing the action, as stated by de Kretser, J., are (a) there must be two parties, (b) the person benefited must be ignorant of the act and (c) there must be an intention to act as *negotiorum gestor*.

62. *Dingiri Appu* v. *Punchi Appuhamy* (1947) 48 N. L. R. 365 at 367; Wessels, s. 3558.

63. Pothier, ss. 175, 180; Voet 5.3.1.; Wessels, ss. 3358-9; Wille, *Principles*, 5th ed., p. 481.

(b) The management should have been undertaken for the benefit of the principal and not of the *negotiorum gestor*.[64]

(c) The principal may claim from the *gestor* all that has come into the *gestor's* hands incidental to the administration whether in the shape of property, capital, fruits, interest or profits.[65]

(d) The *gestor* must have performed the service intending to claim the costs of his exertions,[66] and not as an act of benevolence or gift.[67]

(e) The *gestor* must have reasonable cause, from the nature of the services rendered, to presume there will be ratification on the part of the principal.

(f) The act should not be one which the *dominus* has expressly forbidden the *gestor* to do.[68]

(g) The *gestor* cannot claim any salary, remuneration or profit.[69] The *gestor* may however claim interest on the money expended.[70]

The *gestor* must render accounts of his management together with all supporting documents in regard to expenses, as a prerequisite to a claim to recovery.[71]

(h) The standard of care required of the *gestor* depends on the circumstances and the nature of the transaction, the diligence required of a reasonably prudent person being sufficient as a rule.[72] This modern approach prevails over the older view which called for the highest degree of diligence from the *gestor*.[73]

64. Voet 3.5.1.; Nathan, *Common Law*. 2nd ed., vol. 2, p. 1151; *Dingiri Appu* v. *Punchi Appuhamy* (1947) 48 N. L. R. 365; Wessels, s. 3574.
65. Gr. 3.27.3; Voet 3.5.3.; Pothier, s. 212; Wessels, ss. 3587, 3590; Wille, *Principles*, 5th ed., p. 482.
66. Wessels. ss. 3569-3578; Pothier, *Neg. Gest.*, s. 185.
67. *Dingiri Appu* v. *Punchi Appuhamy* (1947) 48 N. L. R. 365; Nathan, *Common Law*, 2nd ed. Vol. 2, p. 1151.
68. D. 3.5.7 (8), 3; 17.1.40.
69. Van Leeuwen, Cens. For. 1.4.26.4; Wessels, s. 3627; *Williams' Estate* v. *Molenschoot & Schep (Pty.) Ltd.* (1939) C. P. D, 361, 370; *Dingiri Appu* v. *Punchi Appuhamy, supra note 62.*
70. D.3.5.19.4; C.2.19.18; Wessels, s. 3626; Wille, *Principles*, 5th ed., p. 482.
71. Pothier, *Neg. Gest.* s. 212.
72. Wille. *Principles*, 5th ed., p. 482; Wessels, s. 3602; see also Voet 3.5.4; Van Leeuwen *Cens. For.* 1.4.26.3.
73. As required in Inst. 3.27.1, Gr. 3.27.3; Pothier, s. 211; see Wille, *ibid.*

(i) The *gestor* is not as a rule liable for fortuitous accident or *vis major* or the unlawful acts of third parties.[74]

(j) Where expenditure is incurred which is necessary for the protection or preservation of property, the *gestor* is entitled to claim it from the *dominus*, and the same principle applies in the case of useful expenditure,[75] to the extent of the enrichment of the *dominus*. Expenses which merely add to the appearance of a thing without adding to its intrinsic value cannot be recovered, for the *dominus* is not liable to make good an outlay incurred for the mere sake of pleasure.[76]

(k) Contractual capacity in the *dominus* is not a requisite for a claim based on *negotiorum gestio*, for service or work may be rendered for the benefit of a minor or a lunatic.[77]

(l) Work once undertaken must be carried through to completion and all acts necessarily incidental to that which has been undertaken must be performed.[78]

(m) A stranger who pays another's debt has no legal right to have the debtor's obligation transferred to him.[79]

(n) A debtor may not make payment to his creditor's creditor without the consent of his own creditor except in so far as such action is for his benefit, though unknown to him.[80]

(o) In order to ground the right of the *gestor* to recover his expenditure the act done by him must be a right thing to do in the interest of the *dominus*, mere good intentions not being enough.[81]

(p) A person may not conduct litigation on behalf of another except in the limited way provided by the Civil Procedure Code.[82]

74. Voet 3.5.5.
75. Voet 3.5.8.; Pothier, s. 222; Wessels, s. 3617; Wille, *Principles*. 5th ed., p. 482. See also *Darley Butler & Co.* v. *Fernando* (1908) 11 N. L. R. 168.
76. Voet 3.5.10; Wessels, s. 3619.
77. D.8.5.3.5.; Pothier, *Neg. Gest.* s. 178; Wessels, s. 3583.
78. Voet 3.5.6.; Rubin, *op cit.*, p. 50.
79. Voet 20.4.5.
80. Voet 46.3.7., Gane's translation. On this principle a sub-tenant would not be entitled to pay directly to the head landlord the rent due from his landlord, the principal tenant, to the head landlord, unless the principal tenant consents to such payment, or such payment is for his benefit — *Solomon* v. *Mohideen* (1962) 64 N. L. R. 227 at 230.
81. Lee, *Roman Law*, 4th ed., p. 373.
82. *Thangamma* v. *Ponnambalam* (1943) 44 N. L. R. 265.

The principle that the *negotiorum gestor* is entitled to be remunerated in respect of moneys advanced or expenses incurred by him on behalf of the principal is but an exception to the more general rule that no person is entitled to interfere uninvited in the affairs of another.[83]

The burden hence lies upon the person claiming to be a *gestor* to prove that he falls outside the scope of the general rule and that in the circumstances his interference was justifiable in that it was intended to benefit and did in fact benefit the *dominus*. As Grotius observes,[84] the affairs must turn out well or at least be conducted in such a way that according to the general judgment of competent persons a good outcome was to be expected.[85]

The onus of proving enrichment, the necessary nature of the work and its economic execution lies upon the *gestor*.[86]

The difference in attitude between the law of Sri Lanka and the English law in this field, is best expressed in the following words of Professor Dawson:[87]

"It is well known that in the treatment they accord to altruist there is a major difference between the Anglo-American common law and most legal systems of Western Europe. An altruist can be defined in this context as a good neighbour who renders a service to another, acting without request and through purely unselfish motives, but not intending a gift. The disapproval with which most Englishmen and North Americans regard such persons is reflected in the words we use to describe them. The mildest comment will probably be that the unsolicited intervener is "a mere volunteer". It is even more likely that he will be described as an "officious intermeddler", and he will be lucky if he is not described as an outright tortfeasor. In French or German, Italian or Dutch, he is apt to be described as 'manager of another's affairs', and the impulse will be both to praise and reward him."[88]

(B) Unjust enrichment is accorded a definite status in the law of Sri Lanka as the source of an obligation to restore property or make payment to the extent of the enrichment.

83. D.50.17.36 — *culpa est immiscere se rei ad se non pertineti.* See also D. 9.2.8.1; Voet 3.5.1.
84. Intr. 3.27.5.
85. See also Wessels, ss. 3552, 3625.
86. Wessels, s. 3626; D. 3.5.6.3; 3.5.10; 3.5.11; 3.5.25.
87. Negotiorum Gestio : The Altruistic Intermeddler (1961) 74 *H. L. R.* 817.
88. *Ibid.*

The Roman view that it was inequitable that any person should be enriched to the detriment and injury of another[89] received ready and extended recognition from the lawyers of Holland,[90] and through them passed into the South African[91] and Sri Lanka[92] legal systems. The action most often invoked for this purpose is the *condictio indebiti.*

Voet describes the *condictio indebiti* as the personal action, in quasi-contract, by which is reclaimed what has been paid without being due.[93] In order that such an action may lie it is required that the thing reclaimed should be shown to be due both naturally and civilly.[94]

The action lies for the recovery of money or other property, and is probably available also for the recovery of the value of services rendered[95] and for every kind of right.[96]

What had been received was required to be returned together with accruals and profits[97] and interest too was recoverable from the date of *mora.*[98]

89. *Jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem* — D. 50.17.206; 12.6.14; *de Silva* v. *Silva* (1956) 58 N.L.R. 145 at 150. See, however, Lee, *Roman-Dutch Law*, 5th ed., p. 347, citing Sir John Kotze in *Brunsdon's Est.* v. *Brunsdon's Est.* 1920 C. P. D. at 177 "...but maxims have their limitations, and (this) maxim of Roman Law, so readily and widely adopted by the Dutch lawyers, is not of universal application".

90. See Lee, 5th ed., p. 347; Voet 6.1.36; Gr. 3.30.1.

91. *Van Rensburg* v. *Straughan* (1914) A.D. at 329; *Urtel* v. *Jacobs* (1920) C.P.D. at 493; *Pretorius* v. *Van Zyl* (1927) O.P.D, 226; *Gorfinkel* v. *Miller* (1931) C.P.D. 251; see also Mr. Justice McGregor on Unjustified Enrichment in 55 *S.A.L.J.* pp. 4, 167 and W. de Vos, Liability Arising From Unjustified Enrichment in the Law of the Union of South Africa, 1960 *Juridical Review*, p. 125.

92. See the cases hereinafter referred to : see also *Marie Cangany* v. *Karuppasamy Cangany* (1906) 10. N.L.R. 79, F.B.; *Mohamadu Marikar* v. *Ibrahim Naina* (1910) 13 N.L.R. 187 at 192.

93. Voet 12.6.1.

94. Voet 12.6. 2.

95. See Hahlo & Kahn, *The Union of South Africa. The Development of its Laws and Constitution* (1960) p. 566; Vote 5.2. 18; 12.6.12.

96. Wessels, s. 3701; Voet 12.6.1.

97. D. 12.6.15 pr.; Voet 12.6.12; Wessels, s. 3702.

98. Voet 12.6.12; Lee & Honoré, s. 684 note 5, *Balliol Investment Co. (Pty.) Ltd.* v. *Jacobs* 1946 T.P.D. 269; see also Wessels, s. 3710.

There were[99] a number of enrichment actions in Roman law[100]; these remedies were adopted and their scope of relief was extended by the Roman-Dutch lawyers. The modern Roman-Dutch law too has adopted these remedies[101] but today liability is founded directly on unjust enrichment and in modern practice no particular type of action need be invoked.[102] Further the courts have recognised an action based on enrichment even where the action was not brought within the scope of the old *condictiones*.[103]

So wide is the area of relief now available that, even though the requirements of a general action based on unjust enrichment as such do not appear to have been judicially formulated, and the existence of such an action has in fact been denied,[104] there would appear to be ground for considering that there is a general principle of liability for unjust enrichment in the Roman-Dutch law,[105] which covers the residual cases not covered by the old actions.

In the words of Sir John Wessels,[106] "That this rule (that no one ought to be enriched at the expense of another) is of universal application, has often been decided by our courts and reiterated by the Court of Appeal"; and de Villiers, J.P., has observed "I come to the conclusion that the doctrine against enrichment at the expense of another is of general application."[107]

In Sri Lanka no search is required as is sometimes thought to be necessary in English law, for an imputed contract on which to rest the claim.[108] In England the rule against unjust enrichment has been adopted by gradual

99. See Weeramantry, *The Law of Contracts*, s.1024.
100. See for example *Saibo* v. *The Attorney-General* (1923) 25 N.L.R. 321 at 324 where Bertram, C.J., points out that the *condictio indebiti* lies in respect of money voluntarily paid and that payment made under the pressure of an illegal threat would not strictly be recoverable by the *condictio indebiti* but by the *condictio ob unjustam causam*. For an instance of the *condictio sine causa* see *Amarasekera* v. *Arunasalem Chetty* (1941) 42 N.L.R. 371.
101 Wille, *Principles*, 5th ed., p. 474.
102. *Peiris* v. *Municipal Council, Galle* (1963) 65 N. L. R 555 at 558, 559; *De Costa* v. *Bank of Ceylon* (1970) 72 N. L. R. 457.
103. Hahlo & Kahn, p. 570; John, p. 105 *et seq.*
104. *Nortje en 'n ander* v. *Pool N.O.* (1966) 3 S. A. 96 (A.D.).
105. See W. de Vos in 1960 *Juridical Review* 125-142 and 226-255 on "Liability Arising from Unjustified Enrichment in the Law of the Union of South Africa"; see also Hahlo & Kahn, *op.cit.* 1960 *Annual Survey*, p. 150 *et seq.*; Mackeurtan, *Sale of Goods*, 3rd ed., p. 332; *De Costa* v. *Bank of Ceylon*; (1970) 72 N.L.R. 457,
106. In *Spencer* v. *Gostelov* (1920) A. D. 617 at 619.
107. *Pretorius* v. *Van Zyl* (1927, O. P. D. 226 at 229. *Nortje en 'n ander* v. *Pool N. O.* regrettably now supersedes this view.
108. See *Peiris* v. *Municipal Council, Galle* (1963) 65 N. L. R. 555 at 558-9.

stages, with the assistance of legal fictions such as the "quasi-contract" and, in more recent times, the "quasi-estoppel". But in countries which are governed by Roman-Dutch law, this broad and fundamental doctrine is unfettered by technicalities, and there is no need to insist on proof that the general rule has been previously applied in a precisely similar situation. The comprehensiveness of the Roman-Dutch law principle must be enforced whenever the 'enrichment' asked for would, in the facts of a particular case, be demonstrably 'unjust.'[109]

Assuming the existence of such a general action not already covered by the classical enrichment actions, its requisites may be summarised[110] as follows :

(1) The defendant must be enriched.[111]

(2) Impoverishment or loss must be caused thereby.[112]

(3) Such impoverishment or loss must be caused to the plaintiff.[113]

(4) The enrichment must be unjustified (*sine causa*) that is to say, the sum paid or thing delivered must not have been due.

(5) There must be no rule of law which, in spite of the preceding requirements being fulfilled, prevents the person impoverished from recovering.

(6) The enrichment must not be permitted by law.[114]

(7) The enrichment must not have occurred in fulfilment of a contractual obligation lying on the party impoverished.[115]

109. *Per* Gratiaen, J., in *Jayatilleke* v. *Siriwardena* (1954) 56 N. L. R. 73 at 80. See also *Perera* v. *Abeysekera* (1957) 58 N. L. R. 505, D. B. at 537; *Kathirgamu* v. *Nadarajah* (1949) 51 N. L. R. 516.

110. See generally Lee, *Roman-Dutch Law*, 5th ed., p. 347; 1960 *Juridical Review*, pp. 242 *et seq.*

111. *Ibid.*

112. *Ibid.*

113. On this requisite see *de Silva* v. *Silva* (1956) 58 N. L. R. 145. See however *Mohamedu Marikar* v. *Ibrahim Naina* (1910) 13 N. L. R. 187 and *Andris* v. *Punchihamy* (1922) 24 N. L. R. 203 wherein an attempt was made to soften the rigorous application of this rule by an application of English equitable principles.

114. e.g. a *bona fide* possessor had no action but only a right of retention to recover compensation for improvements and the enrichment of the owner was permitted by law to this extent, a principle which is still the law in regard to movable property — see Lee *Roman-Dutch Law*, 5th ed., p. 347.

115. The last two requirements are but particular aspects of the requirement that the enrichment must be unjustified (*sine causa*). On this requisite see Lee, *Roman-Dutch Law*, 5th ed., p. 348. See also 5 *Cam. L. J.* at 215-18.

(8) The case must not fall within the scope of an already existing action.[116]

It has been suggested[117] that if the doctrine of unjustified enrichment is to be kept within reasonable limits it should be confined to cases in which there is an antecedent legal relation between the persons concerned. It is respectfully submitted that such a restriction placed upon a principle still in the early stages of its growth will unduly hamper its evolution towards that fuller maturity so necessary in this vital and developing area of the law.

The principal types of enrichment which are of practical importance in Sri Lanka law are the following :

1. Delivery or payment in error.[118]
2. Delivery or payment under a void or voidable contract.[119]
3. Non-performance or partial performance of a contract fulfilled by the other party.[120]
4. Improvements by another to one's property.[121]

A person who has paid a sum of money[122] or delivered property to another person by error is entitled to recover the sum from the latter by

116. See de Vos, 1960 *Juridical Review* 125, 226. See also 82 S. A. L. J. at 146; *Rahim* v. *Minister of Justice*, 1964 (4) S. A. 630 (A. D.).
117. Lee *op. cit.*, p. 348. See also *Frame* v. *Palmer* 1950 (3) S. A. L. R. 340; *Kroll* v. *S.A. Flooring Industries Ltd.*(1951) 1 S. A. 404 (1950) 67 S. A. L. J. 329; for Sri Lanka see *Ismail* v. *Ratnapala* (1920) 22 N. L.R. 374.
118. See Weeramantry, *The Law of Contracts.* vol. 2, ss. 1033-1044.
119. *Id.* s. 1045.
120. *Id.* s. 1046.
121. *Id.* s. 1047.
122. On the question when 'property' in money passes, where money has been paid under a mistake of fact, see the judgment of the Privy Council in *Speldewinde* v. *Savundranayagam* (1957) 59 N.L.R. 25 at 29, 30, and Weeramantry, *supra* note 118, s. 1039.

When it is said at the present day that 'property' in money has not passed what is meant is that the payee is liable to pay to the payer the same amount which he has received. It does not mean, as the Supreme Court considered it to mean (56 N. L. R. 457) that money so paid still 'belongs' to the payer. The notion that property in such money does not pass and that it still belongs to the payer was observed by the Privy Council to be traceable probably to the time when under the old action of debt — the defendant was regarded as having in his possession something belonging to the plaintiff which had to be "restored" — Holdsworth, *History of English Law*, vol. ii, p. 366, vol. iii, p. 420. This action based on a promise express or implied, was later extended to cover cases such as money paid under a mistake of fact, thereby associating with the latter type of claim a mode of thought peculiar to the original action.

means of the *condictio indebiti*.[123]

There are certain exceptions, however, to the general rule that payments made in error are recoverable. These may be summarised as follows :

1. Mistake of law[124]
2. Mistake due to negligence or recklessness[125]
3. Payment on condition of non-recoverability[126]
4. Payment in compromise of a disputed right.[127]
5. Payment under judgment[128]
6. Payment despite knowledge that it was not due.[129]

Payment in error raises the question of the rights of third parties to whom the benefit has passed. The civil law favoured the view that third parties to whom the benefit of the payment has passed cannot be required to pay it back,[130] a view favoured also in the case of delivery of an article.[131]

This view of the law is in consonance with the principle of the civil law that delivery could pass title.[132]

The English law would appear to recognise that where money has been paid under a mistake of fact, the payer may have, in addition to a personal claim, a proprietary claim, if the effect of the mistake was such as to prevent the property in the money passing at law to the recipient. Such

123. Voet 12.6.1; Van Leeuwen, *Cens. For.* 1.4.14.3; Gr. 3.30.4; Digest 12.6.7; Wille, p. 475.
124. See Weeramantry, *supra* note 118, ss. 1034-9.
125. *Id.* s. 1040.
126. *Id.* s. 1041.
127. *Id.* s. 1042.
128. *Id.* s. 1043.
129. *Id.* s. 1044.
130. D. 12.6.49; Wessels, s. 3714.
131. Wessels. *ibid.*; Voet 12.6.12; Pothier, *Cond. Indeb.* s. 178. However in the case of goods so received by the third party *ex titulo lucrativo* Pothier favours the view that the payer would be able to follow it up in the hands of the third party though not in the case of goods received *oneroso titulo* — *Cond. Indeb.* s. 179. This distinction does not however find favour with modern commentators. — Wessels, s. 3716.
132. D. 41.1.36.

cases are, however, extremely rare for the money would cease to be identifiable at law in the hands of a third party to whom it has passed *bona fide*.[133]

C) *Quantum Meruit.* In addition to the two heads of quasi-contracts under the Roman-Dutch law which we have specially considered, it is necessary also to refer briefly to the notion of *quantum meruit* which derives from the English law.

It must at the outset be stated that the term *quantum meruit* refers to and includes a variety of claims some of which are quasi-contractual in their nature while others are strictly contractual. When, therefore, the term *quantum meruit* is used, the distinction must carefully be drawn between those cases where this description covers claims of a contractual nature and those cases where the claims referred to are quasi-contractual.

Winfield enumerates five distinct senses in which the term *quantum meruit* is used.[134]

Of the several types enumerated it will be seen that payment of a reasonable price or remuneration where none is fixed by the contract rests upon the implication of such a term and is, therefore, contractual and non quasi-contractual in its nature. So also where a new contract has replaced an earlier one, as where a wine merchant supplies ten bottles of whisky and two bottles of brandy when twelve bottles of whisky had been ordered, a reasonable price must be paid for the brandy, if accepted, for an acceptance of this item gives rise to an obligation arising not from quasi-contract but from contract.[135] In contrast to these cases, where work is done on a void contract which was supposed to be valid, such a claim clearly cannot be based on contract. It can be said to be based on contract only by way of analogy, and is purely quasi-contractual.[136]

So also where one of the parties to a contract ends the contract in view of an act by the other disabling himself from performance, the party ending the contract, when he claims on a *quantum meruit* for what he has done, does so not on the basis of the original contract.[137]

133. Goff & Jones, *Restitution*, pp. 78-9. As to when property in money passes, see the observations of the Privy Council in *Speldewinde* v. *Savundranayagam* (1957) 59 N. L. R. 25 at 29-30.
134. *The Law of Quasi- Contracts*, pp. 51-54.
135. The example is that given by Atkin, L. J., in *Steven* v. *Bromley & Son* (1919) 2 K.B. at 728 and referred to by Winfield, *Quasi-Contract* at pp. 52-3.
136. See for example *Craven-Ellis* v. *Canons Ltd.* (1936) 3 All E.R. 1066, see also 65 L.Q.R. at p. 54 on this case.
137. See *De Bernardy* v. *Hardy* (1853) 8 Exch 822.

CONTRACTS IN RESTRAINT OF TRADE

There are many types of restraint that contracting parties may contemplate in the sphere of commerce. There may, for example, be restraints in regard to actual trading restraints in regard to employment and restraints imposed on the vendor of a business. These types of restraint may all be discussed together for they raise the same problems and attract the same principles.

The South African courts in a series of decisions have declared that clauses in restraint of trade are void. This rule has been adopted from the English law.[138] The doctrine as prevailing in the modern Roman-Dutch law has therefore been described as "an unvarnished importation from English law",[139] and the principles laid down in the English cases have been followed in South Africa[140] and Sri Lanka.[141]

The English law concerning restraint of trade has fluctuated with changing social concepts and conditions. In Elizabethan days all restraints of trade whether general or partial were regarded as totally void in view of their tendency to create monopolies. Early in the eighteenth century however the courts deviated from this view in their decision in *Mitchel* v. *Reynolds*.[142] It was there decided that a general restraint of trade was necessarily void but that a partial restraint was *prima facie* valid and enforceable if reasonable.

For nearly two centuries this view was followed till the case of *Maxim Nordenfelt Gun Co.* v. *Nordenfelt*.[143] Nordenfelt, a manufacturer and inventor of guns, sold his business subject to a condition that for twenty years he would not compete anywhere with the purchasing company. After some years he broke this condition by entering into a partnership with a company that competed with the purchasers. Upon the purchasers' seeking to restrain him from doing so, he pleaded that the condition was void as being a general restraint of trade. The House of Lords held that the old rule that general restraints were bad always and that partial restraints were bad if unreasonable, had been modified. The true test of the validity of a con-

138. Wessels, ss. 538-542.
139. By P.M.A. Hunt, *Annual Survey of South African Law*, 1962 p. 112.
140. *Federal Insurance Corporation of S.A. Ltd.* v. *Van Almelo* (1908) 25 S.C. at 943-4.
141. *Krishnan Chetty* v. *Kandasamy* (1924) 3 Times 21 at 22.
142. (1711) 1 P. Wms 181; 10 Mod. Rep. 130.
143. (1894) 63 L.J. Ch. 908.

dition in restraint of trade was held to be whether the restraint in the particular case, be it general or particular, is or is not reasonable. The facts that the restraint is general, that the area of prohibition is too wide and its period unlimited, are important elements in determining whether the restraint is reasonable or not and no more. In this particular case the House of Lords was of the view that the undertaking not to compete with the plaintiff in any business it may carry on in the future was wider than was reasonably necessary for the protection of the interest of the purchasing company, and therefore void and unenforceable. Lord MacNaghten's judgment in the *Nordenfelt* case is the foundation of the present law on the subject of restraint of trade.

In 1913 the House of Lords further developed the law in two respects.[144] All covenants in restraint of trade, partial as well as general, were deemed to be *prima facie* void and to be unenforceable, unless the test of reasonableness propounded in *Nordenfelt's* case was satisfied. Further, a distinction was drawn between contracts of service and contracts for the sale of a business. In the latter case restraints could be imposed more readily and more widely in the interests of a purchaser than could be imposed in the former case in the interests of the master. A purchaser of a business has paid the full market value for the requisition of his interest, and the interest so purchased will suffer if the vendor is free to continue his trade with former customers. A contract of service on the other hand by its very nature ties the servant to his master only so long as the employment lasts. Public policy requires that neither the servant himself nor the State should be deprived of the benefits of his labour, skill or talent by restrictions so placed upon his future activities.

Thus a covenant which restrains a servant from competition with his former master is always void as being unreasonable unless there is some exceptional proprietary interest owned by the master that requires protection.[145] However, it is clear that a restraint against competition is justifiable if its object is to prevent the exploitation of trade secrets learned by the servant in the course of his employment.[146]

An employer is also entitled to protect his trade connection, i.e., to prevent his customers from being enticed away from him by a former servant. However, such a restraint will only be valid in cases where the nature of the employment is such that the customers will either learn to rely upon the skill or judgment of the servant or where the customer deals

144. In *Mason* v. *Provident Clothing & Supply Co. Ltd.* (1913) A.C. 724.
145. *Herbert Morris Ltd.* v. *Saxelby* (1916) 1 A.C. 688.
146. *Forster & Sons Ltd.* v. *Suggett* (1918) 35 T.L.R. 87. For a recent South African case see *All Metals (Pty.)Ltd.* v. *Thornton*, 1962 (2) P.H., A. 42 (D).

with him directly and personally, with the result that he will probably gain their custom if he sets up business on his own.[147]

An agreement not to trade in a particular place for the life time of the promisor is not such an unreasonable restraint as to be void.[148] If a partial restraint is limited as to time but unlimited as to space and unreasonable, the condition is void. But a condition which limits the space but does not fix the time may be valid if reasonable in the circumstances. Where the type of business to be protected is specialised and the market limited, even a restriction covering the entirety of the country is not necessarily unreasonable.[149]

To summarise the position, therefore, all contracts in restraint of trade are *prima facie* void, and each case must be examined having regard to its special circumstances to consider whether or not the restraint is justified. The only ground of justification is that the restraint is reasonable having regard to the interests of both contracting parties as well as to the interests of the public.[150]

The onus of establishing that a restraint is reasonable between the parties rests upon the person alleging that it is so.[151] The onus of showing that, notwithstanding that a covenant is reasonable as between the parties, it is nevertheless injurious to the public and, therefore, void, rests upon the party alleging that it is so.[152]

SUITS BY AND AGAINST THE GOVERNMENT

"The development of the law in Sri Lanka as to suing the Crown is that the courts have gradually enabled the subject in Sri Lanka to obtain

147. *Hepworth Manufacturing Co. Ltd.* v. *Ryott* (1920) 1 Ch. D. 1 at 9; *Aling and Streak* v. *Olivier* 1949 (1) S.A. 215 (T); *Hepworth's Ltd* v. *Snelling* 1962 (2) P.H., A. 48 (T). The latter judgment summarises the principles of law applicable.

148. *Estate Fisher* v. *Bradley* (1931) C.P.D. 46.

149. *B.E.M. Corporation* v. *Stanford* 1963 R. & N. 53 (S.R.) at 59, per Lewis, J.: "As regards place, the mere fact that the whole Federation is covered does not necessarily mean that it is unreasonable". See also *Pest Control (Central Africa) Ltd.* v. *Martin* 1955 (3) S.A. 609 (S.R.).

150. Cheshire & Fifoot, 6th ed., p. 320; *Herbert Morris Ltd.* v. *Saxelby* (1916) 1 A.C. 688 at 707.

151. Cheshire & Fifoot, *op. cit*, p. 328.

152. Chesire & Fifoot, *op. cit., p. 328*; *A-G of Commonwealth of Australia* v. *Adelaide Steamship Co. Ltd.*, (1913) A.C. 781.

by action against the Crown the relief that the subject in England obtains by petition of right but nothing more."[153]

In English law the Crown may contract with a subject and may enforce against the subject a contract so made.[154]

In England the general common law rule was that no action may be brought against the sovereign.[155] The courts were the sovereign's courts and, therefore, had no jurisdiction over him.[156] Apart from this procedural difficulty there prevailed also a maxim of substantive law that "the king can do no wrong". The former rule denied the subject a forum and the latter denied him a cause of action against the Crown. However, a procedure known as the Petition of Right grew up whereby the Crown submitted as a matter of grace to the jurisdiction of the common law courts. This relief, though theoretically available in respect of all types of claim, was in practice confined largely to cases of breach of contract.[157]

In England the procedure governing the Petition of Right was contained in the Petition of Right Act, 1860. The Crown Proceedings Act of 1947 has, however, now abolished the necessity of proceeding by way of Petition of Right in England, and grants a regular action in those cases where, prior to the Act, a Petition of Right lay.

The procedure of Petition of Right has never been introduced into Sri Lanka,[158] and it is through the procedure of an ordinary or regular action instituted against the Attorney-General under the Civil Procedure Code that relief is sought against the Crown. As observed earlier, such relief would only be available in those cases in which relief would be available against the Crown in England.

The Civil Procedure Code by Chapter XXXI provides a set of procedural rules for the institution and conduct of such actions, but these must

153. Per Wood Renton, J., in *Colombo Electric Tramways Co.* v. *The Attorney-General* (1913) 16 N.L.R. 161 at 177-178.

154. Chitty, 22nd ed., s. 717.

155. This immunity still remains in respect of the personal contracts of the sovereign — Halsbury, 3rd ed., vol. 7, s. 544.

156. *The Parlement Belge* (1880) 5 P. D. 197, 206.

157. See for the scope of the petition of Right, Hood Phillips, *Constitutional & Administrative Law*, 3rd ed., p. 652.

158. See *The Attorney-General* v. *Russel* (1955) 57 N. L. R. 364.

not be taken as having introduced any rule of substantive law relating to Crown liability.[159]

It should be remembered, however, that the successful plaintiff is not as of right entitled under our procedure to satisfaction of his judgment debt in an action against the Crown.[160] It would appear to be a matter of grace or discretion on the part of the Crown as to whether a particular judgment debt should be satisfied. There is no procedure for execution against the Crown. Nevertheless, in all cases in which money decrees have been entered against the Crown, such decrees would appear to have been satisfied.

Limitations on the liability of the Crown in contract

Apart from the special position of the Crown in regard to the contracts of employment of its servants,[161] the following are the principal heads under which a special position has been claimed for the Crown in matters of contract.

(a) The implied condition that the obligation is dependent upon the supply of funds by Parliament. This exception, based on certain *obiter dicta* in *Churchward* v. *The Queen*,[162] has not, however, been followed in later cases.[163]

(b) The absence of a remedy where the performance of the contract is rendered impossible by statute.[164]

(c) "*The Amphitrite Doctrine.*" The rule that the Crown cannot by contract "fetter its future executive action,[165] is commonly known as the "*Amphitrite Doctrine*".

159. See *Colombo Electric Tramways Co.* v. *The Attorney-General* (1913) 16 N. L. R. 161 at 177; see also *Simon Appu* v. *Queen's Advocate* (1884) 9 A. C. 586 in regard to the position under s. 117 of the repealed Ordinance 11 of 1868, and *Le Measurier* v. *The Attorney-General* (1901) 5 N. L. R. 65 at 73.

160. See s. 462 C. P. C. and *The Attorney-General* v. *Russel* (1955) 57 N. L. R. 364.

161. *Dunn* v. *The Queen* (1896) 1 Q. B. 116; *Terrell* v. *Secretary of State for the Colonies* (1953) 2 Q. B. 482.

162. (1865) L. R. 1 Q. B. 173 per Shee, J., at 209; cf. Cockburn C. J., at pp. 200-201.

163. *Commercial Cable Co.* v. *Government of New Foundland* (1916) 2 A. C. 610 P. C.; *Commonwealth of Australia* v. *Kidman* (1926) 32 A. L. R. 1 at 2-3 per Viscount Haldane; *New South Wales* v. *Bardolph* (1935) 52 C. L. R. 455 at 474 per Evatt, J.

164. See *Reilly* v. *The King* (1934) A. C. 176.

165. See *Rederiaktiebolaget Amphitrite* v. *The King* (1921) 3 K. B. 500 per Rowlatt, J., at 503.

Estoppel against the Crown

Questions of estoppel are governed in Sri Lanka by section 115 of the Evidence Ordinance. There would appear to be no limitation upon the scope of the section such as would suggest that the Crown is exempt from its operation.

When Crown is bound by act of public officer

It is only when a public officer acts in the discharge of a duty within the limits of his authority, or alternatively, where the Government directly or by implication ratifies an act done in excess of authority, that the Government is bound.[166] Thus, for example, the Crown would not be bound by an agreement entered into by a Government officer purporting to act on behalf of the Crown in the matter of a lease of Crown land which it was beyond the competence of such officer to grant according to the Land Sales Regulations,[167] or by a contract for the sale of goods entered into by the Principal Collector of Customs in excess of his authority.[168]

"It is a simple and clear proposition that a public officer has not by reason of the fact that he is in the service of the Crown the right to act for and on behalf of the Crown in all matters which concern the Crown. The right to act for the Crown in any particular matter must be established by reference to statute or otherwise. No public officer, unless he possesses some special power, can hold out on behalf of the Crown that he or some other public officer has the right to enter into a contract in respect of the property of the Crown when in fact no such right exists."[169]

Every subject is presumed to know the law, and, where the limitation of the authority of a public servant is contained in a statute, the Government would *a fortiori* be protected from incurring liability in consequence of the unauthorised act of such servant.[170]

Crown servant contracting on Crown's behalf may not be sued

A servant of the Crown who contracts on behalf of the Crown cannot himself be sued on the contract.[171] The rule that an official cannot be sued

166. *Collector of Masulapatam* v. *Cavaly Vencata Narainappah* (1860) 8 Moore's Indian App. p. 554, P. C., cited with approval in *The Attorney-General* v. *Wijesuriya* (1946) 47 N. L. R 385 at 392.
167. *The Attorney-General* v. *Wijesuriya*, *supra* note 166.
168. *The Attorney-General* v. *Silva* (1953) 54 N. L. R 529, P. C.
169. *The Attorney-General* v. *Silva*, *id.* at 536. But see *Deen* v. *The Attorney-General* (1923) 25 N. L. R. 333 at 335; Wade & Phillips, *Constitutional Law*, 7th ed., p. 685.
170. See *Deen* v. *The Attorney-General*, *supra* note 169.
171. *Macbeath* v. *Haldimand* (1786) 1 T. R. 172; Hood Phillips, *Constitutional Law* 3rd ed., p. 647.

personally in contract follows from the principle of the law of agency that the agent is not personally liable upon a contract entered into by him on behalf of his principal. Tortious liability, however, proceeds on different principles, for liability to be sued in tort stems from the principle that both master and servant are liable and may each be sued.[172]

The rule that a Crown servant cannot be sued does not apply where he expressly pledges his own credit,[173] for in such a case he acts as principal and contracts on his own behalf.

Where a public officer acts in excess of his authority, he would nevertheless not be liable in those cases where the other contracting party knew or must be presumed to have known of such absence of authority.[174]

Where on the other hand the other contracting party cannot be invested with such knowledge, liability may attach to the Crown servant acting in excess of his authority.[175]

Where government officials or departments have been incorporated by statute, and the incorporation is for all purposes, they may be sued in contract, although servants of the Crown.[176] If, however, the incorporation is for a limited purpose only, as for acquiring and holding land, the ordinary rule applies, and the remedy if any in English law is by Petition of Right.[177]

172. The Crown cannot, however, be sued in tort in this country — *see Attorney-General* v. *Nadaraja* (1956) 59 N. L. R. 136 and *Colombo Electric Tramways Co.* v. *The Attorney-General* (1913) 16 N. L. R. 161. The Crown Proceedings Act of England which permit the Crown to be sued in tort, subject to certain exceptions, has not been introduced into Sri Lanka — see *Attorney-General* v. *Nadaraja, supra.*
173. Chetty, 22nd ed., s. 520.
174. *Dunn* v. *Macdonald* (1897) 1 Q. B. 401.
175. *Clutterbuck* v. *Coffin* (1842) 3 M. & G. 842.
176. *Graham* v. *Public Works Commissioners* (1901) 2 K.B. 781; *Roper* v. *Public Works Commissioners* (1915) 1 K. B. 45; *Public Works Commissioners* v. *Pontypridd Masonic Hall Co.* (1920) 2 K. B. 233; an example of such a public office in Sri Lanka would be the office of Public Trustee — see Cap. 88, C. L. E.
177. A plaintiff is not precluded, merely for the reason that he describes himself by reference to his public office in the caption to the plaint, from obtaining with the consent of the defendant a decree in his favour in his personal capacity in cases where the cause of action has accrued to him otherwise than as a Crown servant — *de Silva* v. *Casinather* (1953) 55 N. L. R. 121. This was a case brought by one S. Casinather who was designated in the plaint as the Acting Rubber Commissioner of Ceylon, on behalf not of the Government of Ceylon but of the Board of Trade in England who were his undisclosed principals.

PROCEDURE

Attorney-General represents Crown

Section 456(1) of the Civil Procedure Code provides that all actions by and against the Crown shall be instituted by or against the Attorney-General. In the Court of Requests any person appointed in writing by the Attorney-General or by a Government Agent, or Assistant Government Agent, or Collector of Customs of the District, may represent the Crown as party to the action.

The Attorney-General of Sri Lanka is the "traditional and constitutional representative in any litigation in which the Crown is interested in our courts.[178] He is "the lineal successor of the Advocate Fiscal of olden time, and just as in those days actions against the Government were brought against the Advocate Fiscal so they may now be brought against the Attorney-General...."[179]

Notice of action

The Civil Procedure Code provides that no action shall be instituted against the Attorney-General as representing the Crown, or against a public officer in respect of an act[180] purporting to be done by him in his official capacity,[181] until the expiry of one month after notice[182] in writing of the intended action has been delivered to the Attorney-General or the officer, as

178. Per Gratiaen, J., in *Attorney-General* v. *Russel* (1955) 57 N. L. R. 364 at 367.

179. *Le Mesurier* v. *Layard* (1898) 3 N. L. R. 227. The Attorney-General was originally styled Advocate Fiscal, a title later changed to Queen's Advocate and thereafter to Attorney-General without any substantial changes in the duties of the office — *Sanford* v. *Waring* (1896) 2 N. L. R. 361 at 365. The change was merely in name — see 3 N. L. R. 230 per Bonser, C. J.

180. As to whether an act includes an omission see *Revati Mohandas* v. *Jatindra Mohan Ghosh and others*, 1934 A. I. R., P. C. 96. As to whether particular conduct constitutes an act or omission see *Edirlweera* v. *Wijesuriya* (1958) 59 N. L. R. 446.

181. A public servant can only be said to act or to purport to act in the discharge of his official duty if his act is such as lies within the scope of his official duty — *de Silva* v. *Elangakoon* (1956) 57 N. L. R. 457 at 460; *Meads* v. *The King* (1948) A. I. R., P. C. 156; *Gill and another* v. *The King* (1948) A. I. R. P. C. 128.

182. Notice given to the Attorney-General under section 461 does not cease to be effective if action is filed in the wrong court, withdrawn and subsequently instituted in the proper court. *Attorney-General* v. *Arumugam* (1963) 66 N. L. R. 403.

the case may be, or left at his office.[183] It is also important that the plaint in such an action should contain a statement that such notice has been delivered.

It has been held that the notice required by section 461 of the Civil Procedure Code to be given to public officer before the institution of an action against him is necessary in the case of actions based on contract.[184]

The most recent decision in Sri Lanka relating to the liability of the Government for contractual obligations is the case of *Rowlands* v. *The Attorney-General*[185] decided in 1971. There, the plaintiff sued the Crown for the recovery of a sum of Rs. 2,407,872 as damages resulting from a breach of an alleged contract. His case was presented in appeal on the basis of three main contentions: (a) that there was a promise on the part of the Government to purchase certain stocks of scrap iron from the plaintiff for utilisation in a proposed steel factory; (b) that there was later a novation of this obligation in terms of which the Government undertook and promised to pay a certain sum of money *in discharge of the obligation it had already incurred*; (c) that there was an undertaking by the Crown to *waive the plea of prescription* which it might otherwise have been entitled to take and this constituted an obligation binding on the Crown which disentitled it to raise the plea of prescription.

The evidence, documentary and oral, showed that the plaintiff had good reason to expect that the scrap iron would be purchased from him by the Ministry of Industries on behalf of the Government, but it was not sufficient to establish a legally binding promise. Although the plaintiff wrote several letters to the Ministry stating that he was holding his stocks of scrap iron for the Government, the Ministry did not definitely repudiate the suggestion but informed him in reply that no final decision upon the establishment of a steel factory had yet been reached by the Government. It was contended that failure to disabuse the plaintiff's mind of his belief that the Government would purchase his stocks constituted an estoppel precluding the Crown from denying the existence of a contract.

In regard to the second and third submissions, the appellant sought to prove novation by leading evidence that the Minister of Finance had undertaken, on behalf of the Government, to pay a sum of one million rupees in discharge of the promise that had already been made by the Government and that there was an agreement by the Minister not to plead

183. The Civil Procedure Code, s. 461.
184. *Silva* v. *Jonklaas* (1913) 17 N. L. R. 377; *Pelis Singho* v. *Attorney-General* (1954) 57 N. L. R. 143.
185. (1971) 74 N. L. R. 385.

prescription. It was also argued that the claim was not, in fact, prescribed mainly because the reference, at one stage, to arbitration of the dispute had the effect of interrupting the running of prescription after the cau e of action had already accrued.

It was the contention of the Crown that the Minister of Finance, though he was a Minister of State, was not the proper authority for making contracts of a nature such as would bind the Crown and that, accordingly, both the alleged novation to pay a sum of million rupees and the alleged contract to waive the plea of prescription were invalid for want of authority.

The court adopted the statements relating to the enforceability of contracts against the Crown, as set out by Evatt, J., of the High Court of Australia in *New South Wales* v. *Bardolph*.[185a] This statement which summarised the law on this matter in terms accepted thereafter even in England as one of the most authoritative expositions of the subject was as follows :- "... in the absence of some controlling provision, contracts are enforceable against the Crown if (a) the contract is entered into in the ordinary or necessary course of Government administration, (b) it is authorised by the responsible Ministers of the Crown, and (c) the payments which the contractor is seeking to recover are covered by or referable to a parliamentary grant for the class of service to which the contract relates". However, Evatt, J., went on to state regarding class (c), "In my opinion, however, the failure of the plaintiff to prove (c) does not affect the validity of the contract in the sense that the Crown is regarded as stripped of its authority or capacity to enter into a contract.... The enforcement of such contracts is to be distinguished from their inherent validity".

In the contract alleged in the present case the three requisites set out by Evatt, J., were absent. Firstly, the alleged contract was not one that was entered into in the "ordinary or necessary course of Government administration". Secondly, the undertakings given by the Minister of Finance could not be justified by the provisions of Article 46(4) of the Ceylon (Constitution) Order in Council read with the Assignment of Ministers' Functions (Consequential Provisions) Act No. 29 of 1953 and the relevant Gazette Notifications. The requirement of authorisation by the responsible Ministers of the Crown was not complied with, for the responsible Ministers in relation to a contract involving substantial expenditure would appear to be the Cabinet as a whole and not a single Minister acting on his own responsibility. Thirdly, parliamentary control of finance is one of the important principles laid down in article 67 of the Ceylon (Constitution) Order in Council. No Minister of the Crown has authority in his own right to commit the public revenue to a sum not covered or contemplated

185a. (1934) 52 C. L. R. 455 at 474-5.

by an existing vote in the estimates approved by Parliament. There was never a vote by Parliament for the purchase of steel scrap, although there was a token vote in earlier years providing a sum of Rs. 100 as "running expenses" for a steel factory which had not yet been established. This token vote had apparently lapsed by the time the alleged promise was given in 1958. Even under the authority of a valid token vote, the Minister could not commit the public revenue to the expenditure of a large sum of money. However, in regard to a Government contract involving the payment of money by the Crown, the lack of necessary funds would appear to point to unenforceability rather than invalidity of the contract.

Accordingly, the claim failed as none of the three tests formulated by Evatt, J., in *New South Wales* v. *Bardolph* was satisfied in the present case. The lack of the first two requirements would in any event make the contract invalid while the lack of the third would make it unenforceable against the Crown.

The court went on to observe that even if a Minister is authorised, by the allocation of functions among the Ministers, to purchase certain stores or equipment or to waive prescription, the implementation of the decision of the Minister belongs to the administrative officials concerned. While policy decisions fall within the purview of the Minister, financial accountability falls upon his officials.

On the question of ostensible authority it was held it could not be contended that even if the Minister of Finance did not have actual authority to bind the Crown he had ostensible authority to do so, inasmuch as he apparently held himself out to the plaintiff as having such authority. In the field of agency, in so far as it concerns contracts seeking to impose liability upon the Crown, the common law doctrine that the agent need have only ostensible authority does not apply, and his authority must be actual.

The Crown was held not precluded in law from taking the plea of prescription. Although the Minister of Finance genuinely believed, and assured the plaintiff, that the plea of prescription would not be taken by the Attorney-General, the Attorney-General had at no stage unequivocally agreed to waive prescription.

In regard to the requirement of notice under section 461 of the Civil Procedure Code, the fact that, after the final refusal, the plaintiff made further attempts at making appeals to the authorities, resulting in drawing certain replies to his letters, was held not to take away from the finality of the refusal. Nor could the subsequent willingness of the Government (although this later proved futile) to determine the dispute by arbitration, with a view to an equitable settlement, delay the commencement of prescription until the arbitration arrangements broke down.

PART THREE

REMEDIES FOR BREACH OF CONTRACT

A. PAYMENT OF DAMAGES

Introductory

Damages constitute "the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract."[186] With special reference to contract they have been defined as "the loss which a person has sustained or the gain which he has missed."[187] The law relating to damages in Sri Lanka is built on principles derived from the Roman, the Roman-Dutch and the English law.[188]

In the Roman and Roman-Dutch law relating to contract there is a marked absence of that elaborate treatment of damages which characterises their approach to the question of delictual damages. The superior development of the subject of contractual damages in English law has hence resulted in the superimposition of English principles on the Roman-Dutch law.

The award of damages is based upon the general principle that a sum of money to be given in reparation of the damage suffered should, as nearly as possible, be the sum which will put the injured party in the position he would have enjoyed had he not sustained the wrong for which the award of damages is made,[189] and that it should include both actual loss and loss of profit. Damages for breach of contract must, in other words, place the plaintiff, "so far as money can do it, in the same position as he would have been in had the contract been performed."[190]

It follows from this principle that a party complaining of breach of contract is not entitled to be placed in a better position than that he would have enjoyed if the contract had been performed according to its terms.[191] Likewise, if upon default by the party of his contractual obligations, the other is able to procure the identical work or services at no extra cost, no action will lie for damages however gross the breach of contract.[192] On the same principle, if rent is payable in a specified quantity of produce,

186. Mayne & McGregor, *Damages*, 12th ed., s.l.
187. Pothier, *Obligations*, s. 159.
188. See Nathan & Schlosberg, *Law of Damages*, p. 4.
189. *Livingstone* v. *Raywards Coal Co.* (1880) 5 A.C. 25, 39.
190. *Salih* v. *Fernando* (1951) 53 N.L.R. 465.
191. *Sri Lanka Omnibus Co. Ltd.* v. *Perera* (1951) 53 N.L.R. 265, P.C.
192. *Stow, Jooste & Mathews* v. *Chester & Gibb* (1889) 3 S.A.R. 127, 130.

damages for non-payment will be assessed on the basis of the value of such produce not at the time of contract but at the time of payment.[193]

An important difference between contractual and tortious damages is that the former are awarded with the object of giving compensation for loss suffered, and are not influenced, as tortious damages are, by the consideration that the wrongdoer should be punished,[194] nor do they concern themselves with the mental or bodily suffering of the injured party.[195]

Loss of reputation would thus not be treated as a natural result of breach of contract,[196] nor would damages be awarded in contract for injury to the plaintiff's feelings.[197] An injury to feelings suffered under the circumstances of a breach of contract may of course give rise to an action in tort in damages for *injuria* or *contumelia*.[198] However, physical injury and discomfort resulting from breach of contract are compensated for in damages,[199] though, strictly speaking, such relief savours of tort rather than of contract.[200]

So also sentimental damages are not claimable for breach of contract. Where, for example, jewellery entrusted to a jeweller for repairs has great sentimental value to the owner as a family heirloom, damages are not claimable on this account in the event of breach of contract by way of failure to return; and the measure of damages in such a case would be only the market value of the jewellery.[201]

The right to claim damages for breach of contract may be excluded by special provision to that effect in the contract.[202]

General and special damages

Damages awarded for breach of contract may be either general damages (*damnum commune*) or special damages[203] (*damnum singulare*). The

193. *Vyramuttu* v. *Dissanayake* (1920) 22 N.L.R. 195.
194. Anson, 22nd ed., p. 499; Wessels, s. 3194.
195. Wessels, s. 3191; Wille, *Principles*, 5th ed., p. 380.
196. *Silva* v. *Seneviratna* (1917) 4 C.W.R. 423.
197. Chitty, 22nd ed., s. 1358; Wille, *Principles*, 5th ed., p. 380.
198. See Wessels, 2nd ed., s. 3191, note 4; Pollock, 13th ed., p. 540.
199. *Hobbs* v. *London & S.W. Railway* (1875) 44 L.J.Q.B. 49—damages allowed for inconvenience, but not for catching a cold in consequence of having to walk four miles on a wet night!
200. Wessels, ss. 3196, 3197. See also *Jockie* v. *Meyer* (1945) A.D. 354 at 364.
201. *Salih* v. *Fernando* (1951) 53N.L.R. 465.
202. Chitty, 22nd ed., s. 1335.
203. The expression 'special damages' can have a variety of meanings. For example in a running down case it may refer to medical expenses and loss of earnings, as distinct from those for the actual injury and its accompanying pain and suffering.

former expression refers to such direct loss suffered by the plaintiff as every other person in similar circumstances would have suffered or such a gain missed by him as every other person in similar circumstances would have missed; the latter refers to such losses as are peculiar and personal to the creditor, and which other persons similarly placed would not necessarily have suffered.[204]

Special damages can only be claimed in contract if they can reasonably be said to have been in the contemplation of the parties.[205]

Any loss resulting from special circumstances can be recovered in an action for breach of contract only if the special circumstances are communicated at the time of the contract to the party from whom it is afterwards sought to recover damages.[206] Special damages must always be pleaded if they are to be recovered.

Nominal damages

In English law, nominal damages is a technical phrase which means that you have negatived anything like real damages, that there is an infraction of a legal right which, though it gives you no right to any damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed."[207] Such damages are awarded in England both in contract and in tort.[208] In certain cases such damages have been as small as one shilling,[209] sixpence[210] or even a farthing,[211] but in England the token sum so awarded for breach of contract "appears now to have crystallised at forty shillings."[212] The Sri Lanka courts, in contracts governed by English law, have awarded damages as small as one rupee.[213]

In Sri Lanka law nominal damages have been awarded in cases of tort,[214] and, though local precedent on the subject is scanty, there would appear to be no adequate reason precluding our courts from following English precedent, as in South Africa, and awarding such damages, in

204. Wessels, s. 3203 *et seq.*
205. *Wessels*, s. 3240.
206. *David & Co.* v. *Seneviratne* (1946) 47 N.L.R. 73.
207. Per Lord Halsbury in *The Mediana* (1900) A.C. 113.
208. Mayne & McGregor, *Damages*, 12th ed., ss. 201-6.
209. *Sapwell* v. *Bass* (1910) 2 K.B. 486.
210. *Feize* v. *Thompson* (1808) 1 Taunt. 121.
211. *Mostyn* v. *Coles* (1862) 7 H. & N. 872; 31 L.J. Ex. 151.
212. Mayne & McGregor, *Damages*, 12th ed., s. 204.
213. *National Bank of India Ltd.* v. *Essack* (1950) 51 N.L.R. 505.
214. *Jayasuria* v. *Silva* (1914) 18 N.L.R. 73—damages of one cent awarded for slander. *Fernando* v. *Perera* (1956) 54 C.L.W. 15—nominal damages of Rs. 25/- for assault.

respect of contracts governed by Roman-Dutch law, on principles similar to those followed in South Africa.[215]

Intrinsic damages (*Id quod interest circa rem*) and extrinsic damages (*Id quod interest extra rem*)

Intrinsic damage means that which is suffered in connection with the thing itself, as contrasted with extrinsic damage, which is external to the thing itself and which causes loss not by a diminution in value of the thing itself but by a resultant patrimonial loss to the estate of the creditor.[216] An example of the former is the case where damage is suffered by the non-payment of the price of timber sold, and of the latter where damage results to the buyer from the collapse of a building built with defective timber purchased.[217]

A person in breach of contract is ordinarily liable only for intrinsic damages, while no liability arises in respect of extrinsic damages unless it appears that it was contemplated in the contract and submitted to either expressly or impliedly by the debtor.[218]

Actual and prospective damages

Damages for breach of contract include not merely the actual loss already sustained but also such future loss as may reasonably be anticipated to ensue from the breach. Indeed in many cases the entire loss is one expected to accrue in the future, as where a debtor repudiates his contract before the time fixed for performance, and the creditor elects to treat the contract as at an end.[219]

Damages and *res judicata*[220]

The explanation to section 207 of the Civil Procedure Code states that every right of property or to money or to damages or to relief of any kind which can be claimed, set up or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up or put in issue or not in the action, becomes, on the passing of the final decree in the action, *a res adjudicata*, which cannot afterwards be made the subject of action for the same cause between

215. See *Miskin* v. *Hadjie Marcair* 1863—8 Ram 43.
216. Wessels, ss. 3198-9.
217. D. 19.1.13.
218. Pothier, *Obligations*, s. 162, Wessels, ss. 3200-3201.
219. Wessels, s. 3346.
220. See generally on the topic of *res judicata* in Sri Lanka, Wikramanayake, *Civil Procedure in Ceylon*, revised ed., p. 20 *et seq.*

the same parties.[221] Section 5 of the Code defines the expression 'cause of action' as meaning the wrong for the prevention or redress of which an action may be brought and as including the denial of a right the refusal to fulfil an obligation, the neglect to perform a duty and the infliction of an affirmative injury. A breach of contract is a wrong within the meaning of this definition, and even though fresh items of damage may keep manifesting themselves from time to time, the cause of action, namely the breach of contract, is one. Hence later items of damage cannot be the subject of fresh claims for damages. Further, section 34 of the Code enacts that every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and that if a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted.[222]

Liquidated and unliquidated damages

Parties to a contract often agree at the time of contracting on the mode of assessment of damages in the event of breach. Damages so fixed are described as liquidated.[223] Liquidated damages may also in certain instances be fixed by statute, as in the case of dishonour of a bill of exchange[224] where section 57 of the Bills of Exchange Ordinance[225] fixes the measure of damages. Damages are, on the other hand, described as unliquidated where they have not been so quantified and fixed, and are to be assessed by the court.[226] Such damages remain unliquidated until made definite and precise by admission or judgment.[227]

Where damages are liquidated the court will regard the sum fixed by the parties as the quantum to be awarded even though the damages actually sustained are very different from this figure.[228] Loss of profit will not

221. See *Palaniappa* v. *Saminathan* (1913) 17 N.L.R. 56 (P.C.).
222. For the purposes of this section an obligation and a collateral security for its performance are deemed to constitute but one cause of action—section 34(3).
223. On demurrage clauses and liquidated damages see the observations of Viscount Dilhorne in *Suisse Atlantique etc.* v. *N.R. Rotterdamsche etc.* (1966) 2 All. E.R. 61 at 69. On building contracts and liquidated damages see *Mohamed* v. *Wijevwardene* (1947) 48 N.L.R. 73.
224. Chitty, 22nd ed., s. 1334.
225. Cap. 82.
226. Chitty, 22nd ed., s. 1334.
227. Nathan & Schlosberg, *Law of Damages*, p. 5, *Vanderstraaten* v. *de Latre* (1820) Ram. 1 at 3.
228. *Suisse Atlantique etc.* v. *N.V. Rotterdamsche etc.* (1966) 2 All E.R. 61, H.L.

in such a case be awarded even though flowing from a deliberate breach and even though wilfully caused.[229]

The courts will not generally interfere with the mode of assessment adopted by the parties,[230] but feel constrained to do so in cases where the payment stipulated is in reality a penalty.[231]

Exemplary damages

Damages are called exemplary when they are in excess of the actual loss sustained and are intended to express the court's disapproval of the defendant's conduct.[232] Exemplary damages, also called vindictive[233] or punitive damages, are not awarded for breach of contract in English[234] or Roman-Dutch[235] law, except in the exceptional case of damages for breach of promise of marriage.[236]

REMOTENESS OF DAMAGE

Introductory

There is a two-fold aspect to most problems of remoteness, and the tendency to a blurring of the distinction between these aspects must be resisted.[237] The first concerns itself with problems of causation and exists in the realm of pure fact. The second concerns itself with the extent to which the law is prepared to extend its protection to the rights of the plaintiff, and exists in the realm of legal policy.[238] It is the former aspect that tends to be stressed in tort and the latter in contract.[239]

In general, both aspects of the question of remoteness have been more carefully and extensively analysed in the English rather than the Roman-Dutch law. The principles evolved by the English law are not in any way at variance with the principles of Roman-Dutch law, and have been invoked with profit by the law of Sri Lanka and South Africa.

229. *Suisse Atlantique etc.* v. *N.V. Rotterdamsche etc.* (1966) 2 All E.R. 61, H.L.
230. Pollock, 13th ed., p. 546.
231. *Attorney-General* v. *Costa* (1922) 24 N.L.R. 281.
232. Nathan & Schlosberg, *Law of Damages*, p. 89.
233. On vindicative or exemplary damages see *Silva* v. *Perera* (1952) 55 N.L.R. 378; *Coorey* v. *Jayawickrema* (1954) 57 N.L.R. 300.
234. Chitty, 22nd ed., s. 1338.
235. Wessels, s. 3194.
236. Wessels, s. 3195.
237. Mayne & McGregor, *Damages*, 12th ed., s. 66.
238. See Hart & Honoré, *Causation in the Law*, p. 5.
239. Mayne & McGregor, *ibid.*

Causation

As already observed, the preoccupation of the law of delict with questions of causation is not shared by the law of contract. Hence decisions in contract rarely embody such elaborate discussions of causation as are found in the classic case of *Re Polemis* in tort.

However, the rules of causation in contract do not differ from those in tort,[240] and should such questions of physical causation arise in contract as are so frequently encountered in tort (as where breach of contract causes physical injury or damage) the same principles are applicable.[241] Indeed the view has been expressed[242] that just as in the law of tort, so also in the law of contract, damages can be recovered for nervous shock or an anxiety state resulting from breach of contract.[243]

Scope of protection

The only damages which will be awarded for breach of contract are such as flow naturally and directly from the breach, or may reasonably be supposed to have been in the contemplation of the contracting parties as a probable consequence of the breach.[244]

The basis of Sri Lanka law on the subject is the case of *Hadley* v. *Baxendale*[245] which is the classic formulation, in so far as contract is concerned, of the rules governing remoteness of damage. *Hadley* v. *Baxendale* has been interpreted in several later decisions and has been explained as laying down two rules regarding remoteness of damage, namely, that the plaintiff must prove either (a) that the loss is the natural and normal result of the breach or (b) that though it is exceptional and abnormal loss, yet the probability of its occurrence was "in the contemplation of the parties" at the time of contracting. These two rules are often referred to as the first and the second branch, respectively, of the rule in *Hadley* v. *Baxendale*.[246]

An illustration of the first branch of the rule is the provision in the Sale of Goods Ordinance by which the measure of damages for non-acceptance or non-delivery is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's or seller's breach of

240. See *David & Co.* v. *Seneviratne* (1946) 47 N.L.R. 73, at 76.
241. Mayne & McGregor, *Damages*, 12th ed., s. 117.
242. *Cooke* v. *Swinfen* (1967) 1 W.L.R. 457 at 461, per Lord Denning, M.R.
243. Provided, that is, that such a result is a reasonably foreseeable consequence of the breach.
244. For one of the earliest references to this principle in the case law of Sri Lanka, see 1846 Austin, p. 100 per Stark, J.,
245. (1854) 9 Exch. 341.
246. See Anson, 22nd ed., p. 488 *et seq*.

contract.[247] Losses which follow from abnormal or exceptional circumstances not known to the party in default are not within the rule.

As regards the second branch of the rule, it is clear that its application depends on the knowledge the defaulting party possessed, at the time of contracting, of any special circumstances likely to cause extra loss. The mere communication of special circumstances by one party to the other does not impose an obligation on the party so informed to compensate the other for all damages ordinarily flowing from such breach. Proof is required of the assent by such party to the assumption of such responsibility.

The rules in *Hadley* v. *Baxendale* have been considered as correctly setting out the Roman-Dutch law on the question of remoteness,[248] and have been followed in Sri Lanka in regard to contracts governed by English[249] as well as Roman-Dutch law.[250]

These rules have more recently been explained and elaborated by Asquith, L.J., in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[251] This formulation of the law is so clear and precise that it is generally quoted *in extenso*[252] as the most comprehensive modern statement of the rules regarding damages in contract.

Mitigation of damages

It is the duty of a party claiming damages to take all steps to minimise the loss consequent on a breach of contract.[253]

"There are certain broad principles which are quite well settled. The first is that, as far as posssible, he who has proved a breach of a bargain ... is to be placed, as far as money can do it, in as good a situation as if the contract has been performed ... but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps

247. ss. 51(2) and 50 (2).
248. Nathan & Schlosberg, *Law of Damages in South Africa*, pp. 21 and 22; Wessels, s. 3253 *et seq.*, *David & Co.* v. *Seneviratne* (1946) 47 N.L.R. 73 at 75.
249. *Narayanan Chetty* v. *Stevenson & Sons* (1850) 4 S.C.C. 2, F.B.
250. *David & Co.* v. *Seneviratne*, *supra* note 206.
251. (1949) 2 K.B. 528; (1949) 1 All E.R. 997 at 1002-3.
252. Mayne & McGregor, *Damages*, 12th ed., s. 124; Chitty, 22nd ed., s. 1348.
253. Wille, *Principles* 5th ed., p, 380; Wessels. s. 3325 *et seq.* Anson, 22nd ed. pp. 504-5; Chitty, 22nd ed., s. 1381; Hart & Honoré, *Causation in the Law*, p. 212; *Victoria Falls & Transvaal Power Co. Ltd.* v. *Consolidated Langlaagte Mines Ltd.*, 1915 A.D. 1, at 22; *British Westinghouse Electric Co.* v. *Underground Electric Railways*, 1912 A.C. 673. See also *Wimalasekera* v. *Parakrama Samudra Co-operative Agricultural Production & Sales Society Ltd.* (1955) 58 N.L.R. 298.

to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps".[254]

One does not find reference to this principle in the Roman-Dutch texts but it has been incorporated into the law of South Africa[255] and the law of Sri Lanka.[256]

The rule regarding mitigation of damages has been analysed as in fact consisting of three rules: [257]

1. that the plaintiff should take all reasonable steps to mitigate his loss,

2. that where the plaintiff does take steps to mitigate his loss he can recover for loss and expenses incurred in so doing, and

3. that where the plaintiff so takes steps to mitigate his loss, the defendant is liable only for the loss as lessened.

There is in addition a subsidiary meaning of the term 'mitigation'. Where a plaintiff, suing a defendant for breach of contract, is himself in breach, the loss so accruing to the defendant may in certain cases be applied in mitigation of the plaintiff's own claim.[258] This last meaning is, however, a purely subsidiary one, and involves questions of procedure rather than substantive law.[259] In Sri Lanka the Civil Procedure Code is silent on the nature of the matters that can be claimed in reconvention and the principles of Roman-Dutch law have, therefore, been applied.

There is no duty to mitigate damages where the innocent party stands upon his contract, holds the other party responsible and awaits performance, for this duty arises only where he elects to treat the repudiation as an immediate breach and to sue upon the contract at once.[260] Such an exemption from the usual duty to mitigate damages has, however, been

254. per Lord Haldane in *British Westinghouse Electric Co.* v. *Underground Electric Railways* (1912) A.C. 673, 689.

255. Wessels s. 3327; *Victoria Falls & Transvaal Power Co.* v. *Consolidated Langlaagte Mines* (1915) A.D. 1, 22.

256. *Town Council, Chavakachcheri* v. *Devabalan*, (1962) 68 N.L.R. 10; *Noorbhai & Co.* v. *Karuppen Chetty* (1924) 26 N.L.R. 161 at 181.

257. Mayne & McGregor, *Damages*, 12 ed., s. 144; Chitty, 22nd ed., s. 1381.

258. Mayne & McGregor, *op. cit.*, s. 147.

259. *Ibid.*

260. *Holland Ceylon Commercial Company* v. *Mahuthoom Pillai* (1922) 24 N.L.R. 152.

criticised as resulting in hardship[261] though it accords with principle in that the duty to mitigate does not arise so long as the contract remains alive.

The onus of showing that damages could be minimised is on the person asserting it.[262]

In contracts for the sale of goods, the innocent party is ordinarily required to act immediately upon the breach and buy or sell in the market if there is an available market.[263]

Fraud or deceit accompanying breach of contract

Fraud entitles the defrauded party not only to an action for rescission of contract[264] but also to an action for damages.[265]

Penalty and liquidated damages

The distinction drawn by English law between penalties and liquidated damages was not known in Roman and Roman-Dutch law,[266] nor was the word '*poena*' understood in the sense of the 'penalty' of English law.[267]

Lord Dunedin in *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage & Motor Co., Ltd.*[268] summarised the rules of English law for distinguishing a penalty from liquidated damages. Briefly these rules are as follows :

(1) The use by the parties of the words 'penalty' or 'liquidated damages', though raising a presumption[269] that they intended what they said, is not conclusive.[270]

261. Cheshire & Fifoot, 6th ed., p. 527. See also Goodhart, 78 L.Q.R. 263.

262. *Swaminathan* v. *Karunaratne*, at 480; *Bank of China* v. *American Trading Co.* 1894 A.C. 266, 274.

263. Chitty, 22nd ed., s. 1384, see also Sale of Goods Ordinance ss. 49(3) and 50(3).

264. Where rescission is not allowed the defrauded party will be entitled only to damages—Wessels, ss. 1155, 1156.

265. D. 4.3.9.5, 10, 11; Wessels, s. 1154, Voet 4.3.11, 2.

266. *Attorney-General* v. *Costa* (1922) 24 N.L.R. 281.

267. See *Namasivayam* v. *Supramaniam and Thambyah*, 1877 Ram. 362 at 371.

268. (1915) A.C. 79 at 86-88, adopted in *Attorney-General* v. *Cader* (1933) 37 N.L.R. 348; *Abdul Majeed* v. *Silva* (1930) 32 N.L.R. 161; *Subramaniam* v. *Abeywardene* (1918) 21 N.L.R. 161.

269. On this presumption see the adoption by Macdonell, C.J., in *Associated Newsppaers of Ceylon Ltd.* v. *Hendrick* (1935) 37 N.L.R. 104 at 107, of the words of Lord Esher, M.R., in *Law* v. *Board of Redditch* (1892) 1 Q.B. 127; "Where the parties to a contract have agreed that, in case of one of the parties doing or omitting to do some one thing, he shall pay a specific sum to the other as damages, as a general rule such sum is to be regarded by the court as liquidated damages and not as a penalty".

This rule would not apply if the sum so agreed on is *ingens—Pless pol* v. *De Soysa* (1909) 12 N.L.R. 45; *Associated Newspapers of Ceylon Ltd.* v. *Hendrick* (1935) 37 N.L.R. 104 at 107.

270. For an old Ceylon case illustrative of this principle see *Davith* v. *Dingiri Appuhami* (1887) 8 S.C.C. 84, where, despite the use of the Sinhala expression meaning "fine", the sum in question was held to be liquidated damages and not a penalty.

(2) The essence of a penalty is a payment of money stipulated as in *terrorem* of the offending party;[271] the essence of liquidated damages is a genuine pre-estimate of damage.

(3) The question whether a payment is a penalty or liquidated damages is one of construction depending on the terms and circumstances of each particular contract, [272] judged not at the time of breach but at the time of contracting.[273]

(4) If the sum stipulated is extravagant and unconscionable in comparison with the greatest possible loss sustainable in the event of breach,[274] it is a penalty.

(5) If the occurrence of one or more possible events involving varying magnitudes of damages be provided for by one lump sum payment, there is a presumption that such payment is a penalty.[275]

Where the damages stipulated are adjudged by the court to be a penalty rather than a genuine pre-estimate of damage, the court fixes the amount of damages having regard to the circumstances of the case, but disregarding the quantum pre-determined by the parties. In cases where the amount fixed is *ingens*, the court would reduce the amount[276] though it is controversial whether the fact of its being *ingens* was a prerequisite to the grant of such relief.[277]

The English distinction between penalty and liquidated damages has been taken over by the law of Sri Lanka.[278]

271. On stipulations *in terrorem* see *Subramanian* v. *Abe ywardene* (1918) 21 N.L. R. 161 at 164.
272. See also the speeches of Lords Halsbury and Dunedin in *Clydebank Engineering Co. Ltd.* v. *Yzquierdo* v. *Castenada*, 105 A.C. 6.
273. For a Sri Lanka case on this principle see *Webster* v. *Bosanquet* (1912) 15 N.L.R. 125.
274. Thus where the payment of a smaller sum is secured by a stipulation that the person making default shall pay a larger sum, such a stipulation would be a penalty — *The Negombo Co-op Society* v. *Mello* (1934) 13 C.L. Rec. 141.
275. For Sri Lanka see *Webster* v. *Bonsanquet* (1909) 13 N.L. R. 47.
276. Voet 45.1.12; Bynkershoek, *Quaestiones Juris Privati* 2.4; Van Leeuwen, *Cens. For.* 4.15; see also 1877 Ram. 362 at 371; *Huxam* v. *de Waas* 1820 Ram. 39. See also *The Negombo Co-operative Society* v. *Mello* (1934) 13 C.L. Rec. 141.
277. Bonser, C.J. took the view in *Fernando* v. *Fernando* (1899) 4 N.L.R. 285 that the court has no jurisdiction to enter into the question of the quantum of damages unless they are established to be 'ingens'. This view would probably not be followed today.
278. *Wijewardene* v. *Noorbhai* (1927) 28 N.L.R. 430,432; *Webster* v. *Bosanquet* (1912) A.C. 394; 15 N.L.R. 125; *Pless Pol* v. *de Soysa* (1909) 12 N.L.R. 45.

The *stipulatio poenae* in Roman-Dutch law[279]

Although modern decisions have attracted the principles of English law into the legal system of Sri Lanka, it is necessary to observe in somewhat greater detail the attitude of the Roman-Dutch law to the *stipulatio poenae*. The Roman-Dutch law exhibits a clash of views among the commentators[280] on the extent to which the *stipulatio poenae* may be enforced.

It may, however, be noted that the principle of Roman-Dutch law was that, in the event of non-performance, a penalty agreed upon by the parties to the contract was incurred by the party in default. This principle was subject, however, to the rule that if the penalty was much larger than the actual loss, the court had jurisdiction to reduce it,[281] whereas if the penalty proved less than the damages suffered, the aggrieved party could rely on his ordinary right to claim damages.[282] The stipulation for a penalty was never regarded as a novation of the contractual obligation.[283] In the Roman-Dutch law the fact of its being 'penal' did not prevent the stipulation from being enforced. [284]

The lex commissoria[285]

The *lex commissoria* is, "a pact annexed to a purchase at the time it is contracted to the effect that, unless the price be paid at a certain time, the thing shall be considered as unbought."[286] In regard to the question of penalties *lex commissoria* attracts different rules from the generality of contracts, and it becomes irrelevant to consider whether such a clause is in the nature of a penalty or liquidated damages,[287] for it has been held to fall

279. See for Sri Lanka the following cases, *Negombo Co-operative Society* v. *Mello* (1934) 13 C.L.Rec. 141; *Associated Newspapers of Ceylon* v. *Hendrick* (1935) 37 N.L.R. 104; *Uttumchand & Co. Ltd.* v. *Times of Ceylon* (1939) 48 N.L.R. 179.

280. Bynkershoek, *Quaestiones Juris Privati* 2.14 — "There is utter confusion among the commentators, both ancient and modern, on the question of penal clauses in wills and contracts."

281. Pothier, s. 345; Lee, *Roman-Dutch Law*, 5th ed., p. 265; *Jayasinghe* v. *Silva* (1911) 14. N.L.R. 170.

282. Voet 46.2.4.

283. *Ibid.*

284. *Fernando* v. *Fernando* (1899) 4 N.L.R. 285, per Withers, J.; see also *Pless Pol* v. *de Soysa*, (1909) 12 N.L.R. 45.

285. See further Norman, *Purchase & Sale*, 3rd ed., pp. 118 *et seq.*; Mackeurtan, *Sale of Goods*, 3rd ed., pp. 70 *et seq.*; Wessels, ss. 1419 *et seq.*

286. Voet 18.3.1.; Wessels, s. 1419; *Port Elizabeth Town Council* v. *Rigg*, 20 S.C. 252 at 256. Such a term is described for short as a "commissory term", and constitutes a typical resolutive condition — Mackeurtan, *Sale of Goods*, 3rd ed., p. 70; Wessels, s. 1419.

287. Lee, *Roman-Dutch Law*, 5th ed., p. 265, note 6; Wille, *Principles*, 5th ed., p. 316.

outside the penalty-liquidated damages field.[288] The *lex commissoria* is valid even though it provides that the seller may keep any portion of the purchase price received as a penalty for the buyer's default.[289] Even where in a forfeiture clause there are penal claims in addition to the *lex commissoria*, the seller is not prevented from enforcing the claims under the *lex* only.[290]

INTEREST

Interest may be awarded either as damages or otherwise than as damages. Where interest is payable by the terms of a contract, an award of interest does not strictly concern the topic of damages at all. On the other hand where no interest is payable by the terms of the contract itself, but interest is nevertheless awarded, such an award of interest would be an award of interest as damages.

A Full Bench of the Supreme Court has held [291] "that the Usury Laws of Holland were in their nature merely local enactments and unsuited to the condition of affairs in Sri Lanka, and as such were neither formally introduced by the Dutch nor observed in practice by them during their occupation of the island". Consequently, according to the common law in Sri Lanka, any rate of interest stipulated for was held to be recoverable,[292] a position which prevailed until the enactment in 1918 of the Money Lending Ordinance.[293]

Present statutory provisions

Section 5 of the Civil Law Ordinance[294] provides that no person shall be prevented from recovering on any contract or engagement any amount of interest expressly reserved thereby or from recovering interest at the rate of five *per centum* per annum[295] on any contract or engagement in any case in which interest is payable by law.

The other important provisions of statute law which must be noticed are those contained in the Money Lending Ordinance.[296] The Money

288. *Auby & Pastellides* v. *Glen Anil Investments (Pty.)* 1960 (4) S.A. 865 (A.D.).
289. *Ibid.*
290. *Baines Motors* v. *Piek* 1955 (1) S.A. 534 (A.D.).
291. *Ramasamy Pulle* v. *Tamby Candoe* (1875) 1872-76 Ram. 189 per Morgan, A.C.J. and Stewart, J., Cayley, J., dissenting.
292. See also *Periacarpan Chetty* v. *Herft* (1886) 7 S.C.C. 182.
293. Cap. 80.
294. No. 5 of 1852, Cap. 79.
295. The rate was formerly 9 per cent, but was reduced to 5 per cent by s. 2 of Ordinance No. 17 of 1944.
296. *Ramasamy Pulle* v. *Tamby Candoe* (1875) 1872-76 Ram. 189 at 204.

Lending Ordinance specifies certain rates above which interest is presumed to be unreasonable.[297] Proof of special circumstances showing that the rate charged is not unreasonable, is required, if higher rates of interest are to be recovered than those specified in the section.[298]

The court is further not precluded in any case in which the specified limits are not exceeded, from directing a reduction of the rate of interest charged if the party seeking relief satisfies the court that in all the circumstances of the case such reduction ought to be made.

In computing the rate of interest charged, the court is required to take into account all payments, other than principal, made by the debtor to the creditor or charged to the debtor by the creditor in account in respect of the loan, whether purporting to be by way of interest or otherwise,[299] and is required for the purpose of this computation to convert all such payments into a rate *per centum* per annum as nearly as practicable.[300]

Compound interest

The Roman law prohibited compound interest.[301] So also the Roman-Dutch law did not allow compound interest even though expressly stipulated for,[302] but the Roman-Dutch legal prohibition against compound interest is no longer in force in Sri Lanka.[303] The recovery of such interest would be permitted where the parties have expressly agreed to pay it,[304] as well as where agreement may be implied from conduct such as acquiescence in prevailing banking[305] or other custom,[306] or where it is allowed by statute.[307]

297. These rates are as follows :
    (a) in the case of loans of an amount up to and including one hundred rupees, twenty per centum per annum;
    (b) in the case of loans over one hundred rupees and up to and including two thousand five hundred rupees, eighteen per centum per annum;
    (c) in the case of loans over two thousand five hundred rupees, fifteen per centum per annum. — section 4.
298. *Carron* v. *Ferando* (1933) 35 N.L.R. 352.
299. Not being payments from which the creditor derives no benefit.
300. S. 4 (3).
301. C. 4.32.28.
302. Voet 22.1.10.
303. *Marikar* v. *Supramaniam Chettiar* (1943) 44 N.L.R. 409 D. B. See also *Abeydeera* v. *Ramanathan Chettiar* (1936) 38. N.L.R. 389; *National Bank of India* v. *Stevenson* (1913) 16 N.L.R. 496.
304. *Abeydeera* v. *Ramanathan Chettiar* (1936) 38 N.L.R. 389.
305. *National Bank of India* v. *Stevenson* (1913) 16 N.L.R. 496.
306. For a local custom by which compound interest is charged, see the reference in *Murugappa Chettiar* v. *Muththal Achy* (1956) 58 N.L.R, 225 at 226 P.C., to nadappu interest by which, according to the custom prevailing among the *Chettiar* community, interest is added to the principal from time to time.
307. For such an instance see section 192 (2) of the Civil Procedure Code. See also *Obeyesekere* v. *Fonseka* (1934) 36 N.L.R. 334 at 336.

Apart from such cases a claim for compound interest will not be allowed unless specifically and unequivocally provided for in the document sued upon.[308]

Interest exceeding principal

The legislative provisions in Sri Lanka which must be noted on this matter are section 5 of the Civil Law Ordinance[309] which states that the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal; section 192 of the Civil Procedure Code;[310] section 5 of the Money Lending Ordinance[311] which requires the court, when determining whether the return received by the creditor is excessive, to observe the rule that no interest shall at any time be recoverable to an amount in excess of the sum then due as principal, and section 97 of the Bills of Exchange Ordinance.[312]

No interest after deposit in court

The defendant in any action brought to recover debt or damages may in terms of section 409[313] of the Civil Procedure Code deposit in court at any stage of the action such sum of money as he considers a satisfaction in full of the plaintiff's claim. Notice in writing of the deposit must be given by the defendant to the plaintiff.[314] No interest is allowed to the plaintiff on any sum deposited by the defendant from the date of notice in writing of the deposit being given by the defendant to the plaintiff.[315]

***Liability* of the crown to pay interest**

In England the Crown Proceedings Act, 1947[316] enacts that the provisions relating to the power of a court to order the inclusion of interest in a judgment, shall apply to proceedings by and against the Crown.[317] There is

308. *Paarl Board of Executors* v. *Reid* 1965 (1) P.H., A. 3 (T).
309. Cap. 79.
310. This section, which is merely procedural, does not in any way supersede s. 5 of the Civil Law Ordinance which states the Roman-Dutch law — see *Perera* v. *Fernando* (1931) 1 C.L.W. 107; *de Silva Appuhami* v. *de Silva* (1882) 5 S.C.C. 16.
311. Cap. 80.
312. Cap. 82.
313. For India see s. 376 of the former code and o. 24 r. 1 of the present code.
314. S. 410—for India see o.24 r. 2 and s. 377 of the present and former codes, respectively.
315. S.411. For India see o. 24 r.3 and s. 378, respectively; see also s. 38 of the Contract Act relating to tender.
316. 10 and 11 Geo. 6 c.44 s. 24 (3).
317. Halsbury, 3rd ed., vol. 9, p. 256; Bell, *Crown Proceedings*, pp. 152-3, 192.

no similar provision in Sri Lanka but it has always been understood that interest may be awarded against the Crown in the same manner as in litigation between subject and subject.[318]

Civil procedure

Where damages are claimed for breach of contract, section 192[319] of the Civil Procedure Code permits the court to grant interest[320] according to the rate agreed on by the parties by the instrument sued on, or in the absence of any such agreement at the rate of five *per centum* per annum[321] to be paid on the principal sum adjudged from the date of the action to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the action, with further interest at such rate on the aggregate sum so adjuged, from the date of the decree to the date of payment, or to such earlier date of the decree to the date of payment, or to such earlier date as the court thinks fit. When the decree makes no provision for the payment of further interest on such aggregate sum the court is deemed to have refused such interest and no further action will lie for its recovery.[322]

This section of the Civil Procedure Code does not in any way repeal the provisions contained in section 3 of the Civil Law Ordinance which provides that the amount recoverable on account of interest or arrears of interest should in no case exceed the principal. The latter section states the Roman-Dutch law[323] and is not in any way superseded by the Civil Procedure Code, which is merely a procedural enactment.[324]

318. See, however, Voet 49.14.2 where, in an enumeration of the privileges of the Fisc, Voet states that it receives interest on every contract as a result of default but does not pay interest except in so far as it succeeds to the rights of private person.

319. For India see s.34 of the 1908 Act and s. 209 of the 1882 Act.

320. A claim for interest is not considered to be incidental to the cause of action but part of the cause of action itself for purpose of determining jurisdiction. Consequently where the amount claimed together with interest up to the date of plaint exceeds Rs. 300 (now Rs. 750) the Court of Requests would have no jurisdiction — *Hamid* v. *Badurdeen* (1946) 47 N.L.R. 114.

321. This would appear to be the most usual rate in England as well, where there do not appear to be any cases where interest has been awarded on damages at a rate exceeding five per cent. See Mayne & McGregor, *Damages* 12th ed., s. 293.

322. For Roman-Dutch Law see Voet 42. 1.37 to the effect that interest does not accrue on judgments unless it has been expressly ordered that it is to accrue right up to payment or satisfaction.

323. See *de Silva Appuhami* v. *de Silva* (1882) 5 S.C.C. 16.

324. *Perera* v. *Fernando* (1931) 1 C.L.W. 107.

Damages and rate of exchange

Where, upon the breach of a contract, the person in default becomes liable to pay a sum of money in foreign currency, the damages must for the purposes of the judgment be assessed as at the date of default, and the sum payable must be converted into local currency at the rate of exchange prevailing at that date.[325]

Where damages are payable in terms of a foreign judgment in currency other than that of Sri Lanka, the judgment must be registered[326] as if it were a judgment for such sum in the currency of Sri Lanka, on the basis of the rate of exchange prevailing at the date of the judgment of the original court.[327]

B. SPECIFIC PERFORMANCE

Nature of specific performance

Specific performance is a term of English law meaning the actual performance by a party to a contract of that which he has by the contract undertaken to perform. The corresponding expression of Roman-Dutch law — *ad factum praestandum* — has fallen into disuse in modern Roman-Dutch terminology in consequence both of the more expressive nature of the English term[328] and of the superior development of its associated principles. A decree of specific performance is a discretionary remedy[329] which takes the form of an order by court requiring performance in terms of the contract in cases where a party fails or refuses to render such performance, and stands in sharp contrast to the remedy of damages which is merely a substitute for performance.[330]

Specific performance is in general aimed at the doing of some positive act, and is, therefore, sought where damages are not an adequate remedy in cases where it is desired to enforce the observance of a positive contract. Where, on the other hand, what is sought to be enforced is a negative contract or an obligation of a negative nature such as the non-performance of

325. *Mercantile Agency* v. *Ismail* (1924) 26 N.L.R. 326; *Harrisons & Crossfield* v. *Adamally* (1918) 5 C.W.R. 32; *S.S. Celia* v. *S.S. Volturno* (1921) 2 A.C. 544 at 551, 552.
326. Under the Enforcement of Foreign Judgment Ordinance, Cap. 93.
327. S.3 (3).
328. Wille, *Principles*, 5th ed., p. 372.
329. Wille, *Principles*, 5th ed., p. 372; Anson, 22nd ed., p. 514; Cheshire & Fifoot, 6th ed., p. 533.
330. See Fry, *Specific Performance*, 6th ed., s. 3; cf. Halsbury, 3rd ed., vol. 36, p. 263.

a particular act, the remedy of injunction is generally sought in preference to the remedy of specific performance.[331]

Specific performance differs from damages in this important regard, that whereas the right to claim damages is linked with the existence of a cause of action flowing from contractual breach, the right to claim specific performance is not necessarily so dependent on the existence of a cause of action or of a breach of contract.[332]

Sri Lanka law

In Sri Lanka the right to claim specific performance of an agreement regulated by the Roman-Dutch law[333] has been fully recognised from the earliest times.[334] Moreover, the Civil Procedure Code[335] assumes the existence of this remedy in the country's legal system.

Principles governing grant of specific performance

It has already been observed that specific performance is a discretionary remedy. This does not, however, mean that the court is at liberty to grant or withhold the remedy capriciously,[336] and certain principles have been evolved which guide the court in the exercise of its discretion. These principles are generally stated in negative form, and indicate those situations in which the court will not grant the remedy. Some of them are so well-established that refusal of the remedy will invariably follow should the circumstances exist which render them applicable.

These principles, evolved initially by the English Courts of Chancery, are followed in the modern Roman-Dutch jurisdiction of Sri Lanka.[337]

It must, however, be stressed that these principles do not exhaust the situations in which the remedy would be refused, or detract in any way from its essentially discretionary nature.[338]

331. See Halsbury, 3rd ed., vol. 36, p. 265.
332. Chitty, 22nd ed., s.1423; *Hasham* v. *Zenab* 1960 A.C. 316; 76 L.Q.R. 200.
333. *Abdeen* v. *Thaheer* (1958) 59 N.L.R. 385, P.C., (1955) 57 N.L.R. 1, S.C. Contracts governed by the English law attract of course the principles of English law relating to the grant of this relief. For a statutory illustration see s. 51 of the Sale of Goods Ordinance.
334. (1837) Morgan & Beling, p. 145; (1881) 43/55 Ram. p. 152; (1873) Grenier, p. 39; (1886) S.C.M./19th November 1886, D.C. Negombo 14,007; *Perera* v. *Rodrigo* (1878) 1 N.L.R. 99; *Holmes* v. *Alia Marikar* (1896) 1. N.L.R. 282.
335. Sections 193, 217 and 331 *et seq.*
336. Anson, 22nd ed., p. 514; Mackeurtan, *Sale of Goods*, 3rd ed., p. 386.
337. *Abdeen* v. *Thaheer*, *supra* note 333.
338. Wille, *Principles*, 5th ed., p. 372.

1. Where damages are an adequate remedy, specific performance will not be granted.[339]

2. Specific performance will not be granted where the court cannot supervise the execution of the contract.[340]

3. The right of specific performance may be expressly excluded.[341]

4. Specific performance will not be granted where the contract is impossible of performance.[342]

5. Specific performance will not be granted unless the contract is certain.[343]

6. Specific performance will not be granted unless the contract is fair and just.[344]

7. Specific performance may be refused for want of mutuality.[345]

8. Specific performance may be excluded by an alternative stipulation.[346]

9. Specific performance will not in certain cases be granted when the plaintiff has himself been guilty of delay in performing his part of the contract.[347]

10. Specific performance is not granted in respect of contracts for personal work or service,[348] except in cases of strictly negative stipulations.

11. An agreement ancillary to an unenforceable principal contract will itself not be specifically enforced.[349]

12. Specific performance will not be granted to a plaintiff who is himself not ready and willing to perform his part of the contract.[350]

339. Cheshire & Fifoot, 6th ed. p. 532; Wessels, s. 3136.
340. Cheshire & Fifoot, p. 535; Wessels, s. 3124.
341. *Abdeen* v. *Thaheer*, *supra* note 333.
342. *Ibid.*
343. Chitty, 22nd ed., s. 1429; Wessels, s. 3117.
344. *Perera* v. *Moraes* (1947) 48 N.L.R. 548.
345. *Abeysekera* v. *Gunasekera* (1918) 20 N.L.R. 404.
346. *Abdeen* v. *Thaheer*, *supra* note 333.
347. *Ismail* v. *Ismail* (1921) 22 N.L.R. 476.
348. Anson, 22nd ed., s. 515.
349. Halsbury, 3rd ed., vol. 36, p. 271.
350. Chitty, 22nd ed., s. 1457.

13. The party rendering himself unable to perform is not entitled to enforce performance.[351]
14. The court does not interfere directly to enforce an illegal contract by specific performance.[352]
15. The fact that a contract has been rescinded is a bar to any claim to enforce it.[353]

Procedure

Specific performance may be claimed by itself or as an alternative relief to damages or cancellation.[354] Indeed there are circumstances in which specific performance may be claimed in addition to some other relief such as damages.

Where damages are claimed in addition to specific performance, they must be specifically pleaded and specified.[355]

Specific performance may be ordered with or without damages in respect of a part of a contract or to the extent to which the defendant can perform.[356]

Where damages are claimed as an alternative to specific performance, the plaintiff must be content with whichever alternative the defendant elects to give him.[357] If he fails to prove his damages in such an event the plaintiff runs the risk of being awarded only a nominal sum as damages.[358]

Section 193 of the Civil Procedure Code provides that where an action is brought for damages for breach of contract, if it appears that the defendant is able to perform the contract, the court may, with the consent of the plaintiff, decree specific performance of the contract within a time to be fixed by the court, and in such cases shall award an amount of damages to be paid as an alternative[359] if the contract is not performed.[360]

An order for specific performance is enforceable in the same manner as any other order of the court, and disobedience is punishable as a contempt.[361]

351. *Sellathurai* v. *Annaledchumy* (1961) 63 N.L.R. 289 (P.C.).
352. Halsbury, 3rd ed., vol. 36, p. 298.
353. *Id.* at p. 319.
354. *Suppiah Pillai* v. *Ramanathan* (1920) 22 N.L.R. 225 at 228.
355. Norman, *Purchase & Sale*, 3rd ed., p. 330.
356. *Saparamadu Appuhamy* v. *Anthony Pulle* (1928) 30 N.L.R. 278.
357. Norman, *Purchase & Sale*, 3rd ed., p. 330; *Silverton* v. *Bellevue Syndicate* 1904 T.S. 462; *Payne* v. *Lockie* 1912 E.D.L. 533.
358. *Shakinovsky* v. *Lawson & Smalowitz* 1904 T.S. 326.
359. See *Elmore* v. *Pirrie* (1887) 57 L.T. 333.
360. Other sections of the Code which recognise and provide for this remedy are sections 320-330 dealing with the execution of a decree for the delivery of movables, sections 331 and 332 dealing with decrees for the execution of a conveyance and section 334 relating to mandatory decrees.
361. See *Shakinovsky* v. *Lawson and Smalowitz* 1904 T.S. 326.

C. INJUNCTIONS

The Courts Ordinance

Section 86 of the Courts Ordinance[362] provides that where it appears that the plaintiff[363] demands and is entitled to a judgment against the defendant restraining the commission of an act or nuisance which will produce injury to the plaintiff, or that the defendant during the pendency of the action is committing, permitting or threatening to do an act or nuisance in violation of the plaintiff's rights respecting the subject-matter of the action and tending to render the judgment ineffectual, or is about to remove or dispose of property[364] with intent to defraud[365] the plaintiff, the court may grant an injunction restraining the defendant from committing such act.[366]

It will be seen that the phraseology of this section covers the grant of both permanent and interim injunctions, for while one limb of the section speaks of a judgment restraining the commission or continuance of an act or nuisance, which would produce injury to the plaintiff, the other limbs of the section concern themselves with the restraining of acts committed during the *pendency of the action*, which tend to render the judgment ineffectual or which are done to defraud the plaintiff.

An injunction will not ordinarily be granted when it is possible to compensate a plaintiff by way of damages.[367]

362. Cap. 6.
363. A defendant who makes a claim in reconvention may ask for an injunction in such a claim, and for this purpose his claim in reconvention will be treated as a plaint — Courts Ordinance, s. 87.
364. As to whether a specific debt due from a third party may possibly come within the description of property, see *Alubhay* v. *Mohideen* (1916) 18 N.L.R. 486. See also *Kesavanayagam* v. *Vellaipillai* (1907) 3 A.C.R. 21, to the effect that an injunction does not lie to restrain the defendant from drawing certain moneys due to him from a third person.
365. Before granting injunction under section 87(3) of the Courts Ordinance the court should find on sufficient material not only that the defendant threatened, or was about, to dispose of the property, but that he had the intention to defraud the plaintiff thereby—*Alubhay* v. *Mohideen* (1916) 18 N.L.R. 486.
366. An injunction will only be granted when a civil right is involved and not for example where controversies exist between rival religious sects as to points of doctrine or ceremonial—*Pitcha Tamby* v. *Cassim Marikar* (1914) 18 N.L.R. 111.
367. *Sego Madar* v. *Makeen* (1922) 27 N.L.R. 227. See also *Jindasa* v. *Weerasinghe* (1929) 31 N.L.R. 33 at 35, citing Lindley, L.J., in *London and Blackwall Ry. Co.* v. *Cross* 31 Ch.D. at 369. "...the very first principle of injunction law is that you do not obtain injunctions for actionable wrongs for which damages are the proper remedy".

There is no inherent power in the Supreme Court to issue injunctions. Its jurisdiction to do so is restricted to the cases referred to in section 20[368] of the Courts Ordinance. This section repeats the language of section 49 of the Charter of 1833. These provisions have been the subject of a considered interpretation by a Full Court as early as 1859.[369] In view of the re-enactment of the provisions of the Charter in identical terms in the Courts Ordinance, the construction of the former enactment by the Supreme Court has been considered binding in respect of the latter as well.[370]

The limited power so conferred on the Supreme Court has been stated to be very different from that given by the Judicature Act of 1873[371] to the English Court, of granting injunctions in all cases in which it shall appear 'just or expedient' to do so.[372]

An injunction will thus not be granted under section 20 of the Courts Ordinance if the petitioner was in a position to apply to the District Court for an injunction at or about the time that he filed his application in the Supreme Court or even if, between the date of his filing his petition in the Supreme Court and the date of hearing of arguments, the petitioner could have instituted action in the District Court.[373]

The circumstances in which such jurisdiction is to be exercised are the following[374] —

(1) that irremediable mischief would ensue from the act sought to be restrained;[375]

(2) that an action would lie for an injunction in some court of original jurisdiction ;

(3) that the plaintiff is prevented by some substantial cause from applying to that court.[376]

368. Formerly, s. 22.
369. *In re Baly* (1859) 3 Lor. 238.
370. *Buddhadasa* v. *Nadaraja* (1955) 56 N.L.R. 537 at 541.
371. 36 and 37 Vict. c. 66.
372. Per Bonser, C.J., in *Mahamado* v. *Ibrahim* (1895) 2 N.L.R. 36.
373. *Buddhadasa* v. *Nadaraja*, *supra* note 370.
374. *Mahamado* v. *Ibrahim* (1895) 2 N.L.R. 36; *Mohideen* v. *Abeyweera* (1964) 67 C.L.W. 65.
375. (1919) 6 C.W.R. 358. On this requirement see also *Vallasamy* v. *Dias* (1965) 68 C.L.W. 37.
376. An illustration of this last situation is a case where in consequence of a statutory requirement of a month's notice prior to action, there would necessarily be delay in filing action in the District Court in consequence of which delay irreparable mischief will ensue—*Meera Mohideen* v. *Town Council Kalmunai* (1962) 65 C.L.W. 57.

The act sought to be restrained by the issue of an injunction must be a wrongful one.[377]

The Civil Procedure Code

The substantive law as to when an injunction may be allowed is contained in the Courts Ordinance, and the Civil Procedure Code merely sets out the procedural steps for obtaining and setting aside injunctions. Injunctions are ordinarily obtained by way of petition except in cases where injunctions are prayed for in a plaint in an action.[378] A petition for an injunction must be accompanied by an affidavit of the applicant or some other person having knowledge of the facts, containing a statement of the facts on which the application is based.[379]

An order for injunction made in terms of the Civil Procedure Code may be discharged or varied or set aside by the court on application made to the court on petition by way of summary procedure by any party dissatisfied with such order.[380]

Disobedience of an injunction is punishable as for a contempt of court,[381] notwithstanding even that it has been irregularly issued.[382]

Damages for improperly obtaining injunction

Where an injunction is applied for on insufficient grounds or if, after its issue, it appears to the court that there was no probable ground for applying for an injunction, the court may award reasonable compensation for the expense or injury caused to the party on whom it is issued.[383]

Ex parte injunctions

An injunction is ordinarily granted only upon notice to the opposite party.[384] It is granted *ex parte* only when the plaintiff applies for it promptly on learning of the threatened harm and this appears to be so urgent

377. *Mohideen* v. *Abeyweera* (1964) 67 C.L.W. 65.
378. The Civil Procedure Code, s. 662.
379. *Ibid.* see also *Rambukpota* v. *Jayakoddy* (1928) 29 N.L.R. 383. On procedure in regard to the ordering of security; see *Don Mathes* v. *Dissanayeke* (1919) 6 C.W.R. 358.
380. The Civil Procedure Code, s. 666.
381. *Id.* s. 663; the Court of Requests also has such power to punish - *Perera* v. *Abdul Hamid* (1931) 33 N.L.R. 285.
382. *Silva* v. *Appuhamy* (1899) 4 N.L.R. 178.
383. S. 667; in awarding such damages for obtaining an injunction on insufficient grounds the real damage suffered ought to be ascertained by the court and the party obtaining it should not be punished for mere breach of duty—*Pieris* v. *Pabilis Appu* (1906) 10 N.L.R. 30.
384. The Civil Procedure Code, s. 604.

that it would be completed if notice were served on the defendant before it could be obtained.[385] The court may, if it thinks fit, require security before granting an injunction.[386]

The court may also in its discretion enjoin the defendant until the hearing and decision of an application for an injunction.[387]

Under section 20 of the Courts Ordinance the Supreme Court has power in a fit case to grant an injunction after only an *ex parte* hearing and without prior notice to the opposite party.[388]

OTHER PROVISIONAL REMEDIES

(a) Sequestration of property

A plaintiff may either at the commencement of an action or at any subsequent period before judgment obtain a mandate sequestering the property of the defendant to such value as the court shall think reasonable and adequate. In order to obtain such a mandate the plaintiff must satisfy the judge that he has a sufficient cause of action against the defendant in respect of a money claim of or exceeding Rs. 200 or that he has sustained damage to that amount and that he has no adequate security to meet the same. He must further show that the defendant is fraudulently alienating his property with intent to avoid payment of his debts or that he has with such intent quitted the island leaving therein property belonging to him.[389]

There is no distinction in procedure between an application for a mandate of sequestration based on fraudulent alienation and an application under section 87 of the Courts Ordinance for an injunction.[390]

(b) Arrest before judgment

A plaintiff may seek the remedy of arrest before judgment either at the commencement of the action or at any time before judgment. For this purpose he must satisfy the court by way of motion or petition supported by affidavit and *viva voce* examination if necessary that he has a sufficient cause of action against the defendant either in respect of a money claim of or exceeding Rs. 200 or because he has sustained damage to that amount. He must further show that he has no adequate security to meet the same

385. *The Bamberakelle Estates Tea Company* v. *Goonewardene And Saraneris Fernando* (1900) 2 Br. at 79; *Jinadasa* v. *Weerasinghe* (1929) 31 N.L.R. 33.
386. *Don Mathes* v. *Dissanayeke* (1919) 6 C.W.R. 358; (1916) 3 C.W.R. 154.
387. The Civil Procedure Code, s.664.
388. *Silva* v. *Tambiah* (1961) 53 N.L.R. 228.
389. The Civil Procedure Code, s. 653 In regard to crown debtors, there is special procedure for sequestration under section 3 of the Crown Debtors Ordinance.
390. *Alibhoy* v. *Mohideen* (1916) 2 C.W.R. 10.

and that he verily believes that the defendant is about to quit the island and will do so unless he be forthwith apprehended. If he so satisfies the court, the court may order the arrest of the defendant.[391]

No person can in any case be imprisoned under these provisions for a longer period than three months before the decree.[392]

(c) The appointment of receivers

Whenever it appears to the court to be necessary for the restoration, preservation, or better custody or management of any property, movable or immovable, the subject of an action or under sequestration, the court may on the application of any party[393] who shall establish a *prima facie* right to all interest in such property, by order appoint a receiver of such property and if need be remove the person in whose possession or custody the property may be from such possession or custody.[394] The court may further commit such property to the custody or management of such receiver and grant to such receiver such fee or commission on the rents and profits of the property by way of remuneration as the court thinks fit. The court may also grant to such receiver all such powers as to the bringing and defending of actions, and for the realisation, management, protection, preservation and improvement of the property.

(d) Other interim orders

Any court may, on the application of any party to an action, order the sale in such manner and on such terms as it thinks fit of any movable property being the subject of such action, which is subject to speedy and natural decay.[394a]

(e) Sequestration of tenant's property for non-payment of rent

The Mortgage Act[395] makes special provision in relation to the rights of the landlord to goods upon premises of which rent is in arrears.

E. RESCISSION

Upon a repudiation or breach by one party the other may elect to treat the contract as being still alive or to 'accept' such discharge, and then rescind the contract.[396]

391. The Civil Procedure Code, s. 650.
392. *Id.* s. 651.
393. A defendant may apply for the appointment of a receiver against a co-defendant—*Velupillai* v. *Palanyandy* (1952) 55 N.L.R. 158.
394. The Civil Procedure Code, s. 671.
394a. *Id.* s. 668.
395. Cap. 89.
396. See *Radiotronics (Pty.) Ltd.* v. *Scott Lindberg & Co. Ltd.*, (1951) 1 S.A. 321 at 328-9; *Nieuwoudt* v. *Els* 1953 (3) S.A. 642 (O) at 645.

When the relief of rescission is sought, what is really meant is that the party having the right to rescind has exercised this right and comes to court to enforce this or some ancillary right which is disputed. He does not come to court to rescind the contract for he has already done so on his own.[397] He may also come to court to confirm his cancellation in cases where such a confirmation would be desirable.[398]

When a party elects to claim rescission he is entitled also to claim damages arising out of the breach.[399] A person claiming rescission is however obliged to make restitution to the other party of that which he has received under the contract, and indeed the ability to do so would appear to be a condition precedent to the right to claim rescission.[400]

In addition to the ordinary powers of the court to grant the relief of rescission in the sense described above, courts are sometimes invested by statute with a special power of rescission over and above the jurisdiction they could ordinarily exercise in such matters.[401]

Failure to perform within stipulated time

If time is of the essence of the contract, failure to perform on the stipulated day, or even at the stipulated hour, may constitute a breach of contract[402] whereas if time is not of the essence, the mere fact that the contract mentions a day or time for performance does not prevent the debtor from making a valid payment at a reasonable time after such stipulated day or time.[403] As a general rule time is not considered to be of the essence of the contract unless there is sufficient ground for concluding that it is.

397. *Radiotronics (Pty.) Ltd.* v. *Scott Lindberg & Co. Ltd.*, 1951 (1) S.A. 312 (C) at 333.
398. *Sonia (Pty.) Ltd.* v. *Wheeler* 1958 (1) S.A. 535 (A.D.) at 561. See also Cheshire & Fifoot, 6th ed., p. 511.
399. Mackeurtan, *Sale of Goods*, 3rd ed., p. 276; Norman, *Purchase & Sale*, 3rd ed., p. 335; *Microutsicos* v. *Swart* 1949 (3) S.A. 715 (A.D.) at 728.
400. *Radiotronics (Pty.) Ltd.* v. *Scott Lindberg & Co. Ltd.*, 1951 (1) S.A. 312 (C) at 330-331. See the cases cited therein by Van Zyl, J. as supporting this proposition impliedly if not directly. See also Norman, *Purchase & Sale*, 3rd ed., p. 335; Cheshire & Fifoot, 6th ed., pp. 512-3.
401. See for example s. 72 of the Merchant Shipping Act, Cap. 367 which specially confers on court the power to rescind contracts between the owner or master of a ship and a seaman or apprentice if, having regard to all the circumstances of the case, it thinks just to do so. This power is in addition to any other jurisdiction the court can exercise independently of this section.
402. Wessels, ss. 2248-50.
403. D. 45. 1.135. 2; Wessels; s. 2247; Maasdorp, 7th ed., vol. 3., p. 111. On the strict consequences following from breach where time is of the essence, see the observations of the Privy Council in *Sellathurai* v. *Annaledchumy* (1961) 63 N.L.R. 289 where it was observed that a party who placed himself by his conduct in a position in which he could not perform his obligations under a contract, could not enforce performance by the other party, ***unless time was of the essence***.

The Sale of Goods Ordinance also expressly provides by section 11(1) that unless a different intention appears from the terms of a contract, stipulations as to time of payment are not deemed to be of the essence of the contract of sale.[404] In transactions concerning land, stipulations as to time are not regarded as of the essence unless made so in express terms or such intention appears from all the circumstances.[405]

In agreements to reconvey on payment of a certain sum by the vendor within a stipulated time, time is of the essence of the contract, and tender of the price within the stated time is a condition precedent to the performance of the promise by the vendee.[406]

Defective performance

Defective performance relied on must, in order to confer the remedy of cancellation, be in respect of an essential term of the contract. It must in other words be a term the performance of which is so vitally important to a party that but for it he would not have entered into the contract, a term which goes to the foundation or root of the contract.[407]

F. RESTITUTIO IN INTEGRUM

The remedy of *restitutio in integrum* is one which is deeply rooted in the legal system of Sri Lanka. The remedy has been invoked at one time or another to set aside contracts shown to have been based upon total misconception,[408] to grant relief in cases of want of capacity,[409] error,[410] *res noviter veniens* or fraud,[411] and to set aside judgments on a variety of grounds similar to those which would vitiate contfacts.[411a]

Where relief is sought from the effects of a contract, this is done in Sri Lanka by means of an ordinary action instituted for this purpose in the courts of original civil jurisdiction. Where, however, relief is sought from a decree, a special application must be made to the Supreme Court, and the procedure governing this matter is outlined in the next succeeding paragraph.

404. For S. Africa see Mackeurtan, *Sale of Goods*, 3rd ed., pp. 278.
405. See generally Norman, *Purchase & Sale*, 3rd ed., pp. 177-181.
406. *Fernando* v. *Perera* (1926) 28 N.L.R. 183; *Babahamy* v. *Alexander* (1896) 2 N.L.R. 159. See also *Appuhamy* v. *Silva* (1914) 17 N.L.R. 238 and *Uduma Lebbe* v. *Kiribanda* (1947) 48 N.L.R. 220, 223.
407. Wessels, s. 2965; Pothier, *Vente*, s. 476; Wille, *Principles*, 5th ed., pp. 377-8.
408. *Strok* v. *Orchard* (1893) 2 S.C.R. 1.
409. On *restitutio* with special reference to minor's contracts see further 47 *S.A.L.J.* 180 at 183-5.
410. *Perera* v. *Wijewickreme* (1912) 15 N.L.R. 411.
411. *Ex parte Gordon* (1879) 2 S.C.C. 108, F.B.
411a. *Sabapathy* v. *Dunlop* (1935) 37 N.L.R. 113 at 126-7.

Restitutio in respect of court decrees

The remedy of *restitutio* has been invoked in Sri Lanka to set aside such decrees as those obtained by fraud.[412] entered by mistake,[413] consented to under threat of dismissal of the action by the judge[414] or embodying a compromise by a proctor acting contrary to his client's instructions.[415]

An application for *restitutio in integrum* is an action within the meaning of section 11 of the Prescription Ordinance and is barred in three years.[416]

Relief by way of *restitutio* should be sought with the utmost promptitude.[417]

412. *Obeysekere* v. *Gunasekere* (1884) 6 S.C.C. 102; *Buyzer* v. *Eckert* (1910) 13 N.L.R. 371 at 375; *Jayasuriya* v. *Kotalawala* (1922) 23 N.L.R. 511 at 512.
413. See *Perera* v. *Ekanayake* (1897) 3 N.L.R. 21; *Sinnatamby* v. *Nallatamby* (1903) 7 N.L.R. 139, F.B.
414. *Sabapathy* v. *Dunlop* (1935) 37 N.L.R. 113.
415. *Silva* v. *Fonseka* (1922) 23 N.L.R. 447; *Narayan Chetty* v. *Azeez* (1921) 23 N.L.R. 477.
416. *Silindu* v. *Akura* (1907) 10 N.L.R. 193; 1 A.C.R. 150.
417. *Babun Appu* v. *Simon Appu* (1907) 11 N.L.R. 44 at 45; *Menchinahamy* v. *Muniweera* (1950) 52 N.L.R. 409 at 414.