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

BY FELIX B. BAUTISTA, B.A., LL.B.

(Continued from December number)

### CHAPTER IV

#### CONSUMMATION (SPANISH LAW)—DISCHARGE (AMERICAN LAW)

I. ((a) *Spanish Concept of Consummation*.—Consummation “is the extinction of the obligation, due to the fulfillment of the obligation produced.” (8 Manresa 618.) The consummation of contractual obligations is realized by the compliance of their object which is at the same time the object of the contract, and its effects are two: Positive and Negative, to wit:

(1) The compliance of the prestations and the effectiveness of the reciprocal rights which form the contractual obligatory relation;

(2) The extinguishment of the relation, re-establishing the parties which maintained it to the state of liberty or independence which they were enjoying at the time of the execution of the contract. (IV Sanchez Roman 249.)

From the above concept of consummation, it may be stated, therefore, that Consummation “is that period of the life of a contract wherein the rights and obligations emanating therefrom are extinguished either by the performance of the end in view, by the agreement of the parties, or by other means provided for by law.

(b) *American Concept of Discharge*.—The discharge of contract is the stage wherein the contract is terminated, or the contractual obligations are discharged, either by its due performance or by some other ways prescribed by the parties themselves or by operation of law. (Elliott on Contracts, Vol. III, sec. 1856.)

II. *Kinds of Consummation under Spanish Law*.—The modes of consummation, according to article 1156 of the Civil Code, are of six kinds: By payment or compliance of the obligations, by the loss of the thing due, by remission of the debt, by the merging of the rights of the creditors and debtors, by compensation and by novation. As there are other kinds of consummation besides those mentioned above, and in order to specify them all with clearness and distinction we will reduce

them into three kinds: (1) those which take place by the performance of the contract; (2) those obtained by the mutual agreement of the parties; and (3) those which take place due to the impossibility of the compliance of the contract. The first may be direct as it happens with the payment, either general or special, or indirect as in the case of compensation. The second takes place either by remission, mutuo disenso, transaction, compromise and novation; and the last may take place either by the impossibility of performance as regards the parties, or as regards the subject matter, or as regards the obligation itself of the contract. (8 Manresa 246; IV Sanchez Román 823.)

*Kinds of Discharge under American Law.*—The ways in which a contract may be discharged under American Law are: (1) By agreement of the parties to that effect; (2) By performance of the contract; (3) By impossibility of performance; (4) By operation of law; and (5) By breach. (Elliott on Contracts, Vol. III, sec. 1856; 9 Cyc. p. 593.)

A. By performance under Spanish Law—

(1) *Direct*—(a) *By Payment in General.*—The word Payment has three distinct acceptations: general, special and very special (*especialísima*). The first two are juridical terms and the last, common. The acceptance, however, more proper to the nature of the payment in question, and the most admitted by the authorities is the special payment which consists “in the real and effective compliance of the prestation which forms the object of the obligation, whatever may be the nature of the object in which the prestation consists of.” Thus, the following shall be deemed payment: The person who, owing money to another, pays his debt; the borrower of a horse, who returns the same to the lender; the architect who is bound to construct a thing and terminates it and places the same at the disposal of the owner and the like. (8 Manresa 250.) Viso, speaking about this kind of payment, says: “By payment or compliance is meant the delivery of the thing or quantity or the prestation of the service which was promised.” From this definition our Civil Code was also inspired and in its article 1157, it provides: “A debt shall not be considered as paid, until the total amount of the things has been delivered or the prestation of which the obligation consisted has been made.” In order to have an effective payment, it is necessary that the following circumstances be present: (1) that the payment be made by the party who has a right to the thing which constitutes the object of a contract; (2) that it must be made to the person entitled to receive the payment; (3) that the payment be made in the place and time stipulated for in the contract; and (4) that it be made in the form provided for by law or by the customs of the place. For the elaborate discussion of this subject, see 8 Manresa pp. 258-300; IV Sanchez Román pp. 253-263; Viso Vol. 3, pp. 82-88.

*Imputation of payment. Concept.*—This imputation of payment takes place when one is a debtor of several debts or obligations of the same creditor. (IV Sanchez Roman 267.) This from may be reduced into the following rules:

a. When the debtor pays a certain sum to the person whom he owes several debts of the same kind, such payment shall be applied to the debt the debtor may assign at the time of making the payment, but if the debtor does not make any assignment, such payment shall be applied to the debt the creditor may designate in the receipt, and the debtor cannot later object to such application unless there be a cause which would invalidate the contract. (Article 1172, Civil Code);

b. When the debt bears interest, the payment cannot be applied to the capital, while the interests are not yet paid, unless the creditor agrees to that effect. (Article 1173, Civil Code);

c. If neither the debtor nor the creditor make any assignment of the payment nor could it be applied in accordance with the foregoing rules, such payment shall be applied to the debt most onerous to the debtor among those due, understanding, however, for onerous, that debt which bears interest or to which penalties were imposed, or which was given under security. (Article 1174, Civil Code, part 1);

d. If all the debts were of the same nature and charges, the payment shall be applied to all pro rata. (Article 1174, part 2, Civil Code.)

(1) Adjudicación o dación en pago.

Concept: "It is the conveyance of the ownership of a thing as an accepted equivalence of performance". (8 Man. 314.) It is a sort of sale. (Id.)

See Art 1531, Civil Code.

This special form of payment differs from assignment of property in these respects: the former does not require, in order to take place, that there be a plurality of creditors, whereas the latter does; neither it needs refer to all the property of the debtor as assignment does and finally adjudication unlike assignment may take place even during the solvency of the obligor. (8 Man. 314.)

(2) Tender of Payment and Consignation. Concept.—This form takes place when the debtor, desiring to make payment, the creditor, however, declines to accept the thing or the amount owed, in which case the debtor may extinguish his obligation by means of Tender of Payment and Consignation made in the form prescribed bylaw. Tender of Payment means "the act by which the debtor informs the creditor that he is ready to make payment of the amount due, or to make the delivery of the thing belonging to him;" and Consignation "is the deposit which the debtor desires to make of the thing or amount due, when the creditor declines to receive the same." (3 Viso 89.)

Requisites of Tender of Payment.—In order that the Tender of Payment may be valid it must have the following requisites:

- (a) That the payment be of the whole debt;
- (b) That it be made by the person who has capacity to make the payment, and to the person who has capacity to receive the same; the same may also be made to the creditor's agent if the latter is specially authorized for that purpose;

(c) That it be made in the place agreed upon and, in its default, in the domicile of the creditor;

(d) That the payment be made at its maturity, or that the condition imposed upon when the debt was contracted, be complied with;

(e) That the debtor should inform before persons of good reputation or before a judge of competent jurisdiction that he is ready to pay his debt and that if the creditor refuses to receive the same, he is ready to make the consignation thereof (Law 8, tit. XIV, Partida 5.) It seems that the first part of the last requisite is no longer in force here.

**Requisites of Consignation.**—Consignation should follow the Tender of Payment. (Article 1176, part 1, Civil Code; *Panganiban vs. Cuevas*, 7 Phil. 477.) However, the consignation alone may be made, when the creditor is absent, or when he is incapacitated to receive the payment at the time it is to be made, and when several persons pretend to have a right to collect the debt, or when the title of the obligation has been mislaid. (Article 1176, part 2, Civil Code, *Panganiban vs. Cuevas*, 7 Phil. 477, 487.) The consignation may also be effected when the creditor, without just reason, refuses to accept the payment. (Article 1176, part 1, Civil Code; *Fabros vs. Villa San Agustin*, 18 Phil. 336, 340), or when the creditor is not found at the time and place agreed upon for the payment (IV Sanchez Román 295), or when the creditor is not known (IV Sanchez Román 295), or finally when the creditor refuses to give a receipt for the payment made in order to avoid fraud. (IV Sanchez Román 295.) The effect of consignation is to free the debtor from responsibility. (Article 1176, part 1, Civil Code; 8 Manresa 318.) But in order to have a proper consignation, it should be notified to the person interested in the compliance of the obligation. (Article 1177, part 1, Civil Code.) Moreover, it should be adjusted literally to the provisions which regulate the payment. (Article 1177, part 2, Civil Code.) The consignation is made by depositing the things due at the disposal of the judicial authority, before which the Tender shall be accredited and the announcement of the consignation, to the others, Consignation, once duly made, shall also be notified to the interested parties. (Article 1178, Civil Code; *Panganiban vs. Cuevas*, 7 Phil. 477, 486; *Fabros vs. Villa San Agustin*, 18 Phil. 336, 340.) The expenses of the consignation, when properly made, will be charged against the creditor. Consignation once duly made, the debtor may ask the judge to order the cancellation of the obligation. As long as the creditor has not yet accepted the consignation, or the approval of the judge as to consignation has not yet been made, the debtor may withdraw the thing or amount consigned leaving the obligation subsisting. (Article 1180, Civil Code.) If, after the consignation is made, the creditor authorizes the debtor to withdraw, the former shall lose all the right of preference which he has on the thing. The co-debtors and sureties in such a case shall be discharged. (Article 1181, Civil Code.)

(3) Payment by Assignment (Cession) of Property.—Concept.—Assignment is meant the abandonment by the debtor of his property in favor of his creditor or creditors. Proemio of tit. XV, Partida 5.

Kinds: Assignment may be conventional or judicial.—Conventional assignment or cession "is that which the creditors accept voluntarily binding themselves as to what was stipulated between them and the debtor. Judicial assignment or cession is that which, by some special benefit, the law concedes to the debtors in good faith, in order that they may abandon their property in favor of their creditor, when, in consequences of a fatal misfortune, they become unable to pay their creditors. (3 Viso 92.)

Persons who can make the assignment of property.—These may be those unfortunate debtors, who, by unforeseen events, become unable to pay their creditors. In case of extra judicial assignment, as this is the result of an agreement between the creditor and the debtor, the latter cannot force the former to accept the property assigned; but in a judicial assignment the creditor cannot refuse nor the judge can permit such refusal, because the law considers as an act of humanity to protect the debtors once their misfortune and good faith are proven. (Law 1, tit. XV, Partida 5.)

Property subject to assignment.—In accordance with Law 1, tit. XV, Partida 5, all property of the debtor except the ordinary clothing, may be subject to assignment; but in practice it is conceded as a humanitarian act that those instruments used in the profession of the debtor and all others which are exempt from attachment as provided for in the Code of Civil Procedure, section 452, Act 190, may also be respected.

Effects of assignment.—In order to determine the effect of assignment, it should be noted that the assignment may be conventional or judicial. If conventional, what was stipulated should govern. But the creditor who is not in conformity with the terms of the assignment, cannot be bound by the same. (8 Manresa 312.) If it were judicial, or being conventional and nothing was stipulated, the important effects produced are: (1) to sell the property assigned and with its proceeds to satisfy the creditors according to their respective credits. (8 Manresa 313); (2) to extinguish the credit or credits up to the amount the proceeds of the sale may cover, the debtor remaining obligated to pay for the rest together with his joint creditors and sureties if their be any, and in their default, the heirs of the debtor if they receive the inheritance without the benefit of the inventory. (Article 1175, Civil Code.) It seems that this last part regarding inventory is no longer in force at the present time in the Philippine Islands; (3) in view of the assignment the creditors will become subrogated in all the rights of the debtor, with the right to exercise all the actions which may be derived therefrom. In this connection see article 1175, Civil Code. The stipulation which may be agreed upon between the creditor and the debtor in the contract of assignment will be adjusted in accordance with the provisions of title XVII of the Civil Code and those of the Enjuiciamiento Civil.

(2) Indirect—(a) Compensation, Concept.—“Compensation shall take place when two persons in their own right are mutually creditors and debtors of each other.” (Article 1195, Civil Code.) “Two obligations are balanced and extinguished to the extent in which the value of one co-exist with the other and this is often called simplified payment.” (8 Manresa 391.) Compensation is very useful to both parties, because it saves expenses, suits and troubles which cannot be avoided if each debtor should be compelled to pay materially what he owes, in order to extinguish his debt. (8 Manresa, 391.)

Kinds: As to its cause, it may be legal, voluntary and judicial; and as to its effect, it may be total or partial.

Legal compensation “is that which is created against the will of one of the parties and even without the consent of either party from the time the reciprocal concurrence of the debts and the conditions required from the latter, take place.” In this connection see *Luengo & Martinez vs. Herrero*, 17 Phil. 29 and also *Yap Unki vs. Chua Jamco*, 14 Phil. 602. This kind of compensation is paramount. Voluntary compensation “is the one obtained through the agreement of the parties.” It differs from novation in that in the latter the original obligations are extinguished in order to produce or create new ones, while in the voluntary compensation, the obligations become totally extinguished. Judicial compensation, ordinarily speaking, does not exist as such and it is only so called when the same is declared by the court in view of a demand made by one of the parties. (8 Manresa 393-394.) Total compensation takes place when it produces the extinguishment in toto of the obligations, and partial when it extinguishes only in part. (8 Manresa 392-393.)

Requisites.—Compensation in order to be valid must have the following requisites: (1) Each debtor must be principally bound and must be at the same time the principal creditor of the other; (2) Both debts must consist of a sum of money or other fungible goods of the same kind and quality, if quality has been stipulated; (3) Both debts must be due; (4) The debts must be liquidated and demandable; (5) None of them must be subject to any retention or suit instituted by a third person and of which the debtor has been duly notified; (6) Finally, none of the debts must be of the kind which the law excludes from the operation of compensation. (Articles 1195 and 1196, Civil Code; see *Acuña Co Chongco vs. Dievas*, 12 Phil. 250.) Let us explain briefly some of these requisites for their clear understanding.

The debts must be mutual.—The law requires that the debts must be mutual or must be of persons who at the same time are principal debtors and creditors of each other. (Article 1195; Article 1196, part 1, Civil Code.) So, for the lack of this requisite the following debts cannot be compensated each for the other: (a) The debtor who has consented to the assignment of the rights by a creditor in favor of a third person, cannot set up to the transferee the compensation which would correspond to him against the transferrer, (Article 1198, part 1, Civil Code; (b) If the debtor be informed of the assignment and he refuses, then he can set up the compensation for the

debts prior to it, and not to the subsequent ones. (Article 1198, part 2, Civil Code.) But if the assignment was made without the knowledge of the debtor he can set up the compensation of the credits prior to it and to the subsequent ones until he acquires knowledge of the assignment. (Article 1193, part 3, Civil Code.) The surety may also set up the compensation with regard to the debt which the creditor should owe the principal debtor. (Article 1197, Civil Code.) There are other several cases that may be proposed, but all of them may be solved by taking into consideration the principle that compensation does not take place but between persons who are mutually creditors and debtors of each other, whether they be those by whom the debts were constituted, or those who succeeded them, in their obligations and rights, or their respective sureties. (See *Gochongco vs. Dievas*, 12 Phil. 250.)

The debts must consist of money or things of the same kind. This requisite is necessary because, compensation being another mode of payment, it is necessary that the objects or things in which a debt may consist of may serve as payment to the other; and as only between money or between fungible things of the same kind and quality this circumstance may be verified, because only between them lie the exactness and similarity required in what is to be mutually exchanged, hence, the necessity of this requisite is obvious. Such are the dispositions of law 21, tit. XV, Partida V, and article 1196, part 2, Civil Code. If the debts do not consist in money or fungible things of the same kind and quality, compensation cannot be made either by law or by a competent authority, except by mutual agreement of the parties interested if they agree to appraise the prices of the things constituting the debts and to extinguish them as to the concurring amount, if of unequal value, or wholly if the value of each be the same. (3 Viso 100.)

The debts must be liquidated.—The debts must be liquidated, otherwise they cannot be compensated without express agreement of the parties. (Article 1196, part 4, Civil Code; see *Luengo and Martinez vs. Herrero*, 17 Phil. 29.) If the debt be subject to a suit or to the payment of certain undetermined indemnity it cannot be compensated with another, certain and fixed, unless its certainty and quantity be shown within ten days in the same action when it is an ordinary proceeding. (Law 20, tit. XIV, Partida 5; Articles 1559 and 544 of the *Enjuiciamiento Civil*.)

The debts must be demandable.—This means that the debts be demandable by both parties. From this it may be inferred: (1) That the debt subject to a period cannot be compensated, because if no body can be compelled to verify the payment before maturity, compensation can neither take place, as this is a sort of payment. (Decision of the Supreme Court of Spain, 15 of April 1890.) However if the period be only granted by the judge or gratuitously, in this case compensation may proceed; (2) That a pure debt cannot be compensated with another conditional, unless it is so agreed upon by the interested parties; (3) Neither can be compensated those other debts which do not confer any action on the creditors, like those which have been contracted in gamblings forbidden by law or those already extinguished by prescription. (3 Viso 101.)

The debts must not be precluded from the operation of compensation.—By reason of this requisite compensation does not take place: (1) In the restitution of a deposit, either necessary or voluntary, because the depositary and his heirs must restore the things to their owner without having a right to retain them except as a lien for the extraordinary expenses incurred in the thing, in which case he can retain them until he is reimbursed (article 1200, Civil Code, article 1780, Civil Code; see *Luengo & Martinez vs. Herrera*, 17 Phil. 29); (2) In the restitution of the thing, loaned in *comodatum* even when extraordinary expenses were made on the thing, which can only be claimed after the restitution is made. (Articles 1200 and 1747 Civil Code); (3) Against an action brought for support by way of gratuitous title, because the support of a person has a preferential right over the debt of the recipient. (Article 1200, part 2, Civil Code); (4) When a person is sentenced to pay to another certain amount of money by reason of certain violence or injury done to the latter. (Law 27, tit. XIV, Partida 5); (5) Compensation is not also admissible with respect to a debt arising from public assessments, whether of the state or of a municipality. (3 Viso 104.) Finally, if a person has several compensatory debts, the compensation shall be observed in the manner provided for with regard to the imputation of payments. (Article 1201, Civil Code.)

Effects of Compensation.—The following are the effects of compensation: (1) The debts are extinguished by operation of law, although the causes which may give rise to them are not the same. If the debts are of the same amount the extinction is total, and if not, the extinction will only be limited to that part of the concurrent amount of both debts, even though neither the creditor nor the debtor had a knowledge thereof. (Article 1202, Civil Code; see *Luengo & Martinez vs. Herrero*, supra); (2) The privileges, mortgages, pledges, and interests attached thereto are also thereby extinguished either totally, or to the extent of the amount compensated and the sureties are likewise discharged in the same proportion. (8 Manresa 414); (3) Should one of the parties have several debts, the one due and more onerous to the debtor by reason of interest, mortgage or other incumbrances, will be considered extinguished; but should there be no difference between the debts, they will be extinguished proportionately as pointed out in speaking about imputation of payments. It is operative from the moment the two debts co-exist. (*Luengo & Martinez vs. Herrero*, supra; 8 Manresa 415.)

B. Discharge by Performance under American Law—Concept.—Where a promise has been given on an executed consideration, performance of the promise by the promisor necessarily discharges the contract, for the obligation, existing between the parties, is thereupon extinguished. But when the contract is wholly executory, i. e., when one promise is given in consideration of another, performance by one party does not discharge the contract, although it discharges him from further liability. (9 Cyc. 601; *Elliott on Contracts*, Vol. III, sec. 1875.)

**Form.**—Under the modern Common Law rule, a substantial performance in all respects in good faith, is sufficient to satisfy the law. A strict performance is no longer required, as a condition precedent to recovery. The question as to whether or not the contract has been performed is usually a question of fact. But it may in some instances be a question of law, or at least, so clear under the evidence that the court will not permit if there be contrary to the evidence, to stand. (Elliott on Contracts, Vol. III, secs. 1878, 1887.)

**Time and place of performance.**—The time and place of performance are matters depending largely upon the terms and constructions of the particular contract. It may be said generally that, under the strict common law rule, time is usually regarded as of the essence of the contract and attempted performance made after the time stipulated is not strictly performance in the eye of the law; but in equity the rule is more liberal and time is not now regarded as of the essence of the contract unless it is clear that such was the intention of the parties; and where no time is fixed by the contract, the law usually implies that performance is to be made within a reasonable time. (Elliott on Contracts, Vol. III, sec. 1877.)

**Performance by payment.**—

(a) **In General.**—Payment is the most common form of performance. It is, the delivery of money or its equivalent by one person from whom it is due to another person to whom it is due. In its most general acceptation, it means the fulfillment of a promise, the performance of an agreement, the accomplishment of every obligation, whether it consists in giving or doing. As used in its strict legal sense, there must be (1) a delivery, (2) by the debtor or his representative, (3) to the creditor or his representative, (4) of money or of something accepted by the creditor or as the equivalent thereof, (5) with the intention on the part of the debtor to pay the debts in whole or in part, (6) accepted as payment by the creditor. (30 Cyc. p. 1180.)

(b) **Effect.**—Payment discharges the debt pro tanto. A payment made by one of the two joint debtors extinguish the debt pro tanto. On the other hand a payment of his share of the debt by one or two joint and several debtors does not release him. Payment of a debt by a stranger although without the debtor's request, if accepted as such by the creditor, discharges the debt so far as the creditor is concerned. (30 Cyc. 1220-1221.)

**Application of Payment. Definition.**—Application of payment "is the application of a payment made by the debtor to his creditor to one or more of several debts owing the creditor by the debtor." (30 Cyc. 1227.) The rule is not confined to payment made in money but is extended to payment made in commodities or services. (Young vs. Harris, 36 Ark. 132.)

**Rights of the parties**—

(a) **Of debtor.**—The general rule is that a debtor paying money to his creditor has the primary and paramount right to direct the application of his money to such items or demands as he chooses, provided the payment is a voluntary one. (30 Cyc.

1228.) The reason for this rule is that up to the time of payment the money is the property of the debtor and being such may be applied as he sees fit and directs. But the debtor may use this right if he makes a payment without any direction as to its application. (*California Bank vs. Webb*, 94 N. Y. 467; *Elliott on Contracts*, Vol. III, sec. 1939.)

(b) Right of Creditor.—According to Common Law rule in force in most of the States, a creditor may apply a payment voluntarily made by the debtor without any specific application where there are two or more debts, to whichever debt he pleases so as to best subserve his own interests. But there is a limitation to this rule, where the particular application would be inequitable and unfair and would enable the creditor to inflict an injustice on the debtor. (*Arnold vs. Johnson*, 2 Ill. 196.) By the rule of the Civil Law, the creditor was bound to make his application at the time of the payment, but at Common Law, the creditor is not compelled to exercise his right at the time the payment is made. There is much conflict among the authorities, as to how long the right exists. But the weight of authority is that the creditor must make it at least before suit is brought. (30 Cyc. pp. 1233-1238; *Elliott on Contracts*, Vol. III, secs. 1940-1941.)

(c) Right of Court.—When neither party makes the application, the law, through the court, will make the same in accordance with the intention of the parties if ascertainable, and if not, in accordance with certain general rules that are supposed just and equitable and will best protect and maintain the rights of both debtor and creditor. This subject was recently considered in the following Indiana and North Carolina Cases: *Barrett vs. Sipp* (Ind. App.), 98 N. E. 310; *Stene vs. Rich* (N. Car.) 75 S. E. 1077; (30 Cyc. pp. 1239-1241; *Elliott on Contracts*, Vol. III, sec. 1942.)

Tender. Definition.—Tender “is an offer to perform a contract or to pay money, coupled with a present ability to do the act.” It imports not merely the readiness and ability to pay or perform, but also the actual production of the thing to be paid or delivered over and offer it to the proper person; (*Holmes vs. Holmes*, 12 Barb. (N. Y.) 137, 144); and the act of tender must be such that it needs only acceptance. (38 Cyc. p. 131.)

Requisites. (a) The tender must be made by the debtor or his agent and not by a mere stranger; (b) Must be made to the party entitled to receive it, or his agent; (c) Where the contract calls for payment in money, the tender must be made in money which is the legal tender, unless there is a waiver, whether express or implied; (d) The money must be actually produced, unless the requirement is waived, either expressly or impliedly; a mere readiness and willingness to pay, even though expressed, is not sufficient; (e) The tender must refer to the whole amount due; it may be greater but not smaller, otherwise would be ineffective for the creditor is not bound to accept less than the whole amount of his demand; (f) The tender must be made at the place fixed in the contract; if there is none or where the creditor may be

found, at the creditor's residence or place of business; if none of this is available, then the debtor may select any suitable place and make a delivery there, with notice to the creditor, if he can be found; (g) The tender must be made on the very day the performance is due. A premature tender is ordinarily of no effect. This rule in some States has been changed by statute and in others, by decisions of courts. But if no time is fixed for the performance or tender, the rule is that it may be made within a reasonable time; (h) The tender must be unconditional in order to be effective; this, however, has certain qualifications; (i) The tender must be kept good, i. e., must be deposited into court. (Elliott on Contracts, Vol. III, secs. 1956-1973.)

**Effect.**—Ordinarily a tender of money does not operate as a satisfaction of the debt and is no bar to an action thereon; the effect being to discharge the debtor from a liability for interests subsequent to the tender, or damages that would accrue by reason of nonperformance, and the costs afterward incurred. Although a creditor by refusing to accept does not forfeit his right to the thing tendered, he does lose all collateral benefits or securities, such as lien of an attorney, of a pledge, of a mortgage and mechanic's liens.

### C. By Agreement under Spanish Law.

1. **Remission.** Concept.—“It is an act of liberality by which the obligee who receives no price or equivalent thereof, renounces the enforcement of the obligation, which is extinguished in its entirety or in that part or aspect of the same to which the remission refers.” (8 Manresa 355.) Or, “The gratuitous abandonment by the creditor of his right.” (IV Sanchez Román 422.) Remission “is the release made by the creditor of the whole or part of what is due.” (3 Viso 105.)

**Requisites.**—In order that there may be a valid remission, the following requisites must be present:

(a) Must be gratuitous, because from the moment an equivalent be given in return, its nature is thereby transformed into either an imputation of payments, if something else is received instead of the money due; or a novation, if the object and circumstances of the obligation be changed. (8 Manresa 355.)

(b) The obligation must be demandable at the time of the remission, because if there is a period within which to make the payment and such period has not yet elapsed, the right to demand has not yet accrued and therefore the creditor cannot yet dispose of the same; the same is true when the right is already prescribed. (8 Manresa 356.)

(c) The creditor or creditors must have legal contractual capacity, because the remission transmits ownership, and it is for this reason that minors, insane persons and the like are disqualified to exercise this mode of remission.

(d) It must not be exercised to defraud creditors. (Law 12, tit. XV, Partidas V, VI, VII, tit. XXXII, book XI Nov. Recon.)

(e) As the remission is but a kind of donation, it follows that in its exercise extrajudicially, the laws regarding the amount allowed to be donated, or the law as to inofficious gifts, shall be observed. (Article 1187, part 2, Civil Code); in this connection see also articles 630-3, 534-646, 654, 820 and 1036; 8 Manresa 357-362.

Kinds: Remission may be express or implied; the former may be judicial or extrajudicial, total or partial. (Article 1187, part 1, Civil Code.)

Express remission is that made by words, whether the creditor binds himself not to collect the debt or whether he declares to have been paid though in fact he has not received any payment. Implied remission is that which results from an act which necessarily supposes in the creditor an intention to remit the debt, and such is so when the creditor makes a voluntary delivery to his debtor of the document or instrument representing the debt. (Article 1188, Civil Code.) Thus, the Supreme Court in the case of *Velazco vs. Masa*, 10 Phil. 280, held: "Possession by the debtor of a private document proving a debt, raises the presumption that the creditor voluntarily delivered the document to him, unless the contrary is proven by said creditor, upon whom rests the burden of overcoming the presumption, inasmuch as presumptions established by law exempt those favored thereby from producing further proof. The *voluntary return of an instrument of credit* of a private character *implies the gratuitous remission* of the debt, the extinction of the obligation to pay, and a waiver of the right of action for its recovery." There is also an implied remission when the creditor tears up said document with the intention to renounce his right. (Article 1189, Civil Code.) The burden of overcoming the presumption established in article 1189 rests on the creditor. (See *Velasco vs. Masa*, supra.) This implied remission does not require any special form for its validity. (8 Manresa 359.)

Judicial remission is that made in the voluntary meeting of the creditors upon the request of the common debtor, observing therefor the proceedings provided for in the *Enjuiciamiento Civil*, Articles 1130-55, inclusive. It seems to me that these provisions are no longer in force here, since the enactment of Act 190, the Spanish Code of Civil Procedure (*Enjuiciamiento Civil*) was nullified by it. (See *Legaspi vs. Aguilar*, 12 Phil. 353.) Extrajudicial remission is that remission which is obtained by virtue of an agreement between the creditor and the debtor, taking into consideration the provisions of Law 1, Tit. XV, Partida 5, for its due resolution. This is a sort of express remission. Finally, remission may be total or partial according to whether the amount remitted is total or partial.

Effects of Remission.—The following are the effects of remission: (1) If the remission be implied and the debtors are jointly liable, remission to one of them favors the other, because the creditor in remitting the debt to one, indicates impliedly that he remits to all. (Article 1143; see Article 1146, Civil Code; 8 Manresa 368-370); (2) Should the remission be express and the debtors be jointly liable though the effect may be the same as above mentioned, however, if in the remission made

to one, the right against the others was expressly reserved, the debt will still subsist in so far as the others are concerned, deducting the portion remitted; (3) Should the remission be made in favor of the principal debtor, it favors the sureties, but not reciprocally, i. e., when it remits to sureties, the principal debtor is not released; likewise, when it is made to one of the sureties not jointly liable, the others are not discharged. The same is true in case of pledge or other accessory obligations. (Article 1190, Civil Code; 8 Manresa 371-373.) However, the accessory obligation of pledge is presumed to be remitted if the thing pledged, after delivery to the creditor has been made, be found in the hands of the debtor. (Article 1191, Civil Code; 8 Manresa 371-8.) This presumption is conclusive according to Sanchez Román, but Manresa maintains that it is only prima facie. (See IV Sanchez Román 462; 8 Manresa 877.)

2. Mutual Dissent (*Mutuo Disenso*). Concept.—*Mutuo disenso* "is the agreement entered into by the parties to rescind a contract already perfected in order to extinguish the obligation arising therefrom." (3 Viso 108; see IV Sanchez Román 407.) The authorities generally establish that this way of dissolving obligations is only proper in consensual contracts, and although it be a case of a consensual contract, it is necessary that it be not yet consummated; and if consummated, novation should take place rather than a dissolution of the contract. However, some authors believe that consensual contracts, as well as real contracts may be dissolved by mutual agreement, as in the case of a sale, where the delivery of the thing has not yet been made as provided for by Law 2, tit. X, Book 3 of the *Fuero Real*; also in the case of a promise, if the delivery of the thing has not yet been made; in the lease, while the period of time stipulated has not yet elapsed; and so with partnership, *mandatum* and the like. (See IV Sanchez Román 409.) Real contracts may also be dissolved by mutual dissent because though a debtor cannot be obliged to make a delivery of the thing because the period for it has not yet come, yet the parties may agree to have the thing delivered, in view of extinguishing the obligations arising therefrom. (3 Viso 110.) Our Civil Code is silent in this point, for which the writer expects that the foregoing explanation might subserve this deficiency. The rule as to contracts in general is applicable to mutual dissent.

3. Transaction. Concept.—Since transaction is an act by which the obligation previously contracted is renewed or extinguished it is not amiss therefore to consider it as a means of extinguishing obligations. According to Viso "transaction is an agreement on a doubtful thing made before or after a suit thereon has begun." (3 Viso 412.) Our Civil Code defines it as "a contract by which each of the parties by giving, promising, or retaining something, avoids the provocation of a suit, or puts an end to the one that has already been instituted." (Article 1809, Civil Code.)

**Requisites.**—From the foregoing definitions it may be inferred, that in order to have a valid transaction the following requisites must concur: (1) Consent, because a transaction is the result of an agreement; (2) each party must receive or remit mutually some thing; (3) it must fall on a doubtful thing because its object is to avoid a suit not yet commenced, and there would be no suit if the one of the parties should appear clearly that he has no right whatever over the thing in question; (4) if it falls on a suit already commenced the same must not have been settled by a final judgment of the court, because otherwise the thing should then be a real one and not doubtful. (Law 32, tit. XXXIV, Partida 3.) (5) the parties must have free administration of their property, and if the same is made in the name of another, they must be duly authorized therefor. Moreover, a written instrument should be made for the convenience of the parties. (Law 15, tit. XVIII, Partida 3.)

**Persons who can transact.**—Any person who is not expressly forbidden by law may enter into the contract of transaction, and those who are so forbidden may be summarized as follows: (1) Those persons legally incapacitated to make contracts as insane, spendthrifts, minors, and the like; (2) the agents if they do not possess a special power to that effect, or if they be given a general one but there is not any particular clause allowing them to enter into that contract. (Law 19, tit. V, Partida 3); (3) the guardians cannot compromise the interests of their wards except in the form provided for in the article 259, No. 12, and article 274 of the Civil Code; article 1810, part 1, Civil Code; (4) the father or mother, as the case may be, may transact the property or rights of the children under patria potestas, except if the value of the object under transaction exceeds 2,000 pesetas, it must be judicially approved in order to be effective and binding. (Article 1810, part 2, Civil Code); (5) Neither the husband nor the wife can transact over the property or dotal right except in the cases and with the formalities required for their alienation and incumbrance (Article 1181, Civil Code); (6) corporations having juridical personality can only transact in the form and with the necessary requisites to alienate their property. (Article 1812, Civil Code.)

**Things which can be the object of transaction.** These are the following: (1) The civil action arising from a crime; but the same does not bar the public action for the imposition of the legal penalty; (2) The transaction cannot be made in regard to the civil status of persons, neither in regard to matrimonial questions, nor about future support. (Article 1814, Civil Code.)

With the exception of the foregoing cases the transaction can be made if the foregoing requisites are fulfilled and the two following conditions are observed: (a) That it shall only embrace the object specifically set forth in the transaction, or those which by a necessary induction from its words must be considered embraced therein; (b) That the general renunciation of rights shall only be understood as including those which have relation to the question about which the transaction has been made. (Article 1815, Civil Code.)

**Effects of Transaction.**—The effects of transaction are: (1) The termination of the suit and the abiding of the parties by the transaction. (Law 34, tit. XII, Partida 5); (2) The transaction has the same authority among the parties as a final judgment, but summary proceedings shall not be taken except when they are in compliance with a judicial transaction. (Article 1816, Civil Code); (3) If there is a surety in the obligations to be transacted, the transaction made by the surety with the creditor is not binding upon the principal debtor; neither that made by the latter should be binding on the surety if made without his consent; the same is true in case where there are several debtors, in which case the transaction made with one of them does not prejudice, nor benefit the others. (3 Viso 116.)

**Causes for rescission of transaction.**—The transaction can be rescinded for the following causes: (1) For having intervened error, deceit, or violence (Article 1817, Civil Code); however, one of the parties cannot oppose an error of fact against the other when on account of the transaction the latter has withdrawn from a suit already begun (Article 1318, Civil Code); (2) for having intervened in the contract false documents; but the transaction shall not be annulled for the mere discovery of new documents, unless bad faith is shown. (Articles 1817-1818, Civil Code); (3) When the transaction has fallen on a suit which has been decided by a final sentence, because one of the parties interested did not know about the existence of such a final sentence; the ignorance however of a revocable sentence is not a cause for contesting a transaction. (Article 1819, Civil Code.)

4. **Compromise.**—Concept.—As a transaction is not only the means by which a suit may be avoided and thus to extinguish the obligation, but the same may also be avoided by means of a compromise whose effect is the same but of different proceedings, it is but proper that the latter be also treated as one of the means by which the obligations may be extinguished. Compromise "is an agreement by which the parties which have some dispute between them agree to submit it to other person or persons for decision. (3 Viso 17.)

**Persons who can compromise.**—The same persons who can transact as discussed before may also submit their controversies to a third person for decision. (Article 1820, Civil Code.)

**Persons to whom compromise may be submitted.**—In order to determine the persons to whom compromise maybe made, it should be noted, at the outset, that they are of two kinds: Arbitrator or judge of law, and arbitrator or judge of fact. Arbitrators are those who proceed or take cognizance of a suit presented before them in the manner provided for by law; and arbitrators are those who take cognizance of the facts submitted before them according to their honest judgment and discretion without having due regard to the provisions of the law. According to Partidas, minors, foreigners, clergymen, dumbs, blindmen, and even infamous persons may be arbitrators; but now-a-days the power to be an arbitrator is only limited to lawyers

of twenty-five years old and who are enjoying full civil rights, as provided for by article 790 of the Enjuiciamiento Civil; and arbitrators may extend to all persons of legal age and who are enjoying full civil rights and who are able to read and write according to the provisions of Article 827 of the Enjuiciamiento Civil. The Civil Code does not say anything about arbiters, for which these provisions of the Enjuiciamiento Civil may be applicable.

Manner of formalizing compromise.—Compromise shall be executed in a public instrument which shall contain the following: (1) The names, profession and domicile of the contracting parties; (2) the names, profession and domicile of the arbiters or arbitrators; (3) the business wanted to be submitted with all the necessary circumstances; (4) the time in which the arbiters or arbitrators should file their decision; (5) the agreement as to the question of fine to be imposed upon the party failing to comply with the indispensable conditions necessary for the realization of the compromise; (6) the agreement as to another fine to be paid by the one who should appeal from the decision; (7) the place of the trial; (8) the date of the execution of the compromise. (Article 793 of the Enjuiciamiento Civil.) The execution of this instrument with all its conditions required, is so important that failure to specify one of them is sufficient to invalidate the compromise. (Article 792, Enjuiciamiento Civil.) Once said instrument is executed the same will be handed in to the arbiters for their acceptance (Article 794, Enjuiciamiento Civil); and once accepted either expressly or impliedly, they cannot refuse to comply with it; if they do not comply they can be compelled to do so by a competent judge at the instance of the parties unless there are good reasons shown therefor. (Laws 28 and 29, tit. IV, Partida 3; and article 1800 Enjuiciamiento Civil); however the arbiters as well as the arbitrators may be excused in certain cases, such as with regard to the former in those designated for ordinary judges (article 799, Enjuiciamiento Civil), and with regard to the second in those cases wherein they are interested in the matter submitted to their decision. (Article 1831 Enjuiciamiento Civil.)

Things which may be compromised. They are those on which there is a litigation between the parties, before or after the trial of the same and whatever may be the status of the latter (article 487 Enjuiciamiento Civil); except when they fall on the following: (1) The suits referred to in article 483, No. 3 of the Enjuiciamiento Civil; (2) on questions which, according to law, the fiscal should intervene. The provisions on this matter regarding transaction is applicable also to compromise. Article 1821, part 1, Civil Code.)

Manner in which arbiters and arbitrators shall proceed.—The arbiters shall proceed according to the order established for arbitration in the article 1804 of the Enjuiciamiento Civil. The arbitrators have nothing to do with these legal provisions; they may decide the case according to their best judgment and discretion. (Article 833, Enjuiciamiento Civil.) One thing however must necessarily be done

by them and this is that the acceptance and nonacceptance must be embodied in a document signed by the clerk of court and must render their decision before him. (Article 1835, *Enjuiciamiento Civil*.) Should the decision be to compel the debtor to fulfill his obligations, the obligation will be extinguished as soon as the decision is complied with; and should the arbitrator only declare the manner of extinguishing the obligation and should there be no appeal therefrom, it will only be considered as a novation with respect to the original transaction.

These provisions are in force, according to article 1821, part 2 of the Civil Code. I believe, however, these provisions, so far as the Philippine Islands is concerned, are now repealed and the only provisions regarding arbitration which are now considered are those provided for in sections 135-140 of the Code of Civil Procedure (Act 19). See *Cordova v. Conde*, 7 Phil. 447.

5. Novation. Concept.—Although novation does not extinguish the obligation at all, however, as by this means the obligation previously contracted disappears and a new one is substituted, hence it is obvious to consider it as one of the modes of extinguishing obligations. Novation "is the change, substitution, or renewal of an obligation or obligatory relation, with the intention of extinguishing or modifying essentially the former: *debitum pro debito*." (IV Sanchez Román 424.) "It does not operate as an absolute but as a relative extinction." (8 Manresa 417; see Article 1203, Civil Code.)

Kinds.—As to its cause, novation may be personal, real and mixed; and as to its form, it may be express and implied.

Personal novation occurs when the change or substitution takes place either in the person of the debtor or in that of the creditor, the other terms of the obligation being subsisting. The first kind may take place either by *Expromission and Delegación*. Novation by *Expromission* takes place where a third person of his own accord and even without the knowledge of the original debtor assumes the obligation, with the consent of the creditor. Novation by *Delegación* takes place where the debtor asks the creditor to accept a third person to take his place as obligor. (See IV Sanchez Román 423, 426; 8 Manresa 418.) The second is called *Subrogation*. Subrogation is the transmission made to a third person of the credits, rights and actions which a person has against another, leaving the obligation of the debtor subsisting.

Real novation takes place where the transmission, substitution or novation is made either in the object which constitutes the obligation, or in the condition which affect the same, or in the cause of said obligation. (See *Peterson vs. Azada*, 8 Phil. 432.)

Mixed novation takes place whenever it involves a modification of the obligation and of the subjects thereof. (IV Sanchez Román 428.)

Finally, novation may be express when the parties clearly so determine in their agreement, otherwise it would not be binding, unless the old and the new obligations are inconsistent with each other in all respects, in which case implied novation takes place. (Article 1104, C. V.; 8 Manresa 420; see *Martinez vs. Cabibes*, 25 Phil. 581; *Zapanta vs. De Rotaache*, 21 Phil. 154.)

Modes of verifying novation.—From the above definitions, the novation may be verified in the following cases: (1) By the modification of the obligation contracted, which takes place either by taking or adding something to it, the obligation being subsisting. Such would be where an obligation being pure, it was converted into a conditional one or with a period, or bearing no interest, the same be imposed, or having no sureties, the same had been created, etc. (Article 1203, Civil Code); (2) By the substitution of the new obligation in the place of the old, such as when what it is owned as a purchase price in a contract of sale, it was agreed to satisfy the same in the nature of a loan (Article 1203, part 1, Civil Code); (3) By the substitution of a new debtor in the place of the original one, concurring the following conditions: 1. That the substitution be made with the consent of the creditor, even though it is not necessary that the debtor should consent thereto, (article 1205, Civil Code); 2. That the subrogated person expresses clearly his intention to relieve the person primarily liable from the obligation; (4) By subrogating a third person in the rights of the creditor. (Article 1203, part 3, Civil Code.)

Effects of novation.—The effects of novation would be the same as the cases in which the novation may take place. Beginning with the first case above mentioned, its effect would be to comply with the obligation as it was constituted after the novation. In this connection it is to be noted that the validity of the novation depends upon the primitive obligation; that is, if the latter be conditional, its fulfillment is necessary for the validity of the new, unless the contrary has been stipulated. (3 Viso 121; 8 Manresa 433.) With regard to the second case, its effects are: to extinguish the primitive obligation leaving subsisting the new one; and the cancellation of the mortgages, bonds, and other accessory obligations such as interests, etc., except when the accessory obligations benefit third persons who have not given their consent to the novation, in which case, said accessory obligations would subsist notwithstanding the novation of the primitive obligation. (Article 1207, Civil Code; 8 Manresa 428, column 31.) But, in order that an obligation be extinguished by another, it is required that it be so expressly declared or that the old and the new obligations are in all respects inconsistent with each other. (Article 1204, Civil Code.) In the same way, the novation is null and void if the primitive obligation be null, save where the cause of the nullity may be invoked by the debtor, or where the ratification has validated the acts which are null and void in their origin. (Article 1208, Civil Code.) The reason of this principle is obvious, because the original obligation determines the novation and this, being null and void, necessarily the novation should be null and void. The exception to this principle is likewise obvious, because being

the debtor the only one who can invoke the nullity, by giving his consent to the novation he impliedly renounces to the action of nullity and thereby he validates the new obligation; in the same way happens, when the debtor validates the vice of the obligation by ratification, as it happens in the case where the vice is in the consent, in which case the express novation implies its ratification. (8 Manresa, 834.) Finally, in the third case, the effect would be to extinguish the obligation of the primitive debtor, if should concur the two conditions above mentioned, for, otherwise, there would be no novation, but the new debtor would be obliged with the primitive one like a surety. (Law 15, tit. XIV, Partida 5.) As a consequence of this, the insolvency of the new debtor who has been accepted by the creditor, will not revive the action belonging to him against the original debtor, except where the insolvency has been previously known by the debtor at the time of the delegation of the debt. (Article 1206, Civil Code.)

#### D. By Agreement under American Law—

1. In General.—As a contract is the result of agreement, so an agreement may put an end to a contract. Therefore, a contract may be discharged at any time before the performance is due, by a new agreement with the effect of altering the terms of the original agreement or of rescinding it altogether. (9 Cyc. 593.)

2. Requisites.—The new agreement must have all the requisites of a valid and enforceable agreement or it will not be binding, although there are some exceptions or qualifications in regard to the doctrine of consideration. (9 Cyc. 593; Elliott on Contracts, Vol. III, sec. 1857.)

3. Kinds.—Discharge by agreement may be a discharge by waiver, by cancellation or rescission. But the agreement of waiver or rescission must in general have all the essential elements of a valid contract. This agreement, however, may be implied or express. Another mode of discharging an executory contract by agreement of the parties is by substituted agreement. This substituted agreement may be express or implied as the new contract is inconsistent with the old one. A contract may also be discharged by a change in the parties thereto, as by the acceptance by the creditor of a new debtor in place of the old one where the original parties and the new party are all parties to the agreement. This is called a Novation. A contract may contain provisions either express or implied for its discharge, in which case such may be regarded as the discharge by agreement, thus the validity of a contract may depend upon the existence of certain facts and, if they do not exist, the contract can not be enforced. Or it may contain a condition, either express or implied that the occurrence of some acts or events shall discharge the contract, or the contract may provide that it may come to an end at the option of either one of the parties. (Elliott on Contracts, Vol. III, secs. 1858-1859, 1867-1871; 9 Cyc. pp. 595, 600.)

4. Form of New Agreement.—Contracts under seal.—The ancient rule of the Common Law was that the new agreement to discharge the old must have been in the same form and hence a sealed executory agreement could not be discharged by a

parol agreement whether oral or in writing and this rule has been followed in the United States. In some jurisdictions, however, there are decisions to the contrary. And it has been held that the time fixed for the performance of a contract under seal may be extended by parol, and that a condition in a sealed instrument may be waived by a parol (*Flanders vs. Barstow*, 18 Me. 357; *Moses vs. Loomis*, 156 Ill. 392; 9 Cyc. 593; Elliott on Contracts, Vol. III, sec. 1860.)

(2) Unsealed Contracts.—A simple contract, whether written or oral may be discharged, according to the weight of authority, by a subsequent written or oral contract, unless there is a statutory provision to the contrary. Nor is it material that the written contract provides that no modification shall be made except in writing, for this provision itself may be changed by word of mouth. (9 Cyc. 597; Elliott on Contracts, Vol. III, sec. 1861.)

(3) Contracts required by Statutes to be in Writing.—When the original contract was required by the Statute of Frauds or any other statutes to be in writing, the new contract must also be in writing. (*Blood vs. Goodrich*, 24 Am. Dec. 121.) This rule seems to be supported by the weight of authority, where the discharge is not absolute or in full but is the substitution of a new agreement either in whole or in part; but in some States there are decisions to the contrary. (9 Cyc. 599; see Elliott on Contracts, Vol. III, sec. 1862.)

(To be continued)