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## A COMPARATIVE STUDY OF THE STAGES IN THE LIFE OF A CONTRACT UNDER THE SPANISH LAW AND THE AMERICAN LAW

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### CHAPTER I

#### INTRODUCTION

History tells us that man is one of the greatest creation of Divine Providence; that among the seven elements which formed the subject of its creation he is one among those endowed with peculiar gifts and characteristics, the one endowed with reason, the being which deserved from its omnipotent power the right to ever develop, and to ever prosper. By virtue of these peculiar endowments, thus he differs from the irrational beings, the brutes, and the lot of inanimate objects which embellish this immense universe, making of the latter sole instruments for his progress, and sure means to attain his happiness and to endure his enviable existence. Thus, Aristotle has said: "that man is by nature a social animal"; and Paulus, in his deepest appreciation of things' development: "that man cannot exist without law." By nature then he is destined to progress and by necessity he has to live with and deal with his fellow beings so as to ever acquire what he needs for his subsistence, and make his life more easy and comfortable. From this imperative need of man's natural tendency, the contracts among individuals came into existence. For the accomplishment of the use of these contracts, the early people knew of no other rules than equity, nor of other means than good faith to carry into effect their agreements, (Viso, Vol. 2, p. 15); but as men are susceptible of fraud and injustice, it became necessary for the law to intervene to give rules to impede the effects of these pernicious fancies and to secure the due execution of the contracts that may be entered into by the parties. In this way, what has been but a mere act between private persons, which rested exclusively upon their free will, it came to merge into a civil obligation conferring a right upon public authority to intervene in its form and to make effective its fulfillment in case of failure of any of them. To meet this necessity, the law on contracts had its origin in the Spanish and American legislation as well as in other civilized countries of the world.

A contract, according to Civil Code, Article 1254, exists from the moment when one or several persons consent to bind himself or themselves, in respect to another or others, to give something or to render some service. From this definition, thoroughly and carefully analyzed, it can be inferred three different stages which constitute the life of a contract in general, and that in the language of Manresa and Sanchez Román, they are: (1) Birth or Preparation (*generación*); (2) Perfection, and (3) Consummation. (8 Manresa, page 617; IV Sanchez Román, pages 235, 249.) These are the stages of the life of a contract, as they now stand, under the Spanish Law. Under the American Law the writer has found himself at a stake in his researches and was handicapped greatly in his preparation by his inability to find, at first, the stages of the life of a contract under the American Law, and later he realized that no one has so far attempted to point them out distinctly and specifically. The writer, however, is of the opinion that what the authorities on contracts name in their treatises as Formation, Operation, and Discharge, constitute the stages in the life of a contract under the American Law. To the discussion and comparison in general of these different and respective stages as they stand under both laws, this work is carefully devoted to.

## CHAPTER II

### PREPARATION (SPANISH LAW)—FORMATION (AMERICAN LAW)

I. (a) *Spanish Concept*.—As neither the Civil Code, nor its distinguished commentators give any definition of Preparation but only an idea of its meaning, the writer will only limit to give an idea of its nature, in his way of thinking after due regard to the opinions given by commentators. The period of preparation may be defined to be: "that which includes the time in which the intention of making an offer was borne in the mind of the offerer and made known to the person offered, and the time in which the person offered shall have communicated the offerer his acceptance." Therefore, all transactions which may give occasion to communicate the offer of a person to another and the acceptance of such offer by the latter to the former, formed what we call the stage of Preparation. Manresa calls this stage "*Proceso preparatorio*" (preparatory process) while Sanchez Román calls it "*Proceso Constructivo*" (constructive process). (8 Manresa 617; IV Sanchez Román 235.)

(b) *American Concept*.—Formation under the American Law is the period wherein all the steps leading to the creation of a contract take place or, as the word itself indicates, it is the stage wherein the contract is formed. From this concept it may be said that all the steps which the prospective contracting parties may undertake to do with all their incidents leading to the creation of a contract and until this effect (creation) is accomplished, constitute the nature of Formation.

The appreciation as to whether the concurrence of the offer and its acceptance exists is a question of fact for the court. This is in accord with a decision rendered

on March 9, 1866, by the Supreme Court of Spain. (8 Manresa, 632.) The question whether a given transaction has resulted in a contract or not is one of law for the court. (Bishop on Contracts, Sec. 322.)

## II. GENERAL CONSIDERATIONS OF PREPARATION AND FORMATION

### A. Under Spanish Law—

a. Elements of Preparation.—There are two elements constituting preparation, i. e., the offer and the acceptance. Both have their origin from two psychological forces: the intelligence and the will which, if found in complete accord in the contracting parties, produce the consent, the basis of all contracts. (IV Sanchez Román, 235.) This is also true considering the provisions of Articles 1258 and 1262 of the Civil Code.

### B. Under the American Law—

a. Elements of Formation.—There can be no contract in the true sense, as distinguished from quasi-contracts, in the absence of the elements of agreement of the parties. This above all, perhaps, is an essential element of every contract. (Corcoran vs. White, 57 Am. Rep. 858; 9 Cyc. 245; Page on Contracts, Vol. I, Sec. 22.) It is necessary therefore to ascertain the elements of agreement. Every agreement, whether written or oral, springs from offer and acceptance. Although, as Pollock has said, there are exceptions to this rule, however, they are governed by the general rules applicable to offer and acceptance, and for this it may be said that an offer of terms on the one side and acceptance of these terms on the other communicated between the parties constitute the elements of an agreement. (Hanson vs. Nelson, 82 Minn. 220; Pollock on Contracts, p. 516.)

b. Definition and Kinds of Offer.—An offer, as the term is used in the law of contracts, is a proposal to enter into a contract. (Black Law Dictionary; Bouvier Law Dictionary.) The process of offer may take place in four ways: namely, where there is an offer of (1) a promise for assent; (2) an act for a promise; (3) a promise for an act; and (4) a promise for a promise. (Anson on Contracts, p. 12.)

(1) One may offer to make a promise if the offeree will assent to it. But this kind of an offer, to result in a binding contract, can be made only under seal, as no promise without a consideration is binding upon the promisor. (William vs. Forbes, 114 Ill. 167); (2) The offer of an act for a promise takes place where a man offers goods or services to those who will promise to pay him for them as, for example, the sending of goods to another; the doing of work for another with his knowledge, etc. (Day vs. Cator, 119 Mass. 513); (3) The offer of a promise for an act takes place in the case of advertised rewards for the recovery of property or the apprehension or detection of a criminal; or the request of one to another to do work for him and similar cases. (Vigo Agricultural Co. vs. Brumfield, 102 Ind. 146); and (4) The offer of a promise for a promise is the common case of one to another to do something if the other will promise to do something for him, or in consideration of the promise. (9 Cyc. 247.)

c. Necessity for Acceptance and who may Accept.—Before an offer can become a binding promise and result in a contract it must be accepted, either by words or acts, for without this there can be no agreement. " (9 Cyc. 254.) When an offer is made to a particular person it can be accepted by him alone and is not assignable to another. (*Boston Ice Co. vs. Potter*, 123 Mass. 28); a general offer made to the public or to a particular class of persons may be accepted by any one or by one coming within the description of the class. (*Seymour vs. Armstrong*, 62 Kan. 720; 9 Cyc. 255.)

### C. Spanish View as to Forms of Offer and Acceptance

The offer as well as the acceptance may be verbal, written, pure, conditional, with a period, conjunctive or alternative. Both may also be between persons present or absent. The offer may also be made to a determined or undetermined person, and, finally, the acceptance may be express or implied. (IV Sanchez Román, 237.) Due to the importance which these forms of making the offer and the acceptance may bring into the perfection of contract, the writer has deemed proper to make a brief discussion of each of said forms.

Verbal and written forms of offer and acceptance are explicative by themselves and need no further explanation.

Pure offer and acceptance are those which contain no condition and which make the contract perfected by their mere concurrence. It is therefore necessary to know whether the offer and acceptance are pure in order to know the time in which the perfection of the contract takes place.

Conditional Offer and Acceptance.—It is important to know the nature of the condition involving the offer or the acceptance, because there are various conditions of different nature and of different effects and because the perfection of the contract lies chiefly, if not wholly, on the condition or conditions imposed. For example, in a contract for sale with a condition precedent, the legal perfection will depend not only on the mutual consent of the vendor and the vendee on the things sold and price, but also on the compliance with the conditions, without which the contract produces no reciprocal rights nor obligations. (IV Sanchez Román, 527.) Hence, the importance of determining the nature of the conditions imposed, and of complying with the same in order to produce the perfection of the contract.

Offer and Acceptance with a Period.—It is also important to know the nature of the period imposed on the offer and the acceptance, as the period that may be imposed may also be of different nature and of different effects. Period is a portion of time which influences in the perfection and termination of the legal relations. The difference of such influence is determined by the nature of the period which may be either suspensive or resolutive, and which, according to Roman jurisprudence, is called *ex die* or *in diem* (from or up to a certain time). The first helps in the perfection of the legal relations because unless complied with, the rights which are the consequence of such a perfection are not binding; and the second causes the termination of the legal

relation created by the contract, and with it cease all the rights derived therefrom. (II Sanchez Román, 536.) Thus, it is necessary to determine the nature of the term for its due compliance and to know the time of the perfection of the contract.

**Conjunctive or Alternative Offer and Acceptance.**—Neither the commentators nor the existing laws mention of what these offers and acceptances consist. They only make a reference to the effect that the theory of conjunctive and alternative obligations is also applicable to conjunctive and alternative offer and acceptance, and for this reason the writer was forced to form his own idea of the nature of said forms considering the theory referred to. Conjunctive offer is that which consists of various propositions united by a copulative particle, but that the acceptance of them all is necessary to produce the perfection of the contract. By analogy it may be said that conjunctive acceptance is that which consists of various propositions united by a copulative particle, and which formed new propositions for offerer, full acceptance of which is also necessary to produce the perfection of the contract. Alternative offer is that which consists of various propositions united by a disjunctive conjunction, but by the acceptance of any of the propositions is sufficient to perfect the contract. By analogy, it may be said also that alternative acceptance is that which consists of various propositions united by a disjunctive conjunction and which constitute new propositions for the offerer, a partial acceptance of which is sufficient to perfect the contract. (II Sanchez Román, 535.) From the foregoing it is evident that it is necessary for its due acceptance, to distinguish whether an offer or an acceptance is conjunctive or alternative, otherwise there may or may not be concurrence of will and may result in default of the perfection of the contract.

The offer and the acceptance are considered to have taken place between persons present when they have been communicated by both parties in the same place and at the same time; and between absent persons, when the offer and the acceptance have been made within a certain period, finding both at different places, as happens in the contract by letter or telegram. (IV Sanchez Román, 237.)

Verbal form may also be made by telephonic communication. The Civil Code is silent on this point. However, in my opinion, it seems that it admits it, though indirectly considering the provisions of Article 1278 of the Civil Code that contracts shall be binding whatever the form may be in which they have been entered into, provided the essential conditions required for their validity are present. This shows that the agreement through telephone is admissible in this legislation if said requisites or conditions are present. This form, however, offers some possibility of danger, because there may intervene in the conversation a third person, a possibility exposed to suspicion or fraud which as all other questions of fact is for the court to determine. (IV Sanchez Román, 237; 8 Manresa, 636.)

**Offer and Acceptance by Letter.**—This form is indirectly recognized by the Civil Code in the Article 1262, par. 2, which says: acceptance made by letter only binds the person who made the offer when it came to his notice. From these provisions of

law it is inferred that this form of making contract is admitted in this legislation, but the perfection of the contract does not take place until the acceptance is made known to the offerer. (*Gamboa vs. Ronsalez*, 17 Phil. 381.) The Code of Commerce also recognizes this form of making contract in its Article 54 which says that contracts executed through correspondence shall be completed from the time an answer is made accepting the propositions or the conditions by which the latter may be modified.

**Offerer and Acceptance by Telegraph.**—The Civil Code is also silent in this respect. But owing to the similarity of circumstances surrounding civil and mercantile transactions and considering the fact that the Code of Commerce recognizes this form of transaction, it may be said that in civil contracts this form may be used even without the requirements contained in Article 51 of the Code of Commerce, which provides that telegraphic correspondence shall only be the basis of an obligation between contracting parties who have previously admitted this medium in written contract, and provided that telegrams fulfill the conventional conditions or tokens which may have been previously fixed by the contracting parties if they agreed thereto. The reasons for this conclusion are the following: (1) Because the usefulness and importance of the telegraph at the present time as a means of communication cannot be denied; (2) Because the Civil Code in Article 1278 recognizes the fact that all contracts are binding whatever the form may be in which they have been entered into, provided the essential conditions required for their validity are present, wherefore a contract entered into through telegraphic communication is valid provided the essential conditions are present. (IV Sanchez Román, 238; 8 Manresa 635.)

Offer may also be made to determined or undetermined person. As the first case is the most common it warrants no further comment. As to the second form, also called "pluri-personal offer," it is enough to say, that in general it is similar to unipersonal offer, except in the case where in the former several persons are bound by the tie of solidarity. If this is not the case, but each person is independent to the others it is immaterial that the offer be made to all or any of them, because in such a case the legal relation which may arise from each acceptance is autonomous. This happens when a commercial firm announces to sell its goods at public auction and makes offers of contract to the public in general, by circulars, advertisements, and by other means of publicity. In this case, there is a pluri-personal offer or to an undetermined person and anybody may accept said offers without the others being affected. It does not so happen when said offers were made to the creditors in solidum of said firm; in which case the acceptance made by one is binding upon the others. (IV Sanchez Román, 240; 20 Scaevola, 590.)

Finally, the acceptance may be express or implied. It is not necessary for the perfection of the contract that the offeree should reduce into writing his acceptance for he may also do it impliedly, i. e., by facts which, if reasonably interpreted, an acceptance therefrom may be clearly inferred. (IV Sanchez Román, 239.)

D. *American View as to Forms of Offer and Acceptance—*

a. *Of Offer.*—The offer may be made either expressly or impliedly. Thus, offers by expressed words, an option to a town to buy a water-works company; an offer made by a city ordinance to perform the conditions of the lease to be assigned, etc. (*Braintree, etc., Co. vs. Braintree*, 146 Mass. 482; *Curtis vs. Forthmouth*, 39 Atl. 439.) The offer may be made impliedly or by acts as well as by words, such as if one person performs work and labor for another of a sort for which compensation is customary, intending to charge therefor, and the person for whom the work is done has requested impliedly before the doing of such work, that it should be done, or after it was done, has voluntarily accepted the benefit arising therefrom, the person for whom the work is done is liable to the person who does it. (*Lafayette Ry. Co. vs. Turker*, 124 Ala. 514; *Page on Contracts*, Vol. I, Sec. 29.)

*Communications by Letter.*—Negotiations which finally culminate in a contract may also be carried on entirely by letter. (*Kimball vs. Moreland*, 55 Ga. 164.) There is no dispute as to whether or not contracts can be so formed. The only question to be determined in such instance is whether the correspondence shows an agreement upon which the minds of the parties met or whether the negotiations are inchoate and imperfect. If the latter is true there is of course no contract. (*Bissenger vs. Prince*, 117 Ala. 580; *Elliott on Contracts*, Vol. I, Sec. 44.) One who makes an offer by mail constitutes thereby the post-office his agent for its transmission. (*Bishop on Contracts*, Sec. 328.)

*Communications by Telegraph.*—There is but little, if any, difference between the rules governing contracts formed by correspondence through the post-office and those governing contracts made through communications by means of the telegraph. (*Minnesota and Oil Co. vs. Collier & Co.*, 431 Fed. Cas. No. 9635.) It is universally considered that people may contract by means of telegraphic messages. (*Utley vs. Donaldson*, 94 U. S. 29.) Contracts thus formed are governed the same as all other contracts, by the general rules relative to offer and acceptance. A telegram, in order to constitute an offer, must be made with the intention to form a legal obligation or relation. It must not be intended only as a preliminary negotiation. (*Strobriedge Lithographing Co. vs. Randall*, 73 Fed. 619.) The telegrams sent and received must be final, free from fatal ambiguity or indefiniteness, and sufficiently designate the parties. And the answer must usually be given promptly in order to form a binding contract. In short, they must show all the essential elements of the contracts. (*Martin vs. Northwestern Fuel Co.*, 22 Fed. 596; *Elliott on Contracts*, Vol. I, Sec. 45.) In the United States a party making an offer by telegraph is responsible for the correct transmission of his message and is bound by it in the terms in which it is delivered to the party addressed. (9 Cyc. 294.)

*Communications by Telephone.*—Contracts may be consummated by means of telephonic conversations. When a person places himself in connection with another by means of the telephone system he thereby invites communications relative to his

business through that channel. In a recent case, referring to an argument against the validity of such a contract, it was held: "If by this is meant that a contract cannot be made by telephonic conversation it is too late to so argue. A large part of our business transactions are, in this century, carried on by telephone. Our courts have long ago held that contracts made by telephone are as effective and binding in law as if made verbally between the parties standing face to face and carrying the conversation which culminates in the contract." (*Saint Louis Maple & Co. vs. Knust*, 128 S. W. 532; *Elliott on Contracts*, Vol. I, Sec. 46.)

b. Of Acceptance.—(1) The party making the offer may prescribe a mode in which acceptance must be made, if at all. Unless the party making the offer subsequently modifies his requirements, expressly or impliedly, he cannot be bound by an acceptance in any other form. (*Wishell vs. Bresnahan*, 24 Atl. 885.) In case the party to whom the offer is made has done all that is prescribed in the offer as requisite for an acceptance, the offer is accepted whether the party offering has actual knowledge of the acceptance or not. (*Second National Bank vs. Dufendorf*, 90 Ill. 393; *Page on Contracts*, Vol. I, Sec. 48.)

(2) Where the offer does not prescribe any specific manner of acceptance, any form of communicating the intention to accept the offer, made to the offerer or his duly authorized representative is sufficient. (*Summers vs. Hibbard*, 153 Ill. 102.) Thus, when one communicates his acceptance by express words, either orally or in writing. (*Fairmount Glassworks vs. Wordenware Co.*, 106 Ky. 659; *Page on Contracts*, Vol. I, Sec. 49.)

(3) The party accepting an offer may as well signify his assent to an offer, by doing acts which clearly show such assent, as by express words. If such acts are done with the knowledge of the party making the offer, they amount to an acceptance thereof. (*Witnay vs. Wyman*, 101 U. S. 392; *Page on Contracts*, Vol. I, Sec. 50.)

(4) The acceptance can also be made by mail or telegraph.—But in order to bind the offerer, it is necessary that he must have actual knowledge of such acceptance unless when he has required, either expressly or impliedly, that the acceptance be made in this way in which case the mailing or sending of the letter of acceptance is enough as will be seen later. (*Adams vs. Lindsell*, 19 Rev. Rep. 415); and finally it can also be made by telephone. (*Smith vs. Ingram*, 90 Ala. 529; *Page on Contracts*, Vol. I, Sec. 52.)

#### E. Requirements to Constitute Perfection under Spanish Law—

a. Identity Between Offer and Acceptance.—Offer and acceptance are two correlative ideas; the former qualifies the latter and only when this is wholly in accord with the former where the consent is produced, hence, the perfection of the contract. There should therefore be an identity between offer and acceptance. There are two kinds of identity: Internal and External.

Internal Identity.—This refers to the conformity of the parties with regard to the *persons*, the *things* and *nature* of the contract. To understand each of these

kinds of identities it will suffice to give an example which will serve as an illustration of each kind: (1) If A proposes to B to recognize a debt to C, and B accepts the proposal but in favor of D, in this case there is no perfection of the contract because there is no meeting of the minds with respect to the person which is the subject of the contract; (2) If A proposes to B to buy a horse with certain characteristics for a certain price, and B accepts it with a different price, in this case there is neither perfection of the contract, there being no identity of minds with regard to the price constituting the object of the contract. (Roman *vs.* Grimault, 6 Phil. 96; Yu Tek & Co. *vs.* Gonzalez, 29 Phil. 384); (3) If A proposes to B to loan him a horse in lieu of his service, but B accepts the service under the condition to give him the horse as a donation, in this case there is neither perfection of the contract, because there is no identity of minds as to the nature of the contract. (IV Sanchez Román, 236.)

*External Identity.*—This refers to the agreement of the parties as to the *circumstances* which may affect or be imposed upon the offer and the acceptance as to the *time* within which the minds of the parties should meet, and as to the *external form*, general or special, in which according to law the offer and the acceptance have to be made, if the offer or acceptance as the case may be, so demands.

Identity as to the circumstances of the case takes place when the offer or acceptance is accompanied by certain conditions, upon which depends the validity of the contract, or with a period or other circumstances of mode and place and there had been a conformity between the parties as to them. In this case, it is to be noted, however, that it is not only important that there should be identity, but it is further necessary to determine the nature of the circumstance imposed, for in most of the cases not only upon the identity but upon its compliance depends the perfection of the contract. (IV Sanchez Román, 237.)

*Identity as to Time.*—Generally, offer and acceptance are made simultaneously, specially if the contract is made between persons present and there is no reservation to accept or decline to offer within a certain period of time. In case there is such a reservation, and if the contract is to be made between persons absent, there intervenes a new factor, i. e., certain time which elapses between the offer and the acceptance. Now then, within which period the acceptance should be made? This depends whether or not a period has been fixed by the offerer in which acceptance should be made. Should there be a period fixed in the offer, then the acceptance must be made within that period, otherwise, the acceptance made after the expiration of that period will not result into the perfection of the contract, and is, therefore, not binding upon the offerer. Hence, the importance of the identity with respect to time within which the acceptance should be made. (IV Sanchez Román, 239.)

*Identity as to Form.*—Although it is true that the Civil Code and the Code of Commerce require no form for the perfection of the contract as may be seen later on, however the offer may require as a requisite for the validity of the contract, that it be clothed with certain forms provided for by law. Such as when the offer

requires that the contract be embodied in a public instrument, or the same be registered in accordance with the provisions of the Mortgage Law. In either case the form should be regarded as a condition precedent to the perfection of the contract. (IV Sanchez Román, 249.)

Acceptance must be Absolute.—In order to produce legal effect, the acceptance must be in a perfect accord with the terms of the offer without any addition, restriction or modification; in other words, it should conform entirely to the terms of the offer. Otherwise, there would be no valid acceptance, but a new proposition which must also be accepted fully by the original offerer, in order to produce the perfection of the contract. (IV Sanchez Román, 235; 8 Manresa, 635.) This theory is confirmed by a decision of the Supreme Court of Spain, October 2, 1867, in declaring that a proposition accepted conditionally is not binding, unless said condition is accepted in turn by the original offerer. Acceptance made in this form is equivalent to a new proposition which the offeree proposes to the original offerer and such is the spirit of Article 1293 of Mexican Code in providing that: “\* \* \* if the acceptance imports a modification of the proposition, the same is considered as a new proposition” and Article 654 of the Portuguese Code in providing that: “\* \* \* when the answer involves a modification of the offer it will be considered as a new proposition.” (20 Scaevola 590.) However there are special cases wherein acceptance of one of the propositions contained in the offer may produce the perfection of the contract, but this depends upon the nature of the offer. If it consists of two propositions, one a lease of land and the other a sale of another land, which are divisible and independent to each other, in this case the acceptance of one will produce the perfection as far as the accepted part of the offer is concerned. Not so if the propositions in the offer are indivisible. From this clearly follows that to produce the perfection of the contract there must be an absolute acceptance of the terms of the offer.

F. *Requirements to Constitute Operation under American Law.*

a. Of Offer.—The offer which by acceptance can become an agreement must have the following qualities:

1. It must purport to create liabilities which are legally enforceable. Thus it is often said that offers purely social or religious in their nature cannot form the basis of a contract even if all the other elements are present. (*Sweeney vs. Supply Co.*, 121 Ala. 454; Page on Contracts, Vol. I, Sec. 24.)

2. It must be so made as to indicate a real intention to assume liability. An offer made in jest and known to be made in jest by the party accepting it, cannot be the basis of any legal liability, such as a marriage ceremony intended by both parties as a jest and the like. (*McClurg vs. Terry*, 21 N. J. Eq. 248.) However, both parties must understand such a joke. An offer made in jest is enforceable by one who accepts it *bona fide* as a serious proposition. (*Plate vs. Duost*, 32 L. R. A. 404; Page on Contracts, Vol. I, Sec. 25.)

3. The offer must be one which is intended of itself to create legal relation on acceptance. It must not be an offer intended merely to open negotiation which will ultimately result in a contract or intended to call for an offer in legal form from the party to whom it is addressed. (*Maclay vs. Harvey*, 32 Am. Rep. 35.) The commonest example of offers meant to open negotiation and to call forth offers in the technical sense, are the advertisements, circulars, and trade letters sent out by business houses. While it is possible that the offers made by such means may be in such form as to become contract, they are often merely expressions of a willingness to negotiate. (*Maclay vs. Harvey*, 32 Am. Rep. 36; Page on Contracts, Vol. I, Sec. 26.)

4. The offer must be so complete that upon acceptance, an agreement is formed which contains all the terms necessary to determine whether the contract has been performed or not. (*Bissenger vs. Babcock Co.*, 67 Fed. 892.) Thus, an offer which leaves the amount of compensation to be determined by subsequent negotiation fixing only the extreme limits within which the negotiations are to range; or one which leaves to a future valuation between the parties the price to be paid for realty and the like. (*Wardell vs. Williams*, 62 Mich. 50; *Cunn vs. Newcomb*, 82 Ia. 468.) However, the terms need not all be expressly set forth in the offer. If the terms can be determined from the context, the offer is sufficiently complete. So a contract to furnish gas is not indefinite as not fixing the time during which gas is to be furnished, where the law requires a Gas Company to supply gas as long as required by the occupant of any buildings if he pays for it. (*Gallagher vs. Gas Light Company*, 75 Pac. 329.) So where the context shows that prompt performance is intended, the contract is sufficiently definite though no time is expressly fixed. (Page on Contracts, Vol. I, Sec. 27.)

5. The offer must be certain and definite in its terms so that the court may be able to determine who the parties were, what the subject matter was, and whether the contract had been performed or not. If an agreement is uncertain it is because the offer was uncertain for the acceptance is always required to be identical with the offer; hence the agreement being uncertain, it becomes inoperative. (*Hart vs. Georgia*, 101 Ga. 188.) Therefore if the offer is in any case so indefinite as to make it impossible for a court to decide just what it means and to fix exactly the legal liability of the parties, its acceptance cannot result in an enforceable agreement. (*Baurman vs. Buizen*, 16 N. Y. Suppl. 342.) A written agreement may be void for uncertainty because of failure to name the parties, or because it is so misspelled or ungrammatical, etc., that it has no meaning at all. (*Cheney Bigelow Wire Works vs. Sorrell*, 142 Mass. 442.) An offer intended and was understood by the offeree is sufficient. That is certain which may be rendered certain, according to the maxim "*in certum est quod certum reddi potest.*" So an offer to sell goods need not specify the price, for if no price is stated it will be presumed that the reasonable or market price was intended. (*Troy Fertilizer Company vs. Logan*, 96 Ala. 619; *Elliott on Contracts*, Vol. I, Sec. 30; 9 Cyc., pp. 248-251.)

6. It must be communicated to the person to whom it is made in order to confer rights or to impose liabilities. (Page on Contracts, Vol. I, Sec. 30.) One cannot accept an offer which has not been communicated to him, and therefore as a general rule an uncommunicated offer whether by words or acts, cannot result in a contract. (*James vs. Marion Fruit, etc., Co.*, 69 Mo. App. 207.) It follows from this principle that where services are rendered for another without his request or knowledge he cannot be held liable to pay for them. (*Scals vs. Edmondson*, 49 Am. Rep. 51.) The principle which this case and the like established is that a man cannot be forced to pay for what he has had no opportunity to reject. (9 Cyc., pp. 252-253; Page on Contracts, Vol. I, pp. 36-52; Bishop on Contracts, Sec. 324.)

b. Of Acceptance.—The acceptance to be valid must have the following qualities:

1. Intention to Accept.—An intention to accept the terms of the offer as valid is ordinarily an essential element of a valid acceptance. Hence failure or omission to reject an offer is not the equivalent of an acceptance. (*Ryan vs. Ryan*, 192 Ill. 589.) The party to whom the offer is made may, however, have agreed that his silence shall be equivalent to an acceptance; and this agreement may be understood from the conduct of the parties. (Page on Contracts, Vol. I, Sec. 42.)

2. Mere Mental Intention Ineffective.—A mere mental intention to accept, not followed by such act or notice as is sufficient in law to charge the party making the offer with notice of the acceptance, does not have any legal effect in converting the offer into a contract. (*Trounstine vs. Sellers*, 35 Kan. 447.) The intention to accept must be communicated to the offerer. Whether knowledge of acceptance acquired from some person other than the offeree or his agent is sufficient, a distinction must be made. If the acceptance is to be made by words, a communication by the offeree to a stranger is not an acceptance, even if the offerer should learn of it. (*Benton vs. Springfield G. M. C. A.*, 170 Mass. 534.) If it is to be made by acts, according to the weight of authority, if knowledge of the acceptance is actually brought to the offerer is sufficient. (*Adams vs. Jones*, 12 Pet. (U.S.) 207; Page on Contracts, Vol. I, Sec. 43.)

3. Must be Positive.—The intention to accept must be expressed in positive terms. (*Beck, etc., Co. vs. Cereal Mills*, 109 Wis. 65.) Thus a statement by the offeree that he would think over the matter, or that he would like to accept, or a promise to take up the matter at a later time, or that he would see what he could do and give notice later, are none of them equivalent to an acceptance. (*Thurber vs. Smith*, 54 Atl. 790; *McGimis vs. Smythe*, 1 Sil. (N. Y.) 23; *John R. Davis Lumber Co. vs. Ins. Co.*, 94 Wis. 472; Page on Contracts, Vol. I, Sec. 54.)

4. Must Correspond to Offer.—The acceptance must correspond to the offer at every point, leaving nothing open for future negotiations. Otherwise it will be without validity. (*Compañía Bilbaina, etc., vs. Spanish, etc., Co.*, 146 U.S. 483; Page on Contracts, Vol. I, Sec. 45; Bishop on Contracts, Sec. 323.)

5. Must be Absolute.—An attempted acceptance which seeks to modify one or more terms of the offer is of no legal effect as an acceptance. It is really a rejection of the offer and a counter-proposition in lieu of the original offer, and must be accepted by the party making the original offer in order to constitute an agreement. (Minneapolis, etc., *Ry. vs. Rolling Mill Co.*, 119 U. S. 149.) On the same principle if a written offer is made and before acceptance by the offeree it is modified by a third party, without the consent of the offerer and it is then accepted by the offeree, no valid contract exists. (*McGavock vs. Mortons*, 57 Neb. 385; Page on Contracts, Vol. I, Sec. 46; Bishop on Contracts, Sec. 323.)

G. *Time of Acceptance under Spanish Law.*—The time within which the acceptance should be made under the Spanish Law has already been discussed before in dealing with the subject of identity as to time. (See page 17 *supra*.)

*Time of Acceptance under American Law.*—The offer may or may not specify the time within which the offer must be accepted. In case the time is fixed by the offerer, it may be accepted at any time before the expiration of that period, provided there is no revocation by the offerer before acceptance. This is true even though the delay might be considered unreasonable if it were not for the terms of the offer. (*Richard vs. Taylor*, 122 Fed. 931.) In case the offer is couched in language, or conveyed in a manner, or relates to a matter which shows that prompt action is demanded, unnecessary delay is not permissible. (*Maclay vs. Harvey*, 32 Am. Rep. 35.) Should there be nothing to indicate the time within which acceptance must be made, the proposition must be accepted within a reasonable time. (*Averill vs. Hedge*, 12 Conn. 424.) What is a reasonable time within which the acceptance is to be made, has been held a question of law, depending upon the situation of the parties and the subject matter of the contract. (*Moore vs. Ballows*, 28 Am. Dec. 372; Elliott on Contracts, Vol. I, Sec. 34.)

H. *Revocation of Offer and Acceptance under Spanish Law.*

1. Of Offer.—Since a contract is perfected by the mere consent of the parties and this is created when the acceptance is made known to the offerer it is but logical that the offerer may withdraw the offer before same is accepted, for in that case there exists no legal tie which binds him and impedes him to do so. (8 Manresa, 632; 20 Scaevola, 588.) This right of the offerer rests on the principle of law that "an offer, not accepted, does not obligate." (IV Sanchez Román, 241.) But if a period was fixed in the offer within which the acceptance should be made the offer cannot be withdrawn while that period has not yet elapsed. (*Idem.*) The revocation of the offer may be renounced only up to a certain time, but not absolutely, because otherwise it would amount on one hand to an obligation existing before the contract be borne and there will be, on the other hand, only one party to be bound or not at the mercy of the other, which is contrary to the provisions of Article 1256 of the Civil Code. (8 Manresa, 632.) Once the acceptance is made and it is in conformity with the terms of the offer, the revocation of the contract is not possible for, in that case,

the contract becomes perfected. (Article 1258, Civil Code.) There is, however, an exception to this rule, i. e., when both the offerer and offeree have mutually reserved the right to make such a revocation, for in that case there is no perfection of the contract in the strict sense but simply a licit agreement (*Pacto licito*), as it was held in a decision rendered by the Supreme Court of Spain on November 24, 1859. (8 Manresa, 633.) Revocation of the offer before its acceptance may be voluntary and by operation of law. The first form is that which depends on the absolute will of the offerer; and the other takes place when the offerer dies or becomes incapacitated before the acceptance is made known to the incapacitated party. The reason for this revocation by operation of law is based on the principle that "where there is no offerer, there is no offer, no will." (IV Sanchez Román, 241.)

2. Of Acceptance.—Should a contract be executed between persons present the revocation of the acceptance by the offeree is inadmissible, once the acceptance has been made and is in conformity with the terms of the offer without additions, restrictions or modifications. (8 Manresa, 632.) However, the acceptance may be withdrawn if the contract was entered into between persons absent, and said acceptance has not yet been communicated to the offerer. The reason for this conclusion is the same as that for the revocation of the offer, for there being no consent which is deemed to take place only when the acceptance is made known to the offerer there is no tie created, there is only but a unilateral act, which being personal the same can be withdrawn by the offeree. There are also two forms of revocation of the acceptance: voluntary and by operation of law. The former takes place when the offeree revokes his acceptance before the same is put to the knowledge of the offerer. The latter takes place when the acceptor dies or becomes incapacitated before the acceptance comes to the knowledge of the offerer. By analogy the reason for this conclusion is the same as that of the offer, for, there being no acceptor, there is no acceptance, no will. (IV Sanchez Román, 242.)

a. Intransmissibility of Offer and Acceptance.—In the revocation by operation of law, it may be objected to, that in case of death or incapacity of the offerer the offer is deemed *ipso facto* transferred to his heirs in which case no revocation takes place and consequently there is no reason for the existence of this form of revocation. This objection, suggests a question: Is the offer transmissible to the heirs of the offerer? A proposes to buy a thing from B, and without coming to the knowledge of A the acceptance of B, A dies. Are the heirs of A bound to comply with the offer? Taking into consideration the provisions of the Civil Code the question should be answered in the negative. That which ties and obligates is the bilateral act, the concurrence of wills. Unilateral act is personal and therefore intransmissible. The offerer having died without the acceptance having been known to him, which is the time which determines the perfection of the contract, as will be seen hereafter, the contract was not perfected and therefore there was no tie, no right, no obligation to transmit. The heirs do not acquire anything, because their predecessors did not

acquire any right and therefore no obligation is transmitted. The same reason may be applied by analogy to heirs of the offeree. (20 Scaevola, 589.) If the heirs of the offerer ratify the offer, the same would have to be accepted anew by the offeree in view of the novation of the parties-offerer, and in case the same be accepted then the heirs will be bound not under the original offer but under the one which has been ratified by them. In the same manner, the acceptance ratified by the heirs of the offeree constitutes a new proposition with respect to the offerer, who becomes then, the offeree and whose acceptance is still necessary for the perfection of the contract. This theory of the intransmissibility of the offer and acceptance is based on the fact that the perfection of the contract not having yet taken place, there was no tie created and consequently there was no transmission of rights and obligations to the successors. (IV Sanchez Román, 241-242.)

#### I. *Revocation of Offer and Acceptance under American Law.*

a. *Of Offer.*—An offer unsupported by any consideration may be withdrawn, at any time before acceptance. (Waterman *vs.* Banks, 144 U. S. 394.) This applies to a general offer. It is revocable at any time before assent is given and before anything is done in reliance on it. Like any other offer to contract, it may be withdrawn through the same channel on which it was made. Care should be taken that the same publicity is given to the revocation that was accorded to the offer. (Shuey *vs.* United States, 92 U. S. 73.) Any general offer not made to any specific person directly may be revoked in the manner in which it was made, and if a person, being ignorant of the withdrawal performs the service the offer called for, still he cannot recover. (Id.) There need be no express revocation of an offer. It may be withdrawn by implication. It may be withdrawn by acts inconsistent with the continuance of the proposal, in case such acts are brought to the knowledge of the other party. (Lannon *vs.* Jordan, 56 Ill. 206.) But it is not possible for the offerer to withdraw, at will, every offer he may have made. For if the offer is given for a certain definite time and is supported by a valuable consideration it cannot be revoked or withdrawn within the time specified. (Ross *vs.* Parks, 93 Ala. 153.) But a revocation of an offer cannot prevent an effectual acceptance unless it is actually communicated to the offeree. (Shuey *vs.* United States, 92 U. S. 73; Eskirdge *vs.* Glover, 26 Am. Dec. 344.) But in case of a general offer, it may be revoked and the revocation be effective without actual notice to the party who may have afterward accepted it without knowing of its revocation. (Kempner *vs.* Cohn, 47 Ark. 519; Elliott on Contracts, Vol. I, Sec. 33; Page on Contracts, Vol. I, Sec. 33.) An offer under seal cannot also be revoked under Common Law. This results from the Common Law rule that a grant under seal is binding, though it has not been communicated to the grantee, if duly delivered. (Koslaw *vs.* Kushaw, 102 Ill. 307; Bishop on Contracts, Secs. 325-7.)

Another form of revocation is that by lapse of offer. An offer lapses on the expiration of the time for which it is left open. And if the date on which it will lapse

is not definitely stated, the proposal usually becomes a nullity if not accepted within a reasonable time. (*Patterson vs. Farmington, St., Ro. Co.*, 76 Conn. 628; *Ferrier vs. Storer*, 63 Ia. 484.) Likewise the death of the offerer before any acceptance causes it to lapse. An offer which has not been accepted in the life time of the offerer is necessarily terminated by his death; nor can the representative of the deceased be made liable upon the unaccepted offer. (*Grand Lodge Inc. vs. Farnhan*, 70 Cal. 159.) However, if the offer is one supported by a sufficient consideration and could not have been withdrawn by the offerer in his life time, his death does not cause it to lapse prior to the date mentioned therein. (*Mueller vs. Northman*, 116 Wis. 468.) Likewise, an offer relating to the property of a person is terminated by his bankruptcy, which transfers all his property to his trustees. (*Meynell vs. Surtees*, 26 L. J. Ch. 257; *Elliott on Contracts*, Vol. I, Sec. 35; *Page on Contracts*, Vol. I, Sec. 40; *Bishop on Contracts*, Sec. 327.) The same results to offerer's insanity. (*Beach vs. Church*, 96 Ill. 177.)

b. Of Acceptance.—An acceptance may be revoked by a communication to that effect before the acceptance is communicated, but not after. (*Commercial Ins. Co. vs. Hallock*, 72 Am. Dec. 379.) Like the revocation of offer, the revocation of acceptance may be express or implied. Since the rule is firmly established (as will be seen later) that a contract is complete the moment the letter of acceptance is posted, or a telegram giving assent is delivered to the telegraph company, it would logically follow that the acceptor cannot revoke his acceptance after it has been mailed or delivered to the telegraph company. (9 *Cyc.*, pp. 288, 296.)

In case it is the person to whom the offer is made that dies, the same rule as to offer applies to acceptance. The proposal lapses with his death. The privilege of acceptance does not descend to his personal representatives. (*Werner vs. Humpshreys*, 2 M. and G. 853; *Newton vs. Newton*, 23 Am. Rep. 476.)

### CHAPTER III

#### PERFECTION (SPANISH LAW)—OPERATION (AMERICAN LAW)

I. (a) *Spanish Concept*.—Perfection is "the birth, the appearance of a contract as a binding tie, as a result of the conformity arrived at." (8 *Manresa*, 618.) "Perfección del contrato equivale a terminación, a acabamiento en su formación, a contrato perfecto, terminado de generar, dando a entender tal concepto que desde entonces produce todos sus efectos o sea el cumplimiento de lo expresamente pactado." (20 *Scaevola*, 558.) Our Civil Code in Article 1258 in speaking about perfection provides: "Contracts are perfected by mere consent and from that time they are binding, not only in respect to the fulfillment of what has been expressly stipulated, but also in all the consequences which, according to their nature are in accordance with good faith, use, and law." From the foregoing it may be concluded that Perfection of the contract is created by the mere consent of the parties and constitutes the period in which the legal relation is created thus giving birth to the rights and obligations deriving therefrom.

(b) *American Concept*.—Operation under American Law is the stage wherein the contract is created by the concurrence of offer and acceptance proper, thus begetting all the respective rights and obligations pertinent thereto and which are the consequences of the relation created. The contract is complete when both parties have agreed to one and the same set of propositions. (*Andrews vs. Scherber*, 93 Fed. 367.)

## II. *Time Determining Perfection and Operation.*

1. Under Spanish Law.—Perfection being the basis of all contracts, it is therefore of great importance to determine the time in which they take place. As it was stated before, the contract may be entered into between persons present or absent. If entered into between persons present, there being no reservation period for acceptance, the time of the acceptance and the putting to the knowledge of the offerer is the same and there is therefore no difficulty. The same does not happen in case the contract be entered into between persons absent such as in contracts made by correspondence or by telegram, for in these cases two periods of time must be considered: the time of acceptance and the time the same is communicated to the knowledge of the offerer. Which of these two periods determines the perfection of the contract, there are conflicting opinions as to this question. There are two tendencies followed by different commentators. Some hold that the time of acceptance perfects the contract and others admit that it is that period wherein the acceptance is made known to the offerer, which makes the contract perfect. The writer is in favor of the latter view, not because it has many followers, as Manresa, Sanchez Román and others, but because the Civil Code, Article 1262, par. 2, is very explicit in that "in communication by letter, the time wherein the notice of acceptance comes to the knowledge of the offerer, is the one which determines the Perfection of the contract." (See Article 1252, par. 2, Civil Code; IV Sanchez Román, 243; 8 Manresa, 634.) Moreover this theory is impliedly corroborated by Article 1257, paragraph 2, of the Civil Code which refers to an agreement made in favor of a third person, and under this article the parties may revoke the agreement before the acceptance has been duly communicated to the parties and the case being similar to the one under consideration, because this stipulation in favor of a third person represents an offer made by the executors of the contract which produces no effect until acceptance is known by them, hence, due to the similarity of both cases the same rule might be applied. (20 Scaevola, 588.)

Under the Code of Commerce, however, the time of acceptance determines the perfection of the contract, though the same has not yet been communicated to the knowledge of the offerer. (See Article 54 of the Code of Commerce.) This theory is in accord with the American Law.

2. Under American Law.—The question as to the time when the contract becomes completed or created, arises when the negotiations to form the same take place between persons absent or not residing in the same place, as it happens in deal-

ings by correspondence either by mail or by telegraph. Where a person makes an offer and requires or authorizes the offeree, either expressly or impliedly, to send his answer by post or telegraph, the acceptance is communicated and the contract is complete from the moment the letter is mailed or the telegram sent, and it makes no difference whatever that through mistakes of the post-office authorities, or the telegraph company, or through accident in transmission, it is delayed or is lost in transit and never received by the offerer. (*Lun vs. McLean*, 8 Ala. 360.) The request or authorization to communicate the acceptance by mail is implied in two cases: (1) Where the post is used to make the offer, as where a person makes an offer to another by mail and says nothing as to how the answer shall be sent; and (2) Where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind the post might be used as a means of communicating the acceptance. (*Henthorn vs. Fraser*, 40 Wky. Rep. 434.) From the foregoing therefore it may be stated as a general rule, that when the parties contemplated either expressly or impliedly the giving of the acceptance by mail or by telegraph and there is no agreement to the contrary, the contract is complete, the moment the letter of acceptance is made or a telegraph giving assent is delivered to the telegraph company. This is the rule in United States except in Massachusetts. (9 Cyc., 295; Bishop on Contracts, Sec. 328.) In *Adams vs. Lindsell*, 19 Rev. Rep. 415, the English Court stated the reason for the doctrine thus: "If that (namely, the doctrine requiring the receipt of the answer) were so, no contract could be ever completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered in law as making, during every instance of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter." But this rule has its exceptions: (1) When the offer is so qualified as to require the actual receipt of the letter of acceptance before the agreement becomes complete. (*Coll vs. Dunlevie*, 60 S. E. 384); (2) When an offer is made by advertisement it would not seem that an acceptance is communicated until the letter actually reaches the offerer. (*Haldane vs. United States*, 69 Fed. 819; 9 Cyc. p. 295); (3) When the offer does not authorize either expressly or impliedly that the acceptance be made by mail or telegraph, in which cases, the acceptance must reach and be read by the offerer, before it becomes binding. (*Elliott on Contracts*, Vol. I, page 53.)

### III. *Essential Requisites to accomplish Perfection (Spanish Law) and Operation (American Law.)*

1. In General.—Manresa in speaking about Perfection said: "Perfection of a legal act supposes the concurrence of those requisites which its assent requires and which determine the creation of the legal consequences of the relation." (8 Manresa,

618.) It may be seen that mere consent does not produce the perfection of the contract. It is necessary that other requisites, essential to all contracts be present, i. e., capacity of the parties and the circumstances that the consent be not given through error, violence or intimidation and fraud; that the subject-matter or object be clear; and that there be a true and licit cause. (Article 1261, Civil Code.) In order to show the effects of these requisites in the perfection, the writer has deemed convenient to make a brief exposition of their nature and effects, in contrast with those under American Law.

Under American Law in order to accomplish the operation of the contract it is also necessary that the parties be legally capable, that the agreement be free from mistake, duress and fraud, that it must have a lawful subject-matter, and a real and lawful consideration. (Elliott on Contracts, Vol. I, Sec. 34; Bishop on Contracts, Secs. 889, 24 and 31.)

## 2. Capacity—

(a) Under Spanish Law.—The capacity is an essential element in order to create a contract. (8 Manresa, 628.) Article 1263 of the Civil Code enumerates the persons who are incapable to enter into a contract. To this article may be added the spendthrifts while under guardianship. (Sec. 559, Act 190); the persons sentenced to civil interdiction until their release, (Article 42, Penal Code); and those persons specially disqualified by law (see the provisions of Articles 1334, 1458 and 1459, Civil Code.) It should however be noted that there are two kinds of incapacities: (1) natural, based on the actual lack of capacity to give consent as in case of insanity, dumbness, etc.; and (2) legal, because the capacity appears to be restricted by operation of law as in the cases of a married woman, minors not emancipated and the like. The first kind of incapacity is absolute and produces *ipso facto* the nullity of the contract; while the other is relative that is, subject to nullity, though it may produce effects until it is declared void. (8 Manresa, 638-9.) It is therefore important to distinguish natural incapacity from legal, because the former does not result into the perfection of the contract while the latter does though revocable.

(b) Under the American Law.—The parties must also have legal capacity to enter into the contract in order that this may be binding. The following persons are considered incapable under the American Law to enter into the contract: (1) infants, though most of their contracts are regarded only voidable and only in special cases they are regarded void; (2) married women (See Bishop on Contracts on this matter, Chapter XXIV); and (3) insane persons, such as idiots, lunatics, though not during lucid interval; persons *non compos mentis* in all their faculties, or a monomaniac as to a particular thing, imbeciles from age, or deranged and the like. In most cases the contracts entered into by them are merely voidable. (Bishop on Contracts, Sec. 958 et seq.; Sec. 975.)

## 3. Consent—

a. Under the Spanish Law.—As it was said the consent must be free from mistake, violence or intimidation and fraud in order to be binding. (Article 1265, Civil

Code.) Is mere mistake, violence or intimidation, or incidental fraud sufficient to affect the perfection of the contract? Let us see how they influence respectively in the perfection.

The mistake in order to affect the perfection of the contract must fall: (1) on the *object* of the contract (Article 1266, Part 1, Civil Code) as when a person bought a land from another in the belief that it was the one he intended to buy (Law 20, Tit. V, Partida 5); or when he desires to buy a golden glass but he was given another kind (see *Peterson vs. Azada*, 8 Phil. 432); but error in the name of the locality does not nullify the contract unless there be some fraud, in which case the revocation of the contract may be made and indemnity therefor be asked for. (Law 21, Tit. V, Partida 5); (2) on the *conditions* imposed upon the contract which were the cause of the celebration of the same (Article 1266, Part 1, Civil Code) as if one, believing to be a debtor, stipulated with his supposed creditor the manner of paying debt (Law 7, Tit. XIV, Partida 4, Book II of Digest); (3) on the *person* whose personality was the main cause of the execution of the contract (Article 1266, Part 2, Civil Code) as when one desiring to marry a woman, he was given another woman (Law 10, Tit. II, Partida 4); (4) on the *nature* of the contract as may happen where a person thinking he is buying a thing while the owner wanted only to lease it or loan it. This last case is not provided for by the Civil Code but by Viso in his commentaries. (3 Viso, 32.)

b. Under American Law. Definition.—“Mistake is occasioned by ignorance or misconception of some matter, under the influence of which an act is done; and arises where one of the parties does not mean the same thing as the other, or where one or both, while meaning the same thing form untrue conclusions as to the subject-matter of the agreement.” (Anson on Contracts, page 127; 9 Cyc., p. 388.)

In General.—Mistake in general does not of itself affect the validity of contracts at all. But mistake may be such as to prevent any real agreement from being formed, in which case the agreement is not merely voidable, but is absolutely void, both in law and in equity. (Pollock on Contracts, p. 353.)

Mistake of one party only.—A mistake of one of the parties only in the expression of his agreement or as to the subject matter, not known to the other, does not affect its binding force, unless it is such a mistake as to show that there is a complete difference in substance between what is supposed to be and what is taken, so as to constitute a failure of consideration. (*Crane vs. McCormick*, 92 Cal. 176; 9 Cyc., p. 394.) Except in cases depending on special reasons, the mistakes which will render the contract void, must be mutual or it may be mistake on one side and fraud on the other. (Bishop on Contracts, Sec. 702.)

Mutual Mistake.—Mutual mistake as to material facts will avoid the agreement. (*Barfield vs. Price*, 40 Cal. 535.) As to extrinsic facts which may have a bearing or influence on the making of an agreement, but which are not the cause of it, it seems that a mutual mistake does not affect the agreement. The agreement may be set aside for the mistake only where the point misconceived was the cause of the agree-

ment or had an important influence upon it. (*Segur vs. Fingley*, 11 Conn. 134; 9 Cyc. 397.) In order to brief the treatment of this topic, it is enough to say that the principle of the American Law is the same as that of the Civil Law and the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going to the root of the matter, or only to some point, an error as to which does not affect the substance of the whole consideration. (9 Cyc., 394.) Or what Pomeroy has said: "If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction is merely incidental, and not a part of the very subject matter, or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in either case the mistake will not be ground for any relief affirmative or defensive." (Pomeroy Eq. Juris., Sec. 856.)

Violence or intimidation under Spanish Law.—In order to affect the perfection of the contract, the violence must be made through irresistible force (Article 1267, Part 1, Civil Code), and intimidation requires that the fear or apprehension be reasonable and well founded, based on the verosimilarity of the threat, in its seriousness, the possibility of its being realized, the disposition of means to realize it on the part of the apprehensor according to the circumstances of the case. (Law 7, Tit. XXXIII, Partida 7; Article 1267, Part 2, Civil Code.) Illustrations regarding intimidation may be found in the following cases: *Doronilla vs. Lopez*, 3 Phil. 360; *Martinez vs. Hongkong and Shanghai Bank*, 15 Phil. 252; *Jalbuena vs. Ledesma*, 8 Phil. 601.

Duress under American Law. Definition.—"Duress is any unlawful, physical force, applied or threatened to the person of the party, or of the party's husband, wife, parent, or child, through constraint of which he, in form, consents to what he otherwise would not." (Bishop on Contracts, Sec. 175.)

Kinds.—There are two kinds of duress under Common Law: (1) duress by imprisonment, and (2) duress per minas. Duress by imprisonment arises where a person is actually imprisoned—(1) for an improper purpose without just cause, (2) for a just cause without lawful authority, and (3) for a just cause and under proper authority but for an improper purpose. Hence it is only where the imprisonment is with lawful authority, for a just cause, and for a proper purpose, that it cannot be called duress. Imprisonment is the restraint of one's liberty, whether in prison or elsewhere, for every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of a common prison. (9 Cyc., pp. 444-445.) Duress per minas arises when a person (1) is threatened with loss of life, (2) is threatened with loss of limb, (3) is threatened with mayhem, or (4) is threatened with imprisonment. (9 Cyc., 445; Bishop on Contracts, Secs. 717-718.)

Requisites.—In the early history of the law legal duress existed only where there was such a threat of danger to the object of it as was deemed sufficient to deprive a constant and courageous man of his free will. Later the rule was modified in that instead of a constant and courageous man that of a person of ordinary firmness was

considered. So, the question before the court in each case is: "Was the person so acted upon by threats of the person claiming the benefit of the contract for the purpose of obtaining such contract, as to be benefit of the quality of mind essential to the making of a contract, and was the contract thereby obtained? (9 Cyc., pp. 449-450); Bishop as to the nature of duress said: "That only when the duress, through exciting the fear of the party, becomes the cause of his executing the contract, will its validity be impaired." (Bishop on Contracts, Sec. 719.)

Effect.—A contract made under duress is voidable and not void, for the consent is present, although not such a free consent as the law requires. Thus if a person having been constrained by duress to make a contract afterwards voluntarily acts upon it or in any way affirms its validity he precludes himself from afterwards avoiding it. (*Bartle vs. Breniger*, 37 Ia. 139.) And duress cannot be set up against the rights of a third person who acquired for value and without notice. (9 Cyc. 443; Bishop on Contracts, Sec. 728.) There are, however, circumstances which duress makes the contract void. (Bishop on Contracts, Sec. 729.)

Fraud under Spanish Law.—Fraud affects the perfection of the contract when it is: (1) grave as provided for in Article 1270, Part 1, Civil Code; and (2) it was not employed by both parties (Article 1270, Part 1, Civil Code). In this connection it should be noted that there are two kinds of fraud: absolute and incidental (*Dolo causante* and *Dolo incidente*). (8 Manresa, 658; 3 Viso, 35.) The first kind annuls the contract and whose nature is explained by Article 1269 of the Civil Code in the following manner: "There is fraud, when by words or insidious machinations on the part of one of the contracting parties, the other is induced to enter into a contract which he would not have done without the use of them." Incidental fraud does not annul the contract but only obligates the party who employed the same to indemnify for damages and injuries sustained by the other. (Article 1270, Part 2, Civil Code.) Incidental fraud may be employed either by one of the parties, by both parties, or by a third person. The Civil Code apparently does only refer to the first case which the writer believes to be correct and just, because if the fraud was caused by a third person, it is not reasonable to impose upon the innocent party the consequences of the acts of the third person upon whom an imprudent trust has been extended by the other. However, when a third party causes the fraud with the collusion or knowledge of the benefited party, such a fraud produces no binding obligations, because in that case the fraud is imputable to the latter. It seems also reasonable to hold mutual fraud ineffective to the validity of the contract because in this case both parties were guilty, and the law does not render its aid to the guilty persons but allow them to stand as they are as a means of punishment and as an example to others.

Fraud under American Law. Definition.—"Fraud may be defined to be any spoken or acted falsehood, whereby one is induced to enter into what in form is a contract, under the belief that it is a different thing from what it is, or that there is for it a motive which does not in truth exist." (Bishop on Contracts, Sec. 643.)

Nature.—It may be laid down as a general rule that any false representation of a material fact, made with knowledge of its falsity, and with intent that it shall be acted upon by another in entering into a contract, and which is so acted upon, constitutes fraud, and will entitle the party deceived thereby to avoid the contract or maintain an action for the damages sustained. (*Martin vs. Martin*, 35 Ala. 560; 9 Cyc., p. 411; Bishop on Contracts, Sec. 360.) The misrepresentation must relate to the subject of the contract; they need not be directly related; they will suffice if so closely connected that, but for them, the party would not have entered into it. And they must be of material facts, properly constituting an inducement to the contract. (Bishop on Contracts, Sec. 652.) A contract cannot be set aside because of the fraud of a third person in which the other party to the contract was not implicated. (*Books vs. Dick*, 135 N. Y. 652.) In other words the representation must be made by the other party to the contract or by his agent or with his command or consent, or must be subsequently ratified by him. (9 Cyc. 421.)

Effect.—On discovering the fraud by which he was induced to enter into a contract, the party defrauded may elect whether he will treat the contract as binding or refuse to be bound by it; but until he so elects it continues valid. An agreement procured by fraud is voidable and not void, may be ratified by the party who was induced by the fraud to enter into the contract. (*Wellington vs. Jackson*, 121 Mass. 157; 9 Cyc., 431; Bishop on Contracts, Sec. 671.)

#### 4. Subject matter.

A. Under Spanish Law.—The object or subject matter is one of the essential requisites of the contract, because consent is based upon it. The object may be a thing whose custody or ownership may be transferred; or services. (3 *Viso*, 36.) In order that the object may be valid it is necessary that the following requisites be present:

(a) In the Thing.—(1) It must be within the commerce of men. (Article 1271, Part 1, Civil Code; 8 Manresa, 669-672); (2) It must exist or if it does not, it may exist, as fruits, or issues of animals, etc., (Article 1271, Part 1, Civil Code; 8 Manresa, 662); exception is made as to future inheritance, on which any contract made is null and void, even with the consent of the person whose succession is in question, except when a division of the property was made *inter vivos* in accordance with the provisions of Article 1056 of the Civil Code. (Article 1271, Part 2, Civil Code); (3) It must be definite in kind. The indetermination in the quantity will not be an obstacle to the existence of the contract, whenever it is possible to determine it without making any further agreement between the parties. (Article 1273, Civil Code; 8 Manresa, 672.) This, however, does not preclude the fact that an undetermined thing or whose existence depends on luck or chance cannot be the object of the contract, as it is provided for by Law 11, Tit. V, Partida 5, in declaring valid the sale of what a person may hunt or fish, up to a certain time of the day. (4) Finally, it must not be physically or legally impossible. (Article 1272, Civil Code; 8 Manresa, 662-666.)

(b) In the Act or Service.—This object must have the following qualifications: Possible, licit and determined; thus, it cannot be an object of the contract of services those which are impossible in their nature, or those which are opposed to laws or customs. (Article 1251, Part 3, and Article 1272, Civil Code; *Perez vs. Pomar*, 2 Phil. 682; 8 Manresa, 665.)

B. Under American Law.—The subject-matter of a contract under American Law, must be for something which the law permits to be contracted for, not contrary to the law or its policy. (*Hawes vs. Stobbins*, 49 Cal. 369; Bishop on Contracts, Sec. 31.) The discussion on this subject under American Law is very meager. For the purposes of this work, however, this is enough.

5. Cause—

(a) Under Spanish Law. Concept.—“Cause is the essential or most proximate purpose which the contracting parties have in view at the time of entering into the contract.” (IV Sanchez Román, 203.) “It is the essential reason which impels the contracting parties to enter into the contract.” (8 Manresa, 676.) In order to determine the cause of the contract it is necessary to know to what class it pertains and for this purpose the contracts may be divided into unilateral or bilateral contracts. In onerous bilateral contracts the cause for each party is the prestation or promise of a thing or a service by the other. (Article 1274, Civil Code; 8 Manresa, 678); in remuneratory contracts, the service or the benefit remunerated therefor. (Article 1274, Civil Code; 8 Manresa, 679); and in unilateral contracts such as gratuitous, iucrative or beneficial, the cause is the liberality of the benefactor. (Article 1274, Civil Code.) Such are the causes which impel the contracting parties to enter into a contract, but in order to produce the corresponding obligations, or the perfection of the contract, it is necessary that the following requisites be present:

(1) It must be real.—This requisite is so important that without it, there will be no obligations created. (Art. 1275, Civil Code; 8 Manresa, 683.) It is not absolutely necessary that the cause be expressed in the contract. (Art. 1277, Civil Code; 8 Manresa, 679.)

(2) The cause must not be false nor illicit.—(Article 1275, Civil Code; 8 Manresa, 681, 685.) The cause is false when the supposed motive which impelled the contracting parties to enter into a contract, does not exist; and the cause is illicit when the consideration is contrary to law and good morals, or falls within these *factos* expressly forbidden by law. (Article 1275, Civil Code.) Neither the one nor the other will produce any binding effect, except in the former case when the false cause is founded on another real and licit one. (Article 1276, Civil Code; 8 Manresa, 679; See *United States vs. Ricoy*, 1 Phil. 595 (dissenting opinion); *Lee Liong vs. Hizola*, 19 Phil. 57; *Escalante vs. Francisco*, 2 Phil. 650; *Palma vs. Canizares*, 1 Phil. 602; *De la Rama vs. Lacson*, 3 Phil. 618.) Where the consideration stated in the contract is illegal the burden of proof is on the plaintiff to show a legal consideration. (*Lichauco vs. Martinez*, 6 Phil. 594.) But in order to hold a contract void as setting forth a false

promise \* \* \* it is indispensable that the falsity of the basis of the indebtedness, as set forth in said document be *fully proven* \* \* \* because in the absence of such proof, the obligation must be sustained with all of its consequences. (*Compañía General de Tabacos vs. Obed*, 13 Phil. 391.) The cause is presumed to exist and to be licit while the debtor does not prove the contrary. (Article 1277, Civil Code; *Rodríguez vs. Martínez*, 5 Phil. 67; *Sparrevohn vs. Bachrach et al.*, 7 Phil. 194; *Azarraga vs. Rodríguez*, 9 Phil. 637; see Sec. 334, parts 19 and 34 of Act 190 (Code of Civil Procedure); *Elliott vs. Montemayor*, 9 Phil. 693).

(b) Consideration under American Law. Definition.—“A consideration is something esteemed in law as of value, in exchange for which the promise in a contract is made.” (Bishop on Contracts, Sec. 38.) “A benefit to the party promising or a loss or detriment to the party to whom the promise is made.” (9 Cyc., p. 308.)

Necessity for.—In general, at Common Law every contract not under seal requires a consideration to support it, that is, some benefit to the promisor, or some loss or detriment to the promisee. It is now well settled that except in a few cases for all promises not under seal, whether oral or in writing, a consideration is necessary. (9 Cyc., pp. 309-310; Bishop on Contracts, Sec. 40.)

Nature of.—In general the consideration should be something to which a jury can attach pecuniary value. (Bishop on Contracts, Sec. 41.) Still it is said that it need not be of pecuniary value, and there is a sufficient consideration for a promise if there is a benefit or any loss or detriment to the promisee. (9 Cyc., pp. 311-315.)

It is not necessary that a benefit should accrue to the person making the promise; it is sufficient that something valuable flows from the person to whom it is made, or that he suffers some prejudice or inconvenience and that the promise is the inducement to the transaction. The benefit may be a mere expectation or hope, or contingent. (*Greene vs. Bartholomew*, 34 Ind. 235; 9 Cyc., pp. 311-312.)

Good and valuable consideration.—A good consideration, says Blackstone: “Is such as that of blood, or of natural love and affection, when a man grants an estate to a mere relative; being founded on motives of generosity, prudence and natural duty. A valuable consideration is such as money, marriage, or the like which the law esteems an equivalent given for a grant; and is founded on motives of justice.” (Bishop on Contracts, Sec. 43.) The only consideration which the law recognizes as sufficient to support a contract is the valuable one. A promise founded on a good consideration is a gratuitous one and unenforceable. (*Cook vs. Bradley*, 7 Conn. 57.) Deeds made upon good consideration are considered as voluntary and though valid at law between parties, they are not aided in equity and are liable to be held void as against creditors and purchasers for value. (9 Cyc. 319.) A consideration immoral, illegal or contrary to public policy will not support a contract. (Bishop on Contracts, Secs. 59 and 467.)

#### IV. *Perfection (Spanish Law) as to Different Kinds of Contracts*

Although the consent is an indispensable requisite for the perfection of the contract, there are however cases in which this requisite alone is not sufficient in order

to produce binding obligations. There are cases in which the concurrence of other requisites is still necessary as it happens in real or formal contracts. It is therefore necessary to divide the contracts into purely consensual, real or formal, and to explain briefly when the perfection takes place in each.

Consensual contracts are those which are perfected by mere consent. (Article 1258, Civil Code; 8 Manresa, 619; 3 Viso, 9.) These contracts are called consensual not because they require consent, for this being so every contract will be so called, for the reason that in every contract exists this requisite, but because they are perfected by the mere consent alone, without requiring the delivery of a thing or the doing of something else. (See *McCullough vs. Aenlle & Co.*, 3 Phil. 285; *Goyena vs. Tambunting*, 1 Phil. 490.) To this kind belong the following contracts: Purchase and Sale, Exchange, Donation, Assignment, Lease, Insurance, Promise, Mandatum, Partnership, Suretyship, Mortgage, Transaction, Censo and Compromise.

As to nature of purchase and sale, see IV Sanchez Román, pp. 551-2; 3 Viso, 182; examples of consensual contracts may be found in the following cases: *McCullough vs. Aenlle & Co.*, 3 Phil. 285; *Goyena vs. Tambunting*, 1 Phil. 249. As to mercantile purchase and sale, Blanco says substantially the same. (See Blanco, Vol. 2, p. 150);

As to nature of exchange, see Article 1538, Civil Code; 10 Manresa 424; IV Sanchez Román, p. 660 et seq.; as to mercantile exchange see Blanco, Vol. 2, 146;

As to nature of donation, see Article 623, Civil Code; IV Sanchez Román, p. 671 et seq.;

As to nature of assignment, see IV Sanchez Román, p. 722 et seq.;

As to nature of lease, see 10 Manresa, 435; IV Sanchez Román, p. 738 et seq.;

As to nature of insurance, see IV Sanchez Román, p. 802 et seq.;

As to nature of promise, see Article 1451, Civil Code; IV Sanchez Román, p. 476 et seq.; 3 Viso, 405;

As to nature of mandatum, see Article 1718, Part 1, Civil Code; IV Sanchez Román, 490 et seq.; 3 Viso, 362;

As to nature of partnership, see Article 1679, Civil Code; 11 Manresa 316; IV Sanchez Román, 523 et seq.; 3 Viso, 380; see also *Thunga Chui vs. Lue Bentec*, 2 Phil. 561;

As to nature of suretyship, see 12 Manresa 1; IV Sanchez Román, 911; 3 Viso, 502; as to mercantile suretyship, Blanco says substantially the same thing. (See Blanco, Vol. 2, 588);

As to nature of mortgage, see IV Sanchez Román, 939; 3 Viso, 481;

As to nature of transaction, see IV Sanchez Román, 948;

As to nature of censo, see 3 Viso, 340;

As to nature of compromise, see IV Sanchez Román, 962.

Real contracts are those which require delivery, besides consent. (8 Manresa, 619.) Real contracts are those in which, besides consent, intervenes some other act without the performance of which the corresponding obligations are not produced.

(3 Viso, 20.) In this kind of contracts, therefore, *the delivery of the thing is a sine qua non requisite* for their perfection. To these contracts belong the following: Loan, Comodatium, Depositum, and Pledge.

As to nature of loan, see Article 1740, Part 1, Civil Code; 11 Manresa, 580; IV Sanchez Román, 839 et seq.; 3 Viso, 434; as to mercantile loan, see 2 Blanco 555;

As to nature of comodatium, see Article 1740, Civil Code; 11 Manresa, 580; IV Sanchez Román, 859 et seq.; 3 Viso, 447; as to mercantile comodatium, see Blanco, Vol. 2, p. 556;

As to nature of depositum, see Article 1758, Civil Code; 11 Manresa, 643; IV Sanchez Román, 874; 3 Viso, 456; as to mercantile deposit, see Blanco, Vol. 2, p. 630;

As to nature of pledge, see Article 1863, Civil Code; 12 Manresa 411; IV Sanchez Román, 971 et seq.; 3 Viso, 481; as to mercantile pledge, see Blanco Vol. 2, pp. 596-597.

Sanchez Román, however, considers also as a real contract, the contract of life annuity. (See IV Sanchez Román, 826.)

Formal contracts are those which, though not under penalty of nullity, require a special form. (8 Manresa, 693.) Formal contracts are those which, in order to produce the corresponding obligations, it is necessary to comply with certain formalities prescribed by law. (3 Viso, 21.) Formerly, said formalities were necessary for the perfection of the contract, but according to Civil Code they are no longer essential. The same is true with regard to commercial contracts. (See Article 51, Code of Commerce.) It is enough that all the conditions required for their validity are present. (Article 1278, Civil Code; see *Aldecoa & Co. vs. Warner Barnes Co.*, 30 Phil. 153.) When the law exacts the execution of a deed or other special form for making effectual the obligations of a contract, the contracting parties may only compel each other to comply with such form, from the moment in which consent and the other requirements, necessary for their validity have taken place. (Article 1279, Civil Code; see *Manalo vs. De Mesa*, 29 Phil. 475.)

The contracts are binding whatever may be the form in which they have been entered into provided all the essential conditions required for their validity are present; the perfection of the contract, therefore, depends not upon their form, but upon their validity. (Decisions of the Supreme Court of Spain, 4th of July, 1899, and 19th of October, 1901.) The right to demand the execution of an instrument required by law does not impair the perfection of a contract entered into with all the essential conditions present. (Decision of the Supreme Court of Spain, 19th of February, 1898.)

The Supreme Court of these Islands in construing these articles (1278-1280) of the Civil Code, held: "An oral contract of the sale of real property, made prior to the enactment of the Code of Civil Procedure (Sec. 335, Act 190), is binding between the parties thereto, although it may still be necessary for the party seeking to enforce such contract to take some action to secure the execution of the proper document, but this requirement *will not render the agreement invalid*. (*Thunga Chui vs. Que*

Bentec, 2 Phil. 561; Serrano *vs.* Cortes, 8 Phil. 459.) As to commercial contracts there is no doubt because Article 51 of the Code of Commerce is clear in this point. (See Article 50, Code of Commerce; see also Thunga Chui *vs.* Que Bentec, *supra*, and 2 Blanco, 399.)

The above conclusion is true in spite of the Statute of Frauds. (Sec. 335, Act 190, Code of Civil Procedure). The Supreme Court in deciding what effect has the Statute of Frauds put in force in these Islands (Sec. 335, Act 190) upon Article 1278 of the Civil Code, held: "Section 335, of Act 190, makes no attempt to render such oral contracts invalid. It simply provides how such contracts be proved. It does not attempt to make contracts invalid which have not been executed in writing. This provision does not go to the existence of the contract except when made by an agent. (Sec. 335, Part 5, Act 190.) It simply requires a form of contract. The contract exists and is valid though it may not be clothed with the necessary form, and the effect of noncompliance with the provisions of the statute is simply that no action can be proved unless the requirement is complied with; but a failure to except to the evidence because it does not conform with the statute is a waiver of the provisions of the law. If the parties to the action, during the trial, make no objection to the admissibility of oral evidence to support the contract of sale of real property, thus permitting the contract to be proved, it will be just as binding upon the parties as if it had been reduced to writing." (Conlu *vs.* Araneta and Guangco, 15 Phil. 387, 390; the same decision was confirmed by our Supreme Court in the case of Gallemit *vs.* Tabiliran, 20 Phil. 241; and in a later decision the same was also confirmed in the case of Gomez *vs.* Salcedo, 26 Phil. 485.)

From the foregoing decision, it may be said, therefore, that the Statute of Frauds, Section 335 of Act 190, is only effectual, when the same is invoked in court in opposition to the admissibility of oral evidence. Unless such opposition is made, the oral contract will be held good notwithstanding the Statute of Frauds. Hence, such contracts are only voidable and not void.

Notwithstanding the above decision, however, the Supreme Court in one case held: "that under the provisions of the Civil Code (Article 1280, Part 6) in an action to recover money under a contract of loan, if the amount loaned was for a sum exceeding ₱300 (1,500 pesetas) the plaintiff *must show* that the contract was reduced to writing." (Que Young Lueng *vs.* Tan Guico, 14 Phil. 173.)

#### V. *Operation (American Law) as to Different Kinds of Contracts*

a. In General.—The only formal contracts under American Law are the contracts under seal and those which are required by the statutes to be in writing and to be stamped; all others being parol contracts, depending for their validity upon consideration, whether they be by word of mouth or in writing. (Quigly *vs.* Muse, 15 La. Ann. 197.) It may be stated, therefore, as a general rule, that, aside from the formal contracts and those which required delivery (bailments), the contracts take effect and are operative from the moment the parties come to an agreement. (9 Cyc., 299.)

b. Formal Contracts.—

(1) Contracts under seal.—A contract under seal is a contract to which the seal of the party or parties executing it is affixed, and which derives its validity from its form alone, and not from the fact of agreement or from consideration. (*Parker vs. Parmeler*, 11 Am. Dec. 253.) A contract under seal is necessary at Common Law where the promise is without consideration, and in many jurisdictions conveyances of land and certain other contracts are required by statute to be under seal. (9 Cyc., p. 297.)

(2) Contracts in writing.—The only contracts which in the absence of the statutes are required to be in writing, outside of those requiring a seal, are bills of exchange and promissory notes. The necessity of writing, as evidence of agreement or as giving validity to the agreement, is, except in these cases, purely statutory. The most important of this class is the Statute of Frauds of 29, Chapter II, the provisions of which have been substantially reenacted in most of the States and Territories. Under these statutes many agreements which might otherwise be entered into by words of mouth have been rendered by positive statutory enactments either void or unenforceable unless embodied in a written document. (9 Cyc., 298.) The general effect of this Statute as to the contracts of sale of goods, wares, and merchandises, is to require either: (1) an actual receipt and acceptance of a part of the goods, or (2) the giving of something in earnest to bind the bargain or (3) a part payment, or (4) a note or memorandum in writing of the bargain, signed by the party to be charged thereby or by his agent thereunto duly authorized. (*Mechem on Sales*, Vol. I, p. 271, Sec. 291; *Towers vs. Osborne*, 1 Strange 506.) Failure to comply with the forms prescribed by the Statute of Frauds, does not render the contract void, but only voidable. Only no action can be maintained to charge one upon it, but for all other purposes it is good. (*Bishop on Contracts*, Sec. 1238.)

(3) Contracts requiring stamps.—In the absence of statute, of course, no stamp is required in order to render a written contract complete and valid. But sometimes the revenue laws require written agreements of a particular kind to be stamped and the omission of the stamp in such a case may render an agreement invalid. (9 Cyc., p. 302.) Where the revenue stamps are required by the statute to be affixed to an instrument, are purposely omitted with an intent to evade the duty, the instrument is void and inadmissible in evidence. (*Byington vs. Oaks*, 32 Iowa, 488; *Sawyer vs. Parker*, 57 Me., 39.) But where the omission to affix stamps is without intent to evade the provisions of the statutes, the rule seems to be settled that it will not render the instrument void. (*Bates vs. Bailey*, 57 Ala. 73; *Bumpass vs. Faggart*, 26 Ark. 398; 9 Cyc., p. 305.)

c. Contracts of sales.—These contracts are confined only to personal properties known as chattels. Contracts for the purchase and sales of chattels, if complete and unconditional, and not within the Statute of Frauds, are sufficient as between the parties to vest the property in the purchaser without delivery. The rule is that when

the chattels are clearly designated and appropriated to the contract, are ready for immediate delivery and the terms of sale including the price are explicitly given, there is an executed contract, and the title to the property as between the parties passes to the purchaser even without actual payment or delivery. (*Rail vs. Little Falls Lumber Co.*, 47 Minn. 422; *Natch vs. Oil Company*, 100 U. S. 124; *Penley vs. Bissey*, 33 Ala. 524; *Clinton National Bank vs. Studeman*, 74 Iowa, 104.) From the decisions of these cases it can be stated as a rule that in sale of chattels not within the Statute of Frauds, if the same is complete and unconditional, the title passes right away to the purchaser by the mere agreement of the parties on the object and consideration, even though no payment or delivery has yet been made. The title may also pass at once if that appears to be the intention, even though the seller is yet to make a delivery. (*McElwec vs. Metropolitan Lumber Co.*, 69 Fed. Rep., 302; *Thayer vs. Davis*, 75 Wis., 205); even though the seller is to do something to the goods after delivery (*Lingham vs. Egleston*, 27 Mich. 324; *Whitcomb vs. Whitney*, 24 Mich. 486); even though the goods are in the hands of the seller's bailee or agent (*Erwin vs. Arthur*, 61 Mo. 386); even though the goods remain in the hands of the seller as bailee for the buyer (*Bertelson vs. Bower*, 81 Ind. 512); even though the price is not yet paid (*Rail vs. Little Falls Lumber Co.*, 47 Minn. 422). But when the sale is conditional the title does not pass until the condition is fulfilled, even though the terms of the contracts are complete. The following cases are of this class:

(1) Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that estate in which the purchaser is to be bound to accept them, or into a deliverable state, the performance of these things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property. (*Blackborn on Sales*, p. 175; *Rosted v. Eugermoer*, (1896), 65 Minn. 148; *Rourke vs. Bullens*, (1857), 8 Gray (Mass.) 549.)

(2) Where anything remains to be done to the goods, for the purpose of ascertaining the price, as by weighing, measuring or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, though the individual goods be ascertained, and they are in the state in which they ought to be accepted. But later this rule was modified, to the extent that this condition shall only be presumed precedent, unless the contrary intention is shown. (*Blackborn on Sales*, p. 185; *Byles vs. Colier* (1884), 54 Mich. 1.)

(3) Where the buyer is by the contract to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer. (*Clark vs. Greely*, (1882), 62 N. H. 394; *Blackborn on Sales*, p. 175.)

(4) Where by the terms of the contract, any other act or event is made a condition of the passing of the title, the property will not pass unless and until such act or event happens or the performance is waived. (*Mechem on Sales*, p. 422; *Notier vs. Hunnel*, 22 Ill. App. 194; *Cormick vs. Williams*, 92 Iowa 601.)

d. Bailments.—It is said that a bailment “is a delivery of goods in trust, for some special purpose and upon a contract, express or implied, to conform to the object or purpose of the trust.” (Storey on Bailments, C. 1, par. 2.) From the foregoing it may be said that bailment is not the contract itself but the latter only forms or constitutes its basis, and that upon its validity depends that of the contract. Delivery is absolutely essential to a bailment, and the delivery marks the real inception of the bailment. (Schouler on Bailments, Secs. 21 and 32.) Therefore, unless delivery has been made either actual or constructive, the contract is not binding, whether this be a depositum, mandatam, comodatum, mutuum, pignus, or location. (Storey on Bailments, Sec. 55; *Whitaker vs. Summer*, 20 Pick. (Mass.) 399; *Tuxworth vs. Moore*, 9 Pick (Mass.) 346.)

*(To be continued.)*