Preliminary Year

Sri Lanka Law College

Law of Obligations - I

iGuide

Empowers Independent Learning

Independent Law Student Movement

Reviews, responses and criticism
iGuide,
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The Definition of a Contract:

- A Contract is a promise or a set of promises which the law will enforce.
- A Contract is a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law recognises as a duty.

"A contract is a promise or promises mutually exchanged, setting up against the promisor or promisors, duties of performance which the law will recognise or enforce at the instance or for the benefit of the promisee or promisees, or a third party intended to be benefitted"

- *C. G. Weeramantry – Law of Contracts vol-1, pp 83*

Contrasting Agreement with Contract –

- An agreement is any understanding or arrangement reached between two or more parties. A contract is a specific type of agreement that, by its terms and elements, is legally binding and enforceable in a Court of law.
- An agreement is a manifestation of a mutual assent to one another as gathered from their words or deed. A Contract is where the law on an objective basis ascertains a presumed or notional intention of parties by the external manifestations.

Will Theory –

All attributes of a contract is determined by the will of the parties. People join a contract in their own terms (not true, if the bargaining power is unequal).

Objective Test vs. Subjective Test:

Objective Test –

The Court examines what the parties said and did; not what they intended; and in the eyes of a reasonable man, whether the parties ought to be bound.

The court will further look into two aspects;

1. Which litigant's version of terms is correct?
2. Up to what extent the obligations arising from the above said terms are met?

In Smith v. Hughes (1871) LR 6 QB 597, Hughes, after inspection of a sample of fresh Oats, ordered same from Smith, as horse feed. Upon delivery, Hughes refused to pay, claiming he anticipated old Oats as new Oats cannot be fed to horses; and that Smith knew Hughes is making a mistake but ignored it.

Reaffirming the old idea of *caveat emptor* (buyer beware), Blackburn J held: "*If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms*".

In Centrovincial Estates PLC v. Merchant Investors Assurance Company Ltd (1983) Com LR 158, office was let to the defendants at a yearly rent of £68,320 subject to review from 25th December 1982. A clause provided that the rent should be increased on that date to the current market value. There was a proviso that in no circumstances should the rent be reduced from what it was.

On 22nd June 1982, plaintiffs wrote to the defendants, inviting them to agree to the figure of £ 65,000 per annum. On 23rd June the defendants replied agreeing that figure. On receiving that reply the plaintiffs said that the letter had contained an error and that they intended to propose £126,000. The defendants refused to accept this and said that they wished to hold the plaintiffs to the binding agreement constituted by the letters of 22nd and 23rd June. The plaintiffs claimed that no legally binding agreement had been made.

The Court of Appeal refused to grant such a declaration and held that "there was agreement at a figure of £65,000".

Slade LJ stated: in the absence of any proof that the defendants either knew or ought to have known of the plaintiffs' error at the time they accepted the offer, why should the plaintiffs now be allowed to resile from that offer? It is well-established principle of the English Law of contract that an offer fails to be interpreted not subjectively by reference to what has actually passed through the mind of the offeror, but objectively, by reference to the interpretation which a reasonable man in the shoes of the offeree would place on the offer. It is an equally well-established principle that ordinarily an offer, when unequivocally accepted according to its precise terms, will give rise to a legally binding agreement as soon as acceptance is communicated to the offeror in the manner contemplated by the offer and cannot thereafter be revoked without the consent of the other party.

Subjective Test –

Aims at discovering the true intent of the parties in their mind as understood by the parties.

Subjective test or circumstances are important to decide on the objective test.

- Where there is a mistake as to a term – there is no contract

- Where there is a mistake as to a fact – there is a contract
- Offeree is at fault in failing to note that the offeror has made a mistake.

In Hartog v. Colin & Shields (1939) 3 All ER 566, the defendants mistakenly offered a large quantity of hare skins at a certain price per pound whereas they meant to offer them at that price per piece (approx. one third of the price). The claimant Hartrog accepted the offer. The court held that the contract was void for mistake. Hare skins were generally sold per piece and given the price, the claimant took advantage of the mistake.

Statoil ASA v. Louise Dreyfus Energy Services (2008) EWHC 2257 / (2008) 2 Lloyds 685

Fly the Wall Test –
Taking an impartial view, looking at a contract between the two parties as if events are seen as they happen.

Scriven Bros. v. Hindley (1913) 3 KB 564

The defendants bid at an auction for two lots, believing both to be same commodity. Lot A was Hemp but Lot B was Tow (very low in value). The defendants declined to pay for Lot B and the sellers sued for the price. The defendants' mistake arose from the fact that both lots contained the same shipping mark 'SL', which usually is never landed from the same ship under the same shipping mark. The defendants' manager had been shown bales of Hemp as "samples of the 'SL' goods".

The auctioneer believed that the bid was made under a mistake as to the value of the Tow.

Lawrence J. held the defendant's mistake had been caused by the negligence of the plaintiffs.

Constituent Elements of a Contract:

They are; obligations which arise from promises between parties which gives rise to actionable personal rights against determinate (specific) individuals.

1. Agreement between parties.
2. Intention to create a legal obligation (actual or presumed).
3. Due observance of prescribed forms or modes of agreement, if any.
4. Legality and possibility of the object of the agreement.
5. Capacity of parties to a contract.

Illegal, Void, Voidable and Unenforceable Contracts:

These are not mutually exclusive.

1. Illegal Contracts – Those which law forbids.
   E. g.:
   Offering a bribe to Technical Officer to get a plan passed by Municipal Council.

2. Void Contracts –

They are not enforceable by law. Even if one party breaches the agreement, you cannot recover anything because essentially there was no valid contract. Some examples of void contracts include:

- Contracts involving an illegal subject matter such as gambling, prostitution, or committing a crime.
- Contracts entered into by someone not mentally competent (mental illness or minors).
- Contracts that require performing something impossible or depends on an impossible event happening.
- Contracts that are against public policy because they are too unfair.
- Contracts that restrain certain activities (right to choose who to marry, restraining legal proceedings, the right to work for a living, etc.). E.g.:

A promises B to sell his horse after one month. Before the completion of one month, the horse dies. Now, the contract becomes void as the contract cannot be performed, i.e. the object on which the parties agreed is no more, so there is an impossibility of performance of the contract. This type of Contract is known as Void Contract.

3. Voidable Contracts –

These are valid agreements, but one or both of the parties to the contract have the right to rescind the contract at any time. As a result, you may not be able to enforce a voidable contract:

- Contracts entered into when one party was a minor. (The law often treats minors as though they do not have the capacity to enter a contract. As a result, a minor can walk away from a contract at any time)
- Contracts where one party was forced or tricked into entering it.
- Contracts entered when one party was incapacitated (drunk, insane, delusional).

E. g.:

X says to Y, that he should sell his new bungalow to him at a low price otherwise, he will damage his property and Y enters into a contract due to fear. In this situation, the contract voidable as the consent of Y is not free, so he has the right to avoid the performance of his part. As well as he can claim for any damages caused to him.

❖ Difference between Void and Voidable Contracts –

The main difference between the two is that a void contract cannot be performed under the law, while a voidable contract can still be performed, although the unbound party to the contract can choose to void it before the other party performs.

"Difference between the two lies in; Voidable contracts are deprived of legal consequences from the time of avoidance and the void contacts are retrospectively annulled as from the date of their formation".

- *Weeramantr*

4. Unenforceable Contracts –
   Literally, this term seems to include void, voidable and illegal contracts. But in a specific sense, law does have provision for enforcement, they remain live and viable, giving rise to natural obligation, but not enforceable due to a technical short-coming.

   E. g.:
   A promise to marry which is not in writing.

Most Important Causes of Invalidity:

1. Incapacity – require detailed inspection to decide whether void or voidable.
2. Informality – void.
3. Illegality – void.
4. Error, fraud and misrepresentation – may render voidable.
5. Duress and undue influence – may render voidable.
6. Want of consideration or causa.

2. Agreement - Formation of a Contract

Offer and Acceptance:

The acceptance should be a mirror of the offer; if not there is no contract.

- The law of contract is about the enforcement of promises. Not all promises are enforced by Courts.
- To enforce a set of promises, or an agreement, Courts look for the presence of certain elements. When these elements are present a Court will find that the agreement is a contract.
- A contract means that the parties have voluntarily assumed liabilities with regard to each other.
- The process of agreement begins with an offer. For a contract to be formed, this offer must be unconditionally accepted.
- The law imposes various requirements as to the communication of the offer and the acceptance.
- Once there has been a valid communication of the acceptance, the law requires that certain other elements are present.
- If these elements are not present, a Court will not find that a contract exists between the parties.
- In the absence of a contract, neither party will be bound to the tentative promises or agreements they have made.
- It is thus of critical importance to determine what the offer is and whether such offer was unconditionally accepted to commence the test as to whether or not a contract has been formed.

An Offer:

- An offer is an expression of willingness to contract on certain terms. It must be made with the intention that it will become binding upon acceptance.
- The offer must be serious and a definite promise.

Gunthing v. Lynn

- There must be no further negotiations or discussions required.
- The nature of an offer is encapsulated by two cases involving the same defendant, Manchester City Council.

The Council decided to sell houses that it owned to sitting tenants. In two cases, the claimants entered into agreements with the Council. The Council then resolved not to sell housing unless it was contractually bound to do so. In these two cases the question arose as to whether or not the Council had entered into a contract.

In Storer v. Manchester City Council (1974) 1 WLR 1403, the Court of Appeal found that there was a binding contract. The Council had sent Storer a communication (with price)

which they intended would be binding upon his acceptance. All Storer had to do to bind him to the later sale and to sign the document and return it.

In Gibson v. Manchester City Council (1978) 1 WLR 520, in contrast, the Council sent Gibson a document which asked him to make a formal invitation to buy and stated that the Council 'may be prepared to sell' the house to him. Gibson signed the document and returned. The HL held that a contract had not been concluded because the Council had not made an offer capable of being accepted.

❖ An important distinction between the two cases is that in Storer's case there was an agreement as to price, but in Gibson's case there was not. In Gibson's case, important terms still needed to be determined.

- It is very important to realise from the outset that not all communications will be offers. They will lack the requisite intention to be bound upon acceptance.
- If they are not offers; they are mere steps in the negotiation process which might include a statement of intention, a supply of information or an invitation to treat.

Invitation to Treat:

Following are an invitation to treat;

a. Advertisements.
b. The display of an item in the showcase or picking up something from a supermarket shelf.
c. Display of price.
d. Auctions.
e. Tenders.

a. Advertisements –

In Partridge v. Crittenden (1968) 2 All ER 247, the advertisement was an invitation to treat and not an offer for sale.

An advertisement by Mr Partridge appeared under the general heading "Classified Advertisements" which contained the words *Quality British Bramblefinch hens 25 s. each*. In no place was there any direct use of the words "offer for sale". Mr Thompson bought the bird for 30s. The bird was in a particular state where offer for sale of it was prohibited. The charge by Mr Crittenden, a member of a Society, was not upheld by the AC on the grounds that the advertisement in question constituted in law an *invitation to treat* and **not** an *offer to sell*; therefore the offence with which the appellant was charged was not established.

In Lallyett v. Negris & Co – 14 NLR 247, - Defendant advertised Ham, Plaintiff placed an order by letter from Nuwara Eliya. Plaintiff paid and sued on finding Ham was spoilt. Middleton J: there is no evidence on the record to show what the terms of the advertisement were, and in the absence of these I should deem that particular advertisement was merely an invitation to do business, like the issue of a bookseller's catalogue, not an offer intended to create and capable of creating legal obligations.

The contract is formed by offer and acceptance, and it must treat the plaintiff's letter as the offer, and the despatch of the hams from Colombo was a conduct communicating the acceptance.

An offer is made when, and not until, it is communicated to the offeree.

A contract is made when the acceptance is communicated, and acceptance must be communicated by words or conduct.

- However, advertisements may be treated as offers if they are unilateral – i.e. it is open for the world at large to accept. A unilateral contract is a contract in which one party makes a promise to whoever takes action as prescribed in the offer. It requires that only one party make a promise that is open (to the world) and available to anyone who performs the required action, like collecting the reward for finding a lost pet.

In Carlill v. Carbolic Smoke Ball Co (1893) 1 QB 256, the Defendant offered in an advertisement to pay 100 pounds to any person who contracted influenza after using a smoke ball in a specific manner and for a specific period. The company was found to have been bound by its advertisement, which was construed as an offer which the buyer, by using the smoke ball, accepted, creating a contract. The Court of Appeal held the essential elements of a contract were all present, including offer and acceptance, consideration and an intention to create legal relations. It was held that this was an offer and a contract was established in the event a person used the smoke ball. Lindley LJ:

i. The advertisement was not "mere puff" as had been alleged by the company, because the deposit of £1000 in the bank evidenced seriousness.
ii. The advertisement was an offer made specifically to anyone who performed the conditions in the advertisement rather than a statement "not made with anybody in particular".
iii. The communication of acceptance is not necessary for a contract when people's conduct manifests an intention to contract.
iv. The nature of Mrs Carlill's consideration (what she gave in return for the offer) was good, because there is both an advantage in additional sales in reaction to the advertisement and a "distinct inconvenience" that people go to when using a smoke ball.

b. Display of Goods –

c.

In Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd (1953) 1 QB 401, Boots Cash Chemists, would let shoppers pick drugs off the shelves and then pay for them at the Cash Desk. Before then, all medicines were stored behind a counter and an assistant had to get what was requested. The Plaintiff objected that under the Pharmacy and Poisons Act 1933, that was an unlawful practice. Both the Queen's Bench Division of the High Court and the Court of Appeal sided with Boots.

i. They held that the display of goods was not an offer.

ii. Rather, by placing the goods into the basket, it was the customer that made the offer to buy the goods.

iii. This offer could be either accepted or rejected by the Pharmacist at the Cash Desk, the moment of the completion of contract was at the Cash Desk, in the presence of the Supervising Pharmacist. Therefore, there was no violation of the Act.

- Fisher V Bell 1961 1 QB 394
- De la Bere V Pearson Ltd 1908 1KB 280
- Shipton V Cardiff Corp 1917 87 LJKB 51

According to Anson acceptance to an offer is that what a lighted match to a train of gun powder it creates something that cannot be recalled or undone
Offer should be a accepted by offeree.if it accepted by a 3rd party there is no contract because there is no concurranc of mind.
Boulton V Jones 1857 2 HRN 564

Benefit of the offer cannot be given to another one than the offeree without the consent of offeror-
Bala V Vander westuizen and de klark 1941 TPD SAT 08

Statement of Price –

A mere statement of price at which a party may be willing to sell will not amount to an offer.

Harvey v. facey (1893) AC 552, the defendant, Facey, was planning to sell property in Kingston City. The appellant, Harvey, sent Facey a telegram which said, "Will you sell us Bumper Hall Pen? Telegraph lowest cash price". Facey replied: "Lowest price £900." Harvey replied: "We agree to buy Bumper Hall Pen for £900 asked by you…"

Facey, however refused to sell at that price, at which Harvey sued. It escalated to PC which held:

i. There was no concluded contract between the two to be collected from the telegrams.

ii. The first telegram asks two questions; first: the willingness of Facey to sell to the appellants; second: the lowest price,

iii. Without saying "yes" to the first question, Facey replied to the second question only.

iv. The third telegram from the appellants *treats* the answer of Facey stating his lowest price as an unconditional offer to sell to them at the price named.

v. Court cannot treat the telegram from Facey as binding him in any respect, except to the extent it does by its terms, viz., the lowest price.

vi. Everything else is left open, and the reply telegram from Harvey cannot be treated as an acceptance of an offer to sell to them. The contract could only be completed if Facey had accepted the appellant's last telegram.

The mere statement of the lowest price at which he would sell contains no implied contract to sell at that price to the persons making the inquiry.

Gibson v. Manchester City Council
Grainge and son V Gough 1896 AC 323-

*Catalogues and price lists are not offers

*Display of goods at a shop with a price tag,by the window, by the shop keeper is also an invitation to treat.

- Timothy V Simpson (1894)6 C and P 499

e. Auctions –

- An auctioneer's call for bids is an invitation to treat – it is a request for offers.
- The bids made by persons at the auction are the offers which the auctioneer can accept or reject as he chooses. Similarly the bidder may retract his offer before it is accepted

- Payne v. Cave (1789) 3 Term Rep. 148
- Harris V Nickerson 1873 LR 8 QB 286

Auctions is request for bids for such a sale is only an attempt to get the ball rolling and the buyer 's bid is the offer which the auctioneer can either accept or reject it.

f. Tenders –

- Where goods are advertised for sale by tender, the advertisement or the statement is not the offer. It is an invitation to treat.
- The offer is made by the person who tenders and the contract is made when the tender is accepted.

Harvella Investments v. Royal trust Co of Canada (1985) 2 All E.R. 966 Blackpool Aero Club v. Blackpool Borough Council (1990) 3 AllSpeS Spencer V Harding 1870 LR 5CP 561

In the case of tender notices,calling for tenders in respect of fixed quantity of goods the acceptance of the tender amount to acceptance of the offer. Thus produces a binding contract.

Attorney General V Withiyalingam 1941 43 NLR 117

The accepted tender may result in a standing offer to supply goods as and when and if required by the buyer. When the buyer gives an order there is a contract.

- G.N .Ry V Whitham (1873) L.R 9 C.P 16

If the buyer gives no order or does not order the full quantity of goods set out in the tender, there is no breach of contract.

- Percival Ltd V L.C.C (1918) 87 L.J.K.B.677

The buyer may not be bound to take any specific quantity, but bound to buy all the goods he needs. Such a contract is broken if the buyer does need some of the goods and does not take them from the tenderer.

- Kier V Whitehead Iron Co.(1938)1 All E.R 591

Summary:

- A contract begins with an offer. The offer is an expression of willingness to contract on certain terms. It allows the other party to accept the offer and provides the basis of the agreement.

- An offer exists whenever the objective inference from the offeror's words or conduct is that she intends to commit herself legally to the terms he proposes.
- This commitment occurs without the necessity for further negotiations.
- Many communications will lack this necessary intention and thus will not be offers. They may be statements of intention, supplies of information or invitations to treat.

Communication of the Offer:

- To be effective an offer must be communicated.
- There can be no acceptance of the offer without knowledge of the offer. The reason for this requirement is that a contract is an agreed bargain; there can be no agreement without knowledge.
- There can be no 'meeting of the minds' if one mind is unaware of the other.

Stated another way, an acceptance cannot 'mirror' an offer if the acceptance is made in ignorance of the offer.

Acceptance:

- For a contract to be formed there must be an acceptance of the offer. The acceptance must be an agreement to each of the terms of the offer. It is sometimes said that the acceptance must be a 'mirror image' of the offer.
- The acceptance can be by words or by conduct.

In Brogden v. Metropolitan Railway Company (1871), the offeree accepted the offer by performance.

In Day Morris Associates v. Voyce (2003), acceptance occurs when the offeree's words or conduct give rise to the objective inference that the offeree assents to the offeror's terms.

In Hyde v. Wrench (1840), if the offeree attempts to add new terms when accepting, this is a counter-offer and not an acceptance. A counter-offer implies a rejection of the original offer, which is thereby destroyed and cannot subsequently be accepted.

In Stevenson Jacques & Co v. McLean (1880) 5 QBD 346, where the offeree queries the offer and seeks more information, this is neither an acceptance nor a rejection and the original offer stands.

- Butler Machine Tool v. Ex-Cell-o (1979) 1 WLR 401
- Tekdata Interconnections Ltd v. Amphenol Ltd (2009) EWCA Civ 1209

In some cases, the parties will attempt to contract on (differing) standard forms. In this instance, there will be a 'battle of the forms' with offers and counter-offers passing to and fro. The Court of Appeal has held that the 'last shot' wins this 'battle of the forms'.

- Mccutcheon V David Macbrayne Ltd 1964 WLR125,128 -although the approach is objective ,the Intention of the parties are not entirely irrelevant ,so that the contract can not be formed which is in accordance With the intention of neither party. It has

been stated that the judicial task is not to discover the actual intention of each party, it is to decide what each was reasonably entitled to conclude from the attitude of the other.

Communication of the Acceptance:

- The general rule is that an acceptance must be communicated to the offeror.
- Until and unless the acceptance is so communicated no contract comes into existence. Entores v. Miles Far East Corporation (1955) 2 All. E R 493

Exception:

- The general rule is displaced in the case of a unilateral contract. A unilateral contract is one where one party makes an offer to pay another if that other party performs some act or refrains from some act.
- The other party need make no promise to do the act or refrain from the act.
- In these cases, acceptance of the offer occurs through performance and there is no need to communicate acceptance in advance. E.g.: the offer of a unilateral contract is an offer of a reward for the return of a lost cat.

  In the case of Carlill v. Carbolic Smoke Ball Company (1893) it was established that performance is the acceptance of the offer and there is no need to communicate the attempt to perform.
- Communication of the acceptance is waived because it would be unreasonable of the offeror to rely on the absence of a communication which would have been superfluous or which no reasonable person would expect to be made.

Postal Rule of Acceptance:

Where acceptance by post has been requested or where it is appropriate or reasonable means of communication between the parties, then acceptance is complete as soon as the letter of acceptance is posted, even if the letter is delayed, destroyed or lost in the post so that it never reaches the offeror.

- Adams v. Lindesell (1818) 1 B & Ald 681
- Household Fire Insurance v. Grant (1879) 2 Ex. D 216

But if the acceptance, instead of being properly posted, is handed to a postman to post, the contract is not complete until the acceptance is actually received by the offeror (Re London and Northern Bank [1900]1Ch 220)

Exceptions to the Postal Rule –

- Postal rule applies to post and telegrams but not to telephone, fax, telex or email.

- The rule will also not apply where: ○ The letter is not properly posted; ○ Letter is not properly addressed; ○ Where the offer expressly excludes the postal rule.

Method of Acceptance:

- Offer may specify that the acceptance must be communicated and manner in which the acceptance should be communicated.
- If a method is prescribed and it is not stated that no other method will suffice, an equally advantageous method would suffice.
- Where the offer is required by law to be in a particular form there is no requirement that the acceptance as well must be in that form- Muthukuda V Sumanawathi (1962)65 NLR 205 at 209

Tinn v. Hofmann (1873) 29 LT 271
Yates Building Company v. Pulleyn Ltd (1975) 119 SJ 370

Termination of the Offer:

The methods are;
1. Lapse of time
2. Rejection
3. Revocation
4. Counter offer
5. Failure of a condition
6. Death

An offer may be terminated in the following circumstances:

(i) Acceptance: once an offer has been accepted, a binding contract is made and the offer ends.

(ii) Rejection or counter offer: If the offeree rejects the offer or makes a counter offer that is the end of it. Sheffield Canal Co V Shielded and Rotherham Railway Co 1841 3 Railway and Canal cases 121

(iii) Revocation: The offer may be revoked by the offeror at any time until it is accepted. However the revocation of the offer must be communicated to the offeree(s). Unless and until the revocation is so communicated, it is ineffective.

Guus V Van den Hott 1903 20 sc 237 –if the offer has entered into an independent contract not to withdraw his offer then he will be liable for breach of contract

(iv) Byrne v Van Tienhoven – expedition theory which applies in the case of the postal rule will not apply in the case of postal revocation of offers: there is a more stringent rule for revocation than offers.

Dickinson v Dodds: revocation need not be in communicated by the offeror personally, it is sufficient if it is done through a reliable third party

Boyd v Nel – an option offer is an offer to keep open for a definite or indefinite period an offer that has already been made.

An option offer cannot be terminated during the term specified in such contract or if no term is specified, the offer must be kept open for a reasonable time (Roman Dutch law position which does not recognise the English law doctrine of consideration). In English law however, a promise to keep an offer open for a fixed period does not prevent its revocation within that period. However a person by giving consideration may buy a promise to keep an offer open for a fixed period.

Shuey v U.S. – held that an offer made by advertisement in newspaper could be revoked by a similar advertisement even though second advertisement was not read by some offerees – revoked by reasonable steps.

Errington v Errington and Woods – once the offeree has commenced performance of an unilateral offer, the offerror may not revoke the offer

Weeramantry – in a system governed by Roman Dutch law where absence of consideration has no effect, the doctrine of causa would be flexible enough to include sufficient part performance of a unilateral contract as sufficient causa whereby the offeror would be bound not to revoke the offer even before completion of the act or performance.

(iv) Lapse of time: where an offer is stated to be open for a specific length of time, then the offer automatically terminates when that time limit expires. Where there is no express time limit, an offer is normally open only for a reasonable time.

Ramsgate Victoria Hotel v Montefiore – defendant's delay in allotting the shares caused the lapse of the plaintiff's offer to buy the same.

(v) Failure of a condition subject to which the offer was made: an offer may be made subject to conditions. Such a condition may be stated expressly by the offeror or implied by the courts from the circumstances. If the condition is not satisfied, the offer is not capable of being accepted.

Financings Ltd. v Stimson – D who wished to purchase a car signed a hire purchase form (offer – becomes binding once the finance company signed the form). Car was stolen before signing by finance company and it was held that D was not bound to take the car as there was an implied condition that the car would be in substantially the same condition as when the offer was made when it was accepted.

(vi) Death: the offeree cannot accept an offer after notice of the offeror's death. However, if the offeree does not know of the offeror's death and there is no personal element involved, then he may accept the offer – Bradbury v Morgan

3. Form

There are three classifications;

1. Contracts Void unless in particular Form.
2. Contracts unenforceable unless in particular Form.
3. Contracts requiring no formalities

1. Contracts Void unless in Particular

Form: a. Transactions of immovable

property.

a. Immovable Property:

Statutory Provisions Relating to Form among others are;

Prevention of Frauds Ordinance**:** Section 2 –
No sale, purchase, transfer, assignment, or mortgage of land or other immovable property,...shall be of force or avail in law unless the same shall be in writing and signed by the party making the same...,

- in the presence of a licensed notary public and two or more witnesses present at the same time, and
- unless such ... instrument be duly attested by such notary and witnesses.

Fructus Naturales –
They are the natural fruits of the land on which they arise, such as grass, timber or fruit trees. They are considered to be part of the real property, and not separate chattels in relation to any legal conveyance of the property.

Fructus Industrales –
They are the produce of land that requires periodical application of labour for its production.

In Sri Lanka, the produce of this description are never covered by Section 2.

See:
Marshall vs. Green (1775) 1 CPD 35
Lee Hedges Co. vs. Seville (1886) PSCC 26 FB
Wall vs. Sharaader 1963-68 Ram 284

2. Contracts Unenforceable unless in Particular Form:

Many types of contracts require in writing, to render them enforceable by law.
a. Sale of Goods

b. Promise of Marriage
c. Partnership Agreements
d. Promissory Notes

a. Sale of Goods:

The Sale of Goods Ordinance: Section 5 (1) –

A contract for the sale of any goods shall not be enforceable by action unless...

- some note or memorandum in writing of the contract be made and signed by the party to be charged...

The object of this statute is to ensure that when there is no contract in writing, there is some overt act (which can be proved with evidence and from which criminal intend can be inferred) to rend the bargain binding.

KibbleV Gough(1878)38 l.j at 206

Walkdas V Suppramaniam Chetty (1917)20 NLR 23

b. Promise to Marry:

General Marriage Registration Ordinance: Section 19 –

No action shall lie for the recovery of damages for breach of promise of marriage unless

- such promise have been made in writing.

Karunawathi V Wimalasooriya(1941)42 NLR 390

c. Partnership Agreements:

Prevention of Frauds Ordinance: Section 18 –

No promise, contract, bargain or agreement, unless;

- it be in writing and signed by the party,
- shall be of force for establishing

partnership.

e. Promissory Notes:

Money Lending Ordinance: Section 10 (1) –

In every promissory note... there shall be ... distinctly set forth upon the document— (a) the capital sum actually borrowed; (b) the amount of any sum deducted... (c) the rate of interest...

(2) Any promissory note not complying with the provisions of this section shall not be enforceable:

3. Contracts Requiring No Formalities:

All contracts other than above mentioned falls within this category. A part of a document may have certain requisites of form, but other parts may not.

See: Perera vs. Abeysekara 58 NLR 505

4. Capacities of Parties to Contract

Categories of Disability:

The law protects persons under specified disabilities by denying full contractual capacity.

1. Minority
2. Lunacy, drunkenness and prodigality
3. Marriage
4. Insolvency

- There are also other categories based on professional and political status whose contractual capacity may differ from the ordinary.
- Contracts entered to by persons with contractual disability may be void or voidable.

Absolute and Limited Incapacity –

- Absolute incapacity is when a person is altogether incapable of binding himself with a contract in all circumstances. E.g.: An idiot
- Limited incapacity is when the disability operates only in certain circumstances. E.g.: A minor in certain circumstances, a lunatic who passes through lucid intervals

1. Minority:

Considered as a condition requiring special protection under any legal system, in EL and law of Sri Lanka, persons under 18 years are considered minors.

Offices Connected with Minority –

- Under RDL, it was the Guardian or Curator.
- Our law, recognising the principle of Upper Guardianship empowers every District Court as the upper guardian of the minors resident within their jurisdiction under the
- Judication Act Section 19 (1).The offices connected with minority in our law are;
  i.. Next friend or guardian *ad litem* (represents minor in litigation)
  ii. Curator (administration and management of the goods and property)
  iii. The guardian (in-charge of the person and maintenance of the minor)

Next friend or guardian *ad litem* –

- Since a minor does not have *locus standi in judicio* and cannot institute or defend any legal proceedings on self, an adult is needed for the purpose.
- The minor can sue or be sued only in the name of this adult.

- The terms next friend and guardian are used in the Civil Procedure Code as the representative of minor as plaintiff or defendant.
- The next friend has no authority to enter in to any agreement or compromise on behalf of the minor without leave of the Court in the absence of which, such agreement is voidable.

Effect of Non-representation –

In the absence of a next friend or guardian, every order made in an action or application in connection with a minor may be discharged on application made for the purpose. However, this principle is not valid for all purposes and a judgement will stand a valid adjudication against the minor until reversed.

The Natural Guardian –

Though no statutory office in our law -which follows RDL-, parents are the guardians over the person and property of a minor who provides education and maintenance (father >> mother >> grandfather >> grandmother becomes the natural guardian).

Contracts with a Minor:

Nature and Effect of Unassisted Contracts:

A minor's conveyance was not *ipso facto* void but only voidable at his instance based on the following cases.

Siriwardane v. Banda (1892) AC Rep.

218 Selohamy v. Rapheil (1889)

Silva v. Muhammadu 19 NLR 426

According to RDL a minors contract does not bind him unless he ratifies it on attaining majority, but it binds the other party to it, thus invalid on minor's obligation and valid on the other's obligation.

Fernando v. Fernando 19 NLR 193

The Exception to Rule –

The exceptions are by ratification by the minor, guardian, beneficial contracts (those which are beneficial to the minor and therefore binding) and contract for necessities.

AG v. Costa 24 NLR 281

In a contract of sale of goods, the minor is not bound to pay the contractual price but only their reasonable value.

Beneficial Contracts

Such contracts, in which the minor has favourable terms and which is entered into for the overall benefit of the minor are identified as 'Beneficial Contracts.'

R. vs. Konig

Contracts of service and apprenticeship are generally considered to be for the benefit of the minor.

Contract for Necessities –

The supplier is entitled to recover a reasonable price for the goods supplied, by Sale of Goods Ordinance - Section 3.

Necessities of a minor according to RDL are;

a. All things absolutely necessary for the existence.
b. Things are of use to him according to his station (standing) in life.
c. Things conducive to future mental and moral good.
d. Services for preservation of liberty and rights.

Peter vs. Fleming (1840)

A gold watch was held to be a necessity, despite its apparent luxury. However, it must be noted that this broad interpretation of necessities was adopted for the benefit of shopkeeper's who gave credit to minors from wealthy families.

Nash vs. Inman (1908)

An undergraduate of Cambridge bought 11 fancy waist coasts from a supplier on credit despite having an ample supply of clothing items. The Courts held that the purchased items were not necessities; hence, the supplier was rendered unable to enforce the contract.

Misrepresentation Regarding Age –

A contract by a minor falsely representing to be of full age and deceiving the other party is binding on the minor ordinarily.

Assisted Contracts:

- Contracts entered with the assistance of a guardian (or the guardian himself on behalf of a minor) are ordinarily valid and are binding the minor.
- If the contract is for alienation or burdening of their immovable property, the guardian is insufficient and the consent of the Court is required for it to be valid.
- Ratification, in the absence of the guardian at the transaction, requires his consent on the terms of a contract.

See: Fouche vs. Battenhausen

Action for Restitution –

This remedy in Sri Lanka was recognised since 19th century. It seeks to restore parties to their former position.

Abeyesekara v. Harmanis Appu (1911) 14 NLR

356 Simon Naide v. Aslin Nona (1945) 46 NLR 337

at340

In Sri Lanka, application for *restitutio in integrum* has been always made to the Supreme Court by minors as well as ordinary where the application is based on the discovery of fresh evidence that the applicant alleges to be surprised to a position of prejudice in the course of a judicial proceeding.

The second instance that a minor can repudiate arises where advantage of their inexperience is taken by other party whether fraudulently or not. Minors are entitled for *restitutio in integrum,* making the Court intervention necessary for their protection.

Ratification by the Minors **–**

Ratification in an assisted contract is not the same as in non-assisted contracts. Instead, it takes away the right he would enjoy in repudiation of the contract. It is depriving of a right rather than assertion of a right.

Misrepresentation of Age –

Only under the limited circumstance of minor, actually obtaining the assistance of the guardian conceals that fact from the contracting party. Consequence is that the minor would not be permitted to claim restitution after majority.

Conflict of Interest between Minor and Guardian –

In the presence of such conflict, guardian's consent carries no weight. The minor can repudiate such contract, notwithstanding such consent.

Burdon of Proof –

Unassisted Contracts – there is a presumption of invalidity. All that is required is to prove the fact of minority.

Assisted Contracts – there is a presumption of validity. Proof is required not merely of minority but also prejudice.

Methods of Termination of Minority:

Minority comes to an end by;

a. Attaining 18 years
b. Grant of letters of *venia aetatis*
c. Marriage
d. Attainment of puberty (Muslims)

2. Drunkenness or Intoxication:

According to RDL, intoxication to a degree where a person loses his reasoning powers or unable to realise the seriousness of his actions, render any contract by him invalid. EL provides that, a contract by a drunken is voidable on the ground that if he is not capable of forming a rational judgment.

The Sale of Goods Ordinance makes special provision in regard to the sale of necessities to a person whom by reason of drunkenness is incompetent to contract must pay a reasonable price therefor. Necessities mean (Section 3) goods suitable for the actual requirement at the time of the sale.
Gore v. Gibson (1845) 19 M&W 626

Burdon of Proof –

Voluntary or not, what must be proved is an incapacity to understand the nature of act done. The BP lies upon the person who makes the allegation which is self. The drunkard when sober can ratify the contract, which binds both parties.
Goodman v. Pritchard (1907) 28 (NLR) 227

3. Insolvency:

- Does not wipe out but it only curtails contractual capacity. Governed by the; ○ Insolvency Ordinance - for natural persons ○ Companies Act - for corporate entities.
- When a person is adjudged insolvent, all conveyances, assignments, transfers of property, all deliveries of bills, bonds notes or other securities are void except for marriage of his children or other valuable consideration.
- Court has the power to order liquidation of property for the benefit of creditors under insolvency.

4. Political and Professional Status:

a. The state
b. Heads of foreign states or their representatives
c. Attorneys-at-law
d. Aliens
e. Public servants

a. The State –

As in England, in Sri Lanka too, state liability in a contract is same as its subjects.
AG v. Junaid (1949) 52 NLR 176

The CPC Section 461 provides that no action shall be instituted against AG as representative of the State or against a public officer in regard to acts purporting to be done by him in his official capacity, until expiry of one month after notice in writing

delivered to his office. The time frame for actions (Constitutional Injunction) is as per Prescription Ordinance.

b. Immunity of Foreign State, Ambassadors and Diplomats –

They are not subject to the jurisdiction of our Courts and are immune from liability to be sued, but can waive this privilege and submit to the local jurisdiction. Diplomatic Privileges Ordinance prevails.

Corporations:

- They are legal personalities over and above the persons who are its members.it may be created by a special statute unique to the establishment or a general statute. E.g.: Unique statutes: SLPA, BOC.
- The latter: companies established and incorporated by the Companies Act. Notwithstanding the corporate members of such entities are state organs it is the company recognizes as a corporation.

Corporations could be either Corporations Sole or Corporations Aggregate.

Corporations Sole –

AG, Public Trustee, Arch Bishop of Colombo, though individuals, are considered as two distinct personalities in law, and are created mostly by a statute.

Corporations Aggregate –

These are such as limited liability companies, composed of several persons with a legal personality, distinct from those of its members.

Common Characteristics of a Corporation –

A distinctive name, common seal and perpetual existence.

Contracts of Corporations:

Quasi Corporations –

Many entities exist which are not corporations, which yet enjoy many attributes of a corporation. These unincorporated associations exist with periodical changes to their composition but are not recognised by the state as legal personalities. These have no separate existence apart from individual members and therefore cannot make contracts in its own name.

Every member is a direct party to the acts of the association and in most occasions, a corporate personality intervenes to break the nexus between the individual member and the other contracting party.

A distinctive factor in between an incorporated body and an unincorporated body is; the constituent members of prior are not liable for the acts of that body and the liability of the individual is limited to his contribution to such incorporation.

Unincorporated Societies & Associations –

Cannot sue (or be sued) in such name but by (or against) each and every constituent member. E.g.: LSSU, Sri Lanka Cricket, all political parties.

Right to Sue on Behalf of or Against an Association –

As provided in Section 16 of the CPC, obtaining permission to sue a representative (such as President) of the general membership is a special requirement of the law, in the absence of which an action will not be properly constituted.

With regard to property, an incorporated entity can hold same in its name but an unincorporated body, not being a jurisdiction person has no such capacity and the owners of property would be the individual members.

Partnerships –

A Partnership is no more than a collection of separate individuals and is of the same position as an unincorporated entity.

Plurality:

Contracts could be multilateral and may involve more parties than two. Even with two parties, a party could consist of more than one person.

One such person may be jointly or severally affected by the terms under the contract.

The RDL presumption is that in case of any doubt whether the multiple debtors are joined, each is liable pro-rata of his share of the debt. There is no presumption where there is more than one creditor; the obligation is *joint and several* rather than *joint*. Consequently if an obligation is to be joined and several, it must be specifically stated

.

In Panis Appuhamy v. Selenchi Appu (1903) 7 NLR 16, Layard CJ stated: when persons have jointly stipulated to pay a sum of money, each is ordinarily liable to pay a quota of that, and only when the intention of the parties is clearly expressed that each is severally bound for the payment of the whole, that each party becomes liable in *solidum*.

Solidum - liability of the debtor is for the entire sum of money (EL).

Pro –rata - each co-obligator is liable for his share of the debt (RDL).

In Babapulle v. Rajaratnam (1899) 4 NLR 348 at 352, Lawrie ACL stated: I always understood our law is that; in joint obligations, each debtor is liable only for the proportion of his debt, i.e.

pro-rata.

5. Consideration / Causa

Consideration:

An EL principle. The benefit or detriment undergone by a party in a transaction is *Consideration*.

A valuable Consideration in the eyes of law may consist of either in some

- Right,
- Interest,
- Profit or
- Benefit to one party and some
- Forbearance,
- Detriment,
- Loss or
- Responsibility given, suffered or undertaken by the other.

- *Weeramantry, Law of Contracts Vol. I – pg. 221*

Currie vs. Misa (1975)
Umma Saloomar v. Hassim (1928) 30 NLR 164
Shadwell vs. Shadwell (1860)
Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd (1915)
AG vs. Abraham Saibe

Aspects of Consideration:

1. Consideration has to be sufficient* but need not be adequate**.
2. Past consideration is no consideration.
3. Consideration should move from the promisee.

*Sufficient - condition of being as much as is needed.
**Adequate - something meeting the minimum requirement.

1. Consideration has to be Sufficient –

Chapel v. Nestle (1960) AC 87

Facts:–

i. Nestle ran a promotion whereby 3 sweet wrappers and 1 shilling could be sent by post to be sent back a record valued at 6 shillings.

ii. Chappel, a record seller, applied for an injunction to prevent the sale at such a price, as Nestle was not paying the statute-required 6.25% of the purchase price (6 shillings) of a record to the copyright holders.

Issue:-

iii. Could the sweet wrappers constitute good consideration for the purchase of the records; if so the value of the records was not quantifiable and the claim would fail.

Decision:-

iv. Sweet wrappers could be good consideration.

Reasoning:-

v. Consideration has to be sufficient.

vi. Nestle encouraged sales of sweets therefore the sweet wrappers were a consideration valuable to them.

2. Past Consideration –

If a consideration is already complete before a promise is made, so that nothing is given in return for the promise; that promise is not enforceable.

E.g.:

A promise to reward someone for acts he has already performed prior to that promise is a past consideration.

Salman v. Obias (1918) 21 NLR410

Facts:-

i. The consideration alleged in this case is that the appellant rendered certain services to his deceased grandmother, and spent for her benefit.

ii. It is stated by a witness to the deed that she, at the time of its execution said; the appellant was looking after her, spent for medical assistance, and that he had better have a conveyance.

Held:-

iii. These words denote plainly that the consideration for the deed was a past consideration.

iv. The principles of English law are perfectly clear; that a past consideration is no consideration at all.

Also, see: Lampleigh vs. Brathwait (1616)

Consideration Must Move from Promisee –

While consideration must move from the promisee, there is no requirement that it must be made to the promisor. The promisee can provide consideration by conferring a benefit to a third party. But the promisee himself must provide the consideration by incurring some detriment or by conferring some benefit to the promisor.

Tweddle v. Atkinson (1861) EWHC QB J57
Facts:-

i. A couple were getting married. The father of the bride entered an agreement with the father of the groom that they would each pay the couple a sum of money.
ii. The father of the bride died without having paid. The father of the son also died so was unable to sue on the agreement.
iii. The groom made a claim against the executor of the will.

Held:- iv. The claim failed: The groom was not party to the agreement and the consideration did not move from him. Therefore he was not entitled to enforce the contract.

Bolton v. Madden (1973) LR 9QB 55 South Canadian Trading Co v.

Justa Causa

A Roman law principle. The element of *actionability* of a contract (over and above the mere fact of an agreement), which varied with each type of contract, not conforming to a general principle, bearing no special characteristic; is called *Causa*. This element is required to make a contract legally binding.

The actionable element or Causa in a verbal contract could be found in the formal language; in written contracts, in the writing used to record the agreements.

Nuda Pacta – were the informal agreements lacking the requirement of Causa which could not be sued upon. "*Ex nudo pacto non oritur actio*"

In Lipton v. Buchanon 8 NLR 49; 10 NLR 58, Facts:-

i. Buchanon and Frazer carrying on business in partnership incurred a debt to Lipton. Later, this partnership was dissolved by decree of Court. ii. F paid half of the debt to L and L promised in writing to F that he will not take any action against F but recover the balance half from B.

iii. L, alleged to have deliberately omitted recovery from B for more than a year; by which time B became insolvent.
iv. L then sued both B and also F for the balance half of the debt.
v. The DC judge decided, there is no consideration in L's promise not to take action against F, so F is liable to pay again.

i. Wendt J (KC) states: though there might be no *consideration* for Lipton's promises according to EL, there was sufficient Causa according to RDL.
ii. Causa devolves the grounds, reasons or objects of a promise, giving such promise a binding effect in law. It has a much wider meaning than the English term consideration and comprises the motive or reason for a promise and also, purely moral consideration.

In Jayawickrama v. Amarasuriya 20 NLR 289, the PC held: According to RDL, a promise deliberately made to discharge the moral duty or to do an act of generosity can be enforced by law. This was followed in the case of Public Trustee vs. Udurawana 51 NLR 193 as well.

In Abesekara v. Gunasekara 5 CWR 242, the requirement for Causa must be a deliberate and a serious act which is not one motiveless.

In Edward v. De Silva 46 NLR 510, it is settled law that a lawful promise deliberately made to discharge a moral duty or to do an act of generosity can be enforced under the RDL Justa Causa Debendi to sustain a promise being something for wider than what the EL treats a good consideration for a promise.

Only the Civil Law Ordinance (1852) reflects the EL. Other than that, all other contracts are covered under RDL, which is the common law of Sri Lanka.

Conclusion on the Meaning of Causa –

The following may be treated as the meaning of Causa;

1. Seriousness or deliberateness of intention.
2. The motive or reason for a transaction and also, purely moral consideration.
3. The reasonableness objectively judged of the cause for a transaction.

6. The Terms of a Contract:

The Difference between Terms and Representation:

In the negotiation for a contract, Terms are *promissum* and the Representations are *dictum*. A representation does not become a contractual promise that gives a right to a claim. The decisive factor, as inferred by the Court is; whether it was intended by the parties that there should be contractual liability in regard to the accuracy of the term. E.g.:

Tradesmen's Puff used by vendors in extolling their goods does not form a part of a contract and are to be expected by any reasonable purchaser. But assertion regarding the quality of goods should be regarded as Terms of a contract, falling outside puffery.

The failure to comply with a Term will be a breach of trust. However, if the statement is a mere representation, the innocent party can only claim damages for misrepresentation or set aside the contract. In modern law, the distinction is not that important but relevant to the amount of damages recoverable.

Other Relevant Factors –
Whether a statement was made;

i. Merely in preliminary negotiations.
ii. To become a part of formal contractive writing.
iii. By a party who had special knowledge or skill compared with the other party.

Conditions in a Contract:

A condition may be a promissory one or be contingent. The latter is based on rising of an obligation only in some uncertain eventuality. An obligation will not rise until such an event happens.
London Passenger Transport Board v. Moscrop (1942) AC 332

English Law – Condition means an essential, promissory stipulation which will give right to the innocent party to sue, if not fulfilled. Thus it is in the sense of a term of the contract.

Roman-Dutch Law – A condition is a suspensive* or contingent stipulation which if fails, there is *ab initio* no contract at all.

*Suspensive:-

- If the parties agree that the performance of obligations under the contract is not enforceable until a certain condition is fulfilled, that condition is a *suspensive* one.
- A suspensive condition (or condition precedent), therefore, is one that suspends the operation of the obligation until the condition is fulfilled. If the condition is not fulfilled, the obligation is treated as void *ab initio*.

- Usually a suspensive condition must be fulfilled within a reasonable/ agreed period of time.

E.g.:

Father promises son to buy a car on passing his examination. The contract forms when these terms are agreed to, but the father's obligation to buy the car sets in only if the son passes the exam.

Warranty:

Used in EL as a term of contract, a breach of which gives rise to a claim for damages. A warranty is not so imperative so the contract will subsist after a breach. Modern RDL treats warranty similar to that of a condition in EL, which has major importance.

In Sri Lanka, the term shall take the meaning of either EL or RDL, based on what applies to a particular type of a contract.

See: Bettini vs. Gye (1876)

Jamis vs. Suppa Umma 12 NLR 33

Express Terms and Implied Terms:

The two principle sources of contractual terms are these.

Express Terms are those which are specifically agreed by the contracting parties. Implied Terms are those which are not explicitly agreed by the contracting parties but are implied in the contract by statutes, Courts or custom.

See: Banco de Portugal vs. Waterlow & Sons (1932)

Herbert Clayton and Jack Waller vs. Oliver (1930)

Terms Implied by Law –

Those which the Parliament has seen fit to incorporate in to contracts by statutes, which are not based upon the intention of the parties, but are the rules of law or public policy. E.g.: Unfair Contract Terms Act, Sale of Goods Ordinance, Carriage of Goods by Sea Act, etc.

By Common Law –

Broadly two types and are; implied in fact and implied in law.

A Scally v. Southern Health & Social Services Board (1992) 1 AC 294

By Customs –

A contract may deem to incorporate a usage or custom of the trade market or locality in which the contract is made.

Hutton v. Warren (1836) 1 NLW 466

Taltran Brown & Son Ltd v. SS Turlid (1922) AC 397

Exclusion and Exemption Clauses:

They are usually framed as a safeguard against losses that may occur.

- A term that excludes or restricts a liability or legal duty of a contract which would otherwise arise.
- Most frequent types are to exclude or limit liability for breach or negligence on a specific term.
- The exclusion clauses by being defined, the contractual parties have chosen to accept.
- The Courts have traditionally treated them as defence against a claim on breach of trust by the innocent party.

The party who includes such clause should overcome three hurdles;

1. The clause must be properly incorporated to the contract.
2. It must be property interpreted.
3. There must be no other rule of law that would invalidate same.

Methods of Impugning (challenging) Exclusion Clauses –

a. The Courts strictly insist that there must be sufficient communication of the terms prior to the contract without which, it will not be satisfied that such fact included in the contract.
b. Such clauses are strictly construed by the Court to provide redress to the burdened party.
c. The Courts apply the Fundamental Obligation Theory which disallows to seek refuge in an exclusion clause for the breach of the very purpose of the contract.
d. The Court seeks to delete terms which are wholly unreasonable.
e. An exemption clause may be subject to an earlier statement or be superseded by a latter express statement.
f. That there is no privity* of contract.

* Privity - connection or bond between parties to a particular transaction.

Communication of Terms:

Exclusion clauses must be incorporated into the contract and notice of such incorporation and the clauses must be communicated to the other party, before or at the time of contract. In contracts which are not signed, if reasonable notice is given of such incorporation of a particular clause, that is sufficient communication.

Grogan vs. Robin Meredith Plant Hire (1996)

Facts: The defendant entered into a contract with the company, Triact, by which the parties agreed to hire employees from the Robin Meredith Plant Hire to work at a Triact Project; the claimant was one such hired employee. The defendant requested the Triact management to sign a time sheet which recorded the working hours of their employees, at the bottom of which was an indemnity clause, requiring the Triact to indemnify the defendant against any liability incurred within the hire.

Issue: Was the indemnity clause at the end of the time sheet incorporated into the contact upon the Triact management signing it?

Held: 1. A time sheet is a document which is administrative in nature. Hence, no reasonable man would expect that terms included in such a document are contractual in nature. 2. Notice of a term after the contract's conclusion does not incorporate the term in the contract.

See also: L'Estrange vs. Graucob (1934)
Saunders vs. Angelia Building Society (1971)
Parker vs. South Eastern Railway (1877) - Reasonable Notice
Chapleton vs. Barry Urban District Council (1940) - Reasonable Document

Strict Construction:

An exclusion clause must be construed strictly, the benefit of any ambiguity given to the party against whom it is set up.

Contra Proferentem Rule –

Any ambiguity in a clause is against the party seeking to rely on such clause. Although this rule is applicable to any ambiguous term, it has been strictly applied to exclusion clauses.

Fundamental Obligation Rule –

At the heart of every contract, there is a core of basic or fundamental obligation failing which the contract loses its original character and identity altogether.

E.g.: Delivery of goods by carriers to persons not entitled to receive them.

Two different approaches are there;

1. Rule of Law Approach – it is not allowed by law, to exclude obligations deemed to be fundamental. A contract can be voided if a breach of a fundamental term can be found. Suisse Atlantique Societe d'Armament SA v. NV Rotterdamsche Kolen Centrale (1967) 1 AC 361

2. Rule of Construction Approach – a fundamental breach by an exclusion clause is found only through examining the reasonable intentions of the parties at the time of contract. Photo Production Ltd v Securicor Transport Ltd (1980) UKHL 2

Ordinary Jurisdiction of Court:

In contracts there may be exception clauses withdrawing disputes that may arise from ordinary jurisdiction of Courts with a provision for arbitration or exclusive jurisdiction of

a domestic tribunal. The Courts have jealously guarded their right to adjudicate upon such disputes in the past.

> "The right of a citizen to invoke the aid of the Court is so fundamental that it cannot be taken away by rules of any association or even the legislation itself. Such right also cannot be denied by any Court whose jurisdiction is invoked in proper proceedings"
>
> - *Basnayake CJ*

The strict intervention from the Courts relaxed since the last century, allowing the parties to exclude the jurisdiction of Court in very limited circumstances.

One such area is the arbitration agreements under Section 5 of the Arbitration Act of 1995, which provides that; if one party invokes jurisdiction of Courts in a contract agreed to be arbitrated upon and the other party objects, the Court is devoid of jurisdiction.

Another is the Mediation Boards Act whereby a dispute specified in the act must be taken up to a Mediation Board.

Therefore, in these cases, the Court will assume jurisdiction only if the Alternative Dispute Resolution Methods are unsuccessful.

Privity of a Contract:

The servants or agents of a party to a contract can claim benefit of an exclusion clause included by their principles.

Interpretation of Contract:

Objective Test –

Without considering the terms and proceedings of a contact, only the actual intent is taken in to account.

Most contractual disputes arise out of disagreements over the interpretation of a particular phrase in a contract and most of them hinge upon the precise and proper wording of the contract.

It is for the Court and not the parties to decide the proper interpretation of a term, should a dispute arise. The guiding principle is for the Court to ascertain and give effect to the intention of the parties. Their approach in regard to exclusion clause is to place obstacles to the party who seeks to exclude their liability to the other.

Bank of Credit & Commerce Int. SA v. Alli (2001) UKHL 8 / (2002) 1 AC 251

- Generally, the intention of the parties is to be ascertained from an objective assessment of the wordings and the surrounding circumstances of the contract.

  The Common Law methodology is not to probe in to the real intentions but to ascertain the contextual meaning of the relevant contractual language.

  It is the 'expressed' rather than actual intention that is sought, thus the wordings of the document are crucial.

Lovell & Christmas Ltd v. Wall (1911) 104 LT 85,Buckley LJ:

'For rectification it is not enough to set about to find what one or even both of the parties to the contract intended. What you have to find out is what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain.'

- The literal approach of the Court on a term of contract has shifted to a purposive approach in recent times with emphasis to the commercial purpose of the transaction. Deutshe Gemossensuhafts Bank v. Burnhole (1995) 1 WLR 1580

Parallel to the shift in drafting of statutes in the last few decades, there has been a movement from literal construction of contracts too, to a commercially sensible construction of contracts.

In Investors Compensation Scheme Ltd v. West Branswich Building Society (1998) 1 WLR 896, by Lord Hoffman; five modern principles of interpreting contractual documents are set out.

1. Interpretation is the ascertainment of the meaning of the contract to a reasonable man having all the background knowledge.
   (*What a reasonable man having all the background knowledge would have understood*).
2. The background is the matrix of facts including anything available to the parties as understood by any reasonable man.
   (*Where the background includes anything in the 'matrix of fact' that could affect the language's meaning*).
3. The law excludes any previous negotiations of the parties for the background.
4. The meaning which a document would convey to a reasonable man may not be the same meaning of its words.
   (*Where meaning of words is not to be deduced literally, but contextually*)
5. The rule that the words should give their natural and ordinary meaning (*It is presumed that people do not easily make linguistic mistakes in formal documents*).
   Mallai Investment Co v. Eagle Star Light Assurance Co Ltd (1997) AC 749 Total Gas Marketing Ltd v. Arco British (1998) 2 Lloyds 209

Specific Rules of Interpretation (by Hon. Weeramanrty) –

1. Words in a contract must prima facia be taken with their ordinary grammatical meaning.
2. The real intention of the party is preferred by the Court in constructing a document and has less regard to its literal sense.
   Gunathilaka v. Simon Appu (1918) 2 CeyLR 11

3. When a clause is capable of two meanings, the effective meaning which would confer validity should be preferred over the ineffective meaning.
4. Usage and customs must be taken in to account. A contract is understood to contain customary clauses although not express. The Evidence Ordinance also recognises this principle.
5. Clauses are to be interpreted in accordance with other terms in the same document.

Eiusdem Generis Rule – to restrict general words to things of the same nature of those already mentioned.
Vaithyalimgam v. Holland Colombo Trading Society 44 NLR 245

Noseitur a Soclis Rule – where two words of analogous meaning are together, each word must be understood according to the company in which they are found.

Contra Stipulatorem Rule – in case of doubt, a clause is interpreted against the promisee (who stipulates anything) and in discharge of the promisor (person who contracts the obligation). A civil law rule.

However, in ordinary contracts, both EL and RDL agree dual meaning would be interpreted against the stipulator and in favour of the other. Allegans Contraria Non Est Audiendus – a party is not permitted to take advantage of two conflicting clauses to his benefit in both possibilities.

Other Guidelines –
Equitable construction preferred (not give one party an unfair advantage over the other).

- Writing prevails over the print.
- Words prevail over figures.
- Plans preferred to deed.
- Body of deed prevails over the schedule.
- The operative part (of a deed) prevails over recitation.
- Earlier clause prevails over the latter.

Interpretation with Regard to Computation of Time:

If an act to be done within a specified time from a certain date, the specified date must be excluded for time computation.

Unfair Contract Terms Act No 26 of 1997:

The Purpose of the Act:

The purpose of this act is to prevent any party to a contract evading his responsibility to fulfil reasonable expectations of the other party by way of including unfair terms in the contract.

First Schedule **–**

Exclude following type of contracts.

i. Insurance.
ii. Land.
iii. .Intellectual property.
iv. Company or partnership.
v. .Securities.

Avoidance of Liability:

Section 3 – For losses caused due to negligence.

It stipulates such losses as;

(1) Death or personal injury.
(2) Other losses or damages that attract a reasonable claim.
(3) Inducing the other party to accept any risks.

Section 4 – A consumer, having to accept other's standard terms of business as *Terms of Contract* that circumvent liability.

Such terms are;

(a) Exclusion of liability for any breach.
(b) Claiming entitlement for non-performance or to differ from reasonable expectations of performance.

Indemnity Clauses:

Section 5 – Inhibits attempting to indemnify liability arising out of the performance of the contract. This flawed performance could be direct or vicarious.

Section 6 – refers to Guarantee* voidance clauses of consumer goods if proven defective whilst manufacture or in use.

*Guarantee - promise to make good, for /of the defects of a product.

Sale and Hire Purchase:

Section 7 – deals with excluding liability for not obliging the *Sale of Goods Ordinance* and the *Consumer Credit Act, No.29 of 1982*.

Effects of Breach:

Section 8 – even if the contract has been terminated by breach or repudiation, an effective contract term has to meet the requirement reasonably.

Section 9 – restricts evasion by means of secondary contracts with the same party.

Section 10 – elaborates on means to ascertain reasonableness.

Exemption Clauses:

To the same extent this act restricts evasion of liability, is also prohibits any restrictive clauses on the enforcement of liability.

Section 11 – restricts;

(a) Making the enforcement of liability difficult.
(b) Subjecting a person to disadvantage as a consequence of pursuing his right/ remedy.
(c) Exclusion/ restriction of evidence or procedure.

7. Vitiating Factors of a Contract

1. Error / Mistake
2. Misrepresentation
3. Duress and undue influence
4. Illegality

1. Error / Mistake:

Two types;

1. Contracting parties may each have something different in mind as the subject.
2. One party may labour under a mistake of subject which the other party may be unaware.

Both parties may be in mistake of something fundamental such as the very existence of the .subject matter. There is agreement but the contract may be held to collapse for want of content.

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Categories of Mistake –

- A person is said to do an act under mistake when his will is influenced by an erroneous belief.
- Erroneous belief could be in regard to the existence (or non-existence) of some

fact. Subjects of such erroneous belief could include mistake on;

1. Identity of a person.
2. Subject matter of the contract.
3. The nature, quality and quantity of the subject matter.
4. Nature of the transaction.
5. Motive.

Common Mistake – common to both parties.

Unilateral Mistake – mistake exists only on one party.

Mutual Mistake – both parties may be mistaken about the other party's intention.

Mistake may negate a contract in two distinct ways;

1. Mistakes that prevents formation of an agreement being made. This may relate to a term of the offer in which case, no contract comes in to existence. Error in regard to motive would not affect the contract.
2. Mistakes that nullify a contract that is already made. This could be due to some condition precedent to the operation of the contract. It is required to examine how

fundamental is the matter to which the error relates for it to be sufficiently basic to result in the failure of a condition precedent.

A mistake has to be a mistake of fact. It cannot be a mistake of law.
Hartog v. Collin & shields (1939) 3 AAR 566
Smith v. Hughes (1871) LR 6 QB 597
Shogun Finance Ltd v. Hudson (2003) UKHL 62
King's Norton Metal Co v. Edrige Merrot & Co (1897) 14 PLR 98

2. Misrepresentation:

Could be either innocent or fraudulent.

Definition – An unambiguous false statement of facts or law is addressed to the party misled which is material and induces contract.

The misrepresentation would have induced a reasonable person to enter in to a contract (or not have induced not to enter).

"A representation which is false in fact at the time it is made or in the case of continuing representation at the time it is acted upon".

- *Hon. Weeramantry*

Thus, prerequisites are;

1. There has to be representation.
2. Representation has to be false for it to be misrepresentation.
3. It should be a material fact.
4. The representation should induce one party to enter in to an agreement.

For a representation to be proper;

a. It cannot be an un-communicated statement.
b. It cannot be statements regarding future acts, intentions, opinion, beliefs, commendations, exaggeration or puffery.

Klein Benson Ltd v. Lincoln City Council (1999) 2 AC
349 Carlyle v. Carbolic Smoke-ball Co
Bisset v. Wilkinson (1927) AC 177
Asso. Petroleum v. Mardom (1976) QB 801

A claimant will be unable to show inducement where he;

1. Was unaware of the existence of the representation.
2. Knew that the representation was untrue.

3. Did not allow the representation to affect his judgement.

Innocent Misrepresentation:

It is neither fraudulent nor negligent, the represento honestly believed it to be true on the material date.

Remedy Available – Rescission and as a ground of defence, to a claim of specific performance.

Fraudulent Misrepresentation:

In Berry v. Peek (1889) 14 AC 337 Lord Hershel: fraud is proved when it is shown that; a false representation has been made;

i. either knowingly or
ii. without belief in its truth or
iii. recklessly careless.

whether it be true or false.

- For a false statement not to be fraudulent there should be honest belief that it is true

Remedy Available –

a. Setup the fraud as a defence
b. Sue for damages
c. Set aside the contract

Rescission for Misrepresentation:

Arises when the contract is set aside both retrospectively and prospectively. Aim is to restore the parties to the point where they were prior to the contact as much as possible and to ensure no unjust enrichment to one party. Rescission does not occur automatically therefore the representee should elect either to rescind or to affirm the contract.

2. Duress and Undue Influence:

Roman Law Definition – an act done in fear or force that the Praetor will not uphold. Duress exists when one acts (or forebear from acting) under fear of actual or threatened danger so compelling as to deprive freedom of will.

A contract entered to under physical or moral constraint is voidable at his option provided;

a. The fear was reasonable.
b. The threat was immediate and involved illegal conduct.
c. Some damage resulted from so entering in to the contract.

a. Fear Must be Reasonable –

In RDL, the fear should properly descend even on a steadfast person but age, sex, social standing etc., should be regarded. The test would be whether the person placed in the particular circumstance would have been influenced to act as he did.

b. The Threat Must be Immediate –
The threat must be so near that the victim cannot protect himself. If protection is possible, there is no duress. A party using its legal rights to induce fear does not entitle the other to avoid the contract.

c. Damage –
No restitution unless the person has sustained any damage.

- In EL, a contract entered in to under duress is voidable. There are three kinds of duress in common law
  1. Duress to the person.
  Barton v. Armstrong (1976)
  2. Threat to damage goods.
  Skeat v. Beale (1814) 11 AD & E 983
  3. Economic duress – party with superior economic power forcing the other illegitimately to agree to terms.
  The Siboen v. The Sibotre (1976) 1 Lloyds Reports 293

In R v. AG for England & Wales (2003) UKPC 22, Lord Hoffman stated: an unlawful threat is regarded as illegal but a lawful threat does not necessarily make the pressure legitimate. The PC envisages that; if a threat is unlawful, it amounts to duress; if the threat is lawful but used to support an unlawful demand, it may constitute duress.

Undue Influence:

Requires prior relationship between the parties most of the time.

Occurs where the consent of one party is not voluntary but influenced by an act not amounting to duress.

An equitable doctrine, it has emerged separate from the common law doctrine of duress; which Court views in two ways;

1. Focused on the claimant, relief given due to impairment of decision making process caused by excessive reliance on the defendant.
2. Looks to the defendant for some wrongful conduct on his part.

National Commercial Bank of Jamaica v. Hew UKPC 51, undue influence is one ground on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. The doctrine involves two elements; 1. There must be a relationship capable of giving rise to the influence and;

2. The influence generated by the relationship must have been abused.

Inequality of Bargaining Power:

EL gives relief to one who is without independent advice, bargaining power impaired due to needs, ignorance or infirmity, pressured under undue influence enters in to a contract for the benefit of the other.

In Sri Lanka, the Unfair Contract Terms Act No 26 of 1997 prevails.

4. Illegality:

Contracts illegal;

a. By Statutes
b. At Common Law
c. Due to Public Policy and morality

a. Contracts Illegal by Statute –

- Statutory prohibitions could be express or implied. They may declare certain contracts null and void or prohibit making of a contract in a manner other than specified under the pain of invalidity.

Mahmoud & Isphani (1921) 2 KB 731
Hull Blyth & Co v. Valliappa Chettiar 39 NLR 97

The Court has to deal with the question whether a statue imposes express prohibition or imposes a penalty for entering in to a class of contract. In the latter case, the precise terms of the statute which imposes the penalty should be carefully examined.

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- It is found that, statutes impose penalty yet does not prohibit the contract if it is made with a party innocent of the offence created by the statute.

  A contract is not invalid for illegality merely because it is contrary to the policy of an ordinance. It is so, if it contravenes with some specific provision of law. E.g.:

  The Excise Ordinance stipulates that liquor cannot be sold without a valid licence. This does not invalidate the contract if a buyer claims action against selling adulterated liquor to him by an un-licenced seller.

- A contract made otherwise than in the manner indicated by the statute would fall within the category of prohibited contracts thereby void.

  Fernando v. Ranmanathan 16 NLR 337, if the intention of the legislature is to merely discourage a contract by levying a charge, it presumably does not make the contract illegal. On the other hand, if the intention is to protect the general public by requiring compliance with certain terms or conditions, that indicates illegality.

- The question whether a particular transaction falls within the meaning of prohibitory statute should be evaluated case by case, based on the language of relevant act in its own footing.
  Kandasamy v. Kandaiah 57 NLR 115

b. Prohibited Contracts at Common Law –

i. Transaction in things extra-commercium (no commercial value) - Seashores, rivers, streams, state land cannot be sold thus, extra-commercium. Opium, drugs, firearms cannot be sold without a licence thus are 'relatively extra-commercium'.

ii. Contracts entered in to with fraudulent intention – A fraudulent deal is valid until cancelled at RDL. Such cancellation reverts to the date of the deal. E.g.: Paulian Action*.

*Paulian Action – an action given to creditors to obtain the revocation of activities done by their debtor in fraud of their rights. The action is based on the fiction that no alienation of the property had in fact taken place

.

c. Illegal Due to Public Policy –

Kiran Atapattu v. Janashakthi Insurance
Co Light Weight Body Armour Ltd. Vs.
SL Army

Public policy is a restitution cause which once gotten in, no knowing where it will lead to.

In Richardson v. Mellish (1824) 2 BING 229 at 252, Burroughs J stated: Although social concepts are ever changing, at any given point in time, there would be definite types of contractual clauses which law would condemn on grounds of public policy.

Contracts in Conflict with Public Policy:

1. Agreements in conflict with the interests of state in relation to;
   i. National security
   ii. Public service
   iii. Administration of justice

2. Agreements conflicting with morality.
3. Agreements restraining individual freedom.

i. In Relation to National Security – when two countries are at war, all legal relations between their subjects will seize and under the Common Law, any trading with the enemy alien becomes *hipo facto* illegal.

ii. Public Service – in the national interest, members of public service should be free of corruption. The Bribery Act has made offering of such gratification to a public officer a punishable offence.

iii. Administration of Justice –

a. All bargains to stifle criminal prosecution (by supressing investigations, deterring citizens from their public duty of assisting the detection and punishment of crime) are void and against public policy.

Fernando v. Piyadasa 61 NLR 566

b. Agreement to give or supress evidence of another in a pending law suit is illegal and is no valid consideration for a contract.

c. Agreement to commit or even abstain from a crime or delict is void.

d. Maintenance and Champerty – Maintenance is intermeddling with a pending civil action by an un-connected third party by assisting the plaintiff or defendant. Champerty is a form of maintenance to gain from the outcome of the pending civil action.

e. Intermeddling with suitors – interference with the litigant's right to retain the lawyer of his choice by promoting any other lawyer for a fee is a punishable offence under the Intermeddling with Suitors Ordinance.

f. Agreements to oust the jurisdiction of Courts – illegal and void, being contrary to the public policy. Exceptions exist with alternative dispute resolution methods such as Arbitration. Also, if an agreement only requires certain conditions precedent to be compiled with for right of action, it is not considered illegal. E.g.:
making an arbitration award a condition precedent to right of action (Section 5 of the Arbitration Act)
Vijiya Narayan v. Gen. Insurance Co 47 NLR 289

Agreements that Conflict With Morality:

Agreements relating to;

- Mess up or restrain marriages.
- Voluntary separation of husband wife.
- Marriage brokerage.
- Maintenance.
- Future succession.
- Usury.
- Wagering based on chance or uncertainty.

Swaminadan Chetti v. Douglas 32 NLR 293

- Restraint of individual freedom.

Finlays Rentokil v.Vivekananthan (1995) 2 SLR 346

Facts:-

A former Pest Control Supervisor having left the services of the Petitioner, engaged in the same business for purposes contrary to clause 15(h) of the Letter of Appointment.
Held:-
"...an injunction will not be allowed against an employee if it would force the employee working for the former employer or starve".

8. Termination and Discharge of a Contract:

Contracts may be terminated in four ways. They are, discharge by;

1. Performance
2. Agreement
3. Operation of law
4. Breach

1. Termination by Performance:

Performance of a contract is the discharge of duties assumed under the terms and conditions of the contract. The law enforces the duties to perform with no degree of divergence between the promise and the performance.

Time of Performance –

An insufficient time cannot be demanded for compliance and where no time limit is fixed, the law permits performance to be completed within a reasonable period of time depending on the circumstances of the case.

Abesiri Gunawardane v. Abesiri Gunawardane 43 NLR 469

Where the time is fixed, the performance should take place on or before the stipulated time. If it is a particular day, the time extends until the end of the day. Failure to do so automatically places debtor in breach. There is a presumption that a future date is fixed for the benefit of the debtor.

Place of Performance –

If specified, the performance and payment should follow the stated place. If not specified, recourse must be had to the ground rules of law for determining the place of performance. In EL, the debtor seeks the creditor. In RDL, the creditor seeks the debtor. This distinction of the law governing a particular type of contract is important in regard to determining the territorial jurisdiction of Court (as per Civil Procedure Code) trying an action for any breach.

Fernando v. Arunasalam Pillai 21 NLR 126
Dias v. Constantine 20 NLR 333
Srimanna v. New India Assurence Co 35 NLR 413
Hanifa v. Ocean Accident & Guarantee Corp 53 NLR 216

Proof of Performance –

The burden lies upon the person alleging performance to satisfy the Courts on balance of probabilities that he has rendered the performance.

Partial Performance –

A creditor is not under any obligation to accept part performance. What is done under the contract must be paid for performance, in its entirety.

The Party Who Should Perform –

It is usually the debtor or his Agent acting within the scope of his authority.

Under EL, an independent third party if not vested with same authority cannot act for the creditor. In RDL, even a third party who is not an agent can perform unless the performance is so personal that it can be properly rendered by the debtor.

To Whom Performance Should be Rendered –

It is generally to the creditor unless he requests a third party to be paid in which case, it is considered as a direct payment to the creditor.

{VCLIP 01:02:00}

Appropriation of Payment –

The question arises when more than one debt owing from one debtor to the same creditor exists and the payment made is insufficient to discharge the entire sum bill.

Appropriation of any payment or debt can be done by either the creditor, debtor or by the operation of law. E.g.:

when a person has two bank loans to settle and when a payment is made, to which proportions the two loans be settled.

Appropriation by Debtor –

The debtor's right to declare must form not only an intention to appropriate in a particular way but should be communicated to the creditor expressly or implicitly.

Appropriation by Creditor –

If the debtor does not appropriate, the creditor can settle within certain limits, but equitably.

- Either way, the appropriation should take place at the time of payment and not thereafter.

Appropriation by Law –

Operates if neither the debtor or creditor elects.

a. Of enforceable claims, the most onerous one must be selected.

b. If equally onerous, the older one must be settled.

If equal on both counts, it should be rateably reduced from the payment.

Ephrams v. Jans 3 NLR 142

2. Termination by Agreement:

May take the following forms;

a. Release of waiver
b. Compromise
c. Novation

a. Release or Waiver:

It is the discharge or acquittance of an obligation by the creditor either gratuitously or value.

All that RDL requires is a manifestation by the creditor of his intention to release the right and acceptance of that benefit by the debtor.

Release by Creditor –

It should be positive and not a matter of inference. However, it could be made implicitly by conduct.

E.g.:

If someone under a tenancy agreement does not come in to occupation, he by conduct releases the contract. If one issues a Cheque as a payment and the recipient never deposits it, by conduct he is saying that he will not enforce the contract.

The Effect of Release –

Release is operative between the contracting parties but not operative with regard to the rights of any third parties.

When parties mutually release each other whilst one party has carried out his part, the law presumes that the agreement to release includes an agreement to compensate for whatever the part already carried out.

Release and the Doctrine of Consideration –

- EL seeks consideration for release by mutual consent. It regards the abandonment of the right to performance by each party as sufficient consideration.
- EL also has another type of release known as "*accord and satisfaction*". Here, one party releases the other party from its obligations in return for some form of compensation. The agreement is the 'accord,' and the compensation is the 'satisfaction.' **{VCLIP 23:00}**

Presumption against Release –

The intention to waive a right or benefit someone is entitled for, is never presumed.

Fernando v. Fernando 33 NLR 313

Rex v. Devadas (1820) 33 Ram LR 45 at 49

"The presumption is against waiver. Though everyone is at liberty to renounce his entitled benefit or right by our law, his intention to do so cannot be lightly inferred, but must be clear from his words and conduct".

Basnayake J

Release of Principal and Surety –

The release of a principle debtor releases of sureties but not visa-versa unless it is clearly intended that way.

b. Compromise:

For an agreement to be described as a compromise there should be something uncertain, which is contested or may be contested in Court. There is no compromise without each party receding from his previous position and conceding something by diminishing his claim or increasing his liability.

Aiyampillai v. Sornammah (1942) 44 NLR 23

Effect of Compromise –

Compromise extinguishes the original debt and once in effect, the creditor's remedy is upon the compromise and not the original debt. But the compromise can explicitly mention that if breached, a party can fall back on the original cause of action.

Compromise by Lawsuits –

Once action is filed, parties can enter in to any lawful agreement or compromise. As per Section 408 of the Civil Procedure Code, if an action be adjusted by any agreement, it shall be notified to the Court by motion and a decree obtained in accordance with the agreement.

c. Novation:

Creation of a fresh contract extinguishing and replacing an existing contract.

Varieties of Novation:

i. Novation Proper –

Substitution of a new debt for an existing debt. A new and independent contract comes in to effect creating new obligations. There must be new elements found in the contract superseding the terms and conditions of the older contract. Mere variations of the terms of an agreement will not lead to novation.

AG v. Perera 12 NLR 161

Amarasooriya v. Elaris 45 NLR 488

ii. Delegation –

Substitution of a new debtor for an existing debtor. With the consent of the creditor, a new party substitutes the original debtor who is discharged from liability.

iii. Cession –

Substitution of a new creditor for an existing creditor. The contractual rights are ceded and replaced by another. Does not require the consent of the original debtor.

iv. Assignment –

Substitution of one original party by a third person who takes over both rights and obligations. The elements of both Delegation and Cession are involved in an assignment and the consent of all three parties is necessary to perfect an agreement.

- ❖ The difference between Novation and Compromise is that; in the first, if the original contract is invalidated, the novation too becomes invalid. In Compromise, the latter contract is valid and binding even if the validity of the original contract is in doubt.

3. Termination by Operation of Law:

A contract comes to an end in the following ways;

i. Set off – Compensatio
ii. Merger – Cofusio
iii. Impossibility of performance – Frustration iv.
iv. Prescription - Limitation
v. Insolvency (for a person)
vi. Winding up (for a company)
vii. Judgement
viii. Death

i. Set-off/ Compensatio:

In the RDL principle of Compensatio; if A owes money to B in one transaction and B owes money to A in another transaction, A is permitted to set off his debt against his credit to B. if his debt is larger than the credit, it will reduce the debt by the value set off. If the credit is equal to or larger than the debt, it will wipe out the debt altogether.

Muthunayagam v. Senathiraja (1926) 28 NLR 263

Compensatio is not a claim to set one demand against another but rather a defence or a plea that a claim is not sustainable on the ground that it has been extinguished to the extent of the counter-claim. Compensatio should be pleaded specifically and claimed.

In EL principle of Set-off; a debt is treated as being live (not extinguished). It permits the debtor at his option to pay or contest the claim, and institute a separate action for his debt if he so chooses.

For the operation of compensatio or set-off it is required that both debts should be;

a. Of the same nature
b. Liquidated
c. Fully due
d. Payable by and to the same persons with the same capacity.

i. Confusio – Merger:

One and the same person becomes the debtor and the creditor in regard to the same obligation.

E.g.: if a father owes a son, as a result of inheritance, that debt is passed back on to the son himself after the death of the father.

ii. Impossibility of Performance (Frustration):

Occurs in the following ways;

a. Supervening Illegality – may arise by legislation due to changing public policy.
Atkinson v. Ritche (1809) 10 East 513 – this case marks the first recognition of the SI.

b. Physical impossibility – when the subject matter of the contract is destroyed, the performance becomes physically impossible thus frustrated. Taylor v. Caldwell (1861) 3 B&S 826

c. Frustration of the Adventure – when the state of things the parties consider as basic or fundamental to the contract, is destroyed by latter events.
Krell v. Henry (1903) 2 KB 740
Chandler v. Webster (1904) 1 KB 493

Theories of Frustration:

a. Implied Term Theory –
There is a presumed intention of parties that the continued existence of the contract depends on the continuing existence of a person, thing or state of things.

b. Radical Change of Obligation –
Without default of either party, a contractual obligation becomes incapable to perform because the circumstances would render radically different results from what was undertaken.

In Davis Contractors Ltd v. Fareham UDC (1956) AC 696, Lord Radcliffe Stated: without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

Consequence of Frustration:

It does not render the contract void ab initio. The contract is deemed to be at an end when frustration event occurs and both parties are released from further performance under the contract.

Hiraji Mulji v. Cheongn Yugss Co (1926) AC 496

Parties Expressly Providing for Frustration:

Express provisions in the contract could be made for allocating the risk of unforeseen events. Where such provision is made, the risk will be borne by the party who undertakes it as agreed in the contract and the contract is not deemed to be frustrated by an event so expressly provided, taking place.

Frustrating events could be provided by a force majeure clause. When an event occurs which would otherwise frustrate the contract, force majeure clause comes in to operation but the entire contract is not frustrated.

Mohammed & Sons v. Zahiere Lye & Co 46 NLR 101

vi. Limitation of Action/ Prescription:

Prescription may operate to extinguish a substantive right or to bar the remedy.

Acquisitive Prescription – does not restrict the right of recovery by action but is in fact a mode of acquiring ownership.

Extinctive Prescription – merely bars the creditor's remedy on the lapse of a specified period of time. It is negative in operation depriving a person of power he possessed.

Prescription is governed by the Prescription Ordinance no 22 of 1871, last amendment 2 of 2014. Section 5 onwards relates to laws of obligation. Period of time is based on from;

a. Breach b. Cause of action

Section 5 - the recovery of any sum due upon performance of any agreement within ten years...

Section 6 - partnership, written promise, contract or agreement (not falling within section 5), unless such action shall be brought within six years...

Section 7 - the recovery of rent, or *mesne profit, or for any money lent upon any unwritten promise, contract, bargain, or agreement within three years...

* profits of an estate received by a tenant in wrongful possession and recoverable by the landlord.

Section 8 - any goods sold and ... labour done... within one year after the debt became due. Section 9 - Relates to any loss... within two years...

Section 10 - any cause of action not hereinbefore provided... within three years from the time when such cause of action shall have accrued.

If a cause of action falls within two or more sections of the ordinance, the principle of construction is that; the particular provision is to be given effect to over the general enactments or cause of action.

9. Breach and Remedies for Breach of Contracts

A breach of contract is committed when a party does not perform what is due from him or performs defectively or incapacitates him from performing, without any lawful excuse. The breach can take the form of words or conduct. Whether or not a particular contract has been breached depends upon the precise construction of the terms of the contract.

Anticipatory Breach:

- One party informs the other that he will not perform his obligation under the contract, before the time fixed for performance. His anticipatory breach entitles the innocent party to terminate the contract and claim damages at the date of acceptance of the breach.
  Hochester v. Delta Tours (1853) 2 E&B 678
- The innocent party who is not obliged to terminate the contract can elect to affirm the contract and demand performance at the stipulated time. This has two consequences;
  1. Innocent party can yet accept the breach, if the other party refuses to perform at the date fixed.
  2. Innocent party, in addition to affirming the contract may continue with his obligation, knowing that the performance is not wanted by the other party. White & Carter (councils) Ltd v. McGregor (1962) AC 413
- Unless and until the repudiation is accepted the contract continues in existence.

In Howard v. Pickford Tool Co Ltd (1951) 1 KB 417, Asquith LJ: an unaccepted repudiation is 'a thing written in water and of no value to anybody'.

Consequence of Breach:

Even the most serious breach does not automatically bring a contract to an end but gives various options to the innocent party. The extent of options depends on the seriousness of the breach.

There are three principle consequences;

1. The innocent party is entitled to recover losses suffered as a result of the breach. An action for damages depends on whether the term which is broken is a condition, warranty or an innominate* term.
   * An intermediate term which cannot be defined as either a "condition" or a "warranty".
2. The breach may entitle the innocent party to terminate further performance.
   This too may depend on whether it was a condition, warranty or an innominate term. If the obligations of the parties are independent of each other; this entitlement does not prevail. Breach of a warranty does not give the innocent party the right to terminate his performance but will only enable to claim damages. But the breach of a condition gives right to terminate plus claim damages, if the consequences of the breach are serious.

3. The party in breach is unable to sue/ enforce performance by the innocent party.

The Right of Election:

An innocent party has a reasonable time and the option to either;

a. Terminate the performance and claim damages, accepting the repudiation. But this decision must be communicated to the party in breach. OR
b. Affirm the contract and claim damages.

Once the decision is made to terminate or affirm, it is irrevocable.

Damages:

- Damage is the loss which a person has sustained or the gain he has missed. Constitute the pecuniary compensation obtainable by success in an action, either a tort or a breach of contract.
- Breach of contract, being a civil wrong, no punitive action is sought even though the defendant may have calculated that he will make profit on the breach.

Addis v. Gramophone Co Ltd (1909) AC 488

Facts: -

The defendant in breach of contract terminated claimant's services and replaced him with a new manager. The Claimant brought an action claiming that the level of damages should reflect the damage to his reputation and ability to find suitable employment. Held: - He is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more.

Reasoning: -

Contract law seeks to put the parties in the position they would have been in, had the contract been performed. He was therefore limited to claiming wages and loss of commission during the contractually agreed notice period. There was no right to 'damage to reputation' in contract claims. Such claims would have to be actioned in the law of tort.

- The award of damage is based on the near cost of reparation of same, had the innocent party not suffered from the loss. Damages should include both actual loss and loss of profit so the sum awarded place the plaintiff in the same position so far as money can do.

General and Special Damages:

- General damages refer to direct loss or gain missed by the plaintiff. They arise naturally in the normal course of things.
- Special damages are personal to the creditor which another person similarly placed may not have suffered. They occur under special and extraordinary circumstances beyond reasonable contemplation of the parties. Further, any special facts must be communicated between the parties and agreed upon, at the time contract is entered in to.

  Sproms Bruks Aktie Bolag v. Hutchinson (1905)
  David & Co v. Seneviratne 47 NLR 73

  Facts: -

  Parts of an oil engine were given by the defendants to the plaintiff for repairs. The plaintiff was not informed that the engine was in use and that special loss would incur if not repaired by a particular date. Plaintiff sued for the cost of repairs. DC awarded defendants Rs. 30.69 plus a sum of Rs. 1,500 as damages on plaintiff's bad work and delay, as the defendants could not work their mills. Decision: -

  At the appeal it was held: The claim of Rs. 1,500 for loss of profit for the non-user of the engine is remote and were the result of special circumstances which were not communicated to the plaintiff at the time of the contract, hence cannot be awarded.

{VCLIP 29:18} Nominal Damages:

A technical phrase which means that a party has no right for any real damage at all, but gives him the right to the verdict of a judgement because his legal right has been infringed. The main reason why a plaintiff strives for such award is the acknowledgement of Courts that a breach has occurred and that it entitles him to an order for costs against the defendant. The value could be one Rupee.

The Mediana (1900) AC 113 (The Owners of the Steamship Mediana v. The Owners, Master and Crew of the Lightship Comet)

Intrinsic Damages and Extrinsic Damages:

Intrinsic Damages –

Those directly related to the thing itself.

E.g.: A seller not getting money for the timber he sold.

Extrinsic Damages –

External to the thing itself which causes loss by resultant patrimonial loss to the estate of the creditor.

E.g.: the damage that results from a roof collapsing due to defective timber.

A person in breach of a contract is liable only for Intrinsic damages unless it appears that the Extrinsic damage was contemplated in the contract and either explicitly or implicitly submitted by the debtor.

Actual and Prospective Damages:

Damages for breach of contract includes not merely actual loss already sustained but also any future loss that may reasonably be anticipated to occur from the breach.

Liquidated and Unliquidated Damages:

Parties can agree on the mode of assessment of damages in the event of a breach. Liquidated damages are those fixed where the parties have quantified. The Court will regard this as the value of award whether they are actual or not. Unliquidated damages are those not quantified by the parties thus the Court has to decide.

Remoteness of Damage:

Any damage should be within contemplation of the party in breach. Modern EL set it out as follows;

In Hadley v. Baxendale (1854) 9 Exchequer 341,

Facts:-

The delay in delivering a machinery spare part caused the factory a temporary closure (not within the contemplation of the shipper).

Held:-

"In the breach of a contract, damages the innocent party ought to receive are to be reasonably considered arising naturally or have been in contemplation of both parties at the time of the contract made, as the probable results of a breach".

The mere communication of a special circumstance does not impose an obligation on a party to compensate the other through assumption of such responsibility. Victoria Laundry (Windsor Ltd) v. Newman Industries Ltd (1949) 2 KB 528

Mitigation of Damages:

It is the duty of the claimant to take all steps to minimise the loss consequent to a breach of contract.

Wimalasekara v. Parakrama Samudra Coop. Agri Production and Sales Society Ltd 58 NLR 298

The rule regarding litigation of damages constitute of three limbs;

1. The plaintiff should take all reasonable steps to mitigate his loss.
2. Where he does so, he can recover for loss and expenses incurred in so doing.
3. The defendant is liable only for the loss so lessened.

The Date of Assessment of Damage:

It is the date of breach, though not inflexible and depends on circumstances of the case. Jonson v. Agnew (1918) AC 367

Fraud or Deceit Accompanying Breach:

In such cases, the law awards compensation both in contract and tort. The guilty party becomes liable for both for breach of contract and damages on fraud.

Fraud brings an exception to the strict rule that a party is not liable for indirect damages beyond contemplation of parties.

Penalty vs. Liquidated Damages:

Dunlop Pneumatic Tyre Co Ltd v. New Garages Motor Co Ltd (1915) AC 79 summarises the rules distinguishing a penalty from liquidated damage.

1. The use of the word penalty or liquidated damage is a presumption and not conclusive.
2. Penalty is a payment not related to the damage. Liquidated damage is a genuine reestimate.
3. The distinction is a matter of construction depending on the terms and circumstances of each contract, not at the time of breach but contracting.
4. If the sum is extravagant and unconscionable in comparison to the greatest possible loss due to a breach; it is a penalty.
5. If one lump sum payment contains varying magnitude of damage, the presumption is; it is a penalty.

Interest:

Interest may be paid as damages or otherwise. If payable as a term of contract, it does not concern the topic of contract at all. If it is not included as a term but nevertheless awarded, it could be an interest as damages.

Law imposes limitation on the recoverable rate of interest. In RDL, it may vary with different class of lenders, customs and regions. In EL, no limit set to the rate chargeable by agreement, subject to statutory power of Courts to set aside or vary if the interest is excessive.

In Sri Lanka, the present statutory provision in regard to recovery of interest is in Section 5 of the Civil Law Ordinance which provides that;

a. Parties can agree to any amount of interest expressly provided in the contract.
b. In the absence of an agreement, the amount stipulated as the legal rate of interest can be recovered.
c. But the amount recoverable as interest or arrears of interest shall not increase the principle. Subject to this general provision, specific statutes may provide different rates.

Statutory Provisions of Sri Lanka Regulating the Interest:

The Money Lending Ordinance –

Section 2: the Court can re-open the transaction and take an account between the lender and the borrower where;

a. The return to be received by creditor is excessive, the transaction harsh/ unfair.
b. The transaction was induced by undue influence.
c. The lender took a promissory note or other obligation as security against the loan knowing it is a fictitious amount; or the amount due was left blank.

Section 4(1): if the return is excessive, the Court shall consider the reasonableness of the interest rate charged and

Section 4(2): provides what is unreasonable.

Section 6: defines undue influence.

MLO also rules that the interest shall not be in excess of the capitol.

The Debt Recovery Act No 2 of 1990 –

Section 30: Regulates the interest of lending institutes; defined. They are; licenced commercial banks, State Mortgage Bank, NDB, the Development Finance Co of Ceylon and any finance company registered under the Finance Companies Act.

Section 30 also provides that the Court can order the rate agreed upon by the parties or in the absence, order interest at the market rate, determined by the Monitory Board of the Central Bank.

Section 21: provides that; no action by a lending institution for the recovery of a loan shall be entertained by any Court, if the amount of interest exceeds the capital. Such loan be less than Rs. 250,000 and the recovery period over 5 years.

The Civil Procedure Code –

Section 192: provides that; if the parties have agreed upon the rate of interest, the award shall be from the date of the breach. If not it will be only from the date of filing action.

Personal Laws –

In Kandyan Law, the provisions of Civil Law Ordinance apply. In Tesawalamai, payment of interest is recognised. Muslim Law prohibits usury (interest) but in Sri Lanka, this issue has not received judicial consideration.

Compound Interest –

Both RDL and EL did not allow compound interest. But Sri Lanka law permits same if parties have expressly agreed or is implied by prevailing banking customs or allowed by statutes.

EL now provides compound interest if expressly provided in the contract.

Specific Performance:

A discretionary remedy under EL where the Court orders a party to perform in terms of the contract, where damages are not an adequate compensation. It differs to claim of damages which are a substitute to performance.

The plaintiff who sought remedy is entitled to the option of claiming damages instead, but the defendant has no similar right of election if ordered for specific performance.

The Principles for Refusal of Specific Performance:

Specific performance will not be granted;

1. Where damages are an adequate remedy.
2. When the Court cannot supervise the execution of the contract.
3. When the relief of Specific Performance is expressly excluded in the contract.
4. The contract is impossible to perform.
5. Unless the contract is certain.
6. Unless the contract is fair and just.
7. For want of mutuality.
8. Excluded by an alternative stipulation.
9. When plaintiff himself is guilty of delay in performing, not ready or not willing to perform his part of the contact.
10. In respect of contracts for personal work or service, except for strictly negative stipulations.

    E.g.: contract of Employment
11. Itself to an agreement ancillary to an unenforceable principal contract.
12. To enforce an illegal contract.
13. For a rescinded (cancelled) contract.

Injunctions:

Section 54 of the Judicature Act with Section 662 of the Civil Procedure Code sets out the manner in which injunctions can be granted. A person can seek an injunction where;

1. The plaintiff can show his entitlement to judgement against defendant restraining the commission of an act which will produce injury to the plaintiff.
2. The defendant during pendency of action is omitting or threatening to do an act in violation of the plaintiff's right.
3. Defendant removes or disposes of property with the intent to defraud the plaintiff.

In Felix Dias Bandaranayake v. State Film Corporation (1981) 2 SLR 287,the Court in deciding to grant an Interim Injunction should follow the sequential criteria below;

1. Has the plaintiff made out a strong prima facie case?
2. In who's favour is the balance of convenience?

3. Whether the conduct and dealings of the parties justified the grant of an injunction. Phoenix Industries v. Dept. Secretary to the Treasury (1994) 3 SLR 361

Rescission:

Upon repudiation or breach by one party, the other may elect to treat;

a. the contract being still alive or

b. to accept the repudiation or discharge and then rescind (cancel, annul or abrogate) the contract. This is Rescission.

When the relief of rescission is sought from Court, it means that the innocent party has already exercised his right of rescission but comes to Court to enforce it or enforce some other right which is disputed.

When a party claims rescission, he is entitled also to claim for damages arising out of the breach or repudiation.

Forfeiture Clause:

Permits a party to rescind the contract and the other party to forfeit (lose) all rights under the contract, if there is an express agreement to that effect, in the event of a breach.

Unjustifiable Repudiation:

Repudiation whether expressed or implied, which is known to the innocent party entitles him to claim rescission only if it is unjustifiable. If repudiation is justifiable, it does not give the other party a right of rescission.

Defective Performance:

Performance cannot be different to what was promised. Yet, in order to give rights of rescission or cancellation, the defective performance should be of an essential, foundation term of the contract.

In Mersey Steel & Iron Co v. Naylor (1884) 9 AC 434, it was held: the breach must go to the substance of the contract and the non-performance of a term is as substantial as failure to perform at all.

Restitutio In Integrum:

Restitution is available not only for the purpose of restoring innocent party to the position they would have enjoyed had they not entered to the contract, it is also a general remedy for restoration of *status quo ante*.

Under RDL, restitutio is a type of action by a party deserving to liberate himself from a contract. In EL it is achieved by a decree rescission of a contract.

Restitutio is also available to a party to liberate himself from a judicial decree affecting his rights which has been entered in consequence of fraud or mistake.

Under RDL following are the requisites to succeed in an application for restitution.

1. The plaintiff must be able to restore to the defendant whatever he has received under the contract.
2. The plaintiff must show either fear; fraud; mistake; misrepresentation; duress; undue influence; *laesio enormis*; contractual incapacity or absence.
3. The right to restitution should not be renounced expressly or implicitly.
4. The conduct, of the party seeking relief, should not disentitle him to relief.
5. Only a party to a contract or to legal proceedings may claim such relief.
6. Restitution is not allowed unless the party can show actual damage, loss or prejudice to him.

Restitutio in Respect of Court Decrees:

This remedy has been invoked to set aside judicial decrees such as those obtained by fraud, entered by mistake, consented to under threat of dismissal of action by a judge or a compromise by the Attorney acting in contrary to client's instructions.

Restitutio of a Decree:

In addition to the above principles applicable to contracts; the following are for the relief from the effects of judgements.

1. No other remedy such as appeal or review should be available for redress.
2. Only a party to a legal proceeding can claim this release.
3. Restitutio will not be granted on the ground of error unless it is so vital that it has altered the whole aspect of the case.
4. This remedy is not a right but an act of grace and discretion of Court.
5. The relief must be sought without any undue delay.

Quasi Contracts:

There are cases founded neither in contract or Delict in which law considers that a person is under legal obligation to reciprocate for a benefit received from another. This is distinguished from contractual obligation in that; it does not originate in expressed or implied consent.

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Negotiorum Gestio:

A Roman Law term to describe a transaction in which one person renders a service to another without mandate or legal obligation. Some principles applied are;

1. The work should be undertaken without the knowledge of the owner. If he is aware, it becomes a mandate or agency.
2. The management should have been undertaken for the benefit of the principal.

3. The principal may claim from the *Gestor* all property, capital, fruit, interest or profit that has come in to his hand as a result of the administration.
4. The Gestor must have reasonable cause to presume that there may be ratification on the part of the principal.

Unjust Enrichment:

In Fibrosa Spolka Akeyine v. Fairbairn Lawson Combe Barbour Ltd (1948) AC 32 at 61, it is stated: "it is clear that any system of law is bound to provide remedies to prevent a man from retaining benefit derived from another, which is against conscience that he should keep".

Unjust Enrichment is given a definite status of an obligation to restore property or make payment to the extent of the enrichment.

Principles Applicable for Action against Unjust Enrichment:

1. The defendant must be enriched and the enrichment must not be permitted by law.
2. Loss must be caused to the plaintiff thereby.
3. The enrichment must be unjustified i.e. the benefit received must not have been due.
4. There must be no rule of law (even if the above three requirements are fulfilled), preventing the person who suffered from recovering.
5. The enrichment must not be in fulfilment of a contractual obligation of the impoverished.
6. The case must not fall within an already existing action.

Therefore, the principle of unjust enrichment presupposes three things;

1. The defendant has been enriched by the receipt of a benefit.
2. The enrichment should be at the expense of the plaintiff.
3. It is unjust to allow the defendant to retain the benefit.

Examples where this principle is applicable –

a. Delivery of payment in error or under void or voidable contract.
b. Non-performance or partial performance of a contract fulfilled by the other party.
c. Improvements to one's property by another.

Situations where Unjust Enrichment Not Granted:

1. A party who makes payment or delivery under a mistake of law (as opposed to mistake of fact, which grants entitlement) is not entitled to restitution.
2. An error arising from gross negligence.
3. The right to recover has been specially renounced.
4. Payment under mistake is not recoverable where it is made by a valid compromise of a disputed right.
5. Payment made in terms of a judgement is not recoverable until/ unless the judgement is set aside.
6. The knowledge that the debt was not due at the time of payment.

Quantum Meruit:

It is the payment of a reasonable price or remuneration to be made, where none is fixed by the contract.