N.H.Jhabvala-The Law of Contracts 2018- C.Jamnadas & Co

THE LAW OF CONTRACTS-(The Indian Contract Act, 1872)-*BY* NOSHIRVAN H. JHABVALA, B.A., L.L.B.

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We are very glad to place before the students the thirty fifth edition of this popular book. In this revised edition, several changes have been made in the arrangement of the matter, and an attempt has been made to make it up-to-date.

A detailed Table of Contents has been given at the beginning for the convenience of the students. New cases have been added and an Index of Cases has been provided for ready reference of the students. Likewise, questions set at recent examinations of the University of Bombay have been given in the margins at the appropriate places.

A Glossary of Latin terms and expressions has also been included in the *Appendix* to the book.

We are confident that this revised edition will continue to be of immense use to the student community. — Publishers

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Recommended for further reading

Anson : Law of Contract

Pollock & Mulla : The Indian Contract and Specific Relief Acts

Mulla : The Indian Contract Act (Students' Edition)
Cheshire & Fifoot : Law of Contract
Cheshire & Fifoot : Cases on the Law of Contract
Avtar Singh : The Law of Contract
Ramchandran : Law of Contract in India
Venkoba Rao : Commentaries on The Indian Contract Act
Major : Cases in Contract Law
Major : The Law of Contract
Sutton & Shannon : On Contracts
Chitty : On Contracts
Prof. Pithawalla : Leading Cases on The Law of Contracts

Introduction to the book-THE LAW OF CONTRACTS

IMPORTANCE OF THE LAW OF CONTRACTS.—Contracts play a very important role in the day-to-day life of *every* person. Many a time, people enter into contracts *without even realising it.* Thus, when one buys any item, say a newspaper, there is a contract. In return for the money paid to the paper-vendor, one gets the newspaper. Similarly, there is also a *contract* when one opens the door of a taxi and announces his destination. The taxi-driver agrees to take the person to that place, and in return, the person agrees to pay the fare indicated by the taxi-meter.

The law of contract thus affects *every* person, - for everyone enters into contracts day after day. In every purchase that a person makes, in every loan of an article, in going for a ride in a bus or a taxi, and in various other transactions of daily life, contracts are entered into and legal relations created, though a layman may *not* bother to find out what he is doing from the legal point of view. To a man of business, however, the law relating to contracts is of *vital importance,* for usually, his whole business, and most of his transactions, are based upon contracts.

All such transactions, whether of laymen or of businessmen, when analysed, show that they are based on agreements creating mutual rights and obligations. In this book, an attempt is made to explain, in as simple a style as possible, the fundamentals of this interesting branch of the law regulating contracts, as contained in the Indian Contract Act, 1872.

SCHEME OF THE ACT -The Act can be divided into the following *two* very broad heads:

I. GENERAL PRINCIPLES OF CONTRACTS

II. SPECIFIC KINDS OF CONTRACT

I. GENERAL PRINCIPLES OF CONTRACTS (Sections 1 to 75)

The *general principles* of Contracts are laid down in Ss. 1 to 75 of the Act. These sections will be discussed under the following *seventeen* sub-heads:

1. Introductory (S. 1)
2. Basic concepts (Proposal, Acceptance, Consideration, *etc.)*(Ss. 2-9)
3. Communication of Proposal, Acceptance and Revocation (Ss. 3,7& 8) .
4. Valid Contracts (S. 10)

5. Competency of parties to contract (Ss. 11 & 12)
6. Consent and Free Consent (Ss. 13-22)
7. Lawful consideration and object (Ss. 23, 24, 57 and 58)
8. Agreements without consideration (S. 25)
9. Agreements in restraint of marriage (S. 26)
10. Agreements in restraint of trade (S. 27)
11. Agreements in restraint of legal proceedings (S. 28)
12. Ambiguous agreements (S. 29)
13. Agreements by way of wager (S. 30)
14. Contingent Contracts (Ss. 31-36)
15. Performance of Contracts (Ss. 37-67)
16. Certain relations resembling those created by Contract (Quasi-Contracts) (Ss. 68-72)
17. Breach of Contract (Ss. 73-75).

II. SPECIFIC KINDS OF CONTRACTS

The remaining part of the Act deals with *three particular kinds* of contracts, discussed in Ss. 124 to 238 of the Act. These are -

1. Indemnity and Guarantee (Ss. 124-147)
2. Bailment (Ss. 148-181)
3. Agency (Ss. 182-238).

Originally, the Indian Contract Act also dealt with contracts relating to *sale of goods* and *partnership.* However, the law relating to sale of goods is *now* embodied in the Indian Sale of Goods Act, 1930, while that of partnership is *now* to be found in the Indian Partnership Act, 1932. This is why the Act does *not* contain any section between S. 75 and S. 124. For good reasons, the remaining sections were *not* re-numbered.

I. GENERAL PRINCIPLES OF CONTRACTS (Ss. 1—75)

1 INTRODUCTORY (S. 1)

The Indian Contract Act, 1872, which extends to the whole of India, *except the State of Jammu & Kashmir,* came into force on 1st September, 1872.

Besides the three specific types of contracts mentioned earlier, there are other kinds of contracts, *e.g.,* contracts of sale or mortgage of immovable property, leases, *etc.,* which are *not* covered by the Indian Contract Act, but by the Transfer of Property Act. So, it can be said that the Act is *not exhaustive, i.e.,* it does *not* deal with *all* the branches of the law of contracts. There are various *other* Acts which deal with specific kinds of contracts, as for example, the Negotiable Instruments Act, the Transfer of Property Act, the Specific Relief Act, the Companies Act, the Sale of Goods Act, the Partnership Act, the Railways Act, *etc.*

As stated in the Preamble, the Indian Contract Act was passed to *define* and *amend certain parts of the law relating to contracts.* Thus, though this Act is a statute relating to

contracts, it does not contain the entire contract law of India. The Indian Contract Act is *not exhaustive*; *it is not a complete Code. (Irrawady Flotilla Co.* v. *Bhagwandas,* 18 I.A. 121)

Although the Act applies to the whole of India *{except* Jammu & Kashmir), it does *not* affect any usage or custom of trade. Nor does it affect any *incident of contract not* expressly repealed by the Act.

LEGISLATIVE LIMITATIONS ON THE FREEDOM OF CONTRACTS.— It may be noted that due to the complexity of modern commercial and social conditions, there is an increased tendency towards increased legislative interference with the right of the parties to make *any* contract they like.

The nineteenth century was an era of *laisez-faire,* and there were *very few restrictions* placed on the *freedom of contract.* Writing in 1861, Sir Henry Maine postulated (in his book entitled *Ancient Law)* that *the movement of progressive societies had been a movement from status to contract.* However, the position today is quite different, and there has been a fundamental change, both in social outlook *and* in the policy of the Legislature towards the law of contracts. The result is that, today, the law interferes, at numerous points, with the freedom of parties to make whatever contract they like. Thus, the legislature has enacted certain Acts for the protection of employees, and an employer *cannot,* therefore, induce his employees to enter into *any* contract favourable to the employer. Similar protection is given by other Acts to tenants, to persons dealing with money-lenders, and so on.

Thus, today, freedom of contract is mostly a *myth.* The *standard- form contract* (with printed terms and conditions) is in vogue today, and several contracts entered into by laymen are *not* the result of individual negotiations. Thus, if a person is in need of electricity *or* a telephone *or* a gas connection, it is *not possible* for him to settle the terms of the agreement with the Electricity Board or the Telephone or the Gas Company. Each of them would have *standardised printed contracts,* and the intending consumer would have no opportunity to discuss or negotiate any of the clauses. He would either have to accept it on those terms, *or* do without electricity, telephone or gas, as the case may be. In such a case, since one *cannot* go on without such necessary services, the individual is, in effect, compelled to accept *all* the standard terms. It is clear, therefore, that absolute *freedom of contract is now largely an illusion.*

[M. U. = Mumbai University]

End of chapter 1

Chapter2. BASIC CONCEPTS (Sections 2 to 9)

The following fundamental and basic concepts of the law of contracts are discussed in this Chapter:

A. Proposal
B. Acceptance
C. Promise, Promisor & Promisee
D. Consideration
E. Agreement & Contract

*"A proposal is the starting point of a contract." Discuss with reference to the essential elements of a valid proposal.*M.U. Nov. 2014

What is an offer? (2 marks) M.U. Apr. 2015

What is 'Proposal' as defined under the Indian Contract Act? (2 marks) M.U. Apr. 2016

Define proposal. What are the essentials of a valid proposal? M. U. May 2018.

What is the effect of a counter-offer? (2 marks) M.U. 2018

Define offer. Explain counter-offer and invitation to offer with case laws. M.U. April 2014

Write a short note on: Offer and invitation to offer.M.U. Apr. 2013 Nov. 2015

Give 2 examples of invitation to offer. (2 marks)M.U. Nov. 2014 May 2018

Does an article displayed in a shop with a price tag amount to an offer? (2 marks)Nov. 2013 Jan. 2017

A. 'PROPOSAL' [S. 2(a)]

Definition

When one person *signifies* to another his willingness to *do or* to *abstain* from *doing anything, with a view to obtaining the assent of that other* to such act or abstinence, he is said to *make a proposal: S. 2(a).*

It is to be noted that an offer *to do* or *not to do* something must be made *for the purpose of being agreed to.* So, if one person informs another that he is ready to do a particular act, this may be a *threat* or a *mere statement of fact* about himself, as for instance, "I should like to serve you" *or* "I am willing to die for my country". Thus, a statement is *not* a proposal, *unless it is made with the view of obtaining the assent of the other party* to whom it is addressed. Thus, I propose to marry you" *or* "I am willing to sell you this book for fifty rupees" are *proposals,* as they are made *with that view.*

OFFER .-The term *"proposal"* of the Indian Contract Act is synonymous with the term *"offer"* of English Law.

LEGAL RELATIONS.-An offer, in order to give rise to a contract, must be *intended* to create, and be *capable* of creating, *legal relations.* Mere *social* or *moral* relations will *not* give rise to legal obligations, *e.g., an invitation to dinner* or *an agreement to accompany another for a walk* does *not* constitute an offer. Thus, it is necessary that, to amount to a contract, there must be a promise *to do* or *abstain from doing* something *as a legal duty.*

|n an English case, *Mr. B,* who was posted in Ceylon, promised his wife living in England, to pay her a monthly allowance, so long M. u. May 2018 as she could *not* go to Ceylon for reasons of health. When *Mr. B* failed to honour his promise, and she filed a suit against him, the Court *held* that she could *not* enforce the obligation, as from the *nature of the contract,* it was clear that no intention existed to give rise to a legal obligation. It was merely a *domestic, arrangement. (Balfour* v. *Balfour,* 1919 2 K. B. 571)

This does *not,* however, mean that in *all* family matters, there *cannot* be legally binding contracts. What is important is whether the parties intended *legal consequences* Thus, in one case, a husband and wife withdrew the complaints which they had filed against each other under an agreement by which the husband promised to pay an allowance to the wife, and she, in turn, agreed to refrain from pledging his credit. The Court *held* that the agreement was a *valid contract: McGregor* v. *McGregor,* (1888) 21 Q. B. D. 424.

A football pool competition was run on the understanding that as between the competitors and the organisers, no legal relationship whatsoever would arise. *X,* who sent a successful forecast of the result, could *not* sue for the prize, as no legal claim existed, which a Court would enforce : *Appleson* v. *Littlewood,* (1939) 1 All Eng. Rep.

464.

Similarly, *A* promises to consider favourably the application of *B,* a contractor, for renewal of a contract, *if* satisfied with *B's bonafides.* The Court *held* that this did *not* create legal relations between the parties : *Montreal Gas Co.* v. *Vasey,* (1900) A. C. 595.

MERE INTENTION IS NOT ENOUGH.-Similarly, a *mere statement of intention,* made in the course of conversation, will *not* constitute a binding promise, even though acted upon by the party to whom it was made.

Thus, *A* says to *B,* in conversation, that he *intends* to give 100 pounds to anyone who marries his *(i.e. A's)* daughter with his consent. *B* marries *A's* daughter with A's consent. In these circumstances, there will be *no contract* between *A* and *B,* because A's statement was *not* an *offer. (Weeks* v. 7yba/d,-1605 Noy. 11). As the Court observed in that case, it is *not reasonable* that the person should be bound by such general words spoken to entice suitors. B

COMMUNICATION OF OFFER.—It is to be remembered that there is no offer till it is *communicated* to the offeree. Thus, if *A* promises something if an act is done, and *B* does that act *not knowing* about the offer, there will be *no contract.* (See *Lalman* v. *Gauri Dutt,* discussed later under the topic entitled "ACCEPTANCE".) Similarly, if *A* does some work without the knowledge or request of *B, A cannot* claim payment for the work done.

PROBLEM.—*X* applied for the post of a head master in a school. At its meeting, the Managing Committee passed a resolution appointing him to that post. *X* did *not* receive any official intimation of his appointment, but one of the members of the Committee privately informed him about it. The resolution was subsequently rescinded. Can *X* sue the Managing Committee for breach of contract?

Ans._*No,* he *cannot.* There was *no official communication* to *X* by the Committee, and hence, *no contract.* As observed by the Court, the very fact that the Committee did *not* inform *X* goes to show that their decision was *not final,* and that there was a possibility of reconsidering the same. *(Powell* v. *Lee,* 1908 24 TLR 606)

Further, an offer to work *cannot* bind a person who has no Opportunity of accepting or rejecting the work. Thus, in *Taylor* v. *Laird* (25 L.J. Ex. 329), *T* was engaged to command *L's* ship. During voyage, *T* gave up the command, but he helped to bring the vessel home. *T* claimed wages for this work from L. As *L* had no opportunity of accepting or rejecting the offer of *T* for working the ship back to port, *L* is *not* bound to pay.

It may be noted in passing that a proposer *cannot* dictate terms under which the offer may be *refused, e.g.,* a person cannot say that, if within a certain time, acceptance is *not* communicated, the offer would be considered *as accepted.* [This point is discussed at length under the topic entitled "ACCEPTANCE".]

*COUNTER-OFFER.*_ At times, the person to whom the proposal is made indicates his willingness to buy at a lesser price than what he is offered. Thus, *A* makes an offer to *B* to sell his pen for Rs.100, but *B* says that he is willing to buy it for Rs.90. *A,* however, insists on Rs.100 for the pen. *B* goes away, but after a while, he comes back to *A,* and tells him that he is now willing to buy it for Rs. 100. At this point of time, however, *A* refuses to sell the pen to *B* for Rs.100. Would he be justified in doing so?

In the above circumstances, *A would* be entitled to do so. When *B* offered to pay Rs.90, he was actually *rejecting A's offer of Rs.100, and he made a counter-offer for Rs.90, which A rejected.* Later, when *B* came back to *A,* and purported to accept *A's* earlier offer of Rs.100, he could *not* so, as there was no offer from *A* at that point of time. It was *B* who was *now* making a fresh offer (of Rs.100), *which A was justified in not accepting.*

INVITATION TO OFFER._ An offer must be distinguished from an invitation to offer. Many statements which *seem* to be offers are, very often, merely *invitations to offer.* Thus, the following are *not* offers, but merely invitations *for* an offer :quotations of the usual prices of a trader, quotations of the lowest price in answer to an enquiry, a catalogue of goods or books, and advertisement for tenders, or an advertisement of an auction. *It is the purchaser who makes the offer, and it is for the trader, book-seller or the auctioneer to accept the offer or to reject it.*

In short, every statement that *seems* to be an offer may *not* be an offer, and may *not* create *legal obligations.* Very often, such statements are merely *invitations to offer.* Thus, a book-seller's catalogue, with prices stated against the names of the books, does *not* contain a number of *offers,* but constitutes simply an *invitation* to the purchasers. The *purchasers* are the ones who *make* the offers, and it is for the *book-seller* to *accept* or to *reject* such offers.

Thus, *A* sees an article marked Rs.50 in *B's* shop. He tells *B* he will buy it, and offers him Rs.50. *B* says that he does not wish to sell that article. It will be seen that here there is no *contract at all.* If a customer enters the shop, tenders the price and demands the article, the *shop-keeper is not bound* to sell it to him. In such cases, *the price-tag is not an offer,* but an invitation to offer. The demand of the customer is the *offer,* which the shop-keeper is free to *accept or reject* as he pleases, and therefore, *there is no contract.*

In a famous English case, *A* telegraphed *B :*"Will you sell us Bumper Hall Pen ? Telegraph lowest price." *B* telegraphed, "Lowest price 900 pounds". *A* replied : We agree to buy B.H.P. for 900 pounds". The Court *held* that there was *no contract,* because *B* never made a proposal, *i.e.,* expressed his willingness to sell : *Harvey* v. *Facey,* (1893) A.C. 552.

In another case, a merchant wrote to a firm of oil millers, "I am offering today plate linseed for January-February shipment to Leith and have pleasure in quoting you 100 tons at usual plate terms. I shall be glad to hear if you will buy and await reply." The oil millers telegraphed the next day : "Accept", and confirmed it by a letter. It was *held,* distinguishing *Harvey* v. *Facey,* that *the merchant's letter was an offer to sell,* and *not* a mere quotation of price, and that the contract was concluded by the telegram: *Philip & Co.* v. *Knoblanch,* (1907) S.C. 994.

STANDING OR OPEN OFFERS._ Government, Railways and other bodies, who require stores in large quantities, often invite tenders for the supply of goods. An advertisement *inviting tenders is not an offer* in itself; it is merely an invitation to offer. It is the person who sends a tender for the supply of the goods that is making the offer which the party *inviting* the tender *may* or may *not* accept. The so-called "acceptance" of such a tender merely amounts to an intimation that the offer will be considered to remain open during the period specified, and that it will be accepted from time to time by orders for specific quantities. It does *not* bind either party, until such orders are placed. On the one hand, there is no obligation on the party accepting the tender to place any order; on the other hand, the party making the tender has only made an open or continuing offer, which he may revoke before any order has actually been placed.

A submits a tender to *B* to supply grains upto 1,000 quintals within a year. *B* accepts that tender, and from time to time, places orders with *A* the quantities required. Here, the tender does *not* constitute the offer, nor does the so-called "acceptance" amount to acceptance in law. The tender is really a *continuing offer,* which may, from time to time, be *accepted by placing an Order,* but, till an. order is placed, there is no acceptance: *Kundan Lai* v. *Secy, of State,* 72 P.R. 1904.

Similarly, *A* agrees to supply coal to *B* at certain price *upto* a certain quantity, as much as *B* may require. Here, *B* has *not* agreed to buy any specific quantity of coal, and

there is no contract, but a mere continuing or standing offer, which may be accepted from time to time, by placing orders: *Bengal Coal Co.* v. *Homi Wadia & Co.,* 24 Born. 97.

INVITATION FOR TENDERS._ A person who *invites* tenders for the purchase or sale of goods does *not* make an *offer.* It is the I person who *submits a* tender that makes an offer, *which it is for the person who invites the tenders to accept or not.*

AUCTION SALES._ The same principle governs the case of *auction* sales also. In auction sales, the offer proceeds from the *bidder,* and it is for the auctioneer to accept it or *not.* In auction sales, the acceptance is signified by the fall of the hammer, but the offer can be revoked *before* such acceptance.

An announcement of an auction is only an invitation to offer, and a bid made at the auction constitutes the offer. Like all other offers, it may be *accepted or rejected.* Thus, there is no obligation on the auctioneer to accept any bid, *even though it may be the highest bid, unless* it has been announced in advance that the goods would be sold to the highest bidder.

Payne v. *Case,* 3 T.R. 148._ *A* holds an auction of his furniture, at which *E, F* and *G* bid. The highest bid of Rs.1,000 is made by *G. A* refuses to sell. There is no contract, for an auctioneer merely invites proposals, and the bidders make proposals which are accepted by the auctioneer with the fall of the hammer, and before the hammer falls, the property may be withdrawn or bids *not* accepted.

So also, if an auctioneer advertises that he will have an auction sale on a particular day at a particular place, *it does not legally bind him to hold such auction.* Nor does it make him liable to indemnify persons who may have incurred expenses to attend the sale. Such advertisements are *only invitations to offer. (Harris* v. *Nickerson)*

Wariow v. *Harrison,* I E & E. 295._ *A* advertises an auction "without reserve", indicating thereby that there is no reserve price and that the highest bid would be accepted. *B* makes the highest bid at the auction. *A must* sell to *B;* otherwise, he will be liable for committing a breach of the contract.

PROPOSALS FOR INSURANCE._ The concepts of *proposal* and *acceptance* in insurance contracts may be best illustrated by *the following three* cases:

1. A person handed over to an insurance company, a "Proposal Form", by which he proposed to insure his life with the company, and the company wrote that the "proposal had been accepted", adding that "No insurance can take place until the first premium is paid." Before the first premium was paid, the company came to know that the proposer had gone down in health, and refused to accept the premium. In a suit against the company, it was pointed out that the so-called "proposal" was only a *preliminary negotiation,* and that the so-called acceptance" was really the *offer,* so that there was no contract till the first premium was paid. It was *held* that the company could, therefore, revoke their so-called "acceptance" (in law only an offer) before the premium was paid: *Canning* v. *Farquhar,* (1886) 16 Q.B.D. 727.

2. *South British Ins. Co.* v. *Stenson,* 52 Born. 532._ *A* proposes to have an insurance policy; *B* issues one to *A,* subject to payment of premium. A does *not* pay the premium. *B* files a suit to recover the premium. The suit will fail, for the issue of policy subject to a condition was a *counter-offer,* which *A* has *not* accepted.

3. The plaintiff entered into a contract of insurance against theft of his goods and furniture. He signed the proposal and paid the premium for the year to the General Manager of the Insurance Company. The insurance was to be in force for one year. The Insurance Company sent a *Cover Note,* acknowledging the receipt of the premium, and undertook the risk for 30 days, within which the policy would be issued. No policy was, as a matter of fact, issued. Theft having occurred in the plaintiff's house within the year,

the Insurance Company repudiated its liability to compensate the plaintiff for his loss.

It is clear that, in this case, the contract is complete, and the Insurance Company is liable to compensate the plaintiff for his loss : *Mohmed Sultan* v. *Clive Insurance Co.,* 56 All. 726.

PROBLEMS

1. A, a second-hand book-seller, published a catalogue quoting prices against various second-hand books. *A* received letters from the customers *B, C* and *D,* offering to buy a particular book. *A* wants to refuse to sell the book for the price. Can he do so?

Ans— Yes, He *can* do so. *A,* in publishing the catalogue, did *not* make any *offer,* but merely *invited* offers. *A* may, therefore, refuse to sell the book, because, in doing so, he is merely refusing to accept an offer.

2. *A* sends an invitation to his friend *B* in Bombay, to come to Pune to play in *A's* friendly cricket match against a local team during the week-end. *B* sends a letter accepting A's offer and travels to Pune at his own expense. He presents himself on the cricket field, but A refuses to include him in the team. Can *B* sue A for a breach of contract?

Ans._ It is clear that, in this case, A's invitation is *not* an offer, but an *invitation to offer. B's* letter is an offer, and unless *that* offer is accepted by A, there is no concluded contract, and consequently no breach of contract. By refusing to include *B* in the team, A has refused acceptance of *B's* offer. *B cannot,* therefore, sue A. Moreover, it is also clear that there was no intention to create a legal relationship between the parties.

3. A offered to sell *B* his farm for 1,000 pounds. *B* said he would buy for 950 pounds, for which price A refused to sell. Then *B* expressed his willingness to buy for 1,000 pounds. Is there a concluded contract between the parties?

Ans._ There is *no contract* between the parties in this case.The offer to buy for 950 pounds is a counter-offer, a *rejection* of the original offer, which *comes to an end.* Subsequent willingness to pay 1,000 pounds can be no acceptance, as there is nothing to accept now. *(Hyde* v. *Wrench,* 5 Bear. 334)

4. *A* invites *B* and his family to dinner, and *B* accepts the invitation. When *B* fails to turn up (with his family), *A* sues him for the price of the unconsumed food. Will he succeed?

9 *Ans._No, A's* suit will be dismissed. Here, there was no intention to create a legal relationship, and hence, no enforceable contract. (*Kalai Haidar Sheik,* 23 W.R. 217)

B. 'ACCEPTANCE' [S. 2(b), Ss. 7-8]

What is acceptance of an offer? (2 marks) B.U. April 2014

"Acceptence is to a proposal what a lighted match is to a train of gunpowder." Discuss and state the essentilals of a valid acceptance. B. U. April 2011, April 2015

What is the effect of a conditional acceptance? (2marks) B. U. Nov. 2015

Write a short note on: Mental acceptance is not enough. B. U. Nov. 2014

What is a 'standard form of contract' B. U. Nov.2008, April 2011

*Write a Short note on standard form Contracts.*M.U. Apr. 2007 Apr. 2008

What is reasonable notice in a standard from contract? (2 marks) M.U. Apr. 2009

*Write a short note on: Reasonable notice of terms under standard form contract.*M.U. Nov. 2009 May 2017

State the various modes of protection evolved by the courts to protect an *individual against the possibility of exploitation inherent in standard form contract.* M.U. Nov. 2009 Nov. 2013

Explain standard form contracts and the safeguards provided against standard

*clauses.*M. U. May 2018

S. 2(b) defines acceptance thus : When the person to whom the proposal is made signifies his *assent* thereto, the proposal is said to be “accepted”.

Section 8 then lays down that performance of the *conditions* of a proposal, *or* the acceptance of any *consideration* for a reciprocal promise which may be offered with a proposal, is an *“acceptance"* of the proposal.

Its essentials

S. 7lays down *two essentials* of a valid acceptance. It says that, in order to convert a *proposal* into a *promise,* the acceptance must— (1) be *absolute* and *unqualified; and* (2) be *expressed* in some *usual and reasonable manner, - unless* the proposal prescrjbes the *manner* in which it is to be accepted, (as for instance, by registered post only), acceptance can validly be made in that manner only. If the acceptance is *not* made in that manner, the proposer may insist (within a reasonable time) that his proposal shall be accepted *in the prescribed manner,* and *not* otherwise; but he *fails* to do so, he *accepts* the acceptance.

CONDITIONS REQUISITE TO CONVERT PROPOSAL INTO PROMISE. It may be noted that every contract springs from the *acceptance* of an offer. The acceptance may be made either by *words or* by *conduct.* It must be *absolute* and *unqualified.* If there is a variation in the acceptance, the acceptance is *not* an acceptance, but a *counter-proposal* in itself; and there is *no* contract until this *counter-proposal* is, in its turn, *accepted* by the original proposer. This is sometimes referred to as the *“mirror image rule",* namely, that the acceptance must be a mirror image of the proposal, which no changes or variations whatsoever.

Thus, until there is an *absolute* and *unqualified* acceptance, the stage of *negotiation* has not *passed* and no *legal obligation* comes into play. Acceptance of a proposal with *conditions and reservations is no acceptance at all.*

Where *A* and *B* agreed upon the terms of a contract of sale, and the writing concluded with the words “contract in due course”, it was *held* that this was *not* a concluded contract: *Sewak* v. *Municipal Board,* A.I.R. (1937) All. 328.

B offered to purchase a house upon certain terms, possession to be given on or before *25th July.* A agreed to the terms, but said he would give possession *on the 1st of August.* This was *held not* to be an acceptance of *B’s* offer.

A offered to buy *B’s* mare on giving a warranty that the mare was quiet in harness. *B* gave a warranty that the mare was “sound and quiet in *double* harness”. The Court *held* that this was *not* an acceptance of the offer.

A offers to let his house to *B* for 10 years at a certain rent. *B* accepts, adding that he would have an option of renewal for another 5 years. This is *not* an unqualified acceptance, but a counter-offer.

Similarly, when an offer to sell property was accepted “subject to the terms of the contract being arranged" (as in *Honeyman* v.*Marryaf) or* when examination of title deeds was yet to be had at the office of the seller’s attorney (as in *Koylash Chunder* v. *Toriny Churn),* it was *held* that there was *no acceptance* in either case, as a condition remained to be performed in the future.

Haji Mahomed v. *Spinner,(*1900) 24 Born. 510— *A* made an offer in writing to *B* for the purchase of 200 bales of Pepperill at a stated price. A few days later, *B’s* salesman tendered for signature to *A,* an indent containing certain terms *not* according to the original offer, and in particular containing the words “Free Bombay Harbour and interest”. *A* refused to sign this. *B,* however, ordered the goods, and on their arrival, tendered them to *A,* demanding at the same time such sums as would have been due under a

contract entered into on the terms “Free Bombay Harbour and interest”. *A* refused to pay. On a suit by *B,* it was *held* that there was no acceptance of *A's* offer, but that there was only a counter-proposal by *B,* which was *not* accepted by *A.*

Hindustan Co-operative Insurance Society v. *Shyam Sunder*._*X* signed a proposal form of life insurance and gave it to /, an organiser of the Insurance Company, along with a cheque for the premium. *Y* had actually no authority to cash the cheque, but after the medical examination of *X,* the Company cashed the cheque. Two weeks later, the Company wrote to Y asking him to make I ^ further inquiries regarding *X's* proposal, but then *X* died of pneumonia the very next day. It was *held* that the contract was complete from the moment the cheque was cashed, and in the circumstances, *X* had dispensed with the express communication of acceptance.

A sends a written offer to *B* by a messenger, *B* accepts by post. The acceptance is good, for “where the *circumstances* are such that, according to the *ordinary usage of* mankind, the post might be used as a means of communicating the acceptance of an offer, *the acceptance is complete as soon as it is posted”. (Per* Lord Herschell in *Henthorn* V. *Fraser,* (1892) 2 Ch. 27)

(The detailed rules as to when acceptance is said to be complete when the parties are at a distance are discussed in a later Chapter.)

REFUSED PROPOSAL HAS TO BE RENEWED._ If a *proposal is once refused, it cannot be accepted unless it is renewed.* Thus, if *A* makes a proposal to sell his horse for Rs.5,000 and *B* says that he will pay Rs.3,000, he cannot *afterwards* bind *A* to sell the house, *even though he is ready to pay* Rs.5,000, *i.e., the amount demanded* by *A.* This is so, because *A's* offer of Rs.5,000 was rejected by *B,* who made a counter-offer for Rs.3,000 (which was not accepted by *A).* So, unless *A* once again makes an offer for Rs.5,000, there is nothing left for B to accept.

OFFEROR CANNOT IMPOSE BURDEN OF REFUSAL.— A person making an offer *cannot* impose on the other party, the burden of expressly *refusing* the offer, by saying that he will *assume* acceptance if he receives *no answer* within a stated time. The proposer has the right to prescribe the *manner in* which the proposal may be *accepted, but not* the manner in which it may be *refused, e.g.,* a person *cannot* say that if within two days, *acceptance* is *not* communicated, the offer would be *considered as accepted.* “I will take it to be clear law,” said Jenkins, C.J. in *Haji Mahomed* v. *Spinner,* 24 Born. 510, “that a person making a proposal *cannot* impose on the party to whom it is addressed, the obligation to refuse it under the penalty of imputed assent, or attach to his silence the legal result he must be *deemed* to have accepted it.” No duty is cast by the law upon a person to whom an offer is made to *reply* to that offer.

MENTAL ACCEPTANCE._ At the stage when the offeree makes up his mind to accept the offer, the agreement obviously does *not* come into being. This acceptance has then to be communicated to the proposer. In other words, there must be some external manifestation of assent *or* some act which the law can regard as communication of the acceptance to the proposer. *Mental acceptance,* therefore, *would not be enough.*

Felthouse v. *Bindley,* 11 C.B. (N.S.) 869._ Foffers by letter to buy his nephew *N's* horse, Z, for 30 pounds saying, “If I hear no more about him, I shall consider the horse mine at 30 pounds,” *N* does *not* reply, but instructs *B,* the auctioneer with whom his horses are for sale, not to sell Z. *B* sells Z by mistake. Fsues *B.* In the circumstances, F's suit against *B,* the auctioneer, will *not* succeed as there was no concluded contract between F and *N. N's* silence *cannot* amount to acceptance, and *mere* uncommunicated or *mental acceptance* by *N,* which is indicated by his directing *B not* to sell Z, is *not enough.*

However, if it could be shown that, on account of previous dealings between the

parties, it was reasonable to infer that the offeree was under a duty to notify the proposer if he did *not* intend to accept the proposal, his silence could amount to acceptance, a view which finds support in the American Reinstatement of the Law.

Cheshire and Fifoot are of the view that, if in *Felthouse* v. *Bindley* (above), the nephew had sued the uncle, instead of suing the auctioneer, the Court would have *held* that a contract *did* exist between the parties. This would, indeed, be a paradoxical situation, because if F sues *B,* the Court would rule out a contract between F and *N,* and if F were to sue *N,* there would be a contract between F and *N,* the facts and circumstances being indentical I This paradox can, however, be partially solved by the argument invoking *the doctrine of estoppel* against *N,* when sued by F.

A similar problem of acceptance arises in the case of what is known in English Law as *"inertia selling".* In such cases, a trader sends unsolicited goods to a customer, along with a letter which states that *if the goods are not returned within ten days, it would be presumed that the customer has decided to purchase them.* Following the well-established principles of the law of contract, it would be seen that the customer is under no obligation to return the goods, but, if he manifests any intention to accept the goods, as for instance, by using or consuming the goods, he would have to pay for them. *In England,* such cases are now covered by the *Unsolicited Goods and Services Act, 1971.*

STANDARD FORM CONTRACTS_ As stated earlier, the days of laissez-faire in contract law are gone and standard form contracts are in vogue today. A standard form contract is one which has printed terms and conditions on which a business entity (say, a telephone company) does business. Any person who wishes to have a telephone connection from this company must sign on the dotted line on a document where the company has listed dozens of terms and conditions. It is not open to a prospective consumer to agree to only some those terms. Either he agrees to all the conditions - or he stays content without a telephone line of that company!

The following are the ways in which courts have interpreted these types of contracts:

IGNORANCE OF OFFEREE OF TERMS OF OFFER.— It may be Apr. 2011 noted that an offer may be communicated, *although the acceptor may be ignorant of some of the terms of the offer.* Many contracts set out in printed documents, *e.g., tickets issued* by the railway, tram-way, steamship and airline companies, contain numerous terms, many of which are *not* read by the party receiving the document. But, they are deemed to be communicated to him, and he is bound by them, *whether or not* he has read them, *provided they are legible.*

If, however, it can be shown that the acceptor did *not* know that the document contained the terms of the contract *and reasonable notice of them was not given to him,* he will *not* be bound by the terms.

Richardson v. *Rowntree,* (1894) A.C. 217.— A passenger, who suffered injuries by the negligence of a steamship company, filed a suit for damages against the company. The only evidence of a contract between her and the steamship company was the ticket issued to her by the company. On the ticket, there was a clause printed in small types which purported to limit the liability of the company in various ways. The said clause was, however, obscured by words stamped across it in red ink. The Court *held* that as the passenger *did not know* about the printed conditions relating to the contract, she was *not bound by the conditions,* as she did *not* know of their existence, and having regard to the smallness of the types in which they were printed, the absence of any calling of attention to them and the stamping of red ink across them, the company had *not* given any reasonable notice of such conditions. Therefore, the passenger's suit for damages succeeded.

It has often been stated that if a particular condition relied upon by a party seeking exemption is unusual in such contracts, such a party must take special measures to bring it to the notice of the other party. This may be done by underlining such a condition, or putting it in bold print, *etc.* In one case, *Lord Denning* went to the extent of observing that such a clause "would need to be printed in red ink on the face of the document, with a red hand pointing to it before the notice could be held to be sufficient". (*Spurling Ltd. v. Bradshaw)*

It is submitted that Lord Denning's "*red hand approacff* appears to have taken the matter a bit too far, and its applicability to commercial contracts was doubted in subsequent cases like *Ocean Chemical Transport Inc. v. Exnor Craggs Ltd.*

However, in cases where the contracting party has *signed* such a document, and all its terms and conditions are legible, he is bound by its terms, *even if he had not actually read it.* This is also known as the *rule in L' Estrange* v. *Graucob Ltd.* (1934 All. E.R.16). In that case, a buyer signed an agreement for the purchase of a cigarette vending machine without reading its terms. One of the terms excluded liability for all kinds of defects in the machine. The machine supplied was defective, but the Court *held* that the supplier was *not liable.*

If the terms are *not apparent* on the face of the contract, and no reasonable *caution* is taken to draw the attention of the acceptor, those terms will *not* be binding. Thus, where the attention of a passenger was *not* drawn to the clause "that the Company is *not liable* for any loss of the luggage", it was *held,* in a suit for the loss of the luggage, that the Company *was* liable: *Henderson* v. *Stevenson.*

In *Henderson* v. *Stevenson,* the plaintiff sued the defendant company for damages for loss of his luggage on account of the negligence of the servants of the company. The company's defence was that the company was protected by the conditions of the contract which were printed on the back of the ticket. The front side of the ticket showed simply the names of the places, *viz.* "Dublin to Whitehaven". On the back of the ticket, it was printed in small types that the company was *not* liable for the loss to the passengers due to the negligence of the servants of the company. It was *held* that the plaintiff did *not* have sufficient notice of the conditions, and as such he could recover.

In *Haris* v. G. *W. Rly., H* deposited luggage at a cloak room and received a ticket on the face of which was printed, "Left subject to the condition on the other side.This ticket to be given up when the luggage is taken away." On the back of the ticket was a condition that "The company will not be responsible for loss of or injury to any package beyond the value of 5 pounds, unless extra payment are made." *H knew* that *there were* conditions on the back, *but did not read them.* The luggage was lost, and the company refused to be responsible as the extra payment had not been made. *H* was *held* bound by the conditions on the ticket, *although she had not read them,* for the ticket in effect contained the terms of the offer which *H* accepted by leaving her luggage and paying for its deposit.

Mackillican v. *Compagnie des Messageries Maritime de France* (6 I.L.R. Cal. 227).— In this case, *X* bought a ticket which was written in French, and contained several clauses and conditions in French. The question before the Court was whether *X, who did not understand French,* was bound by the clauses. The Court observed that although he did not understand French, he was a man of business, contracting with a French Company, and he knew that tickets were issued in French. He had ample time and means to get the ticket explained and translated, which he did *not.* He was, therefore, *bound by the clauses and conditions.*

In *Mukul Datta* v. *Indian Airlines Corporation,* the Court has laid down the

following *three propositions* regarding tickets issued to air passengers:

(a) If the passenger did *not* know that there was any writing on the ticket, he is *not* bound by the conditions.

(b) If the passenger knew that there was a writing, and knew or believed that such writing contained conditions, he is bound by the conditions, *although he did not read them.*

(c) If the passenger knew that there was some writing on the ticket, but did *not* know or believe that such writing contained conditions, he would nevertheless be bound, if the party delivering the ticket has done all that is reasonably necessary to give him notice of such conditions.

Lily White v. *Muthuswami* (A.I.R. 1966 Mad. 13)— In this case, a customer had given a new sari to a laundry, for which a receipt was issued by the laundry. One of the conditions on this receipt was that in case of loss of a garment, the customer would be entitled to claim only 50% of its market price or its value. When the laundry lost the new sari, the customer sued for its *full value.* The Madras High Court *held* that the term was so *unreasonable* that it would defeat the very purpose of the contract. Therefore, this condition was *not binding* between the parties. As the Court observed, such a term would place a premium on dishonesty, — inasmuch as it would enable the laundry to purchase new garments at 50% their price.

ACCEPTANCE OF THE PROPOSAL NEED NOT ALWAYS BE EXPRESSED IN WORDS— Sometimes, the proposal, instead of being made to any *definite* person, is made to the *public at large,* and as soon as any person who is willing to accept it, accepts it by *words or conduct,* a contract is made.

Under section 8 of the Indian Contract Act, a proposal may be accepted in any of the following *three ways:*

(1) By communicating the acceptance;

(2) By acceptance of any consideration for a reciprocal promise; *and*

(3) Performance of the condition of a proposal.

Though the general rule is that an acceptance must be communicated to the proposer, yet, as seen above, it is possible to accept a proposal by performing the conditions of such proposal. In these cases, the proposal may be of *two kinds. Firstly,* the proposal may be in the nature of an offer made to the world at large. For example, in the case of an offer of a reward for a lost dog, the offer, in its very nature, does *not* contemplate an intimation of acceptance from every person who, on becoming aware of the offer, decides to search for the dog. In cases of this type, it is impossible for the offeree to express his acceptance otherwise than by performance of the contract. In such cases, performance of the condition of the proposal itself will be deemed to be an acceptance of the proposal which binds the person who makes the proposal.

Secondly, the proposal itself might indicate that performance is a mode of acceptance. For example, when one orders a book and asks the publisher to send it by V. P. P., it is clear that such publisher must accept the proposal by performing the condition. In such cases, whether the performance of a condition

can amount to acceptance or *not* depends on the intention of the proposer. If the proposer has expressly intended that the proposal should be accepted by performance of the condition, then alone it would amount to acceptance, but *not* otherwise.

Carlill v. *Carbolic Smoke Ball Co.* (1893 1 Q.B. 256)— In this interesting English case, the Carbolic Smoke Ball Company advertised that any person who caught influenza after using the medicine of the Company *{viz.* Carbolic Smoke Ball) in a specified way and for a specified period, would be paid 100 pounds. It was further mentioned that the Company had deposited 1,000 pounds with the Alliance Bank to show the sincerity of the Company in the matter. *Mrs. C,* after using the medicine (as prescribed by the Company) nevertheless caught influenza.

It was *held* that she was entitled to recover 100 pounds, because the Company's advertisement was something more than an invitation to transact business. The Company was *held* liable, for (i) the alleged offer was *not* a mere advertisement or puff, for the statement that 1,000 pounds had been deposited to meet possible claims, was evidence tending to show that the offer was sincere; *and* (ii) the acceptance was complete, as the offer in question admitted of no other acceptance than performance of the condition. The objection raised by the Company that *Mrs. C* ought to have notified her acceptance to the Company was rejected by the Court.

The principle underlying the *Carbolic Smoke Ball Co.'s case* (above) was applied by the Allahabad High Court in a case where a young boy had run away from his father's home, and the father had issued pamphlets announcing thus: "Anybody who finds trace of the boy and brings him home will get Rs.500." *X* saw this boy near a Railway Station and promptly took him to the Railway Police Station and then sent a telegram to the boy's father that he had found the missing son. The Court *held* that *X* had performed the condition and was, therefore, entitled to the reward. *(Har Bhajan Lai* v. *Harcharan Lai,* A.I.R. 1925 All. 539)

THE PERSON TO WHOM PROPOSAL IS MADE MAY OR MAY NOT BE DEFINITE.— It is to be noted that the person or persons to whom a proposal is made may be either one or *more, definite or indefinite.* It may be made to an *unascertained number* of persons or to *the world at large.* But no contract can arise until it has been *accepted* by an *ascertained* person. Only when *anyone accepts* the offer, a *contract comes into existence.* The offer is regarded as being made, *not* to the many who *might* accept it, but to the person or persons by whom it is *accepted.* Thus, the offer of a reward to any person giving such information as shall lead to the conviction of an offender, *or* the discovery of lost property, *or* discovery of a lost boy is an offer to pay the reward to the *first person,* and the first person *only,* who gives such information. *The motive of such person is immaterial.* Thus, where a reward was offered for such information as might lead to the discovery of a murder, and the plaintiff gave information believing that she would *not* live long, and *for* the purpose of easing her conscience, it was *held* that she *was* entitled to the reward : *William* v.

C*arwardine,* (1833) 4 B. & Ad. 621.

EFFECT OF ACT DONE IN IGNORANCE OF PROPOSAL.— But if the act is *done in ignorance of the proposal,* it is *no acceptance* of the proposal, and hence there will be *no contract,* for, when there is *an uncommunicated offer, there can be no acceptance.*

In *Lalman Shukla* v. *Gauri Dutt,* (1913) 11 A.L.J. 489, the plaintiff was in defendant's service as a *munim.* The defendant's nephew absconded, and the plaintiff went to find the missing boy. In the plaintiff's absence, the defendant issued handbills, offering a reward of Rs.501 to anyone who might find the boy. The plaintiff traced him and claimed the reward. The plaintiff did not *know* of the handbills when he found the boy. The Court *held* that the plaintiff was *not* entitled to the reward.

The Court went a step further in an Australian case, where it was *held* that even if the acceptor had once known about the offer, but had completely forgotten about it at the time of acceptance, he would be in the same position as a person who had *not* heard of the offer at all. *(R.V. Clarke* - 1927 40 CLR 227). In that case, one of the Judges gave an interesting example, as follows: Suppose an offer is made to the world at large to pay 100 pounds to any person who swam a hundred yards in the channel on the 1st of January. Now, if *X* was accidentally or maliciously thrown overboard on that very day, and he swam that distance, simply to save his life and without any thought of the offer, he could *not* claim the reward, although he might have heard about it earlier.

ACCEPTANCE MUST BE BY AN ASCERTAINED PERSON— As stated above, while an offer may be made to unascertained persons *or* to the world at large, acceptance must be by an *ascertained* individual. If *A* publishes an offer of a specific reward for information leading to the arrest of a murderer, he does *not* intend to make as many contracts as there should be persons giving such information. His contract will be only with the person who *first* gives such information; and the offer being thus accepted will result in a binding promise. But for the future, it will come to an end, so that a person giving information later will be acting on *no subsisting offer: Lancaster* v. *Walsh,* 4 M. & W. 16.

LEGAL EFFECT OF ANNOUNCEMENT IN RAILWAY TIMETABLES.— The principle that the performance of the conditions of a proposal is an acceptance of the proposal, has also been applied to time-tables published by railway companies; for, the representation made by railway companies in their time-tables *cannot be treated as mere waste paper.* It has been *held,* in *Denton* v. *Great Northern Railway Co.,* that a statement in a railway company's time-table that a certain train will run at a certain time is an offer which is capable of being accepted by a passenger who comes to the station and tenders the price of the ticket. The railway company, however, may absolve itself from liability by the insertion of a suitable disclaimer clause.

C.PROMISE, PROMISOR & PROMISEE

What is 'promise' as defined under the Indian Contract Act? B.U. Apr. 2016
Who are the promisor and promisee under the Indian Contract Act?

B.U. Nov. 2012

When a *proposal* is *accepted,* it becomes a *promise.* The person making the proposal is then called the *promisor,* and the person to whom it is made is called the *promisee.*

Promises are of *four kinds:*

1. Express (S. 9)
2. Implied (S. 9)
3. Reciprocal (S. 2)
4. Alternative (S. 58)

(1) "Express" and (2) "Implied" promise (S. 9)

Where the proposal *or* acceptance of any promise is made *in words,* the promise is said to be *express.* Where such proposal *or* acceptance is made *otherwise than in words,* the promise is said to be *implied:* S. 9.

TACIT CONTRACTS.— As already seen above, a great mass of human transactions depend upon *implied* contracts, which are *not written,* but *grow* out of the *acts* of the parties. Thus, when a passenger enters into a bus or engages a taxi, he thereby *tacitly* or *impliedly* agrees to pay the fare. So also, when a purchaser takes a newspaper from a book-stall, he thereby *tacitly* agrees to pay the price thereof, and so on. An offer will be perfectly valid, *even if no words are used.*

Under the law, both an offer and an acceptance may be made by conduct. *A nod at an auction may constitute a bid or an offer, and a fall of the hammer, the acceptance.* A contract, the terms of which are *not* expressed in words, written or oral, is called *an implied contract.*

Thus *A,* a baker, exposes cakes on his counter. *B* enters and picking up one, eats it. A's act constitutes an offer to sell, and *B's* eating an acceptance of the offer or a promise to pay the price. This is, however, an implied contract, as *A* did *not,* in so many words say, "I am willing to sell my cakes." Nor did *B* expressly say, "I am willing to buy (and eat) your cakes."

(3) Reciprocal promises [S. 2(f)]

Promises which form the consideration *or* part of the consideration for each other, are called *reciprocal promises:* S. 2.

When the agreement consists of reciprocal promises, as is usually the case, there is an obligation on each party to *perform* his *own* promise and to *accept performance* of the other's promise.

In the case of reciprocal promises, each party gives a promise, in return for the other's promise, *e.g.,* a promise to sell and purchase between *A* and *B.* It will be seen that, in such a case, each promise is a consideration for the other.

(The law as to reciprocal promises will be considered at greater length, when discussing Ss. 51-54.)

(4) Alternative promise (S. 58)

An alternative promise is one which offers the choice of one of two things. For instance, *A* and *B* agree that *A* shall pay *B* Rs. 1,000, for which *B* shall afterwards deliver to *A* either rice or wheat.

WHAT IS AN ALTERNATIVE PROMISE— When the promisee is given an alternative or choice of one of two things, the promise is said to be alternative. If *A* promises to pay *B* Rs. 1,000 in return for *B's* promise to sell him 50 maunds of rice *or* 100 maunds of wheat, *B's* promise is an alternative one. Either of the alternatives is perfectly valid; so, if *B* delivers either rice *or* wheat, the obligation would be fulfilled.

But, if there are no circumstances to indicate *which* of the alternatives was intended to be enforced, the whole contract will be *void* for uncertainty; *e.g., A* agrees to sell to B his white horse for Rs.500 or Rs.1,000, there being nothing to show which of the two prices was included. In this case, the contract will be *void.*

ALTERNATIVE PROMISES, ONE BRANCH BEING ILLEGAL.— In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch *alone* can be enforced : S. 58.

Illustration— *A* and *B* agree that *A* shall pay *B* Rs.1,000, for which *B* shall afterwards deliver to *A* either rice *or* smuggled opium. This is a *valid* contract to deliver rice and a *void* agreement as to the *opium:* S. 58.

(The law relating to alternative promises will be considered at greater length under S. 58.)

D. CONSIDERATION

Definition [S. 2(d)]

What Is "consideration" as defined under the Indian Contact Act? (2 marks) M.U. Nov. 2011 Nov. 2015 Jan. 2017 May 2017

State the salient features of considerations. What are the exceptions to the rule. B.U. Nov. 2014

What is consideration? When consideration is absent, what is the effect on the validity of the contract?
B.U. April 2013

What is a privity of contract? Discuss the exceptions to the doctrine of privity of contract? M.U. April 2013

Define "Consideration" Explain the role of privity of contract with relavant cases. State the exceptions to the role of privity. M.U. Jan. 2017

What is privity of contract? Discuss the various exceptions to the doctrine of privity of contract. M.U. Apr. 2011

What is the doctrine of privity of contract? (2marks) M. U. May 2018

Writ short note no: Privity of Contract. M.U. Apr. 2015

S. 2(d) of the Act defines consideration thus :

When, *at the desire of the promisor, the promisee or any other person* something,-

(i) has *done, or abstained* from doing, *or*

(ii) *does or abstains* from doing, *or*

(iii)*promises to do,* or to *abstain* from doing-

something

such *act, abstinence* promiseis called consideration for the promise.

Now, S. 2 does *not* contain any illustrations of the term are to be found in S. 23, as under :

Illustrations to S.23— (a) *A* agrees to sell his house to *B* for *B's* promise to *pay* the sum of 10,000 rupees for *A's* promise to *sell* the house; and *A's* promise to *sell* the house is the consideration for *B's* promise to *pay* the 10,000 rupees.

(b) A promises to pay *B* 1,000 rupees at the end of six months, if C, who owes that sum to *B,* fails to pay it. *B* promises to *grant time to C accordingly.* Here, the *promise* of each party is the consideration for the *promise* of the other party. (This is an instance of a contract of guarantee.)

(c) *A* promises for a certain sum paid to him by *B,* to make good to *B* the value of his ship if it is wrecked on a certain voyage. Here, *A's promise* is the consideration for *B's payment,* and *B's payment* is the consideration for A's *promise.* (Incidentally, this is a contract of insurance.)

(d) *A* promises to maintain *B's* child and *B* promises to *pay A,* 1,000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party.

MEANING OF "CONSIDERATION"— In the ordinary course, when a person makes a promise to another, he does so with an intention of deriving some *advantage* which the person to whom the *'No consideration, no* proposal is made is capable of conferring upon him.

Thus, suppose *A,* at the request of *B,* has taken care of *B's* child. *B* now promises to give him Rs.20,000 in return for that act. Here, the act of A is a consideration for the amount of Rs.20,000. This is a *past act,* and hence, it is called *past consideration.* It is clear, from the language of the definition, that consideration may be *past, present* or *future.*

Again, *consideration may be an act of forbearance.* Thus, A tells *B* that if he pays him Rs.500 out of Rs.1,000, which *B* owes him, he will *not* file a suit against him. This is *abstinence* or *forbearance,* and is a *good* consideration.

Blackstone defines consideration as "the recompense given by the party contracting to the other". *Pollock* calls it "the price for which the promise of the other is bought, and the promise thus given for value is enforceable".

In *Currie* v. *Misa* (1875 CR 10 Ex. 153), *Lush J.* observed as follows:

"A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

Consideration is an important requisite of contract. An analysis of any contract will show that it consists of *two* clearly *separable* parts the *promise* on the one hand *and* the *consideration* for the promise on the other hand. A person who makes a promise to *do or refrain* from doing something *as a legal duty,* usually does so as a *return* or *equivalent* of some benefit accruing to him, or as a return or equivalent of some loss, damage or inconvenience that may occasion, or may have been occasioned, to the other party in respect of the promise. *The benefit so received, or the loss, damage or inconvenience so caused, is regarded in law as consideration for the promise.* It may be described as something accepted or agreed upon as a return or equivalent (or *quid pro quo)* for the promise made.

The law, for very sound reasons, insists on the existence of consideration, if a promise is to be enforced as creating a legal obligation. The fact that a promise has been made in return for, or as an equivalent of, something, suggests that the

parties to the contract had deliberated. It also shows that the parties contemplated the creation of a *legal right.*

The doctrine of consideration, as developed in English jurisprudence, is thus stated by *Blackstone:* "A consideration of some sort or other is so necessary to the forming of a contract, that a *nudum pactum,* or agreement to do or pay something on one side, *without* any compensation on the other will *not* at law support an action; and a man *cannot* be compelled to perform it. The law supplies no means nor affords any remedy to compel the performance of an agreement made *without* consideration. If I promise a man 100 pounds *for nothing,* he neither doing nor promising anything in return or to compensate me for my money, *my promise has no force in law".* In the absence of consideration, a promise or undertaking is *purely gratuitous,* and however sacred and binding in honour, it creates no legal obligation.

Ex nudo pacto non oritur actio— The law will *not* enforce a promise given for nothing. Consideration, in the sense of benefit or detriment, is absolutely essential to support a simple promise. Out of a naked pact, no cause of action arises : *Ex nudo pacto non oritur actio.*

In one English case, the defendants, in their newspapers, offered to give advice about sound investments. The queries and answers were published in the newspaper. The plaintiff was in search of a good stock broker, and wrote to the defendants for advice. The man recommended by the defendants turned out to be an undischarged insolvent, who misappropriated the money which the plaintiff sent to him. The plaintiff sued the defendants for the amount thus lost.The defendants contended that there was no contract, as no consideration had passed between the parties.

The Court of Appeal *held* that when the defendants chose to publish letters and queries in the newspaper,*that would tend to increase the sales of their newspaper.* This possibility of the benefit (of better sales) was a *good consideration* for their offer, and therefore, the plaintiff was entitled to recover the sums lost due to the negligence of the defendants. (*De La Here* v. *Pearson,* 1908 I K.B. 280)

In England, a *contract under seal* is *valid, even in the absence of consideration;* such a contract is known as a *specialty contract.*All contracts which are *not* under seal are *simple* contracts. All simple contracts require consideration to support them. Specialty contracts (/.e. contracts under seal) are required by law to be in *writing.* A specialty contract is, therefore, a contract which is in *writing* and is *signed, sealed and delivered* by the parties. It is also called a *deed* or a *contract under seal. No consideration is required in the case of such contracts.* Specific performance, however, will *not* be granted of *gratuitous contracts.*

However, the position is different in *India.* Our law does *not* recognise contracts under seal, which can be made without consideration. However, contracts are enforceable in India even if made without consideration, if they are covered by any of the exceptions to S. 25 (which will be discussed later).

GRATUITOUS PROMISE WHEN ENFORCEABLE— It is to be noted, however, that a promise, though gratuitous, would be enforceable if, on the faith

of the promise, the promisee suffers a detriment or undertakes a liability.

Kedarnath v. *Gorie Mahomed* (14 Cal. 64).— *A* had agreed to subscribe Rs. 1,000 towards the construction of a Town Hall at Howrah. *B,* the Secretary, *on the faith of A's promise,* called for plans, entrusted the work to contractors and undertook liability to pay them. In a suit by *B, on A's* failure to pay the amount, it was *held* that, though the promise was to subscribe to a charitable institution, and there was no benefit to *A,* the promisor, still it was supported by consideration, in that *B* suffered a detriment in having undertaken a liability to the contractor on the faith of *A's* promise. In the course of the judgment, the Court observed that *A knew* the purpose to which the subscriptions were to be applied, and he *further knew* that on the faith of such subscriptions, an obligation was to be incurred to pay the contractors.

DEFINITION ANALYSED— The following is an analysis of the different *components* of the definition of consideration.

'At the desire of the promisor'

The act or forbearance must be at the desire of the promisor.- It is to be remembered that the act or forbearance must be done *at the desire of the promisor.* If it is done at the instance of a *third* party, or *without the* desire *of the promisor,* it is *not* consideration.

Thus, in *Durga Prasad* v. *Baldeo* (1881) 3 All, 211, Durga Prasad sued on an agreement in writing by which the defendants promised to pay him a commission on articles sold through their agency in a *bazar* in which they occupied shops, in consideration of the plaintiff having expended money in the construction of the *bazar.* Such money had *not* been expended by the plaintiff at *the request of the defendants,* but *voluntarily for a third person.* It was *held* that such expenditure was *not* consideration for the agreement, *since* it was *not* made at the desire of the *promisors,* the defendants.

Bombay Municipal Corporation v. *Sec. of State,* (1934) 36 Bom. L.R. 568.— In this case, the plaintiffs agreed to incur additional expenditure for the purpose of extending educational facilities in the city of Bombay, if the Government of Bombay would pay half the additional expenditure. Having made payments for two years, the Government stopped their contribution. In a suit by the plaintiffs on the above agreement, it was *held* that the agreement was supported by consideration, inasmuch as there was an advantage to be gained by a section of the Government's citizens, *viz.,* the citizens of Bombay.

It is, however, enough if the promisee gives consideration *at the desire of the promisor;* it is *not necessary* that the promisor *himself should benefit* by the consideration; the promise would be valid even if the *benefit* accrued to a *third party.*

Thus, *A,* who owed Rs. 20,000 to *B,* persuaded *C* to make a promissory note in favour of *B. C* promised *B* that he would pay the amount and *B* credited the amount to A's account. Here, the discharge of *A's* account was consideration for *C's* promise: *National Bank of Upper India* v. *Bansidhar,* (1930) 5 Luck. 1.

"The promisee or any other person": Can a stranger to the consideration sue?

According to English law, consideration must move from the *promisee* or from

his *agent,* or if the consideration moves from a *third* party, it must move *on the procurement of the promisee.*

It is a general rule under the *English law* that no one can sue or be sued on a contract, *other than the parties by whom it is made.* There, the consideration for the contract must proceed *from the promisee himself, and not from any other person. So, astranger* to the contract is *not* allowed to claim *any benefit* under the contract.

Under the Indian Contract Act, however, consideration can be furnished by the *promisee or by any other person.* So, *in India,* a stranger to the consideration *can* sue on a contract. This means that where consideration is furnished by a person other than the promisee, such a promisee, though a stranger to the consideration, *can* sue upon the contract. Thus, a promise made by *A* to 8, for which consideration is furnished by *C,* is enforceable by 8, although 8 is a stranger to the consideration. This is possible because section 2(d) of the Contract Act expressly recognises that consideration for a promise may be furnished by a third person, *i.e.,* a person other than the promisee.

This, however, is *not* the position *under English law.* As seen above, under English law, consideration for a promise must move *from* the promisee himself, and *not* from any other person. Thus, in the above example, 8 would *not* be able to enforce the promise *under English law.*

In the *old* English case, *Dutton* v. *Poole* (1678 2 Lev. 210), the father of a bride was about to chop down timber on his estate to provide a marriage portion for her. The son promised to provide for his sister if the father refrained from chopping down the timber. The father abstained from doing so. On the sister suing her brother on the basis of this consideration, *which wholly proceeded from their father,* the suit was *held* to be maintainable, *although the plaintiff (i.e.,* the sister) was not a party to *the contract.* The ground for the decision was that, owing to the *near relationship* of the plaintiff and the party who gave the consideration, *viz.,* the father, the plaintiff was *considered* to be a *party* to the consideration.

The decision in *Dutton* v. *Poole,* was, however overruled in a later case, *Tweddle* v. *Atkinson,* (1861, I B & s. 393). In that case, decided in 1861, an agreement was entered into between the respective fathers of the husband and the wife, that each should pay a sum of money to the husband. After both the contracting parties died without having made the respective payments, the husband sued the executors of wife's father upon the above agreement, but the suit was *held not* to be maintainable. The husband was a stranger to the consideration, and the plea of *nearness of relationship* to the contracting parties (which was upheld by the Court in *Dutton* v. *Poole)* was regarded as of *no consequence.* This case thus laid down that a third party *cannot* sue on a contract, *though made for his benefit, and the nearness of relationship would be immaterial.*

Tweddle v. *Atkinson* was, however, distinguished in a subsequent English case, *Beswick* v. *Beswick* (1966 3 W. L. R. 396), in which an old coal merchant transferred his business to his nephew, in consideration of the nephew agreeing to pay him a fixed amount per week for the rest of the uncle's life, and thereafter

to his widow. After the uncle's death, after giving the agreed amount to the widow for the first week, the nephew refused to make any more payments, and the widow sued him, *both* in her capacity as the administratrix of the deceased's estate *and* in her personal capacity.

The Court of Appeal *held* in favour of the widow, pointing out that she was suing, *not only* as a beneficiary under the contract, *but also* as the heir of her late husband, who was a party to the contract. Now, if the husband had been alive and he had sued for a breach of the contract, he would definitely have succeeded; therefore, the widow's suit was as good as a suit by the contracting party, and would thus succeed.

Beswick v. *Beswick* (above) has thus established that, in such cases, if a third party files a suit in the name of a contracting party, the defendant would have no defence.

. The position is, however, different *in India.* As seen under S. 2(d) above, consideration may move from any *other* person *besides* the promisee. This principle can be illustrated by a Madras case, *viz., Chinnaya* v. *Ramaya,* (4 Mad. 137). In that case *A,* by a deed of gift, gave certain property to her daughter, with a direction that the daughter should pay an annuity to *A's* brother, as had been done by *A.* On the same day, the daughter executed a writing in favour of the brother, agreeing to pay the annuity. The daughter declined to fulfil her promise, and the brother sued the daughter under the agreement. In these circumstances, the daughter sought to argue that she was *not* liable, as no consideration had proceeded from the brother. The Court, however, held that the words "the promisee or any other person" in S. 2(d) clearly show that a *stranger* to a consideration *may,* in certain circumstances, maintain a suit. Hence, the brother, though a *stranger* to the consideration, *was* entitled to maintain the suit.

It will thus be seen that the Indian Contract Act has adopted the ruling of *Dutton* v. *Poole,* and *not* that of *Tweddle* v. *Atkinson.*

Right of a person to sue when he is *not* a party to a contract: "A stranger to the contract cannot sue on the contract": The Doctrine of Privity of Contract

English law- Under the English law, *a person who is not a party to the agreement cannot sue on the agreement.* Thus, if a contract is between *X* and *Y, Z cannot* sue *X* on the ground that *X* has committed a breach of that contract.

Dunlop Pneumatic Tyres Co. Ltd. v. *Selfridge Co. Ltd.,* (1915) A.C. 847.- *A,* a manufacturer of motor tyres, sells a large quantity of tyres at a certain price to 6, a wholesale dealer, on *B* entering into a covenant *not* to sell the tyres below the prices mentioned in a printed list supplied to him by *A. B* in his turn, supplies tyres to C, a retail dealer, under a contract stipulating the same covenant as between *A* and *B. C* sells in breach of the covenant below the list prices. *A* sues C. Now, it will be seen that only a person who is a *party* to a contract can sue on it. A *stranger* to a contract cannot sue. There is *no privity of contract* between *A* and C, and therefore, *A cannot* successfully sue *C.*

Indian law- The *Indian law* on the point is basically the same. However, it

differs slightly from the English law, inasmuch as there are a few exceptions to the general rule which lays down that *only* parties to a contract can sue on the contract. But *the basic rule of privity of contract is equally applicable in India also.* If *A* agrees to sell his house to *B,* and fails to do so, C, a third party, *cannot* sue *A.* In other words, both under English law and Indian law, a *stranger to the contract cannot sue upon the contract.*

Problem- A mortgages his property to *B* for Rs.10,000. *B* pays Rs.8,000 in cash, and-promises to *A* to pay Rs.2,000 to *C* which amount *A* owes to *C. B* does *not* pay Rs.2,000 to *C.* Advice C as to his right to recover amount.

Ans - In this case, *C* is *not* a party to the contract, and therefore, he cannot recover the amount from B. (Babu Ram v. *Dhan Singh,* A.I.R. (1957) Pun. 169)

PRIVITY OF CONTRACT.— If *A* and *B* enter into a contract, and *A* commits a breach thereof, it is only *B* who can, in normal circumstances, sue *A. B's* friend *C,* has no right to do so. The *reason is* that there is a *privity of contract* between *A* and *B,* a *legal bond* which binds them in law, whereas there is no such bond between *A* and *C.*

The doctrine of privity of contract creates a tie or *vinculum legis,* a bond which is personal to the parties. Other parties (*not* being there are representatives) are *neither* bound by the contract, *nor* entitled under it. Thus, the doctrine prevents a third party from enforcing a contract. Applying the same logic, it also prevents the contracting parties from enforcing obligations against a stranger, *i.e. a* third party. Thus, a contract between *A* and *B cannot* be enforced by *C* (- as staled above -); equally a contract between *A* and *B cannot* impose any liability on C.

(See *Shiv Dayal* v. *Union of India,* AIR 1963 Punj. 538.)

Keeping the above in mind, if *B* and *C* enter into an agreement, under which *B* promises to write a book for *C,* and *C,* in turn, promises to pay Rs.10,000/- to *A,* if there is no payment, *A cannot sue C,* as he is a *stranger* to the contract.

Contract enforceable by a beneficiary though not a party to the contract. The Indian law is the same as English law, but with this *modification,* that in India, a person who is *not* a party to the agreement *can* sue on the agreement *if such a person is a beneficiary* (also called *'cestui que trust*0 and the contract is for *his benefit.* In other words, where a contract between *A* and *B* is intended to secure a benefit to *C, then C may sue in his own right.*

This is the principle underlying the decision of the Privy Council in *Khwaja Muhammad* v. *Husani Begum.* In that case, *C* sued her father-in-law, *A,* to recover arrears of certain allowances called *Kharch-i-pandan,* payable by *A* to *C,* under an agreement made between *A* and *C's* father prior to and in consideration of *C's* marriage with *A's* son, *D.* Both *C* and *D* were minors at the date of the marriage. The agreement created a distinct charge in favour of *C* on certain immoveable property belonging to *A* for the payment of the allowance. It was contended, on behalf of *A,* on the authority of *Tweddle* v. *Atkinson,* that *C* could *not* sue upon the contract, as she was *not a* party to the agreement. But this contention was overruled, and the suit was decided in favour of *C.* The Court observed that, in India, and particularly in communities such as the Mohamedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine (of

England) was applied to agreements or assignments entered into in connection with such contracts.

The above rule applied in other similar cases— The same principle has been applied by the Courts of India to cases where a provision is made for the *maintenance of female* members *of a Hindu* family on a *partition* of the joint family property between the male members.

Similarly, where a provision is made for the *marriage* expenses of a *female* member of a *Hindu* family on a *partition* of the joint family property between the male members, the *female* member is entitled to sue the parties to the partition deed to *enforce the provision in her favour.*

So also, a person who is *not* a party to a contract can maintain a suit if he is so authorised by a Statute. Thus, under the Insurance Acts, a stranger to the contract may recover from the Insurance Company in case third party risks are recovered by the Insurance Policy.

From what has been discussed above, it is clear that, in India, there are *four cases* in which a stranger to a contract is competent to maintain a suit. In other words, the following are *four exceptions* to the general rule which lays down that a person who is *not a* party to a contract is *not* entitled to maintain an action upon that contract:

(i) If such person is a *beneficiary (cestui que trust)* under the contract.

(ii) If on a partition of a Hindu Joint Family (made between the male members), a provision is made for the *maintenance* of the female members.

(iii) If on a partition of a Hindu Joint Family (made between male members,) a provision is made for the *marriage expenses* of the female members.

(iv) Under a Statute, *e.g.,* under the Insurance Act (as explained above).

The above discussion - and the cases referred to - make it clear that, in India, a *stranger to the consideration can sue on a contract, but not a stranger to the contract.*

'Has done or abstained': *Past* consideration, how far valid

PAST CONSIDERATION EXPLAINED— *Past consideration* is something wholly done *before* the making of the agreement. If a person has already done something for another, and then comes a promise from the other, the consideration is said to be *past consideration.* Thus, *A* saves *B's* life. *B* promises to pay *A* Rs.10,000 out of gratitude. Here, the consideration is *past,* because *A* did nothing or refrained from doing anything on account of *B's* promise. Whatever he did, he did *before B's* promise was made.

Indian law as to past consideration.— *In India,* past consideration is sufficient to sustain a valid contract; it need *not* be *present or future,* as required by the *English law.* The language of the definition of "consideration" is explicit and past consideration,- if given at the request of the *promisor,* will support a *subsequent promise.* The words "has done or abstained *from doing*" make it very clear that an act done by *A* at *B's* request, without any contemporaneous promise from *B, may* be a consideration for a *subsequent* promise from *B to A.*

The Indian Contract Act thus *allows* past consideration. In *Sindha* v. *Abraham,* (1896) 20 Bom. 775, the plaintiff rendered services to the r defendant at his desire expressed *during his minority,* and continued those services at the

same request *after his majority.* The question arose whether such services constituted consideration for a *subsequent* express promise by the defendant to pay an annuity to the plaintiff. The agreement was one to compensate for *past* services, and it was *held* that it *could* be enforced, as the services formed a *good* consideration within the meaning of the definition of 'consideration'.

Problems - 1. A's mother falls suddenly ill during *A's* absence. *B* attended on her till A's return. *A* promises *B* to compensate him by paying a certain amount. *A* breaks the promise. Advise *B.*

Ans - In this case, the consideration is *good consideration- under* Indian Law. Therefore, *B can succeed.*

2. Mr. *A* promises to give Rs.10,000 to Mrs. *B* in consideration of his *past co-habitation* with her. When the amount is *not* paid, Mrs. *B* sues him. Will she succeed?

Ans. - Although this is a case of past consideration, Mrs. *B* will i *not succeed,* under Indian law as the consideration is *immoral*& under S. 23 of the Act, and the agreement between Mr. *A* and Mrs.*B* is, therefore, *void.* Under English law, the agreement would be : void on two grounds, namely, that the consideration is past consideration and that the consideration is immoral.

"Does or abstains from doing": Forbearance to sue

It is clear from the definition of consideration that consideration j may consist either of some *act* which the promisee does at the desire of the promisor, *or* of some *omission* or *forbearance* on the part of the promisee; thus, if a promisee *refrains* from bringing a suit which, but for the promise, he may have brought, there is good consideration for the promise.

Forbearance to enforce a *bona ride* claim is *good consideration* for an agreement, although it may be that the claim may *not* have been given effect to by a Court of law.

A promise to give time to a debtor is good consideration, *both in England and India.* i,

Consideration need *not* be adequate

As Anson puts it, the Courts do *not* sit to make bargains for the parties to the suit, and consideration need *not* be adequate, although it must be of *some value* in the eyes of the law.

Thus, if *A* agrees to sell his race horse to *B for* Rs. 50 only, the Court will enforce this contract, presuming that it is shown that *A* had freely consented to do so. The *reason* underlying this rule is that it is the function of the parties to *negotiate* the contract (and bargain the price, if necessary), whereas the Court's function is to *enforce* the bargain.

VARIOUS KINDS OF CONSIDERATION— Consideration is of the following *five* kinds:

1. *Executed*— An *executed* consideration is something actually *done, forborne,* or suffered *contemporaneously* with the making of the contract. The offer of a reward for information accepted by the supply of the information required, the offer of goods accepted by their use or consumption, are illustrations of *executed consideration.*

A consideration is said to be *executed* when the promisee has *already done*

or forborne something. Thus, *A* promises to pay a sum of money to *B* if he paints a picture for *A. B* paints the picture. *B's* act is the consideration for *A's* promise; since the act *is done already,* it is said to be *executed consideration.*

2. *Executory_* An *executory* consideration is a promise to do or forbear from doing something *in the future.* Mutual promises to marry, a promise to do work in return for a promise of payment, are illustrations of executory consideration. A consideration is said to be *executory* when *there is a promise for a promise.* Thus, *A* promises to pay a sum of money to *B* in consideration of *B's* promise to paint a picture for *A.* As *B's* promise *has not* yet been *performed,* it is *executory.*

3. *Past— Past* consideration is something wholly done, forborne, or suffered *before* the making of the agreement. (This has been explained above at length.)

4. *Unreal—* A consideration for a promise is said to be 'unreal' when it subsists *merely* in *words,* and *not* in fact. If *A* promises to pay *B,* Rs.1,000 on particular day, in consideration of a promise by *B* to pay *A* Rs.100 at the same time, the consideration is *'unreal'* or *'illusory',* and the promise will be regarded as merely a gratuitous promise by *A* to pay *B,* Rs.900. An apparent consideration which has no legal value is no consideration at all.

Likewise, if a person promises, for consideration, *to do what he is already bound to do,* the consideration is *"unreal".* In fact, in such cases, it can also be said that there is *no consideration at all.*

Similarly, an impossibility existing at the time of the contract, and obvious on the fact of it, would also make the consideration *"unreal".* Thus, borrowing from the facts in *Hall* v. *Cazenove* (1804 I.R. 5 C.P., 577), if in a Charterparty executed on 1st April, 2013, it is agreed that the ship should sail on 1st February, 2013, the contract would be *void.* (It is, of course, presumed that the execution on 1st of April had no connection with practical jokes normally played on that day.)

[A reference may also be made to the topic entitled *"Agreement to do an impossible act",* under S. 56(1), discussed later.]

In *White* v. *Bluett* (1853 23 L.J. Ex., 36), a son owed some money to his father, for which he had executed a promissory note. After the father's death, in a suit by the father's executors, the son alleged that the father had promised to discharge him from liability in consideration of a promise by the son that he would stop complaining (as he used to) that his father had bestowed less benefits and advantages on him than on his brothers. It was *held* that this so-called *"promise"* was too *vague* and *"unreal"* to form a consideration for the father's promise to waive his right under the promissory note. As observed by the Court, the son's promise was no more than *"a promise not to bore his father",* with the usual complaints, and was *not* "real'' consideration, which the law requires.

5. *Unlawful—* (This is fully discussed under S. 23 in a later Chapter.)

POINTS OF DIFFERENCE BETWEEN THE ENGLISH & INDIAN LAW OF CONSIDERATION

The Indian Contract Act, though mainly based on English law, differs substantially from the corresponding provisions under the English law. The *main points of difference between the two* on the topic of consideration *are* as *follows:*

1. Under the *English law,* a contract *under seal* is binding without

consideration. The *Indian law* does *not* recognise any division of contracts into *simple* contracts and those under seal. Even in the case of negotiable instruments, where the consideration is *presumed* under sec. 118 of the Negotiable Instruments Act, they would be void if, as a matter of fact, it is proved that *no* consideration has passed between the parties.

2. Under the *English law,* consideration must have moved from the promisee, but under *Indian law,* consideration may move from the *promisee or any other person.*

3. Under the *English law,* consideration, to have legal effect, need *not* be *adequate,* but must have some value in the eyes of law. A *good* consideration, such as natural love and affection, as distinguished from *valuable* consideration, is *not* sufficient *in English law* to support a contract. Under the *Indian law,* however, natural love and affection is valid consideration under S. 25.

4. Under the *English law,* consideration may be *present or future,* but *past* consideration is *no* consideration; Under the *Indian law, past* consideration *will* support a subsequent promise.

[Note : S. 23, which deals with lawful and unlawful consideration, and S. 25, which lays down the cases in which consideration is *not* necessary, will be discussed in a later Chapter.]

E. AGREEMENT & CONTRACT

Define void Agreements. State & explain briefly the agreements which are expressaly declared void under the Indian Contract Act. B.U. Apr.2016, May 2017

What is a voidable contract? (2marks) B. U. 2014

Under S. 2(e), promise and every set of promises, forming the consideration for each other, is an agreement.

An agreement which is *not enforceable by law* is said to be *void:* S. 2(g)..

VALID, VOID, VOIDABLE, UNENFORCEABLE AND ILLEGAL AGREEMENTS. - All agreements can be classified as follow :

1. *Valid Agreements*— These are agreements that are enforceable3 at law. Such an agreement is fully operative in accordance with the intention of the parties and the law. Such an agreement satisfies *all* the conditions of a *valid contract* under the Act.

2. *Voidable Agreements*— A *voidable* agreement is one which is valid as long as it is *not *avoided"* by the party entitled to do so. Thus, it is an agreement which is enforceable at law at the option of *one* of the parties to such agreement, but *not* at the option of the other. Thus, agreements induced by coercion, undue influence, fraud or misrepresentation are *voidable.* It is for *the party upon whom* such fraud has been practised to set up such fraud and have the agreement set aside by the court; if he does *not,* (within the period prescribed by the law of limitation), the agreement stays as a legal binding contract.

3. *Unenforceable Agreements*— An otherwise valid contract may be *unenforceable* at law, if some rule of law renders it. incapable of proof because of some technical defect, *e.g.,* a promissory note which is unstamped *or not* sufficiently stamped. Such a contract is otherwise valid, but *cannot* be proved and enforced in a Court of law.

4. *Void Agreements*— A void agreement is one which has no legal effect at all, and is therefore *not enforceable* at law. Thus, agreements of which the object or consideration is unlawful, *or* which are in restraint of trade or of marriage or of legal proceedings *or* which are by way of wager, are all *void.* No legal rights flow from such an agreement, and consequently, no action can be taken under such an agreement in a Court of law. In the eyes of law, *there is no agreement at all.* Such agreements are *void ab initio, i.e. void from the very beginning.*

It may also happen that a contract which was valid when entered into becomes void at a later stage. Thus, on January 1, A makes an agreement to sell his horse to B on January 10. Through no fault of either party, the horse dies on January 7. In these circumstances, the contract become void on January 7.

However, it must be kept in mind that there *cannot* be a *void contract.* A contract is always an agreement which is enforceable at law and therefore, to speak of a *void contract* involves a *contradiction in terms.*

5. *Illegal Agreements*— These are agreements which are void because they are against the law. Thus, an agreement to buy smuggled opium would be void as it is illegal.

Illegal and void contracts distinguished— The term 'illegal' is narrower in meaning than the term 'void'. *All illegal contracts are void, but all contracts that are void are not necessarily illegal, e.g.,* an agreement in restraint of trade is *void* but not *illegal.* A void agreement is destitute of legal effect when it is *proved* to be so, but an illegal one is so *ab initio.* The distinction between a void and illegal contract is important as regards *collateral* transactions, because an agreement which is collateral to an *illegal* agreement *cannot* be enforced, whereas transactions collateral to a *void* agreement are *not* affected.

Void, voidable, and unenforceable contracts distinguished— A distinction is sometimes drawn between agreements which are *void or voidable* and those which are *unenforceable.* Strictly speaking, an agreement is void or voidable because of its *substance,* owing to *flaws* in the contract, or for want of free consent; while one which is *unenforceable is so because of a procedural defect, as for instance, due to want of stamp,* by bar of *limitation; etc.* It is valid, but *incapable of proof.* It is good in substance, though by reason of some *technical* defect, one or both the parties cannot *sue* upon it.

CONTRACTS'

S. 2(h) defines the term "contract" as an agreement *enforceable by law.*

CONTRACT EXPLAINED— A contract is an agreement, the object of which is to create an obligation. In the words of *Anson,* "the law of contract is that branch of law which determines the circumstances in which a promise shall be legally binding on the person making it." Thus, if there is an agreement between *A* and *B* that *A* will construct a house for *B,* and *B* will pay Rs.50 lakhs to *A,* the agreements a contract. Likewise, if there is an agreement between A and *d,* that *B* will get Rs.5000, if he does *not* canvass votes for *C,* the agreement is also a contract, because on account of the agreement, *A* is entitled to *B's forbearance.* Thus, when an agreement enables a man to compel another *to do* something *or not to do* something, it is called a contract.

AGREEMENT AND CONTRACT DISTINGUISHED.— An agreement is the expression by two or more persons of a common intention to affect their legal relation. "It is a *wider* term than *contract." (Savigny)* Contract results from a combination of two ingredients—*agreement* and *obligation.* An agreement becomes a contract when there are competent parties, consideration, free consent and legal object. (S. 10) Contract is *that* form of agreement which directly contemplates and creates a legal *obligation.*

(Anson)

Thus, *all contracts are agreements, but all agreements are not contracts.* An agreement, in order to be a contract, must be *enforceable by law.* "Agreement" is a wider term than "contract", and it covers a variety of transactions which may *not* be enforceable by law because of the absence of some of the essential elements of a valid contract, *e.g.,* capacity of parties, free consent, lawful consideration and object, *etc.*

S. 10 of the Act (discussed later) lays down the various conditions which an *agreement* must satisfy in order to become a contract.

VOIDABLE CONTRACT

As seen earlier, an agreement which is enforceable by law *at the option of one of the parties* thereto, but *not* at the option of the other is a *voidable* contract. A contract which ceases to be enforceable by law becomes *void* when it *ceases* to be enforceable.

It will thus be seen that a *voidable contract* is a *contract with a flaw,* of which one of the parties may, *if he chooses,* take advantage. Thus, agreements induced by coercion, undue influence, fraud or misrepresentation are voidable (S. 19). To take an example, if *A,* intending to deceive *B,* falsely represents that five lakh pairs of shoes are made annually at A's factory, and thereby induces *B* to buy *the factory, the contract is voidable at the option of B.*

CIRCUMSTANCES WHICH MAKE AN AGREEMENT VOIDABLE- There are some circumstances under which an agreement may become voidable. Out of these, the following *three* are the most important:

1. When a consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract which is voidable at the option of the party whose consent was so caused : Ss. 19 and 19-A.
2. If a party to an *executory* contract prevents the other party from performing his part of the contract, the contract becomes *voidable at* the option of the party so prevented: S. 53.
3. If a party to a contract, in which time is essential, fails to perform his part of the contract at a fixed time, the contract is *voidable* at the option of the other party: S. 55.

[All these sections are discussed at their proper places below.]

OTHER TYPES OF CONTRACTS

Executed and executory— A contract creates rights *and* obligations. Both the parties to a contract have *mutual* rights and obligations. Thus, if *A* agrees to sell a horse to *B, A* is under an obligation to *sell* and *deliver* the horse to *B,* and at the same time, he has the right to *receive* the price of the horse from *B.* Similarly, *B* is under an obligation to pay the price, and he has the right to *get* the delivery of the horse from *A.* When a party to a contract has performed *his* part of the obligation, the contract is called *executed,* though it may leave an outstanding obligation on the *other* side to perform *his* part of the promise. Thus, a contract of loan, where money has been advanced by the creditor, is an example of *executed* contract, because the creditor *has done* what he *was* to do under the contract; it remains for the debtor to *repay* the debt.

But where neither party has performed *his* part of the obligation, the contract is *executory.* Thus, *A* promises to engage *B* as his servant from January next. Here, the contract is *executory,* because neither *A* nor *B has done* what he had promised to do. So also, we have *executory* contracts, in which certain acts may have been J / performed, but there remains *something* to be done on *both* sides.

A contracts to purchase from *B* a house for Rupees eight lakhs, and pays a sum of Rs.80,000 as earnest money. *B* gives possession of the house to *A,* but does *not* execute a sale deed. This is an instance of an *executory* contract in which there

remains something to be done on *each* side.

Unilateral and bilateral- A unilateral contract is one in which the consideration is *executed;* a bilateral contract is one in which the consideration is *executory.*

Three types of contracts under English law — According to the *English law,* contracts are of *three kinds :* (a) Contracts of Record;
(b) Specialty contracts; *and* (c) Simple contracts.

(a) Contracts of Record are judgments and recognizances, both of which are enforced by immediate execution. These are entered into through the machinery of a Court of Justice, *e.g.,* a recognizance. A judgment of a Court of Record imposes an obligation upon the person against whom judgment is recorded to pay the sum awarded. Although this is called a contract, it is *not,* strictly speaking, a contract, because of the *absence of agreement* on the part of the person against whom the judgment is passed.

(b)A specialty contract is a contract which is in *writing,* and is *signed, sealed* and *delivered* by the parties. It is also called a *deed* or *contract under seal.* No consideration is required in the case of a deed. Specific performance, however, will *not* be granted of gratuitous contracts.

(c) All contracts which are *not under seal* are *simple contracts.*All simple contracts *require consideration* to support them.Some, though *not* all, contracts are also required by law to be *in writing.*

This classification is, however, peculiar to English law. It has no application in India.

End of chapter 2

Chapter3.THE COMMUNICATION OF PROPOSAL, ACCEPTANCE & REVOCATION (Ss. 3-8)

Discuss the law relating to communication of proposal, acceptance and revocation. How can a proposed be revoked? B. U. Nov. 2011, Jan. 2017

When is communication of a proposal said to be complete? (2 mark) M.U. Nov. 2014

When is communication of acceptance complete? (2 marks) M.U. May 2012 Apr. 2015

Write short note on: Modes of revocation of proposal. B.U.May 2012

A. ACCEPTANCE (Ss. 3, 7, 8)

Acceptance of proposal, its essentials

Ss. 7-8 lay down the requisite conditions for converting a proposal into a promise. It is provided that (i) the performance of the *conditions* of a proposal, *or* (ii) the acceptance of any *consideration* for a reciprocal promise which may be offered with a proposal, is an *acceptance* of the proposal: S. 8.

S. 7 then lays down the following two *essentials* of a valid *acceptance,* which will convert a proposal into a promise:

(1) The acceptance must be *absolute* and *unqualified.*

(2) The acceptance must be expressed in some *usual* and *reasonable manner, unless* the proposal *prescribes* the manner in which it is to be accepted.

If the proposal prescribes a *manner* in which it is to be accepted, and the acceptance is *not* made in *such manner,* the proposer may, *within a reasonable time* after the acceptance is communicated to him, *insist* that his proposal shall

be accepted in the *prescribed* manner and *not otherwise;* but if he fails to do so, he accepts the *acceptance:* S. 7.

Acceptance how made

S.3 lays down as to *how* acceptance is to be made. Acceptance may be *communicated* by *words or* by *conduct.* The acceptor must do something to signify his intention to accept. Though acceptance is ordinarily communicated by *express* words, it may even be made *without* express communication; in other words, communication of an acceptance may also be *by* conduct.

However, mere *intention, i.e.,* mental acceptance, if *uncommunicated,* would *not* suffice. Acceptance means *communicated acceptance.* In short, acceptance must be *something more than mental acquiescence.* The acceptor is expected to do something to *inform* the *offerer of the acceptance* of the offer. It is *not enough* if the acceptor only informs his *friend* or his *agent* about the acceptance. (A reference may be made to *Felthouse* v. *Bindley,* discussed in an earlier Chapter.)

B. COMMUNICATION (S. 4)

S. 4 proceeds to lay down how (i) a proposal, (ii) an acceptance, and (iii) a revocation are *communicated.*

(a) Communication of proposal, when complete

Communication of a *proposal* is complete when it *comes* to *the knowledge* of the person to whom it is made: S. 4.

Illustration- A proposes, by letter, to sell a house to 6 at a certain price. The communication of the proposal is complete *when 'B receives the letter.*

(b) Communication of acceptance, when complete

Communication of an *acceptance* is complete—

(i) *as against the proposer,-* when it is put in *course* of *transmission* to him, so as to be *out* of the power of the acceptor;

(ii) as *against the acceptor,-* when it comes to the *knowledge* of the proposer : S. 4.

Illustration— B accepts *A's* proposal by a letter sent by post. The communication of the acceptance is complete—

as against *A,* when the letter is *posted;*

as against *B,* when the letter is *received* by *A.*

(See below, "Acceptance and revocation made through post".)

(c) Communication of revocation, when complete

" Communication of revocation is complete—

(i) *as against the person who makes it,-* when it is *put into the course of transmission* to the person to whom it is made, so a$ to be *out* of the power of the person who makes it;

(ii) *as against the person to whom it is made,-* when it comes to his *knowledge :* S. 4.

Illustration. *A* revokes his proposal by telegram.

The revocation is complete as *against A* when the telegram is *dispatched.* It is

complete *as against B,* when *B receives* it.

B revokes his acceptance by telegram. *B's* revocation is complete as against *B* when the telegram is *dispatched,* and against *A* when it reaches him.

C. REVOCATION (Ss. 5-6)

When can an offer be revoked? (2marks) M. U. Apr. 2011, Nov. 2012

When can an acceptance of a proposal be revoked? (2 marks) M.U. Apr. 2016, Jan. 2017.

A *proposal* may be revoked at any time before the communication of acceptance is complete as against the *proposer,- but not afterwards.*

. -'An *acceptance* may be revoked at any time before the communication of acceptance is complete as against the *acceptor,— but not afterwards.*

Illustration— A proposes, by a letter sent by post, to sell his house to *B. B* accepts the proposal by a letter sent by post. *A* may revoke his proposal at any time *before* or *at* the moment when *B posts his letter of acceptence — but not afterwards.*

B may revoke his acceptance at *any* time *before* or *at* the moment M U' when the letter communicating it reaches *A— but not afterwards.*

ACCEPTANCE AND REVOCATION MADE THROUGH POST- Sections 4 and 5 of the Contract Act deal with acceptance and revocation of acceptance made through post.

As regards acceptance and the revocation of acceptance by post, there is some *difference* between the English and the Indian Law. According to the *English* law, the acceptance of an offer is complete as soon as it is *posted, and cannot be revoked, e.g.,* by a telegram reaching the proposer earlier than the letter communicating the acceptance.

The decision in *Dunlop* v. *Higgins,* 1 H.L.C. 381, affords the best illustration of this English principle. In that case, Dunlop, in answer to an inquiry as to the price of pig-iron wrote to Higgins: "We shall be glad to supply you with 2,000 tonne pig-iron at 65s.per tonne," and after further correspondence wrote on the 28th January explaining that the price was 65s.net. Higgins received this on 30th January, and on the same day wrote: "We will take the 2,000 tonnes pig-iron you offer us". The post was then delayed by the state of the roads, and the acceptance was received six hours later than the hour at which that post ought to have arrived. Dunlop refused to sell the iron. It was *held* that the posting of the letter was an acceptance of the offer, and that Dunlop could *not* refuse to supply the iron.

The Indian law, however, has introduced some *qualifications;* although it makes the communication of an acceptance complete as against the *proposer* when it is put into course of transmission to him (as in English law), it has made some concession in favour of the *acceptor,* as againstwhom the acceptance of communication would be complete when it comes to the *knowledge* of the proposer. Thus, it gives the acceptor, *even after he has posted his acceptance,* a right to revoke the *same by some other communication (e.g.,* a telegram) reaching the proposer *earlier than his letter of acceptance.*

PROBLEMS

1. The defendants, writing from Cardiff on 1st October made an offer to the plaintiffs in New York, asking for a reply by cable.The plaintiffs received the letter on 11th October, and at once accepted in the manner requested. In the meantime, however, the defendants had, on the 18th October, posted a letter revoking the offer. The letter did not reach the plaintiffs until the 20th October. Is the revocation binding on the plaintiff?

Ans- In this case, the revocation became complete only when it was communicated to the plaintiffs. Before that, the plaintiffs accepted the offer and put the acceptance into the course of communication. Therefore, the revocation is *not binding* on the plaintiffs. *[Byrne* v. *Von Tienhoven,* (1880) C.P.D. 344.]

2. A is a merchant at Calcutta and *B* is a trader at Bombay. *A* proposes by a letter dated 1st January, to sell his house at Bombay to *B* for Rs.50 lakhs. The letter states that *B* must give his reply within seven days from the receipt of the letter by him. It takes three days for a letter posted at Calcutta to reach the addressee at Bombay and *vice versa. B* receives the letter written by *A* on the morning of 4th January. *B* sends a reply by post to *A* on 5th January, accepting *A's* proposal. On 6th January, *B* changes his mind, and desires to revoke his acceptance. Can he do so? If yes, how?

Ans- Here, *B's* letter of 5th January, accepting *A's* proposal will reach Calcutta on the 8th. It is open to revoke his acceptance at any time before or at the moment the letter communicating it *reaches A* (see S. 5). *B* should send a telegram revoking the acceptance, so as to reach *A before* the letter of the 5th reaches him.

(b) How a proposal can be revoked

S. 5 above lays down as to *when* a proposal can be revoked. S. 6 provides *how* it can be revoked, and can be analysed as follows:

A proposal is revoked in one of the following *four* ways:

1. By the communication of *notice of revocation* by the proposer to the other party.
2. By the *lapse* of the *time* prescribed in such proposal for its acceptance *or,* if no time is prescribed, by the lapse of a *reasonable* time, without communication of the acceptance.
3. By the *failure* of the acceptor to *fulfil a condition* precedent to acceptance.
4. By the *death or insanity* of the *proposer, if* the fact of his death or insanity comes to the knowledge of the acceptor *before* accepting.

Under the *English law,* death of either party, before acceptance causes the offer to lapse, and the question of such fact coming to the knowledge of the other party (as under the Indian law) does *not* arise at all.

Further, *in England,* the insanity of the proposer before acceptance does *not* operate as a revocation, because under the English law, a lunatic's contract is *voidable* and *not void,* as in India.

End of chapter 3

4. Chapter

VALID CONTRACTS (S. 10)

"All agreements are not contracts but all the contracts are agreements." Dicuss M.U. Nov.2011, Nov.2013, April 2016.

It is important to note that one *cannot* speak of a "*void contract".* By its very definition, a contract is an agreement which is enforceable by law. Hence, it would be a *contradiction in terms* to talk of a "void contract". The right term to use in such cases would be *void agreement.*

Hence, agreements may be *valid* or *void;* but contracts are *valid* (*i.e.* enforceable by either party) or *voidable* (*i.e.,* enforceable by only one of the parties, at his option.)¦

Which Agreements are Contracts (S. 10)

As seen above, *all contracts are agreements, but all agreements are not contracts.* To be a contract, an agreement must be enforceable at law. Thus, *A* and *B* may agree to smuggle gold into India. This may be an *agreement* between them, but it will *not* be a *contract,* as it is *not enforceable* at law.

Under S. 10, all agreements are contracts, if they are made:

(1) by the *free consent*

(2) of *parties competent to contract*

(3) for a *lawful consideration* and a *lawful object,* and

(4) are *not expressly declared to be void. ,D*

S. 10 further provides that if a contract has to be in writing under the provisions of *any other law,* then it must also be *in writing.* For instance, the Memorandum and the Articles of Association of a company *must* be in writing, as prescribed by the Companies Act. Similarly, the Transfer of Property Act requires certain documents like sale-deeds, leases and mortgage-deeds, to be in writing.

Likewise,if the presence of witnesses or compulsory registration is required by any law (as for instance, the Indian Registration Act), such requirements would also have to be observed. (S. 10)

As regards the *first requirement,* namely, that there must be free consent, the position is governed by Sections 13 to 22 of the Act, which will be discussed at length in a later Chapter.

As regards the *second requirement,* namely, the competency of the parties, Sections 11 and 12 of the Act apply, and these sections are discussed in the next Chapter.

The *third requirement* is that the agreement should be for a lawful consideration and a lawful object. Sections 23 to 25 clarify the position in this respect, and these sections will be discussed at their proper places.

The *fourth requirement* postulates that the agreements should *not* be expressly declared to be void by the Contract Act. Sections 26 to 30, in turn, expressly declare certain agreements to be void, and these sections will be discussed later.

All the above mentioned requirements of a valid contract *must* be present in every case. In other words, these requirements are *conjunctive,* and *not*

disjunctive. All of them must co-exist in every case.

Contracts required to be in writing- As seen above, the Contract Act does *not* require every contract to be in writing, unless so specified by law. Thus, under S. 25 of the Act, writing is one of the essential conditions of certain contracts referred to therein. Again, certain provisions of the Transfer of Property Act require writing, as for instance, in the case of a sale, a mortgage, a lease, and a gift. The provisions of the Indian Trusts Act also require trusts to be created in writing. Acknowledgement to save the law of limitation are also required to be in writing by Sec.18 of the Limitation Act, 1963. Submissions under the Arbitration Act are similarly required to be in writing.

Variance between print and writing.- It sometimes happens that hand-written words or sentences appear on a printed contract; in such cases, there may be variance, or even contradiction, between what is printed and what is hand-written. The question that arises in such cases is as to which of the two should be given more weight in interpreting the contract.

The leading English case on this point is *Robertson* v. *French,* (1803 4 East, 130), where *Lord Ellenborough* said that the words added in writing *with mutual consent* are entitled to have a greater effect attributed to them, inasmuch as the written words reflect the real and immediate intention of the parties. However, the printed words are *not* altogether to be discarded, and the Court should arrive at the *real intention* of the parties from the printed *as well as* the hand-written words.

It will be seen, from what is stated above, that S. 10 only lays down the various requirements of a valid contract. However, these requirements are expanded and amplified by the succeeding sections *viz.* Ss. 11 to 30 (which are discussed in the Chapters that follow) and by other laws.

End of Chapter 4

5. Chapter

COMPETENCY OF PARTIES TO A CONTRACT

Who is competent to contract? Discuss the law relating to contracts with a minor. M.U. Nov.2011

At what age does a person become competent to contract? (2marks) M.U. 2018.

Who is competent to contract? (2marks) M.U. Apr.2013, Apr.2014, Nov.2014, Jan.2017.May 2017.

Give any two rules regarding a minor's contract. (2 marks) M.U. Apr. 2015

Who are competent to contract as per section II of the Indian Contract Act? State the rules regarding a minor's agreement.
M.U. Nov. 2015

On attaining majority, can a person ratify an agreement made by him during his minority? (2 marks) M.U. Nov. 2013

Who is said to be sound of sound mind under Indian contract act? (2marks)

M.U. Jan. 2017

When is a person said to be of unsound mind under the Indian contract act? (2marks) M. U. Nov.2012

Write a short note on Unsoundness of mind M.U. May 2018

Write a note on: Government contracts.

B.U. Nov. 2013 Apr. 2015 Apr. 2016 Jan. 2017

What is a government contract? (2 marks)

B.U. Apr. 2014

Can a government contract made in contravention of Act. 299 be ratified? (2marks) B.U. Apr. 2013

In order that an agreement may be a *valid* contract, the *first* ingredient which must be satisfied is that the agreement must be *made by parties who are competent to contract.* This is laid down in Ss. 11 and 12 of the Act.

All agreements are contracts if they are made by competent parties.

S. 11 lays down that a party is *competent to contract,* if—

(i) He is of the age of majority,

(ii) He is of sound mind, *and*

(iii) He is *not disqualified* from contracting by any law to which he is subject.

MINOR'S AGREEMENT— According to the Indian Majority Act, a *minor* is one who has *not* completed 18 years of age. *Earlier,* in the case of minors for whom a guardian was appointed, the status of minority continued until the age of *twenty-one* years under the Indian Majority Act. However, after a recent amendment of that Act, this is no longer so. In other w6rds, *today,* the Act fixes the age of majority at *eighteen years - irrespective of whether or not a guardian has been appointed for the minor.* According to the Indian Contract Act, age of *majority* of the contracting parties is a *necessary* element for the validity of contracts.

Following the English law, several High Courts in India *had earlier held* that a minor's agreement was *voidable* at his option, and *not* altogether *void.* However, the Privy Council, interpreting the wording of Section 11, *held* in a leading case, *Mohiri Bibi* v. *Dharmodas Ghose* [(1903) 30 Cal. 539 (P.C.)] that a minor's agreement is *void, and not merely voidable.* So, a minor is *not liable* either to *perform* what he has promised to do under an agreement or to *repay* the money that he has received under it.

Thus, *A,* a minor borrows Rs.10,000 from *B,* on the security of a mortgage executed by *A.* Can *A* be compelled to make good the benefits derived by him?

The answer is: *No.* All agreements of a minor are *void ab initio.* Therefore, a mortgage made by minor is *void,* and a money-lender who has advanced money to a minor on the security of the mortgage is *not* entitled to repayment of the money.

C, aged 16, is stamp collector. He is particularly anxious to acquire a rare stamp belonging to *M,* who agrees in writing to sell this to C for Rs.100, but

subsequently refuses to deliver it, though *C* tenders the price. *C* wants to bring an action against *M.* Here, *C* is a minor. His contract is therefore *void,* and he *cannot succeed.* A minor's agreement being absolutely *void,* neither *C* nor *M* acquires any right, or incurs any liability, under the agreement. *C cannot* bring any action against *M,* either for specific performance or for damages. (*Suganchand & Co.*v. *Laduram Balkrishandas Firm,*I.L.R. (1942) Nag. 281)

In one interesting case decided by the Bombay High Court, a film producer and a minor girl entered into an agreement under which the minor was to act in a film. Another agreement to the same effect was also entered into by the *father of the girl* with the producer. When the producer failed to keep his commitment, the minor sued the producer through her father. The first agreement (*i.e.,* the one between the minor and the producer) was, of course, *void.* As regards the second agreement, the Court *held* that it was *also void.* The *reason* given was that the consideration moving from the father was girl's promise to act, and as the minor girl was *not* legally competent to promise, *there was no consideration at all.* Hence, the contract between the producer and the girl's father was also *void* on the ground of absence of consideration. *(Raj Rani* v. *Prem Adib,* AIR 1949 Born. 215).

"According to the law to which he is subject."- These words find place in the section because, in the older days, different laws prevailed in British India and in the former princely States. To-day, of course, the expression is of an academic interest only, as the Indian Majority Act applies to *all* persons who are domiciled in India.

In an old case, *Kashiba* v. *Shripat* (1895) 19 ILR Born. 697, a Hindu widow of 17 years, and having her domicile in British India, executed a bond in Kolhapur (which was outside British India). According to the law in the British India *(i.e.* law of domicile), she was a minor, as she was under the age of 18, and was therefore *not liable.* However, according to the law of Kolhapur *(i.e.,* the law of the place where the contract was signed), she was liable, as the age of majority there was 16. The Court *held* that her capacity to contract was *regulated by the law of her domicile (i.e.* British India), and she was therefore *not liable.*

Specific performance of minor's contract.— Again, since a minor's agreement is *void ab initio,* there can be no *specific performance of such* an agreement. Thus, it was held by Privy Council, in *Mir Sarwarjan* v. *Fakruddin,* that a guardian has no power to *bind* a minor by a contract for purchase of immovable property, and the minor *cannot* enforce the contract. In such a case, specific performance also *cannot be* decreed.

Contracts by guardians- A valid contract can, however, be made by a guardian on behalf of a minor, if the following *two conditions* are satisfied, namely,—

(i) the guardian is competent to do so; *and*

(ii) *the* contract is-

(a) for the minor's benefit

(b) for the minor's legal necessaries.

Ratification of minor's contract— Since a minor's contract is *vojd ab* initio, it follows that there can be no question of *ratifying* it; and hence a promise by a person on *attaining majority* to repay money lent and advanced to him *during minority cannot* be enforced, as the consideration given during minority is no consideration at all.

Upon the same principle, a promissory note, given by a person on attaining majority, in settlement of an earlier one signed by him *while a minor,* in consideration of money *then* received from the other, *cannot* be enforced by law. Such a note is *void* for want of consideration. Since the agreement by a minor is *void,* there can be no question of ratification, for there can be no ratification of a *void* agreement.

Transfer in favour of a minor.— There is, however, nothing in the Contract Act which prevents a minor from being a *promisee* or *transferee.* The law does *not* regard a minor as incapable of *accepting* a *benefit.* It has been *held* by a Full Bench of the Madras High Court that a mortgage executed *in favour of a minor,* who has advanced the mortgage-money, is enforceable by him or by any other person on his behalf.

So also, where a minor purchaser of immovable property was, subsequent to his purchase, dispossessed by a third party, it was *held* that the minor *could* recover from his vendor, the sum which he had paid as purchase money.

On the same principle, it has been *held* that a promissory note executed in f*avour* of a minor is *not void,* and can be enforced *by* the minor.

Under Sec. 184 of the Contract Act, which provides that a minor may act as an agent, but unlike other agents, he is *not liable* to his principal for his acts. So also, a minor *agent,* though he can make his principal responsible to third persons for his acts, will *not* himself be liable to his principal. A minor *cannot,* however, contract through an agent.

Again, under Sec. 30 of the Partnership Act, a minor *cannot* enter into a contract of partnership, though he may be admitted to the x benefits of the partnership, with the consent of all the partners. Such a minor *cannot* be made *personally liable* for obligations of the firm, but only the *share* of such a minor in the *property* of the firm is liable.

Estoppel against a minor if he makes a false representation— Formerly, there were many conflicting decisions as to whether a minor would be liable if he had made false representation as to his age, *i.e.,* if he had falsely told the other party to the contract that he had attained the age of majority. However, *now* the controversy has been set at rest by the decision of the Privy Council in *Sadik Ali Khan* v. *Jai Kishore* (30 B.L.R. 1346), where it was observed that a deed executed by a minor is a nullity, and *there cannot be* '•>» *any estoppel against a statute.*

A contract by a minor is *absolutely void (i.e. void ab initio).* Even if a minor obtains a loan by falsely representing that he is of full age, he is *not estopped* from setting up the plea of minority. He *cannot be sued* either on the contract *or* in tort for damage or for fraud, because to allow the injured party to sue would be

giving him an indirect means of enforcing a void contract: *R. Leslie Ltd.* v. *Sheil,* (1914) 3 K. B. 607.

In *R. Leslie Ltd.* v. *Sheil* (above), the defendant, who was an infant, induced the plaintiff to lend him 400 pounds, by falsely representing that he was of full age. The plaintiff sued the infant to recover the money on the ground (i) of fraud *and* (ii) alternatively for money he had received. It was *held* that the Infant's Relief Act made the contract *absolutely void,* and to give the plaintiff relief on either of these two grounds would be an indirect way of enforcing a void contract, and consequently the suit failed.

Liability of minor in tort- As infants *can* be sued under the law of torts, it may now be considered whether a minor who has entered into an agreement can be sued in tort for damages.

Burnard v. *Haggis,* (1863) 143 E.R. 360— *A,* an infant, hires a horse from *B,* expressly for riding and *not* for jumping. *A,* however, jumps it a lot for a long distance and kills it. What is the liability of *A* to *B*? Here, the horse was hired for one purpose and used for *another* and thus, there is a tort *wholly independent of contract.* Therefore, *A* is liable for damage caused by the death of *B's* horse.

It will thus be seen that an agreement *cannot* be converted into a tort to enable a person to sue a minor *(R. Leslie* v.*Sheil,* above). However, if there is a tort independent of the minor's agreement, an action in tort will lie (as in *Burnard* v. *Haggis,* above).

Reimbursement for necessaries supplied to a minor- Although a minor's contract is *void ab initio,* if a person supplies *necessaries* to a minor *or* to his dependants whom he is legally bound to support, such a person is entitled to be reimbursed out of the *property* of the minor (S. 68). It will be seen that in such cases also, the minor is *not personally* liable; the reimbursement is only out of the minor's *property,* if any. (S.68 is discussed at greater length in a later Chapter.)

PERSONS OF SOUND MIND- Under S. 12, a person is said to be of *sound* mind for the purpose of making a contract if, at the time when he makes it, he is capable (i) of *understanding it, and* (ii) of *forming a rational judgment* as to its *effect* upon his interests. Besides, a person who is *usually* of unsound mind, but *occasionally of* sound mind, he may make a contract *when he is of sound mind.* Likewise, a person who is usually of sound mind, but *occasionally* of unsound mind, *may not make* a contract when he is of unsound mind.

Illustrations— (a) A patient in a lunatic asylum, who at intervals, is of sound mind *may* contract *during those intervals.*

(b) A sane man, who is delirious from fever *or* who is so drunk that he *cannot understand* the terms of a contract or form a rational judgment as to its effect on his interest, *cannot* contract *whilst such delirium or drunkenness lasts.*

CONTRACTS BY LUNATICS - Very much akin to a minor is the case of a *lunatic and a drunkard.* The law throws around them a special cloak of protection. S.12 deals with the case of *lunatic,* and has already been discussed above. The contract of lunatic, like that of a minor, is *absolutely void.*

English and Indian law compared- In India, a contract by a lunatic is altogether *void. In England,* mere unsoundness of mind is no defence; the contract of a lunatic is *binding* upon him, *unless* he can show that at the time of

making the same, he was utterly incapable of understanding what he was doing, *and that the other party knew of his lunacy.*

In *India,* it is *not necessary* to prove that the person dealing *write a short note cm:* with the lunatic *knew* of his being a person of unsound mind; so the party pleading unsoundness of mind has the burden upon him to prove such unsoundness to have existed at the time of making the contract. Therefore, a lunatic's contract made during a *lucid interval* is *valid.* The presumption is primarily in favour of *sanity.* The contract of a lunatic, like that of a minor, is *absolutely void.*

In *England,* a person of unsound mind is *personally* liable for *necessaries* supplied to him. In *India, only his property* would be liable.

CONTRACTS BY DRUNKARDS— In *England,* a contract by a person who is too drunk to know what it is about is *voidable only, and not void,* and can be ratified by him when he is sober, so as to bind him without any further consideration. To avoid the contract made in a state of intoxication, a person must prove that, at the time of entering into the contract, he was incapable of understanding the nature of the act, *and* that the other party *knew* his condition.

In *India,* a contract by a person in a state of drunkenness is *absolutely void and incapable of ratification.* But drunkenness, in order to avoid a contract, must be so *excessive* and absolute as to *suspend the reason* for a time and create impotence of mind; it must be such as to deprive the contracting party of knowledge of the nature of the contract and its legal consequences. Mere drinking is *not* a hindrance to the contracting of just obligations. Here, in India, presumably the legal position of a contract by a drunken man would depend upon whether or not the other contracting party fraudulently took advantage of his mental state.

CONTRACTS BY MARRIED WOMEN— There is nothing in the Contract Act which prevents a married woman from making a contract. Both under the Hindu and Mahommedan law, a married woman is entitled to make a contract, so as to bind her property.

CONTRACTS BY INSOLVENTS— There is nothing to prohibit a contract by an insolvent *after* commencement of insolvency proceedings, but *before* adjudication. Thus, *X* executed a sale- deed, but before he could get it registered, an insolvency petition was filed against him. The registration of the deed took place during the pendency of the insolvency proceedings. Under these circumstances, the Madras High Court *held* that the sale-deed was valid and binding on the parties.

CONTRACTS BY CORPORATIONS— No provision is made in the Indian Contract Act as regard the capacity of a corporation to enter into a contract; all that Ss. 10 and 11 say is that the party must be competent to contract, and in order to be so, the person must be of the age of majority and of sound mind and not otherwise disqualified from doing so; but no mention is made as to the contracting powers of a corporate body.The powers of a corporation to make a contract vary according to the character of the corporation. A company is an artificial person created by law, and is competent to contract. But its powers of contracting are subject to limitations which may be either *necessary* or *express.*

A company, being an artificial person created by law, there are limitations to its capacity to enter into a contract; the limitations are: (a) necessary, *or* (b) express. A *necessary* limitation is that which is imposed by the very *nature* of the corporation. It being an *artificial* body and having an existence apart from its members who compose it, it is *impersonal* and must contract through its *agent.* A limitation is *express* if it is imposed by the terms of its incorporationany and agreement entered into by it in *excess* of its powers defined in its Memorandum of Association, would be *void* being *ultra vires.*

GOVERNMENT CONTRACTS

Under Art. 299 of the Constitution of India, all contracts made in the exercise of the executive power of the Union or of the State are to be made in the name of the *President* or the *Governor* respectively, and are to be executed on behalf of the President or the Governor by such persons as he may direct or authorise. However, the President or the Governor is *not personally liable* under such contracts.

The following are thus the *three* requirements of Art. 299 of the Constitution of India:

(a) The Contract must be expressed to be made by, *i.e.* it should be in the name of, the President or the Governor, as the case may be.
(b) It must be executed by a person duly authorised by the President or the Governor.
(c) Such person must execute the contract on behalf of the President or the Governor in the prescribed manner.

As the above conditions are *cumulative* in nature, if any condition is *not* complied with, the contract will *not* be enforceable by or against the Government. Nor can any of these conditions be waived by the parties.

It has been held that even when no formal document is executed between the parties, a contract can be spelt out from the correspondence, and if it complies with Art. 299, the contract is enforceable. *(Bhikrey v. Union of India,* AIR 1962 SC 113, followed by the Madras High Court in *Manickram Chettiar v. State of Madras,* AIR 1971 Mad 221)

Earlier, the courts had taken the view that a contract which does not comply with the above requirements could nevertheless be ratified. However, this view is *not* legally tenable. As is completely void, and therefore, cannot be ratified by the government.*((Mulumchand v. State of M.P.,* AIR 1968 SC 1218; *State of U.P. v. Murari Lai,* AIR 1971 SC 2210)

The Calcutta High Court has observed that if a contract is not made in accordance with the above requirement, it is void, and just because some payment were made under such contracts on previous occasions is no ground for holding that payment become due under that particular contract also. *(Kessuram Poddar v. Sec. of State 54 Cal. 460)*

Types of government contracts

Government contracts are of various types. Almost all contract which can be entered into by private individuals can today be entered into by the government. The following are the kinds of contracts usually entered into by the government:

(i) Service contracts

(ii) Contracts with suppliers of goods and services (to the government)
(iii) Contracts for supplies by the government to private parties.
(iv) Contracts with banks and financial institutions
(v) Contracts with persons whose tenders have been accepted by the government
(vi) Contracts for construction and maintenance of roads, flyovers,bridges, buildings, school, hospitals, *etc.*

Whether S. 70 of the Act applies to a Government contract which is invalidly executed

When a contract is *not* in accordance with Art. 299, but the defendant has accepted the benefit of such a contract, the plaintiff will be entitled to sue under S. 70 of the Indian Contract Act, as there will be a ""quasi-contract" between the parties. The courts have taken the view that section are satisfied. This is so, because under S. 70, the claim is not based on any contract, but on the equitable doctrines of restitution and unjust enrichment.

In *State of West Bengal v. B. K. Mondal & Sons,* a firm had constructed a *kutcha* road, guard-room, kitchen, *etc.* for the State of West Bengal. The contract did *not,* however, comply with the requirements of S. 175 of the Government of India Act, 1935, and therefore, the firm could not *sue* under the contract. However, they were entitled to succeed under S. 70 of the Indian Contract Act. The firm had *not* intended to act gratuitously, and the government of West Bengal had accepted the benefit of the contract. The firm could thus sue under a quasi-contract under the said section.

In similar circumstances, in *Secretary of State v. G. T. Sarin & Co.,* where a Commanding Officer ordered food for horses, the supplier was entitled to succeed under S. 70, although the contract was void, as it did *not* comply with the statutory requirements.

End of chapter 5

6. Chapter

CONSENT AND FREE CONSENT

When is consent said to be free? M.u.Apr.2016

What is free consent? (2 marks) M.U. Apr. 2014, May 2017

Explain free consent. M. U. May 2018

What is coercion as defined under the Indian Contract Act? (2 marks) M.U. Apr. 2011 Nov. 2011 Apr. 2013 Apr. 2015 Apr. 2016

*Write a short note on: Coercion.*M.U. May 2012 Nov. 2013 Apr. 2014 Nov. 2014

What is "undue influence" as defined in the Indian Contract Act? (2 marks) B.U. Nov. 2013

Write a short note on: Undue influence M.U. Apr.2014

When is a person deemed to be in a position to dominate the will of another? (2marks) M.U. Apr.2011, Nov. 2012

When is a contract said to be induced by undue influence? When is a party

deemed to be in a position to dominate the will of another? What is the effect of undue influence on a contract?
M.U. May 2012 Nov. 2015
When is a contract said to be induced by undue influence? When is a party deemed to be in a position to dominate the will of another? What is a effect of undue influence on a contract? M.U. May 2012, Nov.2015

What is fraud as defined under the Indian Contract Act? As mere silence is not fraud, state the circumstances, under which a duty to speak arises.
M.U. Nov. 2012
Write a short note on Fraud M.U. Nov.2011
What is rescission of contract? When can rescission be adjudged or refused? B.U. Jan. 2017 May 2017
What are the consequences when consent to an agreement is caused by coercion, fraud or misrepresentation? (2marks) B.U. Nov.2012
What is the effect of a mutual mistake of fact on an agreement? (2marks) B.U. 2012, Nov.2013, May 2017.
Write a short note on: mistake. B.U. Apr.2015
What is the effect of mistake of law under the Indian Contract Act? (2marks) M.U. Apr. 2011. Jan.2017

Consent

The next ingredient of a valid contract is *free consent.* Under this head fall several important topics like coercion, undue influence, fraud, and misrepresentation. Now, parties usually agree upon the *same thing* in the *same sense.* If they do *not,* there is *no contract.*

S. 13 therefore, lays down that two or more persons are said to *consent,* when they agree upon the *same thing* in the *same sense.*

PARTIES *AD IDEM*— It is essential to the creation of a contract that *both* parties agree to the *same thing* in the *same sense,* in which case they are said to be *ad idem.* It is clear that the word 'thing' must be understood in a very wide sense and would cover the *whole* content of the agreement, whether that refers to material objects *or* payment *or* any other act or promise.

If the parties are *not ad idem* on the subject-matter about which they are negotiating, *i.e.,* there is *no consensus ad idem,* there is no real agreement between them. When their minds are directed to *different objects, or* if they attach *different meanings* to the language which they use, it is obvious that there is *no agreement.* Thus, if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a *different* person or ship in mind, no contract would exist between them.

In *Raffles* v. *Wichelhaus* (1864 2 H & C 906), *A* and *B* entered into a sale contract for 125 bales of cotton coming from Bombay by a ship called ‘‘Peerless”. There were actually *two ships* by this name, and whilst *A* had one ship in mind, *B* thought it was the other. The Court *held* that *A* and *B* were *not ad idem,* and so, the agreement was *void.*

In *Foster v. Mackinnon,* (1869) L.R. 4 C.P. 704, the defendant an old and

feeble man, purported to endorse a bill of exchange which he was told was a guarantee. The plaintiff was a subsequent holder for value, and therefore, the fact that the defendant's signature was obtained by fraud would *not* have protected him in this suit. But the Court *held* that his signature, *not* being intended as an endorsement of a bill of exchange, *or* as a signature to any negotiable instrument, was wholly inoperative, just as if the signature has been written on a blank piece of paper first, and a bill or note written on the other side later on.

So also, where a document was put before an old man, and he was falsely told that it was a guarantee and he, intending to sign a guarantee, wrote his name on the document, in the belief that it was a guarantee, whereas in fact it was a bill of exchange, it was *held* that he was *not liable* even to a *bona ride holder tor* value, for his signature was fraudulently obtained on a document which he never intended to sign. There was no consent and consequently no agreement entered into by him. A deed executed by a person in such circumstances is a *nullity: Oriental Bank* v. *Fleming, 3 Born.* 242,267.

A good illustration of parties not being *ad idem* because of a mistake in identity, is the case of *Cundy* v. *Lindsay* (1878 19 I.L.R. Born. 697), the leading English case on the point. In that case, Blenkarn, taking advantage of the similarity of his name with Blenkiron, wrote to Lindsay & Co., and ordered goods of them. They mistook his order for that of Blenkiron (as the signature of the latter ordering the goods was also made look like Blenkiron's), a respectable firm, and delivered the goods to Blenkarn, who sold the goods to Cundy, and did *not* pay Lindsay & Co. for them. In a suit by Lindsay & Co., against Cundy, it was *held* that owing to the mistake caused by Blenkarn, there was *no real agreement* between him and Lindsay & Co., and that Cundy got no title to the goods.

Another interesting case on the point is the decision of the English Court in *Lewis* v. *Averay* (1972 1 K.B. 198). In this case, Mr. Lewis advertised his Austin car for £ 450. Mr. *X,* in reply to this advertisement, came one evening to the apartment of Mr. Lewis, tried the car, tested it and was ready to buy it for that sum. He told him that his name was Mr. Richard Green, the famous television actor who played the role of Robin Hood in television shows. Thereafter, Mr. *X* wrote out a cheque for £ 450, and wished to take away the car, but Mr. Lewis was hesitant. Seeing this, Mr. *X* took out from his pocket, a special pass for admission to Pinewood Studios, bearing his photo and an official rubber stamp. (In fact, this admission pass was a fake one.) Though *not* totally convinced, Mr. Lewis took the cheque, and handed over the car and the Log Book to Mr. *X,* who took this car and sold it to Mr. Averay for £ 200, representing that he was Mr. Lewis. In the meanwhile, the cheque given to Mr. Lewis was returned to him by the Bank, dishonoured. When Mr. Lewis came to know that the car was in possession of Mr. Averay, he filed a suit against Mr.Averay. The question before the Court was that of a case *where one of two innocent people would have to suffer for the fraud of a third person,* who had absconded.

In this case, the Court *held* in favour of Mr. Averay, and came to the conclusion that when two parties enter into a contract, the fact that one party is mistaken as to the identity of the other, does *not* mean that there is no contract. It

only means that the contract is *voidable, i.e.,* liable to be set aside at the instance of the person who was mistaken, provided he does so before a third person acquires a right under it in good faith. For this reason, it was *held* that there was a contract, under which property in the car passed to Mr. *X,* and in due course, to Mr. Averay, before the contract was avoided.

It will be noticed that the main difference between the above caso and *Cundy* v. *Lindsay* is that in *Cundy* v. *Lindsay,* the goods were sent *only because* one party believed the other to be what he represented himself to be (and *only* on his representation); in *Lewis* v. *Averay,* there was nothing to show that Lewis was prepared to sell the car *only because* the purchaser was a famous television actor. On the basis of ihis distinction, the Court *held in the first case, that there was no contract* between the parties and *in the second case that there was a concluded contract* in the circumstances, although the same was *voidable.* (Cases of mistaken identity of the parties to an agreement also fall under the head "Mistake", discussed later in this Chapter.)

(See further, under the heading "MISTAKE AS TO THE SUBJECT- MATTER OF THE CONTRACT", later in this Chapter.)

Consent when said to be "free" (S. 14) *

Now, parties to a contract may agree upon the same *thing* in the same *sense.* But, mere consent is *not enough;* consent must also be *free.*

Under S. 14, consent is said to be *free,* when it is *not caused by*—

(i) Coercion— as defined in S. 15;

(ii) Undue influence— as defined in S. 16;

(iii) Fraud — as defined in S. 17;

(iv) Misrepresentation— as defined in S. 18; or

(v) mistake — subject to the provisions of Ss. 20, 21 & 22.

FREE CONSENT— As stated above, *not only consent, but free consent,* is *necessary* to complete the validity of a contract; Where there is *no consent,* there can be *no contract* at all. Where there is *consent,* but no *free consent,* there is a contract, which is *voidable* at the option of the party whose consent was *not free.* In other words, when there is no consent, the agreement is *void.* However, where there is consent, but the consent is *not free,* the contract is *voidable.*

Consent is said to be free when it is *not caused by* (i) coercion, *or* (ii) undue influence, *or* (iii) fraud, *or* (iv) misrepresentation, *or* (v) mistake. Consent is said to be so caused when it would *not* have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake. If the consent is given under any of the first four circumstances, the contract is *voidable* at the option of the party whose consent was so caused. If the consent is caused by *mistake of fact* of both the parties, then the agreement is *void.* It is thus essential for the formation of a valid contract that there should be *free* consent of *both the parties.*

These five ingredients of free consent are considered below in *necessary* details.

(i) COERCION (Ss. 15, 19 & 72)

According to S. 15, coercion is—

(i) The *committing* of any act *forbidden* by the Indian Penal Code; *or*

(ii) The *threatening* to commit any act forbidden by the Indian Penal Code; *or*

(iii) The *unlawful detaining* of *any* property to the prejudice of any person whatsoever; *or*

(iv)The *unlawful threatening* to detain any *property* to the prejudice of any person whatever;

— with the *intention* of causing any person to *enter* into an agreement.

It is, however, immaterial whether the Indian Penal Code *is* or *is not* in force in the place where the coercion is employed.

Illustration.— *A,* on board an English ship on the high seas, causes *B* to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code. *A* afterwards sues *B for* breach of contract at Calcutta. *A has employed coercion,* although his act is *not* an offence by the law of England, and although section 506 of the Indian Penal Code was *not* in force at the time when or place where the act was done: S. 15.

It may be noted that coercion may proceed *from anybody,* - even a person who is *not* a party to the contract. It may be *directed against anybody,* and *not necessarily* the other contracting party. It includes physical compulsion, fear and even *menace to goods. Under English law,* the general rule is that coercion must proceed from a party to the agreement, and must also be directed to the other party to the agreement.

CASES— W forged his father's endorsement to some promissory notes by which certain bankers were defrauded. The bankers insisted (without actually threatening) on prosecuting the son for forgery. The N father was induced to consent to the settlement by the knowledge that a prosecution would almost certainly result in conviction of his son. The Court *held* that the settlement should be set aside on the ground that the father was *not* a free voluntary agent.

In another case, an agent employed by the plaintiff to purchase timber in Siamese territory was imprisoned by an officer of the Siamese Government, on a charge brought against him by the defendant of stealing timber. In order to obtain his release, he contracted to purchase (on behalf of the plaintiff) timber which he was charged with stealing, at a price much beyond its value. It was *held* that the plaintiff could rescind the contract.

Ranganyakamma v. *Alwar Setti,* 13 Mad. 24.—A Hindu widow was forced to adopt *X* under a threat that her husband's corpse would *not* be allowed to be removed unless she adopted *X.* The adoption was *held* to be *voidable,* as having been induced by coercion, as with the intention of wounding the feelings of the widow, indignity (non-removal) was offered to the corpse.

ACT FORBIDDEN BY PENAL CODE— In *Amiraju* v. *Seshamma* (1912 16 I.C. 344), a case decided by the Madras High Court, an *interesting question* arose. The Court was called upon to decide whether, if a person held out a threat of committing suicide to his wife and son if they refused to execute a release in his favour, and the wife and son, in consequence of the threat, executed the release, the release could be said to have been obtained by *coercion* within the meaning of this section.

Wills, C. J. and Seshasgiri Aiyar, J., (who delivered the majority opinion), answered the question in the *affirmative,* holding in effect that though a *threat* to

commit suicide was *not punishable* under the Indian Penal Code, it must be deemed to be *forbidden* by that Code, as an *attempt* to commit suicide was p*unishable* under that Code.

Oldfield J. answered the question in the *negative,* on *the* ground that the present section should be construed *strictly,* and that an act that was not *punishable* under the Penal Code could *not* be said to be forbidden by that Code. This view seems to be *correct.* The Penal Code forbids only what is declared punishable. The irresistable conclusion seems to be that the language of the Act has omitted to take account of this exceptional possibility.

In *Purabi v. Basudeb* (A.I.R. 1969 Cal. 293), the question before the Calcutta High Court was, once again, whether a threat to commit suicide amounts to coercion. In this case, Purabi, a student filed a suit against her tutor, Basudeb, for annulment of marriage, on the ground that her consent was obtained by coercion. She alleged that Basudeb had threatened her that if she did *not* marry him, he would first kill her and then commit suicide. The Court observed that to actually commit suicide is *not* an act *punishable* by the Indian Penal Code. (Once suicide is committed, there is none left to be punished.) But, that does *not* mean that the act is not *forbidden* by the I.P.C. After all, suicide is self-murder. Moreover, abatement of suicide and attempt to commit suicide are both punishable. Therefore, the Court *held* that a threat to commit suicide *does* amount to coercion. (In fact, however, it was *not* proved that Basudeb had held out any threat. On the contrary, the Court came to the conclusion that Purabi had married him of her own free will. Her suit was, therefore, dismissed on this ground.)

Liability of person to whom money is paid *or* thing delivered under coercion (S. 72)

S. 72 lays down that a person to whom money has been paid, or anything delivered under *coercion* must *repay* or *return* it.

Illustration— A railway company refuses to deliver certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charge in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

(ii) UNDUE INFLUENCE (Ss. 16 and 19A)

The second factor which invalidates consent is *undue influence.* S. 16 lays down that a contract is said to be induced by “undue influence”, where the relations subsisting between the parties are such that one of the parties (i) is in a position to *dominate the will* of the other, *and* (ii) uses that position to obtain *an unfair advantage over the other.*

In other words, undue influence means *any* influence by which the exercise of *free and deliberate judgment is excluded.* As observed by Lord Selborne in *Earl Aylesford* v. *Morris,* undue influence is “the unconscientious use by one person, of power possessed by h\m over another, to induce the other to enter into a contract".

Now, what is the meaning of being “in a position to dominate the will” of another? This is also clarified by S. 16, which gives *three examples* (without

affecting the generality of the concept) when a person is *deemed to be in a position to dominate the will of another, namely—*

(a)Where he holds a *real or apparent authority* over the other; *or*

(b) where he stands in a fiduciary relation to the other; *or*

(c) where he makes a contract with a person whose *mental capacity* is (temporarily or permanently) *affected* by reason of *age, illness,* or mental *or* bodily *distress.*

Illustrations.— (a) *A,* having advanced money to his son, *B,* during his minority, upon S's coming of age, obtains, by *misuse of parental influence,* a bond from *B,* for a greater amount than the sum due in respect of the advance. *A* employs *undue influence.*

(b) A man enfeebled by disease or age is induced by *B's* influence over him as his medical attendant, to agree to pay *B* an unreasonable sum for his professional service. *B* employs *undue influence.*

(c) *A* applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. *A* accepts the loan on these terms. This is a transaction in the ordinary course of business, and *the contract is not induced by undue influence.* '

As was said in England by Lindley, L.J. "The equitable doctrine of undue influence has grown out of, and been developed by, the necessity of grappling with *insidious forms of spiritual tyranny* and with the *infinite varieties of fraud."*

In *Tate* v. *Williamson* (1866 2 Ch. App. 55), the Court propounded the principle of undue influence in the following words:

"Wherever two persons stand in such a relation that while it continues, confidence is necessarily reposed by one and the influence which necessarily grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will *not* be permitted to retain the advantage, although the transaction could *not* have been v impeached if no such confidential relation existed."

In one case, the plaintiff agreed to serve on a voyage to the Baltic and back to London at £ 5 per month. In the course of the voyage, two seamen deserted, and the captain who was unable to find other men, promised that their wages would be distributed among the rest, including the plaintiff. The plaintiff brings a suit for the extra wages. This is a transaction in the ordinary course of business, and the contract is *not induced by undue influence.* The plaintiff is entitled to the extra wages; his suit will be decreed.

Where a poor Hindu widow borrowed Rs.1,500 from a moneylender at 100 per cent per annum, for the purpose of enabling her to establish her right to maintenance, the High Court of Madras allowed the lender interest at 24 per cent. (*Ranee Annapurni* v. *Swaminathan,* 1930 34 Mad. 7)

The relief, however, has, *not* been confined to money-lending transactions, and as far back as the year 1874, the Judicial Committee set aside a bond obtained by a powerful and wealthy banker from a young *zamindar* who had just attained his majority and had no independent advice, by threats of prolonging litigation commenced against him by other person with the funds and assistance

of the banker.

WHETHER RELIGIOUS INFLUENCE CAN AMOUNT TO UNDUE INFLUENCE— In a leading English case, *Allcard* v. *Skinner* (1887 36 Ch. D 145), the Court was faced with the question as to whether *religious influence* can amount to undue influence. In that case, a young girl joined a Sisterhood at the age of 27, and bound herself to observe the triple vows of chastity, poverty and obedience. The rule of obedience required her to regard the voice of Mother Superior as the voice of God. Moreover, no Sister was allowed to take any independent advice from an outsider, without the leave of Mother Superior. When the girl's father died, leaving considerable money and shares, she made a gift thereof to the sisterhood, and also made a will bequeathing everything to the sisterhood on her death. In 1879, she left the sisterhood, and revoked her will soon thereafter. In 1885, she filed a suit to revoke the gift (which she had made to the sisterhood at the time of her father's death) on the ground that the transaction was vitiated by *undue influence,* and therefore, *voidable* at her option.

The Court unanimously came to the conclusion that religious influence *can* amount to undue influence. However, in the present case, since *six years* had elapsed between the date of her leaving the sisterhood and the date of filing the suit, the Court *held,* by a majority (Cotton, L.J. dissenting) *that her claim was barred by laches* (undue delay).

Where an old Hindu woman gifted away the *whole* of her property to her spiritual adviser, merely with a view to secure benefits to her soul in the next world, the gift was *held* invalid. So also were transactions avoided in a case of a gift by an old illiterate woman to her managing agent and in another case to her *mukhtyar.* Where a beneficiary under a trust made a gift of a portion of the trust fund to the trustees, it was *held* that the case would be covered by this section.

Mere hardship or unconscionableness not enough.— It may, however, be noted that a party to a contract *cannot* avoid it on the ground of undue influence, *merely* by showing that it worked *hardship* on him or was *unconscionable*,— *unless* he proves that the *other party was in a position to dominate his will.* It is only when it has been so proved, that the question arises whether that position has been used to obtain an unfair advantage.

QUESTIONS FOR CONSIDERATION UNDER S. 16

In dealing with cases of undue influence, the Court should consider the following *four important questions, viz*.—

(1) Whether the transaction is a *righteous transaction, i.e.,* whether it is a thing which a right-minded person might be expected to do.

(2) Whether it was *improvident, i.e.,* whether it shows so much improvidence, as to suggest the idea that the donor was *not* master of himself and was *not* in a state of mind to weigh what he was doing.

(3) Whether it was a matter requiring legal advice.

(4) Whether the intention of making the gift (if any) originated with the donor : *Mohamed Buksh* v. *Hosseini Bibi,* 15 I.A. 81.

UNDUE INFLUENCE, WHEN PRESUMED.— After reciting the general principle as above, S. 16 proceeds to lay down certain *rules of presumption* as regard persons in particular relationships. The section proceeds to lay down a

rule of evidence as to the *burden of proof.* It provides that where a person who is in a position to dominate the will of another enters Into a contract with him and the transaction *appears* on the *face* of it to be *unconscionable,*—the *burden* of *proving* that such a contract was *not* induced by *undue influence lies upon the person in a position to dominate the will of the other.*

Illustration— *A,* being indebted to *B,* the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on *B* to prove that the contract was *not* induced by undue influence.

Thus, the general *rule* is that he who alleges undue influence must prove it. However, once the peculiar position of the parties is established, and it *appears* that the transaction is an *unconscionable* one, the Court will *presume* that undue influence was exercised. The burden of proving that it was *not* so, will rest on the party *benefiting by the agreement.*

The onus will lie on the other party *only* when it is established that—

(a) He was in a position to dominate the will of the person whose consent was obtained by such influence; *and*

(b) The transaction *appears,* or is *shown,* to be *unconscionable.*

Thus, where undue influence is pleaded in defence in a suit on a bond, before the burden can be laid on the creditor, *not* one, but *both* the elements mentioned above must be established. Thus, although a mortgage with ample security provides for excessive and usurious interest, no presumption arises that it was induced by undue influence, in the absence of proof by the mortgagor that the *mortgagee was in a position to dominate his will.*

Thus, for instance, if *A,* a man enfeebled by disease or age, is induced, by *B's* influence over him as his medical attendant, to agree to pay *B* an unreasonable sum for his professional services, it will be *presumed* that *B* employed undue influence; the onus of proving that the agreement was *not* so induced will lie on *B.* Cases of needy borrowers and exacting money-lenders have been of common occurrence and Often called for the interference of the Courts under this Act till the passing of the Usurious Loans Act, 1918.

CASES.— *Safdar* v. *Nur Mohd.,* 1930 Sind 25.— *X,* aged 100, makes a gift in favour of *Y,* his creditor, disinheriting his wife and son and stripping himself of almost everything. Undue influence will be *presumed,* as both conditions of S. 16 (2)— (i) position to dominate, *and* (ii) unconscionability, are present.

Abdul Karim v. *Ihsan-ul Ghani,* 1921 Oudh 207.— *A,* an heir, in order to finance litigation for his claim to the estate, takes a loan from *B* of Rs.3,700, and passes a bond for Rs.25,000 payable on receiving the estate, *A* being at the time of the loan even without means of subsistence. The transaction is, on the face of it, unconscionable.

Pt. Shyam Lai v. *Badri,* 1925 All. 31— *A* and *B,* illiterate agriculturists, execute a bond in favour of a professional moneylender *Y,* whereby interest at 4% *per month* is to be paid. Undue influence will be presumed, for the law throws a cloak of protection around *agriculturists,* against *professional* money-lenders.

CONTRACT WITH A PARDANASHIN LADY—*A pardanashin* lady is one who, by the custom of the country or the usage of the particular community to which she belongs to, is obliged to observe *complete seclusion.* The Courts in

India regard such women as being *especially open to undue influence.* When, therefore, an *illiterate pardanashin* woman is alleged to have dealt with her property and to have executed a deed, the burden of proving that there was no undue influence, and that she was a free agent, lies on the *party setting up the deed.*

The Privy Council has observed as follow : "In the first place, the lady was *pardanashin* lady, and the law throws around her a *special cloak of protection.* It demands that the burden of proof shall, in such a case, rest *not* with those who attack, *but* with those who *found* upon the deed, and the proof must go so far as to show *affirmatively* and *conclusively, not only* that the deed was *executed* by, *but* was *explained to,* and was really *understood* by, the grantor. The Court when called upon to deal with a deed executed by a *pardanashin* lady, must satisfy itself upon evidence, *first* that the deed was actually executed by her *understanding* what she was about to do; *secondly,* that she had *full knowledge* of the *nature* and *effect* of the transaction in which she is said to have entered, and *thirdly,* she had *independent* and *disinterested* advice in the matter".

Monsheev. Shamsoonissa, (1867) 11 M.I.A.551.—In this earliest decision of the Privy Council on the subject, a Mahommedan lady \ sued her husband to recover the value of Company's paper, alleging that the paper was her property, and that she had endorsed and handed it over to him for collection of interest. The husband's defence was that he had purchased the paper from his wife. Their Lordships *held,* upon a review of the evidence, that although the wife had failed to prove affirmatively the precise case set out by her, nevertheless as the wife was *pardanashin,* the husband was bound to prove something more than mere endorsement and delivery. He had failed to discharge the *onus probandi,* which was on him, that the sale was *bona ride* and that he had given value for the paper. The wife's suit thus succeeded.

UNDUE INFLUENCE IN MONEY-LENDING TRANSACTIONS— The mere fact that the rate of interest in a money-lending transaction is exorbitant is, *by itself,* no ground for relief under S. 16, *unless* it is shown that the lender was in a position to dominate the will of the borrower. The Privy Council has *held*' that urgent need of money on the part of the borrower does *not,* of itself, place the lender in a position to dominate his will within the meaning of section 16. If people, with their eyes open, choose wilfully and knowingly to enter into unconscionable bargains, the law will *not* protect them. As observed in *Aziz Khan* v. *Duni Chand,* a transaction may undoubtedly be improvident, but in the absence of any evidence to show that the money-lender had actually taken advantage of his position, it is difficult for a Court to give relief only on the ground of hardship.

Problem.—A, a poor Hindu widow, borrows money from *S,* a money-lender, on interest at the rate of 100 per cent. S has filed a suit for the recovery of the amount advanced by him with interest at the contract rate. *A* is seeking to avoid the contract *in toto.* Advise *A.*

Ans— The contract *cannot* be avoided *in toto,* but relief will be given to her against payment of interest at the exorbitant rate. *(Rani* v. *Swaminath,*34,Mad.7).

COMPOUND INTEREST.—Compound interest in itself is perfectly legal, and

it is competent to a Court to allow *compound interest at the same rate* as simple interest from the date of default, if there is a clear stipulation to that effect. In other words, a stipulation in a bond that on default of payment of simple interest, compound interest at the same rate shall be payable from the date of default is *not* by way of penalty : *Sunder Koer* v. *Rai Sham Kishen,* (1907) 34 Cal. 150 (P.C). The Courts do *not* lean towards compound interest; but when there is a clear agreement to pay, it is, in the absence of disentitling circumstances, allowed.

UNCONSCIONABLE OR 'CATCHING' BARGAINS.— Originally, in a contract for a loan made with oppressive terms with an expectant heir, relief was granted in equity, on the ground of constructive fraud, *i.e.,* on the ground that the parties were *not* on equal terms, of which *unfair* advantage had been taken and a *hard* bargain made. Such bargains are called *catching bargains or unconscionable bargains.* The onus is placed on the person seeking to *enforce* the contract to show that the contract is *fair* and *reasonable.* The doctrine has been extended to all cases where parties do *not* meet on *equal* terms *or where one is* under pressure *without* adequate protection, *e.g.,* a contract between solicitor and his client.

'COERCION' AND 'UNDUE INFLUENCE' DISTINGUISHED— Coercion and undue influence are clearly distinguishable from each other. *In* the first case, the consent is obtained by the *threat* of an offence and the person is *forced* to give his consent. In the second case, the consent is obtained by *dominating the will of the giver.*

Undue influence differs from coercion in that *coercion* is mainly of a *physical* character, while undue *influence* is of a *moral* character. But with both alike, the freedom of will is impaired. While coercion is of an avowedly *violent* character, undue influence is more *subtle* and *intangible,* but nonetheless equally *effective.*

The party who alleges coercion is bound to prove it in a court of law. However, in some cases (discussed above), undue influence can be presumed by the court and it is for the other side to prove that there was no undue influence.

Both in the case of coercion and undue influence, the agreement is *voidable* at the option of the party whose consent was so caused.

In both cases, the party avoiding it is bound to restore to the other party, any benefit which he may have received under the contract. However, in the case of undue influence, the Court in its discretion, may set aside the agreement, upon such terms and conditions, as may seem just.

Effect of undue influence (S. 19A)

Assuming that a party *has* entered into a contract under the effect of undue influence, what are his rights? These are discussed in S. 19A.

When consent to an agreement is caused by undue influence, *the agreement is a contract voidable at the option of the party* whose consent was so caused. Any such contract may be set aside, either *absolutely,* or if the party who was entitled to avoid it has received any benefit thereunder, upon *such terms* and *conditions* as the Court may deem just: S. 19A.

Illustrations— (1) A's son forged *B's* name to a promissory note. *B,* under

threat of prosecuting A's son, obtains a bond from *A* for the amount of the forged note. If *B* sues on this bond, the Court may *set the bond aside.*

(2) *A,* a money-lender, advances Rs.100 to *B,* an agriculturist, and by undue influence, induces him to execute a bond for Rs 200 with interest at 6 per cent *per month.* The Court may set the bond aside, ordering *A* to repay Rs100, with such interest as may seem just.

(iii)FRAUD (Ss. 17 and 19)

The *third* factor due to which consent will not be free is *fraud.* S. 17 defines 'fraud' thus:

Fraud *means and includes* any of the following *five* acts, committed by a party to the contract (or with his *connivance, or* by his *agent),* with intent to deceive another party thereto (or his agent) or to induce him to *enter into the contract :*

(i) the suggestion as to a *fact,* of that which is *not true* or which he does not believe to be true *(suggestio falsi);*

(ii) the *active* concealment of a fact by one having knowledge or belief of the fact *(suppresio veri);*

(iii) a *promise* made *without* any *intention* of *performing* it;

(iv) any other *act fitted to deceive;*

(v) any such act or omission as the law *specially declares* to be *fraudulent.*

FRAUD.— From the definition which enumerates various acts which constitute fraud, it will be seen that no endeavour is made in the Act to lay down any precise definition of 'fraud' or to state in a general proposition as to what shall be held to constitute fraud. Any *write a short note on:* act fitted to deceive would be covered by the definition if the other FrflU<MU Nov 2011 elements which are essential to constitute fraud are present. "The fertility of man's invention in devising new schemes of fraud is so great that it would be difficult, if not impossible, to confine fraud within the limits of any exhaustive definition."

Having dealt with the constitutive elements of fraud in a general way, it remains to be observed that the definition is obviously intended to cover all surprise, trick, cunning, and other unfair ways whereby a person is deceived. Usually there is either *suggestio falsi,* a false representation, or *suppressio veri,* an intentional suppression of truth, or both.

Thus, *A,* a horse-dealer, sold a mare to *B. A* knew that the mare had a cracked hoof, which he filled up in such a way as to defy detection. The defect could *not* be detected during the inspection of the horse before the sale, but was subsequently discovered by *B.* It was *held* that the agreement could be avoided by *B,* as his consent was obtained by fraud.

The directors of a company issued a Prospectus, inviting subscriptions for debentures, and stated that the objects of the issue were to complete alterations in the buildings of the company and to purchase horses and vans. The *real object* was to enable the directors to pay off pressing liabilities. The statement as to the object for which the money was wanted was *held* to be fraudulent.

ESSENTIALS OF "FRAUD".-The following are the *four* essential elements of

fraud as defined in the Indian Contract Act:

1. The act must have been committed— (i) by a *party* to the contract, or (ii) with his *connivance, or* (iii) by his *agent.*

2. The act must be— (i) a suggestion by one as to a *fact* of that which is *not true* or which he does not believe it to be true; *or* (ii) an active concealment of a fact by one having knowledge or belief of the fact; *or* (iii) a promise made *without* any *intention of performing it; or* (iv) any other act fitted to deceive; or (v) any such act or omission as the law *specially* declares to be fraudulent.

3. The act (i) must have been committed with an *intent* to *deceive, and (ii) must have actually deceived.*

Intent to deceive— It is only when consent to an agreement is caused by fraud or misrepresentation that a person can be said to have a grievance that his consent was *not* free. A party who, at the time of the agreement, *knows* that the other is making a false representation or is trying to overreach him, and yet enters into the agreement, can have no grievance. It is to be remembered that *deceit which does not deceive is not fraud,* for however false and dishonest the artifices or contrivances may be, by which one man may induce another to contract, they do *not* constitute a fraud if that other knows the truth and sees through the artifices or devices. *Haud enim decipitur qui scit se decipt.*

Thus, for instance, if *A,* who wants to sell his factory to *B,* fraudulently tells *B* that *C* had offered A Rs. fifty lakhs for the factory, and *B* knows that *C* had offered only Rs. forty lakhs, and still buys the factory for Rs. fifty lakhs, it will *not* be open to *B* to avoid transaction on the ground of A's fraud. This is further made clear by the *Explanation* to S. 19, which lays down that a fraud or misrepresentation which did *not* cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does *not* render a contract voidable.

4. Lastly, the deceit must have been aimed at—(i) the party to the contract, or (ii) his *agent, or* (iii) with a view to induce the other party to enter into the contract.

Silence when amounts to fraud (S. 17, Expln.)

Mere silence, without any duty to speak, *does not,* by itself, amount to fraud.

Turner v. *Green,* (1890-2 Lh. 205).— Negotiations for settlement of a suit were going on between *X* and *Y.* Before the final agreement was arrived at, the solicitor of *X* learnt that the suit was decided against *X; Y* was unaware of this, and neither *X* nor his solicitor communicated it to him. In ignorance of this background, /agreed to the settlement.

The Court *held* that mere silence as regards a material fact, which the other party is *not* bound to disclose to the other, is *not* a ground for rescission, or a defence to specific performance.

The Explanation to S. 17 enacts that *mere silence* as to facts likely to affect the *willingness* of a person to enter into a contract is *not* fraud, *unless*—

(i) the circumstances of the case are *such* that, regard being had to them, it is the *duty* of the person keeping silence *to speak, or*

(ii) silence is, in itself, *equivalent to speech.*

Illustrations to S.17— (1) *A* sells, by auction, to 6 a horse which *A* knows to

be unsound. *A* says nothing to *B* about the horse's unsoundness. This is *not fraud* in *A.*

(2) In the above *Illustration, B* is A's daughter and had just come of age. Here, the relation between the parties would make it A's *duty* to tell if the horse is unsound.

(3) *B* says to A — "If you do not deny it, I shall assume that the horse is sound." *A* says nothing. Here, A's silence is *equivalent to speech.*

(4) *A* and *B,* being traders, enter upon a contract. *A* has private information of a change in prices which would affect *B's* willingness to proceed with the contract. *A* is *not bound to inform B.*

It, therefore, follows *that in cases where there is a duty to speak,* non-disclosure amounts to a breach of duty, and if made *with an intent to deceive, it is fraudulent* under Sec. 17 (Explanation), but if it is made without *such intention, it* would be *misrepresentation* under S. 18.

Effect of silence amounting to fraud (S. 19 *Expln.)*

The *Exception to S. 19* deals with the effect of such silence. It lays down that if such consent was caused by misrepresentation, or by silence fraudulent within the meaning of section 17, the contract, nevertheless, is *not voidable* if the party whose, consent was so caused had the *means of discovering the truth with ordinary diligence.*

Thus, A, by a misrepresentation, makes *B* erroneously to believe that 500 maunds of indigo are made annually at *A's* factory. *B* examines the accounts of the factory, which show that only 400 maunds of indigo have been made. After this *B* buys the factory.The contract is *not voidable* on account of A's misrepresentation.

Effect of fraud (S. 19)

Under S. 19, when consent to an agreement is caused by fraud, the *agreement is a contract* which is *voidable at the option of the party whose consent was so caused.*

Right of a party to a contract whose consent was caused by fraud (S.19)

S. 19 also provides that a party whose consent is caused by fraud may *insist* that the contract shall be *performed,* and that he shall be put in the position in which he *would* have been *if the representation made had been true.*

Illustrations to S. 17.

(a) *A,* intending to deceive *B,* falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces *B* to buy the factory. The contract is *voidable* at the option of *B.*

(b) *A,* by a misrepresentation, leads *B* erroneously to believe that five hundred maunds of indigo are made annually at *A's* factory. *B* examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this, *B* buys the factory. The contract is *not voidable* on account of A's misrepresentation.

(c) A fraudulently informs *B* that A's estate is free from encumbrance. 6 thereupon buys the estate. The estate is subject to mortgage. *B* may *either* avoid the contract *or* may insist on its being carried out and the mortgage debt redeemed.

(d) *B* having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from *A.*Through *A's* ignorance, *B* is enabled to buy the estate at an undervalue. The contract is *voidable* at the option of *A.*

(e) *A* is entitled to succeed to an estate at the death of *B. B* dies. *C,* having received intelligence of S's death, prevents the intelligence reaching *A,* and thus induces *A* to sell him his interest in the estate. The sale is *voidable* at the option of *A.*

(iv) MISREPRESENTATION (S. 18)

The *fourth* factor which will prevent consent from being free is *misrepresentation.* Consent given under misrepresentation of facts *cannot* amount to free consent. S. 18 defines misrepresentation as follows:

"Misrepresentation" *means* and *includes*—

(a) The *positive assertion,* in a manner *not warranted* by the information of the person making it, of that which is *not true, though he believes it to be true.*

Thus, *A* learns from *X* that *B* would be a director of a company which is about to be formed. *A* says to *M: 'B* is going to be a director of the Co.', in order to induce him to purchase shares. *M* does so. This is misrepresentation by *A,* though he believed in the truth of the statement and there was no intent to deceive, as the information was derived *not* from *B,* but from *X,* and was mere hearsay. Belief under S. 18(1) must *not only* be reasonable, *but also* must be derived from the *best possible information. (Mohanlal* v. *Shri Gangaji Cotton Mills Co.,* 4 C.W.N. 369)

A wants to buy *B's* mare. *B* writes : "I think your queries would be satisfactorily answered by a friend if you have one in the station, and I shall feel more satisfied. All I can say is the mare is thoroughly sound". This letter is a "positive assertion" of soundness, coupled with a recommendation to *B* to satisfy himself before purchasing. *(Currie* v. *Rennick,* 1886 Pun. Rec. No. 41)

(b) Any *breach of duty* which, without an intent to deceive, gains an advantage to the person committing it (or any one claiming under him), by misleading another to his prejudice or to the prejudice of any one claiming under him.

(c) Causing, *however innocently,* a party to an agreement to make a *mistake* as to *substance* of the thing which is the subject of the agreement.

Thus, on A's representing innocently, that there is motorable road between *X* and *Y, B,* having business at *Y,* agrees to deliver a boiler to *A* at *X.* In fact, there is a suspension bridge between the two places, which cannot bear the weight of the boiler, though *A* did *not* know of this fact. The agreement is *voidable* at the instance of *B,* as *A's* statement amounts to misrepresentation under clause (c): *Johnson* v. *Crew,* (1874) 5 N. W. P. 350.

In *The Oceanic Steam Navigation Co.* v. *Sunderdas Dhurumsey,* (1890) 14 Born. 241, the defendants in Bombay chartered a ship wholly unknown to them from the plaintiffs, which was described in the charter party and was represented to them as being *not more* than 2,800 tonnage register. It turned out that the registered tonnage was 3,045 tonnes. The defendants refused to accept the ship in fulfilment of the charter party, and it was *held* that they were entitled to do so, by reason of the erroneous statement as to tonnage.

PROBLEM— A horse belonging to *A* was to be sold by auction. *B* visited *A's* stable to examine the horse and while *B* was examining, *A* said, "You have nothing to look, for I assure you he is sound". Thereupon, *B* desisted from further examination. The next day, *B* relying upon A's assertion, purchased the horse at the auction, where nothing was said about the soundness of the horse. The horse proved to be unsound. What is *B's* remedy? It will be seen that *this is a case of misrepresentation,* and *B* can avoid the sale.

CONTRACTS UBERRIMAE FIDEI— To avoid a contract on the ground of misrepresentation or fraud, some sort of representation is necessary; but there are cases where a contract is vitiated because of the *non-disclosure of material facts.* Such contracts are called contracts *uberrimae fidei,* or *contracts of utmost good faith.* Here, one of the parties to the contract is on vantage ground. He knows more about the subject-matter of the contract than the other party, and consequently, he is under a *legal obligation to disclose* all the facts which are likely to influence the mind of an average reasonable man who is about to enter into a contract.

A contract is said to be *uberrimae fidei* where it is the duty of one of the parties to disclose *all* the facts within his knowledge to the other, and silence is deemed to be equivalent to *speech.* In such contracts, one of the parties is presumed to have *means or* knowledge *not accessible to the other.* The distinguishing features of such contracts are that they are entered into between persons *in a particular relationship* and require *full disclosure* and *utmost good faith, e.g.,* a contract between a father and a son who has just come of age. These are also exceptions to the rule *caveat emptor* (let the buyer beware).

The following are a few instances of contracts *uberrimae fidei:*

1. *Contracts of insurance.*— In such contracts, the insured knows more about the subject-matter of the contract than the insurer; so that it is the duty of the former to disclose all material facts which might influence the insurer to enter into the contract, or in fixing the amount of premium. Any omission in this respect, *even if not fraudulent,* will vitiate the policy.

2. *Contracts for the purchase of shares in companies.*— When a Prospectus is issued by a company inviting members of the public to take shares, it must disclose *everything* which may influence an intending investor regarding the nature and advantage of such investments. Omission of any material fact would vitiate the contract.

The prospectus should *not* contain any misdescription. It must *not* endeavour to mislead the reader, by any half-statement of the truth, *or* unfair reservation, *or* ambiguous phraseology.

3. *Contracts relating to family settlements.*— In all family settlements, a duty to disclose is imposed upon all parties who know or come to know of any fact which might have any effect on the judgment of the others in entering into a compromise. A family arrangement is *not binding* if either party has been misled by the concealment of material facts.

4. *Contracts in which a fiduciary relationship exists between the parties.*— In certain cases in which a fiduciary relationship exists between the parties to a contract, that relationship requires that the fullest disclosure should be made

between the parties. Thus, in case of contracts between partners, creditors and sureties, agent and principal, solicitor and client, a guardian and his ward, trustee and beneficiary, and various other cases which are too numerous to enumerate, the most frank disclosure is called for from the partners, the creditor, the agent, the solicitor, the guardian, the trustee or any other person in a fiduciary position.

5. *Contract of suretyship.*— Sec. 143 of the Contract Act lays down that any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid. A creditor must disclose *all* material circumstances to the surety.

MISREPRESENTATION OF LAW.— Misrepresentation of a *general* rule of law gives no right to avoid a contract, as everyone is supposed to know the law, and ignorance of the law is no excuse. However, misrepresentation of *particular rights,* such as the effect of a document, is a misrepresentation of *fact.* Similarly, misrepresentation of law, if *fraudulent, is actionable.*

MISREPRESENTATION AND FRAUD DISTINGUISHED— The Contract Act itself does *not* throw much light on the relation between fraud and misrepresentation; and as observed by Pollock and Mulla, *adjudged or refused?* it may even be said to obscure it. The relationship between fraud and misrepresentation has been analysed by the above-mentioned writers thus— "Fraud, as a cause of rescission of contracts, is generally reducible to fraudulent misrepresentation. Accordingly, we may say that *misrepresentation is either fraudulent or not fraudulent.If fraudulent,* it is always a cause for rescinding a contract induced by it; *if not,* it is a cause *of* rescission only under certain conditions, which the definitions of S. 18 are intended to express".

Innocent misrepresentation (called simply 'misrepresentation' in the Contract Act) differs from *fraudulent* or *willful* misrepresentation (referred to as "fraud" in the Contract Act).

The following are the points of difference between fraud and misrepresentation:

1. *First,* both in fraud and misrepresentation, there is a statement which is *false,* but the distinction between them mainly turns on the *intention* of the party. A false statement *without any intention to deceive* would be a *misrepresentation,* but a false statement *deliberately or recklessly made to deceive another is a case of fraud.*

In other words, fraud implies that there must be an *intention* either to *deceive* or to *induce* the other party to *enter into a contract,* whereas misrepresentation may be innocent, *i.e.,* there may *not* be deceit or any *intention* to gain an advantage. Thus, under the heading of fraud, will be found grouped cases where *dishonest intention* is traceable; under the heading of misrepresentation are to be found cases which *do not involve dishonest* intention, that is to say, the element of *moral obloquy* is absent.

2. *Secondly,* misrepresentation is only a *vitiating element* in a contract. It merely makes the contract *voidable* at the option of the party injured; but, fraud, besides being a vitiating element in a contract, gives rise to an *independent action* of tort. In other words,fraud, besides avoiding the contract, gives rise to a cause of action *ex delicto* (to claim damages), while misrepresentation only

vitiates the contract.

Both misrepresentation and fraud make a contract *voidable* at the option of the party whose consent has been caused by such misrepresentation or fraud. In the case of fraud, however, the party defrauded gets the *additional* remedy of suing in tort for *damages* for loss caused by such fraud; in case of innocent misrepresentation, the *only* remedies are rescission and *restitution.*

3. *Lastly,* in case of misrepresentation, the fact that the plaintiff had the *means of discovering the truth* is a good plea; whereas, in a case of fraud, *as a general rule,* it does *not* lie in the mouth of the person making a false or reckless statement to say that the plaintiff had the means of discovering the truth with ordinary diligence. In other words, in the case of fraud, the defendant *cannot* set up the defence that the plaintiff had the *means of discovering the truth* or could have done so with ordinary diligence; in the case of misrepresentation, it would be a *good* defence.

Right of a party to a contract whose consent was caused by misrepresentation (S. 19)

Under S. 19, a party whose consent is caused by fraud or misrepresentation may *insist* that the contract shall be *performed,* and that he shall be put in the position in which he *would* have been *if the representation made had been true* : S. 19.

S. 19 also lays down that, if such consent was caused by misrepresentation *or* by silence fraudulent within the meaning of section 17, the contract nevertheless, is *not voidable,* if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

However, a fraud or misrepresentation which did *not* cause the consent to a contract of the party on whom such fraud was practised, *or* to whom such misrepresentation was made, does *not* render a contract voidable.

Voidability of agreements without free consent (Ss. 19-19A)

Now, suppose a person *has* already entered into a contract through fraud, coercion, misrepresentation or undue influence of the other party; what is the *effect* of *such a* contract? The answer is to be found in Sections 19 and 19A of the Act, which provide as under :

When consent to an agreement is caused by—

(i) coercion, (ii) fraud, (iii) misrepresentation, or (iv) undue influence, the agreement is a contract *voidable* at the option of the party *whose consent was so obtained: Ss. 19 and 19A.*

A party whose consent was so obtained may opt that the *agreement should not be enforced against* him, that is to say, he may *rescind* the agreement. He may also, if he likes, disregard the vitiating factor and *insist on the agreement being carried out.* And if the case is one of fraud or misrepresentation, he may, if he thinks fit, insist that the contract be performed *and* that he be put in the position in which he would have been *if* the representation made had been true.

Thus, for instance, if *A* fraudulently informs *B* that *A's* house is free from any encumbrance and induces *B* to buy it, and it turns out that the house is subject to a mortgage, *B* may either *avoid* the contract *or* may *insist* on its being *carried out*

and the mortgage- debt redeemed. And, as stated above, in case of fraud, he can also sue in tort for damages.

Moreover, deceit which *does not deceive does not make a contract voidable.* It is, therefore, laid down that a *fraud or* misrepresentation which did *not* cause the consent of the party on whom such fraud was practised, or to whom such misrepresentation was made, does *not* render a contract voidable.

Illustration— A, by a misrepresentation, leads *B* erroneously to believe that 500 maunds of indigo are made annually at *A's* factory.

B examines the accounts of the factory, which shows that only 400 maunds of indigo have been made. After this *B* buys the factory.The contract is *not voidable* on account of *A's* misrepresentation.

The principle underlying this rule is obvious. If a false representation has *not* induced the party to whom it is made to act upon it (by entering into the contract), such misrepresentation (whether fraudulent or *not)* becomes irrelevant. Such a person *cannot* complain of being *misled* by a statement which did *not lead* him at all.

A, who wants to sell a unsound horse, forges a veterinary doctor's certificate stating the horse to be sound, and pins it on the stable door.*B* comes to inspect the horse, but does *not* notice the certificate. *B* agrees to buy the horse after the inspection. After buying the horse, *B* discovers that the horse is unsound, and wishes to avoid the contract on the ground of the forged certificate, about which he learns later. He *cannot* do so, as deceit which does *not* deceive is *not* fraud, and therefore, *not* a ground for avoiding the contract.

In one English case, *T* bought a cannon manufactured by *H.* The cannon had a defect, which made it worthless, and *H* had put a plug to conceal this defect. However, *T* agreed to buy the cannon without inspecting it. When the cannon burst on firing, and *T* sought to rescind the contract on the ground of fraud, it was *held* that he could *not* successfully plead fraud, because if he had *not* examined the cannon at all, he was *not* in fact deceived by the plugging of the defect. *(Horsfall* v. *Thomas,* (1862) 1 H.&C. 90)

(v) MISTAKE (SS. 20, 21 AND 22)

Mistake of fact (Ss. 20 & 22)

Mistake is of *two kinds—of fact or of law.* As to mistake of *fact, two principles* are stated in Ss. 20 and 22. The *first principle* is:

1. Where *both* the parties to an agreement are under a mistake as to a matter of *fact essential to the agreement,* the agreement is *void.*

However, an *erroneous opinion* as to the *value* of the thing which forms the subject-matter of the agreement is *not* to be deemed a mistake as to a matter of fact.

Illustration— (a) *A* agrees to sell to 6 a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. *Neither* party was aware of the facts. The agreement is *void.* nr

(b) *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of bargain, though *neither* party was aware of the fact. The agreement is *void.*

(c) *A* being entitled to an estate for the life of *B,* agrees to sell it to *C. B* was dead at the time of the agreement, *but both* parties were ignorant of the fact. The agreement is *void :* S. 20.

PROBLEM— A agreed to purchase a house from *B* for Rs.1,000. He discovered that his opinion as to the value of the house was erroneous. Is the agreement void? Give reasons.

Ans— No, because S. 20 expressly provides that an erroneous opinion as to the value of the subject-matter of the agreement is *not* a mistake of fact which will render an agreement void.

A mistake of *fact* may be either (i) bilateral, *or* (ii) unilateral. It is only a mutual (*i.e.* bilateral) *mistake* as to an *existing* fact *essential* to the agreement renders the agreement *void.*

Ordinarily, mistakes arise either as to *identity of a person* or as to the *subject-matter of a contract.*

MISTAKE AS TO IDENTITY OF PERSON— The best illustration of the case of a mistake as to the identity of a person is afforded by the well-known case of *Cundy* v. *Lindsay* (which has already been referred to earlier). A reference may also be made to *Lewis* v. *Averay,* also discussed earlier.

MISTAKE AS TO THE SUBJECT-MATTER OF THE CONTRACT.— If two persons contract for the sale of an article, each having in mind a *different* article, but believing themselves to be in agreement, there is no contract, as the mistake avoids the contract. In the leading case of *Raffles* v. *Wichelhaus* (1864-2 H & C 906), *A* agreed with *B* for the purchase of 125 bales of Surat Cotton "to arrive *ex Peerless* from Bombay." There were, in fact two ships named *Peerless* sailing from Bombay, and *A* had in mind *one* of these ships, while B had the *other* in mind. It was *held* that the mistake as to the identity of the *subject-matter* rendered the agreement *void.*

In *Couturier v. Hastie* (1856-9 Ex 102), *A* contracted to sell to *B,* a cargo of corn which it was supposed by *both* parties, was on a voyage to England. In fact, at the time when the parties entered into the contract, the corn, having become heated, had already been sold at intermediate port. It was *held* that as there was a *mutual* mistake as to the existence of the subject-matter, the contract was void.

At an auction sale, *A* purchased a property in Calcutta and paid earnest money. It then transpired that nearly half the property was to be acquired by the Improvement Trust, which fact was unknown to *both* the parties at the time of the purchase. It was *held* that there was a mistake as to matter of fact essential to the agreement and that *A* could avoid the contract and recover the deposit : *Nursing Class* v. *Chutto,* (1923) 59 Cal. 615.

A agrees to sell to *B* a particular picture by Rembrandt in his gallery for a certain price. Unknown to *both* the parties, a thief had stolen the genuine Rembrandt and substituted a fake one in its place. After taking delivery of the picture and paying the price, *B* discovers that it is *not* the genuine Rembrandt which he had agreed to buy. *B* offers to return the picture and claims refund of the price. In this case, *both A* and *B* are under a mistake as to the genuineness of the picture, a matter of fact essential to the agreement. Therefore, the agreement is *void.*

2. The *second principle* as to mistake of fact is declared in S. 22, which lays down that a contract is *not voidable* merely because it was caused by *one* of the parties to it being under a mistake as to a matter of *fact.*

As seen above, mistake must be *mutual,* and *not unilateral. Both* the parties must be labouring under such a mistake. Then *alone will* the agreement become void. The following case is the best illustration of this principle.

Haji Abdul Rahman Alarakha v.*The Bombay and Persia Steam Navigation Co.,*(1892) 15 Bom. 561— The plaintiffs chartered a steamer from the defendants to sail from Jedda on "the 10th August, 1892 (fifteen days after the Haj)" in order to convey pilgrims returning to Bombay. The plaintiffs believed that "the 10th August, 1892" corresponded with the fifteenth day after the *Haj,* but the defendants had no belief on the subject, and contracted only with respect to the English date. It turned out that the 19th July, 1892, and *not* the 10th August, 1892, corresponded with the fifteenth day after the *Haj.* On finding out the mistake, the plaintiffs sued the defendants for rectification of the charterparty. It was *held* that *the mistake was* 11 *not mutual,* but on the plaintiffs' part only, and therefore, there could be no rectification. The Court, therefore, decided that there was a *valid contract* between the plaintiffs and the defendants.

Mistake of law (S. 21)

As to mistake of *law,* S. 21 provides that a contract is *not voidable* because it was caused by a mistake as to any law in force in *India;* but, a mistake as to a law *not* in force in India (i.e. a foreign law) has the same effect as a mistake of fact.

Illustration— *A* and *B* make a contract grounded on the | erroneous belief that a particular debt is barred by the Indian Law of Limitation. The contract is *not voidable.*

Ram Ruton v. *Municipal Committee,* A.I.R. (1939) Lah. 511— In one case, a decree-holder agreed to give up costs of the suit, if the judgment-debtor would *not* file an appeal from the decision. It was subsequently found that the judgment-debtor had no right to appeal. It was *held* that the agreement was *void* if the judgment-debtor honestly believed that she had a right of appeal, *or voidable* under S. 19, if the judgment-debtor made a dishonest misrepresentation.

A owed *B* Rs.10,000. *B* was under the impression that the debt was barred by the Law of Limitation. *B,* however, pressed *A* to pay the amount of the debt. *A* was aware that the debt was *not* barred by the Law of Limitation. *A* offered to pay Rs.3,000 in full settlement of *B's* claim. *B* accepted the offer. Thereafter, *B* found that the debt \ was *not* barred by the Law of Limitation. *B* desired to avoid the contract whereby, he agreed to receive Rs.3,000. Here, the contract between *A* and *B* is grounded on the erroneous belief that A's debt is barred by the Law of Limitation. This is a mistake as to a *law in force in India, and B cannot avoid* the contract.

WHEN MISTAKE OF LAW WILL VITIATE A CONTRACT— What is the effect of Although a mistake of *fact* vitiates a contract, a mistake of *law* does *mistake of law under not.* This is based on the maxim that ignorance of law is no excuse. I*gnorantia juris non excusat.* But it must *not* be supposed that relief can *never* be given in respect of mistake of law. *In the following three cases, a mistake of law*

would vitiate the contract:

1. Private rights of property, though they are the result of the rules of law or depend upon rules of law applied to the construction of legal instruments, are generally to be considered as matters of *fact.*

2. If a contract is brought *about* by a *wilful misrepresentation of law,* it can be set aside.

3. Mistake as to any *foreign* law is a mistake of *fact* and as such, it *vitiates* a contract. ,

PROBLEM— A and *B,* believing themselves married, made a separation agreement in which *A* agreed to pay *B* Rs. 100 per month.They were *not,* in fact, validly married. *A* having fallen into arrears, *B* sued *A* to recover the amount. Will *B* succeed in the suit?

Ans— It will be seen that, in this case, the *basis* of the deed of separation was the belief of *both the parties* that they were respectively husband and wife. As this was *not* in fact the case, there was a *mutual mistake of fact essential to the agreement,* and the agreement is, therefore, *void. B,* will, therefore, *not* succeed in the suit. (*Galloway* v. *Galloway,* 1914 30 Times Law Reports, 531, followed in *Law* v. *Harragin,* 1917 33 Times Law Reports, 381)

In a *leading English case* on the point, *Bell* v. *Lever Bros. Ltd.,*(1932 A.G. 161), a Company paid a large amount of compensation to two of its Directors and terminated their contracts. Later, the Company realised that it could have terminated the contracts of these Directors for breach of duty, even without paying them any compensation. The Company sued to recover the money paid and argued, *inter alia,* that the agreement was void for common mistake. When the matter went in appeal to the *House of Lords,* it was *held* (though by a bare majority) that the mistake was *not mutual,* and also that the mistake was *not* so fundamental as to invalidate the agreement. There was therefore, a *valid and binding contract.*

MISTAKE OF 'FACT' AND OF 'LAW' DISTINGUISHED— 1. A mistake of *fact will vitiate* a contract; a mistake of *law* does *not, unless* it is one of the three kinds mentioned above.

2. Secondly, where there is mutual mistake as to an existing fact material to the agreement, the contract is *void:* Ss. 20 and 22. Where there is a mistake of *law, the* contract is *not voidable,* unless the mistake of law falls within one of the three exceptions discussed above: S. 21. '

Remedies for mistake (Ss. 65 and 72)

S. 65 lays down that where the contract is void on account of *mistake,* any person who has received any *advantage* under it, is *bound* to *restore* it or make compensation for it to the person from whom he received it.

to 'Thus, *A* pays *B* Rs.1,000 in consideration of *B's* promising to marry *C, A's* daughter. *C* is *dead* at the time of the promise. The agreement is *void,* but *B must repay A,* Rs.1,000.

The *second* remedy is provided for in S. 72, which lays down that a person to whom money has been paid, or anything delivered by *mistake, must repay or return it.*

End of chapter 6

7 Chapter

LAWFUL CONSIDERATION AND OBJECT (Ss. 23, 24, 57 and 58)

When is consideration of an agreement said to be lawful? (2marks) M.U. Apr.2013

Write a short note on: Immorality of an object? M.U. May 2018

Write a short note on: Agreements against public policy. (2marks) B.U. Apr.2014

Give two examples of agreements which are opposed to public policy (2 marks)B.U.Nov. 2015

The next ingredient of a valid contract is that its *consideration* and *object* must *be lawful.*

Illustrations— (a) *A* agrees to sell his house to 0 for Rs.10,000.

Here, *B's* promise to pay the sum of Rs.10,000 is the *consideration* for *A's* promise to sell the house, and *A's* promise to sell the house is the *consideration* for *B's* promise to pay Rs.10,000.

(b) *A* promises to pay *B* Rs.1,000 at the end of six months, if *C* who owes that sum to *B* fails to pay it. *B* promises to grant time to C accordingly. Here, the promise of each party is the *consideration* for the promise of the other party, and they are lawful considerations.

(c) *A* promises, for a certain sum paid to him by *B,* to make good to *B* the value of his ship, if it is wrecked on a certain voyage.

Here, *A's* promise is the *consideration* for 0's payment, and 0's payment is the consideration for *A's* promise, and these are lawful considerations.

(d) *A* promises to maintain *B's* child, and 0 promises to pay *A* Rs.1,000 yearly for the purpose. Here, the promise of each party is the *consideration* for the promise of the other party. They are lawful considerations.

Under S. 23, the *consideration* or *object* of an agreement is lawful, *unless*— -

(i) it is *forbidden by* law; *or*

(ii) is of such a nature that, if permitted, it would *defeat the provisions of any law; or*

(iii) is *fraudulent; or*

(iv) *involves or implies injury* to the person or property of another; or

(v) the Court regards it as *immoral or opposed to public policy.*

In each of these cases, the consideration or object of an agreement is said to be *unlawful.* Every agreement of which the object or consideration is unlawful is *void.*

'*CONSIDERATION' AND 'OBJECT' DISTINGUISHED*— The *consideration* for a contract is quite distinct from its *object. Consideration* is the *act, abstinence or the promise* made at the desire of the promisor, whereas the *object* is the

purpose for which the agreement is entered into. For example, there may be a contract of sale of arms for the purpose of waging war against the State. In this case, the *consideration* may consist of a set of promises. But the *object of* the contract is to wage war. An agreement is void if *either* the object *or* the consideration is *not lawful.*

Thus, the *consideration* or *object* of an agreement is lawful, *unless:*

(i) It is forbidden by law ,

ACTS FORBIDDEN BY LAW— No suit can be filed on a contract which is prohibited either by the *general law* or by *statute.* A contract may be illegal *either* by reason of the *promise* being one which is prohibited by law, *or* by reason of the promise being made for *consideration* which is prohibited by law.

A, B and *C* agree to rob and to divide equally any property which they may obtain by such robbery. In pursuance of the said agreement, *A, B* and C rob *D* of Rs. 1,000. The said sum of Rs.1,000 remains with *A,* who declines to give to *B and C* their agreed shares. Here, the agreement is *void,* as its *object* is *unlawful.* Therefore, *B* and *C cannot* recover their agreed share from *A.*

In India, the expression “act forbidden by law” would largely cover acts which are punishable under the Indian Penal Code or other Acts of the legislature. However, parties are *not,* as a rule, foolish enough to make a solemn *agreement* to do anything which is obviously illegal, or at any rate, to bring such a matter before the Court. Hence, the question that is faced by the Courts in most cases is whether an act agreed to between the parties does or *does not contravene* some legislative enactment or regulation made by a competent authority.

Cases in which penalty is imposed— A difficulty, however, arises when an act is not *expressly forbidden,* but a *penalty is imposed* for *doing such an act.* The law does *not* always *forbid* things in *express* terms, but imposes certain *conditions and penalties for a breach of those conditions.* Whether the imposition of a penalty in an Act amounts to *‘forbidding’* an act or *not* depends on the *object* of the Legislature in imposing that penalty *and on the nature* of the words used in the particular Act in question. A distinction has to be drawn between cases where—

(a) the prohibition is for protection of the public, that is, when it would be defeating *the policy of the law* if the Court were to *enforce an* agreement for doing an act so prohibited; *and*

(b) Where the prohibition is imposed for *administrative purposes only.*

Generally speaking, the act is deemed to be forbidden by law in the first case (clause (a) above), but *not* so in the case of clause (b) above.

Cases under Excise Laws- Many cases under this head have arisen in connection with Excise Acts. The underlying principle that emerges is that when conditions are prescribed by statute for the *conduct* of any particular business or profession, and such conditions are *not* observed, agreements made in the course of such business or profession *are void, if* it appears by context that the *object of the Legislature* imposing the condition is *the maintenance of public order or the protection* of the persons dealing with those on whom the condition is imposed. However, they are *valid* if no specific penalty is attached to the specific transaction, and if it appears that the condition is imposed for *merely*

administrative purposes, e.g. under the Ferries and Tolls Act. Thus, an agreement to transfer a toll lease, without the consent of the Collector, has been *held not* to be *void.*

Nazaralli v. *Baba Miya,* 40 Bom. 64.—The Forest Department grants a licence to *A* to cut grass. *A cannot,* under a term of the licence, sub-let; and a fine is provided for such sub-letting. *A* agrees to sub-let the contract to *B.* The *agreement* is *not void* and may be enforced. It is, of course, open to the authorities to revoke A's licence. (The *object* of the term in the licence is mere protection of revenue.)

But, take the case where *A* agreed to admit *B* as a partner in his business of a wine merchant, for which a licence had been granted under the Abkari Act to *A* alone. The agreement was *held* to be *void,* as the Act prohibited the licensee from admitting any partner in the business, and made such a violation punishable. *(Hormusji* v. *Pestonji,* 12 Born. 422)

Cases in which object of Legislature is protection of the public.— *Conditions* under the Abkari and Opium Acts are cases where the object of imposing conditions is *protection of the public,* and *not* merely *administrative* convenience. It has accordingly been *held* that the sub-letting of a licence to manufacture and sell country-liquor, without obtaining the Collector's permission, is to be deemed to be an act *forbidden by law,* and that a claim to recover money due to either party on *such* a sub-lease is *not* enforceable. Similarly, a transfer of a contract to convey postal mails without the permission of the Post Master General is also *void.*

(ii) It is of such nature that, if permitted, it would defeat the provisions of any law

Agreements which would *defeat* the provisions of any *statutory* law, or the rules of the *Hindu* or *Mohammedan* law, or which have the *tendency* to *affect* the *administration* of *justice* by contravening *other* rules of law, are *void.*

Illustration— A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. *B,* upon an understanding with *A,* becomes the purchaser, and agrees to convey the estate to *A* upon receiving from him the price which *B* has paid. The agreement is *void,* as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

Thus, where *A* was required under the Code of Criminal Procedure to furnish a *surety* for his good behaviour, and *B* agreed to become a surety, on condition that *A* would deposit with him the sum in which he was required to give bail, and the deposit was made, it was *held* (in a suit brought after the expiry of the period of suretyship) that *A* was *not entitled* to recover the deposit from *B,* as the effect of the agreement was to defeat the provisions of the Code, by rendering *B* a surety only in name: *Fateh* v. *Samval,* (1878) 1 All. 751.

Similarly, a surety who has given a *bail* for an accused person *cannot* recover from the accused, the bail-amount which has been forfeited in consequence of the accused failing to appear, when required by the Court which released him on bail.

So also, an agreement by a debtor *not to raise the plea of limitation is void,* as it would defeat the provisions of the Limitation Act; the same would be equally so in case of an agreement *extending* the statutory *period* of limitation *or altering the starting point of* limitation.

Under the Companies Act, a trading partnership of more than 20 persons is *illegal* unless registered as a company. It has been *held* that a suit will *not* lie for dissolution of such a partnership, as it would defeat the provisions of the Companies Act.

Srinivas v. *Raja,* 1951 M.W.N.653— The amount advanced under a promissory note for the purpose of celebrating a marriage contrary to the provisions of Child Marriage Restraint Act *is not recoverable.* As the purpose of borrowing is unlawful under S. 23, the promissory note is *not enforceable.*

Agreements defeating rules of Hindu or Mahommedan law— An agreement which would defeat any of the rules of *Hindu* or *Mahommedan law* would also be *void.* Thus, an agreement to give a son in adoption in consideration of the natural parents receiving an annual allowance during their lives is *void,* as this agreement, if it was capable of being carried out, and if it was recognised by the Courts, would involve an injury to the person and property of the adopted son, and would defeat the provisions of Hindu law.

Likewise, an agreement entered into before marriage between a Mahommedan wife and husband, by which it is provided that the wife would be at liberty to live with her parents *after* marriage, would be *void,* and would *not* afford an answer to a suit for restitution of conjugal rights.

Mohram Ali v. *Ayesha,* 31 I.C. 562.— *A,* a Muslim, while marrying *B,* agrees with her that should *A* marry again, *B* would have the right to divorce him. The agreement is *not per se void,* as Mahommedan law recognizes delegation by the husband of his right to divorce, to the wife, under the doctrine of *talaq-i-tafwiz.* Such an agreement is opposed *neither* to Mahommedan law, *nor* public policy or morals, although monogamy may be desirable.

(iii) It is fraudulent

When the parties to an agreement intend to commit fraud or to practise fraud upon some other person, the object of the agreement would be fraudulent.

Thus, *A* and *B* agree to distribute between themselves gains acquired or to be acquired by fraud. The *object* of the agreement is fraudulent, and hence, the agreement is *void.*

Similarly, if parties agree *not* to bid against each other *for the purpose of defrauding a third person,* such an agreement would be *void.*

In one Punjab case, when the object of an agreement between *A* and *B* was to obtain a certain contract from a Government Department (for the benefit of both), and such a contract could *not* be obtained without practising fraud on the Department, it was *held* that the agreement was *void,* as the *object* of the agreement was fraudulent.

(iv) It involves or implies injury to the person or property of another

Illustration— *A,* being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for *B,* a lease of land belonging to his principal. The agreement between *A* and *B* is *void,* as it implies a fraud by

concealment by *A* on his principal.

Another example of such an agreement would be an agreement for payment of the price of a libellous publication or an agreement to indemnify a person against the consequence of a wrongful act. A suit *cannot* lie to recover advances paid for printing libellous matter and the defendant *cannot* counter-claim for the printing already done.

An agreement between persons to purchase shares in a company, by fraud and deceit, in order to induce other persons to believe, contrary to the truth, that there is a *bona ride* market for the shares, is illegal, and no action can be brought to enforce such an agreement.

(v) The Court regards it as immoral, or opposed to public policy

Illustrations.— (1) A, *who is B's* mukhtar, promises to exercise his influence, as such with *B* in favour of *C,* and *C* promises to pay Rs. 1,000 to *A.* The agreement is *void,* because it is *immoral.*

(2) *A* agrees to let her daughter in hire to *A* for concubinage. The agreement is *void,* because it is *immoral* — though the letting may *not* be *punishable* under Indian Penal Code.

(3) *A* promises to obtain for *B* an employment in the public service and *B* promises to pay Rs 1,000 to *A.* The agreement is *void,* as the *consideration* is *unlawful.*

(4) *A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of things taken. The agreement is *void,* as its object is *unlawful.*

IMMORAL AGREEMENTS- Of all the kinds of agreements, those which are tainted with *immorality* present little difficulty. The immorality here alluded to is *sexual immorality.* It will readily be seen that agreements *contra bonos mores* (against good morals) *or* those involving *social immorality or prostitution* are frowned upon by law.

All agreements in violation of *morality* and founded upon consideration *contrary to public morals (contra bonos mores)* are *void.* An agreement which is made upon an *immoral condition, or* for an *immoral purpose,* is unenforceable. Hence, a landlord *cannot* recover the rent of his house *knowingly* let to a prostitute who carries on her vocation there. Similarly, money lent to a prostitute expressly to enable her to carry on trade *cannot* be recovered. On like grounds, ornaments lent by a brothel-keeper to a prostitute for attracting men and encouraging prostitution, *cannot* be recovered.

Past cohabitation— *A,* in consideration of past cohabitation, agrees to pay £ 100 to *B. In English law,* past consideration is no consideration and on that ground itself, the agreement will *not* be enforceable. *In India,* one view is that the promise would be binding under S. 25(2)—compensation for something voluntarily done in the past : *Mehtab* v. *Rifaqatullah,* 1925 All. 474.

But the other view, which is *the better view,* is that past consideration, which was illegal when it passed, *cannot* support a subsequent promis : *Husseinali* v.

Dinbai, 1924 Born. 35. But adulterous cohabitation, being an offence, *cannot* be lawful consideration : *Alice* v. *Tom Clarke.* 27 All. 256; *unless* it be with theR husband's consent or connivance : *Sita Devi* v. *Gopal,* 1928 Pat. 375.

On the same principle, money paid by a wife to third person to be given as a bribe to a jailor for procuring the release of her husband from the jail *cannot* be recovered on failure of the jailor to procure the release.

Similarly, where the plaintiff advanced money to the defendant, a married woman, to enable her to obtain a divorce from her husband, and the defendant agreed to marry him as soon as she could obtain a divorce, it was *held* that the plaintiff was *not* entitled to recover the amount, as the agreement had for its *object* the divorce of the defendant from her husband, and the promise of marriage given under such circumstances was *contra bonos mores.*

(Bai Vijli v. *Nansa Nagar,* 10 Born. 152)

PROBLEM— A borrowed Rs. 500 from *B,* in order to bribe a certain officer. After the bribing was done and completed, *A* obtained a loan from C expressly to pay off *B,* and executed a mortgage in favour of *C.* In a suit by C to enforce the mortgage, *A* contends that the mortgage is unlawful as the consideration for it is unlawful. Is A's contention valid?

Ans— No. The object of the mortgage was *not* to effect any illegal purpose. As such illegal purpose had already been effected, it *cannot* be said that the mortgage transaciton was against public policy. S. *23 is not concerned with the motive of the person.* It is confined to the *object* of the transaction, the *reasons* or *motive* which prompted it being *irrelevant. (Kashinath* v. *Bapurao,* 1940 A. N. 305)

Agreement to give evidenc.— An agreement to pay money on consideration that the plaintiff would give evidence in a civil suit on behalf of the defendant *cannot* be enforced. Such an agreement *may* be for giving *true* evidence, and then there is *no consideration,* for the performance of a *legal* duty is no consideration for a promise; *or* it may be for giving *favourable* evidence, either true or false, in which case, the *consideration is vicious.*

On the same principle, a promise given by a master of a ship to his sailors in the course of a voyage, to give them extra wages if they continued service till the voyage was over was *held* to be without consideration, for the promises merely undertook to fulfil conditions of an existing contract. *But* a promise to remunerate an executor for undertaking and performing the task of an executor does *not* fall under this class; nor is it unlawful.

AGREEMENTS AGAINST PUBLIC POLICY— The doctrine of 'public policy' covers a very *wide* ground. It includes *political, social or economic grounds of objection,* outside the common scope of morality. Public policy is, in its nature, so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce, and usages of trade, that it is difficult to determine its limits with any degree of exactness. This rule may, however, be safely laid down, that wherever any contract *contravenes any established interest of society,* it is *void* as being against public policy. At the same time, it may be noted that the enlargement of trade and the growth of cities, with the new and various relations created thereby, have rendered many species of contracts valid, which were

formerly considered to be against public policy.

Public policy, however, *cannot* be defined with any *degree of precision.* Any *agreement which tends to be injurious to the public or is against public good is void* as being contrary to public policy.

It may be observed that the doctrine of public policy *cannot* be considered as being always the same, and that many things would be, and have been, held contrary to public policy which are not so held *now.* The rule, no doubt, remains the same, but its *application varies* with the principles which for the time being guide *public opinion.*

TWELVE HEADS OF PUBLIC POLICY— Although *public policy* is an uncertain and fluctuating concept, sometimes compared to an "unruly horse", the Courts have now laid down that the following *twelve types of contracts* would be against public policy:

1. *Contracts amounting to trading with an enem.*— A contract with an enemy *(i.e.,* a person owing alliance to a Government at war with one's country), *except* with the permission of the Government, is against public policy. Not only is it unlawful to enter into a *contract* with an alien enemy, but it is also unlawful to *purchase goods* from an enemy country without licence from the Government.

Such contracts are illegal on the ground of public policy based upon two *reasons,* namely, that the further performance of the contract would involve commercial intercourse with the enemy, and that the continued existence of the contract would confer an immediate or future benefit upon the enemy : *In re Badishe Co. Ltd.,* (1921) 2 Ch. 331.

Janson v. *Driefontein Consolidated Mines,* (1920) A.C. 484.- *A,* of country *X,* orders goods from *B,* of country *Y.* The goods are shipped and are insured with *C and Co. X* declares war against *Y.* The contract between *A* and *B,* as also the contract of insurance ¦between *A* and *C,* become *void,* as it would amount to *trading with an tenemy. A cannot recover* from C should the goods be seized by the Govern-ment of X.

2. Contracts *for stifling prosecutions*— Contracts for stifling prosecutions (as for instance, when the relatives of a murdered person "settle" with the murderer, and agree *not* to prosecute the murderer), being against public policy, are *void.* Contracts for the compounding or suppression of criminal charges, or offences of a public nature (non-compoundable offences) are illegal and void. Agreements to stifle criminal prosecutions are bad, for it is *not* open to parties to make a *trade of felony,* or to take the administration of justice out of the hands of the *authorities* and *themselves* determine what should be done. This is a rule of law dictated by the soundest considerations of public policy and morality.

Effect of compromise of compoundable offences.— The criminal law of India, however, makes a distinction between various classes of offences, by dividing them into *three* groups: (i) compoundable offences; (ii) non-compoundable offences, and (iii) offences which can be compounded only with the permission of the court. If the offence is *compoundable* (under the Criminal Procedure Code),

and *can* be settled *in or out* of Court *without the leave of the Court,* a compromise in such a case is *not forbidden by law or against public policy,* the policy of the criminal law being to *allow* such a compromise. Thus, where *A* agreed to execute a document of certain lands in favour of *B,* in consideration of *B* abstaining from taking criminal proceedings against A with respect to an offence of *simple assault* (which is *compoundable),* it was *held* that the contract was *not against public policy* and could be enforced.

Thus, *A* agrees to pay *B* Rs. 100 in consideration of *B's* withdrawing a complaint pending against him on a charge of *adultery.* The promise is enforceable, as the *offence is compoundable* without reference to the Court, and the agreement in such cases does *not* amount to a stifling of prosecution. The same would be the result if the agreement related to withdrawal of prosecution of *abduction* where such abduction would be a compoundable offence, or in fact, *any* other compoundable offence : *Sannaullah* v. *Kalimullah,* 1932 Lah. 446. A promissory note executed in consideration of withdrawal of such a complaint is enforceable : *Ramjas* v. *Markande,* 1934 All. 1068.

Effect of compromise of non-compoundable offences.— Where the offence is *non-compoundable,* as where the charge is one of *criminal breach of trust* or murder, and the offence is compounded by the accused *or* if the offence is compoundable only with the leave of the Court, and it is compounded without obtaining the Court's leave, the agreement will be *void.*

Majibarv. Syed Muktashad, 43 Cal. 113.— *A,* in consideration of the compounding of an offence, which is non-compoundable or compoundable only with the permission of the Court, without reference to the Court, passes a bond in favour of *B. B cannot* recover on the bond.

The principle underlying this rule is that *"Felony cannot be made a source of gain";* in other words, it is in the interest of the public that prosecution of felons should *not* be abandoned. If the accused is *innocent,* the law is *abused* for the purpose of extortion; *if he is guilty,* the law is *eluded* by a corrupt compromise, screening a criminal for a bribe. The law does *not* help the plaintiff in such cases, as *inter partes, pari delicto potier est conditio defendantis* : when parties are equally guilty, the position of the defendant is stronger.

3. *Contracts in the nature of champerty and maintenance*.— Champerty and maintenance contracts are unlawful if they tend to *encourage litigation* which is *not bona ride* but *speculative.* These two terms refer to promotion of litigation in which one has *no bona ride interest.*

English Law.— Maintenance is the officious intermeddling in an action, by supporting it with money or otherwise, offered by a *third* person to either party to a suit, *in which he himself has no legal interest,* merely to enable such party to prosecute or defend it. Where a person agrees to *maintain a* suit *in which he has no interest* And does so out of sheer spite or malice, the proceeding is known as *maintenance;* where he *bargains for a share of the result* to be ultimately decreed in a suit, in consideration of *assisting* its maintenance, it is known as *champerty.* Both these agreements are declared *unlawful* under the English law.

As *Lord Abinger* observed, "the law of maintenance is confined on account of the *illegality* of their object, as they tend to encourage litigation which is *not bona*

ride but speculative, to cases where a man *improperly* and for the purpose of *stirring up litigation* and *strife,* encourages others to bring actions or to take defences which they have no right to make."

It may be noted that, in such cases, the person maintaining the suit *acts through ill-will and spite. Malice* is of the *essence* of the action. The law, it is said, *presumes or implies* malice in all cases of maintenance on proof of officious assistances. But this presumption may be rebutted by the defendant by showing :

(a) That he had a *common interest* in the action, which the party maintai-ned, *e.g.,* master for a servant or *vice versa,* brothers, kinsmen *etc., or*

(b) That he was impelled— (i) by motives of *charity, bona ride* believing that the person maintained was poor and was harassed by a rich person (though the charity may be *misguided* and the k action *groundless), or* (ii) by religious sympathy.

Indian Law.— The English law of maintenance and champerty is 1 *not* applicable in India. The Privy Council, in *Bhagwat Dayal Singh* v. P *Debi Dayal Sahu, held* that an agreement which is champertous according to English law is *not necessarily void in India; it must be against public policy to render it void here.* In India, a *fair* contract to share the result of the action successful, in consideration of providing the means of carrying it on, is *not void,* as it is *not* contrary to public Policy. But, *if* it is found to be *extortionate* and *unconscionable, or* if it is *made, not* with the *bona ride* object of assisting a claim, *but* for the purpose of *gambling in litigation or of injuring or oppressing others, by abetting* and *encouraging unrighteous* suits, it is *void.*

Thus, in India, agreements to share the subject-matter of litigation, if recovered, in consideration of supplying funds to carry it on, are *not,* in themselves, opposed to public policy, as for instance, if a master finances a just claim of his servant who cannot afford expensive litigation.. Agreements of this kind are carefully watched, and when found to be *extortionate* and *unconscionable,* so as to be inequitable against the party, *or* when found to be made, *not* with the *bona ride* object of *assisting a claim believed to* be *just* and of obtaining a *reasonable* recompense therefrom, *but* for *improper objects* as for the purpose of *gambling in litigation* or of *injuring or oppressing others* by abetting and encouraging *unrighteous* suits, so as to be *contrary* to the *public policy,* effect ought not to be given to them.

Thus, where it was found that the value of the part of the estate promised to be conveyed amounted to Rs. 64,000 in return for Rs. 12,000 which was to be spent by the person who financed the filing of an appeal in the Privy Council, it was *held* that, although the agreement was *bona ride,* it was *not enforceable because the reward was excessive and unconscionable.*

4. *Marriage brocage contracts.*— These are contracts for the payment of money in consideration of procuring a marriage. A marriage brocage contract is a contract for reward to procure for another, a husband or wife in marriage. Such contracts are against public policy, because parties ought to choose their life-partners for themselves and out of their own free will.

On a review of authorities, the following *two* rules have been deduced in *Bakshi Das* v. *Nadu Pas* on the subject of marriage brocage contracts:

(a) An agreement to remunerate or reward a *third* person in consideration of negotiating a marriage is contrary to public policy and *cannot* be enforced.

(b) An agreement to pay money to the parents or guardian of a bride or a bridegroom in consideration of their consenting to the betrothal is *not necessarily immoral* or opposed to public policy. Where, however, the parents of the bride are *not seeking* her welfare, but give her to a husband *otherwise ineligible,* in consideration of a benefit *secured to themselves,* the agreement by which such benefit is secured is opposed to public policy, and ought *not* to be enforced. *Baldeo Sahai* v. *Jumma Kunwar,* 23 All. 465.—*A,* for a reward promised by *B,* agrees to procure the marriage of *B* with *C.* This agreement, called a *marriage brocage contract,* is void *under English law,* under this head, as marriage should be by the free consent of parties. *In India,* however, marriages are often arranged by parents, relations and friends, and *such an agreement would not be necessarily void.* If a father agrees to give his daughter S in marriage to *Y, not* led by the benefit of the girl or her welfare, *but* by a gain to himself, the agreement would be void even in India.

5. *Contracts interfering with the course of justice.*— It hardly need be said that any agreement for the purpose of using improper influence of any kind with judges or officers of justice (as for instance, by bribing them), is *void.* But the following curious case may be noted:

Balasundara v. *Mahomed,* 53 Mad. 29.— *A* entered into an agreement with *B,* and engaged *B* for the purpose of performing *puja* and offering prayers to Goddess *Kali* for A's success in a suit, and promised to pay Rs. 5,000 in the event of success. The suit ended in a compromise, under which *A* obtained a substantial sum, much beyond his expectations. *B* sued *A* for the amount agreed upon. *A,* however, contended that the agreement was *void,* as it was one which interfered with the course of justice. The Court *held* that there was nothing wrong in *A* employing someone to pray on his behalf for reward. Thus, the agreement entered into between *A* and *B* was *not void* (as it did *not,* in *any* way, interfere with the course of justice), and *B* was entitled to succeed.

6. *Contracts tending to create interest against duty*— If a person enters into an agreement with a public servant which, to his knowledge, might cast upon the publip servant an obligation *inconsistent* with public duty, the agreement is *void.*

Atma Ram v. *Banku Mai,* 1930 Lah. 561.—For an agreed amount, *A* agrees to place his daughter at the disposal of *B,* to be married as *B* likes. The agreement is *void,* as it would interfere with *A's parental duty* (in India) to select a husband in the best interests of the girl.

7. *Contracts* as *regards the sale of public offices.*—Traffic by way of sale in *public* offices and appointments is obviously to thprejudice of the *public service* by interfering with the selection of the best qualified persons and consequently, such sales are *void.*

Ledu v. *Hiralal,* 43 Cal. 115—*A* pays *B,* a district *Nazir,* a urn of money, on *B's* promise to get *A's* son an appointment in the Court. 8 fails to do so, *A* sues to recover the sum. He *cannot* succeed, inasmuch as the object of the agreement was *trafficking in public appointment* or, what in English law styles as *"service brocage"* and is thus illegal, and the Court will *not* help a party to an illegal

agreement.

Another instance of a service brocage contract would be the case where *A* promises to pay a sum to *B* in order to induce him to retire, so as to provide room for *A's* appointment to the public office held by 8 : *Saminatha* v. *Muthusami,* 30 Mad. 530.

In one English case, the Secretary of a charity, fraudulently represented to Mr. *X* that the charity could procure a knighthood for him if he made a substantial gift to that charity. Consequently, Mr. *X* paid £ 3,000 to the charity and waited in vain for his knighthood. In a suit by Mr. *X* against the charity to recover his money, as no title was forthcoming, the Court *held* that he could *not* do so, as the agreement is *opposed to public policy,* being in the nature of trafficking in a public office. (*Parkinson* v. *College of Ambulance Ltd.,* 1925 L. K.B.1)

Indian cases on this topic have arisen mainly in connection with religious offices. Thus, it has been *held* that the sale of the office of a *shebait* is *not valid.* Likewise, it has been *held* that the office of *mutawali* of a *wakf* is *not* transferable.

8. *Contracts tending to create monopolies*— It is against public policy to enter into a contract which would create a monopoly, as the law discourages monopolistic tendencies.

D. B. Jhelm v. *Hari Chand,* 1934 Lah. 474— A local body grants a monopoly to *A* to sell vegetables in a particular locality. The agreement is *void* as being opposed to public policy : *Devi Dayai* v. *Narain Singh,* 1928 Lah. 33. The law looks with disfavour on monopolies. Exclusive rights to run lorries on a particular road given by District Board has also been *held* to be illegal.

Monopolistic and large business houses and indertakings were sought to be controlled and regulated by enacting the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. However, the said Act were repealed in 1991. Thereafter, the Competition Act, 2002 was passed to regulate and prohibit anticompetitive practices.

9. *Waiver of illegality*— Contracts which seek to waive an illegality are also void on the ground of public policy.

Thus, for instance, there may be a contract which is against public policy (as for instance, because it amounts to trading with an enemy). Now, if there is a *second contract* between the same parties, in which they agree that the first contract shall be valid and binding, such second contract would also *be void.*

10. *Agreement not to bid against each other.—In England,* an agreement *not* to bid against each other is declared illegal by statute [Auction (Binding Agreements) Act, 1927]

In India, however, such an agreement would *not* be against public policy, *unless* it was entered into for the purpose of defrauding a third person.

However, *bid rigging* and *collusive bidding* are within the ambit of the Competetio Act.

11. *Suicide and Insurance policies.*— In England, it has been *held* that if a person has insured his life, and he commits suicide, his heirs *cannot* enforce the insurance policy, because it would be against public policy to enforce such an insurance contract.

In India, however, it has been *held* that it is *not against public policy* to

enforce a contract of insurance where the insured has committed suicide. (However, *in practice,* Insurance Policies contain an *exclusion clause,* under which no money is payable if the assured commits suicide.)

12. *Contracts between Pleaders and clients*— The earlier view was that agreements between a pleader and his client under which the pleader is to receive an extra remuneration in case of his success, are *void only if* the *inamchithi (i.e.,* the promise to pay the additional sum) was given *after* the *vakalatnama (i.e.,* the authority to act in the case) had been executed. However, the recent (and better) view is that such *inamchithis* are *per se* against public policy, irrespective of when they were executed.

In *Ganga Ram* v. *Devi Das,* the majority of the judges in a Full Bench *held* that the agreements between legal practitioners and their clients making the remuneration of the legal practitioner dependent, to any extent whatsoever, on the *result* of the case in which he is retained, are *illegal* as being contrary to public policy, and the legal practitioners entering into such agreements are therefore guilty of professional misconduct, and render themselves liable to disciplinary action of the Court.

CASES WHERE CONSIDERATION OR OBJECT IS UNLAWFUL IN PART

S. 23 (which has been considered above) deals with cases in which consideration is *wholly and entirely* void or illegal. But what is the position if consideration is partly legal and partly illegal? S. 24 provides for such a case, and lays down that if any *part* of a single consideration for one or more objects or *any one* (or any *part* of any one) of several considerations for a single object, is unlawful, the agreement is *void.*

Illustration.— *A* promises to superintend, on behalf of *B,* a legal manufacture of indigo, and an illegal traffic in other articles. *B* promises to pay to A a salary of Rs. 10,000 a year. The agreement is void, the object of A's promise and the consideration for *B's* promise being, in part, unlawful.

Thus, if the consideration or object is partly lawful and partly unlawful, then the question will arise as to whether the two can be severed (*i.e.* separated); if they can, then the illegal portion thereof can be rejected, and the legal portion retained. If, however, the two are inseparable, the *entire* agreement is *void.*

Therefore, if *A* agrees to serve *B* as his house-keeper and also to live in adultery with him at a fixed salary, *A cannot* sue even for the service rendered as house-keeper, as it is *not possible* to ascertain what was due on account of adulterous intercourse and what was due for house-keeping. The whole agreement is *void, and* nothing — *not* even that for acting as a house-keeper-can be recovered : *Alice v. Clarke,* (1905) 27 All. 266.

Kathu v. *Vishwanath,* (1925) 49 Born. 619— *A* agreed, when he engaged *B* as a pleader, to give a fee of Rs. 500 in case of full success in the suit, and also to convey to him a portion of the property in dispute for religious or charitable purposes. It was *held* that the agreement that *B* should be given a part of the property in dispute in which he was engaged was contrary to public policy and was unlawful under S. 23, and that a part of the single consideration for one object having been unlawful, the *whole agreement was void* under this section.

PROBLEM.— *A* holds a licence for the sale of opium and *ganja.* The *ganja*

licence contains a condition prohibiting *A* from admitting partners into the *ganja* business without the permission of the Collector. No such condition is embodied in the opium licence. *B,* who is aware of the prohibition, enters into a partnership agreement with *A,* both in the opium and ganja business, without the leave of the Collector, and pays *A* Rs. 500 as his share of the capital. Disputes arise between *A* and *B. B* sues *A* for dissolution of partnership and for a refund of his Rs. 500. Decide the case, giving reasons for your answer.
Ans.— The contract being indivisible, *B cannot* recover anything.

Thus, no suit will lie to recover money advanced as capital for the purpose of a partnership which is partly illegal: *Gopalrao* v. *Kallappa,* 3 Born. L.R 164
Also connected with S. 24, are Ss. 57 and 58 of the Act. Sections 57 and 58 of the Contract Act may be rea^.in the light of the above principle.

1. Where persons reciprocally promise, firstly, to do certain things which are legal, and secondly, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement : S. 57.

Illustration.— *A* and *B* agree that *A* shall sell *B* a house for Rs. 10,000, but that, if *B* uses it as a gambling house, he shall pay *A* Rs. 50,000 for it. The first set of reciprocal promises, namely, to sell the house and to pay Rs. 10,000 for it, is a *contract.* The second set is for an unlawful object, namely, that *B* may use the house as a gambling house, and is a *void agreement.*

S. 57 contemplates a case of a contract consisting of several promises which are *distinct and severable* with a separate consideration for each such promise. The promises are thus independent of each other, except that they form part of the same contract. Under such circumstances, the section declares that the set of promises which are illegal will *not* affect those which are legal; the former alone will be void.

2. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced : S. 58.

Illustration—A and *B* agree that *A* shall pay *B* Rs. 1,000, for which *B* shall afterwards deliver to *A either* rice *or* smuggled opium. This is a *valid contract* to deliver *rice* and a *void agreement* as to *opium.*
Loud Grimwade, (1888) 39 Ch. D. 605.— *A* passes a bond to *B* for £ 3,000 in consideration of *B's* promise *not* to take civil or criminal proceedings against him. The bond is void, as part of the consideration is illegal. It is *not possible* to say what part of the promise to pay money is for the legal consideration and what for the illegal one.

Mst. Roshan v. *Mohd.,* 46 P.R. 1887.— On *B's* promising to marry *A* on divorcing *C, A* advances Rs. 300 to meet expenses of divorce proceedings and to purchase ornaments. On *B's* failure to obtain the divorce, *A cannot* recover anything — *not even* the money spent on the ornaments.

Kearney v. *Whitehaven Colliery,* (1893) 1 Q.B. 700.— In consideration of being employed by *X, A* agrees to give 14 days' notice before leaving service and to allow *X* to make certain deduction from his wages which are illegal under a statute. *A's* promise being *severable,* only the legal part as to notice will be enforced.

8. Chapter

AGREEMENTS WITHOUT CONSIDERATION (S. 25)

"No consideration, no contract." Discuss and state the exceptions, if any. B.U. May 2012

What is consideration? When consideration is absent, what is the effect on the validity of the contract? B.U. Apr. 2013

Define and explain consideration. What are the exceptions to the rule, "No consideration, no contract"?

M.U. Apr. 2014 Nov. 2014

Give 2 exceptions to the rule, "No consideration, no contract"? (2 marks)

M.U. Nov. 2015

Write a short note on: Exceptions to: No consideration no contract.

M. U. May 2018

Write a short note on: Consideration must be real, but need not be adequate.

M.U. Apr. 2016

While discussing the definition of 'consideration', it was seen that an agreement *without consideration (nudum pactum)* is *void.* To this general principle, S. 25 of the Act has laid down *three important exceptions,* which provide as follows :

An agreement made without consideration is void, *unless*—

1. It is in *writing* and *registered,* and is made out of *natural love and affection* by a person standing in *near relationship; or*
2. It is a *promise* to *compensate* (wholly or in part), a person who has already *voluntarily* done something for the *promisor,* or something which the promisor was *legally* compellable to do; *or*
3. It is a *promise* made *in writing* and *signed* by the *promisor* (or his duly authorised agent), to *pay* (wholly or in part), a *debt* barred by the law of limitation.

Apart from the above *three* cases, every agreement, in order to be enforceable by law, *must be supported by consideration.* In other words, the above three exceptions are the circumstances in which an agreement made without consideration is *valid* in India.

Additionally, S. 25 does *not* affect the validity of a gift which is already made, as, by its very definition, a gift is a transfer without consideration.

As seen earlier, *in England, a contract under seal is valid* even in the absence of consideration. Such a contract has to be in writing and signed, sealed and delivered by the parties. It is also called a *deed* or a *specialty contract.* Indian law, *however,* does *not* provide that such contracts would be valid in the absence of consideration. The position in India is governed by S. 25 of the Act.

Thus, an agreement made without consideration is void, except in the following *three* cases:

Exception 1 — Natural love and affection [S. 25(1)]

If the agreement is' expressed in *writing* and is *registered, and* is made on account of *natural* love and affection between parties standing in a *near relation* to each other, the contract is *valid.*

Illustrations— (a) *A* promises, for no consideration, to give to *B,* Rs 1,000. This is a *void* agreement.

(b) *A,* for *natural love and affection,* promises to give his *son, B* Rs. 1,000. *A* puts his promise to *B* into *writing* and *registers* it. This is a *contract.*

It may be noted that in illustration (b), all the four requirements of S. 25 are satisfied. Firstly, the agreement is in writing. Secondly, it is registered. Thirdly, it is made between parties standing in near relationship to each other (father and son). Lastly, it is also made out of natural love and affection.

NATURAL LOVE AND AFFECTION— An agreement without consideration would be legal, *provided* it is in writing and *registered, and proceeds* from *natural love* and *affection* between parties in near relation to each other. Therefore, an *oral agreement* or an *unregistered* agreement, though in writing, will *not* be valid, even if *it proceeds* from *natural love and affection,* and although the parties to it are *near* relations to each other. It must be *both, in writing* and *registered.*

Thus, in order to fall under this exception, an agreement must fulfil the following *four* conditions :

(i) It must be in *writing.*
(ii) It must be *registered.*
(iii) It must be made on account of *natural love and affection.*
(iv) It must be between parties standing in a *near relationship* to each other.

Love and affection— It is *not* to be presumed that merely because a *husband* passes a registered writing to his *wife,* promising to pay her money or anything else, it is a *valid* contract, though no consideration has moved from the wife. The writing must have been passed out of natural *love* and *affection.* In other words, it *is not to i be supposed that the nearness of relationship necessarily imports natural love and affection.*

Thus, where a *Hindu husband* executed a registered document in favour of his *wife,* whereby, after referring to quarrels and disagreements between the parties, the husband agreed to pay her for a separate residence and maintenance, and there was no consideration moving from the wife, it was *held,* in a *suit* by the wife brought on the agreement, that the agreement was *void* as being made without consideration. It was *further held* that the agreement could *not* be said to have been made on account of natural *love* and *affection,* the *recitals* in the agreement being opposed to that view. *(Rajiukhy Dabee* v. *Bhootnath,* (1900) 4 C.W.N. 488)

Exception 2 — Promise to compensate for voluntary services [S. 25(2)]

The *second* exception to the general rule mentioned above is where a promise is made to compensate a person for *voluntary* services. Thus—

An agreement *without* consideration is valid when it is a promise to *compensate* (wholly or in part) a person who has already *voluntarily* done something for the promisor, *or* something which the promisor was *legally*

compellable to do: S. 25(2).

Illustrations— (a) *A* finds *B's* purse and gives it to him. *B* promises to give *A* Rs. 50. This is a contract.

(b) *A* supports *B's* infant son. *B* promises to pay *A's* expenses in so doing. This is a contract.

Promise to reward voluntary services - It will thus be seen that a promise to compensate another for voluntary service *can* be enforced. Where a person, without the knowledge of the promisor or *otherwise* than at his request, does the latter some service, and the latter *agrees* to *compensate* the former for the same, the : agreement is covered by S. 25(2), and does *not,* therefore, need consideration to support it.

Thus, *A* writes to *B :* "At the risk of your own life, you saved me from drowning in the sea. I promise to pay you Rs. 1,000". *A* is bound to pay *B* Rs. 1,000.

Act done must be for the promisor— In order to bring the case | within the provision of this sub-section, it must be shown that what was voluntarily done by the plaintiff was done *"for the promisor* or *something which the promisor was legally compellable to do".* The act voluntarily done must have been *for the promisor.* If it is done for any other person, the promise does *not* come within the provisions of this sub-section. Thus, where the defendants, by a written agreement, promised to pay the plaintiff, a commission on articles sold by them in a market established by the plaintiff at his expense, and it was found that the market was *not* erected at the desire of the *defendants,* nor *for* them, but at the request of the *Collector,* the promise was *held not* to fall within the exception : I*Durga Prasad* v. *Baldeo,* 2 All. 221.

Promisor must be in existence— Again, the act which was voluntarily done, must have been done for a promisor *who was in existence when the act* was *done.* Hence, work done by a *promoter of a company before its formation cannot* be said to have been done *for* the company.

Ahmedabad Spinning, etc. Co. v. *Chhotalal,* 10 Bom. L.R. 141.— *A* promotes a company, *B,* and incurs expenses for its formation, registration, *etc. B* Co. is incorporated. *B* Co. then promises to pay *A's* expenses. This is *not* a contract, as *B* Co. was *not* in existence when *A* rendered the services, *i.e.,* he did *not* "do something for the promisor."

Promisor must be competent to contract— Further, the act done must have been done for a promisor who should *be competent to contract at the time when the act was done.* Hence, a promise by a person on attaining majority, to repay the money lent and advanced to him *during* his *minority,* does *not* come under this clause, the promisor *not* being competent to contract *when the loan was made to him.*

Nanhi v. *Dy. Commr., Kheri,* 1950 A.L.J. 168.— Where, on the occasion of the *Mundan* ceremony of the promisor's daughter, he^ requested the promisee to perform the *ioi lena* ceremony, and on her demanding a village to be given to her, the promisor agreed to give a *guzara* and the ceremony was performed, and subsequently a sum of Rs. 30 per month was paid to the promisee, it was *held* that there was a contract complete in all essentials. Even if the *Ioi lena* ceremony

is taken to be performed voluntarily, the subsequent promise to pay Rs. 30 was a promise according to S. 25(2) of the Contract Act to compensate wholly or in part the promisee who had voluntarily done the *Ioi lena* ceremony for the promisor.

Exception 3 — Promise to pay time-barred debts [S. 25(3)]

The *third* exception to the general rule is when a promise is made to pay a time-barred debt. Thus—

An agreement made *without* consideration is valid when it is a promise, made in *writing* and *signed by the person to be charged therewith* (or by his agent), to pay (wholly or in part) a *debt* of which the creditor might have enforced payment, but for the law of the *limitation* of suits.

Illustration— A owes *B* Rs. 1,000, but the debt is barred by the Limitation Act. *A signs* a *written* promise to pay *B* Rs. 500 on account of the debt. *This is a contract.*

A promise to pay a time-barred debt may be enforced under this exception. There must be a *promise* made *in writing and signed* by the *person to be charged therewith* (or by his agent), to pay a debt wholly or in part. Where it is sought to recover a time-barred debt on the strength of a subsequent promise to pay made by the debtor or his agent, the document relied on must contain *an express promise to pay.*

Thus, *A* passed a promissory note for Rs. 5,000 in favour of *B.* After the pro-note had become time-barred, A wrote to *B* a letter in which he said *inter alia,* "I am quite willing to renew the note; come and see me with it". *A* did *not* renew the note. Is *B* entitled to recover Rs. 5,000 from *A*?

No. Under S. 25(2), a promise to pay a time-barred debt must be *an express promise to pay,* and *not* merely an unconditional acknowledgement involving, as here, an *implied* promise to pay. Therefore, *B* is *not* entitled to recover Rs. 5,000 from *A : Balkrishna* v. *Jayshankar,* 40 Born. L.R. 1010.

PROBLEM— The defendant, being heavily indebted, applied to the plaintiff for a loan of Rs. 500. The plaintiff agreed to lend, provided the defendant passed a promissory note for Rs. 300 originally due by the defendant but which had become time-barred. The defendant finally passed a promissory note for Rs. 800 on receiving a fresh loan of Rs. 500. The plaintiff, having sued to recover Rs. 800 on note, the defendant contended that as far as the amount of Rs. 500 was concerned, there was no consideration and that the promissory note for Rs. 800 was taken by undue influence. Will the defendant succeed?

Ans— The defendant will *not* succeed because :

(i) time-barred debt is good consideration; *and*

(ii) the plea of undue influence *cannot* be successfully pleaded on the above facts.

It is to be noted that the debt should be such that the *only bar* to its recovery is limitation, but otherwise the debt should be perfectly lawful and binding on the debtor, *i.e.,* a *lawful debt,* the remedy for recovery whereof is time-barred.

Moreover, a promise to pay *cannot be inferred* from a *mere acknowledgement* of the debt. To come within this sub-section, the document must contain *an*

express promise to pay a debt, or must express an intention which can be construed as an *express promise.*

Thus, a paper containing the words, "balance due after accounts are taken" is *not* a promise to pay a time-barred debt; nor is a bare statement of account or a balance of account with the words *baki dewa* ("balance due") within the section. A statement with the words "examined account, it is correct" likewise does *not* amount to a promise as required by this clause.

But there is a promise where a debtor writes, "I shall send by the end of next month"; or where in a *khata* by the debtor, words are added "moneys of the *khata* are payable by me; I am to pay whenever you demand" or "the rupees taken in hard cash are due". Where a creditor sent to a debtor a statement of the account between them, and the debtor endorsed thereon an admission of the correctness of the balance, it was *held* that this was enough to bring the memorandum within this clause.

Validity of a gift already made (S. 25, Explanation 1)

Explanation 1 to S. 25 provides that nothing in S. 25 is to affect the validity, as between the donor and the donee, of any gift *actually made* by the donor to the donee.

This is apparently provided only out of abundant caution, and it clarifies that gifts actually made are *not* vitiated. By its very definition, a gift implies absence of consideration moving from the donee, and once a gift is actually made, its validity *cannot* be questioned on the ground that the contract is void on the ground of absence of consideration.

Inadequacy of consideration (S. 25, Explanation 2)

Explanation 2 to S. 25 provides that an agreement to which the consent of the promisor is freely given is *not void* merely because the consideration is inadequate.

Illustration— A agrees to sell a horse worth Rs. 1,000 for Rs. 10. *A's* consent to the agreement was freely given. The agreement is a contract, notwithstanding the inadequacy of the consideration.

Inadequacy of consideration, a matter for the parties

It may be noted that whether the consideration is *adequate or not* is entirely a matter for the parties. It is *not necessary* (nor does the Act say so) that the consideration should be adequate to the promise; the value of the consideration is a matter for the promisor himself. So, the possibility of any benefit to the promisor, *or* any detriment to the promisee will be regarded in law as sufficient consideration.

The courts are *not* concerned with the adequacy - or inadequacy - of the consideration as long as the agreement has been entered into with the free consent of both the parties.

It is a rule of English law that consideration must have some value in the eyes of the law, though it may *not* be adequate, *i.e.,* it must be real. It is *not* enough that something, whether an act or a x promise, appears, on the face of the transaction, to be given in exchange for the promise. That which is given need *not* be of any particular value, but it must be something which the law can regard as having some value, so that the giving of it effects a real change in the

promisee's position.

Under S. 25, consideration need *not* be adequate. But inadequacy of consideration in conjunction with the circumstances of indebtedness and ignorance are facts from which it would be permissible to infer the use of *undue influence.* Inadequacy of consideration may, at the most, be evidence that the promissor's consent was *not* free, but it is *not* more; it is *not* of itself conclusive.

Anson's view.— Anson, in his Law of Contract, observes: "A Court of Law will *not* make bargain for the parties to a suit, and if a man gets what he has contracted for, will *not* enquire whether it was equivalent to the promise which he gave in return. The consideration may be a benefit to the promisor, or to a third party, or may be of no apparent benefit to anybody, but merely a detriment to the promisee; in any case, its adequacy is *for the parties* to consider at the time of making the agreement, *not for the Court,* when it is sought to be enforced".

Inadequacy of consideration, how far indicative of consent that is not free

Explanation 2 to S. 25 further provides that although an agreement to which the consent of the promisor is freely given is *real, but need not be not* void *only because* the consideration is freely given is not void only because the consideration is *inadequate, nevertheless,* the inadequacy of the consideration *may* be taken into account by the Court in determining the question as to *whether the consent of the promisor was freely given.*

Illustration— *B* agrees to sell a horse worth Rs. 1,000 for Rs. 10. *B* denies that his consent to the agreement was freely given.The inadequacy of the consideration is a fact which the Court must take into account in considering *whether or not B's* consent was freely given.

There is an equity which is founded upon gross inadequacy of consideration, but it can only be where the inadequacy is such as to lead to the conclusion that the party either did *not* understand what he was about *or* that he was the victim of some imposition. The inadequacy must be such as to shock the conscience of the Court, and the amount must constitute conclusive and decisive evidence of fraud. Inadequacy of consideration when found in conjunction with other circumstances, such as the suppression of the true value of property, misrepresentation, fraud, oppression, urgent need of money, weakness of understanding, or even ignorance, is an ingredient which weighs powerfully with a Court when considering whether it should set aside the contract or refuse to decree specific performance.

Chapter - 9.

"Define "void agreement" State and explain briefly the agreements which have been expressly declared void by the Indian contract act.
M.U. Apr. 2011 Nov. 2012 Apr. 2014 May 2018
What is the effect of an agreement in restraint of marriage? M.U. May 2012, Apr. 2015. Jan. 2017

[Note : As seen earlier, under S. 10, one of the requirements of a valid contract is that the agreement should not be expressly declared to be void by the Indian Contract Act. Ss. 26 to 30 of the Act declare the following agreements to be void :

1. Agreements in restraint of marriage (S. 26)
2. Agreements in restraint of trade (S. 27)
3. Agreements in restraint of legal proceeding (S. 28)
4. Agreements which are uncertain (S. 29)
5. Agreements by way of wager. (S. 30)

All these agreements are discussed in Chapters 9 to 13 of this book]

AGREEMENTS IN RESTRAINT OF MARRIAGE

(S. 26)

Every agreement in restraint of the marriage of any person *other than a minor* is void : S. 26.

Contracts in restraint of marriage or those which interfere with the freedom of choice in marriage are *void.* A person is *not* by law bound to marry; *but an agreement* whereby a person is bound *not* to marry, *or* whereby his freedom of choice is *interfered* with, is contrary to public policy, and therefore, declared to be *void.* The Allahabad High Court has, however, expressed doubt on the question whether *partied or indirect* restraint on marriage is also within the scope of S. 26.

In an English case, Mr. X promised under seal (no consideration would therefore be necessary) *"not* to marry any person besides Catherine Lowe; and if I do, to pay to the said Catherine Lowe the sum of 2,000 pounds". The Court *held* that such an agreement was *void,* as it was purely restrictive and against public policy. *(Lowe* v. *Peers,* (1768) 4 Burr 2225)

In English law, a condition in restraint of marriage is *void,* but it has frequently been decided in *India,* that conditions in restraint of marriage limited as to *time,* as *to place,* and as to a *person* are good, notwithstanding the rule of English law. However, such partial restraints, if they are to be tolerated, must be *reasonable.* Thus, a condition that should a legatee marry a Scotchman, or a domestic servant, she would forfeit the legacy, has been *held* to be a *valid* condition.

Where a girl's father agreed to the expense of the education of his son-in-law, only on the condition that if the son-in-law married another woman, his father would repay the sum so spent, the condition was *held* to be in restraint of marriage, as S. 26 is *not* restricted in its operation to the case of a first marriage only. *(U Ga* v. *Hari)*

End of chapter 9

10th Chapter

AGREEMENTS IN RESTRAINT OF TRADE (S. 27)

Write a short note on: Agreements In restraint of trade.

M.U. Jan. 2017 May 2018

What is the effect of an agreement in restaint of trade? (2 marks)
M.U. Apr. 2011 Apr. 2013

An Agreement in restraint of trade is *void. Discuss and state the exception to this rule. Is partial restraint valid? B.U. Jan.2017*

Give two exceptions to agreements in restraint of trade. B.U. Nov.2014

The next kind of void agreement is one in *restraint of trade.* It is enacted solely for the purpose of *encouraging* free trade. S. 27 of the Act, therefore, provides that every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind *is, to that extent, void.*

An exception is, however, carved out in respect of sale of goodwill of a business, and it is provided that one who sells the *goodwill* of a business may agree with the buyer to *refrain* from carrying on a *similar* business, *within specified local limits,* so long as the buyer (or any person deriving title to the goodwill from him) carries on a like business therein. However, in such a case, such limits must appear to the Court to be *reasonable,* regard being had to the *nature* of the business.

PRINCIPLE OF S. 27— Every man is entitled to exercise any *lawful* trade as and *when* he chooses. Even the Constitution of India guarantees this as a fundamental right. Therefore, every agreement which interferes with *this* liberty is an *agreement in restraint of trade.* Whether *such restraint is general or partial, qualified or unqualified, it is void.* So, as a general rule, *all* agreements in restraint of trade, being void *pro tanto, are not* binding, *except* in the case of *a sale of the goodwill* of a business. Other exceptions to the general rule are to be found in the Indian Partnership Act, which are also discussed below.

In *Madhub Chunder* v. *Rajcoomar,* (1874) 14 Beng. L.R. 76, the parties carried on business in Calcutta as braziers. The defendant suffered heavy losses from the plaintiff's competition, and agreed that if the plaintiff closed his business in that quarter, they would pay him all the advances he had made to his workmen. The plaintiff complied, but the defendant failed to pay. The plaintiff sued to recover the amount of the advance, but the restriction, though confined to a particular quarter, was *held* to be *void.*

Similarly, in *Nur Ali* v. *Abdul Ali,* (1892) 19 Cal. 765, the plaintiff agreed with the defendant *not* to carry on the business of *dubash* for three years, and to act as stevedore only for five ships assigned to him by the defendant. The agreement was *held* to be *void.*

So, also, in *Crew & Co. Ltd.* v. *North Bengal, etc.* 6 D.L.R. (Cal.) 75, two manufacturers of sugar entered into an agreement whereby zones were allocated to procure sugarcane for meeting the needs of their respective factories. Each of the said factories undertook *not* to draw any cane from the zones allotted to the other factory. The Court *held* that the agreement was in restraint of trade under S. 27 of the Act. (To-day, such an agreement would also be hit by the provisions of the Competition Act.)

PROBLEM— A entered into the service of *B* company, who were tea planters

in Assam, for a term of years, and agreed *not* to be engaged in any other similar business within forty miles of any of *B* company's premises in Assam at any time within five years after the contract of service came to an end. *A* violates the agreement. Advise *B* company.

Ans— The Company will fail, as the agreement is in *restraint of trade.*

RESTRAINT OF TRADE— Agreements in restraint of trade are contrary to public policy, and therefore, *void.* This section is *wider* than the English law, as it refers *not merely* to an *absolute* restraint of trade, *but* to *any* restriction, and does away with the distinction observed in England between *partial* and *total* restraint of trade, and makes all contracts, falling within the terms of the section *void, unless* they fall within the *exception.*

English law— In *England,* a *partial restraint* of trade is *not* frowned upon, *provided* it is reasonable, and accompanied by good consideration, and *not* opposed to the interest of the public. But the restriction imposed must *not* exceed that which is necessary for the reasonable protection of the person in whose favour the agreement is made. In *India,* whether the restraint is general, or partial, qualifed or unqualifed, if it is in the nature of a restraint of a trade, it is *void.*

Agreements restraining freedom of action.—in a sense, every agreement for the sale of goods, is a contract in restraint of trade— for if *A* agrees to sell certain specified goods to *B,* he precludes himself from selling *those* goods to anybody else. But a *reasonable construction* must be put upon the section, and *not* one which would render void the most common form of mercantile contracts. Thus, a stipulation in an agreement whereby the plaintiffs agreed that they would *not* sell to others, for a certain period, any goods of the same description as they were selling to the defendants was *held not* to be in restraint of trade. Similarly, an agreement to sell *all* the salt manufactured by the defendant during a certain period *at a certain price, was held not to be* in restraint of trade.

So also, where *A* agreed with *B* to sell to *B* paper for a period of three years and further *not* to sell to others any paper during the said period, it was *held* that such a contract was *not* in restraint of trade.

Agreements to limit competition and keep up prices— On the same principle, it has been *held* that the fact that a scheme of agreement would *limit competition* and keep *up prices* does *not* make it void under this section; if this *were not* so, many agreements which traders enter into for their own protection and to avoid *unfair competition* would be voided. Thus, an agreement between x manufacturers *not* to sell their goods below a stated price, to pay profits into a common fund and to divide the business and profits in certain proportion, is *not* hit by this section, and cannot be impeached as opposed to public policy under section 23 : *Fraser* v. *Bombay Ice Co.,* (1905) 29 Born. 107.

In *Frazer's case* (above) certain ice manufacturing companies in Bombay entered into an agreement relating to the manufacture and sale by them of ice. Under the agreement, the minimum price at which ice was to be sold was fixed, and the net profits were to be paid into a general common fund, from which each was to receive a certain proportion of the same. On a suit being instituted for breach of the agreement by one of the companies against another, it was *held*

that the agreement was *not* in restraint of trade.

Likewise, a mutual agreement between two neighbouring landowner *not* to hold cattle markets on the same day is *not* in restraint of trade.

The Calcutta High Court has *held* that a contract by a theatrical party *not* to play anywhere else or in any theatre in any town till the termination of the specified period is *void,* it being one which is in restraint of trade.

Similarly, where one of two rival coolie-suppliers agreed *not* to supply coolies in consideration of the other one paying Rs. 50 to him every month, the agreement was *held* to be *void,* as being one in restraint of trade.

In another case, *A & B,* two beef-sellers, entered into an agreement whereby *A* would sell beef for 14 days, and *B* would sell for the other 16 days in the month. The Court *held* that as each party was prevented f from carrying on his trade for long periods at a time, there is a partial restraint of trade, and such agreement is therefore *void.*

In an English case, *Nagle* v. *Fieldon* (1966 1 WLR 1027), the stewards of a Jockey Club followed an unwritten practice of admitting only males to their Club. A lady, who was a well-known and capable race-horse trainer, applied to this Club, but was refused to licence for the above-mentioned reason. The Court *held* such a rule or practice was *void.*

Contract of service.— An agreement of service by which an employee binds himself, *during the term of his agreement, not* to compete with his employer directly, is *not* in restraint of trade. Such an agreement may be *enforced* by an injunction where it contains a negative clause, express or implied, providing that the employee should *not* carry on business on his own during the term of his engagement.

Thus in *Charlesworth* v. *MacDonald,* (I.L.R. 1898 23 Born. 103), the defendant agreed to serve the plaintiff, a physician and surgeon practising at Zanzibar, as an assistant for three years. The letter, which stated the terms which the plaintiff offered and the defendant accepted, contained the words- “The ordinary clause against practising must be drawn up”. No formal agreement was drawn up, and at the end of one year, the defendant ceased to act as the plaintiff’s assistant, and began practice in Zanzibar on his own account. It was *held* that the plaintiff was entitled to an injunction restraining the defendant from practising in Zanzibar on his own account *during the period of the agreement.*

In contracts of service, the only point to be considered is to see whether the restraint imposed is *reasonable or not.* This always depends upon the *particular facts of every case.* Thus, a covenant by an articled clerk of an attorney *not* to be concerned as attorney with any person who had been with the attorney before and during the continuance of the articles, was *held* to be *reasonable.*

Similarly, a covenant by an employee of a milk vendor, *not* at any time to solicit persons who were customers of his master during the employment was *held* to be *reasonable.*

But a covenant by a dentist's assistant with his employer *not* to practise within a hundred miles from York (where his employer was in business) during the lifetime of his employer, was *held* to be *unreasonable.* On the same principle, an agreement by an employee *not* to be engaged in the same business as that of

the employer within 25 miles for three years was *held* unenforceable, as being unreasonably wider than was necessary for the protection of the employer. Similarly, a contract restricting the defendant from engaging in tea-cultivation within a distance of 40 miles from the plaintiff's tea gardens for a period of 2 years was *held* to be *void.*

In *Fitch* v. *Dewes* (1921 2 A.C. 158), solicitor's clerk at Tamworth agreed with his employer, that after leaving the employment, he would *not* practise within 7 miles of Tamworth town hall. The House of Lords *held* that although the covenant *not* to practise was *not* limited to any period of time, yet it was *valid.* The Court pointed out that in the course of his duties, a solicitor's clerk would naturally acquire a good knowledge of the affairs of the clients, and if *not* restrained, he would be in a position to gravely impair the goodwill of his employer's business. The restriction was *reasonable* to secure this, and therefore, it was *valid.*

Niranjan Golikari v. *Century Spg. Wvg. Co. Ltd.* (A.I.R. 1967 S.C. s 1098): In this case, an employee was given special training by his employer, on condition that he would serve the Company for five years, and that if he left his employment before such period, he would *not* directly or indirectly engage in the same business and also pay liquidated damages. The Supreme Court *held* that negative covenants which operate *during* the period of service are generally *not* regarded as restraint of trade, and therefore, do *not* fall within S. 27 of the Act, *unless* the contract is unconscionable or unreasonable. It was, *therefore, held* that this was a *valid* contract.

However, different considerations apply if a *post-service restraint* is sought to be imposed on an employee. Thus, where the contract provided that the employee could *not* engage in the same or similar business for two years *after* he left the Company, the Supreme Court *held* that such a stipulation would be *void* under S. 27 of the Act. *(Superintendence Co. of India* v. *Krishna Murgai, "An agreement in* A.I.R. 1980 S.C. 1717)

EXCEPTION : SALE OF GOODWILL— As seen above, all agreements in restraint of a lawful profession, trade or business of any kind are void to that extent (S. 27) *except* in the case of a sale BU Jan 2Q17 of goodwill.

Now, what is *goodwill*? The Act has *not* defined the term goodwill. *Give two exception to* It is a term which is *easy to understand,* but *not easy to define, agreements in* Goodwill consists of the benefit or advantage which a business has in its connection with its customers. It is based on the probability B U' Nov' 2014 that old customers will continue to resort to the old place of business, or continue to deal with the firm of the same name.

The goodwill of a business may be a very *valuable asset,* and may have been built up after incurring considerable expense and may be the result of the labour, skill and industry exerted by a person during many years. It is only fair that if such a person wants to retire from the business, he should be permitted to sell the goodwill for a consideration. At the same time, if it were *not* open to him to bind himself by agreeing with the buyer to the effect that he shall *not* personally carry on the like business, there would be very little chance of his realising any reasonable price for the goodwill.

It has, therefore, been laid down that one who sells the goodwill of a business may agree with the buyer to *refrain* from carrying on a *similar* business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, *provided that such limits appear to the Court reasonable,* regard being had to the *nature* of the business.

Analysing the *Exception* to S. 27, it is seen that in the case of a *sale of the goodwill* of a business, an agreement in restraint of business is *valid, subject* to the following conditions :

(i) the seller can be restrained only from carrying on a *similar business*;

(ii) the restraint can apply only *so long as* the buyer is carrying on a similar business;

(iii) it can operate only within *specified local limits;* and

(iv) *such limits* must *appear* to the Court to be *reasonable.*

Chandra v. *Parasullah,* 48 I.A. 508.- *A* was the owner of a fleet of motor buses which he plied between Pune and Mahabaleshwar. *B* also carried on a similar trade at the same place. In *order* to avoid competition, *B* purchased the entire business of *A,* together with the goodwill thereof. By the contract of sale, *A* agreed *not* to carry on a similar business in the same place for *a* period of three years. *A* received the consideration money. At the end of one year, *A* started the same business at the same place. In these circumstances, the Court *held* that the contract fell within the exception to S. 27, and was therefore *valid.*

In another case, *A* bought from *B* the goodwill of his business of plying ferry boats between certain places on a river, together with the interest which he had acquired by agreement for the use of landing place and settlements for the collecting of tolls at landing places. Under the contract of sale, *B* agreed that for three years, he would *not* ply boats between the places in question. This was *held* to be an agreement *for* the sale of the goodwill of a business and *enforceable* as falling within the rule stated in this sub-section.

The policy of the law in the application of this principle to modern conditions of trade is amply illustrated in an English case decided by the House of Lords. Nordenfelt was a maker of guns and ammunition. He sold his business to the plaintiffs for a huge sum of money, reserving his right to manufacture explosives other than gunpowder. Later, however, he entered into the business of another company dealing with guns and ammunition. The plaintiffs prayed for an injunction to restrain Nordenfelt from entering into the business of the company. The defence was that the contract with the plaintiffs was void because it was in restraint of trade. It was *held* that the contract between the plaintiffs and Nordenfelt was *valid,* though it was in restraint of trade, because the contract was *neither* unreasonable between the parties *nor* detrimental to public interest, and as such, the defendant could be restrained from entering into the business of the other company. *(Nordenfelt* v.*Maxim Nordenfelt* (1894) A.C. 535..)

Exceptions under the Partnership Act

The Indian Partnership Act, 1932, lays down *three more exceptions* to the general rule that an agreement in restraint of trade is void. These are as follows:

(i) If a partner agrees with his other partner that, as *long as the partner remains a partner,* he shall *not* carry on any other business, the agreement will be a

valid agreement under S. 11(2) of the Partnership Act.

(ii) Likewise, a partner may agree with his partners, that *on ceasing to be a partner,* he will *not* carry on any business similar to that of the firm, *within a specified period or within specified local limits.* Such an agreement would be valid, if the Court finds such a restriction to be *reasonable.* (S. 36(2) of the Partnership Act)

(iii) So also, partners may, *while, or in anticipation of, dissolving the firm,* agree that some or all of them shall *not* carry on a business similar to that carried on by the firm *within a specified period or within specified local limits.* Such an agreement would be valid, if the Court finds such a restriction to be *reasonable.* (S. 54 of the Partnership Act)

End of chapter 10

Chapter 11

AGREEMENT IN RESTRAINT OF LEGAL PROCEEDINGS (S. 28)

What is the effect of an agreement in restraint of legal proceedings? (2marks) B.U. Nov. 2011 May 2017

Write a short note on Agreement in restraint of legal proceedings. B.U. May 2012 Nov.2013, Nov.2014, Jan.2017

Give two exceptions to an agreement in restraint of legal proceedings. (2 marks) M.U. Apr. 2016

State *the exceptions to agreements in restraint of legal proceedings. (2 marks)*

M. U. May 2018

Under S. 28 of the Act, every agreement,

(a)(i) by which any party thereto is restricted absolutely from enforcing his rights under, or in respect of, any contract, by the usual legal proceedings in the ordinary tribunals, *or*

(ii) which limits the time within which he may thus enforce his rights, *or*

(b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability under or in respect of any contract, on the expiry of a specified period, so as to restrict any party from enforcing his rights,

is *void* to that extent.

By way of an exception, it is provided that the above rule does *not* render illegal a contract by which two or more persons agree that any dispute—

(i) which *may arise* between them, (in respect of any subject or class of subjects), *or*

(ii) which *has arisen, -*

shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. (*Exception* to S. 28)

S. *28 EXPLAINED.-* S. 28 consists of three parts— (1) Agreements absolutely

restricting the *enforcing* of rights in the ordinary tribunals; (2) Agreements *limiting* the *time* allowed by the Limitation Act; and

(3) Agreements extinguishing the rights of a party on the expiry of a specified period.

The provisions of this section appear to embody a general rule recognised in England, which prohibits *all agreements purporting to oust the jurisdiction of the Courts.* What the section prevents is that the rights of the parties should *not* be withdrawn *absolutely* from the jurisdiction of a Civil Court.

Thus, if two persons enter into a contract that neither party to such contract should bring *any* action on the contract, it will be *void* under the first part of the section, since it would restrict both parties from *enforcing their* rights under the contract in the ordinary legal tribunals.

But S. 28 will *not* apply where the agreement between the parties restricts the right of either party to *sue in a particular Court* only.

Thus, *A,* who resided in Mumbai, entered into an agreement with *B* in Mumbai to supply 500 tons of linseed to *B,* F.O.R. at Jalgaon. It was a term of the contract that all disputes arising between them should be decided by a Court in Mumbai. A failed to supply. *B* notwithstanding the said term, filed a suit against A in a Court at Jalgaon. *A* objects to the jurisdiction of the Jalgaon Court. In this case, there is nothing in the agreement between *A* and *B* to contravene the provisions of S. 28, as it merely selects one out of two competent tribunals for the disposal of disputes between the parties. Therefore, the suit can be entertained only by a Court in Mumbai. *A* can successfully object to the jurisdiction of the Jalgaon Court.

Effect of agreement providing shorter period of limitation.—Further, an agreement which provides that a suit should be brought for the breach of any terms of the agreement within a time *shorter* than the period of limitation prescribed by law is *void* to that extent under the second part of the section. The effect of such an agreement is to absolutely restrict the parties from enforcing their rights after the expiry of the stipulated period, *though it may be within the period of limitation.*

EFFECT OF RELEASE AND FORFEITURE AGREEMENTS-

Formerly, the courts had taken the view that agreements which do *not* limit the time for *enforcing* any rights, but only provide that failure to enforce them within a stipulated time would operate as a *release* or *forfeiture* of such rights, and they would be binding between the parties, as such agreements would fall outside the scope of S. 28.

Baroda Spinning Mills v. *Satyanarayan,* (1914) 38 Born. 344.—

One of the conditions in a policy of insurance was that if a claim be made and rejected and a suit is *not* commenced within three months after such rejection, "all benefits under this policy shall be *forfeited*".On a suit being filed after the prescribed period, it was *held* that the condition was not one *limiting* the time within which the policyholder may enforce his rights, but one by which the policy-holder had contracted that on the happening of a certain event, he shall lose all his rights; and that such a condition was not void.

However, by a *recent amendment,* release and forfeiture agreements have

also been brought within the ambit of S. 28, and today, such agreements will also be *void.* (See clause (b) above.) So, the ruling in *Baroda Spinning Mills* v. *Satyanarayan* (above) would *not* be applicable today.

VALIDITY OF AGREEMENT EXTENDING PERIOD OF LIMITATION.— It may be noted that no provision is made in the section for an agreement *extending* the period of limitation for enforcing rights arising under it. Such an agreement will *not* fall within the scope of this section. There is no *restriction* imposed upon the right to sue; on the contrary, it seeks to keep the right to sue *subsisting* even *after* the period of limitation. Nor is this an agreement limiting the time to enforce legal rights under the *second branch* of the section. It would, however, be *void* under Sec. 23, as tending to *defeat* the provisions of the Limitation Act.

Exception to S. 28

To the general rule stated in the section, there is *an exception* which lays down that S. 28 would *not* render illegal a contract by which two or more persons agree that any dispute which *may* arise between them, *or* which *has arisen* in respect of any subject (or class of subjects) is to be referred to *arbitration,* and that only the *amount awarded, in such arbitration, would be recoverable in respect of* the dispute so referred. Thus, a contract whereby it is provided that all disputes arising between the parties should be referred to two *competent London brokers, and that their decision should be* final, does *not* come within the purview of this section.

SCOPE OF EXCEPTION TO S. 28 — What the exception prevents is that the rights of parties should *not* be withdrawn *absolutely* from the jurisdiction of a Civil Court. However, an agreement to refer disputes to *arbitration* is *not* an attempt to oust the jurisdiction of a Court, because an arbitrator himself is in ther position of a Judge, and his award is liable to be modified, remitted or set aside, under certain circumstances. But, where *A* and *B* agree to refer to the arbitration of *C,* the dispute pending between them, stipulating that none of them shall object to the validity of the award given by C *on any ground whatsoever* (including misconduct of the arbitrator) before any Court of law, *such* a stipulation is *void,* as it restricts the parties *absolutely* from enforcing their rights in ordinary tribunals.

EFFECT OF AGREEMENT NOT TO APPEAL— A, the plaintiff; and *B,* the defendant, agree that neither party shall appeal against the decision that the Court may give in the suit. The agreement is *valid,* as it is covered by the Exception; the effect of the agreement is to constitute the trial Court an arbitrator. Further, it operates as an adjustment under O. 23, r. 3, C.P.C. : *Anantdas v. Ashburner,* 1. All. 267 (F.B.).

End of chapter 11

Chapter 12

AGREEMENTS WHICH ARE UNCERTAIN (AMBIGUOUS AGREEMENTS) (S. 29)

What's the effect of an agreement in restraint of marriage?(2marks) B.U.

Nov.2013

Under S. 29, agreements, the meaning of which is not *certain,or capable* of being made certain, are void.

Illustrations- (a) *A* agrees to sell to *B* "a hundred tonnes of oil".There is nothing whatever to show *what* kind of oil was intended. The agreement is *void* for uncertainty.

(b) *A* agrees to sell to *B* one hundred tonnes of oil of a specified description, known as an article of commerce. There is *no uncertainty* here to make the agreement void.

(c) *A,* who is a dealer in coconut oil *only,* agrees to Sell to *B* "one hundred tonnes of oil". The nature of A's trade affords an indication of the meaning of the words, and *A* has entered into a contract for the sale of one hundred tonnes of *coconut oil.*

(d) *A* agrees to sell to *B* "all the grain in my granary at Ramnagar." There is *no uncertainty* here to make the agreement void.

(e) *A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by C". As the price is capable of being made certain, there is *no uncertainty* to make the agreement void.

(f) *A* agrees to sell to *B,* 'my white horse for rupees *five hundred or rupees one thousand.' There* is nothing to show *which* of the prices was to be given. The agreement is *void.*

In this context, reference may be made to S. 13 of the Evidence Act, which provides that where the language of a document is ambiguous or defective, no evidence can be given to explain or amend such document. The Court will *not* take on itself to clarify the ambiguities, because that would amount, *not* to enforcing the contract between the parties, *but* to making a new contract for them.

An important *exception* to this principle is when goods are sold without naming a price. In such cases, there is a presumption of an agreement to pay a *reasonable price,* and the Court compels the buyer to pay a *reasonable price.*

CASES

1. Where the defendant executed a document in favour of the Agra Savings Bank whereby he promised to pay to the Manager of the Bank, the sum of Rs. 10 on or before a certain date and "a similar sum monthly, every succeeding month," it was *held* that the instrument could *not* be regarded as a valid promissory-note, as it was *not* at all clear as to for what period such payment was to continue, and as to what was the total amount to be paid under such document. *(Carter* v. *The Agra Savings Bank,* 1883 5 All. 562,)

2. A stipulation in a lease whereby a tenant agrees to pay whatever rent the landlord might fix, is *void* for uncertainty. If it were otherwise, the landlord might fix any rent he likes, and the tenant might become liable to pay an unreasonable or exorbitant amount as the rent. *(Ramaswami* v. *Rajagopala,*-1887 11 Mad. 200)

3. The proprietor of an indigo factory mortgaged to *X all* the indigo cakes that might be manufactured by the factory from crops to be grown on the lands of the factory from the date of the mortgage upto the date of repayment of the mortgage money. The Calcutta High Court *held* that the terms of the mortgage *were not*

vague, and the mortgage was *not void.*

End of chapter 12

13Chapter

AGREEMENTS BY WAY OF WAGER (S. 30)

Discuss the law relating to wagering agreements.
M.U. Nov. 2013 Apr. 2015 May 2017
What Is a wagering agreement? (2 marks} M.U. Apr. 2014
Write a short note on: Wagering agreement. M.U. Nov. 2011
*Write a short note on: Agreement by way of wager.*M.U. Jan. 2017
What is a wagering agreement? What are the essentials of a wagering agreements? B.U. Nov.2012

S. 30 deals with wagering agreements, and provides as follows :

Agreements by way of wager are *void.* No suit shall be brought for recovering anything—

(a) alleged to be won on any wager, *or*

(b) entrusted to any person to abide by the result of any game or other uncertain event on which any wager is made.

It is also provided that S. 30 does *not* render subscription, or contribution, made or entered into for or towards any plate, prize or sum of money, of the value of *five hundred rupees* or upwards, to be awarded to the winner or winners of any *horse-race.*

'WAGER' DEFINED.- Wager is defined as an agreement between two parties to the effect that if a given event is determined *one* way, the *first* of them shall pay a certain sum to the *other,* and in the *contrary* event, the *latter* shall pay that amount to the *first.* A wagering contract is thus a contract 1o give money or money's worth upon the determination or ascertainment of an *uncertain* event".

The peculiarity of such a contract is that there must be *mutual chance of gain* and *loss, and the event, on the happening of which something is to be paid, must be uncertain.* Thus, if the contract between *A* and *B* be such that if it rains on a particular day, *A* will pay *B,* Rs. 500, and if it does *not* rain, *B* will pay the same amount to *A,* it is a wagering contract, because the event on the happening of which the money is to be paid is *uncertain,* and there is the *mutual chance* of *gain* and *loss, i.e.,* the *gain* of *one* is the *loss of* the *other.*

The same idea was expressed by Cotton L.J. in *Thacker* v.*Hardy,* where he observed that the essence of wagering was that)ne party is to win and the other is to lose upon a future event, which, at the time of the contract, is of an uncertain nature.

The event in question may be a *future* event or a *past* event which is *not known* to the parties (as for instance, the result of an election or a chess tournament which is over, but the result whereof is *not* known to the parties). It is *not necessary* that the event on which the bet is placed must be unlawful. The

agreement by way *Agreement by way of* wager is void *even though the event to which it refers is itself legal,* as for instance, a wager on which team would win a cricket match. Both sides must be parties to the wagers; *each side must stand to win or lose* according to the *uncertain or unascertained* event in reference to which the *chance* or *risk* is taken.

In one English case where *A* and *B* deposited £ 200 each with a stake-holder to abide the result of a walking match, and the loser was to forfeit his £ 200, it was *held* that it was a *pure wager. (Diggle* v. *Higge,*-1877 2 Ex. D. 442)

But, in *Babasaheb* v. *Rajaram,* (A.I.R. 1931 Born. 264), the facts were as follows : Two wrestlers agreed to have a wrestling match between them, and the winner was to receive Rs. 1,125 out of the gate-money. If one of the wrestlers failed to turn up, he was to forfeit Rs. 500 to the other. When the defendant failed to turn up, and the plaintiff sued him for Rs. 500, the Bombay High Court *held* that this was *not* a *wager.* Here, neither side stood to lose according to the result of the match; the stakes did *not* come from the pockets of the parties but from the gate-money. Hence, it was *not* a *wager* in the eyes of the law.

Thus, a prize *cannot* be recovered if it is subscribed by the competitors themselves. It is otherwise where the prize is contributed by third parties.

Even a contract of sale of goods would become a wagering agreement if neither party intends *to perform the contract itself, but, only to pay the differences.* In other words, if there is, at the time of the contract, a *common intention to deal* only in differences, the so- called “sale” agreement will amount to a *wager.*

Intention of both parties to gamble essential— It is *not sufficient* if the intention to gamble exists on the part of only *one* of the contracting parties. Contracts are *not* wagering contracts, *unless* it is the intention of *both* the contracting parties, at the time of entering into the contract, *under no circumstances to call for or give delivery from or to each other.* It is *not necessary* that such intention should be *expressed.* ‘If the circumstances are such as to warrant the legal *inference* that the parties never *intended any actual transfer of goods at all,* but only to pay or receive money between one another, according as the market price of the goods should vary from the contract price at the given time, that is *not* a *commercial* transaction but a *wager on the rise or fall of the market." (Kong Yee Lone & Co.,* v. *Lowjee,-2Q* I.A. 239)

FORMS OF WAGER— Wagering contracts may assume a variety of forms, and a type with which the Courts have constantly dealt is that which provides for the *payment of differences,* with or without *colourable provisions* for the *completion* of purchases. Such provisions, if inserted, will *not* prevent the Court from examining the *real* nature of the agreement as a whole. In order to ascertain the *real* intention of the parties, the Court must look at *all the surrounding circumstances,* and must go even behind the written provisions in the *contract, to judge for* itself whether such a provision was inserted for the purpose of *concealing* the true nature of the transaction.

In *Doshi Talakshi* v. *Shah Ujamshi Velsi,* (1899) I Born. L.R. 786, certain contracts were entered into in Dholera *for* the sale and purchase of Broach cotton, a commodity which, it was admitted, never found its way, either by

production or delivery, to Dholera. The contracts were made on terms contained in a printed form which incorporated the rules framed by the cotton merchants of Dholera. Those rules expressly provided for the delivery of cotton in every case and forbade all gambling in differences. The *course of dealing* was, however, such that none of the contracts was ever completed, except by payment of the difference between the contract price and the market price in Bombay on the *vaida* (settlement) day. It was *held* upon these facts, that the contracts were *by* way of wager within the meaning of this section.

THE TEST.— The *true test* to distinguish between a *wagering* transaction and one which is *not so, is whether the same was essentially an agreement to pay differences.* If the Court finds, as a fact, that the *main intention* was to *settle differences,* a term in the contract that either party may, at his option, require completion of the purchase, *i.e.,* delivery, will *not* alter the *character* of the transaction.Such a term is said to be inserted only to *cloak* the fact that it was a gambling transaction and to enable the parties to sue one another *for gambling* debts. It must, however, have been the *intention of both the parties that only the difference was to be given or taken.*

OSTENSIBLE SALE— A transaction, though apparently it partakes of the nature of a *sale,* may *really* be a *wager.*

Thus, *M* agreed to sell his horse to *B* for £ 200 if it trotted 18 miles an hour, but for 1 shilling only if it failed to do so. The horse failed to trot, whereupon *B* demanded the horse for one shilling as agreed. *M* refused. *B* brought a suit against him. The Court *held* that *B* could *not* succeed as the transaction which, though *ostensibly a sale, was in reality a bet: Brogden* v. *Marriott* (1836 3 Bing. NC 88)

CROSSWORD COMPETITIONS.— In *crossword puzzles,* if *skill* plays a substantial part in the result, and prizes are awarded on the merits of the solution, the transaction does *not* amount to a wager.

Thus, *literary competitions* where skill is to be applied, and the best and most skilful competitor gets *the prize, are not wagers.*

WHAT ARE NOT WAGERS— It may be noted that the *mere* fact that a contract for sale and purchase is of a *highly speculative character* cannot *alone* vitiate the transaction as a *wagering* contract. To produce the result, there must be proof that the contract was entered into upon the terms that *performance of the contract should not be demanded,* but that *differences only should be payable.*

Nature of forward purchases— In commercial transactions, it is quite usual for parties to enter into contracts of *forward purchase of goods* or for the *sale* of goods to be delivered at a *future date.* It often happens that in case of a forward purchase, the purchaser has *neither* the *money* nor the *intention* to take delivery of the goods, but the transaction has been entered into solely in the *hope* that the market *will rise* before the date fixed for delivery.

It was, *at one time,* the tendency of Courts in India to readily hold such transactions as wagers and refuse to enforce them. But the *later trend* has been *not* to favour *lightly* a defence of wagering, in case of such *commercial* transactions. It has been *held* in numerous cases that *even speculation does not*

necessarily involve a contract by way of wager, and that a wagering contract is only constituted when there is *common intention to wager.* The Court will look at *all the surrounding circumstances* that may, in any way, throw light on the question in order to ascertain the intention of the parties whether they are *genuinely* and *bona ride* dealing in commodities or *gambling* and speculating in *differences* depending more or less on the *rise* and *fall* of the makret.

PROMISSORY NOTE FOR DEBT DUE ON A WAGERING CONTRACT— Agreements by way of wager being void, no suit will lie on a promissory note for a debt due on a wagering contract. Such a note must be regarded as made without consideration; for a contract which is itself null and void *cannot* be treated as any consideration for a promissory note.

PROBLEM.- *A* and *B* were playing a game of billiards, and agreed that he who lost the game should pay the other a sum of Rs. 1000. *A* lost the game and, as he did *not* have the amount of Rs. 1000 with him, he agreed in writing to pay Rs. 1000 to *B.* Subsequently, *B* files a suit against *A* on the written agreement. Advise *B.*

Ans.- Agreements by way of wager are *void.* A contract which is itself void *cannot* be treated as any consideration. Thus, a promissory note given for a wager is without consideration, and therefore, it *cannot* be sued upon. *B's* suit will be dismissed. [See. *Trikam Damodarv. Lata Amirchand,* (1871) 8 Born, H.C.R. (A.C.J.) 131]

AWARD ON DEBT DUE ON A WAGERING CONTRACT.— An arbitration clause in a wagering contract is *void.* Therefore, an award resulting from a *reference* in such a contract is also void, and can be set aside.

CONTRACT OF INSURANCE AND WAGER DISTINGUISHED.— A contract of insurance is *not a wagering contract,* for *there is some interest in the resulting event.* Such interest is called an *insurable interest.* In the case of fire and life insurance, such insurable interest must exist *at the time the policy is made.* In marine insurance, the holder of the policy must have acquired such insurable interest at the time of loss. Thus, the point of *distinction* between a contract of insurance and a wagering contract is that in the *former* there is *insurable interest* which the law considers *sufficient to validate* it; in the latter there is no such interest.

In fact, a contract of insurance, without insurable interest, is a *wagering* contract, and is, therefore, *void* under S. 30 of the Indian Contract Act. Thus, policies effected for the benefit of persons, who have *no* insurable interest *were known as wager policies or gambling policies* and are *void.* The distinction between a life insurance and a wagering contract is doubtlessly rather *subtle* and probably lies more in the *intention* of the parties than in the form of the contract. Life insurance is a wager, if a person insures the life of another *in whom he has no insurable interest: Alamai* v. *Positive Government Security Life Insurance Co.,* (1898) 23 Born. 191.

In the above case, the High Court of Bombay *held* that in India an insurance for a term of years on the life of a person in whom the insurer had *no interest* was *void* under this section. In that case, the defendant company issued a policy for a term of 10 years for Rs. 25,000 on the life of Mehbub Bi, the wife of a clerk in the

employment of the plaintiff's husband. About a week after, Mehbub Bi assigned the policy to the plaintiff. Mehbub Bi died a month later, and the plaintiff, as assignee of the policy, sued to recover Rs. 25,000 from the defendants. It was *held,* on the evidence, that the policy was *not* effected by Mehbub Bi for her own use and benefit, but had been effected by the plaintiff's husband for his own use and benefit, and that it was *void* as a wagering transaction, *he having no insurable interest in the life of Mehbub Bi.*

Insurable interest- But if a person insures the life of one in *whom he is interested, it is valid, e.g., a master* insuring the life of the *servant, a wife* that of the *husband,* a *creditor* that of the *debtor, etc.* It should be noted that fire and marine insurance are contracts of *indemnity* and *not wagers.* Here too *insurable interest* is required to make the contract *binding.*

'WAGERING' AND 'CONTINGENT' CONTRACTS.— (This is discussed fully under the Law as to Contingent Contracts in the next Chapter.)

TEJI-MANDI TRANSACTIONS— The word *Teji,* which means *brightness'* is used to signify a *rise* in the market price of goods or stock. The word *Mandi which* means *dullness,* signifies a *fall* in the market price of goods *or* stock.

A *teji-mandi* contract is *not* an absolute contract of sale and purchase on the day on which it is made. It is only an ostensible sale by *A* to 6 of a double option of becoming either a purchaser from *A* or seller to him, of certain goods on some future date at a price fixed at the time when the transaction is entered into. On the settling day, the buyer has the right to declare himself either a buyer or a seller. If the market *falls,* he will declare himself a *seller;* if it *rises* he will declare himself a *buyer.*

Thus, suppose the agreed price, or the "unit price" as it is called, of a bale of cotton is Rs.100. *A* buys a double option or *teji-mandi for* Rs. 20 from *B* on Rs. 100, the "unit price". If the price of the goods on the stipulated date *(vaida day)* is Rs. 130, *A* will declare himself to be the *purchaser,* and will get the bale of cotton for Rs. 100. However, his net profit will *not* be Rs. 30, but Rs. 10, as he had paid Rs. 20 to purchase the option. Similarly, if the market price on the relevant date was Rs. 65, *A* would declare himself to be the *seller,* and make a net profit of Rs. 15 (Rs. 35 *minus* Rs. 20 paid for the purchase of the double option). So long as the price fluctuate between the "unit price" and the premium paid or payable thereon, A loses to the extent of the difference between the premium and the market rate prevailing on the day on which *A* exercised his option, or the market rate on the last date on which *A* is bound to exercise that option. But if the price of the goods rises to Rs. 150 or falls to Rs. 50, *A* will declare himself a buyer or a seller respectively, and will, in each case, make a net profit of Rs. 30 (Rs. 50 minus Rs. 20).

In *teji-mandi* transactions, the party selling the double option is really doing no more than backing the stability of the market against its possible fluctuation. The party buying the double option is, on the other hand, backing the fluctuation of the market against its stability.

Their nature.- Formerly, it was *held* in *Jessiram* v. *Tulsidas,* 14 Born. L.R. 617, that *teji-mandi* transactions were in the nature of gambling transactions, and that where it is alleged that they are *not* so, the onus of proof lies heavily on the

party who alleges it. In *Manilal* v. *Allibhai,* 47 Born. 203, however, Shah Ag. C.J., laid down *that the test of common intention to take and grille de/ivery was to he appfsecf: that te/i-manof' transactfons oennof Oe ne/d to do of a* wagering nature *merely* because of their *apparent* nature and characteristics. If it is *proved* that the *common* intention of the. Parties, at the time of the contract, was to deal *only in differences* and in *no* circumstances to call for or to give delivery, then alone the transaction would amount to a wager. This decision was approved by the Privy Council in *Sobhagmal* v. *Mukundchand,* 51 Born. I.P.C.

PUKKA ADATIA AGREEMENTS— Where an up-country merchant wishes to enter into any transaction in the Bombay market, he sometimes employs an agent who is known as a *pukka adatia.* A *pukka adatia* is a person who undertakes or guarantees that on the due date, delivery shall be given (or taken, as the case may be) at the contract price, or the differences paid. In other words, he undertakes to find *goods for cash* or *cash* for *goods*-or to pay the differences.

At one time, the Bombay High Court was of the view that a *pukka adatia* was merely the agent of the up-country merchant, and that, therefore, no transaction between them could be a wager. This view,, however, was reversed by the Bombay High Court in *Bhagwandas* v. *Kanji* (1905 30 Born. 205), where it was *held* that as regards the up- country merchant, the *pukka adatia* was a principal, and *not* an agent, and that the existence of this relationship does *not* of itself, negative the possibility of a contract being a wager between them. This principle was also later approved by the Privy Council.

(A detailed discussion on *Pukka Adatia* will be found in the Chapter on Agency.)

Legal effect of a wagering agreement : Effect on collateral' transactions

It is to be remembered that wagering agreements are *void,* and *not illegal.* This distinction assumes importance in cases of *collateral* transactions. A principal can bring a suit against the betting agent to recover from him the money paid on bets made on his (principal's) behalf. Money paid on bets by the agent on behalf of the principal, even if the latter has revoked his authority, can be recovered. But in Bombay (*i.e.* the areas covered by the former Bombay Presidency), by Act III of 1865, *money paid on wagers cannot be recovered.*

As stated above, wagering transactions are *void,* not *illegal,* except in the erstwhile State of Bombay. The result is that though an agreement by way of wager is *void,* a contract *collateral* to a wagering agreement is *not void.*

Collateral transaction not affected by wager— It must be noted that agreements or transactions which are collateral to wagers are *not affected* by S. 30. So, an agent who has received money on behalf of the principal must pay it to the principal, even though the contract in connection with which he received it may be a wagering agreement. When *A* enters into a wagering agreement with *B* and becomes entitled to a certain amount, *A cannot* recover from *B;* but if *B* has paid the amount to C, A's agent, C must pay it to *A,* and he *cannot* plead the illegality of the agreement under which the amount has been received by him. Similarly, when an agent has paid wagering losses on behalf of his principal, he

can recover the same from the principal, who *cannot* take shelter under the plea of illegality of the original transaction.

Legal position of collateral contracts in Bombay— But in the *areas covered by the former Bombay Presidency, all such collateral* transactions are rendered illegal by Bombay Act III of 1865. The Act embraces *not only* every conceivable form of wagering contracts, *but also* contracts made *in furtherance of* wagering contracts, and all contracts made by way of *security* or *guarantee* for the performance of wagering contracts; it also prohibits all suits for moneys paid or payable in respect of wagering contracts.

Where there is a perfectly lawful contest in a game of skill between two persons, the prize of success in that contest is recoverable, if it is subscribed by *outsiders;* it is *otherwise,* if the amount is subscribed by the *competitors themselves.* Thus - *A* and *B* each deposits Rs. 1,000 with X to abide by the result of a bet between them. *A* wins the bet. X refuses to pay *A.* Can *A or B* recover the amount of deposit from *X*? It is to be remembered that the prohibition contained in S. 30 as regards the recovery of money deposited pending the event of a bet applies to the case of *winners.* Therefore, *A cannot* sue to recover the amount deposited by *B* with X, but *B* can get back his deposit from X *before* the latter has paid it over to *A.* If the case is governed by the Bombay Act, *B cannot* even recover the deposit.

English Law: The position in England is the same as in Bombay, as the Gaming Act declares all collateral transactions to be *equally void.*

End of chapter 13

14th Chapter

CONTINGENT CONTRACTS (Ss. 31-36)

Definition (S. 31)

What is a contingent contract? (2 marks) M.U. Nov. 2011, Nov, 2012, Apr.2014, Apr, 2016.

What is a contingent contract? Discuss the law relating to enforcement of contingent contract. M.U. 2017

Define contingent contracts. What are the rules as to enforcement of contingent contracts? B.U. Nov.2013, Nov.2014

Write a short note on: Contingent contracts. B.U. Apr.2011, Apr.2013, Jan.2017.

A “contingent contract" is a contract to *do or not* to do something, if some event *collateral* to such contract *does or does not* happen.

Illustration- A contracts to pay *B* Rs. 10,000 *if B's* house is burnt. This is a

contingent contract.

*WHAT IS A CONTINGENT CONTRACT***-** As seen earlier, a contract constitutes a relation between the parties to it, and rights arise out of the relation, but it does *not* follow that every contract creates a right which is *immediately enforceable.* The right created may be one which, the parties agree, would be *enforceable only on the happening of some future event* as to which neither of the parties makes any promise, and which is, therefore, *collateral* to the contract. Such contracts are termed *"contingent".*

The *event* upon which such contracts are contingent may be wholly *beyond* the power of the parties, as when a promise is made contingent on the death of some person, *or* it may be more or less within the power of one of the parties, as when it is made contingent on the promisee's marrying a certain person. The material point is that it is *collateral* to the contract and *forms no part of the reciprocal promises of the contract.*

CONTINGENT AND ABSOLUTE CONTRACTS— It is to be noted that a *contingent* contract is quite different from an absolute contract. When *A* agrees to sell his house for Rs. 10 lakhs to *B,* it is an *absolute contract.* But if *A* agrees to sell it to *B* for the same price if *B* married *C* within a period of six months, it would be a *contingent contract.*

In *F. Ranchhoddas* v. *Nathmal Hirachand & Co.*(51 Born. L.R. 491), the defendant contracted to sell to the plaintiff merchandise shipped per "S.S. City of Delhi", and agreed "on arrival of the above said steamer we are bound to give you delivery of the goods." The steamer having arrived without the contracted goods, the plaintiff sued the defendant to recover damages for breach of contract. In these circumstances, the Court *held* that when the defendant agreed "on arrival of the steamer, we are bound to give you delivery of the goods," the parties were dealing with the *mode* of performance, and *not the question of the very obligation to perform the contract.* Therefore, the contract was an *absolute contract,* and *not* a *conditional contract.* The defendant was, therefore, *liable* for breach of contract.

CASE- In one case, a conductor who was recruited by a Bus Company, deposited a sum of money with the Company as security for the due performance of his duty. It was provided that this money was to be forfeited in case of any dereliction of duty on the conductor's part, as to which a certificate (to this effect) from the Manager of the Bus Company was to be final and conclusive. When the Company forfeited the amount, the conductor sued to recover the deposit, and it was *held* that he was bound by the certificate of the Manager.

The following are the *six* rules contained in Ss. 32 to 36 relating to contingent contracts:

1. Contracts contingent on an event *happening,* when *enforceable* (S. 32)

Contingent contracts *to do or not to do* anything if an uncertain future event *happens, cannot be enforced* by law *unless and until that event has happened.*

If the event becomes *impossible,* such contracts become *void.*

illustration.- (a) *A* makes a contract with *B* to buy *B's* horse if *enforcement of A* survives *C.* This contract *cannot* be enforced by law unless and until C dies in

A's lifetime.

(b) *A* makes a contract with *B* to sell a horse to *B* at a specified price if *C,* to whom the horse has been offered refuses to buy him. The contract *cannot* be enforced by law unless and until *C* refuses to buy the horse.

(c)*A* contracts to pay *B* a sum of money when *B* marries *C. C* dies without being married to *B.* The contract becomes *void.*

2. **Contract contingent on an event *not happening* when *enforceable* (S. 33)**

Contingent contracts *to do or not to do* anything if an uncertain future event does not happen can be enforced when the happening of that event becomes *impossible,* and *not before.*

Illustration.- A agrees to pay *B* a sum of money if a certain ship does *not* return The ship is sunk. The contract *can be enforced* when the ship sinks.

3. **Contracts contingent on conduct of person, when event deemed impossible (S. 34)**

If the future event on which contract is contingent is the *way in which a person will act at an unspecified time, the event is to be considered* to become *impossible* when such person does anything which renders it *impossible that he should so act* within any definite time, *or* otherwise than under further contingencies.

Illustration.- A agrees to pay *B* a sum of money if *B marries C. C* marries D. The marriage of *B* to *C* must now be considered impossible, *although it is possible* that *D may die* and that *C may* afterwards marry *B.* (If later, *B* does actually marry C as *D's* widow, *it will not revive the old obligation of A* to pay the sum, for that came to an end when C married *D.)*

4. **When contracts become *void*, which are contingent on *happening* of a specified event within fixed time [S. 35(1)]**

Contingent contracts *to do or not to do* anything if a specified uncertain event happens *within a* fixed time *become void* if, at the expiration of the time fixed, such an event has *not* happened, *or,* if *before* the time fixed, such event becomes *impossible.*

Illustration.- A promises to pay *B a* sum of money if a certain ship returns within a year. The contract may be *enforced,* if the ship returns within the year, and becomes *void* if the ship is burnt within the year.

5. **When contracts may be enforced which are contingent on a specified event *not happening* within a fixed time [S. 35(2)]7**

Contingent contracts *to do or not to do* anything if a specified uncertain event does *not* happen within a fixed time, may be enforced by law when the time fixed has expired *and* such event has *not* happened, *or* before the time fixed has expired, if it becomes certain that such event will *not* happen.

Illustration.- A promises to pay *B a* sum of money if a certain ship *does not* return within a year. The contract *may be enforced* if the ship does *not* return within the year, *or* is burnt within the year.

6. **Agreements contingent on impossible events void (S. 36)**

Contingent agreements *to do or not to do* anything, if an impossible event happens, are *void*—whether the impossibility of the event is *known or not* to the parties to the agreement at the time when it is made.

Illustrations.- (a) *A* agrees to pay *B* Rs. 1,000 if two straight lines should enclose a space. The agreement is *void.*

(b) *A* agrees to pay *B* Rs. 1,000 if *B* will marry *D's* daughter *C. C* was dead at the time of the agreement. The agreement is *void.*

'CONTINGENT CONTRACT' AND 'WAGER' DISTINGUISHED- There are *six points of distinction* between a contingent contract and a wager:

1. A contingent contract is defined as "a contract to do or *not* to do something, if some event collateral to such contract does or does *not* happen". A *wager* is a contingent contract. A wager has been defined as a contract by *A* to pay money to *B* on the happening of a given event, in consideration of *B* paying to him money in the event not happening. Thus, it is an agreement by mutual promises, each of them *conditional* on the happening or *not* happening of an *unknown* event. In the case of every contingent contract, it is *not necessary* that there should be *mutual promises.*
2. All wager contracts are contingent contracts, but all contingent contracts are *not* by way of wager.
3. In a wager, the uncertain event Is beyond the power of both the parties, whereas in a contingent contract, the event *may be* within the power of one of the parties.
4. In a wager, the parties are *not* interested in the occurrence of the event, apart from the money earned or lost. In a contingent contract, they are so interested. For example, *A* insures the life of *B;* the transaction is a wager if *A* has no interest in *B's* life or death; it is a contingent contract if *A* has an insurable interest in the life of *B.*
5. In a wager, the future event is the *sole determining factor* of the contract; in a contingent contract, the future event is *merely collateral or incidental.*
6. Wagers are *void* (S. 30), but a contingent contract is *not, unless* it is dependent on an impossible event (S. 36).

DIFFERENCE BETWEEN 'AMBIGUOUS' AND 'CONTINGENT' CONTRACTS.—

1. A contract is said to be *ambiguous when its terms* are *not* clear. This is ordinarily due to defective or unintelligible *wording.* A contract is *contingent* when it is made to depend upon the happening or non-happening of an event.
2. An ambiguous contract may become void due to ambiguity; whereas a contingent contract is *not* void — except when made to depend upon an *impossible* event under S. 36.

End of chapter 14

15th Chapter

THE PERFORMANCE OF CONTRACTS (Ss. 37-67)

Explain the provisions of the Indian contract act relating to performance of

contracts. B.U. Apr.2015

State the two essentials of a valid tender of performance. (2 marks)
M.U. Nov. 2014 May 2018
Write a short note on: Anticipatory breach of contract. M.U. Nov.2015, Apr.2016
What is anticipatory breach of contract? (2marks) M.U. 2012
What are the remedies available to a person aggrieved by an anticipatory breach of contract? (2marks) M.U. Apr. 2015
Write a short note on: Devolution of joint rights and liabilities (2marks)
B.U. Apr.2015
When two or more persons have made a joint promise, whom can the promise compel to perform the promise? (2marks)M.U.2011, Apr2013, Nov.2013, May2017
Write a short note on: Time and place of performance of contracts? B.U.2013
What is the effect of failure to perform at a fixed time, a contract in which time is essential? (2marks) B.U. May2012, Nov.2013
Write a short note on: Time is the Essence of contract. B.U.2016
Write a short note on: Appropriation of payment. B.U. 2017
Write a short note on: Clayton's rule. B.U.2011, Nov.2012, Apr.2015
Write a short note on: Rules as to appropriation of payments. B.U. Nov.2009
Give two ways in which a contract may be discharged by agreement. (2marks) M.U.Nov.2014
What are the various modes of discharge of a contract? M.U. Apr.2015
Explain briefly the various modes of discharge of a contract. M.U. May2018
Discuss the doctrine of frustration of contracts with the help of decided cases.M.U.Nov.2012.Apr.2014,Apr.2016
What is novation? (2marks)B.U.Nov2015
Write a short note on: Novation M.U. Apr.2011, Nov.2012
What is the obligation of a person who has received any advantage under a contract which becomes void? (2marks) B.U. May2012, Jan.2017.
What is Novation? (2marks) B.U. Nov.2015
Write a short note on Novatio.M.U.Apr.2011, Nov.2012
What is the obligation of a person who has received any advantage under a contract which becomes void? (2marks) B.U.May2012, Jan2017

Chapter IV, Ss. 37 to 67, deals with various rules as to *performance* of contracts. This Chapter can be divided into the following *seven heads:*

1. *Obligation* of Parties to *perform* Contracts: Ss. 37-39.
2. *By whom* Contracts must be performed: Ss. 40-45.
3. *Time, Place* and *Manner* of Performance: Ss. 46-50 & 55.
4. Performance of *Reciprocal Promises*: Ss. 2, 51-54 & 57.
5. Performance of *Alternative Promises:* S. 58.
6. Rules as to *Appropriation of Payments*: Ss. 59-61.
7. Modes of *Discharge of Contracts:* Ss. 37-39, 56, 62-64 & 67.

1. OBLIGATION OF PARTIES TO PERFORM CONTRACTS,

(*i.e,* CONTRACTS WHICH MUST BE PERFORMED)

(Ss. 37-39)

The following *three* topics fall under this head:

A. Who must perform the promise (S. 37)

B. The law as to tender of performance (S. 38)

C. Effect of refusal of a party to perform the promise wholly *(Anticipatory breach of contract)* (S. 39)

A. Who must perform the promise (S. 37)

The *parties* to a contract must *perform,* or *offer* to perform, their respective promises — *unless* such performance is *dispensed with* or *excused* under the provisions of this Act or of any other law.

Thus, a party is released from performing his part of the contract *by law, e.g.,* an insolvent from paying his debtors, *or* a person whose performance of a transaction is declared by law to be *illegal.*

A person's promises are binding on his *representatives* in case of his death, *unless* a contrary intention appears from the contract.

Illustration- A promises to deliver the goods to *B* on a certain day on payment of Rs. 1,000. *A dies before that day. A's* representatives are bound to deliver the goods to *B,* and *B* is bound to pay Rs. 1,000 to A's representatives.

But when the *personal skill* and *qualities* are involved in the performance of the contract, the contractual relations are *put to an end* by the *death* of the promisor.

Illustration.- A promises to paint a picture for *B* by a certain day, at a certain price. *A* dies before that day. The contract *cannot* be enforced either by A's representatives or by *B.*

WHETHER A THIRD PARTY CAN DEMAND PERFORMANCE OF A CONTRACT

General Rule- Ordinarily, a contract affects only the persons who are *parties* to it, *and the general rule is that a person cannot acquire rights under a contract to which he is not a party.* As seen earlier, a stranger to the contract *cannot* sue upon the contract. So, an agreement between *A* and *B* that *B* is to pay money to or do anything for C, in cases where *B is* not *C's* agent or trustee for him, confers no right of action *on C.*

Exceptions.- But where a contract between *A* and *B* is intended to secure a benefit to *C, as a beneficiary (cestui que trust), C* can sue *in his own right* to enforce the trust; a third person *can* claim if the agreement is such as *to make the promisor a trustee for such third persons.* In other words, the third person can claim as a *beneficiary.*

The following are *seven cases,* which are exceptions to the general rule stated above. In these cases, a third person who is *not* a party to the contract *can* enforce the same:

(a) Where a contract between *A* and *B* creates an express or an implied *trust* in favour of *C;*

(b) Where a party is *estopped* from denying his liability to pay or do something for a third person;

(c) Where money to be paid under the contract is *charged* on some immovable property;
(d) Where there is a family settlement;
(e) Where on a partition of a joint family, a benefit is secured to female members of the family who were entitled to *maintenance* or *marriage expenses;* and
(f) Where there has been an assignment of rights under a contract in favour of a third person by act of a party or by operation of law;
(g) Under certain statutes, *e.g.* the Insurance Act.

Assignments of Contracts

The Indian Contract Act does *not* specifically deal with the assignment of a contract. The general principle of the law is that a third person can *neither* sue *nor* be sued in the case of contract, but under certain circumstances, a contract may be assigned, *either* {1) by operation of law, *or* (2) by act of parties.

(1)Assignmentby operation of law

An assignment of a contract can take place by operation of law, namely, by purchase or lease of interest in land, *or* by death *or* bankruptcy.'

(2) Assignment by act of parties

The *burden* or *liability* of a contract *cannot* be assigned without the consent of the other party to contract. A promisor *cannot* assign his liabilities, *i.e.,* a promisee *cannot* be compelled by the promisor or by any other party to accept the performance of the contract from any person other than the promisor.

So also, there can be no assignment of even the *benefit* under a contract, if there are obligations involving personal qualifications : *Griffith* v. *Tower Publishing Co.,* (1877) 1 Ch. 21; *Torkington* v. *Magors,* (1902) 2 K.B. 430.

But, if the contracts are *not* of a personal character, then even if they are contracts of an executory character, they are assignable by the parties. In such a case, the assignee can sue in his own name: *Tod* v. *Lakhmidas,* (1892) 16 Born. 441. But, where the contract is still executory, as for instance, if goods are yet to be delivered, the *burden* of a contract *cannot* be assigned without the consent of the other party.

Benefits under a contract of a *personal nature are not assignable,e.g.,* a contract of service, *or* marriage or where the parties rely on the personal qualification or qualities of each other. Where the parties, at the time of contracting, agree that the contract may be enforced by or against the representatives and assignees of each,*even the burden* along with the rights *may* be assigned : *Tolhurt* v.*Associated Cement Manufacturers,* (1903) A.C. 441.

In cases where it appears that the promisor was *not* selected for his personal qualifications, he may be permitted to perform the contract vicariously *(i.e.,* through another). Thus, *A* agrees to paint *B's* wagons, *A* may have the work done by if *A* was *not* elected for his personal skill; but if the work snoul)e ill-done *A* will remain liable to *B.* Also, *B* will be liable for the painting charges only to *A*: *British Wagon Co.* v. *Lea,* 5 Q.B.D. 149. However, if the original contract was that *A* would paint B's *portrait, A cannot* have the work done by *C,* another artist, as normally in such cases, the artist is chosen for his personal skill.

Broadly speaking therefore, the *benefit* of a contract may be assigned, but *not*

the *burden.* Liability, may, however, be assigned *with the consent of the other party.*

B. Tender (Offer) of Performance: Effect of refusal to accept Tender of Performance (S. 38)

Tender of performance is *not* the same thing as *actual performance, but an offer* of performance. Thus, a tender may be an offer to *deliver goods* or to *pay* a sum of *money.* A contract to deliver goods is completely discharged by tendering the goods for acceptance according to the contract. If the goods are *refused,* they need *not* be offered *again,* and the seller is discharged. He can *bring an action for non-performance,* or *defend* an action for *non-delivery.* In other words, tender is an *attempted performance* of a promise to *do,* or *pay* something by one party to the other. If such an offer of performance is *refused* by the other party, the *person* making the offer is *not responsible* to the other for non-performance as regards his own rights; nor does he lose his rights under the contract. (S. 38)

In other words, if a valid tender is made, but the other party *refuses* to accept it, the party tendering,—

(i) *is free from liability* under the contract; *and*

(ii) He does *not* lose his rights under the contract.

Its essentials

However, in order to be a valid tender, it must fulfil the following three *conditions:*

1. It must be *unconditional.*

Thus *M,* a debtor, offers to pay a smaller sum of money (Rs. 4,000) to *N,* his creditor, on condition that *N* should pass a receipt for the whole amount due (Rs. 5,000). This is *not* a valid tender, as it must be of the *whole* sum due.

However, a tender of the whole sum due "under protest" is a good tender, as it is *not* a conditional tender.

Scott v. *Uxbridge Rly Co.* 1 (1865) I.C.P. 596— *A,* claiming that only Rs.100 are due, offers to pay *under protest,* Rs.125 which *B* demands as being due. The tender is *valid* and *unconditional,* in spite of the protest, which imposes no condition.

Behari Lai v. *Ram Ghulam,* 24 All. 46— *A,* the debtor offers to pay *B* the debt by instalments and tenders the first instalment. This is *not* a valid tender, *not* being of the whole amount due, *unless* the contract provides for payment by instalments.

A offers to pay *B* the *principal amount* of the loan. This is *not* a valid tender, as the whole amount of *principal and interest* is *not* offered.

A owes money to a joint family of *B, C* and *D.* He tenders the amount loaned with interest to *B,* the *karta.* The tender is *valid,* as having been made to one of several joint promisees. But, if a tender is made to a *junior member* of the family, it will *not* be a valid tender.

2. It must be made at *proper time* and *place,* and under such circumstances as to give the other party a reasonable opportunity of *ascertaining* that the person offering to perform is able and willing *there and then,* to do the whole of that which he has promised.

Veeraya v. *Sivayya,* 27 M.L.J.482- *A* offers, by post, to pay *B* the amount *A* owes him. This is *not* a valid tender, as *A* is *not* able there and then" to pay. Actual production of money is necessary.

So also, *A* borrows from *B,* Rs.1,000 promising to repay the same with interest at 6% per annum after one year. Six months after the date of the loan, *A* tenders to *B* Rs. 1000 with interest uptodate. *B* is *not* bound to accept it. Tender must be made at the *proper* time—neither *before* nor *after* the appointed time.

A is a tenant of *B. B* offers rent due by him to *X,* the manager of *B,* at a fair. *X* is *not* bound to accept, as the tender is *not* made at a proper place: *Raja Sati Prasad* v. *Manmath,* 18 I.C. 442. (As to what is proper time and place, see Ss. 46 to 50 below.)

3. If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing *offered is the thing which the promisor is bound by his promise to deliver.* Thus, a tender of goods sold under a contract made under such circumstances that the buyer has very little time at his disposal to examine the goods tendered is *not* a valid tender.

Illustration— A contracts to deliver to *B* at his warehouse, on the 1st March, 2013, 100 bales of cotton of a particular quality. In order to make an offer of performance falling within this section, *A* must *bring* the cotton to *B's* warehouse on the appointed day, under such circumstances that *B* may have a *reasonable opportunity* of satisfying himself that the thing offered is cotton *of the quality contracted for,* and that there are 100 bales.

Offer to one of several joint promisees— Lastly, it may be noted that an offer to one of several joint promisees has the *same* legal consequences as an offer to *all* of them.

As regards tender of a debt to *one* only of *joint creditors,* there is a difference of opinion. According to the Madras High Court, it is *valid* and will *discharge the debtor.* According to the Calcutta, Bombay, Allahabad and Patna High Courts, it is *not valid.*

FURTHER EXAMPLES.— A tender by cheque is *not a* "legal tender" as it is *not* the *current coin* of the realm, but if the cheque is *accepted,* the creditor *cannot afterwards* raise an objection.

When the contract provides for payments by *instalments,* a tender of an instalment is a *good* tender. In the absence *of* such a provision, as the creditor is entitled to the *whole* sum, a tender to pay a loan *by instalments is not valid.*

A tender of goods made at such a *late* hour of the appointed day that the buyer has no time to inspect them is *not* good. The buyer must have a *reasonable opportunity of inspection.*

C. Effect of refusal of a party to perform promise wholly *(Anticipatory breach of contract)* (S. 39)

S. 39 deals with the effect of breach of contract *wilfully* caused by a party thereto. S. 39 can be analysed thus—

When a party to a contract— ,

(a) has refused to perform, *or*- hispromise in its entirety

(b) has disabled himself from performing- his promise in its entrity

— the promisee may *put an end to the contract, unless* he has signified (by words or conduct) his acquiescence in its continuance.

Illustrations.— (a) *A,* a singer, enters into a contract with *B,* the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her Rs. 100 for each night's performance. On the sixth night, *A wilfully* absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) *A,* a singer, enters into a contract with *B,* the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of Rs. 100 for each night. On the sixth night, *A wilfully* absents herself. With the assent of *B, A* sings on the seventh night. *B* has signified his acquiescence in the *continuance* of the contract, and *cannot now* put an end to it, but is entitled to *compensation* for the damage sustained by him through *A's* failure to sing on the *sixth night.*

ANTICIPATORY BREACH OF CONTRACT— *Anticipatory breach of contract* is its breach or repudiation *before the time fixed for its performance.* Where a party to a contract *refuses* to perform his part of the contract *before the actual time arrives,* the law gives the promisee an *option* whereby he may *either* (a) elect to *rescind* and may then (although the time for performance has *not* yet arrived), treat the contract *as at an end, and at once sue for damages; or* (b) elect *not* to rescind, but to treat the contract as *still operative,* and *wait* for the time of *performance,* and *then* hold the other party responsible for the c*onsequence* of non-performance. But, if he elects to take *this* course, the contract still remains operative for the benefit of *both* parties, and the party who has previously repudiated may, notwithstanding his repudiation, still perform it, if he wants to.

In *Frost* v. *Knight,* L.R. 7 Ex. 111, the defendant promised to marry the plaintiff as soon as the defendant's father died. However, even during the father's lifetime, the defendant refused to marry the plaintiff. Although the time for performance had *not* arrived, the plaintiff was *held* entitled to sue for breach of a promise to marry.

So also, in *Hochster* v. *De la Tour* (22 L.J. Q.B. 455), which is the *leading English case* on the point, the defendant promised to engage the plaintiff as his courier on a continental tour from June1, for three months at £ 10 a month. Before that day, the defendant changed his mind, and wrote to the plaintiff that he did *not* want him. The plaintiff, without waiting further, and *before* June 1, sued the defendant for breach of contract. It was *held* that the contract had been broken by express renunciation, and *the plaintiff was not bound to wait until the day of performance.*

Similarly, *A,* a printer, agrees to do all printing work for *B* during a period of three years at certain rates. After one year, *A* writes to *B* that he would *not* do any more printing work for *B. B* certainly has his remedy against *A,* and he can accept A's renunciation as an immediate *breach* of the contract, and sue him for damages.

Refusal to perform.— It is to be remembered that either party must have, *in*

dear terms, refused to perform his part of the contract. As to what act amounts to a *refusal* is a question of fact to be determined in each particular case.

Thus, in *Sooltan Chand* v. *Schiller,* (1878) 4 Cal. 252, the defendants agreed to deliver to the plaintiffs 200 tons of linseed at a certain price in April and May, the terms as to payment being cash on delivery. Certain deliveries were made by the defendants between the 1st and 8th of May, and a sum Rs. 1,000 was paid on account by the plaintiffs, which left a large balance due to the defendants in respect of linseed already delivered. This balance was *not* paid, and the defendant thereupon wrote to the plaintiffs, cancelling the contract and refusing to make further deliveries under it. The plaintiffs answered, expressing their willingness to pay on adjustment, a sum which they claimed for excess refraction, (*i.e.* excess of impurities) and an allowance for some empty bags. The defendants stated that they would make no further delivery, and the plaintiffs thereupon bought in other linseed, and sued the defendants for damages for non-delivery of the remaining linseed. Upon these facts, it was *held* that there was no *refusal on* the part *of* the plaintiffs to pay for the linseed delivered to them, as they were *willing* to pay the sum due as *soon as their cross-claims were adjusted.*

So also, in *Rash Behary* v. *Nrittya Gopal,* (1906) 33 Cal. 477, *A* agreed to purchase from *B,* under two contracts, 300 tons of sugar to be delivered at different dates. *A* having failed to take delivery under the first contract, *B* claimed to rescind both the contracts. It was *held* that there was no refusal on the part of *A* within the meaning of this section, and that *B* was *not* entitled to rescind the second contract.

ANTICIPATORY BREACH, HOW CAUSED— An anticipatory breach may take place in *two* ways:— (A) *By repudiation of the contract or* (B) *By impossibility of performance brought about by the act of one of the parties.*

(A) *Anticipatory breach by repudiation.*— When a party to a contract *expresses or communicates* to the other party, *before* the due date of performance of the contract, his intention *not* to perform it, he is said to *repudiate* the contract. If a party *repudiates* the contract, the other party is *not bound to wait* in order to see whether the contract is *actually* broken when the time of performance arrives. (See *Frost* v. *Knight* and *Hochster* v. *De la Tour,* above.)

But a party is *not bound* to take such advantage of repudiation. He can *keep the contract alive* if he so chooses, until the due date of performance and *then* sue the other party for *damages* and *rescission.* But, it should be remembered that if he fails to take advantage of the repudiation by *rescinding* the contract, *it remains alive upto the due date of performance* with all the normal incidents attached to it. If, therefore, in the interval between repudiation and the due date of performance, some event happens which enables the *repudiating* party *himself* to avoid the contract, he is *entitled* to do so, *notwithstanding his prior act of unaccepted repudiation.*

Thus, if *A* agrees on the 1st January to sell a horse to *B* on the 2nd February, and if he informs *B* on the 15th January that he will *not* sell his horse at all, *B* can *at once* sue *A* for damages. But if he disregards the repudiation and waits till the 2nd February, and if before that date, the horse dies, *B cannot* recover any

damages from A; for, the contract comes to an end by the death of the horse, and *A* can take advantage of this fact.

Further Illustrations

(1) *X* agrees to sell certain goods to *Y,* delivery to be given at the end of the month. The very next day, *X* writes to *Y* and says that he will *not* deliver the goods; *Y* replies that he does *not* accept *X's* wrongful repudiation of the contract. At the end of the month, *X* delivers the goods to *Y,* who refuses to accept them, on the ground that *X* had earlier repudiated his contract. *X* sues *Y* for breach of contract. Will *X* succeed?

Yes. On the ground stated above, *X* will succeed. As *Y* has elected to ignore the repudiation by *X,* and to wait until the time for performance arrives, he remains liable to perform his part of the contract, and *X* is entitled to complete the contract *notwithstanding his previous repudiation.*

(2) *M* has contracted to marry *N* in two years' time. Shortly after the contract, he breaks off the engagement without *N's* consent. *N* writes repeatedly begging him to adhere to his contract. Just before the expiry of two years, a change in law makes it illegal for *M* to marry *N.* On the expiry of the two years, *N* sues for the breach of the promise.

Here, *M* breaks off the engagement without *N's* consent. *N* does *not* put an end to the contract, but begs *M* to adhere to his contract. *N could* have put an end to the contract without waiting for the expiration of two years' time, and *could* have sued *M* for damages. But *N* keeps on writing to *M* to adhere to his contract, and thus *impliedly consents to the continuing* of the contract. *M* could have, therefore, chosen to fulfil the contract any time within two years, and he can now take advantage of the supervening circumstances, which allow him to decline to complete it. *M* is excused from marrying *N,* since a change in the law makes it illegal for *M* to marry *N* (under S. 56). *M* is, therefore, *not liable* to pay damages to *N.*

(3) By a charter-party, the defendant contracted to load a cargo of wheat on the plaintiff's ship at Odessa. After the arrival of the ship, the defendant's agent refused to load the cargo. The master of the ship did *not* accept the refusal as a repudiation and continued to demand the cargo. Before the last day on which the defendant was entitled to load, war broke out between England and Russia, and the contract was thereby dissolved. The ship-owner (by his agent, the master) having elected to treat the contract as still operative, it was kept open for the benefit of both parties until dissolved by the declaration of war. There was consequently no breach, and the plaintiff would have no cause of action.

(4) *A* agrees to supply *B* straw from October to June, in specified quantities, payment to be made on delivery of each load. The straw is supplied till January, by which time *B* is in arrears for payment. *A* demands payment and *B* tenders the amount of arrears, except the price of the last load, which *B* wishes to keep in hand. *A* cancels the contract, saying that he would *not* deliver except *for* cash on delivery. *B* sues. His suit must fail, as he refused to perform his contract in *its entirely, i.e., totally or absolutely,* by keeping back the price of one load: *Withers* v. *Reynolds,* (1831) 2 B & Ad. 882.

(B) *Anticipatory breach of contract by impossibility of performance*— The

second way in which an anticipatory breach may take place is when it is brought about by *either* party to the contract by *his own voluntary act.* There may also be an anticipatory breach of contract (on account of the impossibility of performance) *brought about by the act of the parties.* Thus, if a person contracts to sell a specific thing (as for instance, his white race-horse) to another on a particular day, and if, *before* that date, he sells it to somebody else, the other party can at once bring a suit for rescission and damages.

MEASURE OF DAMAGES IN AN ANTICIPATORY BREACH OF CONTRACT— If the contract is ended at once, the damages will be measured by the difference of price prevailing on the *date of breach* and the contract price; but if such party elects to treat the contract as subsisting and waits till the date fixed for performance, the damages payable will be measured by the difference between the contract price and the price prevailing on the date fixed for performance.

Thus, *A* sells 100 bales of cotton to *B,* a textile manufacturer, at Rs. 500 per bale to be delivered on 1st April. On 1st March, *A* informs *B* that he will *not* sell, supply of cotton in the market being short. *B* secures his requirement on 15th April at Rs. 650 per bale, but in the meanwhile his mill remains closed for 10 days on account of lack of cotton and *B* suffers a further loss of Rs. 10,000. Prices of cotton were as follows : 1st March : Rs. 550 per bale; 1st April : Rs. 600 per bale; measured by the difference between the market price on 1st April and the contract price as the contract was to be performed on that date. On 1st March, *B* could have elected to treat the contract as repudiated, but as he *did nothing,* the contract continued to be alive and *A* could, despite his previous refusal, have *performed* the contract on 1 st April and thus cancelled his notice of refusal to perform. Damages for closure of the mill are, however, too *remote.* (See S. 73.)

2. BY WHOM CONTRACTS MUST BE PERFORMED ' (9s. 40-45)

S. 40 lays down *the first rule,* namely, that if it appears from the nature of the case that it was the *intention of the parties* to any contract that any promise contained in it should be performed *by the promisor himself,* such a promise must be performed by the *promisor.*

Illustration— A promises to paint a picture for *B. A* must perform this promise *personally.*

B, a sculptor, agrees to make a statue for *A,* but before completing it, *B* dies. *X, B's* son, an equally skilled artist, insists on performing the contract and on *A's* paying him. He *cannot,* as the intention of *A* and *B* was that *B* should make the statue himself, as this is a contract of a personal nature.

In *other* cases, the *promisor* or his *representatives* may employ a *competent person* to perform it.

Illustration— A promises to pay *B* a sum of money. *A* may perform this promise either by *personally paying* the money to *B or* by *causing* it to be paid to *B* by another; and, if *A* dies before the time appointed for payment, his *representatives* must perform the promise *or* employ some proper person to do so.

The *second rule,* laid down in S. 41, provides that when a promisee accepts

performance of the promise from a *third* person, he *cannot* afterwards enforce it against the *promisor.*

Two important topics need to be considered in this connection, namely,

Devolution of joint rights

Devolution of joint liabilities.

Devolution of joint rights (S. 45)

Under S. 45, when a person has made a promise to two or more persons *jointly,* then (*unless* a contrary intention appears from the contract) the *right to claim performance* rests with the *joint promisees* during their joint lives, and after the death of any one of them, with the *representative* of such deceased person *jointly* with the *survivor or survivors* - and after the death of the *last survivor,* with the representatives of *all jointly.*

Illustration— A, in consideration of Rs. 5,000 lent to him by *B* and *C,* promises *B* and *C* jointly to repay them that sum with interest on a day specified. *B* dies. The right to claim performance rests with *B's* representatives jointly with *C* during *C's* life, and after the death of *C,* with the representatives of *B* and *C* jointly. .,

PROBLEM— X and *Y* execute a pro-note in favour of *A* and *B* for Rs. 1,000. Will *A* succeed if he sues *X* alone on the pro-note?

Ans— Under S. 45, all the promisees during their joint lives are *jointly* entitled to claim performance. It is *not* open to one of the joint promisees to sue alone either for performance of the promise in its entirety *or* to the extent of his share. Thus, *A* will *not succeed* if he sues alone. *B* must join him, and if he refuses to do so, he must be made a co-defendant.

ENGLISH LAW - The general rule of *English law* is different from the rule contained in S. 45. Under the English law, joint contracts are enforceable by the survivors (or survivor) alone. The *only exception,* founded on grounds of equity, is in respect of debts due to partners.

Devolution of joint liabilities (Ss. 42-44)

There are *three rules* relating to the law as to devolution of joint *liabilities.*

1st rule (S. 42)

When two or more persons have made a *joint promise,* then *(unless* a contrary intention appears from the contract), *all* such persons during their *joint lives,* and after the death of any *one* of them, his *representative* jointly with the *survivor or survivors,* - and after the death of the last survivor, the representatives of all jointly — must *fulfil* the promise.

It will be noticed that S. 42 has been worded in language similar to that of S. 45, with this difference that S. 42 deals with *joint liabilities* whereas S. 45 deals with *joint rights.*

ENGLISH LAW.— The Indian rule, which is in accordance with the modern mercantile usage, makes the *representatives* of the deceased (so far as the assets go) liable *equally* with the *survivors. In England,* upon the death of one of the several joint contractors, the legal liability under the contract devolves upon the *survivors.* The representatives of the deceased *cannot* be sued at law either " *alone or jointly* with the survivors.

2nd rule (S. 43)

When two or more persons make a *joint* promise, the *promisee may,* (in the

absence of an express agreement to the contrary), *compel* any one or more of joint promisors to perform the *whole of the promise.*

*Illustratio*n- *A, B* and *C* jointly promise to pay *D* Rs. 3,000. *D* may compel either *A* or *B* or *C* to pay him Rs. 3,000.

Right of joint promisor (S. 43)

S. 43 also lays down the right of a joint promisor who has been made to pay the *whole* amount. It provides as follows:

Each of two or more joint promisors may compel every *other* joint promisor to *contribute equally* with himself to the performance of the promise (*unless* a contrary intention appears from the contract). If any of the joint promisors makes a default in such contribution,- the *remaining joint promisors* must bear . the loss arising from such default in *equal shares.*

Illustrations.— (1) *A, B* and *C* jointly promise to pay D Rs.

3,000. *D* may compel either *A* or *B* or C to pay him Rs. 3,000.

(2) *A, B* and *C* jointly promise to pay *D* the sum of Rs. 3,000. C is compelled to pay the whole. *A* is insolvent, but his assets are sufficient to pay one half of his debts. *C* is entitled to receive Rs.500 from A's estate, and Rs. 1,250 from *B.*

(3) *A, B* and *C* are under a joint promise to pay *D,* Rs. 3,000. *C* is unable to pay anything, and *A* is compelled to pay the whole. *A* is entitled to receive Rs. 1,500 from *B.*

It is to be noted that before the above rule can be applied, it must be seen if there is a 'contract to the contrary'. Thus, *A, B* and *C* jointly promise to pay *D* Rs. 3,000. It is also stipulated that the amount is to be recovered by *D* from *A, B* and *C* jointly and not from *A* or *B* or C alone. Can *D* compel *A* to pay him the amount? *No, D cannot* compel *A* to pay the whole amount. For here, the joint and several liability is *barred* by an *express agreement to the contrary.*

The *Explanation* to section 43 provides that nothing in this section shall—

(i) prevent a surety from recovering from the principal debtor, payment made by the surety on behalf of the principal debtor, *or*

(ii) entitle the principal debtor to recover anything from the surety on account of payments made by the principal debtor.

Thus, if *A* takes a loan from *B,* and *C* guarantees the loan, A is called the principal debtor, and *C* the surety. The above rule provides that if *A* fails to pay *B,* and therefore, *C* has to pay *B, C* can recover the entire amount from *A.* So, also, if *A does* pay *B,* he *cannot* recover any amount from *C.*

A, B and *C* are under a joint promise to pay Rs. 3,000 to *D, A* and *B* being only sureties for *C.* As *C* fails to pay, *A* and *B* are compelled to pay the whole sum. They are entitled to recover it from C.

PROBLEMS.— 1. *X* sued *A, B* and C alleging that they were partners. At the hearing, *A* admitted *X's* claim, and judgment was thereupon passed against *A* for the amount claimed. *X* wants to proceed with the suit against 6'and *C.* Advise *B* and *C.*

Ans— Here, *X* will succeed against *B* and *C.* Their liability was joint and several. *But,* whatever *X* recovers from *A* will be taken into account while ascertaining the amount to be paid by *B* and *C.*

2. A firm consisting of two partners *A* and *B,* owes a sum of Rs. 5,000 to *C. C*

filed a suit to recover the sum against *A* only, and obtained a decree. The decree remains unsatisfied. *C* now wants to file a suit against *B* to recover the same amount.

Ans— *C* will succeed, presuming that his suit against *B* is *not time-barred.* S. 43 makes the liability on all contracts joint and several, *and* allows a promisee to sue one or more of the several joint promisors as he chooses, and excludes the right of any of them to be sued along with his co-promisor or co-promisors. S. 43 applies as much to *partners* as to the other *co-contractors.*

3. *A, B* and *C* jointly pass a promissory note in favour of *P* for Rs. 800. Out of this sum, *A* takes Rs. 500, and *B,* Rs. 300. *C* is a surety for *B* and *C. B* becomes insolvent and *P* recovers the whole debt from *A.* Can *A* recover any contribution from C? If so,to what extent?

Ans.— The *Explanation* to S. 43 provides that nothing in S. 43 entitles the principal debtor to recover anything from the surety on account of payments made by the principal. Therefore, *A cannot* recover any contribution from *C.*

3rd rule-Effect of release of one joint promisor (S. 44)

The third rule declares the effect of release of one joint promisor by the promisee. S. 44, which deals with the point, can be summarized thus:

The release of one of the joint promissors by the promisee —

(i)does *not* operate as a release of the other joint promissors;

(ii)*nor* does it discharge the promisor so released from his liability of the other joint promisors.

This would also apply in the case of joint *judgment-debtors.* Thus, it has been *held* that a release by a decree-holder of some of the joint judgment-debtors from liability under the decree does *not* operate as a release of the other judgment-debtors.

ENGLISH LAW.- The position is different *in England,* where the discharge of *one* operates as a release of *all* because it is construed as a *covenant not to sue.* As observed by *Lord Herschell, the rule in England is not founded on any principle of justice or equity, or even of public policy,* justifying its extension to the jurisprudence of other countries.

DIFFERENCE BETWEEN INDIAN AND ENGLISH LAW AS TO JOINT PROMISES.— As seen above, the law *differs* from Indian law on the point of joint promisors and promisees, as also on the devolution of joint rights and liabilities. The following are *four* points of difference between the two:

1. *As to persons who have to perform a joint promise.*— Under S. 42, all joint promisors must, during their joint lives and after the death of any one of them, their *representatives* jointly with the survivor or survivors, and after the death of the *last* survivor, the representatives of *all* jointly fulfil the promise.

In *English* law, a joint promise must be performed by all the joint promisors, but on the death of one of them, the liability of the joint contract (as to benefit) devolves upon the surviving promisors, and the representatives of the deceased are under no liability.

2. *As to compelling a joint promisor to perform.*— Under S. 43, when two or more persons make a joint promise, the promisee may, (in the absence of an express agreement to the contrary), *compel* any one or more of joint promisors to

perform the whole of the promise.

In England, all joint promisors must be sued jointly for a breach a contract.

3. *As to the effect of release of one joint promisor.*— In *India,* under S. 44, the release of one joint promisor by the promisee does *not* operate as a release of the others, nor does it discharge the promisor so released from liability (to contribute) to the other joint promisors.

In *England,* on the contrary, the release of one joint promisor by the promisee will, as a rule, discharge the other joint promisors also.

4. *As to person who can sue on a joint promise.—In India,* in the case of joint promises, the right to claim performance rests with the joint promisors during their joint lives, and after the death of any one of them, with the representatives of the deceased jointly with the survivors - and after the death of the last survivor, with the representatives of all jointly: S. 45.

In England, joint contracts are enforceable by the survivor or survivors alone, *except* in case of debts due to partners.

3. TIME, PLACE AND MANNER OF PERFORMANCE (Ss. 46-50 and 55)

There are *six* rules applicable to the law as to *time, place* and *manner* of performance. These are as under:

Rule 1

Where by the contract, a promisor is to perform his promise *without application by the promisee,* and *no time* for performance is specified—the engagement must be performed *within a reasonable time.* What is a reasonable time is a *question of fact* and depends on the facts and *circumstances* of every *particular case*: S. 46.

But, when a *day* for performance is *fixed* by the contract, the promisor must perform it at *any time during the usual business hours* on the day fixed and at the place at which the promise ought to be performed: S. 47.

Illustration.— A promises to deliver goods at *B's* warehouse on the 1st January. On that day, *A* brings the goods to *B's* warehouse, but *after* the usual hour for closing it, and they are *not* received. *A* has *not* performed his promise.

Rule 2

When a promise is to be performed *on a certain day* and only on the application by the promisee—it is the *duty of* the promisee to *demand* performance at a *proper place and time.* What is a proper time and place is, in each particular case, a question of fact: S. 48. When a promise is to be performed *without* application by the promisee and *no place is fixed* for the performance —it is the duty of the *promisor to apply* to the promisee to fix a reasonable place for performance and to perform it at the place so fixed: S. 49.

Illustration— A undertakes to deliver a thousand maunds of jute to *B* on a fixed day. *A* must apply to *B* to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Rule 3

The performance of any promise may be made in any manner, or at any time

which the *promisee* prescribes or sanctions: S. 50.

Illustrations.— (a) *B* owes *A* Rs. 2,000. *A* desires *B* to pay the amount to A's account with *C,* a banker. *B,* who also banks with *C,* orders the amount to be transferred from his account to *A's* credit, and this is done by *C.* Afterwards, and before *A* knows of the transfer, C fails. There has been a *good payment* by *B.*

(b) *A* and *B* are mutually indebted. *A* and *B* settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to a payment by *A* and *B* respectively, of the sums which they owed to each other.

(c) *A* owes *B* Rs. 2,000. *B* accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part-payment.

(d) A desires *B,* who owes him Rs. 100 to send him a note for Rs. 100 by post. The debt is discharged as soon as *B* puts into the post a letter containing the note, duly addressed to A.

Rules 4, 5 and 6

(When time Is of the essence of the Contract)

4. When a party to a contract promises to do a certain thing at or before a specified time or times, and fails to do any such thing at or before the specified time—the contract (or so much of it as has *not* been performed) becomes *voidable* at the option of the promisee, if the intention of the parties was that *time should be of the essence of the contract:* S. 55.
5. If it was *not* the intention of the parties that time *should* be of the *essence* of the contract, the contract does *not* become voidable, by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure: S. 55.

When time is of the essence of the contract

It may be noted that the law does not *always* regard a stipulation as to time as a *rigid* condition in an agreement, and does *not always* allow a party to rescind a contract because the other party has failed to perform his part of the contract within the stipulated time, but considers whether time was of the essence of the contract or *not.* At the same time, it may be observed that in *mercantile transactions,* time is, as a rule, deemed to be of the *essence* of the contract. This is so especially in the case of *shipping contracts. Whether or not* time is of the essence of the contract depends upon the *intention of the parties.*

If time *is* of the essence of the contract, the failure by the promisor to fulfil his promise *within* the specified time will render the contract *voidable* at the option of the promisee. But if time is *not* of the essence of the contract, non-performance within the specified time will *not* render it voidable, but wifi entitle the promisee only to compensation for the loss occasioned by such failure.

Contracts relating to sale of land.— *In England,* the prevailing judicial view is that if some time is named in an agreement to sell land, and the contract is *not completed* within that time due to accidental delays, time is *not* to be of the essence of the contract. This is so because, very frequently, unexpected difficulties crop up at the time of verifying the seller's title, and this naturally results in unexpected delay.

In India also, the same principles apply. The Privy Council has *held* that S. 55 does *not* lay down any principle as regards contracts to sell land, which are different from those which prevail under the English law. This position has now been confirmed by the Supreme Court in *Govind Prasad Chaturvedi* v. *Hari Dutt Shastri* (A.I.R. 1977 S. C. 1005.)

The *legal effect* of S. 55 can be summed up as follows:

A. If time is of the essence of the contract :

On failure to perform *at* or *before* the specified time

-the contract, (or so much of it as is unperformed), becomes *voidable* at the option of the promisee.

B. If time is not of the essence of the contract:

On failure to perform at the specified time, —the contract does *not* become *voidable, but the* promisee is entitled to *compensation..*

6. Lastly, if, in the case of a contract voidable on account of the ; ‘ promisor’s failure to perform his promise at the time agreed, the promisee *accepts performance* of such promise at any time other than that agreed, the promisee *cannot* claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, *unless,* at the time of such acceptance, he gives notice to the promisor of his intention to do so : S. 55.

In one case, the defendant agreed to deliver his elephant to the plaintiff for *Khedda* operations on 1 st October. The defendant later obtained an extension of time upto 6th October, but did *not* deliver the elephant till 11th October, when the plaintiff refused to accept the elephant. The Court *held* that the very fact that the defendant asked for extension of time, pointed out the fact that time was intended to be of the essence of the contract. The plaintiff was, therefore, justified in refusing to accept the elephant on 11th October, and was entitled to damages for breach of the contract. (*Bhudra Chand* v. *Petts,* 1915 22 Cal. L.J. 566)

Cases in which contract becomes *voidable* (Ss. 19-19A, 53 and 55)

Under the Indian Contract Act, a contract becomes *voidable* in the following *three* cases:

1. When a consent to an agreement is caused by *coercion, undue influence, fraud or misrepresentation,* the agreement is a contract voidable at the option of the party whose consent was so caused: Ss. 19 and 19A.
2. If a party to an *executory contract* prevents the other party from performing his part of the contract, the contract becomes voidable at the option of the party so prevented: S. 53. (This will be discussed later.)
3. If a party to a contract, in which *time is of the essence,* fails to perform his part of the contract at the fixed time, the contract is voidable at the option of the other party: S. 55. (This has been discussed above.)

4. PERFORMANCE OF RECIPROCAL PROMISES (Ss. 2, 51-54 and 57)

Definition (S. 2)

Most agreements contain mutual promises. A promise by *X* to deliver goods, in consideration of a promise by *Y* to pay for the same, is the commonest

illustration of mutual or reciprocal promises.

Vide S. 2 of the Act, promises which form the consideration (or part of the consideration) for *each* other are called *reciprocal promises.*

Here, each party gives a promise, in return for a promise, *e.g., a* promise to sell and purchase between *A* and *B.* Each promise is a consideration for the other. When the agreement consists of reciprocal promises, as is usually the case, there is an obligation on each party to perform his own promise and to accept performance of the other's promise.

Performance of reciprocal promises (Ss. 51-54 and 57)

With regard to performance of reciprocal promises, *five simple rules* can be laid down as follows:

1. Contracts which consist of reciprocal promises to be simultaneously performed (S. 51)

In cases of contracts consisting of reciprocal promises, no promisor need perform his promise, *unless* the promisee is *willing* and *ready* to perform his reciprocal promise.

Illustrations— (a) *A* and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery.

A need *not* deliver the goods, unless *B* is ready and willing to pay for the goods on delivery.

B need *not* pay for the goods, unless *A* is ready and willing to deliver them on payment.

(b) *A* and *B* contract that A shall deliver goods to *B* at a price to be paid by instalments, the first instalment to be paid on delivery.

A need *not* deliver the goods, unless *B* is ready and willing to pay the first instalment on delivery.

B need *not* pay the first instalment, unless *A* is ready and willing to deliver the goods on payment of first instalment.

2. Order in which reciprocal promises are to be performed (S. 52)

Where the *order* in which reciprocal promises are to be performed is *expressly fixed* by the contract—they are to be performed in that order, and, where the order is *not expressly fixed* by the contract—they are to be performed in that order which the *nature* of the transaction requires.

Illustration— (a) *A* and *B* contract that *A* shall build a house for *B* at a fixed price. A's promise to build the house must be performed before *B's* promise to pay for it.

(b) *A* and *B* contract that A shall make over his stock-in-trade to *B* at a fixed price, and *B* promises to give security for the payment of the money. A's promise need *not* be performed until the security is given, for, the nature of the transaction requires that *A* should have security before he delivers up his stock.

3. Consequences where a party prevents performance (S. 53)

When a contract contains reciprocal promises, and one party to the contract *prevents* the other from performing his promise, the contract becomes *voidable* at the option of the party so *prevented;* and he is entitled to *compensation* from the other party for loss, if any, which he may sustain in consequence of the non-

performance of the contract.

Illustration— *A* and *B* contract that *B* shall execute certain work for *A* for a thousand rupees. *B* is ready and willing to execute the work accordingly, but *A prevents* him from doing so. The contract is *voidable* at the option of *B* and, if he elects to rescind it, he is entitled to recover from *A compensation* for any loss which he has incurred by its non-performance.

This section is based on the sound and equitable principle that no man should be allowed to complain of another's failure to do something which he himself has made impossible.

CASE— *A* contracted with *B* to remove waste rock lying at *B's* mine within two years, provided that *B* supplied a crusher, and further provided that there were *not* more than fifty thousand tons of such rock. *B* did supply a crusher, but it was inadequate, as it was capable of crushing only three tons an hour. Therefore, *A* stopped the work, and thereafter, sued *B* for damages. The Court *held* that *A* was entitled to recover damages for the expense to which he was put in preparing for the work, and also for the loss of profit which he would otherwise have made by supplying the crushed stones to a third party. (*Kleinert* v. *Abosso Gold Mining Co.,* 1913 58 Sol. Jo. 45)

4. Effect of default in reciprocal promise (S. 54)

When a contract consists of reciprocal promises, *such that one of them cannot be performed,* or that its performance cannot be claimed till the *other* has been performed, and the promisor of the promise last mentioned *fails* to perform it—such promisor *cannot* claim the performance of the reciprocal promise, *and* must make *compensation* to the other party to the contract for any loss which such other party may sustain by the nonperformance of the contract.

Illustration.— (a) *A* hires *B's* ship to take in and convey from Calcutta to Mauritius, a cargo to be provided by *A, B* receiving a certain freight for its conveyance. *A* does *not* provide any cargo for the ship. *A cannot* claim the performance of *B's* promise, and must make compensation to *B* for the loss which *B* sustains by the nonperformance of the contract.

(b) *A* contracts with *B* to execute certain builder's work for a fixed price, *B* supplying the scaffolding and timber necessary for the work. *B* refuses to furnish any scaffolding or timber, and the work *cannot* be executed. *A* need *not* execute the work, and *B* is bound to make compensation to *A* for any loss caused to him by the nonperformance of the contract.

(c)*A* contracts with *B* to deliver to him, at a specified price, certain merchandise on board a ship which *cannot* arrive for a month, and *B* engages to pay for the merchandise within a week from the date of the contract. *B* does *not* pay within a week. *A's* promise to deliver need *not* be performed, and *B* must make compensation.

(d) *A* promises *B* to sell him one hundred bales of merchandise, to be delivered next day, and *B* promises *A* to pay for them within a month. *A* does *not* deliver according to his promise. *B's* promise to pay need *not* be performed and *A* must make compensation.

5. Reciprocal promise to do legal things, and also other illegal things (S. 57)

Where persons reciprocally promise, firstly to do certain things which are

legal, and secondly, under specified circumstances, to do certain other things which are illegal—the first set of promises is a *contract,* but the second is a *void agreement.*

Illustration.— *A* and *B* agree that *A* shall sell *B* a house belonging to *A* for Rs. 10,000, but that if *B* uses the house as a gambling house, *B* shall pay, Rs. 50,000 for it. The consideration was to be paid at the end of one year. *A* executes the conveyance in favour of *B.* Three months thereafter, *B* uses the house as a gambling house. Though one year passes away, *B* fails to pay any sum to *A.*

Here, the first set of reciprocal promises, namely, to sell the house and to pay Rs. 10,000 for it, is a *contract.* But, the second part of the agreement is for an unlawful object, namely, that *A* may use the house as a gambling house, and is a *void agreement.*

In such cases, when the void part of an agreement can be properly separated from the rest, the latter does *not* become invalid. But if the parties themselves treat *all* the transactions (valid and void) as *one integral whole,* the Court will also regard them as such and therefore, the contract will be *wholly void.*

If the consideration or object is partly *lawful* and partly *unlawful,* then the question will arise whether the two can be severed (i.e. separated); if they can, one can *reject* the *bad* part and retain the good. But where one *cannot* sever the *illegal* from the *legal* part, the contract is *altogether* void. Therefore, if *A* agrees to serve *B* as his *house-keeper* and also to live in *adultery* with him at a fixed salary, *A cannot* sue *even* for *service rendered as house-keeper, as it is not possible to ascertain* what was due on account of *adulterous intercourse* and what was due for *house-keeping.* The *whole agreement is void* and nothing—even for acting as a *house-keeper- can* be recovered : *Alice* v. *Clarke,* (1905) 27 All. 266.

5. PERFORMANCE OF ALTERNATIVE PROMISES (S. 58)

ALTERNATIVE PROMISE— The Act has *not* defined the expression "alternative promise". This term may be defined thus.—An alternative promise is one which offers one of *two alternate* things. Thus, *A* and *B* agree that *A* shall pay Rs. 1,000 for which *B* shall afterwards deliver to *A either* 20 kilos of rice *or* 22 kilos of wheat.

Alternative promises, one branch being illegal (S. 58)

In the case of an alternative promise, one branch of which is *legal* and the other *illegal,* the legal branch *alone* can be enforced.

Illustration.— *A* and *B* agree that *A* shall pay *B* Rs. 1,000 for which *B* shall afterwards deliver to *A* either *rice or smuggled* opium. This is a *valid contract* to deliver *rice* and a *void agreement* as to the *opium.*

Thus, *A,* a Hindu reversioner, agrees with *B* to execute a sale- deed of certain property which he expects to get on the death of *C,* and promises in the alternative that if he *cannot* do so, he will execute a sale-deed of certain Zamindari property which was owned by him. The agreement relating to the reversionary right is *void,* but the alternative promise is enforceable, the transfer of a reversionary right being *void* under S. 6 of the Transfer of Property Act. *(Mahadeo* v. *Mathura*—1932 29 A.L.J. 195)

6. RULES AS TO APPROPRIATION OF PAYMENTS (Ss. 59-61)

When there are several debts owing by a person to another, and a payment is

made, the question which at times arises is: “To which of the debts is the payment to be appropriated?” To take an illustration, *A* borrows Rs. 200 from *B* in January. He then borrows Rs. 400 from *B* in March and later Rs. 200 in July of the same year. Next year, he sends Rs. 400 to *B.* Now, a question may arise as to whether this amount is to be adjusted for the second debt (of Rs. 400) or for the first and third debts (also aggregating to Rs. 400)? The answer is that appropriation is a right, primarily of the *debtor* and for his benefit, for a creditor would naturally be inclined to appropriate a payment to a debt which he is *not likely to realise easily.*

THE PRINCIPLE UNDERLYING THE RULES AS TO APPROPRIATION OF PAYMENTS— The *three rules* regarding appropriation of payments are contained in Secs.59-61 of the Contract Act. These three sections enact the *rule of English law* as laid down in *Clayton’s case,* with certain modifications.

The rule relating to appropriation of payments can be stated thus: When a debtor makes a payment, he may appropriate it to *any* debt he pleases, and the creditor *must* apply it accordingly. The primary right of appropriation, therefore, belongs to the *debtor.* If the creditor *disagrees* with the appropriation made by the debtor, he must *refuse to receive* the amount, and, in that case he has his right enforceable against the debtor in the ordinary course; but in *no* case can the creditor receive the amount *under protest.* His protest *cannot* prevail against the debtor's desire, and he will be *bound* by the debtor’s appropriation despite his protest. Failing any express appropriation *by the debtor,* the right of appropriation shifts to the *creditor,* and if he does not exercise it, the payment is to be applied in discharge of the *debts in order of time, even if* such debts are time-barred.

This is, *in short,* the law as to *appropriation of payments.* The question of appropriation will arise in *three* cases:

1. Where the *debt* to be discharged is *indicated:* S. 59.
2. Where such debt is *not indicated*: S. 60.
3. Where *neither* party appropriates:S. 61.

1. Application of payment where debt to be discharged is indicated (S. 59) Where a debtor, owing *several distinct* debts to *one* person, makes a payment to him, either with *express intimation,* or under circumstances *implying* that the payment is to be applied to the discharge of some *particular debt*—the payment, if *accepted, must* be applied *accordingly.*

Illustrations.—{a) A owes, *B,* among other debts, Rs. 1,000 upon a promissory note which falls due on the first June. He owes *B* no *other* debt of *that amount.* On the first June, *A* pays to *B* Rs. 1,000. The payment is to be applied to the discharge of the promissory note.

(b) *A* owes to *B* among other debts, the sum of Rs. 567. *B* writes to *A* and demands payment of this sum.*A* sends to *B* Rs. 567. This payment is to be applied to the discharge of the debt of which *B* had *demanded payment.*

SCOPE OF S. 59— It is to be noted that this section deals only with the case of several *distinct* debts, and does *not* apply where there is only *one* debt, *though payable by instalments.* Thus, where the amount of a decree was by consent

made payable by five annual instalments, it was *held* that the decree-holder was *not* bound to appropriate the payments to the *specific* instalments named by the judgment debtor.

It had been *held* that a monthly salary payable to a servant is a distinct debt arising every month, and payments made by the master can be appropriated by the servant to his past salary.

PROBLEMS— 1. A decree was passed in favour of *A* against *B,* payable by instalments. *B* failed to pay the first instalment, but paid the second, third and fourth instalments in Court, which gave him receipts for those instalments. *A* applied those payments towards the first, second and third instalments, and applied to the Court for recovery of the fourth instalment from *B. B* contended that *A* was bound to appropriate the payment towards the second, third and fourth instalments, and that his claim to the first instalment being barred, his application should be dismissed. Will *B's* contention prevail?

Ans.- B's contention will *not* prevail. S. 59 which gives a right to the debtor to appropriate the payment to any debt he pleases only applies when there are *several distinct debts.* It has no application to a case where there is only *one* debt, though payable by instalments. In such a case, the decree-holder is *not* bound to appropriate the payments to the specific instalment named by the judgment-debtor.

2. *A* owes *B* three debts of Rs.100, Rs.200 and Rs.300. *B* demanded all the three debts from *A. B* sent a sum of Rs.300 with a covering letter in which he stated that he had sent Rs.300 in discharge of the third debt of Rs.300. *B* desires to appropriate the sum of Rs.300 sent by *A* in discharge of the two debts of Rs.100 and Rs.200, which had become time-barred. Can he do so?

Ans.- Here, *A,* the debtor, has expressly indicated that the payment of Rs.300 was towards the debt of Rs. 300. 8 the creditor, has no discretion to appropriate the payment in discharge of the other two time-barred debts. (If *A* had sent Rs.300 without the covering letter, 8 could have appropriated the payment in discharge of the other two time-barred debts.)

2. Application of payment where debt to be discharged is *not* indicated (S. 60)

Where the debtor has *omitted* to intimate, and there are *no other circumstances* indicating to *which* debt the payment is to be applied, the creditor may apply it *at his discretion* to any *lawful* debt actually due and payable to him from the debtor, *whether its recovery is time-barred or not.*

SCOPE OF S.60. -The rule contained in S. 60 lays down that where no appropriation is made by the debtor, the creditor may apply the payment to any *lawful* debt, even if it is *barred by the law of limitation.* This frequently happens where there is a running account extending over several years. The creditor may, in such a case, appropriate the payment to the earliest items *barred by limitation,* and. may sue for such of the balance which is *not so barred.*

Thus, *X* has borrowed from *Y,* Rs.800, Rs.500, and Rs.600 on different occasions, Y's claim in respect of the earliest loan of Rs.800 becomes time-barred, and thereafter *X* pays Rs.1,000 to *Y,* without indicating how the said

amount is to be appropriated. Here, *Y* can treat Rs.800 as being in discharge of the first debt of Rs. 800, *although the same is time-barred,* and the remaining Rs.200 may be appropriated to reduce the amount under the second debt to Rs 300 (Rs 500 *minus* Rs.200).

PROBLEM— A obtains two loans of Rs.50,000 each from a bank, one of which is guaranteed by *B. A* sends the bank a sum of Rs.60,000, but does *not* specifically mention how it is to be appropriated towards the loan. The bank claims to take Rs. 50,000 towards the loan *not* guaranteed by *B,* and Rs.10,000 towards the loan guaranteed by *B. B* objects to such appropriation. Can he succeed?

Ans.- *B cannot succeed.* Where the debtor has omitted to intimate, and there are no other circumstances indicating to *which* debt the payment is to be applied, the creditor may apply it, at his *discretion,* to *any lawful debt* actually due and payable to him from the debtor (S. 60). In this case, as *A* has failed to exercise his right of appropriation of payment, the bank is entitled to apply it to *any of* the two debts, both being due and payable. *B,* being only a surety, has no right to object.

PROBLEM.— *A* owes *B* debts of Rs. 500 and Rs. 1000. *B* writes to *A* demanding payment of the debt of Rs. 1000. *A* sends him Rs. 500, *without* intimating that the payment was to be appropriated towards the debt of Rs. 1,000. *B* appropriates it in payment of the debt of Rs. 500, and after the debt of Rs. 500 is barred by limitation, sues *A* for Rs. 1,000.

'*Ans.*— In this case, *B* demands from *A,* the payment of the debt

of Rs. 1,000, and *A* sends him Rs. 500. It is clear that A sends this amount towards the *discharge of the debt of Rs. 1,000 only.* Hence, *B cannot* appropriate the amount towards the debt of Rs. 500. *A* is *not,* therefore, liable for the whole debt of Rs. 1,000; his liability extends to Rs. 500 *only.* The debt of Rs. 500 is already time-barred, and *A cannot* be sued for the said amount.

Principal and interest

.Where the debt to be paid carries interest, money received without any definite appropriation is to be applied first in the payment of interest, *and then* towards the principal amount. Thus, a decree is passed for Rs.1,500 with interest at 5% per annum, payable by three-yearly instalments of Rs.500 each. The judgment-debtor pays Rs.500 at the end of each of the three years, without indicating any appropriation. In such a case, the decree holder may appropriate Rs.75 for the interest due, and the balance of Rs.425 towards the principal amount.

3. Application of payment where neither party appropriates (S. 61)

Where *neither* party makes any appropriation, the payment is to be applied in discharge of the debts *in order of time, whether they are time-barred or not.* If the debts are of equal standing, the payment is to be applied in discharge of each *proportionately.*

Thus, X has borrowed from Y, Rs.200 in 2007, Rs.300 in 2008 and Rs.800 in 2011. In 2013, when the first two debts become time-barred, *X* sends Rs.600 to *Y.* If neither *X* nor *Y* makes any appropriation the amount of Rs.600 is to be first applied in discharging the first two debts of Rs.200 and Rs.300 (although they are time-barred), and the balance of Rs.100 will reduce the liability in respect of

the third debt to Rs.700.

Summary

To put the above three rules in a nutshell, it can be said that the *debtor* has, at the time of payment, the *option* of appropriating the payment; in default, the *creditor* may appropriate as he deems fit, including time-barred debts; in default of either, the *law will* make the appropriation by applying the debts *in order of time,* whether time-barred or *not.*

7. MODES OF DISCHARGE OF CONTRACTS (i.e., CONTRACTS WHICH NEED *NOT* BE PERFORMED)

(Ss. 37-39, 56, 62-64, 67)

According to *Anson,* a contract may be *discharged* in the following *five* ways:

(1) It may be discharged by *mutual agreement.*

(2) It may be *performed;* the duties undertaken by either party may be thereby fulfilled, and the rights satisfied.

(3) It may be *broken;* when this happens, a new obligation arises, and one party acquires the right to file a suit against the other.

(4) It may become *impossible,* by reason of certain circumstances which may exonerate the parties from their respective obligations. |

(5) It may be *discharged* by *operation of law.*

According to the *Indian Contract Act,* a contract may be discharged in the following *eleven ways:*

1. By performance.
2. Where performance is *dispensed with or excused:* (S. 37)
3. By refusing tender of *performance:* (S. 38) w
4. By one party refusing to perform: (S. 39)
5. By the act becoming *impossible* or *unlawful*: (S. 56)
6. By novation, rescission or alteration of contract: (S. 62)
7. By waiver: (S. 63)
8. By accord and satisfaction: (S. 63)
9. By rescission of a voidable contract: (S. 64)
10. By the promisee failing to afford facilities for performance:(S. 67)
11. By operation of law.

Each of the above *eleven* modes of discharge of contracts will now be discussed in necessary details.

1.By performance

If both parties have *performed their respective obligations* under the contract, the contract is discharged. Contracts are normally entered into with a view to performing them, and hence, this is the *most normal mode of discharge.*

2. Where the performance of the contract is dispensed with or excused by any other law or by the Contract Act (S. 37)

(This has been discussed earlier.)

3. By refusing tender of performance (S. 38)

(This has also been discussed earlier.)

4.**By refusal of a party to perform promise wholly (S. 39)**

(This too has also been discussed earlier.)

5. **By the act to be performed under the contract becoming *impossible* or *unlawful (Doctrine of Frustration)* (S. 56)**

A contract to do an act which, *after the contract is made,* becomes *impossible,* or, by reason of some event which the promisor could *not* prevent, *unlawful,* becomes *void* when the act becomes *impossible or unlawful:* S. 56(2).

Illu.- (i) *A* and *B* contract to marry each other. Before the time fixed for the marriage,*A* goes mad. The contract becomes *void.*

(ii) *A* contracts to take in cargo for *B* at a foreign port. *A's* Government *afterwards* declares war against the country in which the port is situated. The contract becomes *void* when war is declared.

(iii) *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B.* On several occasions, *A* is too ill to act. The contract to act *on those occasions* becomes *void.*

Frustration of Contract

S. 56 lays down that the contract becomes *void* upon the act being (i) *unlawful* or (ii) *impossible,* though there is no condition to that effect in the contract. By the Common Law earlier applied in England, a man who promises without qualification is bound by the terms of the promise, if he is bound at all. If the parties do not mean their agreement to be unconditional, it is for them to *qualify* it by such conditions as they think fit. Thus, *J* rented a house from *P* and occupied it. Later, he was expelled by the army of an enemy (invader), and thus, without any fault, could *not* derive benefit from it. *J* was nonetheless *held liable* to pay rent, as the undertaking was *absolute. J* could have, in the contract, provided for such a contingency: *Paradine* v. *Jane,* (1947) Aleyn 26.

But, a condition need *not* always be expressed in words; there *are* conditions which may be *implied* from the very *nature* of the transaction. On this principle, a promisee is discharged, without the promisor's fault, in *three cases:*

(i) if the performance is rendered unlawful or *impossible by law;*

(ii) if a specified subject-matter *assumed* by the parties to exist is *accidentally* destroyed;

(iii)if the promise was to perform something *in person,* and the promisor *dies* or is disable by sickness or misadventure.

But in cases of such agreement *becoming, or* being *discovered* to be, void, any person who has received any advantage under the agreement or contract is bound to *restore* it, or make compensation for it, to the person from whom he received it. (S. 65)

CASES OF IMPOSSIBILITIES— There are several kinds of impossibilities which may fall within the purview of the *Doctrine of Frustration* embodied in S. 56 of the Act. (also known as "*Frustration of the adventure*" under English law).

Impossibility created by change of law— A contract is discharged when its performance becomes *impossible* on account of a *change in the existing law.*

Persons generally contract on the basis of the law *existing at the time of the contract.* If this law is subsequently changed, they are *not* expected to honour their obligations by committing a violation of the law.

Thus- in *Bailey* v- *De Crespigny* (1869 LR QB 189), C had agreed with *B* that neither C nor his assignee would build any but ornamental buildings on a small park in front of *B's* premises. The park was acquired by a Railway Company under Parliamentary powers, and they had built a station upon it. The Court *held* that *C* was *not liable* for the failure of the covenant.

So also, where the plaintiff contracted to carry the defendant's bales of cotton in his trucks, and before all the bales could be carried, the trucks were requisitioned by Government under the Defence of India Rules, it was *held* that the contract became impossible of performance.

Frustration by delay.- The commercial frustration of adventure by delay means the happening of some unforeseen delay, without the fault of either party to a contract, of such a character that if the fulfilment of the contract is the only way in which the fulfilment is contemplated and practicable, and it is so *inordinately postponed,* that its fulfilment, when the delay is over, will *not* accomplish the objects which both the parties to the contract had in mind.

Jackson v.*Union Marine Insurance Co.,* L.R. 10 C.P. 148.— *A* charters from *B* a ship to go to port *X,* take a cargo there and carry it to port *Y.* The ship runs aground on the way to *X,* and some weeks pass. Then, *A* charters another ship. *B* sues the insurance company for total loss of freight that *B* could have got from *A.* Here, *A* was justified in chartering another ship, as the long *delay* that would have been caused in taking the ship off and repairing it would have *ended* the contract in a *commercial sense,* and to compel *A* to perform his promise after such repairs had been done would be to compel him to perform a new contract. *A's* contract with *B* was *frustrated* when the ship ran aground, and *B* is entitled to recover damages from the insurer.

Jagdish Prasad v. *Produce Exchange Corp.* (1945) Cal. 41.— The plaintiff entered into a contract with the defendant for the purchase of goods at a certain price. Before the goods were delivered, an order was passed under the Defence of India Act, fixing the maximum price of those goods at a rate *lower* than that fixed in the contract. The Plaintiff sued to recover the difference between the contract price and the price fixed by the Government. The Court *held* that the contract became *void* when the order under the Defence of India Act was passed, making it unlawful to charge a price exceeding the price fixed by the order, and therefore, the plaintiff was *not entitled* to recover the difference.

Destruction of the subject-matter of the contract.- A contract is discharged if a specific thing which is essential to the performance of the contract is destroyed. Where a person agreed to make and fit machinery for a steam-ship to be paid for by instalments, and after some of the machinery had been made and instalments had been paid, the ship was lost by perils of the sea, the contract was *held* thereby dissolved, and both parties were discharged from further performance.

In *Taylor* v. *Caldwell,* (1863 3 *B* & S. 826) the defendants being the owners of a Music Hall, agreed to lend the use of the hall to the plaintiffs for the purpose of

giving concerts therein. Before the time came for the delivery of the hall, it was destroyed by fire, so that the contract had to be abandoned after the plaintiffs had incurred considerable expenditure for its preparation. The plaintiffs sued the defendants for damages for the breach of the contract. It was *held* that the defendants were *not liable.* In delivering the judgment, *Blackburn, J.* observed: "The principle seems to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or of the thing shall excuse the performance."

Non-existence or non-occurrence, of a state of things which forms the basis of the contract.- If a state of things on the basis of which a contract was made (and which was *not* a *mere motive* or *inducement* to one of the parties to enter into the contract) does *not* exist *(or* occur), the contract is discharged.

Krell v. *Henry,* (1903) 2 K.B. 740 — *H* agreed to hire the use of *K's* rooms in London on 26th and 27th June, 1902, for the purpose of seeing the intended coronation procession of the king. By reason of the king's illness, no procession took place on either of these days. Is *H* liable to *K* for the agreed rent? Here, the procession was the root-cause of the contract. The procession having been cancelled, *H* is *not liable* to *K* for the rent.

Death or serious illness of promisor in a contract for personal service.- An eminent piano player who had promised to perform at a concert was *held not liable* for non-performance of the promise, non-performance being due to his serious illness : *Robinson* v. *Davison* (1871) LR.6 Ex. 269.

"Supervening circumstances.- A contract is discharged, if on' account of supervening circumstances over which the parties have no control, its performance becomes impossible within the time or in the manner contemplated by the parties.

In *Board* v. *Dick, Keer & Co.* it was *held* that a contract to construct a reservoir for the Metropolitan Water Board (a work which would have taken six years for completion) came to an end when the Ministry of Munitions ordered the contractor to discontinue and suspend the erection of the work under the authority conferred on that Ministry during the war with Germany. (See "Effect of War on contracts" below.)

COMMERCIAL IMPOSSIBILITY— It is to be noted that the *impossibility* contemplated in S. 56 of the Act does *not include what is called commercial impossibility.* To excuse a person from discharging a contract, there must be a *physical* or *legal* impossibility. The word 'impossible' means 'impracticable' in the ordinary sense of the term. An act becomes *impossible* when it *cannot,* by *human means,* be done; but if it be only in a high degree improbable, then it is *not* deemed impossible. So, a contract does *not* become *impossible* merely because it *cannot* be performed *except at a heavy loss.*

Thus, on 1st January, *A* agreed to sell 100 bales of cotton to *B,* at Rs.500 a bale, delivery to be made on 1st February.*A* hoped to procure this cotton from the wholesale market at Rs 480 a bale and thus make a profit of Rs.20 per bale. However, cotton prices shot up (unexpectedly) to Rs.520 a bale on 10th January, and on 1st February, *A* found it imprudent to buy cotton bales at Rs.520 and

resell them at Rs.500 a bale. So, he did *not* deliver the cotton to *B,* who sued him for damages for breach of contract. Will *B* succeed?

In the above case, it was *only uneconomical* to supply the cotton to *B.* Performance of the contract had *not* become *impossible* (or *illegal).* Therefore, *A* would be liable to make compensation to *B. This is not a case of frustration of the contract.*

In *Purshotam* v.*Purshotam* (1897) 21 Bom. 23, *A,* a Hindu, contracted with *B* to give his minor daughter *C* in marriage to *B.* However, *C* declined to marry *B,* and *A* informed *B* that he could *not* compel her to change her mind. *B* sued *A* for breach of contract. Here, the agreement *cannot* be said to be *impossible of* performance, merely because the girl changed her mind.

In *Hurnandrai* v. *Pragdas,* 25 Born. L.R. 537, the defendant Entered into a contract with the plaintiff to sell him 864 bales of *dhoties* manufactured by certain named mills. The seller could only deliver *part* of the goods, owing to the mills failing to manufacture or deliver the balance to the defendant-seller. It was *held* that there was *no frustration of the contract,* and therefore, the buyer was entitled to recover damages from the seller.

On the same principle, it has been *held* that a lessee of saltpans from the Government *cannot* excuse himself from repairing the salt-pans on the ground of a strike of workmen, and is liable for the cost of repairs.

A contracts to let out a godown to *B* for a period of one year from a future date. At the date of the contract, *C* was the tenant of *A* and was occupying the said godown. *C* did *not* vacate the godown though called upon to do so by *A. B* called upon *A* to hand over vacant possession of the godown. *A* pleaded impossibility to do so, as C did *not* vacate the godown. Here, it *cannot* be said that the contract has become impossible to perform owing to *C's* refusal to vacate. *A must* perform the contract *or* pay damages to *B.*

By a contract made with the plaintiff, the defendants agreed to carry from Bombay to Jedda in their steamer 500 pilgrims, who were about to arrive in Bombay from Singapore in the plaintiff's ship. The pilgrims arrived in Bombay. But the defendants refused to receive them on board their steamer, on the ground that during the voyage of the plaintiff's ship to Bombay, there had been an outbreak of small-pox on board, and that the pilgrims had been in close contact with those who had been suffering from the disease, and that the performance of the contract had, under the circumstances, become unlawful, having regard to the provisions of sec. 269 of the Indian Penal Code. (That section provides that whoever unlawfully and negligently does any act which is, or which he knows or has reason to believe to be likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment.) It was *held* that the carrying of the pilgrims in the defendant's steamer would *not* have been in contravention of any law or regulation having the force of law, and that if special precautions were necessary to prevent infection, it was the duty of the defendants to take those precautions, and to perform the contract: *Bombay & Persia, etc.* v. *Rubatino Co.,* 14 Born. 147.

Karl Ettlinger v.*Chhagandas,* 40 Bom.305— *A* agrees to supply freight for *B's* goods from Bombay to Karachi at Rs.10 per ton. On account of war being

declared after the agreement, the shipping company with whom *B* had intended to arrange freight increased their charges to Rs.50 per ton. *B* thereupon pleads that the agreement had become impossible of performance. Now, the impossibility referred to in S. 56 is only *physical or legal* impossibility, and *does* not *include commercial impossibility.* Therefore, the contract to supply freight did *not* become impossible, simply because the freight could *not* be got except at prohibitive prices. *B* is *not* justified in pleading the agreement has become impossible.

EFFECT OF WAR ON CONTRACTS

Numerous cases arose during the First World War (1914-1918), where either the adventure became *impossible* due to enemy action, *or* the performance of the contracts became *illegal,* as trading with the enemy during the continuance of the war, and so, had to be *suspended* till the end of the war. Performance of the agreement after the long delay of four years of the period of war, when the impossibility would have ceased, would have been under entirely different circumstances. Therefore, the contracts were *held* to be frustrated on the declaration of war, and the parties were discharged. Both kinds of cases then came to be classed as "frustrated contracts" and to be regarded as falling under the head "*impossibility*". "The doctrine of frustration is only a special case of the discharge of contracts by an impossibility arising after the contract was made." *Constantine S. S. Line* v. *Imperial Smelting Corporation,* 1942 A.C. 154.

So far as the effect of war on contracts is concerned, one has to consider *two* possibilities, *viz.,* contracts entered into between enemy States (1) *before war,* and (2) *during war.*

(1) *Before war*— The *general rule* with regard to contracts between the citizens of different belligerent (*i.e.* warring) States entered into before the outbreak of the hostilities is that they are *not dissolved* by the outbreak of the war, but are *suspended* until the war is over. *

There are *two* exceptions to the rule that war only suspends a contract, but does *not* dissolve it, namely, (i) contracts which aid the enemy or which involve any dealing with the enemy; *and* (ii) contracts which, by their very nature, are incapable of suspension.

Thus, in *Metropolian Water Board* v. *Dick, Kerr & Co. Ltd.* (1918) A.C. 199, *A,* a British subject, entered into an agreement with *B,* another British subject, to build a reservoir for *B* in three years. After the date of the agreement, war broke out, and the work had to be suspended under the orders of the British Government in pursuance of a special Act. The war terminated after a period of four years, and *B* insisted on *A's* completing the work. On *A's* refusal to complete the work, *B* sued *A* for damages in respect of the breach of contract. The Court *held* that *B's* suit must be dismissed. The inordinate delay caused by the outbreak of the war would make the contract, if resumed, a different contract from the original contract.

(2) *During war*— During war, no performance of the contract is permitted, nor will any action on it be entertained. All contracts entered into during a war between Indian citizens and citizens of a state which is at war with India are *illegal* and cannot be enforced. Transactions with enemies *during* a period of war

are *void ab initio.*So, when peace returns, they are *still* void and of *no effect.*

Abdul Razak v. *Khandia Raw,* 41 Mad; 225.— *A* contract was made, *after* the declaration of war, between merchants at Madras and importers of German dyes in Bombay, whereby the defendants agreed to sell and deliver the plaintiffs certain casks of dyes already shipped from Germany. Are the defendants bound to deliver goods to the plaintiffs? Now, as the defendants could *not* lawfully take up and pay for the goods, they could *not* lawfully agree to sell and deliver them to the plaintiffs. Therefore, the defendants are *not bound to deliver the goods* to the plaintiffs.

Two further provisions relating to impossible agreements

S. 56 lays down [in sub-sections (1) and (3)], two further provisions relating to impossible agreements, as follows —

Agreement to do an impossible act [S. 56 (1)]

Under S. 56(1), an agreement to do an act which is impossible in itself is void. Thus, *A* agrees with *B* to discover treasure by magic. The agreement is *void.*

This section is based on the English Law on the point. Under the English common Law, parties who agree to do something that is obviously impossible must be deemed *not* to be serious *or not* to understand what they are doing. Further, the law *cannot* regard a promise to do something which is impossible in the nature of things as being of any value, and therefore, such a promise is no consideration.

Impossibility may appear on the face of the contract, *or* may exist unknown to the parties at the time of making the contract, *or* may even arise after the contract is made. If the act is impossible in itself, physically or legally, the agreement is *void ab initio;* in such a case, the consideration cannot be said to be real, *i.e.,* it is nonexistent, and hence the contract is void, *whether or not it is known to the parties at the time.* This is based on the maxim *lex non cogit ad impossibillia* (the law does *not* compel the impossible).

When impossibility is known only to the promisor [S. 56(3)]

Under S. 56(3), where one person has promised to do something which he *knew,* or with reasonable diligence, *might* have known, and which the promisee did *not* know to be impossible or unlawful, such *promisor* must *make compensation* to such promisee for any loss which such promisee sustains through the nonperformance of the promise.

Illustration— *A* contracts to marry *B,* being already married to *C,* and being forbidden by the law to which he is subject to practise polygamy. *A* must make compensation to *B* for the loss caused to her by the non-performance of his promise.

It is to be noted that S. 56(3) deals with the case of a person who *knew* of the impossibility or illegality of a contract. The illustration makes this quite clear. In such cases, there is an element of *fraud.*

6. By novation, rescission or alteration of contract (S. 62)

S. 62 deals with the effect of rescission or alteration of a contract.Under this section,if the parties to a contract agree to substitute a *new contract* for it, or to *rescind* or *alter* it, the original contract need *not* be performed.

Illustrations— (a) *A* owes money to *B* under a contract. It is agreed between

A, B and C, that *B* shall thenceforth accept *C* as his debtor, instead of *A.* The *old* debt of *A* to *B* is at an end, and a *new* debt from *C* to *B* has been contracted.

(b)*A* owes *B* Rs.10,000. *A* enters into an arrangement with *B,* and gives *B* a mortgage of his (A's) estate for Rs.5,000 in place of the debt of Rs.10,000. This is a new contract, and extinguishes the old.

(c) *A* owes *B* Rs.1,000 under a contract. *B* owes *C* Rs. 1,000. *B* orders *A* to credit *C* with Rs.1,000 in his books, but *C* does *not* assent to the agreement. *B* still owes *C* Rs.1,000, and *no new contract has been entered into.*

NOVATIO— S. 62 deals with the doctrine of *novatio* (or novation). The term *novation* has been thus defined by the House of Lord:

"That, there being a contract in existence, some new contract is *substituted* for it, either between the same parties or between different parties, the consideration being mutually the *discharge* of the old contract". In India, there is *novatio* when the *parties* are changed, *or* the *nature of the obligation* is changed.

Its forms— The parties to a contract may substitute *new* terms for the old ones, as indicated by illustration (b); or it may be agreed between the original promisor, the original promisee and a *third* party that the promisee will look to the *third* party, instead of the *original promisor,* for the performance of the contract, as in illustration (a). In the former case, there is a *substitution of new* terms for the *old ones* while the *parties remain the same;* in the later case, a new party is substituted for old one. In both the cases, *the old debt is at an end, and a new one takes its place;* the old contract is replaced by a new contract.

Its effect— In cases where there is a novation, the old contract is *completely extinguished,* and a suit based on the old contract is *not maintainable.* Novation *cannot* take place unless it is effected with the consent of *all* the parties. To effect a novation, the contract which is substituted must be one *capable of enforcement in law.* So, a fresh contract contained in a deed which, though compulsorily registrable, is *not* registered, does *not* operate as a *novation.* So also, where the subsequent agreement *cannot* be sued upon, because it is insufficiently stamped, *or* where the promisor has disabled himself from performing his promise, there will be no novation.

Moreover, S. 62 will *not* apply where the alleged agreement to substitute a new contract for the old is made *after* the breach of the original contract. In that case, the original contract *can* be sued upon. This view of the law is supported by *Sir Frederick Pollock.* But in a Madras case, it has been *held* that there *can* be a novation under S. 62 *even after* breach of the original contract: *N. M. Firm* v.*The Perumal Chetty,* (1922) 45 Mad.180.

CASES— Angan Lai v *Saran Behari Lai,*1929, All. 503— *A* owes an obligation to *B* under formal instrument. *A* and *B* agree orally to substitute for it a mortgage a month from that day. There is *no novation,* as the old obligation *has not been extinguished.*

Manoharv. Thakurdas, 15 Cal. 319.— *A* owes *B* Rs. 1,100 on a bond. *A* and *B* agree, *after* the bond becomes due, that *B* will accept Rs. 400 in cash and a fresh bond for Rs. 700. Rs. 400 are *not* paid nor is a fresh bond executed. *B* sues *A* for Rs. 1,100, *A* pleads novation. His plea is *not* sound, because an agreement made *after breach* of the old contract would *not* create novation.

(However, the view of the Madras High Court, stated above, is quite the contrary.)

Ramjiban v. *Dhikum Singh, 16 C.L.J. 264*.— *A* owes a sum of money to *B* under a bond. *A* executes a mortgage deed which is *not* registered *(or* gives a pro-note or a *hundi* which *cannot* be admitted in evidence for want of stamp.) There is *no novation,* as the new contract intended to be created is *not valid* in law. *B* can sue on the original consideration, the bond.

Novation and Assignment

Novation has also to be distinguished from an *assignment* of a debt. Whereas an assignment can operate in some cases even without the consent of the debtor, a novation is effective only if the debtor is a party to it.

Further, in the case of an assignment, there is a transfer of property, whereas in a novation, there is annulment of one debt and a substituted debt is created to take its place.

7. By waiver (S. 63)

Under S. 63, a promisee may—

(i) dispense with, *or* the performance of the

(ii) remit wholly or in part promise made to him, *or*

(iii) extend the time for such performance, *or*

(iv) accept, instead of it, any *satisfaction* which he thinks fit.

Illustrations— (a) *A* promises to paint a picture for *B. B,* afterwards, *forbids* him to do so. *A* is no longer bound to perform the promise.

(b) *A* owes *B* Rs.5,000, *A* pays to *B,* and *B* accepts, in *satisfaction of the whole debt,* Rs.2,000 paid at the time and place at which the Rs.5,000 were payable. *The whole debt is discharged.*

(c) *A* owes *B* Rs.5,000. *C* pays to *B* Rs.1,000, and *B* accepts them in *satisfaction* of his claim on *A.* This payment is a discharge of the *whole claim.*

(d) *A* owes *B,* under a contract, a sum of money, the amount of which has not been ascertained. *A,* without ascertaining the amount gives to *B,* and *B* in satisfaction thereof, accepts the sum of Rs.2,000. This is a discharge of the *whole* debt, *whatever may be its amount.*

(e) *A* owes *B,* Rs. 2,000, and is also indebted to other creditors. *A* makes an arrangement with his creditors, including *B,* to pay them a composition of fifty paise in the rupee upon their respective demands. Payment to *B* of 1,000 rupees is a discharge of *B's* demand.

WAIVER.— Since a contract is created by means of an agreement, it may also be discharged by *another* agreement between the *same* parties, *nullifying* the previous one. An agreement discharging the previous contract may take the form of *waiver.* Waiver or release is the *surrender of a contractual right.*

Thus, *A* gives a loan of money to *B. A* has, of course, the right to recover the money from *B;* but by an agreement he may *give up the right. This giving up of right is called a waiver.* The agreement of waiver need *not* be *express;* it may even be *inferred from* the conduct of the parties.

8. By "Accord and satisfaction'' (S. 63)

When one of the parties to the contract, in order to obtain a release, agrees to do something *other than* what he was bound to do by the contract, and when he has *discharged* the obligation, and *has been set free,* the contract is said to have been *discharged by accord and satisfaction.* The new *agreement* is the *accord,* and the performance thereof is the *satisfaction.*

Thus, the idea of *accord and satisfaction* involves the purchase of a release from an obligation by means of any valuable consideration, which is *not* the actual performance of that obligation. As seen above, the accord is the fresh agreement by which the obligation is discharged, and the satisfaction is the consideration which makes the agreement operative.

For example, *A* owes *B* Rs.300. Both the parties agree that if A pays Rs.200, *B* will accept the amount *in full satisfaction of his debt. A* pays Rs. 200 to *B.* The payment is a discharge of the whole claim, the agreement to *pay* Rs 200 being the *accord,* and the *actual payment* of the sum being the *satisfaction.*

ACCORD AND SATISFACTION DISTINGUISHED FROM PERFORMANCE— *Accord and satisfaction* is to be distinguished from the *dissolution of the obligation by performance.* When the contractual obligation is performed, the contract is *dissolved,* but that is *not* a case of accord and satisfaction. The essence of accord and satisfaction is that by mutual consent, one party *gives something different from that which he was bound to give,* and the other accepts it in satisfaction of his claim. Thus, *A* builds a house for *B* in consideration of *B's* promise to pay Rs. five lakhs to *A.* After the construction of the house, *B* offers a plot of land to *A* instead of Rs. five lakhs. *A* is *not* bound to accept the plot *of* land in lieu of Rs. five lakhs which he is entitled to. But, if *A* accepts *B's* offer in lieu of the money promised earlier, it is a case of dissolution of the contract *by accord and satisfaction.*

9. By rescission of voidable contract (Ss. 64 and 65)

When a person at whose option a contract is voidable rescinds it, the other party is discharged from liability under the contract. However, if the party rescinding a voidable contract has received any benefit from another party to such contract, he must restore such benefit, so far as may be, to the person from whom it was received.

Thus, where the step-mother of a minor sold property belonging to the minor in order to pay off a mortgage executed by his father and to meet the marriage expenses of the minor, the minor could, after attaining majority, have the sale set aside, but, in that case, he was also bound to refund the consideration money by which his estate had benefited. *Limbaji Ravji* v. *Rahi,* 27 Born. L.R. 621.

S. 65 lays down that when an agreement is *discovered to be void, or* when a contract *becomes void,* any person who has received any advantage under such an agreement or contract is bound to *restore* it, *or* to *make compensation* for it, to the person from whom he received it.

Illustrations— (a) *A* pays *B* Rs. 1,000 in consideration of *B's* promising to marry *C, A's* daughter, *C* is dead at the time of the promise. The agreement is *void,* but *B* must *repay A* Rs. 1,000.

(b) *A* contracts with *B* to deliver to him 250 maunds of rice before the first of May. *A* delivers 130 maunds only before that day, and none thereafter. *B* retains

the 130 maunds after the first of May. He is bound to pay *A* for them.

(c) *A,* a singer, contracts with *B,* the manager of a theatre, to sing at his theatre for two nights in every week during the next two months and *B* engages to pay her one hundred rupees for each night's performance. On the sixth night, *A willfully* absents herself from the theatre and *B,* in consequence, rescinds the contract. *B* must pay *A* for the five nights on which she had sung.

(d) *A* contracts to sing for *B* at a concert for 1,000 rupees which are paid in advance. *A* is too ill to sing. *A* is *not* bound to make compensation to *B* for the loss of profits which *B* would have made if *A* had been able to sing, but must refund to *C* the 1,000 rupees paid in advance.

IN PARI DELICTO POITOREST CONDITIO DEFENDANTIS: Further, the rule enunciated in S. 65 is applicable to agreements which are rendered void by *mistake, impossibility or failure of consideration.* Money paid by one party to the other can be recovered in *such cases.* However, the rule does *not* apply to agreements which are void on account of *illegality* of the object known to the parties. Therefore, money paid by one party *cannot* be recovered if *both* the parties are in *pari delicto* (equally guilty).

But there are two exceptions to the rule:

(1) When one of the parties has been induced to enter into a contract by *fraud, coercion or undue influence,* he can recover the amount paid by him, *e.g.,* if a debtor, being in difficulties,pays Rs.5,000 to one of his creditors to induce him to sign a composition deed.

(2) When the contract is *not* performed and the illegal purpose is *not* carried out, *e.g.,* if a person who makes over his goods for the purpose of defrauding his creditors, the goods *can* be recovered before anything has been done with regard to the intended fraud.

Mode of communicating or revoking rescission (S. 66)

S. 66 provides that the rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules as apply to the communication or revocation of a proposal.

In this connection, one may also note S. 75, which entitles a party rightfully rescinding a contract to compensation, and provides as follows:

A person who *rightfully* rescinds a contract is entitled to compensation *for any* damage which he has sustained through the non-fulfilment of the contract.

Illustration.— *A,* a singer, contracts, with *B,* the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* agrees to pay her 100 rupees for each night's performance. On the sixth night, *A wilfully* absents herself from the theatre and B, in consequence, recinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

10. By the promisee neglecting or refusing to afford the promisor reasonable facilities for the performance of his promise (S. 67)

Under S. 67, if any promisee *neglects* or *refuses* to afford the promisor reasonable *facilities for* the performance of his promise/ the promisor is *excused* by such neglect or refusal as to any nonperformance caused thereby.

Illustration- A contracts with *B* to repair *B's* house. *B* neglects or refuses to

point out to *A* the places in which his house requires repair. *A* is excused for the non-performance of the contract if it is caused by such neglect or refusal.

A good illustration of the application of this section is the case of a master workman who has promised to teach his trade to an apprentice. If the apprentice refuses to let the master teach him, it is evident that the master *cannot* be held liable for non-performance of his promise.

11.By operation of law

The last mode in which a contract is discharged is by *operation of law.* This can happen in the following *three way:*

(a) *By merger, i.e.,* the acceptance of a higher security in place of a lesser security.

(b) *By* any *alteration* of a contract. (S. 62)

(c) *By insolvency.*

(a) *Merger* is that operation of law which extinguishes a right by reason of its coinciding with another and *greater* right in the same person, *e.g.,* a right of action on an ordinary debt which would be merged in the right of suing on a mortgage for the same debt. It is necessary that the parties must be the *same,* and the two securities must be *different* in their legal operation, the one of a higher efficacy than the other.

(b) *By alternation of a contract:* S. 62 (This has already been dealt with above.)

(c) *By insolvency:* Insolvency of a party to a contract also discharges the contract. The result of a person becoming an insolvent is that when he gets his discharge, he is released from all his debts and liabilities that can be proved in his insolvency. The mere fact that a person has become an insolvent, however, does *not ipso facto* put an end to any contract that he may have entered into prior to his insolvency. The benefit of the contract would vest in the official assignee,who *may* complete the contract for the benefit of the creditors.

End of chapter 15

16th Chapter

CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT (QUASI-CONTRACTS)

(Ss. 68-73)

Briefly discuss: “Certain relations resembling those created by contract” dealt with in the Indian Contract Act. M.U.Apr.2016

“In a quasi-contract, the promise to pay is always an implication of law and not of fact.” Discuss M.U.Apr.2013

*“Courts of law should prevent unjust enrichment." Discuss, with reference to the provisions of the Indian contract Act.*B.U.Nov.2011

State any 2 quasi-contracts. (2 marks) B.U. Nov. 2014

What are the rights of a person who supplies necessaries to a minor? (2 marks) B.U. Nov. 2012

Write a short note on: Rights of finder of goods. B.U.Nov.2014

State any two rights of a finder of goods. (2marks) B.U.Apr.2015

What is the liability of a person to whom money is paid by mistake or under

coercion? (2marks) M.U.Apr.2013

As seen earlier, contractual obligations are generally *voluntarily* created; but there are some obligations which are *not contractual,* but which are *treated* as such by law, that is to say, there is no contract *in fact,* but there is one in the *contemplation of law.* Such contracts are called *quasi-contracts.* Thus, if *A* pays a sum of money to B, believing him to be his creditor, when, as a matter of fact, B was *not. B* is bound to return the money to *A.*

DIFFERENCE BETWEEN ORDINARY CONTRACTS AND QUASICONTRACTS— Contracts result from the will of the parties, expressed with a view to creating legal obligations. But, in some cases, even without the volition of the parties, *obligations* resembling those created by contract *are imposed* by law. Though, *in fact,* there is *no contract* between the parties, the law deems such obligations to arise, as would arise *as if* there were a contract. Such obligations are said to arise *quasi-ex-contractu,* and such cases are, *for want of a better name,* classified in English law as quasi-contracts. They are *not contracts,* as the obligation does *not* arise from *volition* of the parties; there is no *agreement, not* even a formal expression of will. The essentials for the *formation* of a contract are absent (- for instance, there is no proposal and no acceptance -); but as the *results* resemble those of a contract, they are called q*uasi-contracts.*

The term “implied contracts” (sometimes used in place of "quasi-contracts”) is, however, a misnomer. Such contracts do *not* arise when there is an agreement implied by the conduct of parties; in *quasi-contracts,* there is no agreement at all; only the law *imposes* obligations similar to obligations arising from contracts.

In so far as the obligations in such cases is imposed by law, and do *not* arise from volition of the parties, a quasi-contract resembles a *tort;* but in that the *effect* or *result* is similar to that of a contract—a right *in personam* (and *not* a right *in rem,* as in case of a tort) arises, a quasi-contract resembles a contract.

A quasi-contract arises where one person has received a benefit or a sum of money which, independently of any agreement, express or implied, the law regards as belonging *better* to another, and so compels the former to account for it to the latter or to compensate him. It is to be remembered that the Indian Contract Act avoids the use of the terms “quasi-contracts" or “implied contracts”. It speaks of five cases of “relations resembling those created by contract”.

Jurists like *Sir Frederick Pollock* prefer to explain this kind of relationship by the term “constructive contract”, an expression which is also used in *Halsbury’s Laws of England.* However, it appears that until a better and more acceptable name is invented, these will continue to be grouped under the term “*quasi-contracts*”.

It is to be noted that in quasi-contracts, the Courts are *not* concerned with the *intention* of the parties, and in many cases, they act in disregard of their known intentions. In all such cases, the liability exists independently of any agreement, and rests upon equitable *principles and the doctrine of unjust enrichment.*

Ss. 68 to 72 of the Act deal with *five* types of quasi-contracts, as under:

1. Claim for *necessaries* supplied to a person *incapable* of contracting *or* on his account (S. 68)

2. Reimbursement of a person paying money due by another in the payment of which he is *interested* (S. 69)
3. Obligation of a person enjoying the benefit of a *non-gratuitous* act (S. 70)
4. Rights and liabilities of a *finder of goods* (S. 71)
5. Liability of a person to whom money is paid or a thing is delivered by *mistake* or under *coercion* (S. 72)

1. Claim for necessaries supplied to a person incapable of contracting, or on his account (S. 68)

If a person, *incapable* of entering into a contract, *or* any one whom he is *legally* bound to support, is supplied by *another* person with *necessaries* suited to his condition in life, the person who has furnished such supplies is entitled to be *reimbursed* from the property of such incapable person.

Illustrations— (a) *A* supplies *B,* a lunatic, with necessaries suitable to his condition in life. *A* is entitled to be reimbursed from *B's* property.

(b) *A* supplies the wife and children of S, a lunatic, with necessaries suitable to their condition in life. *A* is entitled to be reimbursed from *B's* property: S. 68.

Sec. 68 provides for liability in respect of necessaries supplied to a person *incapable of entering into a contract. A minor* is a person incapable of contracting, and therefore, the provisions of this section apply to his case. It will be observed that the minor's *property* is liable for necessaries, and *no personal liability* is incurred by him.

Necessaries— As to what are necessaries is a *question of fact* in each case. Thus, costs incurred in successfully defending a suit on behalf of a minor, in which his property was in jeopardy are *"necessaries* "within the meaning of this section. Costs incurred in defending him in a prosecution for dacoity are also similarly covered. So also is a loan to a minor to save his property from sale in execution of a decree. Money advanced to a Hindu minor to meet his marriage expenses is supplied for "necessaries", and may be recovered out of his property.

From S. 10 and the decision of the Privy Council in *Mohori Bibi's case,* it is now quite clear that a *minor or* a person of *unsound* mind is *not* competent to contract or, in the words of section 68, is "a person who is *incapable* of entering into a contract"; this section, therefore, *does* apply to such a person.

In order to render an infant's contract for necessaries *enforceable,* the plaintiff must prove (i) that the contract was for goods reasonably necessary for supporting a person in his position, *and* (ii) that the infant had *not* already a sufficient supply of these necessaries. The obligation, is to pay a *resonable,* and *not* the *agreed,* price for the goods.

The relief contemplated by this section is *not dependent on any contract,* but is *independent* of it. It is *not necessary* that there should be any *agreement* between the parties. The section creates a *statutory* claim against the property of the person who is incapable of entering into a contract and has been supplied with necessaries suited to his condition in life.

2. Reimbursement of person paying money due by another in the payment of which he is interested (S. 69)

Under S. 69, a person who is *interested* in payment of money *which another is bound by law* to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Illustration— *B* holds land in Bengal, on a lease granted by *A,* the *zamindar.* The revenue payable by *A* to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence for such sale will be the annulment of *B's* lease. *B,* to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from *A. A* is bound to make good to *B* the amount so paid.

INGREDIENTS OF S. 69. — The three *important ingredients* of S. 69 are as follows:

1. *There must be a person who is bound by law to make a certain payment.*

Thus, in *Raghavan* v. *Alamelu Ammal,* (1908) 31 Mad. 35, the income-tax authorities assessed the widow of a deceased Hindu in respect of outstanding forming part of the estate of the deceased, notwithstanding protests on her part that the outstanding had *not* come to her, but had been bequeathed under the will of the deceased to the defendants. The widow, however, paid the tax. It was *held* that she could *not* recover the amount from the defendants under this section, for the defendants, *not* being the parties assessed, were not “bound by law" to pay the tax.

2. *There must be another person who is interested in such payment being made.*

It is necessary that the person paying must have interest in the payment being made. Under this section, if a man is *interested* in the payment of money, and has proper grounds for think, ig that another, who is bound to pay the money, *either cannot* pay *or* does *not intend* to pay, he himself is entitled to pay that money, and is allowed to recover it.

Ram Tuhul Singh v. *Bisheswar,* 23 W.R. 305 (P.C.)— *A* owes money to *B. C* voluntarily pays off *A's* debt to *B. C cannot* recover this amount from *B,* as he was *not interested* in the payment.

Nand Kishore v. *Paroo Mian,* 2 Pat. L.J. 676— *A* agrees to sell his land to *B.* Before completion of the sale, this land is attached by *A's* creditor. *B* deposits the amount in Court. Later, *A* refuses to complete the sale. *B cannot* recover the sum paid, as at the time of payment, he had no interest in the land, *not* having either possession *or* title.

A person whose immovable property is attached for a debt payable by another person, is interested in paying the debt to save the property, and can recover from the person by whom it is due. A payment made by a person in order to avoid the sale of certain properties in which he himself had an interest, can be recovered, if the person paying had a reasonable apprehension that his interest in the property would be adversely affected.

Similarly, where in execution of a money decree against *A* obtained by a third person, property mortgaged to *B* was sold, and *B* deposited the amount of the decree to set aside the sale, and afterwards sued for the recovery of the amount, it was *held* that he was *not* a *mere volunteer,* but an interested person, and

therefore, entitled to be reimbursed.

ENGLISH LAW— The section lays down a rule *wider* than that in *England.* There, in order to invite the application of the rule regarding reimbursement, it is necessary that a person must have been *compelled* to pay the debt *or* discharge the liability of another, whereas *in India,* it is sufficient if the person making the payment was *interested* in the payment being made by the person ultimately liable.

3. *Lastly, a payment must have actually been made.*

Thus, when litigation was pending between the parties as to the ownership of certain property, the plaintiffs paid to the Government, revenue of the property under compulsion and eventually lost their suit, it was *held* that they were entitled to recover it from the defendant. The reason given was that they were litigating under a *bona ride* belief that they were entitled to the property, and it was enough that they were interested in making the payment at the time when the payment was made.

3. Obligation of person enjoying benefit of a non- gratuitous act (S. 70)

S.70 deals with the next kind of quasi-contract, and provides as follows:

Where a person *lawfully* does anything for another person, or *delivers* anything to him, *not* intending to do so *gratuitously,* and such other person *enjoys the benefit* thereof,—the latter is bound to make *compensation* to the former in respect of, or to *restore* the thing so done *or* delivered.

Illustrations— (a) *A,* a tradesman, leaves goods at *B's* house by mistake. *B* treats the goods as his own. He is bound to pay *A* for them.

(b) *A* saves *B's* property from fire. *A* is *not entitled to compensation* from *B,* if the circumstances show that he intended to act gratuitously.

S. 70 EXPLAINED.— Where *A lawfully* does anything for *B, not intending* to do so *gratuitously,* and *B enjoys* the *benefit* of the same, he is *bound* to compensate *A* for the thing so done.

It is *not* in every case, however, in which a man has benefited by the act of another that an obligation to compensate arises. As observed by the Privy Council in *Ram Tuhul* v. *Bisheswar Lai,* (1875) L.R. 2 I.A. 131 (which is the leading case on the point):

"It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. To support such a suit, there must be an obligation, express or implied, to repay".

E*SSENTIALS OF S.70:*

*(a)*The thing must have been done lawfully. i.e, the act must be lawful. A payment made by a person dishonestly with the intention of manufacturing evidence of title to land which belonged to the defendant, and to which he knew he had no claim, is *not 'lawful'* within the meaning of this section.

(b) *Secondly,* the person who did it must *not* have intended to act *gratuitously.*

Upendra v. *Naba,* 25 C.W.N. 813.— Where two co-owners of an insanitary tank were sued criminally for ignoring an order of the corporation to fill up the tank, whereupon one of thorn filled up the tank, and brought a suit for contribution

against the other, who also was in receipt of rents from tenants settled on the filled-up tank, the defendant was *held liable,* as the tank was filled up lawfully without intending to be done gratuitously and the person for whom the act was done was enjoying the benefit thereof.

(c) *Lastly,* the person for whom the act is done must have enjoyed its benefit.

In *Damodar Mudaliar* v. *Secretary of State for India,* (1894) 18 Mad. 88, eleven villages were irrigated by a certain tank, some of which were *zamindari* villages, and others were held by Government. The Government effected certain repairs necessary for the preservation of the tank, and it was found that they did *not* intend to do so gratuitously for the *zamindars,* and that latter had enjoyed the benefit thereof. The *zamindars were,* under the circumstances, *held liable* to contribute to the expenses of the repairs.

Upon the same principle, where a mortgagee threatened to sell the land mortgaged to him, and one of the co-sharers paid up the mortgage debt, to prevent the property from being sold, it was *held* that he was entitled to contribution from the other co-sharers. It is, however, different if the person paying the amount has no interest in the property at all.

In *Governor-General in Council* v. *Madras Municipality,*15 Bom. L.R. 927, the Provincial Government wrongly purported to exercise their powers under the Railways Act and required the Railway Company to widen a culvert. The Railway Company, while stating that the Government had no power to require such widening of the culvert, agreed to do the work and charge either the Government or the Municipality. After the work was completed, the Railway Company filed a suit against the Municipality. It was *held* that although the Railway Company did *not* intend to do the work gratuitously, the Municipality did *not* benefit from it, and therefore section 70 could *not* be relied upon.

PROBLEM— P enters into a contract with the Municipality of the town *L* to construct a market. The contract is in writing, but does *not* bear the seal of the Municipality, in the absence of which the contract is *not binding* on the Municipality according to the District Municipalities Act. *P* constructs the market and the said Municipality takes possession of it and enjoys its rent, but refuses to pay *P* as agreed for the construction. P sues to recover his dues. How will you decide?

Ans— P must succeed. His case is covered by S. 70. In this case, the person for whom the non-gratuitous act was done *(i.e.,* the Municipality), has enjoyed the benefit of such act. The fact that there was no enforceable contract does *not* make any difference:

Pallonjee and Sons v. *Lonavala Municipality,* 69 Bom. L.R. 835.

In *Secretary of State* v. *G.T. Sarin & Co.* (11 Lah.375), *A* entered into a contract for the supply of fodder for horses with X, the officer commanding the Depot of a cavalry regiment in India. *X* had no authority to enter into any such contract on behalf of the Government, as he had purported to do. The fodder, however, was accepted and used for the horses belonging to the cavalry regiment.*A* claimed the price of the fodder from the Government. Here, although *X* had no authority to enter into such a contract on behalf of Government, the fodder was in fact accepted and used by Government, and *A* was, therefore, *held*

entitled to claim the price of the fodder from the Government.

In similar circumstances, in *Secretaty of State v. G. T. Sarin & Co.,* where a Commanding Officer ordered food for horses, the supplier was entitled to succeed under S. 70, although the contract was *void,* as it did *not* comply with the statutory requirements.

4. Rights and liabilities of finder of goods (S. 71)

An agreement is also implied by law where a person finds goods belonging to another and takes them into his custody. Although there is, in fact, no agreement between the owner and the finder of the goods, the latter is, for certain purposes, *deemed in law to be a bailee,* and must take as much care of the goods as a man of ordinary prudence would take of similar goods of his own. S. 71 of the Act deals with this topic, and provides as follows:

A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a *bailee.*

A finder of goods is subject to the responsibility of a bailee to take *due care of the goods,* and try and *find out the true owner;* but he is entitled to its *possession* as against everyone *except* the *true owner.*

H found a diamond on the floor of *K's* shop and handed it to *K* to keep it till the owner claimed it. In spite of wide advertisement in the newspapers, no one appeared to claim it. After the lapse of some weeks, *H* tendered to *K* the cost of the advertisement and an indemnity bond and requested him to return the diamond to *H. K.* refused; *K* is liable in damages. *H* is entitled to retain the goods as against everyone except the true owner; so if after wide advertisement, the real owner does *not* turn up, and if *H* is prepared to give an indemnity to *K, K* must deliver the diamond to *H.*

The rights and liabilities of a bailee are contained in Ss. 168 and 169 of the Act, discussed in a later Chapter.

5. Liabilities of person to whom money is paid or thing delivered, by mistake or under coercion (S. 72)

The *last* kind of quasi-contract mentioned in S. 72 which runs thus:

*A person to whom money h*as been paid or anything delivered by *mistake or under* by *mistake* or under *coercion* must *repay* or *return* it.

Illustrations—(a) *A* and *B* jointly owe 100 rupees to C. *A* alone pays the amount to *C,* and *B not* knowing this fact, pays 100 rupees over again to C. *C* is bound to repay the amount to *B.*

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

SCOPE OF S. 72— Under S. 72, money paid in fulfilment of a *natural* obligation is *not* recoverable, *e.g.,* where one has paid up a *time-barred debt.* A person making payment of a debt, *erroneously* supposing that he was liable to contribute, *cannot* sue under this section; nor can a person who has made a purely *voluntary* payment, recover under this section.

The mistake under which money has been paid may be one of *law or fact; so* where money due to *B* was paid by mistake to *A* on the supposition that he was

the legal representative of *B,* and it was afterwards found that C, and *not A,* was *B's* legal representative, it was *held* that the amount paid to *A* under a mistake *could* be recovered under this section.

Under the section, if tax has been paid to the Government, and the Supreme Court later holds that such levy was illegal, the tax would be refundable. It makes no difference even if such tax was voluntarily paid, as long as a payment was made under a mistake of law.

In one case, on 16th September, 1943, *P* entered into a contract with *R* for the purchase of one wagon of maize starch at the rate of Rs.77 per cwt. On 16th December, 1943, before the goods were delivered, an Order was passed by the Government of India under the Defence of India Act making Rs.48 per cwt. the maximum price. The Order was made applicable to all contracts in which delivery was to be given on or after 1st January, 1944. P paid the contract price and took delivery of the goods on 3rd January, 1944. Subsequently, P sued *R* to recover the difference between the contract price of Rs.77 per cwt. and the maximum price of Rs.48 per cwt. as fixed by the new Government Order. P must succeed on the above-mentioned ground.

Lastly, payment "by mistake" in S.72 must refer to a payment which was *not* legally due, and which could *not* have been enforced, the "mistake" being in thinking that the money paid was due when in fact it was *not* due. Every case depends upon its own facts.Thus, upon a misconstruction of a term of the lease, *A,* the lessee, makes an over-payment of Rs. 500 to *B,* the lessor. Is *A* entitled to the refund of the over-payment under S. 72 of the Contract Act? Their Lordships of the Privy Council *held* in the affirmative.

The Privy Council has also laid down that the word "coercion" used in this section is *not* to be understood in its *strict legal sense* as defined in S.15. Rather, it is used in its *general and ordinary sense.*

Compensation for failure to discharge obligations resembling those created by contract (S. 73, para. 3)

It is also to be noted that when an obligation *resembling* those created by contract has been incurred and has *not* been discharged, any person *injured* by the failure to discharge it, is entitled to *receive* the *same* compensation from the party in default *as if such person had contracted to discharge it and had broken his contract.*

In other words, the rights and liabilities of parties to a quasi-contract are the *same as* those of parties who have actually entered into a contract.

End of chapter 16

17th Chapter

BREACH OF CONTRACT (Ss. 73-75)

What is breach of contract? (2marks) M.U.May2017

What is specific performance of contract? M.U.Apr.2016, May2017

What is temporary injunction? (2marks) M.U.Apr.2016

What is breach of Contract? What are the principles on which damages are assessed for breach of contract? B.U. Apr.2011, Apr.2013, May2017

When can special damages be granted? (2marks) B.U.Nov.2015

Write a note on: Liquidated damages and penalty. B.U. Nov.2012

Write a short note on: Quantum Meruit P.U. Apr.2011

CONSEQUENCES OF BREACH OF CONTRACT— The law expects parties to a contract to perform their respective obligations, and naturally frowns upon a breach by either party. Therefore, as soon as either party commits a breach of the contract, the law gives to the other, *three remedies.* He may seek to obtain (1) *damages* for the loss sustained, or (2) a decree for *specific performance, or* (3) an *injuction.* The law as to *damages* is regulated by the *Contract Act,* whereas the law as to *specific performance* and *injunction* is regulated by the *Specific Relief Act,* and is, therefore, discussed below only in brief.

Specific performance can be granted only when the damages are an *inadequate* remedy, *or* when the Court can supervise the execution of the contract or when the contract is certain, fair and just. Specific performance *cannot* be enforced of contracts of *personal* service.

Injunction is used as a means of enforcing a contract or a promise to *forbear, or* it may be the only means of enforcing the specific performance of a contract where damages are an *inadequate* remedy. Thus, *A* agrees to buy and *B* agrees to sell a picture by a dead painter and two rare China vases; *A* may compel *B specifically to perform* the contract— for there is *no standard for ascertaining the actual damage* which would be caused by its non-performance.

So also, *A,* a singer, contracts with *B* the manager of a theatre, to sing at his theatre for one year, and to abstain from singing at other theatres during the period. She absents herself. *B cannot* compel *A* to sing at his theatre (as it is a personal contract), but he may sue her for an *injunction* restraining her from singing at other theatres. Thus, personal contracts, (that is, contracts which have to be performed by the person *himself* or herself and by no one else), *cannot* be specifically enforced. However, an *injunction* can be issued in such a case. Injunctions are of *two* types: *temporary* and *permanent.* A permanent injunction (which is governed by the Specific Relief Act) can be issued when the final order or decree is passed, *i.e.* at the end of the suit. On the other hand, a temporary injunction (which is governed by the Code of Civil Procedure) can be issued at *any stage of the suit.*

[For the law relating to specific performance and permanent injunction, kindly refer to the Specific Relief Act.]

NOMINAL AND EXEMPLARY DAMAGES.— Where *no* loss arises from the breach of contract, the party claiming compensation is entitled to *nominal* damages only. A *special* loss which does *not* naturally and obviously flow from the breach *cannot* be recovered unless expressly *stipulated* for in the contract. It must be borne in mind that damages are given by way of *compensation,* and *not* by way of *punishment.* So, the party wronged can recover only the *actual pecuniary loss sustained* by *him* (compensatory damages), and *not exemplary* damages. *Formerly,* exemplary damages were granted in *cases of breach of promise of marriage,* where the feelings of the person injured were taken into consideration.

The law relating to damages for breach of contract can be discussed under the following *four* heads:

A. Rules governing the measure of damages (S. 73)

B. Compensation for breach of contract where penalty is stipulated for (Difference between penalty and liquidated damages) (S. 74)

C. Rights of party rightfully rescinding a contract (S. 75)

D. *Quantum Meruit.*

A. RULES GOVERNING THE MEASURE OF DAMAGES (S. 73)

S. 73 lays down *four important rules* governing the *measure* of damages. It contains *eighteen* illustrations, which will be discussed with *appropriate* and *necessary* comments, along with the decided cases.

First rule [S. 73(1)]

The *first rule* governing the measure of damages is laid down in S. 73, thus: When a contract has been broken, the party who *suffers* by such breach is entitled to receive, from the party who has *broken* the contract, compensation for any loss or damage caused to him thereby,—

(i) which *naturally* arose in the *usual course of things* from such breach, *or*

(ii) *which the parties knew, when they made the contract,* to be likely to result from the breach of the contract.

Illustrations

(a) A contracts to sell and deliver 50 maunds of saltpetre to *B,* at a certain price to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A,* by way of compensation, the sum, if any, by which the *contract price falls short of the price* for which *B might have obtained* 50 maunds of saltpetre of like quality at the time when the saltpetre *ought* to have been delivered.

Illus. **(a)** establishes the principle that under a contract for the sale of goods, the measure of damages upon a breach is the *difference between the contract price and the market price at the date of the breach.* It is, however, *not necessary* in such a case that the buyer should have *actually* bought like goods from the market. This is made clear in the above illustration by the use of the words, “might have bought".

(b) *A* hires *B's* ship to go to Bombay, and there take on board, on the first of January, a cargo which *A* is to provide, and to bring it to Calcutta, the freight to be paid when earned. *B's* ship does *not* go to Bombay, but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expenses in doing so. *A* is entitled to receive compensation from *B in respect of such trouble and expense.*

Featherson v. *Wilkinson,* (1873) L.R. Ex. 122— *A* contracts with *B* to provide a ship on a certain day to receive a cargo of coal to be carried to Havra. *A* fails to provide the ship in time, and *B* has to charter vessels at an advanced freight and also buy coal at a higher price. What is *B's* remedy?— *B* can recover from *A* the increase of price as well as the increase of freight, *unless A* can show that, by reason of a corresponding increase in the market price at the port of delivery or otherwise, the loss is compensated, wholly or in part.

(c) *A* contracts to buy of *B,* at a stated price, 50 maunds of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will *not* accept the rice if tendered to him, *B* is entitled to receive from *A,* by way of compensation, the amount, if any, by which the *contract price exceeds* that which *B* can obtain for

the rice at the time when *A* informs *B* that he will *not* accept it.

[Note: This is an example of an *anticipatory breach of contract,* discussed earlier.]

(d) *A* contracts to buy *B's* ship for 60,000 rupees, but breaks his promise. *A* must pay to *B,* by way of compensation, the *excess,* if any, *of the contract price over the price which B can obtain* for the ship at the time of the breach of promise.

(e) *A,* the owner of a boat, contracts with *B* to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, *owing to some avoidable cause,* does *not* start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived *if* the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to 6 by A is the *difference between the price* which *B* could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, *and its market price* at the time when it actually arrived.

[Note - lllus. (e) is an illustration of a case of measure of damages in case of delay.]

(f) *A* contracts to repair *B's* house in a certain manner and receives payment in advance. *A* repairs the house, but *not according to the contract. B* is entitled to recover from *A,* the *cost of making the repairs* conforming to the contract.

(g) *A* contracts to let his ship to *B* for a year, from the first January, for a certain price. Freights rise, and on the first January, the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B,* by the way of compensation, a *sum equal to the difference between the contract price and the price* for which *B* could *hire a similar* ship for a year on and from the first of January.

(h) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A,* by way of compensation the *difference* between the *contract* price of the iron *and* the sum for which *A* could have *obtained* and *delivered* it.

(i) *A* delivers to *B,* a common carrier, a machine, to be conveyed, without delay, to *A's* mill, *informing B that his mill is stopped for want of the machine. B* unreasonably delays the delivery of the machine, and *A* in consequence, loses a profitable contract with the Government. *A* is entitled to receive from *B,* by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that the delivery of it was delayed, but *not* the loss sustained through the loss of the Government contract.

RULE IN HADLEY v. BAXENDALE, (1854) 9 Ex. 354— The facts of *Hadley* v. *Baxendale* were similar to those in lllus. (i) to S. 73, except that the defendants did *not* know (in that famous English case) that the plaintiffs' mill was Stopped for want of the machinery which they were to supply. They were *held not liable* for loss of profit. But they *would* have been held so liable had they known about the stoppage of the mill.

S. 73, in fact, is based on *Hadley v. Baxendale* and the observations made therein.

The well-known *rule* in this case was stated by the Court as follows :

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be *either* such as may fairly and reasonably be considered as arising naturally, *i.e.,* according to the usual course of things, from such breach of contract itself, *or* such as may *reasonably be* supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

Now, if the *special circumstances* under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to *both* parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could be supposed to have had in his contemplation, the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage, it would be unjust to deprive them."

FACTS OF THE CASE— The facts of *Hadley* v. *Baxendale* were as follows : A mill belonging to *H* had a broken crankshaft, and *H* delivered the shaft to *B,* a common carrier, to take it to a manufacturer at Greenwich to copy and make a new one. *B negligently* delayed delivery of the shaft beyond a reasonable time, as a result of which the mill was idle for a longer period. He did *not* make known to *B* that delay would result in loss of profits. In a suit by *H* against *B* claiming to recover by way of damages the loss of profit caused by the delay, it was *held* that there were only *two* grounds upon which *H* could sustain his claim. *First,* that in the usual course of things, the profit of the mill would cease altogether for want of the shaft. But this would *not* be the normal occurrence, for, *H* might well have had a spare shaft in reserve. *Secondly,* that the special circumstances were so fully disclosed that the inevitable loss of profit was made apparent to *B.* This however, was *not* the case. Therefore, *B* was *not liable* for loss of profit during the period of delay.

In one English case, *D* agreed to sell a boiler to *P,* who delayed the delivery for twenty weeks beyond the scheduled day. *P* was a dyer, *and D knew* that the boiler was required for his dyeing business. In fact, P required the boiler for certain lucrative contracts with the Government, but based his claim for damages merely on the loss of profits from ordinary dyeing contracts. The Court of Appeal *held* that *P* was entitled to succeed. (*Victoria Laundry* v. *Newman Industries Ltd.,* (1949) 2 K.B. 528)

(j) *A, having contracted with B* to supply *B* with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C for* the purchase

of 1,000 tons of iron at 80 rupees a ton, *telling C* that he does so for the purpose of performing his contracts with *B. C* fails to perform his contract with *A,* who *cannot* procure other iron, and *B,* in consequence, rescinds the contract. *C* must pay 20,000 rupees to *A,* being the profits which *A* would have made by the performance of his contract with *B.*

(k) *A* contracts with *B* to make and deliver to *B,* by a fixed day, for a specified price, a machinery. *A* does *not* deliver the piece of machinery at the time specified, and in consequence of this, *B* is obliged to procure another at a higher price than that which he was to have paid to *A,* and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had *not* been then communicated to *A),* and is compelled to make compensation for breach of that contract. *A* must pay to *B,* by way of compensation the difference between the contract price of the piece of machinery and the sum paid by *B* for another, but *not* the sum paid by *B* to third person by way of compensation.

(l) *A,* a builder, contracts to erect and finish a house, by the first of January, in order that *B* may give possession of it at the time to *C,* to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C. A* builds the house so badly that, before the first of January, it falls down and has to be rebuilt by *B,* who in consequence, loses the rent which he was to have received from *C,* and is obliged to make compensation to C for the breach of his contract. *A* must make compensation to *B* for the cost of re-building the house, for the rent lost, and for the compensation made to *C.*

(m) *A* sells certain merchandise to *B,* warranting it to be of a particular quality, and *B,* in reliance upon this warranty, sells it to *C* •with a similar warranty. The goods prove to be *not* according to the warranty, and *B* becomes liable to pay C a sum of money by way of compensation. *B* is entitled to be reimbursed this sum by *A.*

(n) *A* contracts to pay a sum of money to *B* on a specified day.

A does *not* pay money on that day. *B* in consequence of *not* receiving the money on that day is unable to pay his debts and is totally ruined. *A* is *not* liable to make good to *B* anything except the principal sum he contracted to pay, together with interest up to the day of payment.

INTEREST AS DAMAGES— The above Illustration (n) led to a conflict of opinion among the High Courts on the question whether interest can be allowed as *damages.* The conflict was settled by the Privy Council decision in *B. N. Rly. Co.* v. *Ruttonji,* 40 Bom. L.R. 746, in which it laid down that, subject to certain exceptions, *interest cannot be recovered as damages* for wrongful detention of money. Interest can be recovered now only in the following *four* cases:

(i) when there is an *express or implied agreement* to pay interest;

(ii) where a *custom or trade usage* allows interest; (iii) under the *Interest Act;* and (iv) under S. 61 of the *Sale of Goods Act.*

(o) *A* contracts to deliver 50 maunds of saltpetre to *B* on the first of January, at a certain price. *B afterwards,* before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of January. *A* breaks his promise. In estimating the compensation payable by *A* and *B,* the

market price of the first of January, and *not the profit* which would have arisen to *B* from the sale to *C,* is to be taken into account.

(p) A contracts to sell and deliver 500 bales of cotton to *B* on a fixed day. *A* knows nothing of *B's* mode of conducting his business. *A* breaks his promise, and *B,* having no cotton, is obliged to close his mill. *A* is *not* responsible to *B* for the loss caused to *B* by the closing of the mill.

(q) *A* contracts to sell and deliver to *B,* on the first of January, certain cloth, which *B* intends to manufacture into caps of a particular kind, for which there is no demand except at that season. The cloth is *not* delivered till after the appointed time, and too late to be used that year in making caps. *B* is entitled to receive from *A,* by way of compensation, the difference between the contract price of the cloth *and its* market *price* at the time of delivery, but *not* the profits which he expected to obtain by making caps, *nor* the expenses which he has been put to in making preparation for the manufacture.

(r) *A,* a ship-owner, contracts with *B,* to convey him from Calcutta to Sydney in A's ship sailing on the first January, and *B* pays to *A,* by way of deposit one-half of his passage money. The ship does *not* sail on the first of January, and *B,* after being in consequence, detained in Calcutta for some time and thereby put to some expense, proceeds to Sydney, in another vessel, and in consequence, arriving too late in Sydney, loses a sum of money. *A* is liable to repay to *B* his deposit with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any of the passage money paid for the second ship over that agreed upon for the first, *but not* the sum of money which *B* lost by arriving in Sydney too late.

Second rule [S. 73(3)]

The *second rule* as to measure of damages is to be found in the second clause of S. 73. It deals with what is known as '*remoteness of* damage'. It runs thus:

Such compensation is *not* to be given for any *remote* and *indirect* loss or damage sustained by reason of the breach.

REMOTENESS OF DAMAGES— Damages are measured by the *loss actually suffered by the party.* The loss must *naturally* arise in the usual course of things from the breach; *or* it must be such as the parties *knew,* when they made the contract, to be *likely to result from the breach* of it. It follows, therefore, that a *party is not liable for loss which is too remote, i.e.,* which is *not* the *natural or probable* consequence of the breach of the contract.

In other words, the measure of damages is the estimated loss *directly* and *naturally* arising in the ordinary course of events from the breach of contract. Compensation is *not* to be given for any *remote* and *indirect* loss or damage sustained by reason of the breach.

In *Madras Rly. Co.* v. *Govinda,* (1898) 21 Mad. 172, the plaintiff, who was a tailor, delivered a sewing machine and some clothes to the defendant railway company, to be sent to a place where he expected to carry on his business with special profits by reason of a forthcoming festival. Through the fault of the company's servants, the goods were delayed in transmission, and were *not* delivered until some days after the conclusion of the festival. The plaintiff had *not*

given any notice to the railway company that the goods were required to be delivered within a fixed time for any special purpose. On a suit by the plaintiff to recover a sum on account of his estimated profits, it was *held* that the damages claimed were *too remote.*

PROBLEM— The plaintiff entrusted the defendant with a telegraphic message in cipher *(i.e.,* a coded message) for transmission to America. The message, *not* being intelligible to the defendant, he omitted to send the message, in consequence of which the plaintiff lost a large sum of money which he would have made if the message had been delivered. The defendant had no knowledge of the contract or purpose of the telegram, and hence he could *not* have contemplated any damages as likely to result from his *not* sending it. In the circumstances, it was *held* that the plaintiff was entitled only to *nominal* damages.

In *Mowbray* v. *Merryweather,* (1895 I.Q.B. 640), *A,* a stevedore, agreed with *B,* a shipowner, to discharge the cargo of his ship, and *B* agreed to supply all necessary and proper chains (among other gearing) reasonably fit for that purpose. A chain supplied by *B* was defective and broke in use, and *Z,* a workman of *A* was thereby hurt.*A* was compelled to pay *Z* a reasonable compensation. The Court *held* that *B* was liable to make good to *A* the compensation which *A* had paid to Z as damages naturally resulting from *B's* breach of his warranty. *A* was entitled, as between himself and *B,* to rely on *B's* warranty, though such reliance was no excuse for *A* as against Z

Third rule (Expln. to S. 73)

The *third rule* as to the measure of damages is to be found in Explanation to S. 73, which provides as follows:

In estimating the loss or damage arising from a breach of contract, the *means* which existed of *remedying the inconvenience* caused by the non-performance of the contract *must be taken into account:* Explanation to S. 73.

Thus, if a railway company having contracted with a passenger to take him to a particular station fails to do so, the passenger is entitled to damages for the inconvenience of having to walk and any reasonable expense he has been put to, as by staying at an inn, and he may get some other conveyance, and charge the railway / company with the expense if in the circumstance it is a reasonable thing to do so; *but* he is *not* ordinarily entitled to charter a special train to save himself from the tedium of waiting, and charge the railway company with the expenses.

Fourth rule (S. 73)

Lastly, it is to be noted that damages payable for the breach of a *quasi-contract* are *exactly the same* as those for the breach of an ordinary contract. In other words, all the above rules *also* apply to quasi-contracts.

SUMMARY OF RULES GOVERNING THE MEASURE OF DAMAGES

1. When a party sustains a loss by reason of a breach of contract, he is entitled, (so far as monetary compensation is concerned) to be put in the same situation with regard to damages, *as if* the contract has been performed, subject to the qualification that'loss or damage is such (a) as has arisen *naturally* in the usual course of things, *or* (b) as the parties *knew* when they made the contract to be likely to result from the breach of it, and (c) as is *not remote and indirect.*

2. When a party claims *special* damages, (which would *not* ordinarily flow from the breach), he must prove that such loss was *in the contemplation of both the parties* at the time of the contract ® *and expressly provided for.*

3. In estimating the loss or damage, the *means* which existed of *remedying* the inconvenience caused by the breach must be taken into account.

4. When *no loss* arises from the breach of contract, only *nominal* damages are to be given.

5. It is also to be noted that damages are given by way of *restitution* and *compensation* only, and *not* by way of *punishment.* The aggrieved party can, therefore, recover the *actual* loss caused to him (compensatory damages), and *not exemplary damages.*

6. The above rules relating to damages apply to *quasi-contracts* also.

MEASURE OF DAMAGES IN CASE OF BREACH OF CONTRACT FOR SALE OF LAND —The rule in *Hadley* v. *Baxendale* does *not* apply *in English law* to contracts for the sale of immoveable property. The leading case on this point is the decision of the House of Lords in *Bain* v. *Fothergill,* (1874 L.R. 7 H.L. 158), where it was *held* that the intending purchaser of land *cannot* recover any damages for the loss of his bargain; but he *can* recover deposit and the expenses incurred by him.

The Bombay High Court had, at one time (in *Pitamber* v. *Cassibai,* 1886 11 Born. 272), *held that* the rule in *Bain* v. *Fothergill* was also the law in India. However, it will be seen that Section 73 is very general in its terms, and does *not* exclude cases of immoveable property. As observed in a later case decided by the said High Court, The legislature has *not* prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities".

In later cases, the Bombay High Court has reversed its decision in *Pitamber* v. *Cassibai,* (above) and has *held* that Section 73 would govern cases of sale of land also. Thus, where an intending purchaser of land claims damages for the loss of his bargain, he would ordinarily be entitled to damage caused to him which "naturally arose in the usual course of things from such breach". The High Courts of Calcutta, Lahore and Madras have also taken a similar view.

MEASURE OF DAMAGES IN AN ANTICIPATORY BREACH OF CONTRACT — In the event of an anticipatory breach, the innocent party may *either—*

(i) accept the repudiation, treating the contract as at an end, enforce the appropriate remedy at once, (in which case, the measure of damages will be the difference between the contract price and the market price *on the date of the repudiation)-, or*

(ii) ignore the repudiation, and wait until the time for performance arrives (in which case, the measure of damages will be the difference between the contract price and the market price *on the date of performance).*

B. COMPENSATION FOR BREACH OF CONTRACT WHERE PENALTY IS STIPULATED FOR

(DIFFERENCE BETWEEN PENALTY *AND* LIQUIDATED DAMAGES) (S. 74)

MEANING OF 'PENALTY' AND 'LIQUIDATED DAMAGES.— As a genera|

rule, compensation must be commensurate with the loss or damage sustained. Acting upon this principle, when the injury consists of a breach of a contract, the Court would assess damages with a view to *restore* to the injured party, such advantages as he might reasonably be expected to have derived from the contract, had the breach *not* occurred. But, at times, the parties themselves, at the time of entering into a contract, agree that a particular sum will become payable by a party in case of breach of the contract.

Thus, for instance, *X* may agree to sell his house to *Y* on 1st April, for Rs. 20 lakhs, and one of the clauses of the agreement may provide that if either party commits a default, he would pay Rs.50,000 to the other.

Such a sum is sometimes agreed upon by the parties by way of what is known as *liquidated damages,* that is, it is a sum payable by a party as *damages,* the amount of which, *instead of being left to the determination of the Court, is previously determined by the parties themselves.* At other times, -such a sum is named as a *penalty,* that is, it is an amount stipulated as *in terrorem* of the offending party.

In *English law, a* distinction is made between *liquidated damages* and *penalty.* Whereas liquidated damages are allowed to be recovered, in cases of penalty, the courts In England can grant relief against the penalty. This distinction is *not significant in India, as Indian law* does *not* recognize the same. The rule under S. 74 of the Act is that in the case of a contract which has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled (whether or *not* actual damage or loss is proved to have been caused thereby) to receive from the party who has broken the contract, *reasonable compensation not* the amount so named or, as the case may be, the penalty stipulated for.

Stipulations of this nature are usually to be found in cases of money lending. *A* gives *B* a bond for the repayment of Rs.10,000 with interest at 12 per cent at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of *penalty,* and *B* is only entitled to recover from *A* such compensation as the Court considers *reasonable.*

It is further clarified by S. 74 that a stipulation for increased interest from the date of default *may* be a stipulation by way of *penalty.*

Illustrations— (a) *A* contracts with *B* to pay Rs.1,000, if he fails to pay *B* Rs.500 on a given day. *A* fails to pay *B* Rs.500 on that day. *B* is entitled to recover from *A,* such compensation, *not exceeding* Rs.1,000, as the *Court* considers *reasonable.*

(b) *A* contracts with *B* that if *A* practises as a surgeon within Calcutta, he will pay *B,* Rs.5,000. *A* practises as a surgeon in Calcutta. *B* is entitled to such compensation, *not exceeding* Rs.5,000, as the Court considers reasonable.

(c) *A* gives *B* a bond for the repayment of Rs.1,000, with interest at 12 per cent at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 *per cent from the date of default.* This is a stipulation by way of *penalty,* and *B* is only entitled to recover from *A, such*

compensation as the Court considers reasonable.

(d) *A,* who owes money to *B,* a money-lender, undertakes to repay him by delivering to him 10 maunds of grains on a certain date, and stipulates that, in the event of his *not* delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of *penalty,* and *B* Is only entitled to *reasonable compensation* in case of breach.

(e) *A* undertakes to repay *B* a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the *whole* shall become due. This stipulation is *not by way of penalty* and *the contract may be enforced* according to its terms.

(f) *A* borrows Rs.100 from *B,* and gives him a bond for Rs. 200, payable by five yearly instalments of Rs.40, with a stipulation that, in default of payment of any *instalment,* the *whole* shall become due. This is a stipulation *by way of penalty.*

'PENALTY' DEFINED.— A penalty is a sum mentioned in an agreement with a view to secure performance, the sum being according to the true intention of the parties, only a maximum of damages. The essence of *penalty* is a payment of money stipulated as *in terrorem* of the offending party. *Liquidated damages,* on the other hand, are a *genuine covenanted pre-estimate of damages.*

In other words, if it is found that the parties made no attempt to estimate the loss that might occur to them on breach of the contract, but still stipulated a sum to be paid in case of its breach, *with the* object of ensuring that both the parties would perform the contract, it would be treated as a penalty. In other words, a sum mentioned in the contract as compensation for breach of the contract would be treated as a penalty if it is *extravagant* and *unconscionable* in comparison with the greatest loss that could possibly flow from the breach.

Higher rate of interest, when a penalty

The following *rules* regarding a higher rate of interest may be noted:

(1) A stipulation for payment of interest at a higher rate *from the date of the bond,* on default on the part of the debtor to repay the amount on the due date *always* amounts to a penalty. In such cases, the provisions of S. 74 apply, and the Court may relieve the debtor, and award only such compensation to the creditor as it considers reasonable.

(2) If, however, the stipulation is for the payment of interest at a higher rate from *the date of default,* such a provision is *not* generally regarded as a penalty. However, such a stipulation could, in certain cases, be regarded as penal, and whether it is penal or *not* depends on the facts and circumstances of the case.

(3) A stipulation for payment of compound interest, in cases of default, *at the same rate* at which simple interest was payable, is *not* a *penalty* within the meaning of S. 74.

(4) However, a stipulation to pay compound interest, in case of default, *at a higher rate* than that of simple interest would amount to a *penalty,* and relief would be granted under S. 74.

(5) If a bond provides for interest at a specified rate if the money is *not* repaid on the due date, the case would fall under S. 74, and the appropriate relief would be granted, if necessary.

(6) If a bond provides for payment of interest at a lower rate, if interest is paid regularly on the due dates, such a clause is *not* in the nature of a penalty. Thus, if a bond provides for payment of interest at 18% p.a., with a stipulation that if the debtor pays interest punctually at the end of every year, the creditor would accept interest at 15% p.a., such a clause would *not* amount to a *penalty.*

Difference between part-payment and earnest money

Earnest money is a sum of money deposited as security for performance of a contract. Such sum may be forfeited if there is failure to perform the contract. Such forfeiture, it has been *held* in several cases, will *not* amount to a penalty. On the other hand, part- payment is part of the price paid otherwise than a deposit. Such part- payment can be recovered even though the contract is *not* performed, subject, of course, to the claim for damages of the other party.

FORFEITURE OF EARNEST MONEY— It must be noted that forfeiture of earnest money of a defaulting purchaser is *not* a penalty; but a term that a lump sum shall be paid *in addition* is *penal,* and only *actual* damages can be recovered. Thus, *A* contracts with *B* to purchase a house for Rs.2,00,000 and pays Rs.20,000 as earnest money. The contract provided that should *A* refuse to buy, the deposit would be forfeited; and that should *B* refuse to sell, he will refund the money deposited and pay Rs.20,000 as damages. On breach by *A, B* may forfeit the deposit. This is *not* a penalty. Earnest money is counted towards discharge of part of the price if the transaction *goes* through, but is forfeited if it fails due to purchaser's default. But, if earnest money forms a *major portion* of the price, or is totally disproportionate to the balance left (as for instance, if it is Rs.80,000, out of a total price of Rs.90,000), it *cannot* be forfeited; forfeiture in such a case is regarded as penal, and is *not* enforced. The vendee is, in such cases, entitled to treat it as a *part-payment* towards price and can have it refunded, after deducting *reasonable* compensation payable to the vendor: *Raghbir Das* v. *Sundar Lai,* 11 Lah. 699.

'LIQUIDATED DAMAGES' DEFINED.— The stipulated sum is to be regarded as *liquidated damages,* if it be found that parties to the contract conscientiously tried to make a genuine pre-estimate of the loss which might be occasioned to them in case the contract was broken by any of them. Hence, liquidated damages are *"a genuine covenanted pre-estimate of damages".* Liquidated damages are an *assessment* of the amount which, in the opinion of the parties, will *compensate* the wronged party for the breach.

Thus, where a contract contains only a single *stipulation,* on the breach of which a specified sum is to become payable, such a sum is liquidated damages, *if there is no adequate means of ascertaining the precise damages which may result from the breach, e.g.,* where a contractor undertakes to complete a work by a specified date and in default of such completion, promises to pay Rs.1,000 for every day during which the work remains incomplete after the said date.

DIFFERENCE BETWEEN *'PENALTY'* AND *'LIQUIDATED DAMAGES'*— The following are the *points of distinction* between 'Penalty' and 'Liquidated Damages':

1. The essence of *penalty* is a payment of money stipulated as *in terrorem* of the offending party; the essence of *liquidated damages* is a *genuine covenanted*

pre-estimate of damages.

2. If the clause is construed as a *penalty,* any amount can be recovered, *not exceeding the sum mentioned,* but *not necessarily* the whole; whereas if it is construed as *liquidated damages,* the *whole* sum is recoverable, *even though* the loss actually arising from the breach may turn out to be *greater* or *lesser* than anticipated by the parties. (This distinction is very important under English law, as stated above.)

In considering whether a named sum is a penalty or liquidated damages, the Court does *not* go by the *name* by which the parties have called it but looks to the *actual* nature of the thing, *e.g.,* if the sum fixed is *extravagant, exhorbitant* or *unconscionable,* the Court will regard it as a *penalty,* even if it is termed as liquidated damages in the contract. The Court is *not* bound by the terminology of the parties, *i.e.,* the actual technical terms used, but will inquire into the circumstances, *e.g.,* even though a contract mentions that in case of breach, a particular sum shall be payable as "liquidated damages", the Court will *not* be *bound* by the use of the term "liquidated damages", but will inquire into the circumstances of the case and decide for itself whether the clause is penal or *not.*

3. When the terms of contract specify a sum payable for the non-performance of a contract, a question of construction arises *under English law* as to whether the sum should be regarded as a penalty or *liquidated damages.* The question is important in this sense, that if the Court comes to the conclusion that the sum provided in the contract is a *penalty,* the Court has *discretion to grant,* or *not* to grant, the *entire amount.* In the case of *liquidated damages,* however, the Court has *no option* in the matter. It is *bound* to grant the *entire amount* to the plaintiff.

It may be noted that the above distinction is peculiar to *English law.* No such distinction is recognised in *India.* In India, the Court has *not* to go into the question whether the sum named is a penalty *or* liquidated damages, but *has* to *award reasonable compensation, not exceeding the amount so* named, *or,* as the case may be, the penalty stipulated for in the contract. The *only exception* made is in the case of any bail-bond, recognizance, or other instrument of the same nature given under the provisions of any law or order of Government for the performance of any *public* duty; upon breach of the condition of any such instrument, the *whole sum* mentioned therein is to be paid by the person liable. (See below.)

Exception to S. 74

SPECIAL PROVISIONS FOR BAIL-BONDS, ETC.—S. 74 provides that when any person enters into any *bail-bond, recognizance* or other instrument of the same nature, or, under the provisions of any law or under the orders of the Central Government or of any State Government, gives any *bond* for the performance of any *public* duty or act in which the *public* are interested, *he becomes liable,* upon breach of the condition of any such instrument, to *pay the whole sum* mentioned therein.

Thus, *A* gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the *whole* penalty. *{Illustration* to S. 74)

Bail-bonds, recognizances, or other bonds for the performance of a public

duty or acts in which the public are interested form an *exception to the general rule* enunciated in this section, that a party complaining of a breach can only recover *reasonable* compensation, and *not* any sum that is named in the contract as the amount to be paid in case of such breach. Persons who have executed such bonds are liable to pay the *whole sum* mentioned therein upon breach of the condition of any such instrument.

This exception does *not,* however, apply to *ordinary contracts with the Government.* A contract, therefore, by a builder or cattle- dealer to do work for, or to supply cattle to the Government, in which he binds himself to pay a fixed sum in case of breach, will be subject to precisely the same rule of construction as that which governs cases of this description between private individuals.

C. RIGHTS OF PARTY RIGHTFULLY RESCINDING A CONTRACT (S. 75)

S. 75 lays down that a person who *rightfully* rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

Illus.— *A,* a singer, contracts with *B,* the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night, *A wilfully* absents herself from the theatre and *B* in consequence, rescinds the contract. *B* is entitled to claim compensation for the damages which he has sustained through the non-fulfilment of the contract.

D. QUANTUM MERUIT

Quantum Meruit means "as much as he has earned" where one person has *expressly* or *impliedly* requested another to render him a *service without specifying any remuneration,* but the circumstances of the request *imply* that the service is to be *paid* for, there is implied a promise to pay *quantum meruit,* that is, so much as the party doing the service deserves.

Thus, the claim of *quantum meruit* can only arise upon a promise, to be implied—

(1) from a *request* by the defendant to the plaintiff to perform *services* for him, *or*
(2) from the acceptance of such services as the plaintiff rendered, so as to *imply a* promise to pay for the same : *Liladhar* v. *Mathurdas,* 39, Bom.L.R.119.

Further, if a person by the term of a contract is to do a certain piece of work for a *lump sum,* and he does only a *part* of the work, or something different, he *cannot* claim under the contract, but he may be able to claim on *quantum meruit,* as for example, if completion has been prevented by the act of the other party to the contract.

SUING ON QUANTUM MERUIT— Suing on quantum meruit is the suit for the value of so much as is done. The injured party can sue for *quantum meruit*— Thus, if the injured party has done a part of what he was bound to do under the contract, if the breach operates as *discharge,* and if what the injured party has done can be estimated in a money value, the injured party can sue either for damages for the breach of the contract or for *quantum meruit, i.e.,* for the value of so much as he has already done. Thus, *A* places an order with *B* for supply of 100 chairs to be delivered by instalments. *B* delivers 20 chairs when *A* informs

him that he will require no more. In this case, A's repudiation discharges *B* from the obligation to supply the remaining chairs. He can sue *A* for the breach of contract, or for the value of 20 chairs already supplied.

As observed by *Best, C.J.* in *Mavor* v. *Pyne,* "If a man agrees to deliver to me one hundred quarters of corn, and after I have received ten quarters, I decline taking any more, he is at all events entitled to recover against me the value of the ten that I have received".

In order to avail of this remedy, *two important conditions* must be fulfilled.

Firstly, the right to claim *quantum meruit* is available only if the original contract has been discharged. The contract must have been broken by the defendant in such a way that the plaintiff should be able to regard himself as discharged without any further performance, and he must elect to do so. Hence, if the contract is still "open", he *cannot* avail himself of this remedy, and would have to sue for damages.

Secondly, such aclaimcan beenforced only by theparty who is *not in default.* The party who breaks the contract is *not* entitled to sue *quantum meruit* for the work which he has done, although he may have performed some part of his obligation.

CASES. -*Planche* v. *Colburn.* (1831) 8 Bing.14.— In this case, the defendants had commenced a periodical publication called "The Juvenile Library", and had engaged Mr. *X* to write a volume on ancient armour for the periodical, for which he was to receive £ 100 on completion of the work. When Mr. *X* had completed a part, but *not* the whole, of the volume, the defendants abandoned the publication. The Court *held* that Mr. *X* was entitled to recover *quantum meruit,* and award him £ 50, which the jury found to be payable to him.

De Bernardy v. *Harding,* (1853) 8 Ex. 822.— The Defendant appointed the Plaintiff as his agent to advertise and sell tickets for seats to view the funeral of the Duke of Wellington, on commission basis. After the Plaintiff had already incurred certain expenses in this connection, the Defendant wrongfully revoked the Plaintiff's authority. In the circumstances, the Court *held* that the Plaintiff was entitled to recover *quantum meruit* for the expenses incurred by him.

Clay v. *Yates,* (1865) 25 L. J. Ex. 237— *A* agrees to execute a printing job for *B.* After doing a part of the work, he finds that it contains defamatory material. He is justified in refusing to complete the work, and is entitled to payment *quantum meruit* for the work already done.

End of chapter 17

II. SPECIFIC CONTRACTS

So far, the *general principles* which apply to *all* types of contracts have been discussed. These are contained in sections 1 to 75 of the Act. The remaining sections of the Act (viz., Ss. 124 to 238) deal with *three specific kinds of ontracts,* namely, —

1. Indemnity and Guarantee: Ch. VIII: Ss. 124-147.
2. Bailment: Ch. IX: Ss. 148-181.

3. Agency: Ch. X: Ss. 182-238.

[NOTE: Sections 77 to 123 have been repealed, and are now embodied *in the Indian Sale of Goods Act.* The remaining Ss. 239 to 266 have also been repealed and now constitute the Indian Partnership Act.]

Section II -Chapter 1-INDEMNITY AND GUARANTEE (Ch. VIII: Ss. 124-147)

A. CONTRACT OF INDEMNITY (Ss. 124-125)

Contract of indemnity defined (S. 124)

*Write an essay on indemnity and guarantee.*B.U. Nov. Z013

Define Contract of indemnity. (2 marks) B.U. Nov. 2013 Apr. 2014 May 2015 Nov. 2015

What is a contract of indemnity? Explain the rights of an indemnity holder when sued. (2 marks) B.U. Oct. 2008

Who is indemnifier & who is indemnity holder. (2 marks) B.U. Nov. 2014

Write a short note on: Rights of Indemnity holder .B.U. Nov. 2009 Nov. 2013

Discuss contract of indemnity and the rights and duties of an indemnity holder. B.U. Nov. 2013

What is a surety? (2marks)B.U.Apr.2013

Who is principal debtor? (2marks) B.U.May2015, Nov.2015,

What is the consideration in a contract of guarantee?(2marks)B.U.Oct.2008.Oct2013

Write a short note on: Distinguish between indemnity and guarantee. B.U.Nov.2014

Discuss in detail a contract of guarantee and compare it with a contract of indemnity.B.U.Apr.2009, Nov.2010

What is difference between an Indemnity and a guarantee? (2marks) B.U.Nov.2015

Define a 'continuing guarantee' (2marks) M.U.Apr.2014

Write a short note on: Revocation of guarantee. M.U.Apr.2014

Write a short note on: Rights of a surety. B.U.May2015, Nov.2015

"A Surety is a favoured debtor." Explain this statement, pointing out the right of a surety against the principal debtor and a creditor and a co-surety. M.U.Apr.2013

Discuss in detail the rights of a surety against the principal debtor, the creditor and the co-sureties. M.U.Apr.2014

Discuss: Liability of a surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. M.U.May2015, Nov.2015

Write a short note on: Discharge of surety: M.U.Nov.2013

"A surety is said to be discharged when his liability comes to an end: Explain this statement and discuss the various modes of discharge of surety. M.U.Nov.2014

S. 124 defines a contract of indemnity thus:

A contract of indemnity is a contract whereby one party promises to *save* the other *from loss* caused to him by the *conduct* of the *promisor* or *any other person.*

Illustration— A contracts to indemnify *B* against the consequences of any proceedings which *C* may take against *B* in respect of a certain sum of 200 rupees. This is a *contract of indemnity.*

INDEMNITY AND CONTINGENT CONTRACTS— It will be observed that a contract of indemnity is *really* a kind of *contingent* contract. It is an original and direct engagement between two parties, whereby one promises to *save* another *harmless* from the result of the conduct of the *promisor* or of any *other* person.

LOSS TO PROMISEE ESSENTIAL— It will be seen, from the wordings of S. 124, that the promisee under a contract of indemnity must have suffered loss before he can hold the promisor liable on the contract of indemnity. The happening of the loss is the contingency on which the liability of the indemnifier springs into existence.

Thus, *A* agreed to act as a commission agent for *B* in certain transactions. *B* agreed to indemnify *A* against any loss arising under the transactions. As a result of the transactions, *A* became liable to C and *D* to the extent of Rs.10,000. *A* sued *B* to recover the said sum of Rs. 10,000, although he had *not* in fact paid *C* or *D. A* is *not,* on the above ground, entitled to recover the sum of Rs.10,000 from *B.* He *cannot* be said to have suffered any loss, as he had *not* paid anything to *C* or *D.*

However, in 1942, the Bombay High Court, departing from its earlier decisions, *held* that when a person contracts to indemnify another, the latter may call upon the former to effectuate the indemnity, without waiting until he (the person indemnified), has actually discharged it. This appears to be a sound view, because, as observed by *Kennedy L.J.* in an English case, "if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first instance".

CONSIDERATION AND OBJECT MUST BE LAWFUL—Moreover, it may be noted that the consideration and object of a contract of indemnity must be *lawful.* Thus, an agreement to indemnify the printer or publisher of a *libel* by the writer of the same *cannot* be enforced. Similarly, an agreement by an accused or any other person to *indemnify* the *person who has given bail is illegal,* and *cannot* be enforced.

INDEMNITY MAY BE EXPRESS OR IMPLIED— Although this section applies only to an express promise, a duty to indemnify may arise by operation of law in several circumstances. S. 69 of the Contract Act (discussed earlier) is one such example. Similarly, in the case of a sale of a Company's shares, the transferor is bound to indemnify the transferee against future calls on the shares which are transferred.

SCOPE OF S.124- The definition of a contract of indemnity under this section is *narrower than the one under the English law.* According to S. 124, the loss must have been caused either by the conduct of the promisor or any other person. It does *not* include loss caused by natural factors, *not* involving human conduct,

like accidental fire, *etc.* But in English law, the loss might be caused by a human agency *or by other natural factors also.*

INSURANCE CONTRACTS— Contracts of insurance, which are the commonest examples of contracts of indemnity under the English law, are *not* contracts of indemnity under the Indian Contract Act, according to which indemnity is restricted to those cases only in which the loss which is sought to be reimbursed, is caused by the conduct of the *promisor or* any *other person.* The loss must be such as the promisor has taken upon himself to indemnify.

Rights of indemnity holder (*i.e.the promisee*) when sued (S. 125)

S. 125 lays down the *three important rights* of an indemnity-holder. Under S. 125, the indemnity-holder *(i.e.,* the promisee) is entitled to *recover* from the *promisor*

(A) *all damages* which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(B) all *costs* which he may be compelled to pay in any such suit,--

(a) if in bringing or defending it,—

(i) he did *not* contravene the orders of the promisor, *and*

(ii) he acted as it would have been prudent for him to act in the absence of any indemnity;

or

(b) if the promisor authorised him to bring or defend the suit;

(C) all *sums* which he may have paid under the terms of any *compromise* of any such suit,—

(a) (i) if the compromise was *not* contrary to the orders of the promisor; *and*

(ii) was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity;

or

(b) if the promisor authorised him to compromise the suit.

It has been *held* that Sections 124 and 125 do *not* embody the whole of the Indian law on the subject of contracts of indemnity.

RIGHTS OF PROMISOR- It is interesting to note that although the Act deals with the rights of a promisee (S. 125), there is no provision in the Act regarding the rights of a *promisor* in a contract of indemnity. One may, however, say that they are *analogous* to the rights of a *surety* under S. 141 (- discussed later-).

B. CONTRACT OF GUARANTEE (Ss. 126-147)

Defintion (S. 126)

S.126 defines *four terms* as under:

Contract of Guarantee

A “contract of guarantee” (also known as *suretyship)* is a contract to *perform the promise, or discharge the liability,* of a third person *in case of his* (that is, the third person’s) *default.* It may be either *oral or written.*

Thus, if *A* says to *B,* "Lend Rs.5,000 to *C* for one year at 12% interest per

annum. If he does *not* repay this amount with interest at the end of one year, I shall pay it to you." This is a contract of guarantee.

'Surety'

The person who *gives* the *guarantee* is called the *"surety".* In the above example, *A* would be the surety.

'Principal debtor'

The person *in respect of whose default the guarantee is given* is called the *"principal debtor", (i.e. C,* in the above example)

'Creditor'

The person *to whom the guarantee is given is called "creditor", i.e., B* in the said example.

As stated above, a guarantee may be either *oral or written.*

CONSIDERATION IN A CONTRACT OF GUARANTEE - As in the case of *any* other contract, there should be some *consideration* for the contract of guarantee. However, it is *not necessary* that there should be some benefit to the *surety himself.* It is *sufficient* if something is done, or any *promise* is made, for the benefit of the *principal debtor.* Hence, S. 127 enacts that anything *done,* or any *promise* made, for the benefit of the principal debtor, may be a *sufficient consideration* to the surety for *giving* the guarantee.

Illustrations— (a) *B* requests *A* to sell and deliver to him goods on credit. *A* agrees to do so, *provided C will guarantee the payment* of the price of the goods. C promises to guarantee the payment in consideration of *A's* promise to deliver the goods. This is a *sufficient consideration* for *C's* promise.

(b) *A* sells and delivers goods to *B. C* afterwards requests *A* to *forbear* to sue *B* for the debt for a year, and promises that if he does so, *C* will pay for them in default of payment by *B. A* agrees to forbear as requested. This is a *sufficient consideration* for *C's* promise.

(c) *A* sells and delivers goods to *B. C* afterwards *without consideration,* agrees to pay for them in default to *B.* The agreement is *void.*

ESSENTIALS OF A CONTRACT OF GUARNATEE—The following are the *three essentials* of a guarantee:

1. *Concurrence of three parties necessary*— Contracts of suretyship require the *concurrence of three persons,* the principal *debtor,* the *creditor,* and *surety.* The surety undertakes his obligation *at the request* (express or implied) of the principal debtor. Accordingly, if *A* enters into a contract with *B,* and *C, without any communication with B,* undertakes, for a consideration moving from *A,* to indemnify *A* against any damages that may arise from a breach of *B's* obligation, this will *not* make *C* a surety for *B,* or give him a right of action in his own name against *B* in the event of *B's* default.

2. *Surety's distinct promise to be answerable.*— Secondly, in order to constitute a guarantee, *there must be a distinct promise on the part of the surety to be answerable for the debt.* If *A* goes with *B* to the West End Watch Co. and says to the proprietor, "Let 6 have this watch, and *if he does not pay you,* I will", this is a guarantee. So also *A* says to *B,* "Lend money at interest to *C,* if *C* be

unable to pay, I shall pay." This is contract of guarantee.

3. *Liabilities must be legally enforceable*— Lastly, the words "liability" used, in S. 126 mean a liability which is *enforceable at law,* and if that liability does *not* exist, there *cannot* be a contract of guarantee.

Thus,in *Manju Mahadev* v. *Shivappa,* 20 Born. L.R. 447, *B* owed to *C* debt in 1935. In 1940, *after C's* claim was barred by law of limitation, *C* made a demand from *B. A* intervened and stood as a surety for the payment by *B. C* sued *A* and *B* in 1948, and obtained a decree against both *A* and *B. B* alone appealed and got *C's* suit dismissed as against himself. *A* paid the decretal amount to *C* and sued *B* to recover the amount. Under these circumstances, the Court *held* that there was no consideration for the alleged contract of suretyship, inasmuch as the *foundation* of the contract was *wanting,* there *not* having been any *enforceable* liability in the third person. Therefore, *A's* suit was dismissed.

CONTRACT OF INDEMNITY AND CONTRACT OF GUARANTEE DISTINGUISHED— The following are *five important points of distinction* between a contract of indemnity and a contract of guarantee:

1. *Definitions*— A contract of indemnity is a contract by which one party promises to *save* the other from *loss* caused to him by the conduct of the *promisor himself* or by the *conduct of any other person* (S. 124). A contract of *guarantee* is a contract to *perform the promise or discharge the liability of a third* person in case of his *default.* (S. 126)

In other words, in a contract of indemnity there is *not,* as in a guarantee, any *undertaking* to be answerable for the debt on a default "of another; the person merely undertakes to *save* the party from loss (if any) caused by the conduct of a particular person, either *himself* or any other person.

2. *As to number of parties*— In a contract of *indemnity* there are only *two* parties, *viz.,* the person who promises to *indemnify* and the person who is to be *indemnified.* But in a contract of *guarantee,* there are *three* parties, *viz.,* the *creditor,* the *surety* and the *principal debtor.*

3. As *to number of contracts*— In a contract of *indemnity,* there a *contract of* is *only one contract* between the promisor and the promisee. *Indemnity-* However, in a contract of *guarantee,* there are *three* contracts - two B U' express and one implied. An express contract exists between the creditor and the principal debtor, and another between the surety and the creditor, The third, an *implied* contract, exists between the surety and the principal debtor, by virtue of which the surety is entitled to recover from the principal debtor whatever he has rightfully paid under the contract of guarantee.

4. As *to the nature of liability*— In a contract *of guarantee,* the *primary* liability is of the *principal debtor;* the surety's liability is only *secondary, i.e.,* if the debtor does *not* pay. In a contract of *indemnity,* the person giving the indemnity is *primarily* liable; there is no *secondary liability.*

5. As *to their aim*— A contract of *guarantee* is for the *security* of the creditor; a contract of *indemnity* is for the *reimbursement of loss.*

The points of difference between an indemnity and a guarantee can be summarised in a tabular form as follows:

1.INDEMNITY

1. A contract of indemnity is a 1. contract by which one party promises to save the other from the loss caused to him by the conduct of the promisor or any other person.
2. In a contract of indemnity, there are *two* parties.
3. In a contract of indemnity, there is *only one contract.*
4. In a contract of indemnity, the promisor is *primarily* liable.
5. A contract of indemnity is for *reimbursement of loss.*

2.GUARANTEE
1. A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default.
2. In a contract of guarantee, there are *three* parties.I
3. In a contract of guarantee, there are *three contracts,*-two express and one implied.
4. In a contract of guarantee, the *primary liability* is of the principal debtor and the surety is only *secondarily liable.*
5. A contract of guarantee is for the *security of the creditor.*

CONTINUING GUARANTEE (Ss. 129-131)
The law relating to *continuing guarantee* is laid down in Ss. 129 to 131 of the Act.
Continuing guarantee defined (S. 129)
Under S. 129, a guarantee which extends to a *series of transactions* is called a *"continuing guarantee".*

Illustrations.— (a) *A,* in consideration that *B* will employ *C* in collecting rents of *B's zamindari,* promises *B* to be responsible to the amount of 5,000 rupees for the due collection and payment by C of those rents. This is a *continuing guarantee.*

(b) *A* guarantees payment to *B,* a tea-dealer, to the amount of £ 100 for any tea he may *from time to time* supply to *C. B* supplies *C* with tea of more than the value of £ 100 and *C* pays *B* for it. Afterwards *B* supplies C with tea to the value £ 200. *C* fails to pay. The guarantee given by A was a *continuing guarantee,* and he is accordingly liable to *B to the extent of* £ 100.

(c) *A* guarantees payment to *B* of the price of five sacks of flour to be delivered by B to *C* and to be paid for in a month. *B* delivers five sacks to *C. C* pays for them. Afterwards *B* delivers four sacks to C, which C does *not* pay for. The guarantee given by *A* was *not a continuing guarantee,* and accordingly he is *not liable* for the price of the *four sacks.*

DIFFERENCE BETWEEN GUARANTEE AND CONTINUING GUARANTEE.— The distinction between an *ordinary* guarantee *and a continuing* guarantee is that under the *former,* the surety is liable only in respect to a *single* transaction, whereas under the *latter,* the surety is *prima facie* liable in respect of any of the *successive* transactions which come within its scope.

The question whether a guarantee is *continuing or not* must be ascertained by taking into consideration the language of the document, the *intention* of the parties and *the surrounding circumstances.* As said in one English case, the

Court has power *"not to* alter the language, *but to* fill up the instrument where it is silent, and to apply it to the subject-matter to which the parties intended it to be applied".

Revocation of a continuing guarantee (Ss. 130-131)

There are *two ways* in which a continuing guarantee can be revoked.

1. By notice (S. 130)

A continuing guarantee may, at any time, be revoked by the surety, *as to future transactions,* by *notice* to the creditor.

Illustration.— *A,* in consideration of *B's* discounting at *A's* request, bills of exchange for C, guarantees to *B,* for twelve months, the due payment of all such bills to the extent of 5,000 rupees. *B* discounts bills *for C* to the extent of Rs. 2,000. Afterwards, at the end of three months, *A* revokes the guarantee. This revocation discharges *A* from all liability to *B* for any subsequent discount. But *A* is *liable* to *B* for the Rs.2,000 on default of *C.*

(b) *A* guarantees to *B,* to the extent of 10,000 rupees, that *C* shall pay all the bills that *B* shall draw upon him. *B* draws upon *C.* C accepts the bill. *A* gives notice of revocation. *C* dishonours the bill at maturity. *A* is *liable* upon his guarantee.

2. By surety's death (S. 131)

The *death* of the *surety* operates (in the absence of any contract to the contrary) as a revocation of a continuing guarantee, so far *as regards future transactions.*

FUTURE TRANSACTIONS— The words "*future transactions'* in Ss. 130 and 131 are to be noted carefully. A continuing guarantee can be revoked as to *future transactions only.*

ENGLISH LAW— The English rule of law is that where there is a guarantee subject to revocation by notice and the surety dies without having revoked it, *notice of his death* to the creditor will operate as revocation.

In India, death of the surety, *per se,* revokes the guarantee, and the question of the knowledge of the creditor about the surety's death is *not relevant.*

INVALID GUARANTEES (Ss. 142-144)

There are *three circumstances* in which contract of guarantee becomes i*nvalid:*

1. Any *guarantee* which has been *obtained by means of misrepresentation* made *by the creditor,* or with his knowledge and assent, concerning a *material part of the transaction,* is *invalid.* (S. 142)

2. Any guarantee which the creditor has *obtained by means of keeping silence as to material* circumstances is *invalid.* (S. 143)

Illustrations— (a) *A* engages *B* as a clerk to collect money for him. *B* fails to account for some of his receipts, and *A* in consequence calls upon him to furnish security, for his duly accounting. *C* gives his guarantee for *B's* duly accounting. A does *not* acquaint C with *B's* previous conduct. *B* afterwards makes default. The guarantee is *invalid.*

(b) *A* guarantees to *C* payment for iron to be supplied by him to *B* to the amount of 2,000 tons. *B* and *C* have privately agreed that *B* should pay 5 rupees per ton beyond the market price, such excess to be applied in liquidation of an

old debt. This agreement is concealed from *A. A* is *not liable as surety.*

In this connection, the words of Fry, J. are very relevant. As he remarked in one English case, “Very little said which ought *not* to have been said, and very little *not* said which ought to have been said, would be sufficient to prevent the contract from being valid". *(Davies* v. *London* & *Provincial Marine Insurance Co.)*

It is to be remembered that under this section, it is to be proved, *not only* that there was silence as to material circumstances, *but also* that the guarantee was obtained as a result of such silence.

In one case, *X* was appointed as the Manager of a society. He conducted himself in such a way that the society would have been justified in dismissing him. However, the society agreed to continue his services, on condition that he would arrange for a further security. *Y,* who furnished the further security, was *not* informed about *X's* misconduct in the past. In these circumstances, it was *held* that *Y* was *not liable* for subsequent defaults of *X.*

3. Where a person gives a guarantee subject to the condition that the creditor shall *not* act upon it until another person has *joined* in it as *co-surety,* the guarantee is *not valid* if that other person does *not* join. (S. 144)

RIGHTS AND LIABILITIES OF SURETY (Ss. 128, 140-141, 145-147)

A surety has certain rights- under the Act, against the following *three* parties.

SURETY'S RIGHTS (Ss. 140-141, 145-147)

1. Against the principal debtor (Ss. 140-145)

A surety has the following *two rights* against the principal debtor:

1. Where a guaranteed debt has *become due,* or *default* of the principal debtor to perform a guaranteed duty *has taken place*— the *surety,* upon payment or performance of all that he is liable for, is *invested with all the rights* which the creditor had against the principal debtor. (S. 140)

What S. 140 means is that the surety, who pays on default of the principal debtor, *stands in the shoes of the creditor,* and is invested with all the rights which the creditor had against the debtor.

2. In every contract of guarantee, there is an *implied promise* by the principal debtor to *indemnify* the surety; and the surety is entitled *to recover from the principal debtor,* whatever sum he has *rightfully paid* under the guarantee, — *but no sums* which he has *paid wrongfully.* (S. 145)

Illustrations— (a) *B* is indebted to *C,* and *A* is surety for the debt. C demands payment from *A,* and on his refusal, sues him for the amount. *A* defends the suit, *having reasonable grounds for doing so,* but is compelled to pay the amount of the debt with costs. He can recover from *B,* the amount paid by him for costs, as well as the principal debt.

(b) C lends *B* a sum of money, and *A,* at the request of *B,* accepts a bill of exchange drawn by *B* upon *A* to secure the amount. *C,* the holder of the bill, demands payment of it from *A,* and on *A's* refusal to pay, sues him upon the bill. *A, not having reasonable grounds for so doing,* defends the suit, and has to pay the amount of the bill and costs. He can recover from *B* the amount of the bill, but *not* the sum paid for costs, as there was no real ground for defending the action.

(c) *A* guarantees to *C,* to the extent of 2,000 rupees, payment for rice to be

supplied by *C* to *B. C* supplies to *B,* rice to a less amount than Rs.2,000, but obtains from *A* payment of the sum of Rs.2,000 in respect of the rice supplied. *A cannot* recover from *B* more than the price of the rice actually supplied.

PROBLEMS—1. *A* executed a bond in favour of *B* for a certain amount payable within a certain time. *C* became a surety for payment of the amount by *A* to *B.* The claim by *B* against *A* on the bond became time-barred, but owing to certain payments made by *C,* the claim against C was in time. *B* brought a suit against *C* and obtained a decree against C. C paid a smaller amount to *B* by way of compromise. C then sued the principal debtor *A* for the recovery of the *whole amount* due to *B. A* contended that he was *not* liable as the debt was time-barred and C ought *not* to have paid it to *B,* and contended in the alternative, that in any event, he was only liable for the amount which *C* actually paid to *B.*

Ans— Here, *A,* the principal debtor, is bound to make good the amount to *C,* the surety, under S. 145, for the amount must be treated as a sum *rightfully* paid under the guarantee: *Sripatrao* v. *Shankerrao,* 32 Bom.L.R. 207. But the surety's only claim under S. 145 is to be *fully* indemnified. He *cannot* compound the debt for which he is liable, and then proceed as if he stood in the creditor's place for the *full* amount. As C paid a *smaller* amount to *B* by way of a compromise, he is *not* entitled to recover from *A* the *whole* amount due to *B. A* is only liable for the amount which *C actually* paid to *B: Reed* v. *Norris,* (1837) 2 My. & Cr.361.

2. *D* and *S* execute a pro-note in favour of *C* for Rs. 1,000. The understanding between *D* and S is that S is only a surety for *D. C* files a suit against both *D* and *S,* and gets a decree for Rs.1,400. *C,* however, executes it against S alone, who passes a pro-note in favour of *C,* which *C* accepts in satisfaction of the decree, and the decree is marked satisfied.S now files the suit against *D* for the recovery of the said decretal amount of Rs.1,400. Advise *D.*

Ans. The expression "whatever sum he has rightfully paid," in S. 145 does *not* include the *mere incurring of pecuniary obligation* of the creditor in discharge of the debt owing to him. It is relevant to note that, in this case, only a promissory note is given; the amount is *not* actually paid by *S.* Therefore, mere giving of the pro-note is *not* equivalent to the payment of a debt by *S,* and his suit will, therefore, be dismissed: *Putti Narayanamurthi* v. *Marimuthu,* 26 Mad. 322.

1. Against the Creditor (Ss. 141)

A surety is entitled to the *benefit of every security* which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, *whether the surety knows of the existence of such security or not;* and if the creditor loses or, without the consent of the surety, *parts* with, such security, the surety is *discharged* to the extent of the value of security.

Illustrations— (a) C advances to *B,* his tenant, 2,000 rupees on the guarantee of *A. C* has also a further security for the 2,000 rupees by a mortgage of *B's* furniture. *C* cancels the mortgage, *B* becomes insolvent, and *C* sues *A* on his guarantee. *A is discharged* from liability to the amount of the value of the furniture.

(b) *C,* a creditor, whose advance to *B* is secured by a decree, receives also a guarantee for that advance from *A. C* afterwards takes *B's* goods in execution of the decree, and then, without the knowledge of *A,* withdraws the execution. *A is*

discharged.

(c) *A,* as surety for *B,* makes a bond jointly with *B* to C to secure a loan from *C* to *B. Afterwards, C* obtains from *B* a further security for the same debt. Subsequently, *C* gives up the further security. *A* is *not discharged.*

This section embodies the rule of English law relating to the discharge of a surety when the creditor parts with or loses the security held by him. *In England,* the rule also covers securities given to the creditor *after* the contract of surety, whereas in India it would *not.* (See illustration (c) above.)

A question often arises as to whether a surety who has guaranteed part of a debt can claim the benefit of the securities, *after* the payment of the part of the debt guaranteed by him, though the remaining part of the debt is *not* discharged.

The Bombay High Court has answered this question in the negative, in the case referred to below.

PROBLEM.—C has advanced *P* a loan of Rs.1,000 against some securities. S has guaranteed Rs.500 out of the above loan. S pays Rs.500 to C against the loan. Then S claims his right to the securities. Decide.

Ans— A surety is *not* entitled to the benefit of a portion of the creditor's securities until the whole debt is paid off. S will *not* succeed. *(Gordhandas* v. *Bank of Bengal,*15 Bom. 48.*)*

3. Against co-sureties (Ss. 146-147)

[The law relating to *co-sureties* is discussed later.]

SURETY'S LIABILITIES (S. 128)

A surety's liability is declared in S. 128, which lays down that the liability of the surety is *co-extensive* with that of the principal debtor, *unless it is otherwise provided by the contract.*

Illustrations— *A* guarantees to *B,* the payment of a bill of exchange by *C,* the acceptor. The bill is dishonoured by *C. A* is liable *not only for* the amount of the bill, *but also for* any interest and charges which may have become due on it.

EXTENT OF SURETY'S LIABILITY.— The general rule of law regarding the extent of liability of the surety is stated in S. 128. However, at the time of entering into the contract of guarantee, the surety may state a *limit* of his liability (as for instance, that he would be liable only upto Rs. 10,000). In such a case, his liability will *not* exceed the *stated* limit, whatever may be the extent of the obligation of the principal debtor. In the absence of such contract, his liability is *co-extensive* with that of the principal debtor.

PROBLEM— *A,* an agriculturist, took a loan from *B,* on C agreeing to discharge the liability of *A* in case of A's default in payment to B. *A* repaid part of the loan leaving a large balance due to *B. B,* therefore, brought a suit for recovery of the balance against *A* and C. Under a local Debt Redemption Act, the liability of *A* was scaled down. *B* claimed the *entire* remaining amount from *C. C* contended that he was only liable to the extent of the amount found to be due from *A* to *B* as scaled down, on the ground that his liability was co-extensive with that of *A.*

On these facts the Court *held* that where the discharge of the principal debtor is brought about, *not by* any voluntary act of the creditor, *but by* the operation of statute, the surety *cannot* claim discharge *pro tanto* with the principal debtor. S. 128 defines the obligation of the surety on the date of the contract of guarantee. Accordingly *C,* the non-agriculturist surety, was *held* liable for the *whole* amount of the debt, even though *A,* the agriculturist principal debtor, was liable only for the debt as scaled down under a local Debt Redemption Act : *Subramanianm Chettiar* v. *Batcha Rowther,* (1941) 2 M.L.J. 751.

However, the above decision was overruled by a Full Bench of the Madras High Court in *Subramanian* v. *Narayanaswami* (A.I.R. 1951 Mad. 48), where the court *held* that if a debt is scaled down under a local Act, the surety's liability is also scaled down, and *he is liable only for the reduced amount.*

RIGHTS AND LIABILITIES OF CO-SURETIES (Ss. 132, 138, 142-147)

Co-sureties *(i.e.* more than one surety for the same obligation) have rights and obligations *among themselves,* as under:

1. Liability of two persons who are primarily liable *not* affected by internal arrangement between them (S. 132)

Where two persons contract with a *third* person to undertake a certain liability, and also contract with *each other* that only one of them shall be liable *on the default of the other,* the third person not being a party of such contract — the liability of each of such two persons to the third person under the first contract is *not* affected by the existence of the *second* contarct — *although* such third person may have been *aware* of its existence. (S. 132)

Illus— *A* and *B* make a joint and several promissory note to C. ***A* makes it, in fact, as surety for *B,* and *C* knows this at the time when** the note is made. The fact that *A,* to the knowledge of *C,* made the note as surety for *B,* is no answer to a suit by *C* against *A* upon the note.

In other words, any undertaking between debtors *inter se,* that one of them *only* shall be liable as surety will *not* affect the right of the creditor in any way — e*ven if the creditor knew of the agreement between the debtors.*

2. Release of one co-surety does *not* discharge the others (S. 138)

Where there are *co-sureties, a release* by the creditor of *one* of them does *not* discharge the *others;* neither does it free the surety so released from his responsibility to the *other* sureties. (Sec. 138)

This provision is similar to the one contained in S. 44 of the Act, which lays down the effect of the release of one *joint promisor.*

3. Guarantee *not* to be acted upon until co-surety joins (S. 144)

If a person gives a guarantee upon a contract that the creditor is *not* to act upon it until another person has joined in it as a co-surety, the guarantee is *not valid,* if such other person does *not* join as co-surety.

Thus, *A* gives a guarantee to *X,* stating that *X* should *not* act upon such guarantee, unless *B* also joins as a co-surety. If *B* does *not* join as a co-surety, A's guarantee is *not valid.*

4. Co-sureties liable to contribute equally (S. 146)

Where two or more persons are co-sureties for the *same* debt or duty, either

jointly or severally, whether under the same or different contracts, and whether, with or without the knowledge of each other, the co-sureties, *in the absence of any contract to the contrary,* are liable as between themselves, to pay each *an equal share* of the whole debt, or of that part of it which remains unpaid by the principal debtors. (S. 146)

Illustrations.— (a) *A, B* and *C* are sureties to D for the sum of 3,000 rupees lent to *E. E* makes default in payment. *A, B* and *C* are liable,as between themselves, to pay 1,000 rupees each.

(b) *A, B* and C are sureties to D for the sum of Rs.1,000 lent to *E,* and there is a contract between *A, B* and *C* that *A* is to be responsible to the extent of one-quarter, 6 to the extent of one-quarter, and C to the extent of one-half. *E* makes default in payment. As between the sureties, *A* is liable to pay Rs.250, *B* Rs.250, and *C* Rs.500.

5. Liability of sureties bound in different sums (S. 147)

Co-sureties who are bound in *different* sums are liable to pay *equally* as far as the limits of their respective obligations permit. (S. 147)

Illustrations— (a) *A, B* and *C,* as sureties for *D,* enter into three several bonds, each in a *different* penalty, namely, *A* in the penalty Rs.10,000, *B* in that of Rs.20,000, *C* in that of Rs.40,000, conditioned for *D's* duly acccounting to *E. D* makes default to the extent of Rs.30,000. *A, B* and *C* are each liable to pay Rs.10,000.

(b) *A, B* and C, as sureties for *D,* enter into three several bonds, each in a different penalty, namely, *A* in the penalty of Rs.10,000. *B* in that of Rs. 20,000, *C* in that of Rs.40,000, conditioned for *D's* duly accounting to *E. D* makes default to the extent of Rs.40,000. *A* is liable to pay Rs.10,000, and *B* and *C,* Rs.15,000 each.

(c) *A, B* and C, as sureties for D, enter into three several bonds, each in different penalty, namely, *A* in the penalty of Rs. 10,000, *B* in that of Rs. 20,000, C in that of Rs. 40,000, conditioned for *D's* duly accounting to E. *D* makes default to the extent of Rs. 70,000. *A, B* and C have to pay each *the full penalty* of his bond.

ENGLISH LAW— Under the English law, the co-sureties are liable to pay *in proportion* to the sums they have shared *(i.e.* in the same mathematical ratios). However, under the Indian Contract Act, they are liable to pay *equal sums,* subject to the maximum amount they have agreed to share.

SURETY WHEN DISCHARGED (Ss. 131, 133—139, 141—144)

There are *eight ways* in which a surety is discharged. In other words, there are various acts and omissions on the part of the creditor, whereby a surety is discharged from his liability to the creditor, as follows:

1. By variance in the terms of the contract (S. 133)

Any *variance,* made *without the surety's consent,* in the *terms* of the contract between the principal debtor and creditor, discharges the surety *as to transactions subsequent to the variance.* (S. 133)

Illustrations— (a) *A* becomes surety to C for *B's* conduct as a manager in *C's* bank. Afterwards, *B* and C contract, without *A's* consent, that *B's* salary shall be

raised, and that he shall become liable for one-fourth of the loss on over-drafts. *B* allows a customer to overdraw, and the bank loses a sum of money. *A* is discharged from his suretyship by the variance made without his consent, and is *not liable* to make good this loss.

(b) *A* guarantees *C* against the misconduct of *B* in an office to which *B* is appointed by *C,* and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. *A* is discharged by the change from future liability under his guarantee, *though the misconduct of B is in respect of a duty not affected by the later Act.*

(c) *C* agrees to appoint *B* as his clerk to sell goods at a yearly salary, upon A's belonging surety to *C* for *B's* duly accounting for moneys received by him as such clerk. Afterwards, without A's knowledge or consent, *C* and *B* agree that *B* should be paid by a commission on the goods sold by him, and *not* by a fixed salary. *A* is *not liable* for the subsequent misconduct of 8.

(d) *A* gives to *C* a continuing guarantee to the extent of Rs.3,000, for any oil supplied by C to 8 on credit. Afterwards, 8 becomes embarrassed, and, without the knowledge of *A, B* and *C* contract that *C* shall continue to supply 8 with oil for ready money, and that the payments shall be applied to the then existing debts between 8 and *C. A* is *not liable* on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend B, Rs.5,000 on the 1st March. *A* guarantees repayment. *C* pays the Rs.5,000 to 8 on the 1st January. *A* is discharged from his liability, as the contract has been varied, inasmuch as *C* might sue 8 for the money before the 1st March.

PROBLEM— A becomes surety to C for payment of rent by 8 under a lease which stipulates the rent at Rs.1,000 per annum. Afterwards 8 and C contract, without *A's* consent, that 8 will pay rent at Rs.1,200 per annum. 8 having defaulted, *C* seeks to make *A* liable on the surety bond to the extent of Rs.1,000. Is *A* liable?

Ans— A is *not* liable. There is a subsequent variation of the contract.

PRINCIPLE OF S. 133— The principle underlying S. 133 is quite sound. It is to be noted that the surety enters into the contract upon the *understanding that a certain state of things exists* and will *continue* to exist. If therefore, any *material alteration* is made in the contract between the creditor and the principal debtor, the surety is discharged, because the liability which is sought to be enforced under the changed state of circumstances is *not* that which he *originally* undertook. The surety is entitled to stand by the *original* contract, which *cannot* be altered *without his consent.*

The surety only bargains for the debtor's liability for a particular debt or obligation, and therefore, if any variation is made in the terms of the debtor's liability, the position of the surety becomes *different* from what he contemplated, and he is released.

Thus, a surety for a partner was *held* to be discharged where the partner had extended the business and increased its capital, thus making the partner for whom the surety stood guarantee, liable for greater losses than was

contemplated at the date of the bond.

Keshavlal v. *Pratapsing,* (1935) Born. L.R. 315— *A* agreed to advance a certain sum of money to *B,* and *B* agreed to mortgage to *A* certain properties as securities for the advance. C became a surety for *B.* By a subsequent agreement, it was agreed between *A* and *B* to vary the amount to be advanced, and the number of properties to be mortgaged was also varied. *C* was *not* a party to this arrangement. It was *held* that C, the surety, was discharged.

Khatunbi v. *Abdulla,* 3 All. 9— *A* becomes surety to *C* for payment of rent by *B* under a lease. Afterwards, *B* and *C* contract, without *A's* consent, that, *B* will pay rent at a higher rate. *B* is in arrears of rent for two months previous to his agreement with C and also for a subsequent period. *C* desires to hold *A* liable. Under these circumstances, *A* will be discharged from his suretyship in respect of arrears of rent *accruing subsequent to such variance.*

Creet v. *Seth*— *C* guaranteed the payment of a sum of Rs.5,000 advanced by *A* to *B.* On A's pressing *B* for payment, *B* passed a demand promissory note, and *A* did *not* sue *B* for some time. Then *A* filed a suit against C.

The Court *held* that *B's* passing a demand pro-note was a variance of the contract. *C* was discharged from the suretyship, and *A's* suit against him was dimissed.

Lastly, it is to be noted that a surety will *not* be discharged by a variation, if he has *consented* to the same. The consent may be *express* or *implied,* but *mere knowledge* and *silence* of the surety does *not necessarily* amount to an implied consent.

2. By release or discharge of the principal debtor (S. 134)

Secondly, the surety is discharged by any contract between the creditor and principal debtor, by which the *principal debtor* is released, *or* by any act or omission of the *creditor the* legal consequence of which is the *discharge* of the principal debtor. (S. 134)

Illustrations.— *(a) A* gives a guarantee to C for goods to be supplied by *C* to *B. C* supplied goods to *B,* and afterwards *B* becomes embarrassed, and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here, *B* is released from his debt by the contract with *C,* and *A* is discharged from his suretyship.

(b) *A* contracts with *B* to grow a crop of indigo on *A's* land and to deliver it to 6 at a fixed rate, and *C* guarantees *A's* performance of this contract. *B* diverts a stream of water which is necessary for irrigation of A's land and thereby prevents him from raising the indigo. *C* is no longer liable on his guarantee.

(c) *A* contracts with *B* for a fixed price to build a house for S within a stipulated time, *B* supplying the necessary timber. *C* guarantees *A's* performance of the contract. *B* omits to supply the timber. *C* is discharged from his suretyship.

This section is based upon English law. As *Kelly, C. J.* observed in an English case: "If the creditor, without the consent of the surety, by his own act, destroys the debt, or derogates from the power which law confers upon the surety to the creditor, the surety is discharged." (*Cragoe* v. *Jones,* 1873 L. R. 8 Ex. 81)

It is to be noted that this section does *not* discharge a surety by reason of the discharge of the principal debtor in bankruptcy.

3. When the creditor compounds with, gives time to, or agrees *not to sue,* the principal debtor (S. 135)

A contract between the creditor and the principal debtor by which the creditor—

(a) makes a composition with *or the principal debtor*

(b) promises—

(i) to give time to, or

(ii) *not* to sue the principal debtor

discharges the surety - *unless* the surety assents to such contract. (S. 135)

PRINCIPLE OF S. 135 — The reasoning of S. 135 is that law does *not* countenance any secret arrangement between the creditor and the debtor behind the back of the surety, which would tend to lessen (by a composition) or postpone (by a promise to give time, or a promise *not* to sue) the debtor's liability, on the ground that the surety could presumably suffer thereby. The creditor has no right in law to give time to the debtor without the consent of the surety, even *though the contract might manifestly be for the benefit of the surety.*

Thus, in *Ramkrishnav. Kassim,* (1889) 13 Mad. 172, *A* guaranteed to *C,* the payment of debt due to C from *B. C* subsequently took from *B* a mortgage of certain property to secure the debt. It was *held* that *C,* by accepting mortgage, promised to give time to *B,* and thus rendered it impossible *for* him to sue *B,* had the defendant as surety called on him to do so, and that *A* was, therefore discharged.

Three* cases in which the surety is *not discharged

There are, however, *three* circumstances (laid down in Ss. 136, 137 and 138), in which a surety is *not discharged,* as under:

I. Where a contract to give time to the principal debtor is made by the creditor with a *third person,* and *not* with the *principal debtor,* the surety is *not discharged.* (S. 136)

Illustration.— C, the holder of an overdue bill of .exchange drawn by *A* as surety for 8, and accepted by *B,* contracts with *M* to give time to *B. A* is *not discharged.*

II. *Mere forbearance* on the part of the creditor to *sue* the principal debtor or to *enforce* any *other* remedy against him does *not,* in the absence of any provision in the guarantee to the contrary, discharge the surety. (S. 137)

Illustration— 8 owes to *C* a debt guaranteed by *A.* The debt becomes payable. C does *not* sue 8 for a year after the debt has become payable. *A* is *not discharged* from suretyship.

CREDITOR'S OMISSION TO SUE WITHIN LIMITATION PERIOD— There is considerable difference of opinion on whether a surety is discharged if the creditor allows his remedy against the principal debtor to become barred by limitation. The majority view was that the surety is *not* discharged in such circumstances. The Bombay, Calcutta, Madras and Rangoon High Courts took such a view. The Allahabad High Court has taken a different view. In its view, failure to sue within the period of limitation would amount to an act of omission on the part of the creditor, the legal consequence of which would be the discharge of

the principal debtor. Therefore, the surety also would be discharged under section 134. But the majority view is based on the categorical provision of S. 137, wherein it is provided that mere forbearance on the part of the creditor to sue the principal debtor does *not* discharge the surety. The majority view has been accepted by the Privy Council in *Mahant Singh* v. *U Ba Yi,* 66 I.A. 198.

III. Where there are *co-sureties,* a release by the creditor of *one* of them does *not* discharge the *others;* nor does it free the surety so released from his responsibility to the other sureties. (S. 138)

[This has been discussed earlier.]

4. By the creditor's act or omission impairing the surety's eventual remedy (S. 139)

If the creditor does any act which is *inconsistent* with the rights of the surety, *or* omits to do any act which his *duty* to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby *impaired,* the surety is discharged. (S. 139)

Illustrations— (a) 0 contracts to build a ship for *C* for a given sum, to be paid by instalments, as the work reaches certain stages. *A* becomes surety to C for *B's* due performance of the contract. C, without the knowledge of *A,* prepays to *B,* the last two instalments. *A* is *discharged* by this prepayment.

(b) *C* lends money to *B* on the security of a joint and several promissory note made in *C's* favour by B, and by *A* as surety for *B,* together with a bill of sale of *B's* furniture, which gives power to *C* to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, *C* sells the furniture, but owing to his misconduct and wilful negligence, only a small price is realised. *A* is *discharged* from liability on the note.

(c) *A* puts *M* as apprentice to *B* and gives a guarantee to 0 for *M's* fidelity. 0 promises on his part that he will, at least once a month, see *M* make up the cash. 0 omits to see this done as promised, and *M* embezzles. *A* is *not liable* to 0 on guarantee.

The *object* of this section is to ensure that no arrangement different from that contained in the surety's contract is forced upon him. This section will, therefore, *not* apply to the case of a default of the principal debtor which falls within the terms of the guarantee.

5.By creditor losing the security (S. 141)

If the creditor *loses* or, without the consent of the surety, *parts* with his security, the surety is discharged to the extent of the value of the security. (S. 141)

(This has already been discussed above.)

6. By concealment or misrepresentation by the creditor of a material fact (Ss. 142 & 143)

Any guarantee obtained by *concealment* or by *misrepresentation* of a material fact which should have been disclosed to the surety at the time of his entering upon the guarantee, *invalid.* (Ss. 142—143)

(This has also been discussed earlier.)

7. By the failure on the part of some person or persons to join the surety (S. 144)

The surety is also discharged by the failure on the part of some person or persons to join the surety, in cases where the surety gave the guarantee on the express understanding that they should join him in such guarantee, in this case also, the guarantee *itself* is *invalid.* (S. 144)

(S. 144 has also been discussed earlier.)

8. By revocation or death of the surety in the case of a continuing guarantee: S. 131.

(This has been discussed above in detail.)

Acts of creditor which will *not* discharge the surety (Ss. 136—138)

As seen above, there are *three* acts of a creditor which *do not* discharge the surety. In other words, in the following *three cases,* the surety *will not be discharged.*

1. When the contract to *give time* to the principal debtor is made by the creditor with a *third* person: S. 136.

2. When the creditor, in the absence of any provision in the guarantee to the contrary, merely *forbears* to sue the principal debtor or enforce any *other* remedy against him: S. 137.

3. When there are more sureties than one, a release by the creditor of any *one* of them does *not* discharge the *others;* nor does it free the surety so released from his responsibility to the other sureties : S. 138.

(These exceptions have been discussed above at length.)

End of section II Chapter 1

Section II-Chapter 2 -BAILMENT (Ch. IX: Ss. 148—181)

DEFINITIONS (Ss. 148-149, 153, 159, 162 & 165)

What is bailment? (2marks) M.U.Apr.2013
What is a bailee? (2marks) M.U. May2015
Define Bailment (2marks) M.U.Nov.2013, Nov.2015
What is a meaning of symbolic delivery? B.U. May2015
What is gratuitous bailment? (2marks) M.U. Nov.2014
Explain the kinds of bailments and discuss the various rights and duties of the bailer and the bailee. M.U.Nov.2014, May2015
Define a contract of bailment. What are the rights and duties of a bailee? M.U.Nov.2015
What is meant by bailment? State the rights and duties of a bailor and a bailee. M.U. Apr.2013
Write a short note on: Rights and duties of bailee. M.U. Apr.2014
Discuss the right of lien exercised by a bailee. M.U.Apr.2014
Write a short note on: General lien and particular lien. M.U.Nov.2014
Give one point of distinction between general lien and particular lien. B.U.Nov.2015
When can afinder of goods exercise a particular lien?(2 marks) B.U.April 2014
Who is a finder of goods?Briefly state his rights and obligations.what is the nature of the lien which he has over the goods?B.U.May 2015
Define “pledge” (2marks) M.U. Nov.2013, May2015

Write a short note on: Pledge as a special kind of bailment. M.U.Apr.2014
Distinguish between bailment and pledge M.U.Apr.2014
Write a short note on: Rights of a pawnee. M.U.Apr.2014
State any two rights of a pledgee. (2marks) M.U.Nov.2013
Nemo dat quod non habet. Explain this rule and state its exceptions. M.U.Nov.2015
"No one can pass a better title to goods than what he himself has" Explain this statement and discuss the exceptions to this rule. M.U.Nov.2014

The word "bailment" comes from the *French verb "bailler",* to deliver. "Bailment" is a technical term of the Common Law, signifying a *delivery of goods,* which are to be returned according to the directions of the person giving such goods. Thus, handing over cloth to a tailor (to be stitched into a shirt) would be an example of a *"bailment".* Lending a novel to a friend - assuming that the friend will (hopefully) return it after reading - is yet another example of a *bailment.*

Bailment defined (S. 148)

A "bailment" is the *delivery* of *goods* by one person to another *for some purpose,* upon a contract that they *(i.e.* the goods) shall, when the purpose is accomplished, be *returned or* otherwise *disposed of* according to the directions of the person *delivering* them.

Bailor, bailee (S. 148)

The person delivering the goods is called the *"bailor".*The person *to whom* they are delivered is called the *"bailee".*

If a person who is already in possession of the goods of another, contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may *not* have been delivered *by way of bailment.*

REQUISITES OF BAILMENT—The *three important elements* of a bailment are the following:

1. C*ontract*— In a bailment, the delivery of goods is upon a *contract* that, when the purpose is accomplished, they shall be *returned.* But it may be noted that though bailment is based on a *contract,* there *are* some exceptions, *e.g.,* the case of a finder of goods. There is no contract between the finder of a lost article and its owner; nonetheless, as will be seen later, the finder is *treated in law as a bailee* of the lost article. (Sec. 168)

2.*Temporary delivey of goods*— The main characteristic of a bailment is that the delivery contemplated is for a *temporary purpose.*

There can be *no bailment* if the *whole property* is transferred, and the thing delivered is *not* to be specifically returned or accounted for; nor where the delivery of property is for an equivalent in money or other commodity; if so, it is a sale or exchange, *not* a bailment. Similarly, delivery of Government promissory notes to a treasury for cancellation and consolidation into a single note, is *not* a bailment, because the person who gives them retains no interest in the individual notes.

Now, delivery may be *actual* or *constructive. Actual delivery* may be made by *handing over* something to the bailee. *Constructive* or *symbolic delivery* may be made by doing something *which has the effect of putting the goods in the*

possession of the intended bailee or of any person authorised to hold them on his behalf (Sec. 149). Thus, the delivery of a document of title may amount to delivery of goods referred to therein.

It may be noted that bailment involves a *change of possession. Mere custody without possession* does *not* create the relation of a bailor and bailee. Thus, a servant in possession of his master's goods, *or* a guest using his host's goods, *cannot* be called a bailee.

But, as stated earlier, if a person is *already* in possession of the goods of another *and* contracts to hold them as a bailee, he thereby *becomes* the bailee, and the owner becomes the bailor of such goods, although they were *not* delivered to him *by way of bailment.*

3. *Return of specific goods.*— The person to whom the goods have been delivered is *to return the specific goods either* to the bailor *or* to somebody else according to the directions of the bailor. If the thing delivered is *not* to be specifically returned or accounted for, there is *no bailment.* Even if the goods bailed are in the meantime *altered* in form, as, for instance, if corn is converted into flour, *or* a piece of cloth is made into a coat, still the contract is one of bailment. It is sufficient if the right to have re-delivery of the *same matter* rests with the owner.

It is to be noted that the bailor need *not* be the *owner* of the goods which he delivers, because his business is to transfer *possession, and not ownership.* (Cases where a valid pledge - which is a form of bailment - can be made by made by a person who is *not* the owner of the goods is discussed later in the Chapter.)

DIFFERENT KINDS OF BAILMENTS.— In a leading English case, Lord Holt mentioned *six kinds of bailments,* as under :

(1) *Deposit*— A simple bailment of goods by one man to another ' to keep for the bailor's use.

(2) *Comodatum*- When goods are lent to a friend *gratis* to be used by him.

(3) *Hire*- When good6 are delivered to the bailee for hire.

(4) *Pawn*— When goods are delivered to another by way of security for money borrowed. (This is also referred to as a *pledge.)*

(5) When goods are delivered to be carried *or* something to be done on them, *for reward* payable to the bailee.

(6) Delivery as in the last case, but *without reward.*

Rules as to delivery (Ss. 149 and 165)

The delivery to the bailee may be made by doing anything which has the *effect* of putting the goods in the *possession* of the intended bailee *or* of any person authorised to hold them on his behalf: S. 149. If several *joint owners* of the goods bail them, the bailee may deliver them back to, or according to the directions, of, *one* joint owner, *without* the consent of *all,* in the absence of any agreement to the contrary: S. 165.

Case— A jeweller was engaged by a lady to melt old jewellery and make new ornaments. This work was done at the jeweller's house under the lady's supervision. Every evening, the lady would lock the half-made jewellery into a box, leave the box in the jeweller's house, but take its key with her. One night,

the jewels were stolen. On a suit filed by the lady, the question arose whether the jewels were in the possession of the *jeweller or* of the *lady* on the night when they *were* stolen. The Court *held* that in the circumstances, there was a re-delivery of the jewels to the lady every evening, and that they could *not* be said to be in the possession of the jeweller when they were stolen. (*Kalya Perumal* v. *Visalakshmi,* A.I.R. 1938 Mad. 32)

Bailment when voidable (S. 153)

A contract of bailment is *voidable* at the option of the bailor, *if the bailee does any act* with regard to the goods bailed, which is *inconsistent* with the *conditions of t*he bailment. (S153).

Illustration— A lets to *B, for* hire, a horse for his own *riding. B drives* the horse in his carriage. This is, at the option of *A, a* termination of the bailment.

Gratuitous bailments (Ss. 159 & 162)

A *gratuitous bailment* is one in which a loan is made *without* any charge, detriment or consideration. Thus, when a person borrows a book from a friend, it is a case of a gratuitous bailment. The following *three points* are to be noted with respect to *such* bailments:

1. The lender of a thing for use may at any time require its return, if the loan was *gratuitous, —* even though he lent it for a specified *time or purpose.* (S. 159)

2. But if, on the faith of such loan made for a specified time or purpose, the borrower has *acted in* such a manner that the return of the thing lent *before* the time agreed upon would cause him loss *exceeding the benefit* actually derived by him from the loan, the *lender must,* if he compels the return, *indemnify* the borrower for the amount in which the loss so occasioned exceeds the benefit so derived. (S. 159)

3. A gratuitous bailment is *terminated* by the *death of either* the *bailor* or the *bailee.* (S. 162)

DUTIES AND LIABILITIES OF A BAILOR (Ss. 150, 158—164)

The following are the *three* duties and liabilities of a bailor:

1.The bailor is bound to disclose to the bailee, *faults* in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does *not* make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

However, if the goods are bailed for *hire,* the bailor is responsible *for* such damage, *whether he was or was not aware of the existence of such faults in the goods bailed.* (S. 150)

Illustrations— (1) *A* lends a horse, *which he knows to be vicious,* to *B.* He does *not* disclose the fact that the horse is vicious. The horse runs away. *B* is thrown and injured. *A* is responsible to *B* for damages sustained.

(b) *A hires* a carriage of *B.* The carriage is unsafe, *though B is not aware of it,* and *A* is injured. *B* is responsible to *A* for the injury.

The same principle is to be found in *Roman Law,* under which if a man knowingly lent his neighbour foul or leaky vessels, whereby the *wine* or *oil* put into them perished or was lost, he was *liable* for the damage caused.

2. Where, by the conditions of the bailment, the goods are to be *kept* or to be *carried,* or to have *work done upon* them by the bailee for the bailor, and the bailee is to receive no remuneration,—the bailor must *repay* to the bailee the necessary expenses incurred by him for the purpose of the bailment. (S. 158)

3. The bailor is also responsible to the bailee for any loss which the bailee may sustain by reason of the fact that the bailor was *not* entitled

(a) to make the bailment; *or*

(b) to receive the goods; *or*

(c) to give directions respecting them. (S. 164)

BAILEE'S RIGHTS (Ss. 170—171, 180—181)

A bailee has the following *two rights* under the Act:

1. Lien (Ss. 170 & 171)

Lien is of *two kinds:*

A. *Particular lien,* and

B. *General lien.*

A. Particular lien (S. 170)

Where the bailee has, in accordance with the purpose of the bailment, *rendered any service* involving the exercise of *labour* or *skill* in respect of the goods bailed, he has, *in the absence of a contract to* ' *the contrary,* a right to *retain* such goods *until he receives due remuneration* for the service he has rendered *in respect of such goods.*

Illustrations— (a) *A* delivers a rough diamond to *B,* a jeweller, to be cut and polished, which is accordingly done. *B* is entitled to retain the stone till he is paid for the services he has rendered.

(b) *A* gives cloth to *B,* a tailor, to make into a coat. *B* promises to *A* to deliver that coat as soon as it is finished, and to give a three months' credit for the price. *B* is *not* entitled to *retain* the coat until he is paid.

"LIEN" DEFINED— Lien is a right in one person to retain that which is in his possession, belonging to another, until certain demands of the person in possession are satisfied. Now, *liens are of of two kinds—general* or *particular.* A *particular* or *specific* lien attaches to specific goods, for the unpaid price or carriage thereof, or for the work and labour bestowed thereupon. A *general lien,* on the other hand, empowers the bailee to retain the goods, *not only for* demands arising out of the article retained, *but for* a general balance of accounts in favour of certain persons. S. 170 deals with *particular* lien, and S. 171 deals with *general* lien.

A bailee who has a particular lien can retain only those goods in respect of which *service* involving the exercise of *labour* or *skill,* is rendered in accordance with the purpose of the bailment. He can retain the goods until he receives due remuneration for services renderd in respect of those goods.

To exercise the right of particular lien, the following *four* factors must be present:

1. The bailee must have rendered some service involving labour or skill.

2. This service must be in accordance with the purpose of the bailment, *e.g.,*

making of a coat by a tailor.

3. This service must be with regard to the thing bailed.

4. There must be *no contract to the contrary.*

If all these *four conditions* are satisfied, then the bailee has a right to retain the goods *till he is paid for such service.* The lien is *particular;* it refers only to the article bailed, and is available only for the recovery of the payment for service involving labour or skill in respect of the thing bailed. In the absence of a contract to the contrary, a bailee having a particular lien *cannot* retain goods bailed to him for *one* purpose as a surety arising out of some distinct matter, *e.g.,* the borrower of an article *cannot* keep it by way of security for some other debt.

Again, the right *cannot* be exercised unless the services have been performed *entirely* and the remuneration is *due.* In *Skinner* v. *Jager* (1883 6 All. 394), *A* delivered an organ for repair to *B. B* promised to repair it for Rs.100. Subsequently, he refused to do it for that amount, and wanted to retain that organ *for the work done by him on it. It was held* that as there was an express contract, it must be done in its entirety; till then, nothing could be demanded and there was no right to retain the organ.

B. General lien of bankers, solicitors, etc. (S. 171)

S. 170 above gives a *particular* lien to a bailee. The next section, viz. S. 171, deals with the *general* lien of bankers, solicitors, *etc.,* and provides as follows:

Bankers, factors, wharfingers, attorneys of a High Court *(i.e.* Solicitors) and policy-brokers may, *in the absence of a contract to the contrary,* retain, as a security for a *general balance of accounts,* any goods bailed to them; but no other persons have a right to retain as security for such balance, goods bailed to them, — *unless* there is an *express contract* to that effect.

LAW RELATING TO LIEN.— As seen above, a lien is a right of one man to *retain that which is in his possession* belonging to another until *certain demands,* in *respect thereof* (of the person in possession) are satisfied. Thus, a jeweller will have the right to retain the jewels until he is paid by the owner for the services he has rendered on such jewels. He is, in such cases, said to have a *lien* on the jewels. Lien is the right to "retain" *possession* of goods; and hence it can be exercised only so long as the person claiming lien is in *possession.* Lien is lost by satisfaction of the debt, or by a contract inconsistent with its existence. Lien is a mere right of *retention,* and does *not* include a right of *sale.*

A lien can only arise in one of the *three ways— (i)* by *statute,*

(ii) by express or implied contract, and *(Hi)* by the general *course" of dealing* in the trade in which the lien is claimed.

Lien are of two kinds: General and particular— A general lien is the right to retain the property *of* another *for* a *general* balance *of* accounts. A *particular lien* is a right to retain the property of *General lien and* another for a charge on account of *labour employed* or expenses bestowed upon *that particular property.*

The lien of an agent or a bailee is a *particular lien.* The lien of bankers, factors, wharfingers, attorneys and policy-brokers is a *general* lien. Thus, a banker is *not* bound to return jewels deposited with him as security for a debt on payment of *that debt only,* when the customer is also otherwise indebted to the

bank, unless the customer can prove an agreement excluding the general lien.

A general lien entitles a person in possession of goods to retain them until *all* claims or accounts of the person in possession against the *owner* of the goods are satisfied. A general lien, however, does not exist *merely because* a man occupies a certain position; he must also have received the goods and done the acts in that character to which the lien attaches.

Bankers.— When the goods are pledged to a banker as security *for a* debt and the debt is paid, the banker can still retain the goods as security for payment of other debts of the debtor. He can do this in exercise of the general lien which he possesses over the goods of his customers.

Factors— A factor is an agent entrusted with the possession of goods for the purposes of selling them for his principal. His general lien extends to all his lawful claims against the principal as a factor, whether for advances or remuneration or for losses or liabilities incurred in the course of his employment as a factor. But he *cannot* exercise that lien in connection with debts that arise in a capacity other than that of a factor.

Wharfingers— It is necessary that the person claiming a general « lien must have received the goods and done acts respecting the goods *as a wharfinger.* The mere fact of a man's being a wharfinger will *not* help to claim a general lien over particular goods *unless* he has worked in that capacity in relation to the goods.

Attorneys (Solicitors).—*In England,* a solicitor has a lien on all his client's documents (*not only* deeds and law papers) entrusted to him as a solicitor for all costs, charges and expenses incurred by him as a solicitor for his client; but he has no lien for ordinary advances or loans. His costs, charges and expenses would include money-payments which he makes for his client in the course of his business, such as counsel's fee. A solicitor has also a lien for his costs on any fund or sum of money recovered for his client. A solicitor *in India* has the same lien.

GENERAL AND PARTICULAR LIEN DISTINGUISHED— The above mentioned general lien is to be distinguished from the particular lien mentioned above. Thus (i) it is a special privilege of those mentioned in the section, while a particular lien is common to all bailees, (ii) It is available against any goods bailed, while particular lien can be exercised only over the goods on which the bailee has done work, (iii) It can be exercised for any sum due on a general balance of accounts, while a particular lien is available only in respect of remuneration due for work on a particular thing.

This distinction between *general* and *particular* lien can be summarised in a tabular form as under:

GENERAL LIEN	PARTICULAR LIEN
1. It is a privilege of only the five *classes* of persons mentioned above.	1. It is available to *all* bailees.
2. it is available against all goods	2. It is available only as regards the goods on which the bailee has done any work.
3. It can be exercised for a general balance of accounts.	3. It is available only for remuneration due

	repsect of these goods.

2. Right against wrongful deprivation of or injury to goods (Ss. 180—181)

If a *third* person wrongfully *deprives* the bailee of the use or possession of the goods bailed *or* does them any *injury,* the bailee is entitled to *use such remedies* as the owner might have used in the like case if no bailment had been made; and either the *bailor* or the *bailee* may bring a suit against the *third* person for such deprivation or injury : S. 180. Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests: S. 181.

BAILEE'S LIABILITIES & LIABILITIES (Ss. 151-152, 154, 160-163, 166-167)

The following are the *five liabilities* (or duties) of a bailee :

1. Care to be taken by the bailee (Ss. 151 & 152)

The bailee is *bound to take* as much *care* of the goods bailed to him as a man of *ordinary prudence* would, under similar circumstances, take of his *own* goods of the same bulk, quantity and value as the goods bailed: S. 151. He is *not responsible* for the loss, destruction or deterioration of the thing bailed *if* he has taken such care: S. 152.

It is to be noted that the standard of care imposed by the law is *not* the amount of care which *that bailee* would take of his own goods - but the amount of care which a *man of ordinary prudence* would take of his own goods which are similar to the goods bailed.

Thus, if *A* sends some jewels to *B* for repairs by ordinary post, asking *B* to repair them and then return them to him by V.P.P. if *B* does so, he is *not liable* for the loss of the jewels, merely because he failed to insure the parcel. Here, as *A* himself had *not* insured the jewels when he sent them to *B, B's* failure to insure them does *not* indicate want of such care as a man of ordinary prudence would take of his own goods.

However, where a carrier sent jute bags in a boat which had twenty leaks on one side, and kept the jute bags in that boat for thirty hours, he was *held to be negligent.*

Similarly, where a bailee left some silver bars unattended in a shop, he was *held liable* for the theft of some of the bars.

However, it may be noted that if a particular statute imposes a particular standard of care on a bailee, he *cannot* seek protection of section 152. The liability will then be determined by such special statute or law, as the case may be. For example, in England, under the Common Law, inn-keepers and common carriers were considered as the insurers of the goods entrusted to them, and therefore, they were liable *even if* the loss, destruction or deterioration resulted in spite of their taking such care as a man of ordinary prudence would take.

LIABILITY OF COMMON CARRIERS, INN-KEEPERS, ETC— At Common Law, common carriers and inn-keepers are fixed with a higher degree of liability. They are liable if the goods bailed to them are lost, *not only* by the negligence of such bailees or their servants, *but also* by any acts whatsoever, *except by* an act

of God *or of* the King's enemies. A common carrier denotes a person (other than the Government) engaged in the business of transporting property for hire from place to place, by land or inland navigation, for all persons indiscriminately.

(1) *Common Carriers*

Regarding the liability of *common carriers,* there has been considerable difference of opinion among the various High Courts. The High Court of Bombay has *held* that the definition of bailment in S. 148 is wide enough to include a contract of carriage. Therefore, the liability of a common carrier is governed by Ss. 151 and 152 of the Contract Act. *(Kuverji* v. *G.I.P Railway Company,*(1878) 3 Born. 109).

On the other and, the High Court of Calcutta has *held* that the liability of common carriers is *not* affected by the Contract Act. *(Moothura Kant* v. *I.G.S. Co.,* (1883) 10 Cal. 166)

The Privy Council has approved of the Calcutta decision in *Irrawaddy Flotilla Co.* v. *Bhagwandas,* (1891) 18 I.A. 121.

(2) *Inn-keepers*

The liability of an inn-keeper was similar to that of the common carrier under Common Law. *Prior to* the enactment of the Indian Contract Act, it was *held* that the liability of a hotel-keeper *or* the loss of a guest's luggage would be the same as that of a common carrier in India. *(Whate/y v. Palanji,*(1869) 3 B.H. C.O.C.J. 137).

But *after* the passing of the Indian Contract Act, the relation between the hotel-keeper and the guest is governed by Ss. 151 and 152 as to taking care of the hotel furniture let out to the guest or the goods of the guest lying in a room in the hotel.

(3) *Carriers by Railway*

The liability of the carriers by railways is now governed by the Indian Railways Act, 1890. S. 72 of the Act provides that the responsibility of a railway administration for damage to goods delivered to it or to be carried by railway is, subject to the other provisions of the Act, that of a bailee under Ss. 151, 152 and 161.

2. Liability of a bailee who makes unauthorised use of the goods (S. 154)

If the bailee makes any use of the goods bailed, which is *not* according to the conditions of the bailment, he is liable to make *compensation* to the bailor for any damage arising to the goods *from or during* such use of them. (S. 154)

Illustrations.—(a) *A* lends a horse to *B* for his own riding only. *B* allows C, a member of his family, to ride the horse. *C* rides with care, but the horse accidentally falls and is injured. *B* is liable to make compensation for the injury done to the horse.

(b) *A* hires a horse in Calcutta from *B* expressly to march to Benares. *A* rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. *A* is liable to make compensation to *B* for the injury to the horse.

3. Duty of bailee to return the bailed goods (Ss. 160 & 161)

It is the duty of the bailee to *return,* or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, *or* the purpose for which they were bailed has been

accomplished. (S. 160) If due to the default of the bailee, the goods are *not* returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time. (S. 161)

4.Bailee'sduty todeliverincrease or profit from the bailed goods to the bailor (S. 163).

In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any *increase or profit* which may have accrued from the goods bailed.(S.163)

Illustration— A leaves a cow in the custody of *B* to be taken care of. The cow has a calf. *B* is bound to deliver the calf as well as the cow to *A.*

This section would also apply to *bonus shares* allotted in respect of shares that have been pledged.

PROBLEM— A lends a sum of Rs. 500 to *B,* on the security of five shares of a limited company on 1st May, 2008. On 1st July, 2008, the company issued two bonus shares. *B* returns the amount of Rs. 500 with interest and *A* returns the five shares which were pledged, but refuses to give the two bonus shares. Advise *B.*

Ans. *B* must succeed. Under S. 63, bonus shares are an increase and *B is entitled to* them also: *Motilalv. Bai Mani,*(1924) 49 Bom. 233.

5. Bailee *not* responsible for re-delivery to a bailor having no title to the goods (Ss. 166 & 167)

If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of the bailor, the bailee is *not responsible* to the owner in respect of such delivery. (S. 166)

If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods. (S. 167)

EFFECT OF MIXTURE OF BAILOR'S GOODS WITH BAILEE'S (Ss. 155-157)

Sometimes, it may happen that a bailee *mixes* up the bailed goods with *his own.* In such a case, the following are *three* possible types of mixture, and the rules governing them.

Rule 1 Mixture of goods *with* the bailor's consent (S. 155)

If the bailee, *with the consent of the bailor,* mixes the goods of the bailor with his own goods, the bailor and the bailee have an interest in proportion to their respective shares, in the mixture thus produced. (S. 155)

Thus, *A* takes on bailment from *B* ten bales of superfine cotton and mixes up the bales, with *B's* permission, with his own five bales of ordinary cotton. Here, the five bales of ordinary cotton continue to belong to *A* and the other ten bales (of superfine cotton) continue to belong to B, and will have to be returned to 8 after the bailment is over.

Rule 2 - Mixture of goods *without* the bailor's consent when goods *can be separated* (S. 156)

If the bailee, *without the consent of the bailor,* mixes the goods of the bailor with his own goods, *and the goods can be separated or divided,*—the property in the goods remains in the parties respectively, but the bailee is bound to bear the *expenses* of separation or division, *and* any *damage* arising from the mixture. (S.

156)

Illustration.— *A* bails 100 bales of cotton marked with particular mark to *B. B,* without *A's* consent, mixes the 100 bales with other bales of his own, bearing a different mark. *A* is entitled to have his 100 bales returned, and *B* is bound to bear all the expenses incurred in the *separation* of the bales, and any other incidental damage.

Rule 3 - Mixture of goods *without* the bailor's consent, when goods *cannot be separated* (S. 157)

If the bailee, *without the consent of the bailor,* mixes the goods of the bailor with his own goods, in such a manner that *it is impossible to separate the goods* bailed from the other goods and deliver them back, the bailor is entitled to be *compensated* by the bailee for the loss of the goods. (S. 157)

Illustration.— *A* bails a barrel of Cape flour worth Rs. 45 to *B. B* without A's consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. *B* must compensate *A* for the loss of his flour.

RIGHTS AND LIABILITIES OF A FINDER OF GOODS (Ss. 71 & 168-169)

His rights (Ss. 168-169)

A finder of goods has the following *three rights:*

1. He has a right to *retain* the *goods* against the *When can a Under of owner,* until he receives compensation for the trouble and expenses voluntarily incurred by him (a) to *preserve the goods and* (b) to *find out the owner* — though *he cannot sue* for such amount. (S. 168)

2. Where the owner has offered a *specific reward* for the return of goods lost, the finder *may sue for such reward,* and may *retain* the goods *until* he *receives* it. (S. 168)

3. When a thing which is commonly the subject of sale is lost, (a) if the owner *cannot* with reasonable diligence *be found, or* (b) if he *refuses,* upon demand, to *pay* the lawful *charges* of the finder, the finder may *sell it*—

(i) Whenthething is in *danger* of *perishing* or of *losing the greater part of its value; or*

(ii) When the lawful *charges* of the finder in respect of it amount to *two-thirds* of its value. (S. 169)

Under Common Law, a sale by the finder is *unlawful.* However, the section, which is taken from *American law,* allows such a sale.

His liabilities (S. 71)

A finder of goods is subject to the same *responsibility* as that of a bailee. (S.71)

[A bailee's liability has already been discussed above.]

PLEDGE (Ss. 172-179)

DEFINITIONS (Ss. 172-179)

'**Pledge' or 'pawn' (Ss. 172 & 179)**

The bailment of goods as security *for payment of a debt or performance of a promise* is called "pledge".

'Pawnor' (or 'pledgor'), 'pawnee' (or 'pledgee') (S. 172)

The *bailor* is, in the above case, called the "pawnor". The *bailee* is called

"pawnee".

Where a person pledges goods in which he has only a *limited interest,* the pledge is valid to the extent of that interest.

ESSENTIALS — A pledge is a form of bailment, but the characteristic feature of a pledge is that there is a delivery of goods as *security* for a *debt or a promise.* If *X* hands over his gold chain to *Y* as surety for a loan given by Y to *X,* it is the case of a pledge. As soon as *X* returns the money to *Y,* the latter will have to return the chain to *X.*

Moreover, the most important element of a valid pledge is the actual or constructive *delivery* of the goods pledged. There can be no valid pledge of goods *unless* its delivery takes place. It is, however, sufficient if the delivery takes place with a *reasonable time* of the lender's advance being made.

It is to be noted that a pledge can be made of *movables* alone. If the property transferred is *immovable,* it will then be a *mortgage,* governed by the Transfer of Property Act.

Moreover, *transfer of possession* is necessary to constitute a complete pledge. It must be *judicial possession.* Mere *physical possession* is *not sufficient.* Thus, a servant in custody of his master's goods *or* a wife in those of her husband *cannot* make a valid pledge of the goods so ar to bind the owner. Lastly, the bailee under a contract of pledge does *not* become the *owner,* but as having possession and right to possess, he is said to have a *special property* in such goods.

DIFFERENCE BETWEEN 'PLEDGE' AND 'LIEN'— The following are the *four* points of difference between a *pledge* and a *lien:*

(i) *Lien* gives a right to *possession* until the claim is satisfied. *Pledge* is a bailment of goods as *security* for a debt or for the performance of a promise.

(ii) *Lien* is *not sufficient* to warrant a *sale. Pledge* gives the *right to sell* after default.

(iii) *Lien* is a right which arises out of the seller's *possession* and is *lost* with the loss of possession, while *pledge* is *not necessarily* terminated by the return of the goods to the owner.

(iv) *Lien* is created by the *law* independent of contract; *pledge* is a creation of contract only.

The above can be summed up in a Tabular Form as under :

Lien	Pledge
1. Gives a right to possession of goods until the bailee's claim is satisfied. 2. Person having a lien *cannot sell.* 3. Lien is lost by parting with possession. 4. Lien is created *by law.*	1. Pledge is a bailment : (a) as surety for a debt; or (b) for performance of a promise. 2. A pledge can *sell* on pledgor's default. 3. Pledge is *not* necessarily lost by parting with possession. 4. Pledge is created *by a contract between the parties*

RIGHTS OF PAWNEE (Ss. 173-178A)

A pawnee has the following *four rights:*

1. Pawnee's lien (Ss. 173-174)

The pawnee may *retain* the goods pledged, *not only for* payment of the debt or the performance of the promise, *but also* for the *interest* on the debt, and *all necessary expenses* incurred by him in respect of the possession or for the preservation of the goods pledged : S. 173. But, the pawnee has no right, unless there is a contract to that effect, to retain the goods for any debt or promise *other* than the debt or promise for which they are pledged. Such a contract, however, is *presumed* in regard to *subsequent advances* made by the pawnee: S. 174.

EXTENT OF PAWNEE'S LIEN— It may be noted that the lien of a pawnee (also known as pawnee's *'right of retainer'*) is a *particular lien* only. He can retain the goods pledged *only for the debt or promise to secure which they were pledged, and not for any other debt,* in the absence of a contract to the contrary. The pawnee is, however, allowed to *tack* his subsequent advances to the original debt, in the absence of any agreement to the contrary.

2. Right to recover extraordinary expenses (S. 175)

The pawnee is entitled to *receive* from the pawnor, *extraordinary expenses* incurred by him for the preservation of the goods pledged. (S. 175)

This section uses the word "receive", and *not* "retain" (which is used in Ss. 173 and 174). This would mean that a pawnee would have no right of lien for *extraordinary* expenses, as he has for *necessary* expenses. However, he has a *right to sue* for such expenses.

3. Pawnee's rights where pawnor makes default (Ss. 176-177)

In connection with the pawnee's right in a case where the pawnor makes a default, the following *three propositions* may be noted:

(a) If the pawnor makes a default in payment of the debt, or performance, at the stipulated time, of the promise in respect of which the goods were pledged,—the pawnee may *bring a suit* against the pawnor upon the debt or promise, and *retain the goods pledged as a collateral security; or* he may *sell* thing pledged on giving the pawnor *reasonable notice* of the sale.

It is to be noted that *reasonable notice* is to be given under this clause. Thus, a pawnee of certain articles of jewellary, after the debt had become payable, gave notice to the pawnor that, unless money was paid within a fortnight, the jewellery would be sold without reference to him. The notice did *not* mention the actual time, date and place of the intended sale. The article was sold, but the amount of the debt was *not* realised. In a suit by the pawnee to recover the balance, the pawnor raised a contention that the notice was *not proper.* The Court, however, *held* that the notice was *proper* and *reasonable.*

(b) If the proceeds of such sale are *less* than the amount due in respect of the debt or promise, the pawnor is still liable to pay the *balance.* If the proceeds of the sale are *greater* than the amount so due, the pawnee has to *pay* over the *surplus* to the pawnor. (S. 176)

(c) If a *time is stipulated* for the payment of the debt or performance of the

promise for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time,—he may *redeem* the goods pledged at any *subsequent time* before the actual sale of such goods; but he must in that case, pay, in addition, any expenses which have arisen from his default. (S. 177)

4. Pledge by one in possession under voidable contract (S. 178A)

When the pawnor had obtained possession of the goods pledged by him under a contract which is *voidable* under section 19 or section 19*A* (*I*.e., under an agreement induced by coercion, fraud, misrepresentation or undue influence), but the contract has *not been rescinded* at the time of the pledge, the pawnee *acquires a good title* to the goods, *provided he* acts in good *faith and without notice* of the pawnor's defect of title. (S. 178A)

PLEDGEBY PERSON IN POSSESSION UNDER VOIDABLE CONTRACT— S. 178A lays down that a person may obtain possession of goods under a contract which is *voidable* at the option of the lawful owner on the ground of fraud, misrepresentation, coercion, or undue influence. Such possession is *not* obtained by *free consent* as defined in Sec. 14 of the Act. It is nevertheless possession by *consent,* and the person in possession may make a valid pledge of the goods, *provided* the contract has *not* been rescinded at the time of pledge. There is, in such a case, a *de facto* contract, though voidable on the ground of fraud and the like. The position, is however, different if there is no real consent, as where goods have been obtained by means of theft. A thief has no title, and can give none.

CASES IN WHICH A VALID PLEDGE CAN BE MADE BY PERSON WHO IS *NOT* THE OWNER OF GOODS PLEDGED
(Ss. 178, 178A, 179 & S. 30, Sale of Goods Act)

Normally, it is the *owner* of goods who can validly make a pledge of his goods. Nemo *dat quod non habet :* He who has not can give not. However, in some cases, a *possessor* of goods can also pledge them. However, *every* person who is in possession of goods belonging to *another cannot* make a valid pledge of the same. A valid pledge, *so as to be binding on the true owner,* can be made only under the *five* circumstances given below.

Thus, there are *five cases* in which a person other than the true owner can make a *valid pledge* of goods. These are thus exceptions to the maxim, *Nemo dat quod non habet.* In other words, in the following *five cases,* a pledgee gets a *higher* title in the goods than what the pledgor has.

1. Pledge by a mercantile agent (S. 178)

Where a mercantile agent is in possession of:

(i) goods, or

(ii) a document of title to goods –

with the consent of the owner

-any pledge made by him, when acting in the *ordinary course of business* of a mercantile agent, is valid, *as if* he was expressly authorised by owner of the goods to make the same, *provided,* that the pawnee—

(a) acts in good *faith, and*
(b) *has not,* at the time of the pledge, *notice* that the pawnor has no authority to pledge.

MERCANTILE AGENT— The above provision applies only to *mercantile agents,* and hence a pledge by a *mere servant* or a *warehouseman* or a *wife,* is *not valid, even though* such person is in possession of the goods with the *consent* of the owner.

Interestingly enough, the term "mercantile agent" *is not defined in the Contract Act.* However, it is defined in S. 2 of the Sale of Goods Act. Under the said Act, the term covers a mercantile agent, having in the customary course of business as such agent, authority either to *sell* goods or to *consign* goods for purpose of sale or to *buy* goods or to *raise money* on the security of goods.

Now, under S. 178, a mercantile agent can make a pledge binding on the owner of the goods (even if the agent is *not authorised* to do so). But this rule is subject to several *conditions. ; Firstly,* the agent must have acquired possession *with the owner's f consent;* so, if he has *stolen* the goods, his pledge will *not* be protected. *Secondly,* he must be acting in his usual capacity of a; mercantile agent. And *thirdly,* the pledgee must act in good faith, and must have no reasonable *ground to suspect* the *authority* of the agent; if he suspects this, and yet advances money on the security, he would *lose* his security in case it turns out that the pledge was *unauthorised.*

CASE— *Shanker* v. *Laxmibai,* 30 Bom. L.R. 470— *A* executed a power-of-attorney authorising *B* to collect rents, lease out land, and file suits on his behalf. *B,* who was in custody of *A's* ornaments, pawned them to *C. A* sued *B* and *C* to recover the ornaments.The Court *held* that the pledge by *B* was *not binding* on *A.* For, *B not* having been empowered by the power-of-attorney to deal with moveable property, his possession of the ornaments was merely possession of a *servant* and *not juridical* possession within the meaning of S. 178. Therefore, *A* was entitled to succeed.

PRINCIPLE OF S. 178— The principle underlying this; section was expressed in a leading case thus : "If you, having the right of possession, do *not* exercise that right, but leave another in actual possession, you *enable* that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties, on the hypothesis of his being the owner of that which in fact belongs to you."

PLEDGE AFTER AUTHORITY CEASES— An interesting question which sometimes arises is whether a mercantile agent can pledge his principal's goods *after* his *authority ceases.* The answer is that a pledge by a mercantile agent of goods of his principal *after* his authority is *revoked* is valid, *provided* the pledgee has *not, at the time of the pledge,* notice of such revocation : *Moody* v. *Pallmall,* (1917) 33 Times L.R. 360. The principal (*i.e*., the owner of the goods) can avoid the pledge *only if* he can successfully prove that the pledgee had, at the time of the pledge notice of the revocation of the mercantile agent's authority.

PLEDGE BY OWNER DELIVERING MERCANTILE DOCUMENTS— Can the owner of goods make a valid pledge by delivery of mercantile documents? The answer is that under S. 178, the privilege of pledging goods by delivery of

mercantile documents is restricted to mercantile agents, and the owner of goods *cannot* make a valid pledge of goods by delivery of mercantile documents. The position that emerges is a genuine piece of legal curiosity, namely, that *the actual owner of goods cannot do what his mercantile agent can do.*

2. Pledge by a person in possession under a voidable contract (S. 178A)

When any person has obtained possession of goods under a contract voidable on the ground of coercion, fraud, misrepresentation, undue influence, a pledge of such goods by the possessor is valid, *provided* such a contract has *not* been rescinded at the time of the pledge, *and* the pledgee has acted in good faith, *and* has no notice of any defect in the title of the pledgor.

Where goods have been obtained by fraud, the person who has so obtained may either have no title at all, or a voidable title, according to the nature of the transaction. If the nature of the fraud is such that there never was a contract between the parties (i.e., that was no consent at all), the person who so obtains the goods has no title and can give none.But if the person defrauded really intended to part with the property in the goods, although he was induced to do so by fraud, there is a contract, which he may affirm or disaffirm at his election. Hence the person who obtains the goods has a voidable title, and he can give a good title by pledge to an innocent pawnee only *while the contract has not been rescinded.*

(A reference may be made to the earlier discussion on S. 178A, above.)

3. Pledge by a person who has a limited interest (S. 179)

When a person pledges goods in which he has only a limited interest, the pledge is *valid to the extent of that interest.*

Thus, a pledge by a *co-owner of goods* would be valid to the extent of his proportionate ownership of the goods.

4. Pledge by a seller in possession of goods *after* sale (S. 30, Sale of Goods Act)

The fourth case in which a person who is *not* the *owner* of goods *can* make a valid pledge thereof is contained in S. 30 of the Sale of Goods Act, which lays down that if a person *after* having sold goods, continues to be in possession of the goods (or of the documents of title to the goods), a pledge made by such a person (or by his mercantile agent) to any person receiving such goods (i) in *good faith, and* (ii) *without notice of the previous sale,* has the same effect as *if* the pawnor was expressly authorised by the owner of the goods to make the pledge.

In *Haji Rahimbux* v. *Central Bank, A* sold 100 cases of cutlery to *B* under an agreement made in July 1946, whereby it was agreed that payment should be made within five months from the date of the agreement and delivery should be taken within that time, the goods remaining, in the meanwhile in A's godown free of rent. In August 1947, *A* pledged the goods with *C,* who had no notice of the earlier sale to *B.* The Court *held* that the pledge to *C* was *valid* under S. 30 of the Sale of Goods Act.

5. Pledge by a buyer in possession of goods *before* sale (S. 30, Sale of Goods Act)

Under S. 30 of the Sale of Goods Act, if a person who has bought (or agreed

to buy) goods, obtains, with the consent of the seller, possession of the goods (or of the documents of title to the goods), a pledge made by such a person (or by his mercantile agent) to any person receiving such goods (i) *in good faith,* and (ii) *without notice of any lien or other right of the seller in respect of such goods,* has effect as if such a lien or right did *not* exist.

End of Section II Chapter 2

Section II Chapter 3 -AGENCY (Ss. 182-238)

Who is an agent? B.U.May2015

Define agency. (2marks) B.U.Apr.2013 Nov.2015

Write a short note on Qui facit per alium facit per se. M.U. Nov.2013

Is consideration necessary in a contract of agency? (2marks) M.U. apr.2014

Discuss the various ways in which agecy is created and terminated. M.U. Apr.2013. Apr.2014

What is meant by a contract of agency? Discuss in detail the various modes of creation of an agency. B.U. Nov.2014

Define agency and discuss in detail various kinds of agency and the functions of different types of agent. M.U.Nov.2013

Write a short note on: Classification of agents. B.U. Nov.2014

Explain "factor" and "broker" (2marks) B.U. Apr.2013

Write a short note on:Del credere agent: M.U. Apr.2013

What is meant by del credere agency? (2marks) M.U. Nov.2013

Write a short note on: Extent of agents's authority. B.U. Nov.2014

What are the conditions for proving agency by cohabition? (2marks) B.U. Nov. 2009

Write a short note on: Agent's authority in an emergency. B.U. Apr.2014

Delegatus non-potest delegare. Explain this maxim with reference to agency. B.U. Apr.2013

Define sub-agent and substituted agent. (2marks) B.U. Apr.2014

What is agency by ratification? (2marks) M.U. Nov.2014

Discuss the various ways in which agency is created and terminated. M.U. Apr.2013, Apr.2014

How is agency terminated by act of parties and by creation of law? B.U. Nov.2014

Write a note on: Agency coupled with interest. M.U.May2015 Nov.2015

Write a short note on: Undisclosed principal B.U.Apr.2013

Who is an undisclosed principal? (2marks) B.U. Apr.2014

Although one person *cannot,* by contract with another, confer rights or impose liabilities on a third person, yet, he may represent another for the purpose of bringing him into legal relations with a third party. Employment for this purpose is called *agency.* The law as to agency, laid down in Ss. 182 to 238 of the Contract Act, can be discussed under the following *eleven heads:*

A. Appointment of an agent: Ss. 182-185

B. Kinds of agents
C. Authority of an agent: Ss. 186-189
D. Law relating to sub-agents: Ss. 190-195.
E. Ratification: Ss. 196-200
F. Agency how terminated: Ss. 201-202, 209
G. Revocation of agent's authority: Ss. 203-208 & 210
H. Agent's duties to principal: Ss. 211-216
I. Principal's duties to agent: Ss. 222-225
J. Liability of principal for agent's fraud or misrepresentation: S. 238
K. Rights of an Agent: Ss. 217-225.
L Effects of agency of contracts with third persons (Ss. 226- 237), *namely-*
1. How far a principal is bound by his agent's acts: Ss. 226-229.
2. Agent when personally liable: Ss. 230, 233 & 234
3. Contracts where the principal is undisclosed: Ss. 231 & 232
4. Liability of a pretended agent: Ss. 235 & 236
5. Agency by estoppel: S. 237

A. APPOINTMENT OF AN AGENT (Ss. 182-185)

Definitions, etc. (Ss. 182-185)

An "agent" is a person employed to *do any act for another,* or *represent* another in dealings with *third* persons. The person *for wh*om such act is done, or who is so *represented,* is called the pr*incipal".* (S. 182)

The concept of agency is based on the Latin maxim, *Qui facit per facit per se.* He who acts through another does the act himself, or in other words, the authorised acts of the agent are, in law, the acts of principal himself.*Write a short note* Any person who is of the age of majority according *to the law to on: Qui tacit per which he is subject,* and who is of *sound mind,* can *employ* an *a turn acit per se.* agent: S. 183. As between the *principal* and *third* persons, *any* M.u. Nov. 2013 *person* can become an agent, but no person who is *not* of the age of *majority* and of *sound mind* can become an agent, *so as to be* , *responsible to his principal:* S. 184.

S. 185 then lays down that *no consideration is necessary to create an agency.*

WHO CAN AND WHO CANNOT BE AN AGENT- Any person who is of the age of *majority* and of *sound mind* can contract through an agent. But the person who is appointed as an *agent necessary in a* need *not* be a person of *full* age. When a minor is appointed an agent, he *can* bring about a contractual relation between the principal and a third party, but *personally* he is *not* responsible to the principal like any other adult agent. It follows, therefore, that a *person who engages a minor does so at his own risk,* for, if any loss is caused to the principal on account of the mismanagement or negligence on the part of the minor, he *cannot* recover compensation from such an agent A minor, however, *cannot* appoint an agent, though as stated above, he himself *can* be appointed as an agent.

FORM OF CONTRACT OF AGENCY- The contract of agency may be in *writing* on stamp paper, duly notarized, and it is then called a *power-of-attorney;* or it may be a *simple writing,* or it may be by an *oral* agreement. Agency may

even be may be *inferred* from the *conduct* of the parties and the *circumstances* of the case, as when the manager of a restaurant orders goods for running the restaurant, which are always for by the owner of the restaurant.

Whether a particular relation between two persons does or *does not* amount to agency has to be gathered from the terms and conditions of the contract. The *terminology* used by the parties is *not conclusive* of their legal relationship. Thus, even if a person is specifically called an *"agent"* in a written contract, he is *not* so in the eyes of the law, if the actual relationship between the two parties is that of principal and principal. Conversely, even if a clause in a hire-purchase agreement provides that the car dealer is *not* the agent of the finance company,the dealer *may* be an agent in the eyes of the law

VARIOUS WAYS OF CONSTITUTING AGENCY- The following are the fi*ve ways* in which an agency may be created:

1 *By direct (or express) appointment*- When the agent' authority is *express,* he is said to be *directly* appointed. The author j is said to be *express,* when it is given by *words,* spoken or written as for instance, when *A,* by writing, appoints *B* as his agent.

2. *By implication - Agency is implied* when it is to be *infe* from the *circumstances* of the case in the ordinary *course of deali,* Where the agency is implied, the principal *cannot,* by private instructions, limit the implied authority of the agent in such a way as to affect the rights of a *third* party, who has no notice of the principal's secret instructions. Thus, if *A* habitually pays for the goods supplied to his wife on credit, he *cannot* afterwards affect the right of the shop-keeper who supplies the articles by giving secret instructions to his wife *not* to get any goods on credit.

3. *By necessity*- Under certain circumstances, one can act as an agent of another *without the authority of that other.* Such agency is known as *agency of necessity.* Where a husband does *not* maintain his wife (which he is bound to do) and leaves her without means of subsistence, the wife *can* pledge her husband's *creditor* such articles as are *necessary* for her maintenance, and the husband is *bound* to pay for them. But if the husband has already supplied his wife with necessaries suited to her condition in life, she *cannot* pledge her husband's credit.

It should be remembered that marriage, by *itself,* does *not* create any agency between the husband and the wife. Such agency must either be *expressly* created, or *inferred* from the conduct of the parties. Thus, if *A* authorises his wife, *B,* to borrow goods for him, *B's* agency is *express.* If without express authority from her husband, *B* takes goods on credit which are paid *for* by *A,* A's agency is *implied.* It is *inferred* from the conduct of the husband. In both these cases, *A* can terminate *B's* agency by giving express notice to the parties dealing with *B.* Similarly, a carrier of goods or a master of a ship may, under certain circumstances and in the interest of the employer, pledge his credit.

4. *By estoppel*- (This is discussed in detail under S. 237 below.)

5. *By ratification* - Agency by ratification arises when one *ratifies* or *adopts* the act of another who, *without* his *knowledge* and *authority,* acted as his agent. Thus, if *A* makes a contract with *B* as the agent of *C,* but without *C's* authority, *C*

is *not* bound by such a contract; but, *C* may if he so desires, adopt the transaction by ratifying the contract. This is known as *agency by ratification,* and is discussed later at greater length.

TEST OF AGENCY - As Lord Herschel observ I in *Kennedy v.*

De Trafford (1987 A. C. 180), no word is more commonly and constantly misused than the word “agent'. What, therefore, is the *test* of agency? A person, merely giving advice to another in matters of his business does *not* thereby becomes his *agent.* The real test is : Has he any power of *representing* the principal, *i.e.,* making the principal *answerable* to a *third* person? If he *has* this power, then there is the relation of *agent* and *principal.* This relation may be constituted either by *express words* or by *implication.*

It is the *true relationship* between the parties, and *not the terminology* used by the parties, that is relevant. Thus, it has been *held* by the Allahabad High Court that a description of the plaintiff in an agreement and in a letter as an 'agent’ of the Government of Assam was *not* the conclusive and deciding factor, and it was *held,* on the facts and circumstances of the case, that the plaintiff was *not* an agent of the Government of Assam.

The concept of “agency” has been well brought out by *Ramaswami J.* in *P. Krishna Bhatta v. M. G. Bhatta,* in the following words:

“In legal phraseology, every person who acts for another in not an agent. A domestic servant renders to his master personal service; a person may till another’s field or tend his flocks or work in his shop or factory or mine, or may be employed upon his roads or ways; one may act for another in aiding the performance of his legal or contractual obligations. In none of these capacities he is an agent and he is *not* acting for another in dealings with third persons.”

DIFFERENCE BETWEEN SERVANT AND AGENT— The essential difference between a servant and an agent is that an *agent,* though bound to exercise his authority in accordance with the lawful instructions of his principal, is *not* subject to the direct control or supervision of the principal, whereas a *servant* works under the direction and supervision of his master.

Another important point of distinction between the two is that a master is *liable* for the torts of his servant committed during the course of his employment, *even if* the master does *not* derive any benefit from such act. On the other hand, a principal is *not liable for* the torts of an independent contractor (one type of agent) or for the servant *of* such a contractor.

Further, whereas an agent brings about contractual relations between his principal and third parties, a servant does *not* function in such a capacity.

B. KINDS OF AGENTS

There are *eleven* kinds of agents, as follows

1. *Special agent*— A *special agent* is one who has been authorised to do a *single act,* as for instance, a broker employed to sell a particular house.

2. *General agent*— A *general agent* is one who is authorised to do *all* acts connected with a particular trade, business, or employment, as for example, the

manager of a firm whose authority extends to the doing of *everything* necessary for carrying on the business of the firm.

3. *Sub-agent*— The law relating to sub-agents is discussed later.

4. *Co-agent.*— When two or more persons are employed as agents *jointly* or *severally, or* jointly *and* severally, they are known *Classification of* as co-agents. Where nothing is said, the ordinary presumption is that the authority is *joint,* i.e., all must concur in execution of the authority, unless a quorum is fixed, or the circumstances show an intention to the contrary. But where the authority is *several,* one agent can act *without* the concurrence of the other.

5. *Substituted agent*— (This is discussed later.)

6. *Factor.*— A factor is an agent remunerated by a *commission, and* and is *entrusted* with the *possession* of goods to *sell in his own* name as an apparent *owner.* He can sell them at such times and at such prices as he thinks best. He has thus complete *discretionary authority* to sell. He can even sell on credit, and receive the price as an actual owner and give a discharge to the buyer.

A person who, *in good faith,* advances money to the factor on the security of goods or documents of title is protected on the ground that the possession carries with it an *authority to pledge;* and this authority *cannot* be revoked so as to prejudice third persons who have no notice of the revocation. If any *special* authority is given to a factor who acts beyond the scope of that authority, but within the scope of the apparent authority, the contract is still binding upon the principal.

Thus, *A* deposits certain articles with *B,* asking him *not* to sell them below a stated price. *B* undersells to *C,* who is ignorant of *A's* instructions to *B. A cannot* set aside the contract with *C.* The same is also the case with an auctioneer.

It may be observed that whereas a broker has a *particular* lien only, a factor has a general lien (S. 171) for the balance of accounts as between himself and the principal. But the lien applies *only* to debts due to him in that character, and *not antecedent* debts. A factor has an insurable interest in the goods in his possession.

7. *Broker.*— A broker is an agent whose business is to *bring* about a *contractual relation between two parties.* It is through his instrumentality that a contract is made between the principal and a third party. He has no possession of goods, like a factor, even if he is a broker for sale. He has no authority to contract in his *own* name. He *cannot* also sue in his *own* name. He generally puts the terms of the contract in writing and delivers to each party a note signed by himself. The note which he gives to the seller is called the *sold note,* and that which he gives to the buyer is called the *bought note.*

His liability depends upon the documentation used. If the principal's name is *mentioned,* no suit will lie against him, nor can he bring a suit in his own name. Where the principal is *not* named, but the broker *signs as an agent,* the broker *can* be sued only if there is a usage to that effect. If he acts and purports to deal in his own name, he becomes liable, for he does *not* sign as agent; but the principal may be held liable by the other party when disclosed, and in that case, the principal can also take advantage of the contract.

The commission paid to him is called brokerage.

8. *Auctioneer.*— An auctioneer acts in a *double* capacity. *Primarily,* he is an *agent* for the *seller.* He advertises the auction sale on the *seller's behalf.* As seen earlier, the bargain in an auction sale is completed as soon as the hammer falls. The goods taken are said to have been knocked down to the highest bidder. As soon as the goods are knocked down, the auctioneer becomes an *agent* of the *purchaser.*

He resembles a factor inasmuch as he is in *possession* of the *goods* to be sold. But while a factor has a *general lien,* an auctioneer has only a *particular* lien. If the purchaser fails to pay for the goods auctioned to him, the auctioneer can bring a suit in his own name. The principal will be bound to the third party if the auctioneer acts within his apparent authority, even though he disobeys instructions privately given to him, *e.g.,* when he inadvertently puts up an article for sale without a 'reserve price', contrary to the instructions of the principal.

9. *Commission agent*— A commission agent is a person employed, *not to establish privity of contract between his employer and other / parties,* but to buy or sell goods for the employer on the best possible terms, receiving the commission as a reward for his exertions. The relation between him and his employer is that of principal and agent, and *not* of seller and buyer. He can charge his employer only for the price paid by him for the goods purchased for the employer, although it may be less than the limit stated in his fetter of instructions, except where any custom to the contrary is shown to exist.

10- *Del credere agent.*— A *del credere* agent is one who, in consideration of *extra remuneration,* called a *del credere commission,undertakes that the persons* with whom he enters into contracts on the principal's *behalf will be in a position to* make the contractual payment. He gives an *undertaking* to his principal that the parties with whom the principal is brought into contractual relations will pay the money which may become due under the contract into which they enter.*He promises to answer for the default of another, but, he does not guarantee the performance of the contract otherwise than as regards payment.* He *cannot* be sued if the purchaser refuses to take delivery.

Thus, such an agent *guarantees the solvency of the person* with whom he makes contracts for his principal. The *del credere agent* is liable to pay the seller only if, owing to insolvency of the buyer, the seller is unable to recover the price from the buyer. He is *not liable* if the buyer, *though solvent, has refused to pay on some other ground, e.g. that the seller has not duly performed the contract.* His liability towards his principal is, therefore, secondary; he is in effect a surety for the person with whom he deals, to the extent of any default by insolvency or something equivalent, but *not* to the extent of a refusal to pay on a substantial dispute as to the amount due.

A *del credere* agency may arise by *implication* from the course of dealing between parties, *e.g.,* for the charging of an extra commission for risk. But a description by a party of himself in a contract as a *del credere* agent of the other party does *not necessarily* make him so. His legal position is partly that of an *insurer* and partly that of a *surety* for the parties with whom he deals to the extent of any default by reason of any insolvency or something equivalent. His liability does *not* go to the extent of making him responsible to the principal where there

can be no profit by reason of any stringency in the market.

11. *Pakka adatia and katcha adatia.*— These are a species of agents, and their transactions are known in the Mumbai market as *katchi adat* and *pakki adat.*

When an up-country constituent wants to enter into any transaction in the Mumbai market, he either deals through a *Pakka Adatia* or *Katcha Adatia.*

PAKKI ADAT TRANSACTION.— A *Pakka Adatia,* in the Mumbai market, is a person who undertakes or guarantees that delivery should, on the due date, be given or taken, at the price at which the order was accepted, or differences paid; in effect, he undertakes or guarantees to find goods for cash *or* cash for goods, *or* to pay the difference.

The relationship between the constituent and the *Pakka Adatia* is *not strictly* that of principal and agent, although the *Pakka Adatia* works for a commission. Between the two, the relationship of principal and agent may exist only upto the extent that the *Pakka Adatia* is employed for the purpose of ascertaining the price at which the order is to be completed. When that stage is passed, both are principals with reference to the transaction.

The constituent has no interest in the contracts into which the *Pakka Adatia* may enter with the third parties to fulfil his undertaking towards his constituent. No contractual privity is established between the constituent and the third party with whom the *Pakka Adatia* has contracted. The *Pakka Adatia* makes the contracts with the third parties, *not* as agent, *but* as principal. The *Pakka Adatia* is personally responsible towards his constituent as well as towards the third parties.

Suppose, *A,* in Pune, orders *B,* in Mumbai, either to sell or purchase a certain commodity, as for instance, bales of cotton. *B* enters into a contract for the sale or purchase, as the case may be, of such cotton with *C,* a third party, in Mumbai. If 6 is a *Pakka Adatia,* the relationship ^ between *A,* the constituent, and *B,* on the one hand, and *B* and *C* on the other hand is that of principal and principal, and *not* of principal and agent. For all practical purposes, the relation between *A* and *B* is that of vendor and purchaser. No privity of contract is established between *A* and C. *B* guarantees the performance of the contract; he becomes personally liable for the performance thereof, *not only* to *A,* his principal, *but also* to C with whom he transacts business pursuant to the orders of *A.* Both *A* and *C* must look to *B* alone for the performance of the contract. *B's* obligation is to find cash for goods, j or goods for cash or to settle and pay differences on the due date. *A* is *not* entitled to call upon *B* to disclose to him the name of C. Nor is C entitled to know the name of *A.*

Is Pakki Adat a wager?— It was at one time *held* in some cases that a *Pakka Adatia* was merely the agent of his constituent, and his dealings could, therefore, *not* amount to wagering transactions. In *Bhagwandas* v. *Kanji,* (1905) 30 Bom. 205, however, it was *held,* on the evidence of custom, that as regards his constituent the *Pakka Adatia* is a principal and *not* a disinterested middleman bringing two principals together. Since that decision, it has been *held* by the High Court of Bombay that transactions between a *Pakka Adatia* and his constituent *may* be by way of wager like any other transaction between two contracting parties.

*KATCHI ADAT*TRANSACTIONS— The position of a *Pakka Adatia* is essentially different from that of a *Katcha Adatia.* When a *Katcha Adatia* enters into a transaction for and on behalf of his up-country constituent with a third party in Mumbai, he does *not* ordinarily communicate the name of his constituent to the third party, but he informs the constituent of the third party. The position, as between himself and the third party, is that he is an agent of an unnamed principal with personal liability on himself. His remuneration solely consists of commission, and he is in no way interested in the profits or losses made by his constituent on the contracts entered into by him on his constituent's behalf.

The relation between a *Katcha Adatia* and his constituent being that of an agent and principal, a contract between them *cannot* be a wager. Neither party stands to win or lose according to the fluctuation of the price of any other event. The very essence of wager between them is absent.

C. AUTHORITY OF AN AGENT (Ss. 186-189)

The authority of an agent may be *express* or *implied:* S. 186. An authority is said to be *express* when it is given by *words,* spoken or written. It is said to be *implied* when it is to be *inferred* from the *circumstances* of the case, and things spoken or written, or the *ordinary course of dealing* may be accounted circumstances of the case. (S. 187)

Illustration.— *A* owns a shop in Serampur, living himself in Kolkata, and visiting the shop occasionally. The shop is managed by *B,* and he is in the habit of ordering goods from *C* in the name of *A* for the purposes of the shop, and of paying for them out of A's fund, *with A's knowledge. B* has an *implied* authority from *A* to order goods from *C,* in the name of *A,* for the purposes of the shop.

An agent having an authority *to do an act* has authority to do *every lawful thing* which is necessary in order to do such act. (S. 188)

An agent having an authority to *carry on a business* has authority to do *every lawful thing necessary* for the purpose usually done in the course of conducting such business. (S. 188)

Illustrations.— (a) *A* is employed by *B,* residing in London to recover at Mumbai a debt due to *B. A* may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

(b) *A* constitutes *B* his agent to carry on his business of shipbuilders. *B* may purchase timber and other materials and hire workmen, for the purpose of carrying on the business.

It has been *held,* in an English case, that a matron of a hospital has *implied authority* to pledge the credit of the hospital committee for meat supplied to the hospital.

Husband and Wife

A wife is *not* the general agent of her husband; nor is a husband a general agent of his wife. But either by a contract or appointment or by holding out or ratification, each may become the agent of the other. A husband can be liable for his wife's debt only where he has expressly or impliedly sanctioned what the wife does. *Prima facie,* a presumption of agency arises where the goods for the use of

household purpose are supplied to the wife's order. A wife, as agent of necessity, can pledge her husband's credit for necessaries of life when she is *not* properly provided for by him. Such necessity, in general, arises when the husband and wife are living apart, through the husband's fault.

Though it is possible that a husband living with his wife may have so neglected her that she may, as an agent of necessity pledge her husband's credit for what is strictly necessity for her support, it should be noted that this presumption arises only under pressing circumstances. But where a wife leaves her husband without just cause, or is turned out by him for a just cause, as for instance, committing adultery, there is no liability on him for necessaries supplied to her. But it should also be noted that a husband is liable to the tradesmen who are induced to deal with his wife as a result of his own conduct, namely, the failure to give notice to the tradesmen when his wife ceases to enjoy such authority.

In England it was *earlier held* that "the question whether a wife has authority to pledge her husband's credit is to be treated as one of fact, upon the circumstances of each particular case, whatever may be the presumption arising from any particular state of circumstances." (*Debenham* v. *Mellon,* 1880 6 App. Cases 24)

Today, the position in England is different. The Matrimonial Proceedings and Property Act, 1970, provides that any rule of law or equity conferring on a wife authority, as agent of necessity, to pledge her husband's credit or to borrow money on his credit is *abolished.*

AGENT'S AUTHORITY TO BORROW.— The rule as to an agent's authority to borrow is a strict one. Such an authority generally must be *expressly* given; but if the *nature of the business* is such (*e.g.,* banking) *or* the *duties of the agent* are of such a nature, that he is *bound* to borrow in order to carry out the principal's instructions and the duties of his office, he has an *implied authority* to borrow.

AGENT'S AUTHORITY IN EMERGENCY.— An agent has authority, *in an emergency,* to do all such acts for the purpose of *protecting* his principal from loss, as would be done by a person of *ordinary prudence,* in his own case, under similar circumstances. (S. 189)

Illustrations.— (a) An agent for sale may have goods *repaired,* if it be necessary.

(b) *A* consigns provisions to *B* at Kolkata, with directions to send them immediately to *C* at Cuttack. *B* may sell the provisions at Kolkata, if they will not bear the journey to Cuttack, without spoiling.

In English law, an agent may lawfully act *contrary* to the *principal's instructions in certain cases.* One of these is where goods are of a perishable nature, as in *Illustration* (b) above.

In other cases, where the following *three conditions* are satisfied, the agent may disobey the principal: (i) the *actual* presence of an immediate commercial necessity; (ii) the *impossibility {not* physical, *but* practical) of *communicating* with or getting instructions *from* the principal; and (iii) the *bona ride exercise,* by the person acting, of such authority in the interest of all parties. It may be noted that in *Illustration* (b), all these conditions are present. It was *not* physically impossible

for *B* to get *A's* instructions, but that course would have been of no practical use, as by the time such instructions would be received, the goods would have perished.

D. LAW RELATING TO SUB-AGENT (Ss. 190-195) Delegation by agent (S. 190)

It is obvious that, ordinarily, a principal engages an agent on *personal considerations.* Therefore, normally, *an agent cannot delegate* his duties to another. S. 190 of the Act deals with the law as to *when* and *how far* an agent can *delegate* his duties to another. It lays down that an agent *cannot* lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform *personally, unless* by the ordinary *custom* of *trade,* a sub-agent *may,* or, from the *nature* of the agency, a sub-agent *must,* be employed.

DELEGATUS NON POTEST DELEGARE.— An agent must *not,* as a rule, depute another person to do that which he has undertaken to do. The maxim, "*Delegatus non potest delegare"* means that a *delegate cannot delegate.* The rational principle underlying the rule is that the principal is supposed to have confidence in the honesty or working capacity of the agent; he may *not* have the same confidence in the person appointed by his agent. Hence, sub-agency is *not* generally recognised.

But there are *exceptions* to this rule. Thus, if the ordinary custom of the trade permits the appointment of sub-agents, *or* if the nature of agency be such that it *cannot* be accomplished without the appointment of a sub-agent, then a sub-agent may be appointed.

Thus, in *Mahinder* v. *Mohan,* A.I.R. (1932) All.188.— A, the owner of a house at a hill station, appointed a Bank as his agent to let out the property, and gave full discretion to the Bank in the matter of settling the rent. The Bank entrusted the business to a house-agent, *B. B* let the house to a tenant, recovered rent from him, but did *not* pay over the same to *A. A* brought a suit against *B* for accounts and for the recovery of the rent received by him. *B* contended that there was no privity of contract between him and *A,* and that the suit was therefore *not* maintainable. Now, *A* had given very wide powers to the Bank, and the power to appoint an agent under the circumstances might well be inferred. A Bank is usually *not* expected to go about in search of tenants, and *A* must have known that other agencies would have to be employed in order to find suitable tenants for the house. Under these circumstances, the Bank had authority to appoint *B* as agent and therefore, *B* was *held* to be accountable to *A. A* would, therefore, succeed.

As a general rule, the maxim *delegatus non potest delegare* applies so as to prevent the agent from establishing the relationship of principal and agent between his own principal and a third person. This maxim, when analysed, merely means that an agent *cannot,* without authority from his principal, devolve upon another an obligation to the principal which he has himself undertaken to fulfil personally, and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority *cannot* be implied as an ordinary incident of the contract.

But the exigencies of business do, from time to time, render necessary the carrying out of the instructions of the principal by a person other than the agent originally instructed for the purpose, and where that is the case, reason requires that the rule be relaxed, so as, on the one hand, to enable the agent to appoint a "subagent" and, on the other hand, to constitute in the interests and protection of the principal, a direct privity of contract between such sub-agent and the principal.

"Sub-agent" defined (S. 191)

A *sub-agent* is a person *employed by,* and *acting under* the control of, the *original agent* in the business of the agency. (S. 191)

Representation of principal by a sub-agent (Ss. 192-193)

The relationship between the principal and the sub-agent depends on whether the *agent had an authority to appoint the sub-agent,* and whether the sub-agent was *properly* appointed.

If the sub-agent is properly appointed—the principal is, so far as regards *third* persons, *represented by the sub-agent,* and is *bound* by and is *responsible* for his act, as *if he were an agent originally appointed by the principal.*

But where an agent has appointed a sub-agent *without having authority to do so,* the principal is *not* represented by, or responsible for, the acts of the person so employed; nor is that person responsible to the principal. The agent stands towards such person in the relation of a *principal as to an agent,* and is responsible for his acts *both to the principal and to third persons.*

Liability of principal, agent and sub-agent (S. 192)

But though the principal is responsible for the acts of a properly appointed agent, the relations between the agent and the sub-agent subsist, and the *agent is responsible to the principal for the acts of the sub-agent,* and the subagent is responsible for his acts to the *agent,* but *not to the principal, except* in case of *fraud or wilful wrong.*

Nensukhadas v. *Birdichand,* (1917) 19 Bom. L.R. 948.—*X* consigns 100 bales of cotton to *Y on* commission for sale. *Y* employs Z as his *mucadam* for the purpose of storage and delivery. The railway receipts are made in the name of Z and forwarded to him. Z misappropriates the bales, and becomes insolvent. In these circumstances, the Court would hold that an agent who is paid commission by his principal for the sale of goods and who properly employs a sub-agent for the purpose, is liable to the principal for the sub-agent's fraudulent disposition of the goods within the course of his employment. As the fraudulent disposal took place in the course of employment which was *authorised, Y* is liable to reimburse the loss sustained by *X.*

Who is *not* a sub-agent? Law as to *substituted agents* (SS. 194-195)

Where an agent, holding an express or implied authority to *name another person* to act for the principal in the business of the agency, has *named* another person accordingly, such person is *not a sub-agent,* but an *agent* of the principal for such part of the business of the agency as is entrusted to him. (S. 194)

Illustrations— (a) *A* directs *B,* his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. *B* names *C,* an auctioneer, to conduct the

sale. C is *not a sub-agent, but* is *A's agent* for the conduct of the sale.

(b) *A* authorises *B, a* merchant in Kolkata, to recover the money due to *A* from *C & Co. B* instructs *D,* a solicitor, to take legal proceedings against *C & Co.,* for the recovery of the money. D is *not a sub-agent,* but is a solicitor for *A.*

In selecting such agent for his principal, an agent is ' bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his *own* case, and if he does this, he is *not responsible* to the principal for the acts or negligence of the agent so selected. (S. 195)

Illustrations— (a) *A* instructs *B, a* merchant, to buy a ship for him. *B* employs a ship-surveyor of good reputation to choose a ship for *A.* The surveyor makes the choice negligently, and the ship turns out to be unseaworthy and is lost. *B* is *not,* but the surveyor *is,* responsible to *A.*

(b) *A* consigns goods to *B,* a merchant, for sale. *B,* in due course, employs an auctioneer of good credit to sell the goods of *A,* and allows the auctioneer to receive the proceeds of the sale. The auctioneer *afterwards* becomes insolvent, without having accounted for the proceeds. *B* is *not responsible* to *A* for the proceeds.

SUB-AGENT AND SUBSTITUTED AGENT DISTINGUISHED.— The distinction between a sub-agent and a substituted agent appointed by an agent "holding an express or implied authority to name another person" under Sec. 194, is that while a sub-agent is responsible to the agent, and is *not* generally responsible to the principal, the substituted agent becomes, by his mere appointment, immediately responsible to the principal. Privity of contract is created between them.

E. RATIFICATION (Ss. 196-200)

If an agent enters into a contract *without the authority of the principal,* it does *not,* of course, bind the principal. However, the principal *may subsequently ratify, i.e.,* adopt, the benefit and liabilities of the contract made on his behalf. If he does so, the effect will be the same as *if* he had previously authorised the agent to enter into the contract.

What acts can be ratified (Ss. 196-197 & 199)

Where acts are done by one person *on behalf of another,* but *without his knowledge* or *authority,* he may *elect* to *ratify or* to *disown* such acts. If he ratifies them, the same effect will follow *as if* they had been performed *by his authority.* (S. 196)

Ratification may be *expressed,* or may be *implied* in the conduct of the person on whose behalf the acts are done. (S. 197)

Illustrations.— (a) *A,* without authority, buys goods for *B.* Afterwards, *B* sells them to *C* on his own account; *B's* conduct implies a ratification of the purchase made for him by *A.*

(b) *A,* without B's authority, lends *B's* money to C. Afterwards, *B* accepts interest on the money from *C. B's* conduct implies a ratification of the loan : S. 197.

It may also be noted that a person ratifying any unauthorised act done on his behalf ratifies the *whole of the transaction* of which such act formed a part. (S.

199)

When ratification will *not* be allowed (Ss. 198 & 200)

Ratification will, however, *not* be allowed in the following *two* cases:

1. No *valid ratification* can be made by a person whose *knowledge* of the facts of the case is materially *defective.* (S. 198)

2. An act done by one person on behalf of another, without such other person's authority, which *if* done with authority, would have the effect of *subjecting a third person to damages, or of terminating any right or interest of a third person cannot,* by ratification, be made to have such effect. (S. 200)

illustrations.— (a) *A, not* being authorized thereto by *B,* demands, on behalf of *B,* the delivery of a chattel, the property of *B,* from *C,* who is in possession of it. This demand *cannot* be ratified by *B,* so as to make *C* liable for damages for his refusal to delivery.

(b) *A* holds a lease from *B,* terminable on three months' notice. *C,* an unauthorized person, gives notice of termination to *A.* The notice *cannot* be ratified by *B,* so as to be binding on *A.*

RULES GOVERNING RATIFICATION— There are *twelve* rules governing ratification. These are (including those laid down in Ss. 195 to 200) as under:

1. The contract must be made by the agent avowedly *for, or on account of the principal,* and *not* on account of the agent *himself.*

In other words, for a valid ratification, it is necessary that the agent must *not* have acted on his *own* behalf, but for another, merely *as an agent.*

2. The principal must be in *existence* at the time of the acts. Thus, a newly-formed company *cannot* ratify an act done in its name *before* its incorporation.

3. A transaction which is void *ab initio cannot* be ratified. A principal can ratify only those acts which he is *legally* competent to do. Thus, there *cannot* be ratification of a *void* contract. A minor, *cannot, after* attaining majority, ratify a contract made *during* his minority, because a minor's contract is absolutely *void,* and so there is nothing to ratify.

4. When the act of an agent is ratified, it establishes the fact that the act was done with the *authority* of the principal. Thus, ratification amounts to *previous authority.* And since a ratification is in law equivalent to a previous authority, a person *not* competent to authorise an act *cannot* give it validity by ratifying it.

5. Since a ratification is in law equivalent to a previous authority, a person *not* competent to authorise an act *cannot* give it validity by ratifying it.

This would imply that the principal can ratify an act of his agent, *only if* at the time of the ratification, he himself could have done that act. Therefore, if an insurance contract is entered into by an agent without the authority of the principal, it *cannot* be ratified by the principal *after he* is aware that the event insured against has occurred, *(e.g.* after the insured has sunk). Obviously, he himself could not have insured the ship at that point of time, and he is, therefore, equally incapable of ratifying the unauthorised act of his agent.

Hillberry v. *Hatton,* 2 H & C. 822.— *A* purchased a chattel on behalf of *B,* under such circumstances that the dealing with the property in the chattel would amount to a conversion. *B* ratifies the purchase. In these circumstances, the Court *held* that an act may be ratified though it is tortious. But ratification does

not, of itself, give any new authority to the person whose act is ratified. Therefore, *A* and *B* are jointly liable for the conversion.

6.Ratification may be *express, or* may be *implied* by the conduct of the person on whose behalf the act was done. (S. 197)

7. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective. (S. 198)

8. A person ratifying any unauthorized *act* done on his behalf ratifies the *whole of the transaction* of which such act forms a part. (S. 199)

9. An act done by one person on behalf of another, without such person's authority, which, if done with authority, would have the effect of subjecting a third person to damages or of terminating any right or interest of a third person, *cannot* by ratification, be made to have such effect. (S. 200)

10. Where time is limited for doing an act, the ratification must be made before the time has expired.

11. Where no time is limited, the ratification must be *within a reasonable time.*

12. Lastly, ratification *relates back* to the contract of the agent, *i.e.,* it is *retrospective* in its effect.

Bolton v. *Lambert,* (1888) 41 Ch. D. 295.— *A* made an offer *B,* which *C* accepted in *B's* name, without authority, but *B* subsequently ratified it. *A* revoked the offer before *B's* ratification. The question which arose in these circumstances was whether *B* was entitled to specific performance. The Court *held* that ratification relates back to the contract of the agent. Thus, *B's* ratification relates hack to acceptance, *i.e.,* to the moment when there was a concluded contract between *A* and *B. A's* attempted revocation is inoperative; *A,* being too late, *B* is entitled to specific performance.

F. AGENCY HOW TERMINATED (Ss. 201-202 & 209)

Agency when terminated (Ss. 201 & 209)

S. 201 enumerates *five* ways in which an agency comes to an end.

An agency is terminated by-

1. The principal *revoking* the agent's authority. (When the principal revokes the agent's authority, *four rules* are to be observed, and these are discussed later.)
2. The agent *renouncing the business* of the agency.

Renunciation by the agent. - Renunciation by the agent may be *express* or may be *implied* by his conduct.

When the agency is for a fixed period of time, the agent must *compensate* the principal for any pre-mature revocation of the agency without sufficient cause. He must also give the *principal reasonable notice* of such revocation, failing which he would have to make good the damage thereby resulting to the principal.

3. The *business* of the agency being *completed.*
4. Either the *principal or agent dying* or becoming of *unsound mind.*

Death or insanity of principal or agent. - An agency always terminates by the death or insanity of principal or agent. The death (or the dissolution in the case of an *artificial* person, such as a corporation) of the principal determines *(i.e.* terminates) the authority of the agent *when it is brought to his knowledge.* Mere

death of the principal *cannot* operate to end the agency, *until the agent has heard of it.*

Thus, *A* directs *B,* his agent to pay certain money to *C. A* dies, and *D* takes out probate to his will. *B,* after *A's* death, *but before hearing of it,* pays money to *C.* The payment is good as against *D, t*he acceptor. So also, the death of the principal does *not* affect third persons *until they come to know of it.* The same is the rule in the case of insanity.

In England, the law is otherwise. *There,* the death of the principal *determines* the authority of the agent *immediately,* though the fact of the death *might not be known* to the agent or to the persons dealing with the agent. Needless to say, the death or insanity of the agent also puts an end to the agency.

5. The *principal* being adjudicated an *insolvent.*

It is to be noted that it is the insolvency of the *principal, and not* of the *agent,* that terminates the agency when it has come to the knowledge of the agent; and in the case of third persons, it terminates when the fact of insolvency has come to the knowledge of the third persons.

The solvency or insolvency of the *agent* is *not relevant* as the contract entered into is between his principal and the third party.

It may also be noted that S. 201 is *not exhaustive* of the circumstances in which an agency comes to an end. For example, there is no reference to destruction of the subject-matter of the agency or to the dissolution of a firm. Thus, it has been *held* that a power-of-attorney to sell immovable property executed by a firm is terminated by the dissolution of the firm.

S. 209 then proceeds to lay down a *special* duty on the agent when his principal *dies* or becomes of *unsound mind.*

When an agency is terminated by the principal *dying* or being of *unsound mind,* the agent is bound to *take,* on behalf of the representative of his late principal, all reasonable *steps for the protection* and *preservation* of the *interests* entrusted to him.

There are *five more ways* in which an agency will terminate. They are all based on general principles of contract. Thus, an agency terminates-

1. By *any other incapacity* of the principal or of the agent.
2. By *an agreement between the principal and the agent*.— Sometimes, the contract of agency expressly or impliedly contains provisions for the termination of the agency.
3. *By efflux of time.*— In some cases of agency, a period is mentioned in the contract. As soon as that period is over, the agency terminates.
4. *When the subject-matter of the agency ceases to exist*.— Destruction of subject-matter, puts an end to the agency. Suppose *A* was appointed agent by *B* to transport his bales of cotton to Kolkata. The bales are gutted by fire. The agency comes to an end.

5. When the principal's power over the subject-matter comes to an end.

Agency when *not* terminated: Agency coupled with interest (S. 202)

S. 202, which deals with agency coupled with interest, runs as follows:

Where the agent has himself an *interest in the* property which form the *subject-matter* of the agency, the agency *cannot,* in the absence of an *express*

contract, be terminated to the *prejudice* of such interest.

Illustrations.— (a) *A* gives authority to *B* to sell A's land, and to pay himself, out of the proceeds, the debts due to him from *A. A cannot* revoke his authority; nor can it be terminated by his insanity or death.

(b) *A* consigns 1,000 bales of cotton to *B,* who has made an advance to him on such cotton, and desires *B* to sell the cotton, and to repay himself out of the price, the amount of his own advances. *A cannot* revoke this authority; nor is it terminated by his insanity or death.

AGENCY COUPLED WITH INTEREST.— An agency coupled with interest is an agency where the agent himself has an interest in the *subject-matter* of the agency. Such an agency *cannot,* in the absence of any *contract to the contrary,* be terminated to the *prejudice* of such interest. The *principle* underlying such agency can be stated as follows: "Where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some *benefit* to the donee of the authority, such an authority is *irrevocable".* In fact, the circumstances must be such that revocation of the authority would be a *breach of faith against the agent.* This is technically expressed by saying that *authority coupled with interest* is irrevocable.

The employment must be such as the authority of the agent *cannot* be revoked without *loss to the agent* and the interest of the agent in the subject-matter must be a *substantial* one. Mere *prospect* of remuneration is *not* an "interest" within the meaning of this section.

PROBLEM.— *A,* being indebted to *B,* gives him a power-of- attorney to sell a certain plot of land and discharge his debt out of the purchase money. *A* thereafter changes his mind and revokes the power. *B* however, proceeds with the sale. Advise *A.*

Ans. - Here, *B,* the agent, has an interest in the subject-matter of the agency. *A cannot* revoke the authority. (See illustration (a) to *S.* 202.)

G. REVOCATION OF AGENT'S AUTHORITY (Ss. 203-208 & 210)

There are *four* rules regarding the revocation of an agent's authority, as under:

1. The principal may revoke the authority given to his agent *at any time before* the *authority has been exercised* so as to bind the principal: S. 203. Such revocation may be *express* or may be *implied* in the *conduct* of the principal. Thus, *A* empowers B to let *A's* house. Afterwards, *A* lets it *himself.* This is an *implied* revocation of *B's* authority: S. 207. But the principal *cannot* revoke the authority that has been *partly* exercised, so far as regards such acts and obligation, as arise from acts *already* done in the agency: S. 204.

Illustrations.— (a) *A* authorises *B* to buy, 1,000 bales of cotton on account of *A's* money remaining in *B's* hands. *B* buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. *A cannot* revoke *B's* authority so far as regards payment for the cotton.

(b) *A* authorises *B* to buy 1,000 bales of cotton on account of *A,* and to pay for it out of A's money remaining in B's hands. *B* buys 1,000 bales of cotton in his

own name, so as *not* to render himself personally liable for the price. *A can* revoke B's authority to pay for the cotton.

2. Where there is an express or implied contract that the agency should be continued for any period of time, the principal *must make compensation* to the agent, for any premature *revocation* or renunciation of agency without sufficient cause : S. 205. Reasonable notice must be given of such revocation, otherwise the damage thereby resulting to the principal must be made good by the agent: S. 206.

3. The termination of the authority of an agent does *not,* so far as regards the agent, take effect *before* it becomes *known* to him, or so far as regards *third* persons, before it becomes known to *them:* S. 208.

Illustrations.— (a) *A* directs B to sell goods for him, and agrees to give B five per cent commission on the price fetched by the goods. *A* afterwards, by letter, revokes *B's* authority. B, after the letter is sent but before he receives it, sells the goods for Rs.100. The sale is binding on *A,* and B is entitled to five rupees as his commission.

(b) *A,* at Chennai, by letter, directs B to sell for him some cotton lying in a warehouse in Mumbai, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Chennai. B after receiving the second letter, enters into a contract with *C,* who knows of the first letter, but *not* of the second, for the sale to him of the cotton. *C* pays *B* the money with which *B* absconds. *C's* payment is good as against *A.*

(c) *A* directs *B,* his agent, to pay certain money to *C. A* dies, and *D* takes out probate to his will. *B,* after A's death, but before hearing of it, pays the money to C. The payment is good as against *D,* the executor.

4. Lastly, the termination of the authority of an *agent* causes the termination of the authority of *all sub-agents* appointed by him: S. 210.

H. AGENT'S DUTIES TO PRINCIPAL (Ss. 211-216)

An agent's duties to a principal are *six, viz*.—

1.An agent is bound to *conduct* the *business* of his principal *according to the directions* given by the principal, *or* in the absence of any such directions, *according to the custom* which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts *otherwise, if any loss is* sustained, he must *make it good* to his principal, and, if any *profit accrues,* he must *account* for it: S. 211.

Illustrations.— (a) *A,* an agent engaged in carrying on for *B* a business, in which it is the custom to invest from time to time, at interest, the money which may be in hand, omits to make such investment. *A* must make good to *B* the interest usually obtained by such investment.

(b) *B, a* broker in whose business it is *not* the custom to sell on credit, sells goods of *A* on credit to *C,* whose credit at the time was very high. *C,* before payment, becomes insolvent. *B* must make good the loss to *A.*

2. An agent is bound to *conduct* the *business* of the agency with as much *skill* as is generally possessed by persons engaged in similar business— *unless* the principal has *notice* of his *want* of skill. The agent is always bound to act with *reasonable diligence* and to use such skill as he possesses. He is bound to make

compensation to his principal in respect of the direct consequences of his own *neglect, want of skill* or *misconduct, but not* in respect of loss or damage which are *indirectly* or *remotely* caused by such neglect, want of skill or misconduct: S. 212.

Illustrations.— (a) *A,* a merchant in Kolkata, has an agent, *B,* in London, to whom a sum of money is paid on *A's* account, with orders to remit. *B* retains the money for a considerable time. *A,* in consequence of not receiving the money, becomes insolvent. *B* is liable for the money and interest from the day on which it ought to have been paid according to the usual rate, and for any further direct loss—*e.g.,* by variation of rate of exchange, but *not* further (*i.e not tor A's* insolvency).

(b) *A,* an agent for the sale of goods, having authority to sell on credit, sells to *B* on credit, without making the proper and usual enquiries as to the solvency of *B. B* at the time of such sale, is insolvent. *A* must make compensation to his principal in respect of any loss thereby sustained.

(c) *A,* an insurance-broker, employed by *B* to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterward lost. In consequence of the omission of the clause, nothing can be recovered from the underwriters. *A* is bound to make good the loss to *B.*

(d) *A,* a merchant in England, directs *B,* his agent at Mumbai, who accepts the agency, to send him 100 bales of cotton by a certain ship. *B,* having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival, the price of cotton rises. *B* is bound to make good to *A* the profit which he might have made by 100 bales of cotton at the time the ship arrived, but *not* any profit he might have made by the subsequent rise.

3. An agent is bound to *render* proper *accounts* to the / principal on demand : S. 213.

4. It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in *communicating* with his principal and in seeking to obtain his instructions: S. 214.

5.If an agent deals on his *own* account in the business of the agency, *without* first obtaining the consent of his j principal and acquainting him with all material circumstances a which have come to his own knowledge on the subject, the principal may *repudiate* the *transaction if* the case shows *either* that any material fact has been dishonestly *concealed* from him by the agent, *or* that the dealings of the agent have been *disadvan-tageous* to him : S. 215.

Illustrations.— (a) *A* directs *B* to sell A's estate. *B* buys the estate for himself in the name of *C. A,* on discovering that *B* has bought the estate for himself, may repudiate the sale, if he can show that *B* has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(c) *A* directs *B* to sell *A's* estate. *B,* on looking over the estate before selling it, finds a mine on the estate which is unknown to *A. B* informs *A* that he wishes to buy the estate for himself, but conceals the discovery of the mine. *A* allows 6 to buy, in ignorance of the existence of the mine. A,on discovering that *B* knew of the mine at the time he bought the estate, may

either repudiate *or* adopt the sale at his option.

6. If an agent, without the knowledge of the principal, deals in the business of the agency on his own account, instead of on account of his principal, the principal is entitled to claim from the agent, any benefit which may have resulted to him from the transaction: S. 216.

Illustration.— *A* directs *B,* his agent, to buy a certain house for him. *B* tells *A* that it *cannot* be bought, and buys the house for himself. *A* may, on discovering that *B* has bought the house, compel him to sell it to *A* at the price he gave for it.

Andrews v. *Ramsey,* (1903) 2 K.B. 635.— *A,* the plaintiff engaged B, an auctioneer, to sell some property on the terms that he should receive his due commission of £ 50; *B,* however, received secretly £ 20 as commission from the purchaser. In a suit by *A* against *B,* it was *held* that *B* was *not* entitled to his £ 50 promised, and was bound to pay £ 20 to his employer, *A.*

Damodarv. Sheoram, 29 All. 730.— *A,* acting as *B's* agent, agreed with *C* for the sale to him of 50 maunds of grain for future delivery. *A* delivered his own grain to *C* as against the contract. Subsequently, he received grain from *B* for delivery to *C* under the contract, which he sold in the market at a profit. The Court *held* that the agent stood in a fiduciary position in relation to his principal, and so, any profits made by him without the principal's knowledge, while acting as such agent, must be brought into account. *B* could claim the profit from *A.*

I. PRINCIPAL'S DUTIES TO AGENT (Ss. 222-225)

The following are the *four* duties of a principal towards his agent:

1. The employer of an agent is bound to indemnify him as against the consequences of *all lawful acts* done by such agent in exercise of the authority conferred upon him: S. 222.

Illustrations— (a) *B,* at Singapur, under instructions from *A* of Kolkata, contracts with *C* to deliver certain goods to him. *A* does *not* send the goods to *B,* and *C* sues for breach of contract. *B* informs *A* of the suit, and *A* authorizes him to defend the suit. *B* defends the suit, and is compelled to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

(b) *B,* a broker at Kolkata, by the orders of *A,* a merchant there, contracts with *C* for the purchase of 100 casks of oil for *A.* Afterwards *A* refuses to receive the oil, and *C* sues *B. B* informs *A,* who repudiates the contract altogether. *B* defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. *A* is liable to 8 for such damages, costs and expenses.

2. Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequence of that act, though it causes an injury to the rights of third persons : S. 223.

Illustrations.— (a) *A, a* decree holder, and entitled to execution of *B's* goods, requires the officer of the Court to seize certain goods, representing them to be the goods of 8. The officer seizes the goods, and is sued by *C,* the true owner of the goods. *A* is liable to indemnify the officer for the sum which he is compelled to pay to *C,* in consequence of obeying A's directions.

(b) 5, at the request of *A,* sells goods in the possession of *A,* but which *A* had no right to dispose of. 8 does *not* know this, and hands over the proceeds of the sale to *A.* Afterwards *C,* the true owner of the goods, sues 8 and recovers the value of the goods and costs. *A* is liable to indemnify 8 for what he has been compelled to pay to C and for *B's* own expenses.

3. Where one person employs another to do an act which is *criminal,* the employer is *not liable* to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act: S. 224.

Illustrations.— (a) *A* employs 8 to beat *C,* and agrees to indemnify him against all consequences of the act. 8 thereupon beats *C,* and has to pay damages to C for so doing. *A* is *not liable* to indemnify 8 for those damages.

(b) 8, the proprietor of a newspaper, publishes at A's request, a libel upon *C* in the paper, and *A* agress to indemnify 8 against the consequences of the publication, and all costs and damages of any action in respect thereof. 8 is sued by *C* and has to pay damages, and also incurs expenses. *A* is *not liable* to 8 upon the indemnity.

4. The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill: S. 225.

Illustration.— *A* employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and B is in consequence hurt. *A* must make compensation to B.

J. LIABILITY OF PRINCIPAL FOR AGENT'S FRAUD OR MISREPRESENTATION (S. 238)

Misrepresentations made, or frauds committed, by agents, *acting in the course of their business for their principals,* have the same effect on agreements made by such agents *as if such misrepresentations or frauds had been made or committed by the principals; but* misrepresentations made, or frauds committed, by agents in matters which do *not* fall within their authority, do *not* affect their principals : S. 238.

Thus, an agent's fraud committed in the course of the agency business is equivalent to fraud committed by his principal. In the absence of such a rule, any person would be able to commit fraud through his agent and get away with it.

Illustrations.— (a) *A,* being *B's* agent for the sale of goods, induces C to buy them by a misrepresentation, which he was *not* authorised by *B* to make. The contract is voidable, as between *B and C,* at the option of *C.*

(b) *A,* the captain of *B's* ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are *void* as between *B* and the pretended consignor.

In one interesting English case, the plaintiff had employed an agent to let his house. The defendant, who was interested in leasing this house, was in contact with the agent and *not* with the plaintiff. When the defendant asked the agent "whether there was any objection to the house", the agent replied in the negative. Unknown to the agent, there was a brothel in the adjoining house. After the defendant signed the agreement, he discovered the brothel and claimed a right to avoid the contract on the ground of fraudulent concealment of a material fact.

The court, however, *held* that he was bound by the agreement. The reasoning given was that the principal was *not guilty* because he did *not* know about the agent's statement; nor had he authorised the agent to make any such statement. The agent too was *not guilty* because he did *not* know about the brothel. (*Cornfoot v. Fowke,* (1840) 6 Mayor's Court & W 358)

The above decision has been profusely criticised. It is rightly pointed out that it was the duty of the principal to apprise the agent of the whole situation, failing which there would be a serious risk of innocent misrepresentation on the part of the agent. If the owner had himself made this statement, he would be guilty of fraud - and the same result should follow if the agent made the same statement, innocently or otherwise.

Despite all the criticism, the decision in *Cornfoot v. Fowke* was followed by the Kings Bench Division more than a hundred years later in *Armstrong v. Strain* (1952 1 K.B. 232).

PROBLEM.— A solicitor's managing clerk, having authority to transact conveyancing business on behalf of the firm, took a client's instructions to sell some property, (by his own advice given with fradulent intent) and got the title deeds from her. He then induced her to sign certain documents, which were in fact conveyances to himself, which the client thought were merely formal papers. Having thus obtained the means of making an apparently good title in his own name, he dealt with the property for his own purpose. Is the firm liable to the client for the loss?

Ans. - Yes. A principal is liable for the frauds of his agent committed in the course of the agent's employment. (S. 238)

K. RIGHTS OF AN AGENT (Ss. 217-225)

The Act confers the following *five rights* on an agent:

(1) Agent's right of retainer (Ss. 217-219-221)

An agent may retain, out of any sums received on account of the principal in the business of the agency, all money due to himself in respect of *advances* made or *expenses* properly incurred by him in conducting such business, and also such *remuneration* as may be payable to him for acting as agent: S. 217. Subject to such deductions, the agent is bound to pay to his principal, all sums received on the principal's account: S. 218.

In the absence of any special contract, payment for the performance of any act is *not* due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may *not* have been sold, or although the sale may *not* be actually complete: S. 219.

This is known as agent's *right of retainer.* —The right of retainer can only be claimed on all money received by him on the principal's account in the business of the agency. He *cannot* retain sums received by him in *one* business for his commission in some *other* business on behalf of the *same* principal.

(2) Right to remuneration (Ss. 219-220)

An agent is entitled to his commission or remuneration *only when he has*

carried out the object of agency—unless, of course, there is a contract to the contrary. As seen above, and agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may *not* have been sold, *or* although the sale may *not* be actually complete : S. 219.

But an agent who is guilty of *misconduct* in the business of the agency is *not* entitled to any remuneration in respect of the part of the business which he has misconducted: S. 220.

I*llustrations.*— (a) *A* employs *B* to recover 1,00,000 rupees from *C,* and to lay it out on good security. *B* recovers the Rs.1,00,000, and lays out Rs.90,000 on good security, but lays out Rs.10,000 on securities which he ought to have known to be bad, whereby *A* loses Rs.2,000. *B* is *entitled* to remuneration for recovering Rs.1,00,000 and for investing the Rs.90,000. He is *not entitled* to any remuneration for investing the Rs. 10,000, and he must make good the Rs. 2,000 to *A.*

(b) *A* employs *B* to recover Rs. 1,000 from *C.* Through *B's* misconduct, the money is *not* recovered. *B* is entitled to no remuneration for his services, and must make good the loss.

(3) Right of lien on principal's property (S. 221)

S. 221 gives an agent the *right of lien* over the principal's goods, papers, and other property. (The law relating to lien has been exhaustively dealt with in the Chapter on Bailment.)

In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, . whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him : S. 221.

NATURE OF AGENT'S LIEN— An agent's lien is a *particular lien.* It entitles an agent to retain goods, papers and other property received by him as agent in the course of that agency relating to which he is entitled to his commission. Also, the property on which he claims his lien must *not* have been received by him by a wrongful act.

How lost.— The lien of the agent is, as a general rule, lost by his parting with the possession of the goods. But where possession is obtained from the agent by fraud, or is obtained unlawfully and without his consent, his lien is *not* affected by the loss of possession. An agent's lien is extinguished by his entering into an agreement, or acting in any character, inconsistent with his continuance, and may be waived by conduct indicating an intention to abandon it.

Can the lien be effective against third persons?— The lien whether, general or particular, of an agent attaches only on property in respect of which the principal has, as against third persons, the right to create a lien, and except in the case of money and negotiable securities, is confined to the rights of the *principal* in the property at the time when the lien attaches, and is subject to all rights and equities of *third persons* available against the principal at that time.

Can a sub-agent claim this lien?— A sub-agent who is employed by an agent,

without the authority, express or implied, of the principal, has no lien either general or particular, as against the principal. But a sub-agent who is *properly appointed* has the same right of lien against the principal in respect of debts and claims arising in the course of sub-agency, or property coming into his possession in the course of sub-agency, as he would have had against the agent employing him, if the agent had been the owner of the property, and this right is *not* liable to be defeated by a settlement between the principal and the agent to which the sub-agent is *not* a party.

(4) Right to indemnity (Ss. 222-224)

1. As seen earlier, an agent has the right to be indemnified against the consequence of all *lawful acts* done by such agent in the exercise of the authority conferred upon him: S. 222.

Illustration.— (a) B, at Singapur, under instructions from *A,* of Kolkata, contracts with *C,* to deliver certain goods to him. *A* does *not* send the goods to B, and C sues B for breach of contract. B informs *A* of the suit, and *A* authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. *A* is liable to B for such damages, costs and expenses.

(b) *B,* a broker at Kolkata, by the orders of *A,* a merchant there, contracts with *C* for the purchase of 10 casks of oil for *A.* Afterwards, *A* refuses to receive the oil, and *C* sues B. B informs *A,* who repudiates the contract altogether. B defends but unsuccessfully, and has to pay damages and costs, and incurs expenses. *A* is liable to B for such damages, costs and expenses.

2. Secondly, an agent also has the right to be indemnified against the consequences of the acts done in good faith during the course of the agency, when such acts cause an injury to the right of third persons: S. 223.

Illustrations.—(a) *A,* a decree holder and entitled to execution of *B's* goods, requires the officer of the Court to seize certain goods representing them to be the goods of B. The officer seizes the goods, and is sued by *C,* the true owner of the goods. *A* is liable to indemnify the officer for the sum which he is compelled to pay to *C* in Consequence of obeying A's directions.

(b) B, at the request of *A,* sells goods in the possession of *A,* but which *A* had no right to dispose of. B does *not* know this and hands over the proceeds of the sale to *A.* Afterwards, *C,* the true owner of the goods, sues B and recovers the value of the goods and costs. *A* is liable to indemnify B for what he has been compelled to pay to *C* and for *B's* own expenses.

But the principal is *not liable* to the agent, either upon an express or an implied promise, to indemnify him against the consequences of a *criminal act:* S. 224.

Illustrations.— (a) *A* employs *B* to beat C, and agrees to indemnify him against all consequences of the act. *B* thereupon beats *C,* and has to pay damages to *C* for so doing. *A* is *not liable* to indemnify *B* for those damages.

(b) *B,* the proprietor of a newspaper, publishes at A's request, a libel upon *C* in the paper, and *A* agress to indemnify *B* against the consequences of the publication, and all costs and damages of any action in respect thereof. *B* is sued by *C* and has to pay damages, and also incurs expenses. *A* is *not liable* to *B*

upon the indemnity.

5. Right to compensation (S. 225)

An agent is entitled to compensation for any loss or injury caused to him by *the principal's neglect or want of skill.* But he *cannot* claim compensation if the injury results from his own negligence or acquiescence after knowledge of the risk of the agency, for the agent is presumed to undertake ordinary consequences of the risk incidental to the nature of the agency.

Illustration.— *A* employs *B* as a bricklayer in building a house and puts up the scaffolding himself. The scaffolding is unskilfully put up, and *B* is in consequence hurt. *A* must make compensation to *B.*

L. EFFECT OF AGENCY ON CONTRACTS WITH THIRD PERSONS (Ss. 226-237)

The following *five topics* will be discussed under this head:

1. How far a principal is bound by his agent's acts: Ss. 226- 229.
2. Agent when personally liable: Ss. 230, 233 & 234.
3. Contracts where the principal is undisclosed: Ss. 231-232.
4. Liability of a pretended agent: Ss. 235-236.
5. Agency by estoppel: S. 237.

[1] HOW FAR A PRINCIPAL IS BOUND BY HIS AGENT'S ACTS (Ss. 226-229)

There are *four simple rules* on this point:

(1) Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the *same manner* and will have *same legal consequences, as if* the contracts had been entered into, and the acts done, by the *principal in person:* S. 226.

Illustrations— (a) *A* buys goods from *B, knowing* that he is an agent for their sale, *but not knowing* who is the principal. *B's* principal is the person entitled to claim from *A* the price of the goods, and *A cannot,* in a suit by the principal, set off against the claim a debt due to himself from *B.*

(b) *A,* being *B's* agent with authority to receive money on his behalf, receives from *C,* a sum of money due to *B. C* is discharged of his obligation to pay the sum in question to *B.*

(2) When an agent does *more* than he is authorized ' to do, and when the part of what he does, which is *within* his authority, *can be separated* from the part which is *beyond* his authority, so much only of what he does as is *within* his authority is *binding* as between him and his principal : S. 227.

Illustration.— *A,* being owner of a ship and cargo, authorises *B* to procure an insurance for 4,000 rupees on the ship. *B* procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. *A* is bound to pay the premium for the policy on the ship, but *not* the premium for the policy on the cargo.

(3) Where an agent does *more* than he is authorised to do, and what he does *beyond* the scope of his authority *cannot be separated* from what is *within*

it—the principal is *not* bound to recognize the transaction: S. 228.

Illustration.— *A* authorises *B* to buy 500 sheep for him. *B* buys 500 sheep and 200 lambs for one sum of 6,000 rupees. *A* may repudiate the whole transaction.

(4) Any *notice* given to or *information* obtained by the agent *(provided* it be given or obtained *in the course of the business transacted by him* for the principal) has, as between the principal and third parties, the same legal consequences *as if* it had been given to or obtained *by the principal:* S. 229.

Illustrations.— (a) *A* is employed by *B* to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, *A* learns that the goods really belonged to *D,* but *B* is ignorant of that fact. *B* is *not* entitled to set off a debt owing to him from C against the price of the goods.

(b) *A* is employed by *B* to buy from *C* goods of which *C* is the apparent owner. *A* was, *before* he was so employed, a servant of *C,* and then learnt that the goods really belonged to *D,* but *B* is ignorant of that fact. In spite of the knowledge of his agent, *B* may set off against the price of the goods a debt owing to him from C.

NOTICE TO AGENT.— S. 229 deals with the law as to how far notice to the agent is notice to the *principal.* It may be noted that ordinarily, knowledge of the *agent* is knowledge of the *principal.* Facts which the agent learns in the course of transacting the affairs in which he is employed are treated as *known* to the principal *personally.*

This rule rests on the *assumption* that facts which the agent *ought to* have communicated to his employer *have* in fact been communicated. Thus, an agent of an insurance company obtained a proposal for insurance from a one-eyed man, who was induced by the agent to make a written declaration that he was free from any physical infirmity. That the insured was one-eyed, was, of course, known to the agent. The insurance was against total or partial disablement. The insured lost his second eye, and claimed the amount due under the policy for total disablement. It was *held* that the *company was liable.* The company could *not* set aside the contract on the ground that statement by assured was false, for the knowledge of the agent was knowledge of the principal.

But the above rule does *not* cover cases where the agent's knowledge has been obtained *before* he was engaged by the principal for the particular matter, or otherwise than in the course of a particular business. (See Illustration (b), above.)

An important *exception* to the rule that the knowledge of an agent is equivalent to that of the principal exists in cases where the agent has taken part in the commission of a *fraud on the principal.* In such cases, notice of the fraud, or the circumstances connected therewith, *cannot* be imputed to the principal, because of the extreme improbability of a person communicating his own fraud to the person defrauded. But the exception does *not* apply where the fraud is committed, *not* against the *principal,* but against a third *person.*

[2] AGENT WHEN PERSONALLY LIABLE (Ss. 230, 233, 234)

Under S. 230, in the absence of a contract to that effect, an agent *cannot personally* enforce contracts entered into by him *on behalf* of his principal; nor is he *personally bound* by them.

Such a contract to the contrary is presumed to exist in the following *three cases:*

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant *resident abroad.*

(2) Where the agent does *not disclose* the name of his principal.

(3) Where the *principal,* though disclosed, *cannot be sued.*

As a general rule, an agent who enters into a contract on behalf of his principal is *not* entitled to sue; *nor* is he *personally* liable on the contract. This rule will apply in all cases where the contract is made by him professedly *in his capacity of agent.* It is the principal only who can enforce it and can be held liable, *except* when there is a contract to the contrary. The section then proceeds to mention *three cases* in which there is a *presumption* that the person contracting with an agent has bargained on the agent's personal responsibility under the contract. In these three kinds of contracts, his rights and liabilities to sue and to be sued respectively are presumed by law. The test is— To *whom* was *credit given* by the *other party?*

An agent can personally enforce contracts and can be made personally liable in the following *three cases:*

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad.

In *such* a contract, it is presumed that credit is given *exclusively to* the *agent on the spot,* and the foreigner is really *no party* to the contract. It may be noted that this is merely a *presumption,* and *not* a rule of *law.* The presumption is rebuted when the foreign principal is, in writing, *made a* contracting party and the contract is made *directly in his name.*

(2) Where the agent does not disclose the name of the principal.

UNDISCLOSED PRINCIPAL.— Cases do occur in which the principal may be *non-existent,* or if existing, his name may *not* have been disclosed. In any event, a person dealing with an agent must be given some indication as to the person on whose credit or solvency the person so dealing has to *rely;* in the absence of such a disclosure, the contracting party is *deemed* to have relied solely on the responsibility of the *agent,* who either fails to *intimate* the *name* of his principal *or* the *fact* of his *representative character.*

The essential thing is *knowledge,* and when one party *knows* that the other is an *agent,* the presumption does *not* arise, although the name of the principal is *not* given. Hence, where there is an actual knowledge, or *means* of knowledge, on the part of third persons, disclosure. of the principal's name is *not necessary,* and the agent *cannot* be made personally liable. It may be noted that the third person who deals with the agent does *not* lose his rights *against the principal.* In case of a breach of contract, he has the option to sue either of them. But if the contract is made expressly with the *foreigner,* the agent is *not liable.*

Where the agent does not disclose the name of his principal.— An undisclosed principal may be one whose name is *not known* to the party entering into the contract *or* one who has *no existence.* When an agent acts for an undisclosed principal, either the agent or the principal can sue or be sued at the *option* of the parties interested. But if the principal is *known* or if the contracting party has means of *knowing* his name, the *principal* alone will be liable. The actual disclosure of the principal's name is *not necessary* in such a case.

Bhojabhai v. *Hayem,* 22 Bom. 754.— In this case, it was *held* that an Honorary Secretary and Treasurer of a School Committee can be *held* personally liable for the rent of the school premises, where there is nothing to show that the contract was made on the personal credit of anyone but himself.

(3) When the principal, though disclosed, *cannot* be sued.

This is the *third* case in which an agent will be personally liable. The rule declared in S. 230 refers to those cases in which the principal is *disqualified* from contracting, and evidently *not* to those where the principal is a *minor* or of *unsound mind,* for such a person *cannot* employ an agent *at all.* It should be noted that the agent is held liable only when the third party dealing with the agent is not aware of the inability of the principal to be sued.

The above are the *three* cases declared by *statute,* (viz. S. 230 of the Act) in which an agent becomes personally liable. To this, may be added the following *seven* more, *viz*.,—

1. When the agent has made a contract, in the subject-matter of which he has a *special interest* or property. The agent is, only to *that* extent, a principal, and therefore, can sue or be sued personally. Thus, where *agency is coupled with interest,* the agent may sue personally.
2. Where the agent *expressly agrees to be liable,* or where he contracts by deed in his *own* name, or where his personal liability can be *inferred.*
3. Where the personal liability of the agent is fixed by *usage* as in *mercantile* transactions, *e.g.,* bills of exchange, promissory notes, *etc.*
4. Where the agent acts *without* and *beyond* his authority.
5. Where the agent *pretends* to have authority which he does *' *not* possess. (This is discussed later.)
6. Where the agent makes a representation or commits a fraud in matters which do *not* fall within his *authority.*
7. There is yet another class of cases in which agreements have been entered into by *promoters* on behalf of companies *intended* to be, but in fact not *yet,* incorporated. In such a case, the alleged principal has *no legal* existence, and the *agent* is *held* to have contracted on his *own* account in *order that there may not be a failure of remedy. Lakshmishankar* v. *Murtiram,* (1904) 6 Bom. L.R. 1106.

S. 233 declares the right of a person dealing with an agent who is personally liable.

In cases where the agent is personally liable a person dealing with him may hold either *him or his principal, or both* of them liable: S. 233.

Illustration.— *A* enters into a contract with *B* to sell him 100 bales of cotton,

and afterwards discovers that *B* was acting as agent for C. *A* may sue *either B, or C, or both,* for the price of the cotton.

Right of election (S. 234)

As seen above, in cases where the agent is personally liable, a person dealing with him may hold *either* him *or* his principal or both of them liable. But if he induces the agent to act upon the belief that the principal *only* will be held liable, or induces the principal to act on the belief that the agent *only* will be held liable, he will afterwards lose his remedy against the agent or the principal, respectively. When he has made a final election, he will be *estopped* from making a fresh election.

[3] CONTRACTS WHERE THE PRINCIPAL IS UNDISCLOSED (Ss. 231-232)

MEANING OF UNDISCLOSED PRINCIPAL— Ss. 231 and 232 deal with the law relating to *undisclosed* principal.

Where an agent, having authority to contract on behalf of another, *Undisclosed* makes the contract in his own name, *concealing* the fact that he is merely a *representative,* the doctrine of undisclosed principal comes into play. Thus, where the agent has authority in fact, but *does not disclose* the *existence of agency,* the principal is called an *undisclosed principal.*

The following are the *two rules* contained in Ss. 231 and 232 regarding the legal position of an undisclosed principal.

1. If an agent makes a contract with a person who *neither knows,* nor has *reason* to suspect, that he is an agent, his principal may require the performance of the contract, but the other contracting party has, as against the principal, the same rights as he would have had as against the agent *if* the agent had been the principal: S. 231. If the principal *discloses* himself *before* the contract is completed, the other contracting party may *refuse* to fulfil the contract, *if* he can show that, if he had known *who* was the principal in the contract, *or* if he had known that the agent was *not* a principal, he would not have entered into the contract: S. 231.

2. Where one man makes a contract with another, *neither knowing,* nor having reasonable ground to suspect, that the other is an agent, the principal, if he requires the performance of the contract, can only obtain *such* performance, *subject* to the rights and obligations subsisting between the agent and the other party to the contract : S. 232.

Illustration.—A, who owes Rs. 500 to *B,* sells Rs. 1,000 worth of rice to *B. A* is acting as an agent for C in the transaction, but *B* has no knowledge nor reasonable ground of suspicion that such is the case. *C cannot* compel *B* to take the rice, without allowing him to set off *A's* debt.

Summary

The law in this respect may be summarised as follows:

I. If a contract is made for a *named* principal, then the principal *alone* can sue *or* be sued.

II. Where the agent *discloses* the *existence,* but *not* the *name* of his principal, and if the agent expressly contracts *as agent,* he *cannot* personally sue or be sued on the contract.

III. Where the agent *has* authority in fact, but neither the *existence* nor the *identity* of the principal is disclosed, the doctrine of undisclosed principal comes into play, and the following rules will apply:

1. The contract is enforceable either *by or against* the agent.

2. The *third* person may sue either the *principal or* the *agent* at his option, and conversely, he is liable to be sued either by the principal or the agent.

3. The right of the undisclosed principal to sue the third party is subject to *three limitations,* namely—

(i) the authority of the agent to act for the principal must have existed *at the time of the contract;*

(ii) if the personality of the agent is, in the circumstances, a matter of vital importance to the other contracting party, the undisclosed principal is *not* allowed to intervene; *and*

(iii) the undisclosed principal can be met with any defence which was available to the third party against the agent, before the third party discovered the existence of the principal : Ss. 231-232.

[4] LIABILITY OF A PRETENDED AGENT (Ss. 235-236) (HOLDING OUT)

PRETENDED AGENT.— The liability of *pretended* agent is known as liability by *'holding out'.* It is *mainly* enacted in S. 235. The case of a pretended agent is an instance of a *breach of implied warranty of authority,* if a man contracts as an agent, but without authority (real or ostensible), for a principal whom he names, he *cannot* bind the alleged principal by that contract. And the party whom he induces to contract has one of the *two* remedies--

(i) If the alleged agent *honestly believed* that he had authority which he did *not* possess— *he may be sued upon a breach of warranty of authority.*

(ii) If the professed agent *knew* that he did *not* have the authority which he *assumed* to possess— *he can be sued for deceit.*

The above principle was laid down in the well-known case of *Collen* v. *Wright.* In that case, the rule has been thus stated: "A person, who induces another to contract with him as the agent of a third party, by an unqualifed assertion of his having *authority,* to act as such agent, is answerable to the person who so contracts, for any *damage* which he may sustain by reason of the assertion of the authority being *untrue*". in the said case, Wills J. said: "The fact that the professed agent *honestly* thinks that he has an authority affects the *moral character* of his act; but moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains'.

CASE.— In *Collen* v. *Wright* (1857 7 E & B 301), *X, Y* and Z, the directors of a building society, borrowed money from *W, representing* to him that they were *authorised* to do so. In fact, they had exceeded the limit of borrowing prescribed in the Memorandum of the society. *W* sued *X, Y* and Z for the recovery of the

money lent. The Court *held* that *W* was entitled to hold the directors *personally liable,* and observed : “Persons who induce others to act on the supposition that they have *authority* to enter into a binding contract on behalf of third persons, on the turning out that they have *no* such authority, may be sued for damages for breach of an implied warranty of authority...”

Liability by “Holding out".— As seen earlier, the liability of a pretended agent is also known as *liability of holding out.* The expression 'holding out’ means falsely leading another to believe something which is *not true,* and inducing him to *act* on the strength of the representation. In fact, this kind of liability is a *special application of the principle of estoppel.* This liability is based on the general principles of *public policy* to prevent frauds to which creditors would otherwise be exposed. The Contract Act expressly provides for such kind of liability in Ss. 235 and 236 of that Act. (S. 28 of the Partnership Act contains provisions relating to *partnership* by holding out', analogous to *agency* by holding out.)

A person *untruly* representing himself to be the authorised agent of another, and thereby *inducing* a third person to *deal* with him as such *agent,* is liable (if his alleged employer *does not ratify* his acts) to make *compensation* to the other in respect of any *loss or damage* which he had incurred by so dealing : S. 235.

Now, while the third party has a right to claim compensation from the pretended agent, the agent himself has no right to compel that other party to perform that contract. S. 236, therefore, enacts that a person with whom a contract has been entered into in the character of agent is *not entitled* to require performance, if he was, in reality, acting, *not* as agent, *but* on his *own account.*

This is in accordance with the general rule of law governing fraud. The person committing fraud must make compensation to the other party if that party suffers any loss, but he has no right to *compel* the performance of that agreement induced by fraud. The contract is voidable *at the instance of the injured party,* which means that if he avoids it, the other party committing fraud has no *remedy.*

[5] AGENCY BY ESTOPPEL (S. 237)

Lastly,S. 237 deals with the estoppel of a *principal.* It lays down as under:

> When an agent has, *without authority,* done acts or incurred obligations to third person on behalf of his principal, the principal is *bound* by such acts or obligations, *if* he has, by his words or conduct, induced third persons to believe that such acts and obligations were *within* the scope of the agent's authority.

Illustrations.— (a) *A* consigns goods to *B* for sale, and gives him instructions *not* to sell under a fixed price. *C,* being ignorant of *A’s* instructions, enter into contract with *B* to buy the goods at a price lower than the reserved price. *A* is bound by the contract.

(b) *A* entrusts *B* with negotiable instruments endorsed in blank. *B* sells them to C in violation of private orders from *A.* The sale is good.

AGENCY BY ESTOPPEL— Section 237 deals with what is known as an “*agency by estoppel."* A person may, as a result of the principle of estoppel, be liable for acts and transactions done without any express or implied authority from him and *not* ratified by him.

Essentials of agency by estoppel.— It may be noted that the liability under this section is *not* based on any real *authority,* but arises on account of *estoppel, independent* of the agent having any *authority* at all. In order to hold a person liable as principal by means of an estoppel, it must be shown that the alleged principal, by means of his conduct, led the other contracting party into an honest belief that the supposed agent had authority to bind the principal by the particular act. The belief must, of course, be a *bona ride* belief.

As said by Lord Ellenborough in an English case, "Strangers can look to the act of the parties, and to the external *indicia* of property, and *not* to the private communications which may pass between the principal and his broker."

End of Section II Chapter 3

APPENDIX

Glossary of Latin terms and expressions used in the book

Ab initio	From the very beginning
Ad idem	Of the same mind (Two parties are said to be *ad idem* when they agree to the same thing in the same sense).
Bona ride	In good faith; honestly; without any fraud or collusion
Caveat emptor	Let the buyer beware
Cestui quo trust	A beneficiary; a person for whom another person is a trustee
Comodatum (Commodatum)	A kind of bailment; when goods are lent without any charge
Contra bonos mores	Against good morals
De facto	In fact
Del credere agent	An agent for sale of goods who, in consideration of a rate of commission (*del credere* commission), guarantees the due payment of the price of the goods sold through him
Delegatus non potest delegare	A delegate *cannot* delegate; A person to whom powers are delegated *cannot* delegate such powers to another
Ex delicto	Action (suits) under the law of torts
Ex nudo pacto non oritur action	No action arises from a "nude" contract; a contract without consideration *cannot* be enforced
Gratis	Free; favour
Haud enim decipitur qui scit se decipt	Deceit which does *not* deceive is *not* fraud
Ignorantia juris non excusat	Ignorance of the law is no excuse
In pari delicto, potior est conditio defendants	When both parties are equally in the wrong, the law will not come to aid either
In personam	Any act, proceeding or right available against or with reference to a specific person

In rem	Any act, proceeding, or right available against the world at large
In terrorem	A condition which is intended to frighten or intimidate
In toto	Totally; entirely; wholly
Inter alia	Amongst other things
inter partes	Between the parties
Inter se	Between themselves
Ipso facto	By the very fact
Laches	Unreasonable delay in asserting or enforcing a right
Nemo dat quod (qui) non habet	He who has *not* can give *not*
Nudum pactum	A 'naked pact"; an agreement without consideration
Onus probandi	The burden of proof
Pari delicto	Equally guilty (See "In pari delicto….., above)
Per se	By itself; taken
Prima facie	On the face of which (it)
Pro tanto	To that extent; for so much
Quantum meruit	As much as he has earned
Suggestio falsi	A false representation
Suppresio veri	An intentional suppression of the truth
Uberrimae fidei	Of the fullest confidence; of utmost good faith
Ultra wires	Beyond the power; beyond the scope of authority
Vis major	Act of God; irresistible force