LAW OF CONTRACT

CHAPTER I

KINDS OF CONTRACT

Contracts so far brought into practice have been classified into different groups on the basis of different tests. Thus, there are : (1) **formal** and **informal** contracts, (2) **executed** and **executory** contracts and (3) **valid, void, voidable** and **unenforceable** contracts. There are also quasi-contracts. In the present chapter we propose to deal with contracts of groups : (1) and (2) and quasi-contracts, leaving those of group (3) to be discussed at a later stage after the essentials of a valid contract have been fully grasped.

1. Formal and Informal contracts :

In English Law contracts are broadly classified into **formal** and **informal.** The primary distinction between the two is that the formal contract depends for its validity on the forms prescribed by law for the execution of a contract, while the informal contract derives its validity from the presence of consideration. Consideration means the price for which the promise of the one party is purchased by the other. A formal contract is often known as a *deed*, a *contract under seal*, and a *speciality* and an informal contract is called a *simple Contract*, *Parol Contract*. etc.

A **formal contract** to be valid must have the following elements : (1) Writing, (2) Signature, (3) Seal and (4) Delivery. Its validity would depend upon the strict compliance with the formalities prescribed by law, viz., writing, signature, seal and delivery. Writing does not mean hand-writing. The contract may as well be typed or printed. Sealing may be waived where neither of the parties has any seal to use. It may be delivered to the promisee or to a third party or it may be retained by the party executing it after a declaration of his intention that it should become operative.

The delivery may be conditional or unconditional. When the delivery is made subject to a condition, it does not come into operation till the condition is fulfilled. In the meantime, it is called an *escrow*. The omission of the one or the other of the above formalities, unless waived for justifiable reason, would make the contract void.

The formal contract is not essential in all matters and people do not resort to it all very frequently. The purpose of a formal contract may very well be served by an informal or oral agreement. In certain cases, however, such as the following, the formal contract must be employed:—

(*i*) In all important matters, a corporation must make a contract under seal.

(*ii*) A gratuitous promise, i.e., a promise made without consideration, must be under seal. Thus, if A says to B that he will give him (i. e. B) Rs. 100/-, it is not enforceable because it is gratuitous. But if the promise is made in writing and under A's seal, it is binding.

(*iii*) A lease of land for more than three years must be made by a contract under seal.

Contracts of Record. Within the range of formal contract are also brought two other transactions, viz., (1) the judgment of a Court of Record and (2) Recognizance. The judgment of a Court of Records creates a right in favour of the successful party and imposes an obligation on the other. Recognizance means an obligation of Record, which a man enters into before some Court of Record or Magistrate duly authorized, binding himself under a penalty to do some particular act, e. g., to appear before it on some date or dates, to keep the peace or to pay a debt etc. Both these transactions are technically called *contracts of Record.*

Now, the most important element of a contract, viz., voluntariness, is wanting in such transactions. The agreement that is found present in them is made under compulsion. Hence Contracts of Record are not contracts at all in the proper sense of the term. They may be called so only by courtesy.

An **informal** or **simple** contract may be written or oral. But whether oral or written, an informal contract must have consideration to support it; otherwise it is not enforceable in law. In some cases, however, writing is necessary over and above consideration. In the following cases, a contract, though informal, is required to be in writing :—

(*i*) A bill of exchange or a Promissory Note.

(*ii*) A contract of Insurance.

(*iii*) An acknowledgment of a debt barred by time.

(*iv*) Assignment of copy-right—the right to publish or produce or reproduce a work or a substantial part thereof.

(*v*) Contracts required by the statute of Frauds to be in writing, such as, a promise made by an executor or administrator making himself personally liable for the debt of the deceased or a contract of Suretyship.

Pakistani Law. Formal contract is not recognized by the Indian Contract Act. Although gratuitous promise is enforceable in our country when it is in writing and registered, yet writing and registration alone are not conclusive proofs of its validity. The promise itself must be made on account of natural love and affection between the parties, who, again, must stand in a close relationship to each other.

In Pakistan, besides a gratuitous promise the following contracts are required to be in writing:—

(*i*) A promise to repay a debt barred by time, i.e., by the Indian Limitation Act.

(*ii*) An agreement between two or more persons to refer a dispute to arbitration.

2. Executed and Executory Contract :

A Contract creates mutual rights and obligations. Thus, if A agrees to sell a car to B, A is under an obligation to sell and deliver the car to B, and, at the same time, he has the right to receive the price of the car from B. Similarly, B is under an obligation to pay the price according to the terms of the contract and has also the right to get the delivery of the car according as the contract has stipulated. Now, if A has performed his share

of the obligation by delivering the car to B, the contract is to be called **executed or unilateral** though it leaves an outstanding obligation on the other side to perform his share of the promise. Similarly, 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 and it remains for the debtor to repay the debt. But where neither party has performed his share of the obligation, the contract is **executory** or **bilateral.** Thus, a promise by A to engage B to do a work next week is an example of executory contract, for, in this case, neither A nor B has yet done what he has promised to do.

3. Quasi-Contract :

Contractual obligations are generally created voluntarily. But there are obligations which lack voluntariness such as the obligation to repay a sum of money paid under a mistake of fact. In such cases, therefore, there is no contract but nevertheless the law treats them as such. Such contracts, existing in law but not in fact, are called **quasi-contracts.**

The Indian Contract Act furnishes some examples of Quasi-Contract :—

(*i*) 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, (Sec. 68).

(*ii*) A person who is interested in the payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be reimbursed by the other, (Sec. 69).

(*iii*) A person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it. (Sec. 72).

CHAPTER II

ELEMENTS OF A VALID CONTRACT

1. Nature of the Law of Contract :

"The Law of Contract", says Sir Frederick Pollock, "may be described as the endeavour of public authority, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindendness". (*Principles of Contract*, P I). "He who has given a promise", continues Pollock, "is bound to him who accepts it, not merely because he had or expressed a certain intention, but because he so expressed himself as to entitle the other party to rely on his acting in a certain way".

A contract by itself does not create a proprietory right to a thing though it may lead to such a right. Primarily a contract raises an expectation that one party would act in a particular way excepting, however, some classes of contract, like pledge or hypothecation which go to create rights in things. Thus if A agrees to sell his car to B, the latter may rely on the former's delivering the car to him as promised. If afterwards A sells the car to C, who buys it without knowledge of the contract between A and B, B cannot claim the car from C though he can sue A for breach of contract. This shows that a contract by itself does not confer any proprietory right to the subject of the contract. Hence Sir Pollock aptly observes: "The specific mark of a contract is the creation of a right not to a thing but to another man's conduct in the future".

2. Definition of Contract :

Section 2 (h) of the Indian Contract Act, 1872 (as adapted in Pakistan), defines a contract as "an agreement enforceable by law". In order to be enforceable, the agreement must create an obligation on both the parties to the contract which law may justifiably step in to enforce whenever there is any default on the part

of either. A contract is thus an assimilation of two ideas—agreement and obligation.

Obviously every agreement does not create obligation. When A offers to sell his horse to B for Rs. 500/-, there is an enforceable agreement. But an agreement between A and B to go together to a picnic does not create any obligation on either side and is not, therefore, enforceable in law. Such an agreement is not a contract.

The element of enforceability seems, therefore, to be created by some factors which are absent from an agreement to enjoy a picnic in each other's company. To understand what these factors are we have to turn to judicial exposition of the definition of contract given in the Indian Contract Act, 1872. "The definition of contract appears to be built upon a succession of definitions of the elements which go to make a contract, such as **proposal, acceptance, promise, consideration, agreement.** (*Satyadeva V. Tribeni* 161 I. C. 579). "**Consideration** and **promise** are the two incidents necessary to constitute a contract. Taken together they form the whole of it". (*Herman V. Jeuchner*, 15 Q. B. D. 561). "The result of a contract is to create a contractual obligation by virtue of which the contract is enforceable in law. The term obligation includes every duty enforceable by law. Obligation may be taken to be a tie or bond which constrains a person to do or suffer something; it implies a right in another person to which it is correlated, and it restricts the freedom of the obligee with reference to definite acts and forbearances; but, in order that it may be enforced by a court, it must be a legal obligation and not merely moral, social or religious." (*Bhudeb V. Kalachand* 34, C. L. J., 315)

Analysing the statutory definition of contract in the light of the above judicial opinions, we find that in order to be raised to the status of a contract, an agreement must satisfy certain conditions. Let us, therefore, proceed to define and analyse all the elements which go to make up an agreement and also the conditions which must be satisfied in order to make such an agreement enforceable.

3. Agreement :

There is no distinction between an agreement and a promise. According to Sec. 2 (e) of the Indian Contract Act "every promise and every set of promises, forming the consideration for each other, is an agreement". Sir Pollock defines an agreement as "an act in the law whereby two or more persons declare their consent as to any act or thing to be done or foreborne by some or one of those persons for the use of other or others of them". Now, this declaration may take place by (a) the concurrence of the parties in a spoken or written form of words as expressing their common intention to conclude an agreement, or, (b) an offer made by some or one of them and accepted by the other or others of them. However it is made, an agreement or promise ultimately resolves itself into an offer or proposal made by one party and accepted by the other. When a proposal is thus made and accepted, there is a *consensus ad idem* between the two minds. The person making the proposal is called the "promisor" and the person accepting it is called the "promisee".

An agreement may be either **express** or **implied.** When there is an offer coming from one party which is accepted by the other the agreement is express. An agreement is called implied when the acts of offer and acceptance are not clearly expressed but have to be gathered from the conduct of the parties or from surrounding circumstances. Let us take one illustration of each. A says to B, "Will you buy my watch for Rs. 150/-." B says "Yes". The agreement thus made is **express.** But if A mentions a figure at an auction bid, he is deemed in law to have made an offer. If the auctioneer drops his hammer, his conduct implies that he accepts the offer of A. There is at once an **implied** agreement between them.

4. Offer :

The Indian Contract Act defines an offer thus: "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". There is no distinction between a proposal and an offer. An offer becomes complete when it is communicated to the offeree.

In the absence of such communication, the offer is of no effect so far as the offeree is concerned.

Care should be taken to distinguish between an offer and (a) a seeming offer, (b) an intention to make an offer and (c) an invitation to make an offer. (a) Where A telegraphed: "Will you sell us B. H. P. ? Telegraph lowest cash price", and B wired back, "Lowest price for B. H. P. £ 900," and A then telegraphed, "We agree to buy B. H. P. for £ 900 asked by you", it was held that there was no contract. The telegram of B to A was not an offer but only an answer to a question asked. A's telegram in reply to B's could not be regarded as an acceptance of the proposal to sell but was only an offer that was required to be accepted by B. (*Harvey V. Facey*, 1893, A. C. 552). (b) In *Harris V. Nickerson* (1873), the defendant advertised that he would sell by auction certain furniture at a place some distance from London. The plaintiff went from London to the appointed place and found the sale withdrawn. He, therefore, sued the defendant for breach of contract. It was held that the defendant's advertisement simply declared his intention to make an offer to any intending buyer. It could not, therefore, be accepted by acting upon it. (c) An advertisement for tenders is not an offer which binds a party to sell to the person who makes the highest tender but is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt. The advertisement, therefore, invites a proposal and does not make it, (*Spencer V. Harding* L. R. 5, C. P. 561). Hence the acceptance of a tender may be qualified by conditions: (*Kundan V. Secretary of State*, 1930). Similarly, when a shopkeeper issues a price list or places priced goods in his shop-window, he is not deemed in law to make an offer to sell at the named prices or to sell at all. In both cases it is an invitation to intending purchasers to make an offer.

But an invitation to do business may be couched in such a way that it may be taken as something more than a mere invitation. In the Carbolic Smoke Ball Case (1893), the Carbolic Smoke Ball Company advertised that he who would be attacked

with influenza after using its specific medicine (carbolic smoke ball) would be paid £ 100 and it was added that the company had deposited £ 100 with the Alliance Bank to show the sincerity of the company in the matter. A person after using the medicine was attacked with influenza. It was held that he was entitled to recover £ 100 because the company's advertisement constituted something more than a mere intimation to do business.

Communication of offer. Communication of the offer, as also of the acceptance, is an essential element in a contract. Two persons may have a common intention but without communication there is no agreement. An offer is not, therefore, open to a person who is ignorant of it; nor an ignorant compliance with the terms of an offer means an acceptance of it. Thus where a reward is offered for an act, the doing of the act in ignorance of the proposal does not entitle a party to the reward (*Fitch V. Snedarar*, 30 N. Y. 248).

In our country it is now a settled law that if a man performs the conditions of a proposal made by another in ignorance of the proposal itself, the person who thus performs the conditions of the offer cannot be deemed to have accepted the proposal and thus to be entitled to any benefit under the contract (*Lal Mohan Sukla V. Gouri Dutt*, 1930, 11 All. L. J. 489).

The principle evolved by the above cases is that an offer cannot be accepted so as to create a binding contract, unless and until it has been communicated and brought to the knowledge of the person to whom it is made. This principle as to communication is also laid down in Sec. 4 of the Indian Contract Act (as adapted in Pakistan), which runs thus: "The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made".

To whom an offer can be addressed ? An offer can be addressed to any specified individual or to the whole world. When a general offer is made to the public at large, it can be accepted only by a definite person. Thus an offer of a reward for a lost article can be accepted only by the person who finds it.

A written offer is generally communicated by delivering the document to the offeree. If the offeree does not care to read the

document, though he has the full opportunity to do so, and at the same time accepts the offer, he is bound by all the terms of the document. To this general rule, there are some exceptions :—

(*i*) A party is not bound by the written terms of a document if his assent to it has been obtained by fraud.

(*ii*) Apart from fraud, the acceptor may not know the contents of the document owing to the fault of the offerer. Thus, if on the back side of a travelling ticket it is written in small indistinct types that "the company is not liable for damages" and the attention of the passenger is not drawn to such writing by anything on the face of it, the passenger shall be deemed to have had no sufficient knowledge of that condition of the contract. (*Hood V. Anchor Lines*, 1918, A. C. 837). In such cases, the important question is whether the party sought to be bound by the terms of the contract may be reasonably presumed to have had sufficient notice of these terms. It is a question of fact and has to be determined in each case by reference to the reasonableness of the situation.

Lapse of offer. Under **English Law,** every offer remains open for a reasonable period of time after which it lapses, i. e., loses its legal efficacy. What is a reasonable time is a question of fact and varies from contract to contract.

In general an offer lapses in the following cases:—

(*i*) An offer lapses if the offerer or the offeree dies before its acceptance.

(*ii*) If the offerer prescribes a period within which the offer is to be accepted or if he prescribes a mode in which the offer is to be accepted and if the acceptance is not made within the time or in the manner prescribed, the offer lapses,

Thus where the letter of acceptance was desired by the offerer to be sent as per the bearer of the offer but the offeree sent the acceptance by post thinking that it would reach earlier, it was held in *Eliason V. Henshaw* that the offer lapsed.

Under **Pakistani Law,** too, (i) an offer lapses when it is not accepted within the time prescribed; if no time is prescribed, then by the lapse of a reasonable time. (ii) An offer also lapses by

death or insanity of the offerer provided the fact of death or insanity comes to the knowledge of the acceptor before acceptance. In this respect Pakistani Law differs from English Law in which lapsing of an offer by death of the offerer is not conditioned by the knowledge of the offeree with regard to that death.

Again, in Pakistan if the offeree does not accept in the manner prescribed by the offerer, a duty is cast upon the offerer to bring it to the offeree's notice that his offer must be accepted in the manner prescribed. If he fails to take this step, he is presumed in law to have accepted his acceptance. But in English Law the offerer is not bound to notify the offeree a second time that his offer must be accepted, if at all, in the manner prescribed.

Revocation of offer. Under **English Law,** the proposer is at liberty to revoke his offer at any time before the offeree has accepted it. The revocation of the offer must be communicated, that is, brought to the knowledge of the offeree. A offers on the 3rd of January a quantity of sugar for sale to B. The offer reached B on the 4th of January. On the 4th, A sends another letter to B revoking the offer. The letter reaches B on the 6th of January after B has accepted the offer on the 5th. The revocation is invalid, because though the revocation has actually been made before acceptance it has not been communicated to B before his acceptance of the offer. An offer under seal cannot be revoked in English Law at all.

In Pakistani Law, too, an offer must be revoked before acceptance and revocation must be brought to the knowledge of the offeree before acceptance. "An offer may be revoked before acceptance. Provisional acceptance does not make a binding contract" (*Soma V. Provincial Government*, 1947, M. 366).

5. Acceptance :

Every offer must be accepted in toto in order to make a binding agreement. Section 7 of the Contract Act thus lays down:

"In order to convert a proposal into a promise, the acceptance must: (i) be absolute and unqualified, (ii) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted". An offer must, therefore,

be accepted in toto, unconditionally and in the prescribed manner unless the offerer waives the condition relating to the manner of acceptance by accepting the acceptance.

Until there is an absolute and unqualified acceptance, the stage of negotiation has not been passed and no *consensus ad idem* has been created. Thus, an offer to sell a horse for Rs. 500/ is not accepted when the offeree says that he is ready to buy it for Rs. 300/-. It is only a counter-offer. The existence of counter-proposal shows that the parties have not assented to the same terms (*Lucas V. James*, 7 Ha. 410). Similarly, if an offer is once refused, it cannot be accepted unless it is renewed. Thus if A offers to sell his horse for Rs. 500/ and B says that he will pay Rs. 300/-, he cannot afterwards bind A to sell the horse even though he is ready to pay the amount demanded by A. A mere inquiry, however, will not amount to a counter-proposal or rejection. An acceptance with an inquiry as to whether the terms can be varied is no bar to the formation of a contract (*Stevenson V. Mclean* 5 Q. B. D., 346).

Communication of acceptance. The communication of acceptance is an essential ingredient in the formation of a binding contract. Mere mental assent is no acceptance. The acceptor must do or say something to indicate his readiness to accept. It has been observed in *Brogden V. Metropolitan Rly Co.* (2 A.C. 692) that when the acceptor makes up his mind he should signify it to the plaintiff ; his having it in his own mind is nothing, "for it is trite law that the thought of man is not triable, for, even the devil does not know what the thought of man is".

Communication of acceptance need not be necessarily by words but "may be expressed symbolically as by the fall of the hammer upon a sale by auction (*Payne V. Cave* 3, T.R. 148) or by a nod (*Bird V. Boulter*, 4 B & Ad. 443)." There are certain offers such as is ullustrated in the case of advertisements offering rewards on condition of doing a particular act, which are desired to be accepted by performance. Such acceptance is known as acceptance by conduct. "The person who makes the offer shows by his language and from the nature of the transaction, that he does not expect, and that he does not require notice of the acceptance

apart from notice of performance" (*Carlill V. Carbolic Smoke Ball Co.*, 1893, I. Q. B., 256).

There is a distinction between the communication of offer and the communication of acceptance. While an offer is not communicated unless it is brought to the notice of the offeree, an acceptance is sufficiently communicated even though the offerer may be ignorant of the acceptance. This happens when "contract by post" is made. A makes an offer to B by a letter. The offer is communicated to B only when he gets the letter. If B wants to accept the offer, he must do something to inform A of his acceptance of the offer. Thus, if B posts the letter of acceptance, it will be deemed sufficient. In other words, every offer must be accepted in the usual way provided it has a tendency to inform the offerer of the acceptance. It is not necessary that the offerer must actually know the acceptance of the offer. Thus in the above case, if B can show proof of having posted the letter of acceptance, the acceptance is sufficiently communicated to A though the letter may not reach A at all (*Household Fire Insurance Co.* V. *Grant*, 4 EX. D. 216).

But communication of acceptance will not be considered complete only by showing proofs of posting it unless the offerer expressly or impliedly prescribes the post office as his agent.

Under **Pakistani Law,** "the communication of acceptance is complete as against the proposer when it is put in a course of transmission to him so as to be put out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer" (Sec. 4 of' I. C. Act).

Revocation of Acceptance. Before the acceptance reaches the offerer, the acceptor can revoke the acceptance and thus annul the contract. Thus A makes a proposal to B; B sends his acceptance by post. The communication of the acceptance is complete as against A when the letter is posted, and as against B when the letter is received by A. B, therefore, is at liberty to revoke his acceptance before the communication of acceptance is complete against him, i. e., before his letter is received by A. If he were, therefore, to send a telegram revoking the acceptance, and if the

telegram reaches before the letter, the acceptance will be revoked. But in English Law acceptance cannot be revoked at all. English courts will be bound to hold that an unqualified acceptance once posted cannot be revoked even by a telegram or special messenger outstripping the arrival of the acceptance, for the contract is concluded when the letter of acceptance is posted; the acceptor, therefore, is no longer at liberty to recede from it. Accordingly, it may be concluded that a contract is made at the time and at the place when and where the letter of acceptance is posted, but under the Indian Contract Act, the contract is voidable at the instance of the acceptor by communication of his revocation reaching before the acceptance has come to the knowledge of the proposer (*Muhammad* V. *Hateem*, 153 I. C. III).

6. Free consent :

Section 10 of the Indian Contract Act outlines the elements of a valid contract thus: "All agreements are contracts if they are made **by the free consent of parties** competent to contract, for a lawful consideration and with a lawful object, and are no hereby expressly declared to be void". Apart from other ingredients, this section emphasizes the element of free consent of the parties.

In order that a valid contract may be made, an agreement should reflect the real intention of the parties. But in many cases the apparent agreement may not, in fact, be the real agreement between the parties. Thus, if A accepts the offer of B to sell a horse which he warrants as sound, when as a matter of fact it is not , A can repudiate the contract on the ground that he would not have agreed to purchase the horse at all if he knew that it was not sound. There was, therefore, no real agreement between A and B. Hence it is essential that every agreement must be a true expression of the intention of the parties.

Section 13 of the Indian Contract Act defines consent thus: "Two or more persons are said to consent when they agree upon the same thing in the same sense". Section 14 of the Act says that consent is free when it is not caused by **mistake, misrepresentation, fraud, coercion** and **undue influence.**

(1) **Mistake.** Section 20 of the Contract Act lays down : "When both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void". A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

The mistake necessary to make a contract void must be mutual and not of one of the parties. There may be some defect that is unknown to both the parties whereby the contract is so fundamentally affected that there is good ground for holding the contract void because of a mutual mistake of fact (*Harilal* V. *Mulchand* 52 Bom. 883). It has been held in *Ramanuj* V. *Gajaraja* (1950, M. 146) that in order to bring a case within Sec. 20, it is necessary to prove *inter alia* that the mistake was "fundamental or basic, i. e., in respect of the underlying assumption of the contract".

From the above discussion it is clear that every mistake does not vitiate a contract. The following, among others, have been held to do :—

(*a*) *Mistake as to the nature of a transaction.* When a man, guilty of no negligence, is induced to sign a bill of exchange by a third party who represented it to be a deed of guarantee, he will not be liable on the bill. But if the alleged mistake arises from his want of due care, he cannot set up the plea of mistake to avoid liability (*Foster* V. *Mackinnon*).

(*b*) *Mistake as to the identity of the party to a contract.* When a person forges the signature of another and induces a seller to supply him with a quantity of goods, no contract is formed. In *Cundy* V. *Lindsay*, C forged the signature of B and induced A to supply him with a quantity of goods. These goods were subsequently sold by C to X who was *bona fide* purchaser for value without notice. When A came to know of this fraud he brought a suit against X to recover the articles. It was held that he was entitled to do so. It is to be noted that in this case there was no contract between A and C; for A accepted the offer believing that it came from B, but B made no offer. In the absence of a contract C could not claim any right and title over A's goods and

X who purchased the articles from C, got no right and title over the things for the simple reason that the seller had none. The goods, therefore, remained all along the property of A which he could recover at any moment.

But in *Phillips* V. *Brooks*, C appeared before A and said that he was B and induced A to part with certain articles. In this case it was held that there was a contract between A and C though the contract was vitiated by fraudulent misrepresentation which has the effect of making a contract voidable, not void. Now, a voidable contract is presumed to remain valid unless and until it is avoided. It follows, therefore, that before the avoidance of the contract, if C sells those articles to X, the latter acquires a good title over them and A will not be entitled to recover them from X. The soundness of this decision has, however, been questioned by Salmond. He observes: "If identification by sight and hearing is enough, what shall be said of identification by hearing alone ? . . .Why was not the purchaser in *Cundy* V. *Lindsay* identified as the person who actually wrote the letter and who actually received the goods delivered at his address ? Would it not be simpler and more satisfactory to adopt the general rule that wherever the identity of the purchaser is known by him to be material and he knows that he is not the person whom the seller believes him to be, the contract is void because of error ?"

(*c*) *Mistake as to the subject-matter of the contract.* This kind of mistake happens when the seller intends to sell one thing and the purchaser intends to purchase a different thing. Thus, if A has two horses, one black and the other white, and offers to sell his horse to B intending to sell the white horse and B accepts the offer intending to purchase the black one but nobody makes any mention of the particular horse to be sold or purchased, there is no real contract between the parties.

Similarly, if A offers to sell his black horse to B and B accepts the offer but, after the agreement is made, it turns out that, unknown to both A and B, the horse was dead at the time of the bargain, the agreement is void.

(*d*) *Mistake by one party as to the intention of the other* does

not render a contract void. The mere knowledge of the seller as to any mistake made by the buyer regarding the quality of the goods would not vitiate the sale, for, the seller is under no obligation to disabuse the purchaser of any such mistake. If, however, the seller knows that the purchaser is believing that the seller is selling the goods as what he took them to be, then and then only the contract would be avoided. It follows, therefore, that a mistake by one party as to the intention of the other vitiates the contract when the circumstances are such that the silence on the part of the seller may be construed as an implied misrepresentation by him.

The above point came up for consideration in the leading case *Smith* V. *Hughes,* in which it was held that "the mere knowledge of the seller as to any mistake made by the buyer regarding the quality of the goods would not vitiate the sale". From this case, the following conclusion has been drawn:—

"A mistake regarding the quality of the goods to be sold does not vitiate the contract unless the seller has, by act or omission, done something to cause the mistake on the part of the buyer. In other cases of mistake regarding the quality of goods, the maxim *Coveat Emptor* (purchaser beware) applies. Thus if A purchases a chain believing it to be made of gold when as a matter of fact it is not, he cannot afterwards avoid the sale on the ground that he made a mistake regarding the quality of the chain. But he can make the quality of the goods a condition of the contract".

To the above rule, there are two exceptions :

(*i*) When things are sold by description it is necessary that they should be of the mercantile quality or reasonably fit for the purpose for which they are required.

(*ii*) When goods are sold by samples, the bulk of the goods supplied must agree with the samples.

The effect of mistake on contract. **English Law.** (i) Mistake renders the contract absolutely void because it prevents the formation of an agreement which is the basis of the .contract. (ii) When a contract is vitiated by mistake its specific perform-

ance may be successfully resisted. (iii) In the case of mutual mistake the court allows the parties to rectify the written contract so as to make it expressive of their real intention (*Paget* V. *Marshal* 28 ch. D. 255).

Pakistani Law. The Indian Contract Act (as adapted in Pakistan) provides that, "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" (Sec. 20). But the mistake must be mutual. 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. The *explanation* to Sec. 20 also provides that "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".

Though a mistake of fact vitiates a contract, a mistake of law does not. It is based on the maxim: *Ignoratia Juris haud excusat* (ignorance of law is no excuse). Sec. 21 of the Contract Act lays down: A contract is not voidable because it was caused by a mistake as to any law in force in British India (Pakistan). Relief may, however, be available in the following cases of mistake of law :

(*i*) Where a mistake is so fundamental that it prevents the formation of a real agreement between the parties, it will vitiate the contract though after all it is a mistake of law.

(*ii*) A mistake as to the existence of a private right has to be treated as a mistake of fact. Thus, a man's promise to buy a thing belonging to himself cannot be enforced on the ground that it is a mistake of law.

(*iii*) If a contract is brought about by deliberate misrepresentation of law, it can be set aside.

(*iv*) Mistake as to any foreign law is a mistake of fact. Hence such a mistake vitiates a contract.

(2) **Misrepresentation.** Misrepresentation is the positive assertion of something which is not true though the person making it believes it to be true. Thus defined, misrepresentation means innocent

misrepresentation as distinguished from fraudulent misrepresentation where there is a wrongful intention to deceive.

Condition and *warranty*. In **English Law** a distinction is drawn between **a representation** which induces a party to enter into a contract but **which is not intended to form a part of it** and a representation **which forms a part of the contract.** When a representation is made before a contract and afterwards incorporated into it, a question often arises whether the representation should be regarded as a **condition** or a **warranty.**

Now, the representation is regarded as a **condition** when it forms a part of the contract and for the breach of which the party, who is affected by the breach, is entitled to avoid the contract. If, however, the representation is not essential to the contract but is more or less of the nature of a subsidiary promise, it is called a **warranty.** For the breach of the warranty, the party concerned is not entitled to avoid the contract, but he can sue for damages and compensation. Thus in a contract of charter-party, a statement contained therein as to the port at which the ship is lying is usually regarded as a condition, whereas statements regarding sea-worthiness of the ship, etc., are warranties. (A charter-party means an agreement by which a shipowner agrees to place an entire ship, or part of it, at the disposal of a merchant for the carriage of goods, binding the shipowner to transport them to a particular place, for a sum of money which the merchant undertakes to pay as freight for their carriage).

In **Pakistani Law**, as laid down by Sec. 18 of the Contract Act, misrepresentation means and includes :—

(*i*) "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". A represents to B that 500 mds. of indigo is made annually at A's factory and thereby induces B to buy the factory while it turns out that the factory produces only 400 mds. of indigo. Now, if A can show that he had good reason to believe his statement on the information that he had, it would be a case not of misrepresentation but of mutual mistake. But if it appears that A had no reason to believe so on the information that he had, B can treat the contract as void for misrepresentation.

(*ii*) "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". Now, in a contract of Insurance, the person assured has a duty to disclose correctly his age and other relevant facts. If the assured states, even on an honest belief, that his age is 22 whereas he is really 25 and thereby obtains a lower premium, it will be a case of **misrepresentation by breach of duty without an intent to deceive.**

(*iii*) "Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement". X says to Y: "My car is free from any defect". Y buys the car . X did not know that there was a rupture in the engine of the car which has made it unfit for use. If and when Y finds out the defect, he can treat the contract as void for misrepresentation as the defect relates to the very substance of the contract. If, however, only one tyre was damaged, Y could not have treated the contract as void, for the damaged tyre does not vitally affect the subject-matter of the contract.

Before the Indian Sale of Goods Act, 1930, the Indian Contract Act made no distinction between a **condition** and a **warranty.** Sec. 12 of the Indian Sale of Goods Act, however, distinguishes a condition from a warranty.

A condition has been defined as a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated. A warranty, on the other hand, is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated. Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. **A stipulation may be a condition, though called a warranty in the contract.**

(3) **Fraud.** Fraud has been defined by Anson as "a false representation of fact made with the knowledge of its falsehood or

recklessly without belief in its truth, with the intention that it should be acted upon by the complaining party and actually inducing him to act upon it". So :—

(*i*) *Fraud is a representation of fact which is false.* A representation of fact is different from a statement of opinion; for, in the latter case, the person making the statement does not invite the other party to accept the opinion as true.

(*ii*) *The false statement must be made with the knowledge of its falsehood or recklessly.* Fraud is thus distinguished from innocent misrepresentation.

(*iii*) The false statement must be made with an intention to deceive.

(*iv*) The person to whom the false statement has been made must be actually deceived; or, in other words, a false statement is not actionable unless it causes injury to the person to whom it has been made.

In **Pakistani Law**, as laid down by Sec. 17 of the Indian Contract Act, Fraud means and includes any of the following acts :—

(*i*) "The suggestion as a fact of that which is not true by one who does not believe it to be true". A tells B knowing it to be false that his factory produces 500 pounds of butter a day. On this suggestion B agrees to buy the factory for Rs. 50,000/-. The contract is voidable at the option of B on account of fraud.

(*ii*) "The active concealment of a fact by one having knowledge or belief of the fact". It is a fraud for one to conceal material facts which he is under an obligation to disclose when he is entering into a contract with another. This duty to disclose is not enforceable in all cases of contract. It arises only in the following cases.

(*a*) *Statutory obligation to disclose :* Sec. 55 of the Transfer of Property Act requires a seller of immovable property to disclose to the buyer all defects as to his title to or value or character of the property. Any failure in this respect on the part of the seller will vitiate the contract and the buyer may treat the contract as void even after the transaction has been complete.

(*b*) Contracts *uberrimae fidei.* A contract requiring utmost good faith on the part of both the parties to a contract or of that party who being in a vantage position has the monopoly of material facts, is called contracts *uberrimae fidei.* In the case of such a contract, it is the duty of both the parties or of the party-at-advantage to disclose all material facts. Family settlements, compromise of disputes, contracts between solicitors and clients, between doctors and patients or father and son, are illustrations of contracts of this type wherein the parties must disclose all material facts. Some other contracts *uberrimae fidei,* though apparently not so, are :—

(*i*) *Contracts of Insurance.* Here the insured knows more about the subject-matter of the contract than the insurer, so that a duty is cast upon the former to disclose all material facts which might influence the insurer's decision in entering into the contract or in fixing the amount of premium.

(*ii*) *Contracts for the purchase of shares in companies.* When a prospectus is issued by a company inviting the people 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.

(*iii*) *Contract of Suretyship.* Since there is no universal obligation to disclose in a contract of suretyship as we find in the case of contracts of marine insurance, some are inclined to think that a contract of suretyship is not a contract *uberrimae fidei.* But a contract of suretyship is nevertheless classed as a contract *uberrimae fidei* because a surety is entitled to know the real nature of the transaction he guarantees and of the liability he is undertaking and he generally and naturally depends on the creditor for information on this point, although he is acting usually at the debtor's request.

It has also been provided in the Indian Contract Act that any guarantee which the creditor has obtained from the surety by means of keeping silence as to material circumstances is invalid.

(*iv*) *Contract of Partnership.* Like the contract of suretyship, the contract of partnership cannot properly be regarded as a

contract *uberrimae fidei* because as between the partners there is no general duty to disclose at the time of entering into the contract. But once the partnership is formed, a partner is bound to render true accounts and full information of all things affecting the firm to other partners.

In all other cases of contract, that is, contracts other than those *uberrimae fidei*, where no duty to disclose is cast on the parties, the parties must take care of themselves. Thus, in ordinary contracts of sale the buyer must take care of himself. The seller is under no obligation to disclose material facts. A sells his horse to B for Rs. 500/-. A knew that the horse was ill. But he never made any representation to B to the effect that his horse was not ill. His concealment of the horse's illness will give B no ground to treat the contract as void, for, A had no duty to disclose material facts. B ought to have verified facts for himself. This is what is known as *coveat emptor*, i. e., "Purchaser beware".

A promise made without any intention of performing it. A gives B Rs. 250/-on the latter's promise to appear for him in a suit. If it can be shown by evidence that B had no intention to do so, he is guilty of fraud.

Any other act fitted to deceive. Where a person assigned the whole of his property to trustees for the benefit of his creditors the act amounted to an act of insolvency and the property vested in the official assignee (*Manmohandas V. McLeod*, 26 B,765).

Any act or omission which the law specially declares to be fraudulent. Thus, any transfer of immovable property made with intent to defraud creditors is fraudulent because it is declared so by the Transfer of Property Act.

Explanation (Silence as fraud). Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, unless his silence is, in itself, equivalent to speech.

(*i*) A sells by auction to B a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A. But if B is A's daughter and has just

come of age, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(*ii*) 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. If in this case B buys the horse and finds that the horse is unsound, he can impeach the contract for fraud.

Distinction between fraud and misrepresentation :

(*i*) The distinction between the two turns mainly on the intention of the party. If the defendant has made the false statement with an intent to deceive another, the action is fraudulent. If no such deceitful intention is present, the action constitutes misrepresentation.

(*ii*) Misrepresentation entitles the affected party to avoid the contract if he does not desire to have it fulfilled. But in a case of fraud, not only is the contract voidable but also the party on whom fraud has been practised can sustain an independent action in tort for damages.

(4) Coercion : In English Law coercion or duress consists in actual or threatened violence or imprisonment. Where the consent of a party to a contract can be shown to have been obtained by coercion, it is voidable at the option of the party whose consent was so obtained.

The violence or the threat of violence must be to the person and not to his goods. It is not, however, necessary that the violence or threat of violence should be held out to the contracting party himself. The contract is no less voidable if the violence or threat of violence was held out to the near relatives of the contracting party, e. g., wife, children, brother etc.

Pakistani Law. Section 15 of the Contract Act defines coercion as "the committing or threatening to commit, any act forbidden by the Indian (Pakistan) Penal Code or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever with the intention of causing any person to enter

into an agreement". The explanation to the Section says: "It is immaterial whether the Indian (Pakistan) Penal Code is or is not in force in the place where the coercion is employed". Thus, 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 Pakistan Penal Code. A afterwards sues B for breach of contract at Chittagong. A has employed coercion though his act is not an offence by the law of England and although Sec. 506 of the Pakistan Penal Code was not in force at the time when or the place where the act was done.

Effect of coercion on contract. An agreement vitiated by coercion is voidable at the option of the party coerced. But if he finds it profitable to uphold the contract, he can enforce specific performance of it. The party employing coercion has, however, no right on the contract.

(5) Undue influence : Undue influence is a subtle and improper pressure brought to bear upon a person to induce him to enter into a contract which in the absence of the said pressure he would not do.

Its distinction with coercion is that in coercion the method of obtaining the consent of a party to a contract is rather palpable; but in undue influence the method employed for the same purpose is not so evident. There is no threat or violence, yet the party with whom a contract is made is not a free agent. He is under some improper influence which makes it difficult, if not impossible, for him to negotiate on equal terms. "To be undue influence in the eye of the law there must be—to sum it up in a word—coercion. It is only when the will of the person . . . . is coerced into doing that which he or she does not desire to do, that it is undue infuence (*Miller* V. *Grand Trunk Rly*, 1906, A. C. 187).

Pakistani Law. Section 16 (1) of the Contract Act lays down: "A contract is said to be induced by "undue influence" where the relation subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other".

According to Sec. 16 (*2*) of the Act, "a person is deemed to be in a position to dominate the will of another :—

(*i*) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other ; or,

(*ii*) 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.

Burden of proof. In some cases, undue influence is presumed, such as, in contracts between a preceptor and his disciple, father and his son. In such cases, the person who is in a position to dominate the will of the other is to prove that there was no undue influence, if such influence is alleged. In other cases, undue influence must be proved by the party alleging the same.

Transaction in the ordinary course of business. No allegation of undue influence is sustainable when the transaction relates to one in the ordinary course of business. A applies to a banker for 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 cannot be challenged on the ground of undue influence.

Effect. All contracts caused by undue influence are voidable at the option of the party over whom the influence is exercised.

Contract with a Pardanashin lady. The question of contract with a pardanashin lady becomes relevant in connexion with the issue of undue influence, for, such a lady having little chance of commerce with the outside world, is likely to be unduly influenced more easily than others who are not subject to her restrictions. Hence law allows her some protection.

The person who enters into a legal contract with a pardanashin lady takes upon himself the duty to prove that the lady understood full well the nature of the transaction and she entered into it out of her free will. The fact that the lady had independent and disinterested advice would go a great way to prove the fairness of the transaction. But even in the absence of such advice the court may uphold the transaction if it otherwise appears to have been freely consented to by the pardanashin lady.

CHAPTER III

CONSIDERATION

We have observed in a previous chapter that as legal formalities are essential for the validity of a formal contract, so also consideration is indispensable for every informal contract. An agreement, otherwise perfect, is invalid if it has been concluded without any consideration. Now, what is consideration ?

1. What is consideration ?

In the leading case of *Currie* V. *Misa* (1875) the Exchequer Chamber described consideration thus: "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other". As pointed out by Sir Frederick Pollock, the second branch of this judicial description is the more important, for, consideration means not so much that one party is profited as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first. It is immaterial whether the party accepting the condition has thereby any apparent benefit or not. It should be enough if he accepts it and the party giving it does thereby undertake some burden or lose something which law treats as being of value. As Pollock says: "An act or forbearance by one party or the promise thereof, is the price for which the promise of the other is bought and the promise thus given for value is enforceable".

Thus, in **English Law,** consideration may take one or other of these four forms : (i) act (ii) forbearance (iii) promise of an act and (iv) promise of forbearance, and in each case, **in return for a promise.**

ILLUSTRATIONS

(*i*) A promises to pay B Rs. 500/- if he goes to Karachi to bring the tidings of a relation who is seriously ill. B goes to Karachi for that purpose. B's going is an **act** which is the consideration for A's promise.

(*ii*) A promises to pay B Rs. 100/- if he does not support C in an election. B does not support C in that election. B's **forbearance** is the consideration for A's promise.

(*iii*) A promises to pay B Rs. 50/- if B promises to canvass votes for him. B promises to do so. B's **promise of the act** is the consideration for A's promise.

(*iv*) A promises to pay B Rs. 100/- if B promises not to support C in an election. B promises accordingly. **B's promise of the forbearance** is the consideration for A's promise.

(2) **Rules for consideration in English Law :**

(*a*) Consideration must be real and not sham. Unreality of consideration arises from a number of causes, such as, legal impossibility, physical absurdity, uncertainty, and also when it involves the doing of what one is bound to do. Thus :—

(*i*) A, a servant of B, in return for a promise of £ 100, promises to give C a discharge for a debt which C owes to B. A's promise is unreal because it is **legally imposible** for him to give a discharge for a debt owed to his master.

(*ii*) A promises to pay B £ 500 in consideration of B's pro mise to restore a dead man to life. Here the consideration (the promise of B) is unreal as being **physically absurd** on the very face of it.

(*iii*) A promises to pay B a **reasonable sum of money** in return for the latter's services. Here the consideration (promise to pay a reasonable sum of money) is unreal because of **uncertainty.**

(*iv*) A promises to pay a certain sum of money to a police-man for chasing a thief. The consideration is unreal and unenforceable, for, the policeman, in doing so, has only done what he was legally bound to do. But where a police-constable who sued for a reward, offered for the supply of information leading to a conviction, **had rendered services outside the scope of his ordinary duties.** it has been held that his suit is sustainable (*England V. Davidson*).

(*b*) Consideration must not be illegal. A consideration is said to be illegal when it is intented to defeat the provisions of any law or is against public policy. Thus, a promise by A to pay B £ 100 in consideration of B's promise to drop a prosecution for robbery instituted by him against A, is illegal as being aimed at defeating the provisions of Law. Similarly, A pays B

£ 100 in consideration of B's promise to obtain for A an employment in public service. The consideration is illegal as being against public policy.

(c) *Consideration must not be past.* A past consideration is that which is executed before the promise for which it is paid. Thus, if A promises B £ 5 for his having accompanied A to a shooting last week, the consideration is past. It is something done before the offer and cannot, therefore, sustain a binding contract in English law, for, the rule is that "a past consideration is no consideration". To this rule, however, there are the following exceptions :—

(*i*) If the past consideration was given at the desire of the promissor, it will sustain a subsequent promise. Thus, in *Lampleigh V. Braithwait,* (1 Sm. L. C. 148) the appellant who killed a man requested the respondent to exert his influence to obtain A's pardon from the king. The respondent did so. Afterwards the appellant promised to pay the respondent £ 100 for his service. It was held that the consideration though past was valid and the promise, enforceable.

(*ii*) When, without being asked, one person performs the legal duty of another, and the latter promises to pay subsequently the promise is binding. In *Wing* V. *Nill,* (1 B and Ald. 104) a pauper was residing out of his parish of settlement. He fell ill and was attended by a doctor. The overseer of the parish to which the pauper belonged was legally bound to maintain him and pay for his medical attendance. After the pauper died, the overseer promised to pay the doctor's bill. It was held that the overseer was bound by his promise.

(*iii*) When a person revives a time-barred debt by a subsequent promise, the promise is binding.

(d) *Consideration must move from the promisee.* This means that consideration ought to proceed from the party who is entitled to sue on the contract, for, the rule is : "No stranger to the consideration can sue on the contract". Thus, if A promises to pay B £ 10 if C works for him in an election the promise is not enforceable and B cannot sue on it for he has neither done

nor forborne nor suffered anything nor made any promise in return for A's promise.

(c) *Consideration need not be adequate.* This means that it is not the business of the Court to enquire whether the consideration in a particular case is substantial, that is, whether the act or forbearance or promise of the promisee is proportionate in value to the promise of the promissor. It is enough if there is a consideration, however minute, which is otherwise valid. Thus, if A promises to pay B £ 50 for an autograph of Wordsworth, it would be a poor defence for A to say that in actual fact the autograph was of a much smaller value.

Pakistani Law. Section 2 of the Contract Act defines consideration thus : "When at the desire of the promissor, **the promisee** or **any other person,** has done or abstained from doing, does or abstains from doing, or promises to do or to abstain from doing something, such act, abstinence or promise is called a consideration for the promise".

Thus defined, consideration in Pakistani Law differs in two important respects from that in English Law, namely :—

(*i*) In Pakistani Law past consideration is a good consideration. In *Sindha* V. *Abraham* (20, Bom. 755) it was held that an agreement which was for compensating past services rendered by the plaintiff to the defendant was a valid one.

(*ii*) Consideration may move either from the promisee or from someone other than the promisee. Thus in *Chinnya* V. *Ramyya* (1891, 4 Mad. 137), A, by a deed of gift, made over a certain property to her daughter on condition that the daughter should pay an annuity to A's brother as had been done by A. On the same date the daughter promised in writing to pay the said annuity. The daughter having subsequently declined to fulfil her promise, the brother sued the daughter to recover the amount due under the agreement. It was contended by the daughter that no consideration proceeded from the brother and that he, being a stranger to the consideration, had no right to sue. It was held that the "consideration indirectly moved from the brother to the daughter" and that he was, therefore, entitled to maintain the suit.

The Pakistani Law on consideration, as laid down in Sec. 25 of the Contract Act, also differs from the English Law in that **certain agreements without consideration are valid.** These are :—

(i) A gratuitous promise is binding if it be in writing and registered and if it be made on account of natural love and affection between parties, standing in near relation to each other.

(ii) A gratuitous promise is also binding when it is a promise to pay a time-barred debt, though without any consideration provided the promise is in writing and is signed by the promissor or his duly authorized agent.

(iii) A promise to compensate wholly or in part a person who has already voluntarily done something for the promissor is enforceable, even though it is without consideration.

(iv) A gratuitous promise to compensate fully or in part a person who has already done something voluntarily which the promissor is legally compellable to do is a valid contract.

(v) Where the contract is a promise to appoint an agent under Section 185 of the Contract Act, the contract of agency requires no consideration.

The above five cases provide exception to the rule : "No consideration, no contract."

CHAPTER IV

LEGALITY OF OBJECT

It is essential to the validity of a contract that its object is lawful, for, a contract, otherwise valid, is void if the object of the agreement is unlawful. Now, it may quite happen that the object of a contract is illegal though its consideration is perfectly lawful. For instance, A takes the lease of a house belonging to B for a monthly rent of £ 5. There is nothing unlawful in this. But if A intends to set up an illicit distillery in the house, the contract is void as its object is unlawful.

In **English Law** the following are generally regarded as unlawful objects :—

(*i*) When the object of an agreement is a contravention of any statute, or opposed to the provisions and intent of any Act, it becomes illegal ;

(*ii*) A contract with the object of defrauding others is illegal;

(*iii*) An object contrary to public policy is unlawful.

In **Pakistani Law,** as laid down in Sec. 23 of the Contract Act, an unlawful object is that which

(a) is forbidden by law, (b) is of such a nature that if permitted it would defeat the provisions of any law, (c) is fraudulent (d) involves or implies injury to the person or property of another, (e) the Court regards as immoral or opposed to public policy. "Every agreement of which the object or consideration is unlawful is void". (Sec. 23).

(*i*) *Contracts forbidden by law.* It is an established principle that the court will not lend its aid in order to enforce a contract entered into with a view to carrying into effect anything which is prohibited by law. (*Sarbesh V. Hari* 5 I. C. 236). But the court would not refuse to enforce a contract (or decree) the object of which was actually performed in a country where it was legal (*Chonda-Lavada* V. *Chandalavada* 1940, M. 190).

Similarly, a party entering into a contract in England is not excused from performance because such performance may be visited with penalties under the law of the foreign country (*Trinidad Shipping Co.* V. *Alston*, 1920. A.C. 888).

(*ii*) *Contracts defeating the provisions of any law.* "Every contract made for or about any matter or thing which is prohibited or made unlawful by statute is a void contract". Thus, a contract for realisation of customary dues for the ryots is illegal and void *ab initio.* (*Kamala* V. *Kalu* 3. B.L.R. A. C. 44) Similarly, an agreement to indemnify the doer of an illegal act is void (*Uega* V. *Vankama* 135 I.C. 710).

(*iii*) *Fraudulent.* Where money is paid for the purpose of defrauding the intended shareholders by holding out to them the assurance of an exclusive right, to use a certain process as an inducement to them to contribute their money, when it was known to the parties that no such exclusive right existed, the plaintiff cannot maintain an action to revover back the money on the well established principle that money paid in furtherance of a fraud or other unlawful purpose cannot be recovered back. (*Begbie* V. *Phosphate Swage* L. R. 10 Q. B. 491). Where a railway company refuses to enter into a contract with a particular person, an agreement with another person to secure in his name the contract is fraudulent and void (*Mani Ram* V. *Purshotam* 52 A 1001).

(*iv*) *Injury to property or person of another.* An agreement which binds down the executant to daily attendance and manual labour until a certain sum is repaid is indistinguishable from slavery. Such a contract is not enforceable. (*Ram Surup* V. *Bansi* 42 C. 742).

(*v*) *Immoral.* A promissory note executed for the repayment of the balance of the security deposit for the lease of a house taken for immoral purposes is not enforceable. (*Kali* V. *Manmohinee* 63 C. 445). A man who knowingly lets out quarters to an unlicensed prostitute to carry on prostitution cannot recover the rent in a Court of Law. (*Chogalal* V. *Pyari* 31 A 58) ; So also a man who knowingly sells articles to her for the same purpose cannot recover the price thereof. (*Gaur* V. *Madhumani* 9 B.L. R. Apdx. 37).

(*vi*) *Contracts opposed to public policy.* The term 'public policy' does not admit of an easy definition. Roughly speaking, it may be described as the policy of the state to secure the ultimate good of the citizens at large. As the conception of the good of the citizens varies with the change of time and circumstances, so public policy differs from age to age according to the changed circumstances and ideas and ideals of the people. In our times, however, it has been settled by judicial precedents that the following contracts are in general against public policy :—

(*i*) *Agreements which disturb the friendly relation of the state with other states.*

(*ii*) *Agreement tending to injure the public service.* Thus, a contract by a person to use his influence to secure a public appointment for a particular person is void as being against public policy.

(*iii*) *Agreement tending to interfere with the course of justice.* As has been said, "You shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself". Accordingly a settlement made by a father with certain bankers in order to shield his son from a criminal prosecution on the charge of forgery has been held to be invalid. (*Williams* V. *Bayby* L.R.I. H.L. 200). The reason is that the effect of such an agreement is to take the administration of the law out of the hands of judges and put it in the hands of a private individuals and so has a tendency to subvert public justice (*Lachman* V. *Narain*, 25 I.C. 409).

But there are many cases which are compoundable. An agreement with the alleged offender to drop the prosecution in a compoundable case does not amount to the stifling of prosecution. Section 345 of the Cr. P. C. offers a test of offences which may be compounded with the offender. In England, too an, offence is compoundable where it is a tort as well as a crime.

(*iv*) *Agreements which tend to be an abuse of the process of Law.* The principle of law is that legal remedies, which exist for the vindication of rights, must not be used for harassment of an individual and in furtherance of unconscionable monetary

purpose. Hence in English Law *Maintenance* and *Champerty* are regarded as against public policy.

"**Maintenance** means an officious intermeddling in a civil suit that in way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it." Thus if A contracts with B to finance him in contesting a civil suit, to which A is not a party, the contract is void as being one of *Maintenance.*

"**Champerty** is the maintenance of a person in an action or suit upon condition to have part of the things when recovered. Thus, a bargain that the plaintiff will maintain an action in consideration of the defendant transferring to him half the property, which the defendant might become possessed of as the fruits of the action is illegal as being champertous according to English Law.

Maintenance and Champerty are always treated together by writers on the subject. Maintenance is called the genus of an offence of which Champerty is a species. Champerty is but a form of maintenance, though it be maintenance aggravated by an agreement to have a part of the thing in dispute. Both are founded on the same principle or policy of law, namely, the tendency of the transaction to pervert the course of justice (*Guy* V. *Churchill*, 40 Ch. D. 481).

Pakistani Law on Maintenance and Champerty :

The law on the subject of such agreements as administered in Pakistan has been laid down by the Privy Council in *Ram Coomar* V. *Chander Canto* (4 I. A. 23), and affirmed in a number of subsequent cases. It is that the English law is not applicable in Pakistan nor the law on the subject is substantially the same in both the countries. Accordingly an agreement which would have been void as champertous in England has been held binding in this country (*Bhagwat* V. *Debi Dayal* 35 C. 426 P.C.). In our country, a fair agreement to supply funds to carry on a suit, in consideration of having a share of the property if recovered, ought not to be regarded as being *per se* opposed to public policy but agreements of this kind ought to be carefully examined and when found to be extortionate and unconscionable, or made not

with the *bona fide* object of assisting a claim believed to be just but for the purpose of gambling in litigation, they should not be given effect to. (*Ram Coomar* V. *Chunder Canto* 4 I. A. 23, 46).

It has been observed that there is no specific law against Champerty in Pakistan (*Banarsi* V. *Sitla* 121 I. C. 295). In deciding upon an issue arising from it, the court will have to consider whether the transaction is *bona fide* or unfair (*Chedambara* V. *Renja* I I. A. 241). Hence, in Pakistan also, the party challenging the contract must show that it has something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral and inspired by a bad motive in the same sense. Before declaring such an agreement against public policy, it is, therefore, necessary to look at the substance of the transaction and not merely to the language of the instrument (*Hiralal* V. *Dagdoo* 55 I. C. 635).

(*v*) *Agreements in restraint of marriage.* (See *Supra*).

(*vi*) *Contracts in restraint of trade.* (For discussion see *supra*)

(*vii*) *Contract for marriage brocage.* Under the English Law, a marriage brocage contract is illegal. At the root of the question of illegality of a marriage brocage contract is the introduction of the consideration of money payment into that which should be free from such taint. Money paid under such a contract is recoverable by the party paying it before the execution of the contract even though the other party has taken some steps and incurred expenses under the contract. (*Hermana* V. *Charlesworth* 1905 2 K. B. 123).

So far as Pakistan is concerned, on a review of the rulings of both English and Indian Courts, the following rules have been deduced in *Bakshi Das* V. *Nadu Das* (I, C. L. J., 261) : (a) An agreement to remunerate or reward a third person in consideration of negotiating marriage is contrary to public policy and cannot be enforced, (*Pitambar* V. *Jagjiwan* 13 B. 131) ; (b) An agreement to pay money to the parents or guardian of a bride or bridegroom in consideration of their consenting to the betrothal is not necessarily immoral or opposed to public policy. Where 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 (*Baldeo* V. *Jumna* 23 A. 495).

(*iii*) Where an agreement to pay money to the parents, in consideration of their consenting to the betrothal, is under the circumstances of the case neither immoral nor opposed to public policy, it will be enforced and damages will be awarded for breach of it (Mulji V. *Gomti* 11 B. 412) ; (*iv*) A suit will lie to recover the value of ornaments or presents given to an intended bride or bridegroom in the event of the marriage being broken (*Umed* V. *Nagindas* 7 Bom. H. C. R. O. C. L. J. 122) ;

(v) Although a court may not enforce an agreement to pay money to the parents or guardians of an intended bride or bridegroom on the ground that the agreement is opposed to public policy, yet a suit is maintainable for the recovery of any sum actually paid pursuant to the agreement if the contract is broken and the marriage does not take place (*Jugessur* V. *Panch Cowree* 14 W. R. 154) ;

(*iv*) If one of the contracting parties alleges that the agreement is opposed to public policy, it is for him to set out and prove those special circumstances which will invalidate the contract (*Visvanathan* V. *Smainathan* 13 M. 83). It has, however, been held in *Jagannath* V. *Munno* (165 I. C. 247) that if the marriage does not take place a suit does not lie against the father of the bride under Sec. 56 of the contract Act for the recovery of the value of the ornaments given to the bride because presumably she appropriated them to herself and the father did not get any advantage.

(*viii*) *Contract in consideration of adoption.* There is no difference in principle between contracts to make payments in consideration of marriage and simular contracts in consideration of adoption. Therefore, a promise to pay a sum of money for bringing about an adoption is illegal though the adoption itself is not affected (*Thuri Kothands* V. *Thesu Reddiar* 21 M.L J. 416).

(*ix*) *Contract with an alien enemy.* The Queen's subject cannot trade with an alien enemy. Every contract made in violation of this principle is void and goods which are the subject of such a contract are liable to confiscation.

Wagering Contract. In the words of Anson, a Wagering

Contract is one "to give money or money's worth upon determination or ascertainment of an undertain event". "A Wager is a contract by A to pay money to B on the happening of a given event in consideration of B paying money to him on the event not happening" (*Hampdem* V. *Walsh*, I Q. B. D, 189). For instance, A promises that he will pay B. £ 1 if it rains on a particular day. If not, B will pay the same amount to A. It is a Wagering Contract.

In a Wagering Contract, (*i*) there must be mutual chance of gain and loss and (*ii*) the event on the happening of which something is to be paid must be uncertain. "If either of the parties may win but cannot lose or may lose but cannot win, it is not a wagering contract". (*Carlill* V. *Carbolic Smoke Ball Com.*, 1893, I, Q. B. 256).

Wagering Contract and Contract of Insurance :

The line of demarcation between a *Wagering Contract and a Contract* of *Insurance* is very fine. A man who insures a cargo is apparently in much the same position as one who bets on a particular horse ; yet the former is not a wagering contract because there is no chance of mutual gain and loss in the former. Besides in the former one must have an insurable interest in the thing insured but in the latter there is no such interest. Hence a Contract of Insurance is permitted by law.

Kinds of Wagering Contract. English Law divides Wagering Contracts into two classes : (*i*) Wagering for mere sports, e. g., betting on the age of a particular person, and (*ii*) Wagering contracts for commercial purposes, e. g., speculation on the price of stocks and shares.

The Gaming Act of 1845 made every kind of Wager void, with the exception made in favour of wagers connected with lawful game, sport, pastime or exercise. Horse-race is protected because it is a kind of lawful sport. But this Act made Wagering-Contract void, not illegal. Consequently, a person could bet as much as he pleased if only he took care to appoint an agent for the purpose, for, the Act could not touch the collateral contract of agency for wagering purposes, with the result that if A

appointed X as his agent to bet for him with B, and X lost a sum of money out of his pocket, he could recover the same from A or if X won a sum of money from B, A could revover it. The reason is that the contract between A and X is a contract of agency and as such the principal is bound to compensate the agent for the loss he suffers in carrying out the object of the agency and conversely the agent is also bound to pay the principal any profit made in the course of the agency. If the Act would have made Wagering illegal and not void, the collateral contract for the purpose of Wagering also would come under the prohibition. But as under the Gaming Act of 1845 a Wagering Contract was only void and not illegal, the collateral contract, though for Wagering purpose, was perfectly enforceable. It was obviously to make up this lacuna that the Gaming Act of 1892 was passed which made all such collateral contracts null and void.

Pakistani law on Wager. Section 30 of the Indian Contract Act lays down : "Agreements by way of wager are **void** ; and no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made". The Section, however, makes an exception in favour of a "subscription, or contribution or agreement to subscribe or contribute, made or entered into for or toward any plate, price or sum of money, of the value or amount of five hundred rupees or upwards to be awarded to the winner or winners of any horse-race".

The above section of the Contract Act further provides that it will not "legalize any transaction connected with horse racing to which the provisions of Section 294 A of the Pakistan Penal Code apply". This Section of the Penal Code makes it an offence to keep "any office or place for the purpose of drawing any lottery not being a state lottery or a lottery authorized by the Provincial Government".

It is also to be noticed that like English Law the Pakistani Law also makes a Wagering Contract only **void** not and **illegal.** It follows, therefore, that in Pakistan a collateral contract in connexion with a Wagering Contract is enforceable because in the Indian Contract Act (as adapted in Pakistan) there is no provision corresponding to the English Gaming Act of 1892. Hence it has

been held that "an agent who has paid wagering losses for his principal is entitled to recover them as also his commission" (*Mutsaddi* V. *Bhagirath* 115 I.C. 424).

As to **speculative contracts for commercial purposes,** they are not necessarily void in law because they are not always contracts by way of wager. Speculation does not necessarily involve an agreement by way of wager. To constitute such an agreement, a common intention to wager is essential, i. e., it must be shown that there was a bargain or understanding between the parties, either express or implied, that there should be no delivery but that the difference only should become payable (*Bisseswar V. Basir*, 33, C.L.J. 533). Thus, A makes a contract on the Ist of May 1956, agreeing to sell on Ist July, 1956, 10 shares of the Crescent Jute Mill Ltd. to B at the rate of Rs. 100/- per share. If by the contract the parties intended not to sell or purchase share on the specified day but only to pay the difference in the price of shares, the contract is an agreement by way of wager and hence void. But if they really intend to sell and purchase the shares, the contract is good.

Teji mandi contracts. As defined in *Baldeo* V. *Radhakishan* (1939, Bom 225), "*a teji mandi* contract is one between two parties as principals ; the contract is that one party tells the other that he wants to buy the right to declare himself either a purchaser or a seller on a certain date". "From the mere fact that a contract is a *teji* or *mandi* or *teji mandi* contract it cannot be held as being a wager but the fact that it is in the nature of a wager has to be proved, namely, that the common intention of the contracting parties at the time of the contract was only to deal in difference and under no circumstances to call for or give delivery" (*Manubhai* V. *Keehabji*, 24 Bom. 60). In other words, there is no presumption that *teji mandi* transactions are wagers. In the absence of any evidence to the contrary, they should be treated as genuine contracts (*Narandas* V. *Ghanashyam*, 147 I.C. 412).

Contingent contract. Under the head of 'legality of object', the study of contingent contract is also relevant, for, it apparently looks like a wagering agreement and may thus be viewed as void unless carefully distinguished from the latter.

A contingent contract is one to do or not to do something if some contingency happens or does not happen. "A contingent, or as it is called in English Law, a conditional, promise "says Leake, "is distinguished from an absolute promise by the fact that the performance of the contract becomes due on the happening of a condition or contingency : so it is not due immediately on the making of the contract." Thus, A contracts to pay B £ 100 if B marries C. This is a contingent contract.

A contingent agreement is not enforceable till the event on which it was to depend has arisen ; but when that event has occurred, the contract, for all purposes, rests on the same footing as if it had been made positively and without reference to any contingency (*Regent's Canal* V. *Ware*, 23 Beav. 575). The uncertain event on the happening of which the contract is conditional must be collateral to the contract. This means that it must not form part of the consideration of the contract but must be independent of or ancilliary to it. The event or condition, again, must not be a certainty.

The distinction between a contingent contract and a wagering contract lies in that there is no chance of mutual gain or loss in the former, while such chance forms the very basis of the latter.

Pakistani Law on contingent contract. Section 31 of the contract Act defines a contingent contract as "a contract to do or not to do something, if some event collateral to such contract, does or does not happen".

As to the enforceability of a contingent contract the law in Pakistan is as follows:—

(*i*) Contingent contracts to do or not to do anyting if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible such contract becomes void. (Sec. 32 of I. C. Act). Thus, A makes a contract to pay B a sum of money when B marries C. This contract is enforceable only when C has been married to B. But if C dies without being married to B, the contract becomes void.

(*ii*) Contingent contracts to do or not to do anything if an uncer-

tain future event does not happen can be enforced when the happening of that event becomes impossible, and not before. (Sec. 33). Thus, A agrees to pay B a sum of money if a certain ship does not return. The ship sinks. The contract can be enforced when the ship has sunk.

(*iii*) If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to have 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 (Sec. 34). Thus, A agree 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 C may afterwards marry B.

(*iv*) 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 event has not happened, or if, before the time fixed, such event becomes impossible.

Contingent contract 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, (Sec. 35). Thus, (a) 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. (b) 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.

(*v*) Contingent agreements to do or not to do anything if an impossible event happens, are void, whether impossibility of the event is known or not to the parties to the agreement at the time when it is made (Sec. 36). Thus, (a) A agrees to pay B Rs. 1000/- if two straight lines should enclose a space. The agreement is void. (b) A agrees to pay B Rs.1000/- if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

The effect of illegality. A contract the object of which is unlawful, whether under the English or the Pakistani Law, is void *ab initio*. No suit lies for its performance. "No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not . If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him". (*Scott Brown*, 1892 2 Q. B. 724). Thus a plaintiff cannot get a decree for money lent for the express purpose of accomplishing an illegal object, e. g., giving a bribe to an official. (*Attar* V. *Haku* 24 I.C.692).

A contract may consist of several independent promises based on several considerations some of which are illegal, some legal. In such cases, the court may enforce those promises which are legal and based on legal consideration if they are severable from others; otherwise the whole contract would be void. Thus A and B agree that A shall sell a house to B for Rs. 5,000/- but that if B uses it as an unlicensed distillery he shall pay Rs. 20,000/- for it. The court may enforce the first promise because it is severable from the whole contract.

If the performance of a contract means the violation of any provision of law, the intention and knowledge of the parties as to the existing law is immaterial. But when a contract is capable of being performed in a legal as well as an illegal way, then the intention of the parties becomes material. Thus, A sues to recover a house bought from B. The defence is that the sale was made for raising money to pay a third party as a bribe to induce him to withdraw a charge of criminal breach of trust against the defendant. A is entitled to succeed if it can be proved that A was ignorant of B's illegal purpose.

When facts which go to make a contract illegal come to the notice of the court, the doctrine of *pari delicto* will be given effect to and the court will refuse its aid to the party who has participated in the fraud and asked for relief (*Kalagara V.*

Kalagara 76 I. C. 845). Once the court finds that two parties are in *Pari delicto* in a civil sense, no effect will be given to the claims of either party (*Joseph V. Joseph* 98 I. C. 700).

Money paid or something delivered in pursuance of an illegal contract cannot be recovered when both the parties to the contract are themselves in *Pari delicto* in the absence of fraud, undue influence or coercion. This rule is based on a maxim of common law, viz., *in Pari delicto Potior est conditio possidentis* (When both parties are equally to blame one cannot hold the other responsible) (*Warisali V. Mohammaed* 46 I. C. 424). To this rule there are some exceptions:—

(*i*) When a party has been induced to enter into an illegal contract by fraud, coercion or undue influence, he can sue to recover the money notwithstanding his knowledge of the illegality of the transaction.

(*ii*) If the illegal purpose has not been carried out, the money paid or goods delivered in respect of an illegal contract can be recovered.

(*iii*) When one person has promised to do something which he knew, or, with reasonable deligence, might have known and which the promisee did not know to be impossible or unlawful, such promissor must make compensation to the promisee for any loss which such promisee sustains through the non-performance of the promise (Sec. 56 of I. C. Act).

CHAPTER V

PARTIES COMPETENT TO CONTRACT

In order that an agreement may be a valid contract, it must be made by parties who have contractual capacities as every person does not possess full contractual capacity. Thus, as a general rule, contracts, entered into by (a) minors and (b) persons of unsound mind are void.

Contracts by Minors. According to the **English Law,** a minor (called an infant) is a person who is below the age of 21 years. Under the Common Law of England, a minor's contract was either valid or voidable. When for necessaries or for the benefit of the infant, it was valid. It was voidable at the minor's option when it was for neither of these two purposes.

But after the passing of the **Infants Relief Act, 1874**, a minor's contracts have come to be divided into three classes:

(*a*) *Valid.* As by common law so under the Act, a minor can enter into a valid contract for necessaries and for his benefit.

"Necessaries" include everything that is essential for the maintenance and education of the infant, regard always being had to the minor's social position. Thus velvet might be considered a necessary for a scion of the English nobility but no more than a luxury for an infant of the middle class. Even if things sold are of everyday use, supply in excess of the demand cannot be justified.

Minors are expected to learn some trade or business and as such their contracts of apprenticeship are binding on them as being made for their benefit unless the terms are unreasonable.

(b) *Voidable.* Contracts generally relating to **sale, lease** and **partnership** are voidable. They remain binding unless avoided by the minor either during his minority or within a reasonable time of the attainment of maturity.

(c) *Void.* The following contracts by a minor are void *ab initio:*

(i) Contracts for repayment of loan.

(ii) Contracts for goods supplied excepting necessaries. But if the minor has already paid for such supplies and taken benefit under the contract, he cannot recover the money on the plea that the contract is void.

(iii) Contracts on accounts stated. An account stated is the admission of balance due from one party to another. Such an admission implies in law a promise to pay it.

(1) How far a minor can be made liable for a contract by suing him in an action of tort ? The answer, as given in *Jennings V. Rundall* (3. T. R. 335) is that a minor cannot be made liable in a contract by suing him in tort. In the above case, a minor hired a mare for riding and rode it so carelessly that he sprained the animal. It was held that the minor was not liable. But if the wrongful act of the minor is independent of the Contract, the minor may be sued in tort though he has no contractual liability. Thus in *Burnard V. Haggis*, (143. E. R., 360) an infant hired a mare for riding on the road and **in spite of being expressly told that it was not let out for jumping,** nevertheless rode it across the country and fatally injured it **by jumping on a stake.** The minor was held liable.

According to **Pakistani Law,** majority is attained at the end of eighteen years. Where, however, before a minor has attained 18, a guardian has been appointed for his property or person or both or the superintendence of his property is assumed by a Court of Wards, the Indian Majority Act (as adapted in Pakistan) provides that majority shall be deemed to have been attained on the minor's completing the age of 21.

Unlike the English Law, the Contract Act of our country declares that all contracts by a minor are absolutely void and not merely voidable. This principle has been finally confirmed in *Mohori Bibee V. Dhurmodas* (30 I. A., 114). Exception to this rule is provided by contracts for necessaries and for the benefit of the minor, in respect of which the law here is the same as in England. There is, however, one fundamental difference between the two which is that while in England the minor is personally liable for such contracts, in Pakistan the liability lies not with the minor but

with his estate. Sec. 68 of the Act provides thus: "If a person incapable of entering into a contract is supplied by another person with necessaries suited to his condition of life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person."

But when an agreement is made on behalf of a minor by a person competent to do so, it can be validly enforced by the minor and against him. Thus, a minor's property can be sold or leased out by his guardian and the minor, in all such cases, is bound by the transaction unless it is proved that the guardian acted against the minor's interest.

Minor and Estoppel. There has long been conflict of judicial decisions on the point whether a minor who has made a false representation as to his age while making a contract can be estopped from pleading his minority to avoid the contract. The Bombay High Court originally held that an infant was to be estopped under Sec. 115 of the Evidence Act and so was bound by the transaction (*Ganesh V. Bapu,* 21 *Bom.* 198). The Allahabad, Madras and Lahore High Courts also toed the same view. But a Full bench of the Bombay High Court over-ruled the above decision of the same High Court in *Gadigeppa V. Balaugowda* (55. Bom 741), where it has been laid down that a minor, who by falsely representing himself to be of age has induced a person to enter into a contract, is not estopped from pleading his minority, to avoid the contract, in an action founded on the contract. This rule against the application of the doctrine of estoppel to a contract, void on the ground of infancy, has been adopted by the High Courts of Calcutta (*Dhurmodas V. Brahmo Dutt,* 25 C. 616), Madras (*Vaikuntarama V. Authimoolam,* 38 M.1071) and Allahabad (*Jagarnath V. Lalta,* 31 A. 21). The High Courts or the Supreme Court of Pakistan having evolved no contrary rule, the aforesaid principle of law with regard to estoppel applies here. There can, therefore, be no decree against a person on a contract made during his minority, and this cannot be avoided either on the ground that the minor having represented himself to be a major is estopped from showing that he was a minor or on the ground that by such representation he was guilty of cheating or fraudulent conduct. In other words, Section 115 of the Evidence Act must be read (in such cases)

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as subject to the provisions of the contract Act (*Penchelu V. Chitootr*140 J. C. 325).

(2) Contract by lunatics and drunken persons : Lunatics and drunken persons are generally regarded as **'persons of unsound mind'.** In English Law, contracts entered into by such a person is not void but voidable provided the following two conditions are fulfilled.

(a) that the unsound man was incapable of understanding the true nature of the transaction at the time of the contract and (b) that the other part knew of his condition. It has, however, been provided that a person who makes a contract in a state of intoxication may affirm it in his sober moment. When so affirmed, the contract is binding on him.

In Pakistani Law, as it follows from Sec. 11 of the Contract Act, a contract made by a person of unsound mind is void. Sec.12 of the Act says that "a person who is usually of unsound mind but **occasionally of sound mind** may make a contract when he is of sound mind", and that " a person who is usually of sound mind but **occasionally of unsound mind,** may not make a contract when he is of unsound mind". The meaning conveyed by Sec. 12 is that a contract made by a lunatic in his lucid interval is valid but a contract made by a usually sound man either when he is drunk or delirious from fever is void.

(3) **Married Women.** In English Law, by virtue of the Married Women's Property Act of 1882 and 1893, a married woman may contract and bind her separate estate when it is given to her absolutely. But she has no personal liability for her contract.

The Indian Contract Act makes no such provision as to prevent a married woman from making a contract. Both under the Muslim and the Hindu Laws, a married woman is entitled to make a contract so as to bind her separate property.

(4) **Corporation.** Because the corporation is not a natural person, the contractual capacity of the corporation is somewhat limited. Besides, the Act from which it derives its authority also imposes some restrictions on it. Thus, a Corporation cannot make a contract personally ; it must do so through an authorized agent for the simple reason that it has no physical existence. Secondly,

a corporation has generally to make a formal contract using the Corporate Seal because the seal is the symbol of the corporation's personality as different from the personalities of its members.

In some cases, however, such as the following, a corporation can make simple contracts :

(*i*) A corporation can make a simple contract on a subject-matter which frequently recurs or is of little importance or of urgent necessity. Thus, the contract of a Municipality with its menials or for the supply of stationery need not be under the Corporate Seal.

(*ii*) When work has been done or services rendered at the request of a corporation and the benefit of the work has been accepted by it, a contract to pay is implied. In such cases, the absence of a formal contract is no defence against the liability to pay.

(*iii*) When a Company is incorporated for trading purposes it may make simple contracts relating to the object for which it has been incorporated.

5. Legal Practitioners. A Barrister cannot make a contract regarding his fees. But vakils, pleaders, solicitors and mukhtars can sue for their fees. There is no provision, however, in the Contract Act to debar any lawyer from making a contract regarding his fees.

6. Doctors. Under Common Law a doctor could not sue for his fees but the disability has been removed by the Medical Act of 1858.

7. Independent Sovereign. An independent Sovereign is competent to make a contract but he cannot be sued in an English Court unless he submits to its jurisdiction.

8. **Aliens.** The English Law permits a friendly alien to acquire or dispose of property like a natural-born British subject. But he cannot hold landed property situate outside the United Kingdom nor can he own a British ship.

With regard to an alien enemy the test is not the nationality but the domicile. During the second World War every German was not treated as an alien enemy ; Germans domiciled in America were alien friends.

Modern English law has made a contract with an alien enemy not only void but also illegal and punishable. But if an alien enemy is resident in England with the express or implied licence of the Crown, he can make a valid contract with a British subject.

9. Convicts. A person convicted of felony is debarred from contracting. In Pakistan there is no law to deny contractual right to a convicted person.

CHAPTER VI

CLASSIFICATION OF CONTRACTS

(Valid, void, voidable and unenforceable)

In addition to the classification of contracts dealt with in an earlier chapter, there may be a further division of contracts on the basis of their validity and operation. Under this criterion law recognizes four classes of them, viz.:

(*i*) Valid, (*ii*) Void, (*iii*) Voidable and (*iv*) Unenforceable.

1. **Valid Contract.** A contract is said to be valid when it is enforceable in law. Such a contract creates an outstanding obligation or legal liability which law steps in to enforce whenever a party to the agreement breaks it.

2. **Void contract.** A contract is said to be void when, in the contemplation of law, there has been no *consensus ad idem* between the parties thereto with the result that the contract confers no right or imposes no obligation on either party. There is, no doubt, an apparent agreement but it will not have any legal effect, either because some essential ingredient is lacking or because it is contrary to some law or opposed to public policy.

According to the Indian Contract Act (as adapted in Pakistan) the following contracts are void *ab initio :*

(*i*) 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 (Sec. 24). For instance, A promises to supervise, 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. 10,000.00 a year. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

(*ii*) An agreement made without consideration is void except those covered by exceptions 1, 2 and 3 (Sec. 25) (See the chapter on consideration, Chapter III).

(*iii*) Every agreement in restraint of the marriage of any person, other than a minor, is void (Sec. 26). In English Law, partial restraint, as to time, place or persons, is tolerated, provided the restraint is reasonable (*Re whiting's Settlement*, 1905, 1 Ch. 96). Thus, a condition that should a legatee marry a domestic servant, he or she should forfeit the legacy is a valid condition (*Tenner V. Turner* 16 Ch. D. 188). There is a great difference between promising to marry a particular person and promising not to marry any one else, except the plaintiff. The latter is void as being in restraint of marriage (*Lowe V. Peers*, 4 Burr. 2225). Restraint *of* marriage is different from restraint *on* remarriage (*Latafa V. Shaharb* 1932).

(*iv*) Every agreement in restraint of "a lawful profession, trade or business of any kind is void to the extent of the restraint" except that "one who sells the good-will 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 good-will 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", (Sec. 27).

In *Mahboob V. Rajcoomar* (14 B. L. R. 76) it was ruled that whether the restraint was general or partial, unqualified or qualified, if it was in the nature of a restraint of trade, it was void. This interpretation is plainly justified by the language used in the section.

Under this section, **agreements in restraint of service** have been held to be void. Thus, an agreement restraining an employee from taking service in any similar business for a period of five years from the date of the termination of his agreement, although the restriction only extended to a distance of 40 miles from the city, the place of his work, has been held to be void, as such a contract is not covered by the exception (*Brahmaputra Tea Co. V. Scarth* 11 C 545). But an agreement to exercise a trade or business for a given period in the exclusive service of one person is not an agreement in restraint of trade (*Pragji V. Pranjiwan* 5 Bom. L. R. 878).

Sec. 27 has also been interpreted to disfavour agreements **in restraint of trade competition.** "Liberty of trade is not an asset which the law will permit a person to barter away except in special circumstances". (*Vancouver B. Co. V.* V. *Breweries*, 1934, P. C. 101). Whether a combination between traders or business men is or is not in reality "in restraint of trade", the answer must depend upon the facts of each particular case. Such combinations have in some instances been upheld (*Collius V. Locke* 4 A. C. 674) and in some others ruled void (*Hitlon V. Eckersley* 6 E and B 47), according as the restraints in such agreements were or were not deemed to be only **sufficient to protect the interest of the parties entering into them.**

(*v*) Agreements in restraint of judicial proceedings are void except those that provide for reference of disputes to arbitration (Sec. 28)

Parties are not at liberty to contract themselves out of the jurisdiction of courts. There is, however, "a clear distinction between two classes of cases, i. e., (a) where, in spite of the fact that under the ordinary provisions of law a particular court would have jurisdiction, the parties provide that another court, to the exclusion of the former court, shall have jurisdiction to adjudicate upon the dispute arising under the agreement, and (b) cases in which the agreement specifies the place where the terms of the contract have to be carried out, in other words, where, according to the facts stated in the agreement the cause of action is to be deemed to arise. The first kind of agreement has been held illegal but the second description of agreement cannot be held to be illegal (*Abinash V. Auto Supply* Co., 122 I. C. 488). Thus an agreement that a suit arising out of a contract shall be brought in the High Court or small causes court only of Calcutta (*Milton and Co. V. O. A. Engineering* Co. 57 C. 1280) or of Bombay is not illegal (*Tilakram V. Kadumal* 30 Bom. L.R. 546). In other words, an agreement between parties to select one of two competent tribunals for the disposal of their disputes does not infringe the provisions of this section. But where parties agreed between themselves that for the purpose of litigation the contract should be deemed to have been entered into Karachi, the agreement having been actual-

ly made elsewhere, the contract was void and the Karachi Court had no jurisdiction (*Dreyfus & Co.* V. *Miran* 1 I. C. 965), for the parties by mutual consent can no more take away the jurisdiction vested by law in any court than they can confer on it when it is not so vested by law (*National Petroleum Co. V. Rebbello* 157 I. C. 315).

(*vi*) Agreements which are uncertain, i. e., "the meaning of which is not certain or capable of being made certain, are void" (Sec. 29). For instance, A agrees to sell B "a hundred tons of Oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty. But, A, who is a dealer in cocoanut-oil only, agrees to sell to B "one hundred tons of oil". The nature of A's trade affords an indication of the meaning of the words. The contract is, therefore, capable of being made certain so as to mean that A has entered into a contract for the sale of one hundred tons of cocoanut oil.

(*vii*) Agreements by way of wager are void (Sec 30. For elaborate discussion on this point see *infra*).

(*viii*) Every agreement of which the object or consideration is unlawful is void (Sec. 23. For elaborate discussion, see *infra*).

(*ix*) 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 (Sec. 20. For elaborate discussion see *infra*).

(*x*) Contracts entered into by minors, lunatics and insolvents are void owing to incapacity of such person to contract (Sec 11. For elaborate discussion see *infra*).

(*xi*) An agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promissor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful (Sec. 56). (i) A agrees with B to discover treasure by magic. The agreement is void. (ii) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void. (iii) 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.

Distinction between void and illegal contract. An illegal contract is one whose object is declared illegal by law. The distinction, however, lies not in the comparative validity of the two, for, both are void but in the fact that an illegal contract is prohibited by law whereas a void contract does not get the assistance of law.

A further point of distinction is that an illegal contract affects the collateral transaction but a void contract does not. (For elaborate discussion on '*collateral contract* see '*Wagering contract*).

3. **Voidable contract.** A voidable contract is one which can be avoided or set aside at the option of one of the parties to the contract. The following contracts are viodable under the **law of Pakistan :**

(*i*) When consent to an agreement is caused by **coercion, fraud** or **misrepresentation,** the agreement is a contract vicdable at the option of the party whose consent was so caused (Sec. 19).

(*ii*) 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 (Sec. 16).

(*iii*) An agreement by a person of unsound mind due to drunkenness is voidable (Sec. 13). When it is sought to avoid a document on the ground of unsoundness of mind of the executant, it is not enough to establish that he used to drink hard and was not generally in a sober state of mind, but it must be proved by specific evidence to the effect that at the time when the contract was entered into he was of unsound mind in the sense stated in Section 13 of the Act (*Jainarain* V. *Mahabir*, 95 I. C. 857).

(*iv*) Certain contracts by minors are voidable either during minority or within a reasonable time after the attainment of majority. These contracts generally relate to sale, lease and partnership. These contracts made by a minor are voidable at his option.

A voidable contract is to be distinguished from a void contract. A void agreement is a nullity from the very beginning but a voidable contract is held to be valid until it is avoided and till that time actions taken under it are entitled to protection in law. Thus, if A delivers goods to B under a mistaken belief that B is C and B sells these goods to D, who is a bona fide purchaser

for value without notice, A can recover the goods from D because D purchased the goods from a man who had himself no title under a void contract (*Cundy* V. *Lindsay*, 3 A. C. 459). If, however, B obtains the goods from A by a fraudulent misrepresentation and then sells them to D, a bona fide purchaser, A cannot recover the goods from D until A has avoided the contract with B. (*Phillips* V. *Brooks*, 1919, 2 K. B. 243).

4. **Unenforceable contract.** Under Sec. 10 of the Contract Act, "all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

But even where all the above conditions are satisfied, the courts under certain circumstances, will not enforce contracts which are otherwise valid because of the difficulty created by the law of procedure generally. Such contracts, called unenforceable contracts are : (*i*) a contract made on account of natural love and affection between the parties standing in a near relation to each other, unless it is written and registered ; (ii) a contract made between person whereby one agrees to repay a time-barred debt which was originally due to the other, unless it is in writing and signed by the party making the promise or by his duly authorised agent ; (iii) a contract between parties to refer their present or further disputes to arbitration, unless it is made in writing ; (iv) a contract made by a company unless it is in writing ; (v) under the Transfer of Property Act, all mortgages, other than equitable mortgages, where the principal money secured is Rs. 100/00. or upwards and gifts of immovable property, unless they are in writing and registered.

CHAPTER VII

PARTIES AFFECTED BY CONTRACT

Every contract creates rights as well as obligations. In this chapter we propose to discuss two issues arising out of such rights and obligations, namely : (i) what is the extent of contractual rights and obligations, and (ii) whether contractual rights and liabilities are transferable to a third party ?

1. Extent of contractual rights and liabilities :

The general rule in English Law is that contractual rights and liabilities are confined to the parties to the contract. If A makes a contract with B with regard to the sale of a property, A and B alone can compel each other to perform their respective part of the contract. The point was illustrated in *Tweedle* V. *Atkinson* (30 L. J. Q. B., 265), in which there was an agreement between A's father and father-in-law that each should pay a sum of money to A and that A should have the power to sue for such sum. A sued the executor of his father-in-law for the money. It was held that he was not entitled as being a stranger to the consideration of the contract.

To the above rule, there are some exceptions :—

(*i*) If A covenants to pay £ 1000 to B in trust for C, the beneficial right to the money which B receives under the covenant vests in C, though he is not a party to the contract.

(*ii*) If A makes a contract with B as C's agent, C can enforce the contract.

(*iii*) Where one of the parties to the contract afterwards agrees with the stranger to pay him direct, he can enforce the contract.

(*iv*) Where the contract charges the money to be paid out of some immovable property, a stranger can enforce it.

(*v*) Where money is due to a stranger under a marriage settlement, partition or other family arrangement it can be enforced by him or her.

As contractual rights are open only to the parties to the contract, so also contractual liabilities devolve on none but the parties to the contract. Thus, if A promises to build a house for B for a specified sum of money, A cannot enforce it against B's son unless the liability has been shifted to the son with the consent of A.

Though contractual rights and obligations concern the parties to the contract and cannot impose any liability on a stranger to it, it must be borne in mind that every contract imposes a duty on others to respect the contractual rights of the parties thereto. Hence an action will lie for maliciously procuring a person to break his contract. For instance, an action by a master will lie against a person who, with notice, procures the servant to leave his master's service (*Bowen V. Hall* 6 Q. B. D. 333). "The reason is that a violation of legal right, committed knowingly, is a cause of action and that it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference" (*Quinn* V. *Leathem*, 1901, A. C. 495). In the case of *Brimelow* V *Casson*, (1924), sufficient justification has been held to have existed. But a man who induces a minor to put an end to a contract commits no actionable wrong as the minor is not bound by the contract. (*Maung Nyi* V. E. I. Films, 1939, Rangoon 121).

Pakistani Law. The law in our country on this point is laid down by Sections 37 to 42 of the Contract Act. "The parties to a contract must either 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."

"Promises bind the representatives of the promissors in case of the death of such of promissors before performance, unless a contrary intention appears from the contract" (Sec. 37).

If, therefore, "it appears from the nature of the case that it was the intention of the parties to the contract that any promise should be performed by the promissor himself, such promise must be performed by the promissor. In other cases, the promissor or his representatives may employ a competent person to perform

it" (Sec. 40 of I. C. Act). Thus, if A promises to pay B a sum of money, A may perform this promise either personally or by causing it to be paid to B by another. But if the promise is to paint a picture, or to perform such other work as is based on the personal skill of the promissor, it must be performed by the promissor himself. But "when a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promissor" (Sec. 41 of I. C. Act).

Joint Liability. Under the English Law "all joint contractors must be sued jointly for a breach of contract". But under the Pakistani Law, as laid down in Section 43 of the Contract Act "a promisee in the absence of agreement to the contrary may, at his option, sue one or more of the joint promissors and the rule applies to the case of a partnership firm". The provision which gives the right to a creditor to compel any one of the joint contractors, or the representatives of a deceased contractor, to perform the contract, applies both to the case of ordinary joint contractors and in that of partners jointly contracting (*Motilal* V. *Ghellabhai* 17 Bom. 6). Thus A, B and C jointly promise to pay D Rs. 3000/00. D may compel either A or B or C to pay him Rs. 3000/00.

As between joint promissors, each of them "may compel every other joint promissor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract "and" if any one of two or more joint promissors makes default in such contribution, the remaining joint promissors must bear the loss arising from such default in equal shares" (Sec. 43). Thus (i) A, B & C jointly promise to pay D the sum of Rs. 3000/00, 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. 500/00. from A's estate and Rs. 1250/00. from B. (ii) A, B and C are under a joint promise to pay D Rs. 3000/00. C is unable to pay anything and A is compelled to pay the whole. A is entitled to receive Rs. 1500/00 from B.

Nothing in Sec. 43 of the Act, however, "shall prevent a surety from recovering from his principal, payments made by the

surety on behalf of the principal or entitle the principal to recover anyting from the surety on account of payments made by the principal" (Explanation to the Section). Thus, A, B and C are under a joint promise to pay D Rs. 3000/00, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

Release of a joint promissor. "When two or more persons have made a joint promise, a release of one of such joint promissors by the promisee does not discharge the other joint promissor or joint promissors ; and neither does it free the joint promissor so released from responsibility to the other joint promissor or joint promissors" (Sec. 44 of I. C. Act).

Under the English Law a release of one joint promissor withou expressly reserving the remedies against the other promissors would release them. But Sec. 44 has been inserted in the Contract Act of our country evidently to modify the English Law (*Krishna* V. *Sanat* 44 C. 162).

Devolution of joint liabilities. "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 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" (Sec. 42). This Section varies the common law rule as to the effect and devolution of liabilities under joint contracts. "The principal object of the present section is to establish the rule applied by courts of Equity when partnership assets have to be administered on the death of one of the partners and to abolish the common law rule of survivorship. According to the section, the liability in respect of a joint debt is, for the purpose of a claim made after the death of one of the joint debtors, in no way different from the liability in respect of a joint and several debt" : (C & S 193). The ordinary rule in English Law is that if the liability is **joint and several,** the executor of a deceased contractor is liable along with the surviving contractors but if it be joint, the surviving contractor or contractors alone is or are liable (*Hills case* L. R. 20 EQ. 585).

Distinction between joint promise and joint and several promise. In the case of joint promise the obligation is single but in the case of joint and several liability, the liability is joint as well as separate. When two or more are jointly bound, although neither of them is bound by himself, yet neither of them can say that the bond is not his deed, each of them is bound in the whole. The defendant when sued alone cannot say that he did not promise. Proof of a joint contract is sufficient to sustain an allegation that one contracted (*Richards V. Heather* I. B. and Ald. 29).

A joint and several note, however, of A and B, though on one piece of parchment or paper, is, in effect, three notes : (i) the joint note of A and B, (ii) the several note of A, and (iii) the several note of B. Thus, to a debt due from the defendant to the plaintiff the former may set off the latter's joint and several promissory note payable to the former. (*Owen* V. *Wilkinson* 28 L. T. C. P. 3).

The obligation in a joint promise which is single, is extinguished by a judgment recovered in suit against any one of the joint promissors ; and even if that judgment remains unsatisfied a fresh suit cannot be brought against the other co-promissors. But in the case of a joint and several promise the liability being joint as well as separate, the obligation is not extinguished by recovering judgment against one of the several joint promissors. The creditor can sue more than one joint promissor in case the judgment remains unsatisfied.

There is a distinction, in this connexion, between a promise *by* two or more persons to perform an act and a promise *to* two or more persons to perform an act. A promise *by* two or more persons is a promise that they or some or one of them will perform it (*Addison* V. *Gibson*) ; but a promise *to* two or more persons to perform an act is not a promise to some or one of them but a promise to all of them to perform it. In the former case the entire promise may be performed by one. In the latter case the entire promise cannot be enforced by one. A right may belong to two or more individuals severally or jointly but not jointly and severally (Slingby's Case 5 C. 18).

Devolution of joint rights. "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, as between him and them, with them during their joint lives and, after the death of any 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 ; (Sec. 45 of I. C. Act). Thus, A, in consideration of Rs. 5000/- paid to him by B and C, **promises B and C jointly** to repay them that sum with interest on a day specified. Bdies. The right to claim performance rests with B's representative jointly with C during C's life time, and after the death of C with the representatives of B and C jointly.

Assignment or transfer of contractual rights and liabilities. The rule regarding the assignability of contracts in this country is that the benefit of a contract, as distinguished from the liability thereunder, may be assigned, understanding by the term benefit the beneficial right or interests of a party under the contract and the right to sue for the recovery of the benefit created thereby. The rule is, however, subject to two qualifications ; first, that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to fulfil, and, secondly, that the contract is not one which has been induced by personal qualifications or considerations as regards the parties to it. The right to claim the benefit of the contract, or, the right, on certain conditions, to call for delivery of the goods mentioned in the contract constitutes "a beneficial interest in movable property" under Section 3 of the Transfer of Property Act and as such is assignable but if the assignment be of such a nature that if permitted it would defeat the provisions of the Insolvency Act, then under Section 6 of the Transfer of Property Act as also under Section. 23 of this Act the assignment would be void (*Jaffar V. Budge-Budge jute Mills*, 33 C. 702).

In **English law** Contractual obligations are not assignable. If, however, the performance of a contract requires no special skill and it does not appear that the personality of the promissor is

material for the performance of the contract, the promises cannot object to the work being done by a competent sub-contractor of the promissor. Such delegation, however, does not extinguish or diminish the liability of the principal contractor. The case is, however, different with regard to contractual rights, for, they can be transferred or assigned, generally in either of the two ways, viz., (*i*) by act of parties and (*ii*) by operation of law.

CHAPTER VIII

CONTRACT OF AGENCY

Definition of Agency. "An **'Agent'** is a person employed to do any act for another or to represent another in his dealings with third persons. The person for whom such act is done or who is so represented, is called the **Principal"** (Sec. 182 of I. C. Act).

A person does not become an agent on behalf of another merely because he gives him advice in matters of business. Agency is founded upon a contract, either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name or on his account and by which the other assumes to do the business and to render an account of it. The essence of the matter is that the principal authorizes the agent to represent him in bringing or to aid in bringing, the principal into contractual relation with a third person.

Agent and Servant. An agent is distinguishable from a servant in that while a servant is an employee engaged to act under his master's orders, direction and control in respect not merely of that which he is engaged to do but also in respect of **the manner in which he does it,** an agent, on the other hand, is employed to bring his principal into contractual relation with third persons. He has some amount of discretion and independence in carrying out the work entrusted to him, while the servant has none. "The difference between the relationship of master and servant and that of principal and agent is that a principal has the right to direct what work the agent is to do but a master has the further right to direct how it is to be done" (*Goolbai* V. *Pestonji*, 1935, Bom ·333).

Agent and Trustee. An agent is also to be distinguished from a trustee. In some respects they are alike, such as : (i) Both exercise their powers and authorities in the interest and on behalf of other persons ; (ii) Both have, in a certain sense, a representative character. An agent represents and acts for his principal, a trustee represents and acts for the beneficiary.

But notwithstanding these similarities there are the following essential differences between the two : (i) In the eye of the law, the powers exercised by the trustee are his own but the powers exercised by an agent are merely delegated powers, as far as given to him by the principal ; (ii) The property which a trustee manages is vested in him ; but an agent doing the very same thing deals not with his own property but with the property of the principal ; (iii) A contract made by the agent on behalf of the principal creates a privity of contract between the principal and the third party. But when a trustee makes a contract, the contract is his own.

Different classes of agents. There are the following kinds of agents, the classification being made on the basis of the powers and authorities possessed by each. These powers and authorities may, however, be extended and curtailed by express contract between the principal and the agent.

(*i*) *Auctioneer.* He is an agent who is authorized to sell goods to the highest bidder at a public sale for a commission. He is an agent as well of the buyer as of the owner. An auctioneer has no authority to sell goods by private contracts.

(*ii*) *Broker.* A broker is an agent whose business is to bring about a contractual relation between the principal and a third party. He has no authority to contract in his own name. He generally reduces the terms of a contract in writing and delivers to each party a note signed by himself. The note given to the seller is called the **sold note** and that given to the buyer is called the **bought note.**

(*iii*) *Factor.* He is an agent entrusted with the possession of goods and empowered to sell them in his own name as apparent owner. A factor is remunerated by a commission.

The contract made by the factor is binding on the principal. If any special authority is given to him and he acts beyond the scope of that authority but within the scope of the apparent authority, the contract is nonetheless binding on the principal. Thus, A deposits certain articles with B asking him not to sell them below a stated price. B undersells them to C who is ignorant of A's instruction to B. A cannot set aside the contract with C.

(*iv*) *Del credere Agent.* A *del credere agent* is one who for an extra remuneration acts as the surety for the purchaser and thus guarantees the due performance of the contract by the buyer. By reason of his charging a *del credere* commission he assumes responsibility for the solvency and performance of their contract by the vendees and thus indemnifies his employer against loss (*Galerial and Sons* V. *Churchill*, 1904, 3 K. B. 1272). He, therefore, gives an additional security to the seller, but that does not shift the responsibility of payment from the buyer to the seller.

A *del credere agent*, like any other agent, is to sell according to the instructions of his principal, to make such contracts as he is authorized to make for his principal and he is bound, as soon as he receives the money, to hand it over to the principal. He is distinguished from other agents simply in this that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them (Re Nevill L-R. 6 Ch. 397.

In a contract of *del credere agency*, the guarantor is to answer for the solvency of the vendee and to pay the money if the vendee does not. But a demand on the principal debtor must be proved before the agent can be held liable (*Morris* V. *Cleasby*, 4, M and S, 566).

(*v*) *Commission Agent.* His business is to purchase goods at the lowest price from one person and sell them to another without any profit, receiving only a commission for his services. Strictly speaking he is not an agent at all, for, he does not bring about any privity of contract between the person from whom he buys and the person to whom he sells :

Capacity to appoint or act as agent.

"Any person who is of the age of majority according to the law to which he is subject and who is of sound mind, may employ an agent". (Sec. 183 of I. C. Act).

Under Section 184 of the Act, "any person may become an agent" but one who is a minor or of unsound mind cannot be appointed to act as an agent to a principal so as to be personally liable to the latter.

When a minor is appointed as an agent, he can undoubtedly

bring about a contractual relation between the principal and a third party, but personally he is not responsible to the principal like other adult agents. It follows, therefore, that a person who engages a minor agent does so at his own risk, for, if any loss is done to his property on account of the mismanagement of the minor, he cannot recover compensation from him.

CREATION OF AGENCY

Under Section 185 of the Act "no consideration is necessary to create an agency". An agent, not drawing any remuneration, is thus entitled to act on behalf of the principal as much as one who is paid remuneration for the agency and has the same rights and duties as the latter.

An agency may be created in any one of the following ways:—

(1) **Agency by authority.** This is also known as agency by contract. The authority conferred may be either express or implied. Section 187 of the Act defines express and implied authority thus :

"An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case". Thus, A owns a shop in Dacca, himself living in Comilla 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 funds within 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.

Extent of *Agent's authority.* An agent may be special or general. When appointed to do one specific act or enter into one particular contract, the agent is a special agent. But when entrusted with all acts of some general kind, e. g., all necessary acts connected with some business, the agent so entrusted is a general agent.

Section 188 of the Contract. Act lays down: "An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such an act. An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose or usually done in the

course of conducting such business". Thus, (i) A is employed by B, residing in London, to recover at Karachi 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. (ii) A constitutes B his agent to carry on his business of a shipbuilder. B may purchase timber and other materials and hire workmen for the purpose of carrying on the business. Illustration (*a*) above refers to the authority of a special agent and illustration (*b*) refers to the authority of a general agent.

In an emergency, an agent has far wider authority than he has in normal circumstances. When an emergency arises, "an agent has authority 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" (Sec. 189 of Contract. Act). Thus, A consigns perishable goods to B in Chittagong with direction to send them to Dacca. When the goods reach Comilla, their condition shows steady deterioration so that they will not bear the journey to Dacca. B, in such a case, may sell the goods at Comilla without taking previous permission from the principal if the principal is not within the reach of communication. Section 189 even authorizes an agent to act contrary to the principal's instructions when a sudden emergency arises and when communication is impossible. (*Dayton Price & Co.* V. *Rohomotollah & Co.* 29, C. W. N., 422).

(2) **Agency by ratification.** This arises when one ratifies or adopts the acts of another done without his knowledge or authority but on his behalf. "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 effects will follow as if they had been performed by his authority" (Sec. 196 of Contract. Act). Ratification in law is equivalent to previous authority. When ratified, the principal is bound by the act whether it be for his detriment or for his advantage.

In order that a ratification may be valid, it must comply with the following conditions :

(i) The act must be done by the agent avowedly for, or, on account of the principal and not on his own account. (*Shiddheshar* V. *Ram Chandrav* 6 Bom. 463).

(ii) The Principal must have been in existence when the act ratified was done. Thus a newly formed Company cannot ratify an act done on its behalf before its incorporation (*Ahmedabad Jubilee S & W Co.* V. *Chhotalal* 10 Bom. L. R. 141).

(iii) The Principal can ratify only those acts which he himself is legally competent to do. Thus, a minor cannot, on attaining majority, ratify a contract made during his minority.

(iv) "No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective" (Sec. 198 of Contract. Act). There can, therefore, be no ratification of an illegal act without knowledge of the illegality (*Premila* V. *People's Bank*, 1939, L. I. P. C.).

(v) Where a time limit is prescribed for the doing of an act, the ratification must be made within the prescribed time, for, in such a case, time is of the essence of the contract. (*Dibbins* V. *Dibbins*, 1896, 2 Ch. 348).

(vi) No person can ratify the acts of another the effect of which is to deprive some third person of his property rights or to subject such third person to damages. (Sec. 200 of Contract Act). Thus, 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.

Ratification may be **express** or **implied** in the conduct of the person on whose behalf the acts are done. Thus, A without B's authority, lends B's money to C. Afterwards B accepts interests on the money from C. B's conduct implies a ratification of the loan.

The **effect of ratification** is that a subsequent ratification is tantamount to a prior command of an act done in the name of the party who ratifies it. A ratified act becomes the act of the principal who ratifies it and all consequences arising thereof devolve on him.

(3) **Agency by estoppel.** This arises when a principal is estopped from repudiating the liability or obligation incurred by

his agent acting on his behalf. Section 237 lays down thus : "When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority". Thus, 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. In the leading case of *Soanes V. L. S. W. R.* (1919, 88, L. T. K. B. 524), the plaintiff entrusted his luggage to a porter wearing the uniform of the defendant Railway Company. The luggage was stolen. The Railway Company. wanted to avoid liability for the loss on the ground that the porter was off duty. But it was held that the porter was held out by the company as an agent authorized to receive luggages and as such the Company was bound by his acts.

Agency by estoppel arises in three ways :

(i) A person may hold out another as his agent though that other is not or has never been his agent.

(ii) A person may hold out his agent as having a wider authority than he was actually given. In *Wattean* V. *Fenwick* (1892, I. Q. B., 346), the manager of a public house had the authority only to buy mineral water and bottle beers. But the manager bought some cigars though he had no authority to do so. The owners of the public house were held liable for the cigars as they, by their conduct, held out that the manager had authority to do everything connected with the public house.

(iii) A person may hold out another as his agent although that other has ceased to be so. In *Fruman* V. *Loder* (1840, 11 A & E, 589), Loder's agent H used to sell tallow in the form "sold for L". After some time H ceased to be L's agent. But L did not notify that to his customers. So when H contracted to sell tallow to the plaintiff, Loder was held liable for the contract.

(4) **Agency of necessity.** This arises when the exigency or peculiar nature of the circumstances render it impossible for one

to obtain authority from someone else on whose behalf he acts. Thus, a parent is an agent of necessity to arrange and prepare a marriage settlement of an infant child. The child need not be separately represented by an independent legal adviser (*Tucker* V. *Bennet* 38, Ch. I). Similarly, (i) a stranded wife can act as the agent of necessity of her husband for the purpose of obtaining such things as are necessary for her maintenance. (ii) A seller of goods who cannot deliver them due to war conditions can sell them purporting to act as the original buyer's agent of necessity. (*Prager* V. *Blatspiel*, 1924, I. K. B, 566).

The agency of necessity cannot arise if the agent can communicate with the principal.

5. Agent's duty to the Principal. An agent has the following duties towards the principal :

(*i*) An agent is bound to conduct the business of the principal in accordance with the directions given by the latter. If there is no direction, he is to follow the custom of the trade prevalent in the particular place where the business is conducted. If the agent acts otherwise, he is bound to compensate the principal for any loss sustained thereby.

(*ii*) An agent is bound to conduct the business for which he is appointed with as much skill as is generally possessed by persons engaged in similar business. If the principal suffers loss through the agent's want of ordinary skill, the agent must make good the loss unless it can be shown that the principal has notice of his want of skill.

(*iii*) An agent is bound to act with reasonable diligence by which is meant not perfect or utmost diligence but such diligence as can be expected from men of ordinary prudence. If he fails to act with such diligence, he must pay compensation to his principal in respect of the direct consequences of his own negligence and misconduct, but not for remote losses.

(*iv*) An agent is bound to render proper accounts to his principal on demand.

(v) In case of difficulty an agent must communicate with his principal and obtain his instructions. If he fails to do so without

reasonable excuse he must make good any loss that may result due to such failure.

(*vi*) An agent must not make any profit for himself out of the business or transaction entrusted to him beyond the commission or remuneration agreed upon between him and the principal. All profits made by the agent in the course of the agency belong to the principal and must be duly accounted for.

(*vii*) Without permission from the principal, an agent cannot become a principal party to the transaction by dealing on his own account in the business of the agency. If an agent does so, the principal may repudiate the transaction if it turns out that any material fact has been dishonestly concealed from him or the transaction has been disadvantageous to him. Thus, A directs B, his agent, to sell his house. B buys the house himself in C's name. A can repudiate the sale if he can show that B has dishonestly concealed any material fact or that the sale has been disadvantageous to him.

(*viii*) As a general rule, an agent cannot appoint a sub-agent to do that which he has undertaken to do. But there are exceptions to this rule. Thus, if the ordinary custom of the trade permits the appointment of a sub-agent 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. (For further discussion, see **'Sub-Agency'**)

Principal's duty to agent : Agents' right against the principapl.

(*i*) The principal must pay the agent such commission, remuneration and other dues as may be agreed upon. In the absence of any agreement, an agent is entitled to a reasonable remuneration subject to any custom or usage. But an agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration.

In the absence of any contract to the contrary, an agent cannot claim his commission or remuneration until the work for which he has been constituted agent has been completed. But for his remuneration he may retain money received by him on account of goods sold although the whole of the goods consigned to him for sale may not have been sold. So also, in the

absence of a 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, disbursement and services in respect of the same has been paid or accounted for to him. This right of holding the money or other property of the principal as security for the agent's payment is known as the **agent's right of retainer.**

(*ii*) The principal is bound to compensate or indemnify the agent against the consequences of all lawful acts done by such agent in the exercise of the authority conferred upon him. Thus, B at Singapore under instructions from A at Calcutta, contracts with C to deliver certain goods to him. A does not send the goods and C sues B for breach of contract. A asks B to defend the suit. B is ordered to pay damages and costs and incur expenses. A is liable to B for such damages, costs and expenses.

But if the object of the agency is illegal, the principal is under no liability to indemnify him. Thus, 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 him.

(*iii*) 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. Thus, A employs B, a brick-layer, in building a house and puts up the scaffolding himself. The scaffolding is unskilfully put up and B is hurt. A must make compensation to B.

(*iv*) A principal is bound to indemnify the agent against the consequences of any act which the agent does in good faith at the instance of the principal, though the act causes injury to the rights of third persons. For illustration, B at the request of A sells goods in the possession of A and hands over the proceeds to A. A had no right to dispose of the goods but B did not know of that. 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.

Effect of agency on contract with third person:

When a person contracts through his agent or gets an act done by his agent, his rights and liabilities are just the same as they would have been had he contracted or acted in person (Sec. 226 of I. C. Act). Thus, A being B's agent with authority to receive money on his behalf, receives from B a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

Rights and liabilities of the parties: (1) *When the agent contracts for a named principal.* An agent contracting as an agent for a principal whose name he discloses is not at all liable for the contract because the real contract is made between the named principal and the third party. He can, therefore, neither sue for the contract nor be sued on it, unless there is a contract to the contrary.

According to Section 230 of the Contract Act, such a contract to the contrary shall be presumed to exist in the following cases :—

(*i*) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad.

(*ii*) Where the agent does not disclose the name of his principal.

(*iii*) Where the principal, though disclosed, cannot be sued, e. g., when the contract is made on behalf of one who enjoys diplomatic immunity, such as, an independent foreign sovereign.

In **English law,** when an agent makes a formal contract on behalf of his principal, he can sue or be sued along with the principal.

In order, however, that a principal may be liable for a contract made by his agent the following conditions must be satisfied :

(*i*) The agent must act within the express or implied authority given to him by his principal ; or,

(*ii*) The act, though done without authority, must be ratified by the principal ; or,

(*iii*) Agency by estoppel must arise ; or

(*iv*) The agent must show that he is an agent of necessity.

(2) *Where the principal is undisclosed.* If an agent makes a contract with a person who neither knows nor has reasons to suspect that he is an agent, the principal of the agent is known as undisclosed principal. When, in making a contract, the principal thus remains undisclosed, the agent who makes the contract becomes personally liable for it. Consequently, he can sue or be sued for the contract. "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". (Sec. 233 of Contract. Act).

In a case like the above, the principal can disclose himself and ask for the performance of the contract. But "the other contracting party has, as against the principal, the same right as he would have had as against the agent if the agent has been the principal". (Sec. 231 of Contract Act). For illustration, B contracts to buy some cotton from C, cotton dealer, B is really contracting for A, his principal, which C does not know nor has any reason to suspect. In this case, B can obviously sue C if he refuses to sell the cotton and C also can sue B if he refuses to buy the cotton. A, the principal, can also sue C or be sued by C.

Sec. 231 of the Contract Act further lays down that "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".

Though an undisclosed principal can disclose himself and always require the performance of the contract entered into by his agent with another person who neither knew nor had any reason to suspect that the agent was contracting as an agent, the principal "can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract". (Sec. 232 of Contract. Act). Thus, A, who owes Rs. 500/00 to B, sells rice to B worth Rs. 1,000/00. A is acting as agent of C in the transaction, but B has no knowledge nor reasonable ground to suspect that A is C's agent. C cannot compel B to take the rice without allowing him to deduct from the price A's debt of Rs. 500/00.

In **English law** an agent who contracts as agent for an unnamed principal is not personally liable. Moreover, English Law has gone so for as to state that an agent contracting for an unnamed principal may afterwards declare himself to be the principal. But in **Pakistan** an agent contracting as an agent is estopped from declaring that he is the principal (Sec. 236 of Contract Act).

Liability of a pretended agent. Under Sec. 235 of the Contract Act "a person untruly representing himself to be the authorised agent of another and thereby inducing a third party 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 has incurred by so dealing".

In *Collen V. Wright* (7, E & B, 301), the rule has been thus stated : "A person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized 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 authority being untrue". Section 235 of the Contract Act has, in fact, been cast on the basis of the above rule. To render the agent liable under the section it is only necessary that the representation should have been untrue in fact and it is not necessary to show that the agent was in anyway to blame. Nor does it make any difference that the agent was the agent of both the parties. The representation made by the agent need not be fraudulent. All that is required is that it is untrue. (Kishori V. Secretary of State, 1938, I Cal. 463).

Effect of fraud or misrepresentation by Agent :

The **English law** on the point has thus been enunciated in the leading English case of *Barwick* V. *English Joint Stock Bank* (L. R. 2 Ex. 259) : "The general rule is that the master is answerable for every wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity be proved". But when the duty to be performed is imposed by law and not by the will of the party

employing the agent, the employer is not liable for the wrong of the agent in such employment.

The **law in Pakistan,** similar to the English Law in principle, is as follows : "Misrepresentations made or fraud 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" (Sec. 238 of Contract Act).

Liability for criminal acts of agents. The general rule of law is that a master is not criminally responsible for the acts of his servants unless he expressly commands or personally co-operates in them. In criminal cases they must answer for their own acts and stand or fall by their own behaviour. But there are exceptions to this general rule. In some cases criminal liability is imposed by statute upon the master as regards the acts or omissions of his servants. Thus, a licensed vendor is liable if his servant sells opium in the course of his employment to a person below 14 (*Emperor* V. *Babu Lal,* 34 All. 319). Similarly, a Bank is liable for fraudulent misappropriation by its agent on crossed cheque (*Carpenter's Co.* V. *B. M. Banking Co.,* 1938, I. K. B. 511).

If the offence is prohibited in itself knowledge on the part of the principal is immaterial. Thus, a licensee is responsible for the default of his servants in permitting drunkenness in his shop without his knowledge (*Shim Gyi* V. *Emperor,* 43 I. C. 81).

Notice given to an agent :

Notice of any fact given to an agent is deemed to be as good as a notice given to the principal, provided : (i) such agent has authority to receive the notice or (ii) receives it in the usual course of business or by custom. The agent receiving such notice must also receive it in course of his duty as an agent and not in his private capacity. Thus, A draws a promissory note on his Dacca office in favour of B. B informs the cashier of A's Dacca office that the note has been stolen. The cashier does

not make any official record of the loss of the note and when he is on leave, the stolen note is peesented and cashed. A is bound in this case to pay to B over again, as the notice of the theft communicated to his cashier is notice to himself since the cashier is deemed to have authority to receive such notice.

Now, the position would be otherwise if notice of the loss of the note would be given to the despatch clerk or if the casheir or anybody else authorized to receive such notice, would know of the theft from someone not concerned in the transaction or in course of his private dealings with B. In either of the cases, A, the principal, would not have been bound by such notice.

Liability of principal when agent exceeds authority :

If the agent exceeds the authority given by the principal, the principal is not bound by contracts lying outside the powers granted to the agent. Thus, A authorizes B to buy 5 tons of mustard oil for him. B buys 5 tons of mustard oil and 1 ton of cocoanut oil for a sum of Rs. 18,000/00. A may repudiate the whole transaction, for, B, by buying the cocoanut oil, has exceeded his authority.

But in some cases where an agent exceeds his authority, some acts done by him may fall within the authority given and some outside it. In such cases, if the authorized part can be separated from the one that is not authorized, the principal will be bound by such acts as fall within the authority given. Thus, if B, A's agent, buys the mustard oil and the cocoanut oil in separate lots and pays for them in two separate lumps of Rs. 14,000/00 and Rs. 4,000/00 respectively, the principal will be liable for the transaction relating to the purchase of the mustard oil.

Dissolution of Agency. An agency may be dissolved or terminated in any of the following ways :—

(*1*) *When the principal revokes the authority of the agent.* Such revocation must be made, before the agent has exercised his authority and must be for a just excuse. Revocation has, however, to be made subject to the following restrictions :—

(*i*) "Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency, in the

absence of an express contract, cannot be terminated to the prejudice of such interest". (Sec. 202 of Contract Act). Thus, 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 the authority nor can it be terminated by A's insanity or death.

(*ii*) If the agency has been formed for a definite period, the principal cannot revoke unjustly the authority without paying compensation to the agent. (Sec. 205 of Contract. Act).

(*iii*) "The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency". (Sec. 204 of the Contract Act). Thus, A authorizes 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 to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton. If, however, B purchases the cotton in A's name so as not to render himself personally liable for the price, A can revoke B's authority to pay for the cotton.

(*2*) *When the agent renounces the business of the agency.* Reasonable notice of such renunciation must be given. Renunciation can be made only for a just cause. If the renunciation is unwarranted or otherwise amounts to a breach of the contract, the principal is entitled to compensation.

(*3*) *By the insolvency of the principal.* A person who has been adjudged an insolvent cannot act as a principal because his contractual capacity lapses. Hence, all contracts of agency which he has made with others also are dissolved.

(*4*) *By death or insanity of the principal or the agent.* The relation between an agent and the principal is entirely personal. Therefore, death or insanity of either terminates the agency.

(*5*) *On the completion of the business of the agency.* If an agency has been formed for a definite period, the agency is dissolved on the termination of the stipulated period. Thus, A employs B to construct a building and C to supervise the construction for 3 months. The agency of B will terminate after the construction of the building is over and that of C at the end of 3 months.

(6) *By an agreement between the principal and the agent.* Sometimes the contract of agency expressly or impliedly provides for the termination of the contract.

Sub-Agency. A sub-agent is defined by Sec. 191 of the Contract Act, as "a person employed by and acting under the control of the original agent in the business of agency".

With regard to the appointment of Sub-Agent, Sec. 190 clearly states : "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". This rule contained in the above section is founded upon the maxim, *delegatus non potest deligare* which means that a delegate cannot sub-delegate. But as Sec. 190 of the Act provides, an agent can appoint a sub-agent where it is the usual custom of the trade in question or where, without such a sub-agent, the assignment cannot be properly executed or where the principal has authorized the appointment of a sub-agent. Thus A of Calcutta has an agent in Dacca, to buy jute for him. He may appoint a banker to keep his capital in deposit and must appoint a lawyer whenever any litigation arises. Both the banker and the lawyer are his sub-agents.

Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal. But as far as the agent himself is concerned he is responsible to the principal for the actions of the sub-agent and the sub-agent in his turn is responsible for his actions to the agent but not to the principal except in case of fraud or wilful wrong. (Sec. 192 of Contract Act).

But where an agent improperly appoints a sub-agent, i. e., where he has no authority, implied or express, or where it is neither customary nor imperative to appoint a sub-agent, "the agent stands towards such person in the relation of a principal to an agent and is responsible for his acts both to the principal and to third persons ; the principal is not represented by or responsible for the

acts of the person so employed nor is that person responsible to the principal". (Sec. 193 of Contract Act).

It should be noted that where an agent having express or implied authority to do so has nominated or selected another person to act for the principal in the business of the agency, 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. (Sec. 194 of Contract Act). Thus, 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.

In selecting such an agent as contemplated in Sec. 194, an agent must use such ordinary prudence as he would have done had he been the principal himself. If he does this he is not responsible to the principal for the acts or negligence of the agent so selected. (Sec. 195 of Contract Act).

CHAPTER IX

DISSOLUTION OF CONTRACT

A Contract may be dissolved or discharged in any of the following ways :—

1. **By Performance.** Performance is the most natural and common mode of discharging a contractual liability. As soon as the parties to a contract have performed their shares of the promises, the contract is dissolved, both the promissor and the promisee having been freed from the obligations thereof. In this connexion we must distinguish between performance which discharges one of the two parties from his liabilities under a contract and performance which dissolves the contract as a whole. Thus, if A promises to repair B's time-piece in consideration of B's promise to repair A's fountain pen, the contract is not dissolved when A has fulfilled his part of the promise ; only his liability is discharged. But if A makes the same promise in consideration of B's having repaired his fountain pen a month ago, the whole contract will stand discharged as soon as A has repaired B's time-piece. The performance of a contract must, however, always be made in the manner prescribed by the contract, having regard to the place and time of performance.

Tender of Performance. Besides performance, a contract may also be discharged by a valid tender. Tender means an offer of performance. The law considers a party, who has entered into a contract to deliver goods or pay money to another, as having substantially performed the contract, if he **has tendered the goods or money** to the person to whom the delivery or payment was to be made ; provided only that the tender has been made under such circumstances that the party to whom it was made had a reasonable opportunity of examining the goods or the money tendered, in order to ascertain whether the thing tendered was really what it purports to be. Without such an opportunity an offer to

deliver or pay does not amount to a tender. (*Startup* V. *Machonald* 12 L. J. C. P, 477).

The **Pakistani Law** on tender has been laid down in Section 38 of the Contract Act which says : "Every such offer must fulfil the following conditions :—

(*i*) It must be unconditional ;

(*ii*) It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do ;

(*iii*) 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 promissor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them."

Illustration. A contracts to deliver to B at his warehouse, on the 1st March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance, 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 contracte for, and that there are 100 bales.

Now, a tender may be an offer to deliver goods or to pay a sum of money. So far as a contract to deliver goods is concerned it 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 thereafter bring an action for non-acceptance or defend an action for non-delivery.

But where a sum of money is due, tender by the debtor, if refused, does not operate as a discharge. The debtor must remain ready and willing to pay and, if sued, must pay the money to the court, and plead the tender which is then a good defence. "In the case of tender of money, if it is a valid tender, it shall be

in evidence that the money has been deposited". (*Mewa* V. *Ablak* 34 A. L. J. 140). The interest on the loan, however, ceases to run from the date of the valid tender. A tender, in order to be valid, must be of the whole amount due. A creditor is not bound to accept a less sum nor does such a tender stop the running of interest or the liability for costs of the suit. (*Watson and Co.* V. *Dhonendra* 3 C. 6, 16).

Time and place of performance. (*i*) Where, by the contract, the promissor is to perform his promise without application by the promisee, that is, without the promisee asking him to do it, and no time for performance is specified, the engagement must be performed within a reasonable time (Sec. 46). What is a reasonable time depends in each case on the facts and circumstances of the case.

(*ii*) When a promise is to be performed on a certain day, and the promissor, has undertaken to perform it without application by the promisee, the promissor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed (Sec. 47). For 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. As to **delivery on a holiday,** it is well-settled that in the absence of a statutory provision or trade custom or usage to that effect, the fact that the performance of a contract falls due on a holiday does not alter the rights of the parties by suspending the transaction of private business. The sellers have to establish that they were entitled to perform the contract on the day following the holiday by reason of the existence of a valid usage which may be deemed to have been incorporated in the contract between the parties (*Kashiram* V. *Hurmundroy* 32 C. L. J., 140). Even the terms of a written contract as to this may be nodified by usage (*Lal Chand* V. *Kersten*, 15 Bom. 338). According to the custom of Calcutta merchants, delivery is to be completed on Saturday if it falls on Sunday (*Motumal* V. *Ruttanji*, 24 I. C. 883).

(*iii*) When a promise is to be performed on a certain day, and

the promissor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business (Sec. 48). The question as to "what is a proper time and place" is, in each particular case, to be determined by reference to the facts and circumstances of the case.

(*iv*) When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promissor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place. (Sec. 49). For 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.

(*v*) The performance of any promise may be made **in any manner** or **at ay time which the promisee prescribes** or **sanctions.** (Sec. 50). For illustration, 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.

Performance of reciprocal promise. (*i*) When a contract consists of **reciprocal promises to be simultaneously performed,** no promissor need perform his promise unless the promisee is ready and willing to perform his promise (Sec. 51). For illustration, 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. Similarly, B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(*ii*) Where **the order in which reciprocal promises are to be performed** is expressly fixed by the contract, they shall be performed in that order ; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires. (Sec. 52). For 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.

(*iii*) **Liability of party preventing performance.** 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 any loss which he may sustain in consequence of the non-performance of the contract. (Sec. 53). For 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.

(*iv*) **Effect of default.** 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 promissor of the promise last mentioned fails to perform it, such promissor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which other party may sustain by the non-performance of the contract. (Sec. 54). For illustration, A contracts with B to execute certain builder's work for a fixed price, B supplying the timber necessary for the work. B refuses to furnish any 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 non-performance of the contract.

Performance of contract where time is or is not the essence of it. When a party to a contract promises to do a certain thing at or before a specified time or certain things at or before

specified 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 the essence of the contract.**

If it was not the intention of the parties that time should be the essence of the contract the contract does not become voidable by the failure to do such a thing at or before the specified time but the promisee is entitled to compensation from the promissor for any loss occasioned to him by such failure.

If, in case of a contract voidable on account of the promissor'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 promissor of his intention to do so (Sec. 55).

The rule of equity, which is now the general rule of English jurisprudence, is to look at the whole scope of the transaction to see whether the parties really meant the time named to be of the essence of the contract. The principle is formulated in Sec. 55 of the Contract Act. Even where time is not of the essence of the contract, the court may infer that in the circumstances of the case it has to be performed within a reasonable time or even with the utmost deligence (*Kishan* V. *Purnendu* 15 C. L. J., 40). Whether time is of the essence of the contract or not depends upon the nature of the property, upon the construction of the contract and upon the objects which the parties had in entering into it. (*Fakir* V. *Abdulla* 12 Bom. 658). The mere fact that time is specified for the performance of a certain act is not by itself sufficient to prove that time is of the essence of the contract (*Raghbir* V. *Sundar* 131 1. 6. 371).

Under Sec. 55 of the Contract Act, the question whether or not time is of the essence of the contract, depends upon what the parties may reasonably be seen to have intended with regard to it. This intention is to be ascertained, (*i*) from the express

stipulation of the contract, (*ii*) from the nature of the property, and (*iii*) from the surrounding circumstances. Where there is nothing in the surrounding circumstances from which such an intention can be inferred, the fact that the contract is for sale of land does not import such an intention (*Alliboy* V. *Dowlatram*, 50 1. C. 41). It is well settled that the mere fact that a date has been mentioned for the performance of the agreement does not conclusively prove that time was intended to be of the essence of the contract. The court has to determine whether, from an express promise to that effect, or because such a promise is to be implied from a consideration of the real intention of the parties, inferred from the nature of the contract, time is to be deemed of the essence of the contract (*Mahadeb* V. *Narain* 24 C.W.N. 330).

Time subsequently made essential Section 55 of the Contract Act apparently contemplates that time will be of the essence of the contract when made so by the contract itself and, therefore, made at the same time as the contract is entered into. In English law, however, where time is not made of the essence of the contract itself, although a day for performance is named, if either party is guilty of delay, a distinct notice by the other that he shall consider the notice at an end, if it be not completed within a reasonable time to be named, would be treated in equity as binding on the party to whom it is given, but a reasonable time must be allowed (*Stickney* V. *Keeble*, 1915, A. C. 386) ; non-compliance within the time allowed amounts to a repudiation of the contract and a party not complying with it is not entitled to specific performance (*Abdul* V. *Brown*, 57 I. C. 485).

2. **By Agreement.** A contract being the product of an agreement can also be dessolved by a fresh agreement between the same parties. Such an agreement may take the one or the other of the following forms:—

(*i*) **Release.** Release or waiver means the surrender of a contractual right. Thus, A who has advanced a loan of money to B gives up, by an agreement, the right to recover the debt from B. This surrender of a right is called release or waiver. If gratuitous, an agreement of release must be made under seal. To

this rule there is, however, one exception. The holder of a bill of exchange or a promissory note may waive his rights without consideration, either by writing or surrender of the bill or the note as the case may be.

(ii) **Accord and satisfaction.** If the promisee, instead of giving a release to the promissor for nothing does so by accepting something for giving up his right or by accepting, instead of the promise made to him, any satisfaction which he thinks fit, it is a case of accord and satisfaction. By accord is meant the agreement of discharge and by satisfaction is meant the consideration moving from the discharged party to the other. Thus, A owes B Rs. 5,000/- A pays B, and B accepts Rs. 2,000/- in satisfaction of the whole debt at the time and place at which Rs. 5,000/- were payable. The whole debt is discharged.

(iii) **Rescission.** Rescission means cancelling the original contract by mutual agreement whereby the old contract ceases to be binding on any of the parties. The contract must, however, be executory on both sides. Thus, A promises to paint for B a picture in consideration of B's promise to pay Rs. 100/-. This contract can be rescinded by an agreement in which A surrenders his right to Rs. 100/- and B to the picture promised to be painted by A.

(iv) **Alteration.** Alteration means substituting a fresh contract with altered or different terms from the original one. Thus, A agrees to supply B 1,000 maunds of salt for Rs. 5/- a maund within 3 months from date. Later on, A and B alter the agreement in the following way : A agrees to supply 800 maunds of salt at the same rate within 2 months instead of three. The latter agreement puts an end to the former.

(v) **Novation.** A case of novation arises when the parties to a contract agree to substitute a new contract for the original one. For illustration. 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. This is a case of novation of contract and by this the old debt of A to B has been liquidated and a new debt from C to B has been contracted.

Novation operates as an absolute release of the original debtor.

Thus, where a creditor released his principal debtor and accepted another as debtor, and the surety for the former debtor agreed to give a guarantee for the latter and to continue his former guarantee but died without actually giving the guarantee, the Privy Council observed : "It may be taken as settled law that where there is an absolute release of the principal debtor, the remedy against the surety is gone because the debt is extinguished." (*Commercial Bank* V. Jones, 1893, A. C. 313).

(3) **By Frustration** By frustration is meant impossibility of performance. It has been stated in an earlier chapter that a contract to do an impossible thing, such as to bring a dead man back to life, is void **ab initio** as the object of the contract is impossible to be performed. But it happens very often that parties to a contract agree to perform certain things which are not impossible at the time when the contract is made but which become impossible to be performed subsequently due to causes beyond their control. This is called **supervening impossibility.** In such a case, the contract is discharged as having become void.

Supervening impossibility may arise in the following ways :-

(*i*) **Impossibility arising due to change of law.** It is absolutely forbidden to contract the performance of a thing illegal at the time when the contract is made. But if a thing agreed to be done becomes illegal due to subsequent change in the law of the land, the contract is dissolved and the promissor thereto is discharged from liability. In *Kursell* V. *Timber Operators* and Contractors (1927, 1, K. B. 298), there was an agreement for the supply of timber from Latvian forests. A Lativian law enacted subsequent to the contract forbade the cutting of timber by private companies. The contract was held to have been discharged in the face of the new Latvian Law.

(*ii*) **Impossibility due to the destruction of a specific thing essential for the performance of contract.** In *Taylor* V. *Caldwell* (122, E. R. 309), Justice Blackburn observed : "The principle seems to us to be that, in contracts in which performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of the performance arising

from the perishing of the person or thing shall excuse the performance". In this case, the defendants agreed to lend to the plaintiff the use of a music hall, of which they were owners, for giving a concert therein. Before the time came for the delivery of the hall, it was destroyed by fire. Consequently the concert had to be abandoned after the plaintiff had incurred considerable expenses for preparation. In a suit for compensation, it was held that the defendants were not liable.

(iii) **Impossibility arising out of the death or incapacitating illness of one of the parties to the contract.** In *Robinson.* V. *Davison* (L. R. 6 Ex. 269), the plaintiff made a contract with the defendant that at a concert to be given by the plaintiff on a specified day, the defendant's wife would play the piano. On that day the lady could not fulfil the contract due to incapacitating illness. In a suit for compensation it was held that her failure to do so gave no cause of action to the plaintiff. But the benefit of this rule is available only in a contract of personal service. Where personal considerations are of the foundation of the contract as in the case of principal and agent, or master and servant, the death of either party puts an end to the relation ; and in respect of service after death, the contract is dissolved unless there is a stipulation expressed or implied to the contrary (*Farrow* V. *Wilson* L. R. 4 C. P. 744).

(iv) **Impossibility due to non-occurrence of contemplated events or state of things.** The rule laid down in *Krell* V. *Henry* (1903 2 K.B. 740), viz., "the under lying ratio is the failure of something which was the basis of the contract in the mind and the intention of the contracting parties" is theoretically capable of application to all contracts. The rigidity of the rule that an express unconditional contract is not generally dissolved by its performance being or becoming quite impossible in fact, by reason of particular circumstances, has been relaxed and exceptions have been afforded on grounds explained in *Baily* V. *De Crespigny* (38 L. *J.Q.B.* 98). Since then, the doctrine of frustration of adventure has become a gloss on the older theory of impossibility, and has been greatly developed under the guise of reading "implied terms" into contracts.

When supervening events, not due to the default of either party, render the performance of the contract indefinitely impossible, and there is no undertaking to be bound in any event, the "doctrine of frustration" is invoked, even though the parties may have expressly provided for the case of a limited interruption. "A court can and ought to examine the contract and the circumstances in which it was made not of course to vary but only to explain it, in order to see whether or not the parties must have made their bargain on the footing that a particular state of things would continue to exist. And if they must have done so, then a term to that effect might be assumed though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such **as to upset altogether the purpose of the contract.** (*Tamplin S. S. Co.* V. *A. M. P. Prodnct*, 1916, 2 A. C. 397).

(M) **Impossibility due to the absence of a fundamental condition.** A condition is said to be fundamental to a contract when the whole contract rests on it. Such a condition may be (i) a condition precedent or (ii) a condition subsequent or (iii) a condition concurrent.

(*i*) *A condition precedent* is one, express or implied, which provides that the contract shall not bind one or both the parties unless some state of things exists. Thus, A agrees to hire the house of B provided it is air-conditioned. In this case, the contract will not bind A unless the house is or has been air-conditioned.

(*ii*) *A condition subsequent* is one, express or implied, which requires that upon its disappearance after the contract has been concluded, the contract will be discharged. Thus, A takes the house of B for five years upon the condition that the lease will terminate whenever the water supply to the house is withdrawn. Here, if at any time during the lease the water supply duly is withdrawn, A can terminate the lease.

(*iii*) When in a contract the obligation of each party is dependent on the performance by the other of his obligation, the

obligation of each in it is said to be a *concurrent condition* of obligation of the other. Thus, A agrees to marry B if B can obtain a marriage certificate within a specified time which he agrees to do. Here, if B fails to perform his part of the agreement, the liability of A as to her part is discharged.

The condition of a contract, whether precedent, subsequent or concurrent, need not always be expressly mentioned. The same rule applies to cases where it can be inferred from the terms of the contract and the surrounding circumstances that the condition must have been contemplated by both the parties as the foundation of the contract. Thus in *Krell* V. *Henry* (1903, 2 K. B. 740), the defendant agreed to hire the plaintiff's flat for June 26th and 27th, on which days the Coronation procession of King Edward VII was arranged to be held and to pass by that flat. No express reference to the procession was made, but the purpose of the contract was known to both the parties. After the contract was made, the procession was abandoned and the defendant did not occupy the flat of the plaintiff. In a suit for rent by the plaintiff, it was held that "the contract was to be read subject to the implied condition that the procession would take place on the appointed days and that this implication could be inferred from the circumstances of the case known to both the parties, although there was no basis for it in the terms of the written contract."

Pakistani Law. The law on this point in our country is set forth in Sec. 56 of the Contract Act which lays down that "a contract to do an act which, after the contract is made, becomes void when the act becomes impossible or unlawful". Thus, 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.

The third paragraph of the same section, however, provides that the supervening impediments must not have arisen by reason of some event which the promissor could prevent. If such is the case, compensation may be obtained against the person who is unable to perform it, whether through impossibility or unlawfulness.

The real question that has to be considered in applying the section is not whether the contract was or became void but whether the promissor has to make compensation for non-performance. The substance of the section can only apply when there is no contract to the contrary, i. e., the section must be read, when possible, as an implied term in contracts. The section can be excluded by an express or implied term in the contract. (*Hussainbhoy* V. *Haridas* 105 I. C. 319). The general rule is that where a party has not qualified his obligation under a contract he is liable to make compensation for non-performance, although performance has been rendered impracticable by some unforeseen cause beyond his control (*Noor* V. *Sonu*, 1941 Pat, 429). Where a contract ceases to have application without any default by the plaintiff he can claim refund of the money paid by him (*Parshotam* V. *M. C. Balata*, 1949 E. P. 301).

Rights and liabilities of the parties to a frustrated contract. The Pakistani Law on this point has been laid down in Sec. 65 of the Contract Act which says : "When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it, to the person from whom he received it". 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 marriage. The agreement is void but B must repay A the sum of Rs. 1,000/-. Likewise, A contracts with B to deliver to him 250 maunds of rice before the 1st of May. A delivers 130 maunds only before that day and none after. B retains the 130 maunds after the 1st of May. He is bound to pay A for them.

Until recently **the English Law** on the point was different from that in Pakistan. Under the old law, as laid down in *Chandler* V. *Webster* (1904, 1 K.B. 493), when a contract was dissolved, the parties were excused from further performance but the loss remained where it lay at the time when the contract was dissolved. But in the latest decision of the House of Lords in *Fibrosa Spoika Akcyina* V. *Fairbairn Lawson Combe Barbour Ltd.* (1942, 2 A. E. R.

122), the English law has been brought into line with the law in Pakistan and the old law established by *Chandler* V. *Webster* has been overruled.

4. By breach :

Every breach of contract by one party does not entitle other party to rescind the contract, that is, release him from the performance of his obligation. Such option is available to him only in a few cases.

As a general rule, if a contract is to be avoided on the ground of breach, it must be shown that the breach relates to the essential terms or conditions of the contract. Non-performance of terms that are inessential or, in other words, *warranties* does not entitle a party to avoid the contract. When such is the case, he must be ready and willing to perform his share of the obligation, though at the same time he can claim damages for the breach of the contract.

A breach of contract by one party entitling the other party to the right of rescission may be of two kinds : (*i*) An actual or present breach, and (*ii*) a constructive or anticipatory breach.

(*a*) *Actual breach.* This happens when a party does not perform his promise in the manner and at the time stipulated by the contract. Thus, A covenants to deliver a horse to B on or before the 3rd March, 1963, in consideration of B's promise to pay him Rs. 1000/-. A fails to fulfil the contract. A has committed actual or present breach of the contract. This breach entitles B to rescind the contract, over and above suing him for damages.

(*b*) *Constructive* or *anticipatory breach.* This happens when before the time for performance a party shows by his conduct or words his unwillingness to perform his part of the contract or is incapacitated in such a way as not to be able to perform it. It is called an anticipatory breach because the contract is not yet broken but circumstances are such as suggest beyond doubt that it is unlikely of being performed. Thus, A contracts to deliver to B his black horse within three months from date. One month after the contract A sells his black horse to C. There has been an anticipatory or constructive breach of the contract. This is an example of **anticipatory breac by impossibility of performance.**

Anticipatory breach may also take place by repudiation. When such is the case, the other party is not bound to wait in order to see whether the contract is actually broken when the time of performance arrives. In *Hochester* V. *De La Tour* (118 E. R. 922), the defendant engaged the plaintiff as a courier at £ 10 a month, the appointment taking effect from the 1st of June. Before that date he informed the plaintiff that he should not require him. It was held that the plaintiff's right of action accrued on the receipt of the renunciation and that he was not bound to wait till the 1st of June.

A party is not, however, bound to take advantage of repudiation immediately. 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 if he fails to take advantage of the repudiation by rescinding the contract, it remains alive upto the date of performance with all the normal incidents attached to it. If, therefore, in the interval between repudiation and the due date of performance, something 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 3rd February to sell a horse to B on the 3rd March and informs B on the 16th February that he will not sell the horse at all, B can at once sue A for damages. But if he disregards the repudiation and waits till the 3rd March and in the meantime the horse dies, B cannot recover any damages from A, for the contract is dissolved by the death of the horse and A can take advantage of it.

The **Pakistani Law** on the point has been set forth in Section 54 of the Contract Act which says that "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 promissor of the promise last mentioned fails to perform it, such promissor 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 non-performance of the contract".

Promises which form the consideration or part of the consideration for each other are called **reciprocal promises.** Thus, 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 the week. The promises being reciprocal, A's promise to deliver need not be performed, and B must make compensation.

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5. **Discharge by operation of law.** A contract valid in every respect may be discharged by the operation of law. Thus, under the law of limitation certain contracts are discharged after the lapse of a prescribed period of time and parties thereto cannot sue on them after the prescribed period of time has expired. A contract may also be discharged by the operation of law in any of the following ways:—

(*i*) *Merger.* It means the assimilation of a smaller contract by a larger one by reason of the fact they meet and coincide in one and the same person. Thus, if a party makes an oral contract and makes the identical contract under seal, the former is merged in the latter, with the result that the oral contract is discharged.

(*ii*) *Insolvency.* When an insolvent is discharged by the Insolvency Court, he is released from all his debts provable under the Bankruptcy.

(*iii*) *Alteration.* When a written contract is altered by way of addition or erasure in a material part, it is dissolved. It is to be remembered that such alteration must be affected without the consent of the other party; otherwise it will be a new contract.

CHAPTER X

REMEDIES FOR BREACH OF CONTRACT

When a contract is broken the party affected by it has the one or the other, and at times more than one, of the four remedies: (*i*) **Damages,** (*ii*) **Specific performance,** (*iii*) **Quantum Meruit,** (*iv*) **Injunction.** The remedy must be obtained through the court unless mutually settled by the parties and what relief will be given in a particular case depends as much on what the affected party claims as on the nature of the agreement broken. For instance, in a contract for painting the affected party may claim specific performance but the nature of the contract is such that the pointer cannot be compelled to perform the contract. In that case, the court will prefer giving compensation, may be of such a heavy amount that the painter will be compelled to perform the contract specifically if he wants to be saved from the payment of the heavy compensation.

1. **Damages :**

It means compensation for the loss suffered by the affected party on account of the breach of the contract. It can be claimed in every case. Damages may be **nominal** or **substantial.**

(*i*) **Nominal damages** are granted by way of vindication of a right, generally in those cases where the party complaining has either suffered no actual damage as a result of the breach or the loss suffered is not accurately estimable. Thus, A contracts to marry B and later breaks it. On assessment of facts it is found that B has not thereby been injured materially. Nevertheless, a nominal compensation may be awarded against A just by way of establishing that B has a right to be married to A and the breach of that right itself constituting an injury to her, she has a claim to compensation. Nominal damages are so called because they bear no relation to the cost and trouble of suing, and the sum awarded is so small that it may be said to have "no existence in point of quantity", e. g., one paisa or one shilling.

But nominal damages are not necessarily small damages (*Mediana* V. *Comet*, 1900, A. C. 113).

(ii) **Substantial** or **ordinary damages** are awarded where it is necessary to compensate the plaintiff fairly for the injury he has actually suffered. These are also, therefore, called **compensatory damages.**

In the matter of awarding substantial damages, the true test is what sum would afford, under the circumstances of the particular case, a fair and reasonable compensation to the party wronged for the injury done to him, the plaintiff's own estimate being regarded as the maximum limit. The measure of reparation or damages for any injury should be assessed as nearly as possible at a sum of money which would put the injured party in the same position as he would have been if he would not have sustained the injury (Geet Kumari Poddar V. Chittagong Engineering and Electric Supply, Co., Ltd., 1946, 2 Cal. 433).

With regard to the measure of substantial damages, the loss for which the compensation is claimed, (a) must *arise naturally* from the breach in question or (b) might reasonably be supposed to have been in the contemplation of the parties at the time of entering into the contract. These two criteria for a proper estimate of loss suffered through breach of contract were laid down in the English case of *Hadley* V. *Baxendale* (1854, I Ex.374).

Hadley V. Baxendale: Rules evolved therein. The facts of the case were as follows : The owners of a flour mill sent a broken iron shaft to the office of the defendants, who were common carriers, to be conveyed by them to the consignee to whom it had been sent by the plaintiff mill owners as a patten by which to make a new shaft. Owing to the negligence of the carriers, i. e, the defendants, the delivery of the shaft was delayed and the plaintiff could not get a new shaft for many days, as a result of which the plaintiff's mill was closed. It was held that the carriers never contemplated at the time of the contract that the mill would be closed if the new shaft did not come quickly. The mill might easily have had a spare shaft under the same conditions. Of course, if the owners of the mill had

informed the carriers at the time that the mill would be closed in case of delay in the delivery of the shaft, the case would have been different.

Two rules of estimating damages were evolved out of this case. They are:—

(*i*) *The loss for which damages are claimed must arise naturally out of the breach of the contract.* This precludes the consideration of consequences that are remote. Thus, X delivers to Y, a common carrier, a machine, to be conveyed without delay to X's mill, informing Y that his mill is stopped for want of the machine. Y unreasonably delays the delivery of the machine and X, in consequence, loses a profitable contract with the Government. X is entitled to recover from Y, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that its delivery was delayed but not the loss sustained through the loss of the Government contract, because it is remote and not a natural or probable consequence of the breach.

(*ii*) *Losses which might be remote may still be recovered in an action for breach of contract provided such losses were contemplated by the parties at the time of the contract.* Thus, in the above case, the plaintiff could have recovered the loss of profits which might have been earned if they had informed the defendants at the time of the contract that the mill would be closed in case the delivery of the shaft was delayed.

It may be noted in this connexion that a party who suffers loss from a breach of contract is bound to do all that a reasonable and prudent man would do to mitigate the loss. He must not sit inactive. If he does not try to mitigate the loss as far as he can, he will not be entitled to that amount of loss which he might have prevented by timely vigilance. For instance, A agrees to buy cotton from B for the purpose of running his textile mill. B fails to supply the cotton. A should buy cotton elsewhere and sue B for the difference in price. He must not increase his loss by closing down his mill. If he does so, he will not be entitled to recover the loss thus incurred.

Pakistani Law. The Pakistani Law on the assessment of damages has been outlined in Sec. 73 of the Contract Act which lays down two standards for the purpose : (i) whether the damage naturally arose in the usual course of things from the breach ; and (ii) whether the plaintiff had the means of remedying the inconvenience and has neglected to avail himself of it. "In assessing the measure of damages the principle is that the plaintiff ought to be as near as may be in the same position as if the contract had been performed" (3, D. L. R, 23). "The principle by which courts are guided in awarding damages is *restitutio in integrum.* This means that the court will try to place the injured person in the same situation as if the contract had been performed". (P. L. R., 1954, Lah. 704).

Penalty and Liquidated Damages. Some contracts contain a stipulation that a specified sum shall be payable for its breach. The sum so fixed may be either:—

(*i*) *Penalty, i. e.,* a sum imposed as a punishment on the party committing a breach of the contract, the sum so imposed having no relation to probable losses sustained by the party affected by the breach.

Or

(*ii*) *Liquidated damages,* i. e., a sum payable as damages, the amount of which is determined by the parties beforehand, instead of being left to the Court, by a fair and honest estimate of probable losses likely to be caused by the breach.

Section 74 of the Contract Act provides against enforcing a stipulation of a penal nature, however well-deserved the punishment intended to be imposed might be. In such cases the Court can award such sum as damages as the court thinks fit. If, however, in the case of a breach of contract the court finds that a sum stipulated as damages in the contract is in the nature of liquidated damages, the same sum is decreed as compensation without it being increased or reduced.

Whether a stipulated sum is in the nature of penalty or liquidated damages is to be determined not by the wording of the stipulation but by reference to all the facts and circumstances of the particular case. Whether a sum fixed is penalty or liqui-

dated damages is often difficult to decide and the answer varies with the circumstances of each case (*Habibun* V. *Baldeo* 154 I. C. 200).

2. Specific Performance :

There are cases in which damages do not give adequate remedy to the party injured by the breach of the contract. In such cases, the court may at its discretion order the specific performance of the contract, i. e., compel the party to do what he has promised to do. Thus, A promises to sell B a manuscript of a book of Bernard Shaw, prepared in the dramatist's own hand writing. If B later breaks the contract and A insists on having the manuscript, the court will decree specific performance of the contract because no amount of compensation can be a sufficient remedy for the loss of he manuscript.

Unlike damages, specific performance cannot be claimed in every case nor as a matter of right. As per provision of Sec. 12 of the Specific Relief Act, in the following cases the court may, at its discretion, direct specific specific performance of a contract :—

(*i*) When the act agreed to be done is in the performance, wholly or partly, of a trust; or,

(*ii*) When there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done ; or

(*iii*) When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or,

(*iv*) When it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done. Thus, A transfers without endorsement but for valuable consideration a promissory note to B. A becomes insolvent, and C is appointed his assignee. B may compel C to endorse the note, for, C has succeeded to A's liabilities, and a decree for pecuniary compensation for not endorsing the note would be fruitless.

It must be borne in mind that "unless and until the contrary is proved, the court shall presume that the breach of a contract

to transfer immovable property cannot be adequately relieved by compensation in money and that the breach of a contract to transfer movable property can be thus relieved". (Explanation to Sec. 12)

But as laid down in Sec. 21 of the Specific Relief Act, contracts of the following classes cannot be directed to be specifically performed:—

(*i*) A contract for the non-performance of which compensation in money is an adequate relief.

(*ii*) A contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties or otherwise from its nature is such that the court cannot enforce specific performance of its material terms.

(*iii*) A contract the terms of which the court cannot find with reasonable certainty.

(*iv*) A contract which is in its nature revocable.

(*v*) A contract made by trustees either in excess of their powers

(*vi*) in breach of their trust.

or A contract made by or on behalf of a corporation or public company created for special purposes or by the promoters of such Company, which is in excess of its powers.

(*vii*) A contract the performance of which involves the performance of a continuous duty extending over a period longer than three years from its date.

(*viii*) A contract of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist.

(*i*) **Specific performance of part of a contract** : Section 13 of the Specific Relief Act provides that "a contract to do an act which, after the contract is made, becomes only **partially impossille** by reasons of the loss or destruction of a portion of its subject-matter, does not become void when the act so becomes partially impossible, but may, in the discretion of the court, be specifically enforced so far as it is still capable of performance". Thus, as laid down in *Kenny* V. *Waxham* (6, Mad. 355), A, entitled to an annuity for the life of B, contracted to

sell his right to C. Before completion of the sale, B .died but it was found that the annuity was to be paid to B from the date of the contract which was before the death of B. In these circumstances, it was held that although B was dead, A was entitled to specific performance and payment of the consideration.

(*ii*) Where a party to a contract is unable to perform the whole of his part of it but the part left unperformed bears only a small proportion to the whole in value and admits of compensation in money the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency. (Sec. 14). Thus A, contracts to sell B a piece of land consisting of 100 bighas. It turns out that 98 bighas of the land belong to A and the two remaining bighas to a stranger, who refuses to part with them. The two bighas are not necessary for the use and enjoyment of the 98 bighas nor so important for such use or enjoyment that loss of them may not be made good in money. A may be directed at the suit of B to convey to B th-98 bighas and to make compensation for the rest; or B may be directed, at the suit of A, to pay to A, on receiving the convey ance and possession of the land, the stipulated purchase money, less a sum awarded as compensation for the deficiency.

(*iii*) But if the part unperformed is large, or does not admit of compensation in money, the party who is unable to perform the whole of his part, is not entitled to obtain a decree for specific performance.

The court may, however, at the suit of the other party direct the party in default to perform specifically so much of the contract as he can perform, but the plaintiff seeking specific performance must relinquish all claim to further performance and all right to compensation either for the deficiency or for the loss or damage sustained by him through the default of the defendant (Sec. 15). Thus, A contracts to sell to B a piece of land consisting of 100 bighas. It turns out that 50 bighas of land belong to A, and the other 50 bighas to a stranger, who refuses to part with it. A cannot obtain a decree against B for specific performance of the

contract; but if B is willing to pay the price agreed upon and to take the 50 bighas which belong to A, waiving all right to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey those 50 bighas to him on payment of the purchase money.

(*iv*) When a part of a contract, which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part (Sec. 16).

(*v*) Section 17 of the specific relief Act lays down that "the court shall not direct the specific performance of a part of a contract excepting cases coming under one or other of the three last preceding sections", i.e., Sections 14, 15 and 16.

3. Quantum Meruit :

Taken literally, it means "the value of so much as has been done". When a party has done some work under a contract and the contract is repudiated by the other party, the party who has performed the work may sue either for damages for the breach of the contract or for *quantum meruit*. Thus, A contracts with B to construct a road for Rs. 25,000/-. After a certain portion of the work is done, B repudiates the contract and prevents A from proceeding with the work. In this case, A can claim a *quantum meruit* for the work already done by him over and above suing B for damages for breach of contract.

It is to be noted that a claim for *quantum meruit* is not based on the original contract, because the original contract is at an end by repudiation. It is a new implied contract arising from the offer and acceptance of the service.

4. Injunction:

An injunction is an order of the court restraining a party to a contract from breaking it. Like specific performance injunction is a discretionary remedy of the court, available in those cases where damages would not afford adequate relief. Further, an injunction may be issued only to provide a

negative remedy. For instance, A contracts with B to sing in his theatre for one year. After three months, she contracts with C to sing in C's theatre during the same period. On a suit by A, the court may issue an injunction on B restraining her from singing in C's theatre. But the court will not issue a positive injunction so as to compel A to sing in B's theatre.

An injunction may be temporary or perpetual. Section 53 of the Specific Relief Act says: "Temporary injunctions are such as are to continue until a specified time or until the further order of the court. They may be granted at any period of a suit." "A perfetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit: the defendant is thereby perpetually enjoined from the assertion of a right or from the commission of an act, which would be contrary to the rights of the plaintiff".

CHAPTER XI

BAILMENT

What is bailment ? "A' bailment", says Section 148 of the Contract Act, "is the delivery of goods by one person to another **for some purpose,** upon a **contract** that they shall, when the purpose is accomplished, be **returned** or **otherwise disposed of according to the direction of the person delivering them.** The person delivering the goods is called the **'bailor,'** and the person to whom they are delivered is called the 'bailere".

"If a person 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". (Explanation to Sec. 148).

As defined in the above section, the essential characteristics of bailment, therefore, are :—

(*i*) It consists in the delivery of goods. The word "goods" implies that there can be bailment of movable property only. Delivery of possession is essential. If there be a transfer of ownership, the transaction may be a sale or exchange but is not a bailment. A bailor, therefore, need not be the owner of the goods which he delivers.

(*ii*) The delivery must be for some temporary purpose, e. g., safe-keeping, repair, carriage, gratuitous use by the bailee or pawn.

(*iii*) The delivery is made upon a contract, express or implied. Thus, A goes to Casaba for his lunch and leaves his car in charge of the garage-keeper of the hotel. There is an implied contract that the car is to be returned to him when his luncheon is over. But it is not to be supposed that without an enforceable contract there cannot be a bailment. A bailment without a contract may be illustrated by the case of a person who is somewhat tipsy and finds another taking his watch out of his pocket, when the latter will be liable as a bailee. (*Reg.* V. *Reeves*, 5 *Jur. N. S.*

716). Similarly, there is no contract between the finder of a lost article and its owner; but the finder is treated in law as a bailee of the lost article.

(*iv*) The contract is to the effect that the goods delivered shall be specifically returned or otherwise disposed of according to the direction of the bailor, when the purpose of the bailment is over. There is thus no bailment where there is no obligation to return the identical subject-matter (*Re Gangaram*, 1943, *N.* 168). Money paid into a bank to the credit of a current account does not constitute a bailment. (*Devendra* V. *Gulab*, 1946, *N.* 114).

Kinds of bailment. In the leading case of *Coggs* V. *Bernard* (1 *Sm. L. C*), the classification of bailment in six sorts has been adopted from Roman Law. But in modern English Law a distinction is maintained only between two kinds of bailments: **Voluntary** and **involutary.**

The **Pakistani Law** provides for the following two kinds of bailment:—

(*i*) *Bailment for safe custody.* A gives his watch to B for the latter to keep it in safe custody for one month.

(*ii*) *Bailment for use.* This arises when the bailor delivers an article to the bailee for use by the latter in any general or specific way. A delivers his watch to B for the latter to use it for one month. Here the bailment is a bailment for use.

Whether the bailment is for safe custody or for use, the bailee can either charge for his services or render them free. When the bailee charges for his services the bailment is **a bailment for reward.** When, however, the bailee does not charge anything, it is a case of **gratuitous bailment.**

The Contract Act, however, makes reference to two other varieties of bailment, viz., '*Pledge*' and '*Finding of lost goods*'. To this also may be added '*Carriage of goods*,' for, a carrier is a bailee, with the obligation to deliver the identical goods in accordance with the instructions of their despatcher.

Rights and liabilities of the bailor:

Rights. (*i*) The bailor is entitled to the return of the goods bailed as soon as the purpose of bailment is served. If the bailee

defaults in so returning or tendering to return them at the proper time and place, the bailor is entitled to appropriate compensation for the loss of the goods or any damage to them from that time onwards.

(2) The bailor may rescind the contract of bailment if the bailee does any act with regard to the goods bailed which is inconsistent with the conditions of bailment. Thus, A gives his car to B for one month for the latter's personal use. B employs it for carrying passengers. A can terminate the bailment.

Duties. (*i*) The bailor is bound to disclose to the bailee faults in the goods bailed of which he 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. (Sec. 150 of Contract Act). Thus, A lends to B a horse which he knows to be vicious. He does not disclose the vicious nature of the horse. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

Section 150 of the Act also provides that "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". Thus, 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.

(*ii*) Where the conditions of the bailment are such that he goods are to be kept or to be carried or where work has to be done upon them by the bailee for the bailor, and the bailee will not receive any remuneration for such services, the bailor must repay to the bailee all the legitimate expenses which the has to incur in connection with the bailment. (Sec. 158).

(*iii*) The bailor is responsible to the bailee for any loss which the bailee may sustain by reason of the fact that the bailor was not entitled to make the bailment. For illustration, A gives to C a car for sale. It belongs to B. C believing that the car really belongs to A sells it to a third person. B sues C for damages for the unauthorized sale. A must compensate C for any damages that the court may award against C.

Rights and liabilities of the bailee :

Rigts. (*i*) A bailee is entitled to recover damages from the bailor if he suffers any injury resulting from the defects of the goods bailed.

(*ii*) He is also entitled to be reimbursed for all legitimate expenses incurred for the purpose of the bailment.

(*iii*) He can also recover compensation from the bailor for any loss caused to him due to any defect in the bailor's title.

(*iv*) *Bailee's particular lien.* Where, in pursuance of the contract of bailment, the bailee has rendered services involving the exercise of labour and 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 services he has rendered. (Sec. 170 of Contract Act). This is known as *bailee's particular lien.* Thus, 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.

But there is another kind of lien, called *general lien*, which means the right to retain goods for **general balance of accounts.** This lien is not, as a general rule, available to all bailees. Bankers, solicitors, factors, wharfingers and policy-brokers may exercise this general lien by virtue of which they can retain goods and securities of their customers on account of debts which are not in anyway connected with the goods or securities in question. For instance, A deposits some securities to get an advance of Rs. 10,000/- from a bank. A repays the advance later on. But it is found that A had previously taken an advance of Rs. 2,000/- without any security. The bank may retain the securities until A repays the previous advance of Rs. 2,000/-.

Goods retained on general lien cannot be sold for the realization of dues. They can only be retained. Goods retained on a particular lien can be sold if there is an agreement to that effect.

Duties. (*i*) In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence, under similar circumstances, would take of his own goods

of the same bulk, quality and value as the goods bailed. (Sec. 151 of Contract Act). In the absene of any special contract to the contrary, a bailee is not responsible for the loss, destruction or deterioration of the property bailed provided he has taken as much care as a prudent man would of his own property (Sec. 152).

What is ordinary prudence is in every case determined by the court with reference to all the circumstances of the case, the usage and customs relating to the bailment of the goods in question and such other relevant matters.

(*ii*) If the bailee makes any unauthorized use of the goods bailed, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them (Sec. 154). Thus, 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 to A for the injury done to the horse.

(*iii*) If the bailee, with the consent of the bailor, mixes the goods bailed with his own goods, the bailor and the bailee shall have an interest in proportion to their respective shares in the mixture thus produced. (Sec. 155). Thus, A bails 3 maunds of sugar to B. With A's consent B mixes 1 maund of sugar with A's. In the total mixture A's share will be $\frac{3}{4}$ and B's $\frac{1}{4}$.

(*iv*) 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 expense of separation or division and compensate any damage arising from the mixture (Sec. 156). Thus, A bails 100 bales of cotton marked with a 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 also make good any other incidental damage.

(*v*) 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. (Sec. 157). Thus, A bails a barrel of Cape flour worth Rs. 450/-to B. B, without A's consent, mixes the flour with country flour of his own, worth only Rs. 250/-. B must compensate A for the loss of his flour.

(*vi*) The bailee must 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 (Sec. 160)

(*vii*) The bailee is bound to return, deliver or tender the goods bailed at the proper time. If by 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 (Sec. 161).

(*viii*) The bailee is bound to deliver to the bailor or anyone whom the bailor directs, any increase of profit which may have accrued from the goods bailed (Sec. 163). Thus, 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.

Bailment of pledges. The bailment of goods as security for payment of a debt or performance of a promise is called **pledge.** The bailor, in this case, is called the **'Pawnor'** and the bailee is called the **'Pawnee'.** (Sec. 172 of Contract Act). In pledge, therefore, there is a contract, express or implied, that the Pawnor is to deliver something as security for a loan or performance of some obligation and the Pawnee is to return the thing when the debt is paid or the obligation performed. As in the case of bailment so also in the case of pledge, the delivery may be actual or constructive.

There are **three classes of securities:** *the first*, a simple lien, *the second*, a mortgage passing the property out and out; *the third*, security intermediate between a lien and a mortgage, viz.,- pledge, where, by a contract, a deposit of goods is made as ecurety for a debt, and the right to the property vests in the pledge so far as is necessary to secure the debt. (*Halliday* V. *Holgate L. R.* 3 *Ex.* 299).

Mortgage pledge. (*i*) A mortgage conveys the entire property in the thing mortgaged to the mortgagee conditionally so that when the condition is broken the property remains absolutely in the mortgagee. A pledge conveys not the general property to the pawnee but only a special property in the thing pledged, and the consequence of a default in the payment of the debt is not to vest the entire property in the thing pledged in the pawnee, but to give him a power to sell it, accounting for the surplus. If the pawnee neglects to use this power, the general property in the thing pawned continues in the pawnor who has a right to redeem it at any time.

(*ii*) A mortgage may not be accompanied by delivery of possession but the delivery of possession, actual or constructive, is essential to the contract of pledge.

Pledge and lien. In two respects, a lien is distinguished from both a pledge and a mortgage: (*i*) A lien confers no right to sell. It creates only a right to retain until the debt in respect of which the lien is made is satisfied. But a mortgage or a pledge gives the right sell the property mortgaged or pledged respectively: (*ii*) A lien passes no property. A mortgage conveys the entire property in the thing mortgaged, while a pledge conveys a special property in the thing pawned.

Pledge and Hypothecation. Where the legal property in goods passes to the person who lends money on them, but the possession remains with the borrower, it is hypothecation. It may be created in respect of both movables and immovables. [Though not accompanied by delivery of possession, the validity of hypothecation of movables has been recognized in Indo-Pakistan and it has sometimes been enforced even against a bona fide purchaser without notice. Such hypothecation is not governed by the Transfer of Property Act or the Contract Act. The court, in such cases, is, therefore, thrown back upon principles of equity and justice (*Haripada* V. *Anath*, 22 *C. W. N.* 758).]

Both pledge and hypothecation confer the right to sell the property involved to realize the debt if the borrower defaults in the stipulated time. The point of distinction is, however, that

while in hypothecation possession is not delivered, in pledge delivery of possession, actual or constructive, is essential.

Rights of the Pawnee :

(*i*) The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise but for the interest of the debt and all necessary expenses incurred by him in respect of the possession of or for the preservation of the goods pledged. (Sec. 173). But the Pawnee cannot, unless there is a contract to the contrary, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged. (Sec. 174).

(*ii*) The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged. (Sec. 175).

(*iii*) If the pawnor makes default in the payment of the debt or the performance of the promise by the stipulated time, the pawnee may bring a suit against the pawnor upon the debt or promise and retain the goods pledged as security; or he may sell the goods by giving the pawnor reasonable notice. If the proceeds of such sale are less than the amount due, the pawnor is still liable to pay the balance. If the proceeds of the sale exceed the amount due, the pawnee shall pay over the surplus to the pawnor. (Sec. 176)

(*iv*) If a third person wrongfully deprives the pawnee of the use or possession of the goods pawned, or does them any injury, the pawnee is entitled to such remedy as the owner might have had in the like case if no bailment had been made. And whatever is obtained by way of relief or compensation shall, as between the pawnor or the pawnee, be dealt with according to their respective interest.

Rights of the pawnor. If a time is stipulated for the payment of the debt, or the 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 them, but he must, in that case, pay, in addition, any expense which has arisen from his default.

It may be noted in this connexion that an agreement that a pledge would become irredeemable after a certain time is not *per se* a penalty, unless the value of the article pledged is very much larger than the amount of the loan. (*Dwarika V. Bhagwati*, 1939, R. 413).

A Finder of goods. A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee, (Sec. 71). It is also to be remembered that the finder has a good title over the things found and that his right is enforceable against all except the real owner. (*Armory V. Delamirie*, 1 *Sm. L. C*).

The finder of goods has no right to sue the owner for compensation for trouble and expenses voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods as against the owner until he receives such compensation

When the owner has offered to give a specifc reward for the return of lost goods, the finder may sue for such reward and may retain the goods until he receives it.

The finder may sell the thing found if :—

(*i*) the thing found is commonly the subject of sale; and,

(*ii*) the owner cannot be found with reasonable diligence or the owner refuses to pay the lawful charges; and,

(*iii*) the thing is in danger of perishing or losing the greater part of its value or the lawful charges amount to two-thirds of its value.

Termination of bailment. A contract of bailment is terminated in the following ways:—

(*i*) When the time for which the goods were bailed has expired. A lends his plough to B for 3 months. The bailment will be discharged at the end of the stipulated period.

(*ii*) When the purpose for which the goods were bailed has been accomplished. A lends B his typewriter for typing a certain document. The bailment will terminate as soon as B has finished typing the document.

(*iii*) A gratuitous bailment is terminated by the death of either the bailee or the bailor.

(*iv*) When the bailee does an act inconsistent with the contract of bailment, the bailor can terminate the bailment at his option.

CHAPTER XII

INDEMNITY AND GUARANTEE

Contract of Indemnity :

"A Contract by which one party promises to save the other from loss caused to him by the conduct of the promissor himself, or by the conduct of any other person, is called a 'Contract of Indemnity" (Sec. 124 of Contract Act). For illustration, (i) 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 and (ii) A bond containing these words, "If the aforesaid person fails to pay the amount thereof, I will pay it in accordance with the bond", has been held to be a contract of indemnity (*Nandlal* V. *Surajmal*, 138 *I. C.* 879).

Contract of Guarantee. "A 'Contract of Guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default" (Sec. 126). A tells B : "Lend money at interest to C; if C be unable to pay, I shall pay". This is a contract of guarantee.

A **'Contract of guarantee'** is also called a **'Contract of Surety-ship'.** The person who gives the guarangtee is called the '*Surety*'; the person in respect of whose default the guarantee is given is called the '*Principal debtor* and the person to whom the guarantee is given is called the '*creditor*'. In the above illustration, A is the surety, C, the principal debtor and B, the creditor.

A contract of guarantee is an *accessory contract*—a collateral undertaking—given by way of additional security to the creditor by the surety with the object of strengthening the position of the creditor in the contract between him and the principal debtor. The surety's promise to discharge the debt is in addition to the principal debtor's promise.

A contract of guarantee implies the existence of the liability of a third party, whether actual or prospective. If the third party be not primarily liable, the contract is not one of guarantee. The

guarantee may also be a *fidelity guarantee*, e. g., an agreement guaranteeing the employer against the misconduct of the employee.

The contract of guarantee is also regarded by some as a contract *Uberrimae fidei*, requiring a full disclosure of all facts likely to affect the judgment of the intending surety. Some others are, however, of a different view and hold that a contract of guarantee does not require the same fullness of disclosure as is necessary for a contract of sale. This difference of opinion apart, there is no controversy that any guarantee which has been obtained by means of misrepresentation or silence as to a material circumstance on the part of the creditor, is invalid.

Because, in making himself liable for the debt or default of another the surety may derive no benefit whatsoever, it may seem that his promise to the creditor is unsupported by any consideration. But that is not the fact, for, "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". (Sec. 127 of Contract Act).

Continuing guarantee. A guarantee which extends to a series of transactions is called a continuing guarantee. (Sec. 129) A, in consideration that B will employ C in collecting the rents of B's estate, promises to be responsible to the extent of 5,000 rupees for due collection and payment by C of those rents. This is a continuing guarantee.

The distinction between an *ordinary* and a *continuing* guarantee is important in reference to the duration of the liability of the surety. Under the former, the surety is liable only in respect of one single transaction. Under a continuing guarantee, the surety is *prima facie* liable in respect of any of the successive transactions which come within its scope unless revoked in the manner laid down by law.

Revocation of continuing guarantee. (*i*) A continuing guarantee may, at any time, be revoked by the surety, as to future transactions, by notice to the creditor (Sec. 130). Thus, A made a written promise to B that if B would discount C's bills, A would guarantee the payment of such bills to the extent of Rs. 600/- during a period of 12 calendar months. Some bills were discounted

by B and duly paid. But the twelve months had expired. A revoked the guarantee and announced that he would not be liable for any more bills. B continued to discount the bills for one year and then sued A. It was held that A was not liable for the bills discounted after the notice of revocation had been served on B. (*Offord* V. *Davies*, 12 *C. B. N. S.* 748).

(*ii*) The death of the surety operates, in the absence of a contract to the contrary, as a revocation of a continuing guarantee so far as regards future transactions (Sec. 131). But if from the contract it can be gathered that there was an agreement that the death of the surety would not operate as a revocation, then the contract of guarantee must be held to continue even after the death of the surety (*Durga* V. *Durga*, 55 *C* 154). In *Muhammad* V. *Muhammad* (43 A 132), A and B engaged themselves as sureties and executed a bond on behalf of C binding themselves personally and their representatives after their death. A died. C embezzled a sum of money which was recovered from B. B sued the heirs of A for contribution. It was held that he was entitled to recover, for, the agreement showed that the bond should remain operative after the death of the sureties and there was no stipulation, express or implied, that the death of one of the sureties by itself would terminate the responsibility.

Distinction between Indemnity and Guarantee. (*i*) In a contract of indemnity there are only two parties, namely, the person who promises to indemnify and the person who is to be indemnified against loss. But in a contract of guarantee there must always be three parties, namely: (*a*) the surety, (*b*) the creditor and (*c*) the Principal debtor.

(*ii*) In a contract of indemnity there is but one contract between the two parties involved but in a contract of guarantee, there are three contracts: (*a*) one between the creditor and the principal debtor, (*b*) another between the surety and the creditor and (*c*) the third, an implied contract, between the surety and the principal debtor, by virtue of which the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the contract of guarantee.

(*iii*) In a Contract of Indemnity the liability of the promissor

is primary. He makes himself primarily liable for the loss to be suffered by the promisee. But in a contract of guarantee the surety's liability is conditional upon the default made by the principal debtor. Thus, A requests B to lend money to C and says "I shall see you repaid". This is obviously a contract of Indemnity because A makes himself primarily responsible for the repayment of the loan and does not ask B to look to C for it. But if A says that he will repay the loan if C defaults, it is a contract of guarantee, because A's liability arises only on C's default and not before.

(*iv*) In **English Law,** the contract of guarantee must be in writing or there should be a written memorandum in compliance with the provisions of the statute of Frauds; otherwise, the Contract is unenforceable. But the contract of Indemnity is outside the operation of the statute. In **Pakistani Law,** however, no such formality is prescribed for the contract of guarantee.

The distinction between Indemnity and guarantee has thus been made out in two leading cases:—

(*a*) There is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter into a contract of liability, indemnified against that liability independently of the question whether a third person makes default or not" (*Guild* V. *Conrad*, 1894, 2 *Q. B.* 885).

(*b*) "A promise of guarantee is a promise made to the person to whom another is already or is to become answerable. A contract of indemnity has no reference to the debt of another but creates a new liability which is undertaken by the promissor". (*Harburg & Co.* V. *Martin*, 1902, *I. K. B.* 778).

Rights of an indemnity holder. Acting within the scope of his authority, the promisee in a contract of indemnity has the following rights (Sec.125 of Contract Act):—

(*i*) He can recover from the promisor all the loss which the promissor promised to indemnify.

(*ii*) He can recover all damages which he may be compelled to pay in any suit relating to the subject-matter of the indemnity. An Insurance Company insures A's car against all loss and

accident. A, while driving his car, knocks against B's car and injures it. B sues A and the court awards damages against A. The Insurance Co. is liable to make good the damages to A.

(*iii*) He can recover all costs necessary for bringing or defending such suits as are referred to in Clause (*ii*) above, provided he did not act contrary to the order of the promissor and acted as it would have been prudent for him to do in the absence of any contract of indemnity or if the promissor authorized him to bring or defend the suit.

(*iv*) He can also recover all sums of money which he may have paid under the terms of any compromise of any such suit as referred to above provided the compromise was not contrary to the orders of the promissor and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promissor authorized him to compromise the suit.

(*v*) As laid down in *Prafulla* V. *Gopee* (1946 *C.* 159), the promisee is also entitled to certain equitable reliefs according as the court may consider just and nescessary in consideration of the circumstances of each particular case.

Rights and Liabilities of the surety:

Rights (*i*) Where a guaranteed debt has become due, or where the principal debtor has defaulted in performing a guaranteed duty, 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. He can, therefore, proceed against the principal debtor in the same way as the creditor can when he pays or performs all that he is liable for (Sec. 140).

(*ii*) If the principal debtor gives any security to the creditor at the time of the contract, the surety is entitled to the benefit of every such security. If the creditor loses or parts with the securities without the consent of the surety, the liability of the surety is reduced to the extent of the value of the securities (Sec. 141). Thus, C advances to B, his tenant, Rs. 2000/- on the guarantee of A. C has also a further security for Rs. 2000/- 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.

(*iii*) A surety is entitled to be reimbursed by the principal debtor for all rightful payments he makes on behalf of the debtor to the creditor.

Liabilities. The liabilities of the surety are co-extensive with those of the principal debtor unless it is otherwise provided by the contract. Thus, 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.

Rights and Liabilities as between co-sureties :

Who are Co-sureties ? Co-sureties are persons who guarantee the same debt or performance of the same duty to the same creditor in respect of the same principal debtor. It is not necessary that they should guarantee in the same contract or at the same time. A person may be a co-surety of another without his knowledge.

Principle of contribution among *Co-sureties.* (*i*) In the absence of a contract to the contrary, co-sureties, whether bound jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, 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 debtor (Sec. 146). Thus, A, B and C are sureties to D for Rs. 3000/- lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay Rs. 1000/- each.

(*ii*) Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit. Thus, A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, viz., A in the penalty of Rs. 10,000/-, B in that of Rs. 20,000/- and 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. A's limit permits him to pay Rs. 10,000/- only, and B and C are to pay the balance equally.

Where there are co-sureties, a release by the creditor of one

of them does not discharge the other or others; neither does it free the surety so released from his responsibility to the other sureties.

Discharge of surety. In the absence of any contract to the contrary, the liability of a surety is discharged in any one of the following ways:

(*i*) *By variation of the original contract.* When any variance is introduced into the terms of the contract by the creditor and the principal debtor without the surety's consent, the old contract is terminated and with it also the liability of the surety as to transactions subsequent to such variation is discharged (Sec. 133 of Contract Act.) Thus, C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming 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 subsequent misconduct of B.

(*ii*) *By discharge or release of the principal debtor.* If the liability of the principal debtor is discharged, the liability of the surety is also discharged. This discharge of the principal debtor's liability may take place either when the creditor releases him by a fresh contract or the creditor does or omits to do something, the legal consequence of which is the discharge of the principal debtor (Sec. 134). Thus, (*a*) A gives a guarantee to C for goods to be supplied by C to B. C supplies 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 for a fixed price to build a house for B 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.

(*iii*) *By composition.* If a contract is made between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time, to or not to sue, the principal

debtor, it discharges the surety, unless the surety assents to such contract. (Sec. 135). **But the surety is not discharged when the** contract to give time to the principal debtor is made by the creditor with a third person and not with the principal debtor (Sec. 136). Thus, C, the holder of an overdue bill of exchange drawn by A, as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged. **Similarly,** mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not discharge the surety, unless the guarantee makes a provision to the contrary (Sec. 137). Thus, B owes C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

(*iv*) *By the creditor's act or omission impairing surety's eventual remedy.* 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 (Sec. 139). Thus, A puts M as apprentice to B and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see that M makes up the cash. B omits to see this done as promised and B embezzles. A is not liable to B on his guarantee.

PARTNERSHIP

PARTNERSHIP

(INDIAN PARTNERSHIP ACT, 1932)

1. Definition and nature of partnership :

As defined in Section 4 of the Indian Partnership Act, 1932 (as adapted in Pakistan), "Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all". Persons who have entered into partnership with one another are individually called "Partners" and collectively "firm" and the name under which their business is carried on is called the "firm name".

When analysed the above definition of partnership is found to contain three broad elements all of which must, therefore, be present at the same time to constitute a partnership. These elements are:--

(*i*) There must be an agreement between two or more persons. Partnership is the product of a contract; it is not created by the operation of law. The number of persons must be two or more, but not exceeding twenty and, in the case of a banking firm, not exeeding ten.

(*ii*) The object of the agreement or the contract is to carry on a business with a view to the earning of profit. Where there is no combination to earn profit by doing business, there is no partnership. The mere fact that several persons own something in common which yields returns and divide those returns according to their respective interests, does not make them partners. The business to be carried on must, of course, be legal and the profits contemplated here are "net-profits".

(*iii*) The business must be carried on by all the persons so associated or by any of them acting on behalf of all.

If any of the above three elements is lacking, there is no partnership. For instance:—

(*i*) A, B and C own a house jointly, having either bought it or inherited it from their father. They collect the rent and share

it between themselves. The relation between A, B and C is not one of partnership, for, there is no business with which they are associated. They are simply co-owners of the house.

(*ii*) A, B and C jointly start a store to sell medicine to students at cost price. As the object of the business is not to earn any profit, A, B and C will not be deemed partners.

Rules for determining the existence of Partnership :

Section 6 of the Partnership Act lays down that "in determining whether a group of persons is or is not a firm or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together". The Act has laid down the following to assist the determination of the existence of partnership:—

(*i*) *Distinction with co-ownership.* A careful distinction of partnership from co-ownership facilitates clear appreciation of the nature of partnership. While co-ownership simply connotes the ownership of any particular thing being vested in more than one person, partnership signifies the association of more than one person in a business with a common purpose, namely, the sharing of profits and losses. Thus, co-owners of a ship are not necessarily partners. But if the owners engage the ship in a commercial venture they constitute themselves as partners (*Green V. Briggs*, 1847, 6 Ha. 395).

(*ii*) The sharing of profits or gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners (Exp. I to Sec. 6). In *Lyon* V. *Knowles* (1863, 3 B & S., 556), the proprietor of a theatre hall let the hall to a man named Dillon. Dillon produced shows, managed the theatre and paid all the expenses. The proprietor of the hall paid for only a few minor expenses. The arrangement between the proprietor and Dillon was that the proprietor would collect all the box money and appropriate half of it. In consideration of the above facts of the case, the court found that the proprietor of the hall shared no risk, incidental to the running of the shows, with Dillon. He

simply appropriated half of the box money as payment for the rent of the hall. He **did not share net profits** but took only gross profits and as such was not a partner with Dillon.

(*iii*) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business but the receipt of such a share or of a payment contingent on or varying with the profits of a business does not of itself make him a partner in the business. The Partnership Act lays down the following particular exceptions where the sharing of profits does not constitute a partnership:

(*a*) Where a lender lends money to persons engaged in business or is about to engage in business, and receives payment by instalments out of the profits of the business, the lender shares profits but does not thereby become a partner.

(*b*) Where a servant or an agent receives remuneration on the basis of profits of a business such servant or agent shares profits but does not thereby become a partner.

(*c*) Where the widow or child of a deceased partner is given an annuity created by a share of profits, such widow or child shares profits but does not thereby become a partner.

(*d*) Where the seller of a business shares profits out of the business in consideration of the sale of that business, such seller shares profit, but he does not thereby become a partner.

Creation of Partnership. A Partnership is created by agreement between persons to be associated as partners in a business, particular or general. The agreement may be oral or written. But, generally where the business is large, the partnership contract is reduced into writing and the terms by which it is to be governed are embodied in a written document called the '*Articles of Partnership*".

The Partnership name. The partnership firm may carry on its business under any name it chooses; this name may be the name of one or more of its members, or a combined title embracing the names of all or may be made up of a designation entirely

different from the names of the members composing it. In law, however, a Partnership has no distinct existence like that of a joint-Stock Company, (For details see *poste*).

"The name of a firm", says Lindley, "is only a convenient mode of designating the persons composing it, and variation among these persons is productive of a new significance of the name. If, therefore, a legacy is left to the representative of an old firm, it will be payable to the executors of the last surviving partner constituting it and not to its successor in business". The firm's name, therefore, is only the title under which the partners are supposed to trade and all that can be claimed for it is that by a continuous use of that name in the long course of trading a goodwill may be acquired which may be of value. There is nothing to prevent other persons from using a similar name unless where it can be shown that the use of such name would deprive its old users of the advantage of its goodwill by creating an incorrect impression in the minds of the people that the persons represented by the name are the same persons as made up the old firm whose name they are imitating (*Massam* V. *Thorley's Cattle Food Co.*, 1880, 14 Ch, Division, 748).

Partnership and Joint Hindu family firm:

Section 5 of the Partnership Act lays down that the *members of a Hindu undivided family* carrying on a family business as such or a *Burmese Buddhist husband and wife* carrying on a business as such are **not** partners in such business. Such persons can only be regarded as managing members of the family business and are personally liable for the obligations of the firm, but it would be inaccurate to regard them as partners either *inter se* or as regards third parties. The distinction between Partnership and a joint Hindu family business may be set forth as follows:—

(*i*) A joint Hindu family firm is created by the operation of Hindu law whereas an ordinary partnership is created by a contract. Members in a joint family business is the result of status and not of contract.

(*ii*) In a joint family firm, the manager or managers have an implied authority to contract debts and pledge the property and

credit of the family for the ordinary purpose of family business (*Bemola* V. *Mohim*, 188, 5 Cal. 792) but no other co-parcener has such authority (*Krishna* V. *Krishnaswamy*, 1900, 23 Mad. 597). In an ordinary partnership every partner is the agent of the firm for the purpose of the business of the firm and the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm binds the firm, (Secs. 18 and 19).

(*iii*) The death of a member of a joint family, i. e., a co-parcener or even of the managing member does not dissolve the business, and the property in the business passes by survivorship to the surviving members like any other form of joint family property. But a partnership is dissolved by the death of any one partner unless there is a contract to the contrary contained in the articles for the continuance of the business by the survivors, (Sec. 42).

(*iv*) In a joint Hindu family firm a minor becomes a member from the moment of his birth but in a partnenship a minor cannot become a partner, though he may be admitted to the benefits of partnership with the consent of all.

(*v*) When severing connection with the partnership business, a partner is entitled to ask for an account of past profit and loss. But a co-parcener, when cutting himself off from a family business or when suing for its partition, cannot ask for an account of past profits and loss (*Samalbhai* V. *Someshsar*, 1880, 5 Bom. 38).

(*vi*) In an ordinary partnership, every partner is personally liable for the debts and liabilities of the partnership, that is to say, not only the share of each partner in the partnership assets, but his separate property also would be liable for the partnership debts, (Sec. 25). In a joint family firm carrying on an ancestral business, only the managing member of the firm being a party to the contract is personally liable, i. e. his separate property besides his share in the joint family property is liable. But as regards other members, whether adults or minors, they are liable only to the extent of their interest in the joint

family property, unless in the case of adult members the contract is one to which they may be shown as actual parties.

(*vii*) Under Sec. 69 of the Indian Partnership Act, every firm is required to be registered in order to maintain suit by the firm or by one partner against other partners; but no such registration is necessary in the case of a joint Hindu family firm.

(*viii*) The rights and liabilities of the co-parceners are governed by Hindu Law. But the rights and liabilities of partners in respect of the partnership are governed by mutual contract subject to the Partnership Act.

Partnership at will. "Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is '*Partnership at will*" (Sec. 7).

The question whether partnership is "'*at will*" or not often arises when there is a dispute as to the right of a partner to retire from the firm or to dissolve the same. In the case of "*Partnership at will*", a partner can retire from the firm or dissolve it whenever he thinks proper by merely giving notice in writing to the other partners of his intention to that effect. (Secs. 32-1c and Sec.43-1). This does not, however, mean that a partner can give a notice at an unreasonable moment (*Burdon* V. *Burkus*, 1852).

Particular Partnership. When a partnership has been formed for a particular adventure or undertaking, it is called a particular partnership, (Sec. 8).

The difference between a particular partnership and an ordinary partnership is that the partners incur no responsibility beyond the limits of the particular adventure or undertaking. Thus, A and B carrying on business of banking as A, B & C Co. in Karachi, Lahore and Dacca may enter into an agreement with C that all three of them will be partners in the firm of A, B, and Co . at Chittagong (and not at other places). In such a case, the rights and liabilities of C are confined only to the extent of the business and obligations of the Chittagong firm.

The term "business" used in the definition of partnership

includes also a single commercial adventure on which parties may embark. Thus, for instance, there may be particular partnership between a diamond merchant and a diamond broker in respect of a particular packet of jewellery (*Oppenheimer* V. *Frazer*, 1907, 2 K. B. 50).

Subject to any agreement between the partners, a particular partnership is dissolved by the completion of the adventure or undertaking for which the partnership was formed.

Relation of Partners to one another. Since the relation of partnership is created by contract, the mutual rights and liabilities of the partners may be wholly governed by the terms of the partnership agreement. Thus, a partnership agreement between A, B and C may provide that A will act as the 'Managing Partner' so as to manage the entire business or it may provide that A will sign cheques and bills, B will make appointments and removals of staff and C will look after the purchase and sale of the business and so on. But whatever may be the terms of the agreement or in the absence of any written agreement at all, the following conditions are imposed by the Partnership Act:

1. *Utmost good faith.* Section 9 of the Act requires that each partner must act with utmost fidelity towards the firm and other co-partners with a view to achieving the greatest common advantage of all. "Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative". Thus, where the motive for the expulsion of a partner was found to be to purchase the interest of the expelled partner on unfavourable terms, it was held to be a breach of good faith and the expulsion was thus held invalid. (*Green* V. *Howell*, 1910 I ch. 459).

2. *Duty to indemnity for loss.* Sec.10 requires that "each partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm". Thus, A, B and C are partners in a business of manufacture. A, authorized to do so, appoints his brother as the firm's sole distributor at

an abnormally high rate of commission. The firm suffers loss on account of such high rate of commission given to the sole distributor. A must indemnify the firm for the loss.

3. *Conduct of the business.* Under Sec. 12 of the Act, subject to any contract between the partners:—

(*i*) every partner has a right to take part in the conduct of the business of the firm;

(*ii*) every partner is bound to attend diligently to his duties in the conduct of the business;

(*iii*) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners; and

(*iv*) every partner has a right to have access to and also to inspect and copy any of the books of the firm.

4. *Mutual rights and liabilities.* Under Sec.15 of the Act, subject to contract between the partners:—

(*i*) a partner is not entitled to receive remuneration for taking part in the conduct of the business;—

(*ii*) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm;

(*iii*) where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits;

(*iv*) a partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent per annum.

The rule stated in this sub-section engrafts an important qualification upon the general rule recognized in sub-section (*iii*). It is to the effect that an advance by a partner to the firm is treated not as an increase of its capital, but rather as a loan on which interest should be paid so that subject to any agreement between the parties to the contrary, interest is payable on money paid or advanced on one partner for partnership purposes beyond

the amount of capital which he had agreed to subscribe. (*Govinda Chandra* V. *Haridas*, 1915, 20 C.W.N. 634).

(*v*) the firm shall indemnify a partner in respect of payments made and liabilities incurred by him : (a) in the ordinary and proper conduct of the business and (b) in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case under similar circumstances ; **and**

(*vi*) a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm.

5. *The property of the firm.* (a) Section 14 of the Act provides that subject to contract between the partners the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm or acquired by purchase or otherwise, by or for the firm, or for the purposes or in course of the business of the firm, and includes also the goodwill of the business.

Unless a contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm.

(b) Section 15 provides that subject to contract between the partners the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

6. *Personal profits earned by partners:* Section 16 lays down that subject to contract between the partners:—

(a) if a partner derives any profit for himself from any transaction of the firm or from the use of the property or business connection of the firm, or the firm name, he shall account for that profit and pay it to the firm. Thus, if a partner is employed to purchase goods for the firm and without the knowledge and consent of the other partners sells to the firm goods previously purchased by him at a lower price, he will have to account for that profit and pay it to the firm. (*Bentley* V. *Craven*, 1853, 18 Beav. 751)

(b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.

The justification of this rule is that in partnership matters there must be the utmost good faith between the partners, which is considered to be violated if a partner carries on a business similar to and competing with that of the partnership. But this rule can be invoked only where the business so carried on by a partner is not only similar in nature but is also in rivalry with or in anyway injurious to the business of the partnership and also where there is no agreement express or implied allowing such a business.

So, the mere fact that there are simular business in which a partner is engaged is not enough to justify the profits of those businesses being brought into the accounting. Unless, therefore, expressly restricted by agreement, a partner may carry on another business of the same nature so long as it does not compete with or otherwise injure the business of the partnership. He is not bound to account for the profits of a non-competing business, even though he may be enabled to push the private trade better than would otherwise be the case by reason of his connection with the firm. (*Mohammed Kamil* V. *Hedayetullah*, 1926 A.I.R., Cal. 380), The rule is not applicable where the business is not in rivalry with the business of the firm though the same knowledge and information may be useful in both. (*Pulin* V. *Mahendra*, 1921, 34 Cal. L. J., 405).

7. *After a change in the firm.* Section 17 provides that subject to contract between partners: (*a*) where any change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change as far as they may be;

(*b*) where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry so for as they may be consistent with the incidents of partnership at will; and,

(*c*) where a firm constituted to carry out one or more adventures or undertakings, the mutual rights and obligations of the partners in respect of other adventures or undertakings are the same as those in respect of the original adventures or undertakings.

Relations of Partners to third parties. A partner has been described in the Partnership Act as "the agent of the firm for the purposes of the business of the firm", (Sec. 18). This statement is an express recognition of the doctrine that the law of partnership "may be said to be a branch of the general law of principal and agent" (*Chundee Charan* V. *Eduljee*, 1881, 8 cul. 678).

An implied agency is inseparable from partnership. Each partner is regarded as an agent of the other partners and as such the partners are collectively liable for the acts or defaults of each other. This does not mean, however, that every act or default of a partner can affect the firm. In order that the firm may be bound, a transaction entered into by a partner must satisfy the following conditions:—

(*a*) The transaction must be **related to the normal business** of the firm. Thus if A and B carry on business as partners in a bookstall, a contract signed by A in the firm name to purchase cosmetics would not be binding on the firm or his co-partner unless it is made with the express authority of B, for, the purchase of cosmetics is not **connected with the normal business of a book-stall.**

(*b*) The transaction **must be an act for carrying on business in the usual way.** Thus, even though an act of a partner may be clearly related to the business of the firm, it will not bind the firm, unless it falls within the express or implied authority of a single partner.

(*c*) The transaction must have been carried out by the partner in the firm name or as a partner contracting on that basis or in any other manner expressing or implying an intention to bind the firm (Sec. 22).

(*d*) The transaction must be one which the partner has either express or implied authority to execute. If it is an act forbidden by other partners and if the third person with whom the partner enters into the transaction knows of the restriction, the act will not bind the firm.

Contracting in one own name's. A partner contracting in his own name can create only a personal liability and not the collec-

tive liability of the firm. The mere fact that money borrowed by a partner in his own name on security belonging to him personally has been used for the purpose of the firm with the knowledge of his partners, does not render them liable.

Implied authority of a partner. The general authority of a partner as agent of the firm has been variously designated as "implied", "ordinary", "apparent" and "ostensible". The word "implied" is favoured by noted authorities and seems to be the most suitable, as the kind of authority contemplated flows from, or is implied by, the relationship of partners.

Just as an agent's authority to bind the principal may be express or implied, so also a partner's authority to bind the firm may be express or implied. The express authority is a matter of contract between the parties. Implied authority is inferred from the circumstances of each particular case; Thus, it is always considered as within the implied authority of a partner : (a) to enter into all contracts usual in the ordinary course of business of the firm and to vary such contracts, if necessary, (b) to engage servants and agents, (c) to draw cheques in the name of the firm, (d) to adjust and settle accounts of partnership transactions with persons dealing with the firm, (e) to recover debt due to the firm, (f) to pay a debt on behalf of the firm, (g) to bring and defend suits in the name of the firm and (h) to do such other things as are necessary and usual for the proper conduct of the business of the firm. In an emergency, he has the implied authority to do all such acts for protecting the firm from loss as would be done by a person of ordinary prudence in his own case under similar circumstances. But, in the absence of any agreement or usage or customs of trade to the contrary, the implied authority of a partner does not empower him :—

(*i*) to submit a dispute relating to the business of the firm to arbitration;

(*ii*) to open a banking account on behalf of the firm in his own name;

(*iii*) to compromise or relinquish any claim or portion of a claim by the firm;

(*iv*) to withdraw a suit or proceeding filed on behalf of the firm;

(v) to admit any liability in a suit or proceedings against the firm;
(vi) to acquire immovable property on behalf of the firm;
(vii) to transfer immovable property belonging to the firm; and
(viii) to enter into partnership on behalf of the firm (Sec. 19).

It should be noted in this connection that a partner's implied authority may be extended or restricted by contract between the partners. Even when such restriction exists, the firm may nonetheless be liable for the contract of a partner which falls within his implied authority unless the party contracting with him knows the restriction.

Firm's liability for wrongful act of a partner. The firm is liable for the wrongful act or omission for a partner acting in the ordinary course of business of the firm.

If, acting within his apparent authority, a partner receives money or property from a third party and misappropriates it, the firm is liable to make good the loss.

Any admission or representation made by a partner concerning the affairs of the firm is evidence against the firm if it is made in the ordinary course of business. So also a notice given to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm is as good as a notice to the firm except in the case of a fraud on the firm committed by or with the consent of that partner.

"Holding out". As laid down in Sec. 28 of Partnership Act, when a person represents himself, or knowingly permits himself to be represented, to be a partner in a firm, he will be liable as a partner in that firm to any one who, on the faith of any such representation, has given credit to the firm; no matter whether the person representing himself or allowing himself to be so represented, does or does not know that the representation has reached the person so giving credit.

The person so representing himself or allowing himself to be so represented is known as a partner by holding out and the rule, embodied in Section 28 of the Act, under which such a partner is held liable is known as 'the doctrine of holding out' which is a part of the law of estoppel.

In order to hold such a partner liable, it is not necessary to show that he was influenced by a fraudulent intention. The determining element is not the motive with which the representation has been made, nor the state of knowledge of the party making it, but **the effect of the representation** as having caused another to act on the faith of it.

But, whereafter a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof, shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

Rights of transferee of a partner's interest. It has been held in *Mohammad Ibrahim* V. *Bazhul* (1950), that a partner's interest in the partnership can be regarded as a tangible property capable of being transferred. Now, under Section 29 of the partnership Act, when a partner transfers, either absolutely or by mortgage or by the creation of a charge on such interest the transferee, by virtue of such transfer, is not entitled to interfere in the conduct of the business of the firm. Nor is he entitled to call for accounts or inspect the books of the firm. The transfer entitles him only to receive the share of profits of the transferring partner and he is bound to accept the account of profits agreed to by the partners.

Sub-Section (2) of Section 29 lays down that if the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to call for an account as from the date of the dissolution.

Minor as a partner. As partnership can be created by contract alone a minor cannot be a partner in a firm for the simple reason that he has no contractual capacity. A minor may, however, be **admitted to the benefits of partnership** if all the partners for the time being consent to such admission.

When a minor is so admitted he has a right to such share of the property and of the profits of the firm as may be agreed

upon between the partners. He may also have access to and inspect and copy any of the accounts of the firm.

Such a minor is not personally liable for the liabilities of the firm. His share in the business alone is liable for such liabilities.

A minor admitted as above is not entitled to sue the partners for an account or payment of his share of the property or profits of the firm, except when he severs his connection with the firm.

After attainment of majority. The minor's position as regards the firm after his attainment of majority will be determined by the attitude he takes thereafter. A minor admitted to the benefits of partnership may, at any time within six months of his attaining majority or of his obtaining knowledge that he has been so admitted, whichever is later, give public notice that "he has elected to become or that he has elected not to become a partner in the firm". If he elects to become a partner he will become a partner; if he elects otherwise, he will cease to be a partner. But if he fails to give a notice, he will become a partner in the firm on the expiry of the said six months.

When a person becomes a partner in the above way.—(*i*) his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership and

(*ii*) his share in the property and profits of the firm shall be the share to which he was entitled as a minor.

Where such person elects not to become a partner. (*i*) his rights and liabilities shall continue to be those of a minor up to thedate on which he gives public notice ;

(*ii*) his share shall not be liable for any acts of the firm done after the date of the notice ; and

(*iii*) he shall be entitled to sue the partners for his share of profits when he severs his connections with the firm (Sec. 30).

English law. The English Law regarding a minor's liability as a partner is different. In English Law a minor may be a partner though he cannot be sued for partnership debt during his minority and the obligations contracted by him in the partnership, like

any other contract of an infant, are voidable at his option on attaining full age. If the infant partner continues to act as a member of the firm after attaining full age, or having acted as such during his minority does not disclaim it after the attainment of majority, he is answerable for debts of the firm contracted since his majority.

Registration. Though registration has not been made compulsory by the Partnership Act, it is inescapable for the following reasons of necessity.

First, it is a concrete and reliable evidence of the existence of partnership. So, when a firm is registered, the partners cannot deny the partnership to avoid liability. Under the previous law a person who obtained a decree against a firm was often put to much expense and delay in proving that a particular person was a partner in that firm. This hardship has been obviated by the provision for registration.

Secondly, Section 69 of the Act imposes certain disabilities on an unregistered firm such as the following:

(*i*) A partner cannot maintain a suit in any court against a third party, or against his other partners, unless the firm is registered and the person suing is or has been shown in the register of firms as a partner in the firm.

(*ii*) A firm cannot bring a suit against a third party to enforce a contractual right unless the firm is registered and persons suing are shown in the register of firms as partners in the firm.

To the above rule, there are the following exceptions:—

(*i*) When a partner sues for the dissolution of partnership, or for accounts after the dissolution for the realization of the property of the dissolved firm, he is not required to prove the registration of his name as a partner in the firm.

(*ii*) Registration is not necessary for firms or partners in firms which have no place of business in Pakistan or whose place of business in Pakistan is situated in areas to which Section 69 of the Partnership Act does not apply.

(*iii*) The powers of an official assignee, a receiver, or a Court under the Presidency Towns Insolvency Act, 1920, to realize the property of an insolvent partner remains unaffected.

(*iv*) Registration is not necessary to maintain any suit or claim of set-off not exceeding Rs.100/- in value which is not of a kind specified in the second Schedule to the Provincial Small Causes Court Act, 1887, or to maintain any proceeding in execution or other proceeding incidental to or arising from any suit or claim.

Formalities of Registration. As laid down in Section 58 of the Act, the registration of a firm may be effected at any time by application to the Registrar of firm who is appointed by the Provincial Government. The application for registration is to be accompanied by the prescribed fee (to be levied by notification) and statement of the following particulars :—

(*i*) the firm name,

(*ii*) the place or principal place of business of the firm,

(*iii*) the names of any other places where the firm carries on business,

(*iv*) the date when each partner joined the firm,

(*v*) the names in full and permanent address of the partners, and

(*vi*) the duration of the firm.

The statement must be signed by all the partners or by their agents specially authorized in this behalf.

A **firm name** must conform to the following rules:—

(*i*) It shall not contain any of the words, namely, 'Crown' 'Emperor' 'Empress' 'Empire', 'Imperial' 'King' 'Queen' 'Royal' 'Jinnah' 'Quaid-i-Azam', 'Dominion' or words expressing or implying the sanction, approval or patronage of the Crown or of the Quaid-i-Azam or the Central Government or any Provincial Government, except when the Provincial Government signifies its consent to the use of such words as part of the firm name by order in writing

(*ii*) It shall not contain the name of the "United Nations" or its abbreviations through the use of its initial letters or of any subsidiary body set up by that body unless it has obtained the previous authorization of the Secretary-General of the United Nations in writing.

(*iii*) A firm name shall not contain the name of the "World Health Organization" or its abbreviations through the use of its

initial letters unless it has obtained the previous authorization of the Director-General in writing.

When the registrar is satisfied that the above provisions have been complied with he shall record an entry of the statement in a register, called the Register of Firms, and shall file the statement and this will amount to registration of the firm, (Sec. 59). When the name of the firm is changed or the place of business is changed or any one branch is closed or opened or any new partner is introduced or any old partner retires, all such changes must be notified to the Registrar in a prescribed form and the Registrar will then note the changes in the Register of Firms.

Reconstitution of a firm :

A firm is said to be reconstituted when any of the following changes takes place:—

(*i*) *Introduction of a new partner.* Section 31 lays down that unless otherwise provided by a contract between the partners no person shall be introduced as a partner into a firm without the consent of all the existing partners. So if there is a previous contract between the partners permitting one or more of them to introduce new partners, effcet will be given to it. Otherwise, the consent of all existing partners will be necessary to the introduction of a new partner in order that the firm may work harmoniously. Thus, if an existing partner sells his share in the partnership, the purchaser of his share does not become a partner unless all the other partners agree to such transfer.

The operation of Section 31 is, however, subject to Section 30, i. e., even by agreement, the partners cannot admit a minor into partnership.

Sub-section 2 of Section 31 also lays down that a new partner does not, in the absence of special agreement, become liable for the debts of a firm existing before he became a partner. He is liable only for those debts which have been incurred after he became a partner.

(*ii*) *Retirement of a partnre.* A partner may retire :—

(*a*) with the consent of all other partners,

(*b*) in accordance with an express agreement by the partners, or

(*c*) where the partnership is at will, by giving notice in writing to all other partners of his intention to retire.

A retiring partner has to give a public notice of his retirement; otherwise he remains liable as a partner to a third party for acts of any of the partners which may be construed as acts of the firm. But a retired partner will not be liable to a third party who deals with the firm without knowing that he was a partner.

In the absence of agreement, a retiring partner does not cease to be liable for the debts of a firm incurred while he was a partner.

A retiring partner may still be liable as an apparent member of the firm in respect of all debts incurred to old customers of the firm, even after his retirement, unless such old customers have had actual notice of his retirement.

The rules stated above may be modified by special agreement between partners or between customers and the partners.

(*iii*) *Expulsion of a partner.* No majority of partners can expel a partner unless (a) such power is conferred by contract between the partners, and (b) the power is exercised in good faith, (Sec. 33).

An expulsion in contravention of the rules stated above will not entitle a partner so dealt with to claim damages. His only right is to seek reinstatement. (*Wood* V. *Wood*, 1874, 9 Ex. 190).

A legally expelled partner stands precisely on the same footing as a retired partner as regards his liabilities for existing and future debts of the firm.

(*iv*) *Insolvency of a partner.* Section 34 provides that a partner ceases to be a partner as soon as he is adjudged an insolvent. But the firm is not dissolved unless all the partners or all partners but one are adjudged insolvent.

If it be provided in the contract of partnership that the insolvency of one of the partners will not dissolve the partnership, the estate of the insolvent partner will not be liable for any act of the firm and the firm will not be liable for any act of the insolvent done after the date on which the order of adjudication is made. It is not necessary for either the insolvent partner or the firm to give public notice of the insolvency of the partner.

(*v*) *Death of a partner.* Unless otherwise provided by the Contract of Partnership, the death of a partner has the effect of dissolving the partnership. "Where under a contract between the partners the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after the death". (Sec.35).

Rights of an outgoing partner. An outgoing partner may carry on a business competing with that of the firm and he may advertis such business, but, unless there is a contract to the contrary,e he must not do any of the following acts :—

(*a*) Use the firm-name;
(*b*) Represent himself as carrying on the business of the firm;
(*c*) Solicit the custom of the persons who were dealing with the firm before he ceased to be a partner (Sec. 36-1).

A partner may make an agreement 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 ; and, notwithstanding anything contained in Sec. 27 of the Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable (Sec. 36-II).

Right of outgoing partner in certain cases to share profits. Where any member of a firm dies or otherwise ceases to be a partner as a result of retirement, explusion, insolvency or any other cause and the surviving and continuing partners carry on the business with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner has the option to claim either a share of the profits made since he ceased to be a partner or interest at the rate of six per cent per annum on the amount of his share in the property of the firm.

But if it be provided in the contract that the surviving partners will have the option to purchase the share of the outgoing partner and that the option has been duly exercised, then the outgoing partner will not have any share in the profits made by the firm after he has ceased to be a partner.

Similar are the rights of the representative of a deceased partner against other partners.

Dissolution of a firm. The dissolution of partnership between all the partners of a firm is called the "dissolution of the firm". A firm may be dissolved in any of the following ways :—

(*i*) As a result of any agreement between all the partners (Sec. 40) ;

(*ii*) If all the partners or all partners but one are adjudged insolvent (Sec. 41-a) ;

(*iii*) By the business of the firm becoming unlawful (Sec. 41-b).

(*iv*) Subject to agreement between the partners, on the happening of certain contingencies, such as :—

(*a*) efflux of time,

(*b*) Completion of the venture for which it was entered into,

(*c*) death of a partner,

(*d*) insolvency of a partner, (Sec. 42).

(*v*) By the intervention of the Court in case of—

(*a*) a partner becoming of unsound mind,

(*b*) permanent incapacity of a partner,

(*c*) misconduct of a partner affecting the business,

(*d*) wilful or persistent breaches of agreement by a partner,

(*e*) transfer or sale of the whole interest of a partner

(*f*) improbability of the business being carried on save at a loss,

(*g*) the court being satisfied, on other equitable ground that the firm should be dissolved (Sec. 44),

(*h*) by a partner giving notice of his intention to dissolve the firm in case of partnership at will (Sec. 43).

Rights and liabilities of partners after dissolution :

(*i*) *Liability for acts of partners done after dissolution.* Notwithstanding the dissolution of a firm the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution until the dissolution is publicly notified.

But the estate of a deceased partner, or of an insolvent partner or of a partner who has retired from the firm and not known to the person dearing with the firm to be a partner, is not liable for acts done after the date on which he ceases to be a partner.

Public notice of the dissolution of the firm may be given by any of the partners, (Sec. 45).

(*ii*) *Right of partners to have business wound up after dissolution.* On the dissolution of a firm every partner or his representative is entitled to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed among the partners or their representatives according to their rights (Sec. 46).

(*iii*) *Continuing authority of partners for purposes of winding up.* After the dissolution of a firm **the authority of each partner to bind the firm** and other mutual rights and obligations of the partners continue so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

But the firm is in no case bound by the act of a partner who has been adjudicated insolvent. If after the adjudication of insolvency a person repserents himself or knowingly allows himself to be represented as a partner of the insolvent, he will be liable as such (Sec. 47).

(*iv*) *Profit earned after dissolution.* If a partner dies and the firm is dissolved, any profit secured by the surviving partners or the representative of the deceased partner, before its affairs have been completely wound up, must be thrown into the common account and shared by all (Sec. 50).

(*v*) *Return of premium on premature dissolution.* Where a partner has paid a premium on enteting into partnership for a fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of a partner, he shall be entitled to repayment of the premium or of such part thereof as may be reasonable, unless (a) the dissolution is mainly due to his own misconduct or (b) the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it, (Sec. 51).

'Premium' ordinarily means a consideration, something given to invite a loan or a bargain. Where one person is admitted into partnership with another already established in business, it is often agreed that the incoming partner shall pay the other a premium, i. e., a sum of money for his own private benefit, in consideration of his admission as a partner.

(*vi*) *Right where partnership contract is rescinded for fraud or misrepresentation.* Where a contract creating partnership is rescinded on the ground of the fraud or misrepresentation of any of the parties thereto, the party entitled to rescind is entitled :—

(*a*) to a lien on the surplus assets, after discharge of the partnership liabilities, for any money paid by him for his share and for any capital contributed by him ;

(*b*) to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm ; and,

(*c*) to be indemnified by the partner or partners guilty of the fraud or misrepresentation against all the debts of the firm (Sec. 52).

[A contract of partnership, like any other contract, may be rescinded on the ground of fraud or misrepresentation (*Rawlins* V. *Wickham*, 1858). The right of recission is not expressly given by the partnership Act but is implied from Sec. 42. The principles on which a contract may be set aside for fraud or misrepresentation pertain to the general law of contract and are to be found in Sections 17, 18 and 19 of the Contract Act].

(*vii*) *Right to restrain from use of firm name or firm property.* After a firm is dissolved, every partner or his representative may, n the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up.

But where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name (Sec. 53).

Sale of goodwill after dissolution. In settling the accounts of a firm after dissolution, the goodwill of the firm shall, subject to

contract between the partners, be included in the assets and it may be sold either separately or along with other property of the firm.

Where the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer thereof and he may also advertise such business, but subject to agreement between him and the buyer, he may not

(*a*) use the firm name,

(*b*) represent himself as carrying on the business of the firm, or

(*c*) Solicit the custom of person who were dealing with the firm before its dissolution.

Upon the sale of the goodwill of a firm, any partner may make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits provided the restrictions imposed are reasonable (Sec. 55).

[The term goodwill has thus been defined by Wood, V. C. in *Churton* V. *Dogulas*, 1859 ; "Goodwill, I apprehend, must mean, every advantage—every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm or with any other matter carrying with it the benefit of the business". It is the connection thus formed, together with the circumstances, whether of habit or otherwise which tend to make it permanent, that constitutes the goodwill of a business (*Trego* V. *Hunt*, 1896, A.C. 7].

Application of the assets of a firm on dissolution. Section 48 of the Partnership Act provides that in settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed :

(*a*) Losses, including deficiencies of capital, shall be paid first out of profits, next out of capital and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

(*b*) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order:—

(*i*) in paying the debts of the firm to third parties ;

(*ii*) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital ;

(*iii*) in paying to each partner rateably what is due to him on account of capital ; and

(*iv*) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

Section 49 lays down that where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts and the surplus, if any, in the payment of the debts of the firm.

SALE OF GOODS

SALE OF GOODS

(Regulated by 'the Sale of Goods Act', 1930)

Introduction. The sale of goods in our country is now regulated by the Indian Sale of Goods Act, 1930, as adapted and amended in Pakistan. Till that enactment was passed, the Indo-Pakistani law relating to the sale of goods was provided by Sections 76 to 123 of the Indian Contract Act, 1872.

The existence of a separate law for governing the sale of goods does not mean that it is a separate kind of contract. For all practical purposes, it is governed by all the rules of law which apply to contracts in general. Nevertheless, the contract for the sale of goods has certain peculiar features compared to other types of contract, and so far as these features exist, separate legal provisions are necessary for their regulation. It is these peculiar features that are embodied in the Indian Sale of Goods Act, 1930.

The peculiar or special features of a contract for sale of goods may be set forth as follows :—

(i) A Contract for sale of goods is in every case a contract for sale of **movable property.**

(ii) In every case, the consideration for sale of goods is **money paid** or **agreed to be paid as a price.**

(iii) A contract for sale of goods involves in every case **a transfer of the property in the goods** to the buyer for a price.

Nature of the contract for sale of goods. The Indian Sale of Goods Act defines a contract for sale of goods as "a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price." This definition has the following aspects :.

(i) A transfer of **property** in **the goods** from the seller to the buyer. Property in the goods means ownership in them. In this respect sale is distinguished from pawn or pledge, which vests in the pawnee or the pledgee not the ownership but a special property in the goods pawned or pledged. The general property in

such goods remains with the pawnor or the pledger who can transfer it to a third person subject to the rights of the pawnee or the pledgee. The pawnee or the pledgee cannot effect a valid sale of the goods, for, the transference of the special property vested in him does not constitute a sale proper.

(ii) **A transfer or an agreement** to transfer property in goods. Thus A has a horse, the right in which he transfers to B for Rs. 500/-. There is a sale. But there is also an equally good sale if A agrees to transfer his right for the same price three months hence.

(iii) Goods mean movables and **never immovable property.**

(iv) The consideration for a sale of goods is always a price in terms of money. Exchange of property for property does not constitute a sale but is only a bar ter of goods.

Distinction between :

(*i*) *Sale and Agreement to sell.*

(a) A sale effects present transfer of ownership in the goods while an agreement to sell only promises to transfer such ownership in future.

(b) A sale creates a right *in rem.* It is valid against the whole world and the property transferred is general and absolute. The purchaser is, in short, the owner of the goods sold. Therefore, if before delivery the property is destroyed for no fault on the part of the seller, the purchaser is to bear the loss and at the same time he is to pay the stipulated price of the goods. But an agreement to sell simply creates a right *in personam.* Here the seller remains the owner of the property to be sold and the purchaser can compel the seller to convery the ownership or pay damages for non-performance of the promise.

An agreement to sell becomes a sale when the stipulated time elapses or the conditions subject to which the property in the ods is to be transferred are fulfilled.

(*c*) *Sale* and *bailment :*

(i) In sale there is a transference of ownership for a price but in bailment no ownership is transferred ; there is only a transference of possession.

(*ii*) In the case of bailment, the identical property which is the subject-matter of bailment is to be returned to the bailor but there is no such obligation in the case of a sale. Once the goods sold are delivered there is no question of recovering or restoring them back in whatever form.

How a Contract of sale is made. As provided in Section 5 of the Sale of Goods Act, a contract of sale is made in the same way as any other contract by an offer to buy or sell goods for a price and the acceptance of such offer.

The contract may provide for the immediate delivery of the goods or the immediate payment of the price or both or for the delivery or payment by instalments or that the delivery or payment or both shall be postponed. The contract may be in writing or by word of mouth or may be implied from the conduct of the parties.

Like any other contract, a contract of sale also must be made by parties competent to contract and for lawful object and must be supported by the payment or promise of payment of a price which is recognizable in law.

Three most important elements make up a contract of sale. They are :

(1) **Offer and Acceptance.** The agreement of sale, brought about by the offer and acceptance between the buyer and the seller may be oral or written or partly oral and partly written. Where the agreement is unwritten, a contract of sale may be inferred from the conduct of the parties.

Section 4 of the English Sale of Goods Act provides that a contract for sale of goods for ten pounds or above is to be in writing, unless there is a part payment of the price or part delivery of the goods. But the Indian Sale of Goods Act does not prescribe any such formality for the contract of sale.

(2) **Subject-matter of sale : Goods.** The subject-matter of sale is formed by goods. They may be either existing goods owned or possessed by the seller or future goods. There may thus be the sale of a car ready at the seller's godown or of one which he expects to reach from abroad one month hence. There may

even be an agreement to sell goods which the seller expects to acquire on the happening of a contingency, e. g., a diamond-set walking stick belonging to the seller's father which he expects to inherit at his father's death. Such goods, non-existent at present but reasonably sure to be acquired in future, are called future goods, those that are defined as "goods to be manufactured or produced or acquired by the seller after the making of a contract of sale". In its essence, a sale of future goods is but an agreement to sell the goods in future.

Ascertained and unascertained goods. *Ascertained goods* are those which are so specific that the parties to a contract of sale may clearly understand their identity. My Raleigh Cycle which I have offered to sell is an example of this kind of goods. Its identity is clearly understandable both by me and any prospective buyer.

Unascertained goods, on the other hand, are those which are unspecific so that their identity are not clearly understood between the parties. Goods that are sold by description, such as a certain quantity of wheat or future goods such as those which are yet to be manufactured, produced or finished or goods that from part of some specified larger stock such as 5 tons of coal out of a stock of 100 tons kept in a godown, are unascertained goods.

Passing of Property in ascertained goods. Where there is a contract for the sale of goods which are ascertained or specific, property in them passes from the buyer to the seller as and when the parties thereto intend such property to be so transferred. What the intention of the parties is should be gathered from the terms of the contract, the conduct of the parties and all the circumstances of the case. Unless it appears beyond reasonable doubt that the parties have intended differently, *the following rules* should be followed for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. (Sec. 19, Sub-Secs. 1, 2 and 3).

(i) Where there is a contract for the sale of ascertained or specific goods in a deliverable state, the property in the goods passes to the buyer as soon as the contract is made, provided that the contract is unconditional, that is, when it is not dependent

on other factors. (See. 20). Now, if A buys from B a diamond which is at the latter's absolute disposal, the contract is unconditional. But if a stipulation is attached to the contract that the sale will be effective if C approves of it, the contract is conditional.

(*ii*) Where the specified goods are not in a deliverable state and the seller is bound to do something for the purpose of putting the goods into a deliverable state, the property therein does not pass until such thing is done and the buyer has notice thereof (Sec. 21). Thus, A buys of B a motor car, to be delivered when its engine has been overhauled. The property in the car would not pass to A until B has overhauled the engine and A has notice thereof.

(*iii*) Where there is a contract for the sale of ascertained goods standing in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof. (Sec. 22). Thus, if it is agreed that the whole of the cargo on a ship has to be taken delivery of by B, after the cargo-owner had weighed the goods and ascertained the price at Rs. 500/- per ton, until the said cargo is so weighed and the price ascertained, the property in the cargo will not pass to B. But where the goods are weighed and measured and figures obtained, the property in them will pass even though the same have not been added up.

(*iv*) When goods are delivered to the buyer on terms, e. g., "*sale on approval*" or "*on sale* or *return*", or other similar terms, the property therein passes to the buyer:—

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction ; (b) if the buyer does not signify his approval or acceptance, but retains the goods without giving notice of rejection, he becomes the owner of them after the expiration of the period fixed for the return of the goods or after the expiration of a reasonable time if no time has been fixed.

Transfer of property in unascertained goods : Where there is a

contract for the sale of unascertained goods, no property in them passes to the buyer unless and until the goods are ascertained or made specific. (Sec. 18). Thus, A agrees to sell B 100 tons of coal kept in A's godown which has a larger stock than 100 tons. No portion of the coal has come under A's ownership and, until the stipulated 100 tons of coal are separated from the rest, property in them will not pass to B.

Future goods, though they may be specific, stand in the same category with unascertained goods for the purpose of determining time at which property in them passes to the buyer. *The following rules* should, however, be remembered in this connexion:—

(*i*) Where there is a contract for the sale of unascertained or future goods by description and the goods of that description in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such an assent may be expressed or implied and may be given either before or after the appropriation is made.

Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. (Sec. 23 sub-Secs. 1 and II).

Unconditional Appropriation : When goods sold are not ascertained it is necessary that, in some manner, they should agree upon what is to be delivered in fulfilment of the contract, for, until this is done, there are no goods on which the contract can attach. When, however, the parties have identified the goods to be delivered under the contract as the subject-matter of the contract of sale, and nothing further remains to be done by the seller before the property can pass to the buyer, the property in the goods will pass to the buyer unless a contrary intention appears fron the contract or the conduct of the parties or other surrounding circumstances. It is this act of indentifying the subject-matter of sale by mutual consent, so that it may become clear as to on

what the contract will attach, which is known as **unconditional appropriation.**

Void contract of Sale. When there is a contract for the sale of specific goods, the contract is void if, without the knowledge of the seller, the goods have, at the time when the contract was made, either perished or become so much damaged that they no longer answer to their description in the contract. This is a case of mistake as to the existence of the subject-matter of the contract at the time of its making.

Voidable contract of sale. Where there is an agreement to sell specific goods and the goods, without any fault on the part of the buyer or the seller, perish, or are substantially damaged before the property in them passes to the buyer, the agreement is void. Thus A contracts to sell a horse to B. It is also stipulated in the contract that B will put the horse to trial for three days and shall be at liberty to return it if he does not find it suitable. B takes the horse but one day after the delivery it dies without any fault on the part of either party. The contract can be avoided by B.

(3) *Risk attaching to the goods sold.* With regard to the burden of risk arising from loss or damage of goods that have been sold, the general rule is that unless otherwise stipulated, the goods remain at the seller's risk until the property therein is transferred to the buyer; but the risk is shifted over to the buyer as soon as the property in the goods passes to him, whether delivery of the goods has been made or not. It is, however, provided that if loss occurs due to delay in delivery caused by either the buyer or the seller, the loss must be borne by the party who causes the delay. A sells 500 tons of coal to B. The property passes to B. Now, it is agreed that B is to take delivery of the goods by providing his own transport. B fails to do so and the godown containing the coal is burnt by an accidental fire. B must bear the loss. Supposing it is stipulated that A is to deliver the goods and he fails. In such a case, A must bear the loss.

(3) **Price.** The price payable on a sale should be in terms of money; else, the contract would be one of exchange or barter and not of sale.

The price may be fixed in the contract by the parties themselves or left to be settled by a third party or the terms as to the price may be determined by the course of dealings between the parties.

In a contract of sale the stipulation as to the price payable is essential. Where the parties leave this question undecided and no inference is possible to be derived from the course of dealings between the parties, the buyer must pay the seller a reasonable price and in case of dispute the court will decide what would be the reasonable price in that particular case.

If there is a stipulation in the contract that the price payable is to be fixed by a third party, named in the contract, until that third party fixes the price, the contract may be avoided. But in such a case too, if the goods or a portion thereof has already been delivered to the buyer and appropriated by him, he shall pay a reasonable price therefor. If, however, that third party is prevented from making his valuation by the act of one of the parties to the contract, the party not at fault may maintain a suit for damages against the other party.

Who can sell ? As a general rule, the owner of the goods or his duly appointed agent can sell the goods and give a good title. A pawnee can sell the pawned goods only when the pawnor has committed default. Where, therefore, goods are sold by a person who is not their owner or not otherwise authorized to effect a valid sale thereof, the buyer acquires no better title to the goods than the seller had over them, unless the owner of the goods is by his conduct estopped from denying the seller's authority. Thus, as in *Cundy* V. *Lindsay* (1878, 3 A. C. 459), one Alfred Blenkarn of 37, Wood Street, Cheapside, ordered some goods from the plaintiff. At 123, Wood Street were the premises of a reputable firm, W. Blenkiron & Co. Alfred Blenkarn signed his name so that it looked like Blenkiron. The plaintiff consigned the goods to Messrs. Blenkiron&Co., 37, Wood Street. Blenkarn obtained possession of them and resold the same to the defendants who purchased in good faith. It was held that the defendants acquired no title as against the plaintiff.

To the above rule that "no seller can give a better title to

them than he himself has", there are the following exceptions:—

(i) *Estoppel.* A buyer buying goods from one who is not their owner may still acquire a valid title, where, by the conduct of the owner, the buyer was led to believe that the seller was the true owner. In *Commonwealth Trusts Ltd.* V. *Akotey* (1926, *A. C.* 72 *P. C.*), A sold a quantity of Cocoa to B and consigned the same by railway and sent the railway receipt to B before any agreement was arrived at as to the price. B sold the cocoa to C and delivered the railway receipts to him. It was contended on behalf of A that, as there was no contract between A and B since the price was not fixed, the property in the goods did not pass to B and, therefore, C acquired no valid title. It was held that by his conduct A was estopped from disputing B's title to the cocoa and, therefore, C had acquired a valid title.

(ii) *Sale by a mercantile agent.* Where a mercantile agent is, with the consent of the owner, in possession of the goods, or of a document of title to the goods, he is deemed in law to enjoy the implied authority of his principal to sell his goods. Any sale, therefore, made by him in the ordinary course of his business shall be binding on the owner. He can sell and pass a valid title to the buyer even where he has no authority to sell, provided the buyer had no notice of the absence of his title and acted in good faith. Thus in *Folks V. King* (1923, *I. K. B.* 282 *C.A.*) the plaintiff handed over a motor car to a mercantile agent for sale on condition that the car should not be sold below a specified price. The agent agreed to do so but sold it below such price to A and misappropriated the proceeds. A bought the car in good faith and resold it to the defendant. It was held that the plaintiff could not recover the car from the defendant.

(iii) *Sale by one of the joint owners.* Where one of the several joint owners of goods is in the sole possession of them with the consent of the other owners, he can sell and pass a valid title of tbe goods to any one who buys them bonafide and in ignorance of the absence of title of the joint owner who sells them.

(iv) *Sale by person obtaining goods under voidable contracts:* Since a voidable contract is valid until it is repudiated, if a person

has obtained goods under a voidable contract and has sold them to a buyer before the contract is avoided, the buyer has obtained a good title to the goods thus purchased provided he has acted bona fide and without notice of the seller's defect of title. Thus, A obtains goods from B by misrepresentation and sells them to C who acts in good faith and without any knowledge that the goods were obtained by A by misrepresentation. B cannot recover the goods from C.

But a person who acquires the goods under a void contract cannot, at any time, pass a valid title to a buyer (*Lake* V. *Simmons*, 1927, *A. C.* 487).

(v) *Sale by a person in possession of goods after they were sold.* If after selling the goods the seller remains in possession of them or retains the document of title to the goods and subsequently sells those very goods to a third person a valid title is thereby acquired by that third person provided the subsequent buyer acts in good faith and without any notice of the previous sale.

(vi) *Sale by buyer in possession in spite of seller's lien.* If a person after obtaining possession of goods under a contract of sale transfers them to a third person while the seller has at lien over those goods, he thereby passes a valid title provided the buyer acts in good faith and without notice of the original seller's lien or any other right over those goods and the original seller cannot enforce against such buyer whatever right he has over those goods.

The above exception is illustrated by the case of **"Hire Purchase Agreement"**, which means a transaction by which the buyer gets possession of the goods immediatley and the price is paid in several instalments. Until the whole price is paid the seller retains the ownership of the goods. But since the buyer is in possession of the goods he can pass a valid title to a third person who buys them in good faith and without notice that the goods were subject to hire-purchase agreement.

It is to be noted in this connection that the above rule is applicable only to a case of **"Hire purchase"** and not to one which only looks like that. Thus, I hire a ceiling fan and pay

Rs. 5/- as charge for the hire. In this case too possession of the fan is made over to me but I cannot pass a valid title by selling it to a third person for the transaction is a hire and was never intended to be a sale.

Duties of the seller: Rights of the buyer. Since the buyer and the seller are the only two parties in a contract of sale, the rights of the buyer are those that are the duties of the seller and similarly the duties of the buyer are those that are the rights of the seller.

The duties of the seller (i.e. the rights of the buyer) may be enumerated as follows :--

A. **Delivery.** The first duty of the seller is to deliver the goods sold in accordance with the terms of the contract of sale. In the absence of a contract to the contrary delivery and payment of the price must be simultaneous.

(*i*) Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorized to hold them on his behalf. Accordingly, the delivery of the key of a godown may be treated by agreement as a delivery of the goods contained in the godown. (Section 33 of the Sale of Goods Act).

(*ii*) A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder. (Sec. 34). The intention of severing a part from the whole is to be gathered from the facts and circumstances of the case concerned.

(*iii*) In the absence of a contract to the contrary, goods sold are to be delivered at the place at which they lie at the time of the sale and goods agreed to be sold are to be delivered at the place at which they lie at the time of the agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced (Sec. 36).

(*iv*) Unless provided by any express contract, the seller of

goods is not bound to deliver them until the buyer applies for delivery. (Sec.35).

(*v*) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time. (Sec.36-II).

(*vi*) When the buyer demands delivery or when the seller tenders delivery, such demand or tender must be done **at a reasonable hour.** What is a reasonable hour is a question of fact. (Sec. 36-IV)

(*vii*) Where a seller sells **goods which are in the possession of a third person,** there is no delivery by seller to buyer, unless and until such third person acknowledges to the buyer that he holds the goods on his behalf. (Sec.36-III).

(*viii*) Unless there is an agreement to the contrary, the expenses and incidental charges of putting the goods into a deliverable state shall be borne by the seller (Sec. 36-V).

(*ix*) *Delivery of wrong quantity.* Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them but if he accepts the goods so delivered he has to pay for them at the contract rate. Where the quantity delivered is larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest or he may reject the whole. If, however, he accepts the whole he must pay for them at the contract rate.

If the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest or reject the whole. All these rules, may, however, be varied by any usage of trade, special agreement or course of dealing between the parties. (Sec. 37).

(x) *Instalment deliveries.* Unless he has contracted to that effect, the buyer is not bound to accept the delivery of goods by instalment.

Where there is a contract for the delivery of goods by instal-

ments, each instalment stipulated to be paid for separately, a delicate situation arises in each of the following two cases:—

(a) If the seller makes no delivery or makes a defective delivery in respect of one or more instalments, the question arises whether the default is to be regarded as a breach of the whole contract or only a partial breach relation to the instalment or instalments as to which the default has been committed. Whether it is a breach of the whole contract or only a partial breach will depend on the terms of the contract and all the circumstances of the case. If it is found that the breach concerned is severable from the rest of the contract and that the parties intended the instalments to be treated separately, the buyer is not entitled to avoid athe contract and can only claim damages for partial breach.

(b) If the buyer nelgects or refuses to take delivery or pays for one or more instalments, it is similarly a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a partial or a severable breach giving rise to a claim for compensation only, but not to a right to treat the whole contract as repudiated. (Sec. 38).

(*xi*) *Delivery to carrier or wharfinger.* Where in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer or delivery of the goods to a wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer. (Sec. 39).

(*xii*) *Loss or damage during transit.* (a) In making over the goods to a carrier the seller is expected to make such contract with him on behalf of the buyer as may enable the buyer to proceed against the carrier or wharfinger in case of loss or damage of the goods; otherwise, the seller will be responsible to the buyer for the safe carriage of goods or the buyer may treat the delivery to the carrier or the wharfinger as no delivery to him. (Sec. 39-II).

(b) Where goods are sent by the seller to the buyer by a

route involving sea-transit in circumstances in which it is usual to insure, the seller must inform the buyer of goods so that the latter may insure in time. If the seller fails to inform and the buyer does not insure, the seller must bear all the loss incidental to the transit. (Sec. 39-III).

(c) Where the seller agrees to deliver the goods at his own risk at a place other than that where they are at the time of sale, the buyer, unless otherwise agreed, shall nevertheless take any risk of deterioration in the goods incidental to the transit. (Sec. 40). Here the risk referred to is the risk of deterioration only and not of total loss. If the goods are totally lost, the risk must be borne by the seller.

B. Buyer's right of examining the goods. Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract and the seller is bound to afford to the buyer a reasonable opportunity of examining the goods. If the buyer does not examine the goods in spite of reasonable opportunity being given to the seller, the buyer is deemed to have accepted the goods (Sec. 41).

Duties of the buyer: Rights of the seller :

The most important duty of the buyer is to accept the goods delivered to him and pay the price according to stipulation. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or, when the goods having been delivered to him, he does any act which is inconsistent with the ownership of the seller, e. g., when he sells the goods to a third person or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. (Sec. 42).

Unless otherwise stipulated, while lawfully rejecting the goods, **the buyer is not bound to return them to the seller.** But, in such a case, the buyer must inform the seller of his refusal to accept the goods. (Sec. 43).

But if the buyer **unlawfully refuses to accept delivery of the goods,** the seller cannot only sue the buyer for breach of the contract but can also hold him liable for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods. (Sec. 56).

The seller is entitled to payment of the price at the same time as he delivers the goods, unless there is a contract to the contrary (Sec.32). If the buyer fails to pay, the seller can always sue for the price.

The seller is also entitled to a reasonable rate of interest on the total price of the goods sold from the day of the delivery of the goods or from the day on which the price was to have been paid. (Sec. 61).

Rights of an unpaid seller :

A seller of goods is deemed to be **unpaid :—**

(*i*) When the whole of the price has not been paid or tendered; or,

(*ii*) When a bill of exchange or other negotiable instrument has been accepted by the seller as conditional payment and the condition on which it was accepted has not been fulfilled by reason of the dishonour of the instrument or otherwise. (Sec. 45-I).

A seller includes any person who is in the position of a seller, e. g., an agent of the seller to whom a bill of lading has been endorsed. (Sec. 45-II).

An unpaid seller has the following rights notwithstanding the property in the goods having passed to the buyer. (Sec. 46).

(*i*) He has a lien on the goods while they are still in his possession.

(*ii*) He has the right of stopping the goods in transit after he has parted with the possession of the goods.

(*iii*) He has a right to re-sell the goods in some cases as specified by the Sale of Goods Act.

(*iv*) He can sue the buyer for the price of the goods.

Where, however, the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with of his right of lien and a right stoppage in transit. Where the property

in the goods has passed to the buyer. This right is called a **"quasi lien".**

Lien. A lien means "the right exercised by one to retain possession of something the property in which belongs to some one else". A seller's lien arises, therefore, only when the property in the goods has passed to the buyer. **This right is available to the seller in the following cases.** (Sec. 47):--

(i) When the goods have been sold in cash and without any stipulation as to credit. A sells two chairs to B for Rs.100/- to be paid in cash. B fails to pay. A can retain the chairs.

(b) When the goods have been sold on credit but the term of credit has expired. A sells two chairs to B for Rs. 100/- on credit, the price being stipulated to be paid within 15 days. If within 15 days B fails to pay the price and A is still in possession of the chairs, A can retain the chairs until the price is paid.

(c) Where the buyer has become insolvent i.e., where he has ceased to pay his debts in the usual course of business or is incapable of paying them.

It makes no difference whether the seller is in possession to the goods independently or as agent or bailee of the buyer.

If the seller has made part delivery of the goods, he can exercise the right of lien over the rest unless he has waived tha right.

The unpaid seller's lien is lost or terminated in the following cases:--

(*i*) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving his right of disposal of the goods. A sells 100 chairs to B for Rs. 2000/-. A delivers the chairs to a Railway Company for transmission to B. He further makes out the Railway receipt in the name of B as the consignee and sends the receipt to B. Here A does not reserve the right of disposal. Hence he cannot retain the chairs lying in the Railway godown if B fails to pay or tender the price subsequently. But if A made out the receipt in his own name, he could have retained the chairs as the receipt would indicate that he has reserved the right of disposal.

(*ii*) When the buyer or his agent lawfully obtains possession

of the goods. A sells a horse to B for Rs. 500/-. Before paying the price, B takes the horse to his house. Here A cannot retain the horse because B has taken possession of the horse lawfully. But, supposing B, proposing to give the horse a trial, rides home. Here, A retains lien on the horse because B has taken possession of the horse unlawfully, i. e., by using deceit.

(*iii*) When the seller waives his right of lien, i. e., agrees with the buyer expressly or by implication that he would not exercise the right.

It must be borne in mind in this connection that a seller having a lien does not lose it merely by reason of the fact that he obtained a decree for the price of the goods.

Stoppage in transit:

An unpaid seller is entitled to stop the goods sold while they are in the course of transit and resume and retain possession of them until payment or tender of the price. This right is exercisable when after delivering possession of the goods he comes to know that the buyer has become insolvent. This principle known as the **'right of stoppage in transit'** has thus been enunciated in Sec. 50 of the Sale of Goods Act:—

"Subject to the provision of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods, has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit and may retain them until payment or tender of the price".

The exercise of this right is thus contingent on **two conditions**:— (*a*) that the buyer has become insolvent and (*b*) that the goods are still in the course of transit.

Insolvency. Insolvency of the buyer does not mean that the buyer should actually be adjudged an insolvent. It is enough if he "has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due". Thus evidence of general inability of the buyer to pay debts is enough to constitute insolvency for the exercise of the right of stoppage in transit.

Course of transit. The general rule on this point has been stated as follows in Section 51 of the Sale of Goods Act:—

(i) Goods are deemed to be in the course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, and continues to be so until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

The transit continues as long as the carrier holds the goods as a carrier and not as the agent of the buyer. If, therefore, the conveyance in which the seller sent the goods belongs to the buyer and the seller hands over the goods to the person in charge of the conveyance at the request of the buyer, the goods pass into the buyer's possession... (*Chotmans* V. *L. Y. R. Co., L. R.* 2 *Ch.* 332).

The taking of delivery by the buyer or his agent must be done as an act of ownership. The mere touching or handling of the goods without an intention to exercise the right of ownership will not terminate the transit. Thus in *James V. Griffin* (2 *M. W*, 623), goods were consigned to the buyer by a ship and the buyer became insolvent. The buyer under pressure from the captain sent his son to take the goods with definite instructions **not to meddle with the goods.** The son had the goods landed at the wharf where they were stopped by the sellers. It was held that the taking of the goods by the son was not an act of ownership and the sellers were entitled to stop.

(ii) If the buyer or his agent obtains delivery of the goods before their arrival at the appoited destination, the transit is at an end. (Withehead V. Anderson, 9 M & W, 534).

(iii) If after the arrival of the goods at the appointed destination the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf, the transit is terminated and it is immaterial that a further destination for the goods may have been indicated by the buyer. The law on this point was thus stated in *Richardson V. Goss* (1802, 3 B. P. P, 119) :—

"If a consignee be in the habit, with the consent of the owners, of using the Warehouse of a carrier, packer, Wharfinger, or other person as his own, for instance, by making it the repository of

his goods and disposing of them there, the transit will be considered as at an end when they have arrived at such warehouse".

(iv) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not at an end even though the seller has refused to receive them back. But if the carrier or other baile wrongfully refuses to deliver the goods to the buyer or his agent the transit is deemed to be at an end.

(v) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in possession of the master as a carrier or as agent of the buyer. According to the principle established by leading cases, if the seller delivers the goods to the master on board the ship as the agent of the buyer, the transit comes to an end. *Statesman* V. *Lancashire*. But if the goods are delivered as a carrier, the transit does not come to an end. (*Exparte Rosevear China Clay Co.*) :

(vi) Where part delivery of the goods has been made to the buyer or his agent, the remainder of the goods may be stopped in the transit unless such part delivery has been given in such circumstances as to show that an agreement was made to give up possession of the whole of the goods.

Modes of stoppage :

The seller may effect stoppage in transit. (*i*) by taking actual possession of the goods or (*ii*) by giving notice of his claim to the carrier or other depository in whose possession they are.

The notice of stoppage may be given either to the person in actual possession of the goods or his principal. In the latter case the notice to be effectual shall be given at such time and in such circumstances that the principal may, by the exercise of reasonable deligence, communicate it to his servant or agent in time to prevent a delivery to the buyer. It is not, however, necessary for the seller to prove to the carrier that he has acquired a right to a stoppage in transit. All that he need do is to "assert his claim as vendor and owner" and the master is bound to stop delivery to the buyer, of course, at the vendor's risk as to the consequences arising out of a wrongful stoppage.

When notice of stoppage is given by the seller, the carrier or other bailee in possession of the goods must redeliver them to the seller or to any person according as he directs. The expense of such redelivery shall be borne by the seller.

If, after such notice, the carrier deliberately delivers such goods to the buyer, he is guilty of conversion thereof. If, however, he does so under a bona fide mistake, the mistake does not end the transit and the buyer is bound to return the goods to the seller; otherwise he would be guilty of conversion.

The unpaid seller's **right of lien or stoppage in transit is not affected** by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented to it. To this rule there is, however, **one exception :** If the unpaid seller has transferred to the buyer documents of title to the goods and the buyer has sold the goods to a third person on the strength of such documents, then the lien or stoppage in transit is defeated. If, however, such goods are pledged on the strength of those documents, the unpaid seller's right of lien or stoppage subsists but is exercisable subject to the rights of the pledgee. In such a case the seller may require the pledgee to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other goods or securities of the buyer in the hands of the pledgee.

Right of Resale. The third remedy of an unpaid seller is the right of reselling the goods sold. The exercise by the unpaid seller of the right of lien or stoppage in transit does not *ipso facto* amount to a termination of the contract of sale. The contract subsists but this does not mean that he has to wait *ad infinitum* to realize the price from the buyer by applying the pressure method of lien or stoppage. The unpaid seller may, therefore, sell the goods and terminate the contract of sale in accordance with the provisions of Section 54 of the Sale of Goods Act as noted below :—

(*i*) Where the goods are of a perishable nature, or where the unpaid seller having exercised his right of lien or stoppage has notified to the buyer his intention to resell, he may resell the goods if the buyer does not pay or tender the price within a reasonable time. If, on such resale, the seller suffers loss for

no fault of his own, the buyer must make good the loss. But the buyer shall not be entitled to any profit resulting from the resale.

(*ii*) Where the seller, at the time of the contract, expressly reserves a right of resale in case the buyer defaults to pay the price, the seller can always sell the goods on such default being committed by the buyer.

In addition to resale, the seller can sue the buyer for breach of contract if the seller has sustained damages on account of such breach. If, however, the goods are not perishable or he has sold non-perishable goods without notice, the seller is not entitled to recover from the buyer any loss he might suffer on resale, and the profit on the resale, if any, will go to the buyer.

Conditions and Warranties :

As in other contracts, so in a contract of sale there may be various stipulations with reference to the goods sold or agreed to be sold. Some of these stipulations are **conditions,** others are **warranties.**

A **condition** is a stipulation which is so essential to the main purpose of the contract that the breach of it gives rise to a right to repudiate the contract.

A **warranty,** on the other hand, is a stipulation subsidiary or collateral to the main purpose of the contract, the breach of which gives rise not to a right to repudiate the contract or reject the goods but only to a claim for damages.

Whether a particular stipulation is a condition or a warranty does not depend on the terminology used in the contract by the parties but has to be gathered from a construction of the contract as a whole. A stipulation may be a condition though called a warranty in the contract and *vice versa.* In determining whether a stipulation is a condition or a warranty the most important thing to be considered is the intention of the parties as reflected in the terms of the contract or the conduct of the parties.

To take an illustration, A sells B a horse for Rs. 1,000/- stating that it is a race-horse. It turns out later that the horse never participated in any race. Now, whether the statement of A constituted a condition or a warranty of the sale would depend on whether the parties intended the sale of the horse to be subject

to its being a race-horse. If, for example, B had said, "I will not buy the horse if it is not a race-horse" and A replied, "Yes it is a race-horse", the stipulation about the horse being a race-horse would amount to a condition. B could then repudiate the contract if it turned out that the horse never participated in race. But if B was willing to buy the horse whether it was a race-horse or not, and the statement of A was intended only to enhance the price of the horse, the statement constituted only a warranty. B is not, therefore, entitled to repudiate the contract of sale. He will have to take the horse. If he has paid the price he can sue A for damages for breach of warranty. If he has not paid the price, he can set up the breach of warranty in diminution of the price.

In some cases, however, breach of warranty may amount to misrepresentation, as in the above illustration, and the party affected by misrepresentation may choose to repudiate the contract, if it can be shown that **the untrue statement induced the seller to enter into the contract.** Therefore, as in the above case, if the horse is not a race-horse, the breach of the warranty thus committed will also amount to **misrepresentation** and if it induced the party to enter into the contract, it would be liable to be avoided on that ground.

Cases of *uncertainty.* In some cases the parties are not particular about the terms of the contract and, therefore, the terms of the contract offer some difficulty of interpretation so as to determine whether a particular stipulation is a condition or a warranty. In such cases, the legislature has provided certain rules for interpreting the contract such as the following :—

(*i*) In the absence of any contrary intention appearing from the terms of the contract, stipulations as to the time of payment are not to be of the essence of a contract of sale. Thus, A contracts to sell a car to B and B agrees to pay the price on the 1st of June. A cannot avoid the contract if B is unable to pay the price within the stipulated day.

(*ii*) Unless otherwise contracted by the parties expressly or by implication, where a contract of sale is not severable and the

buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which he has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods or repudiating the contract.

Express and implied conditions. Conditions, as also warranties, may be either *express* or *implied.* **Express conditions** are inserted in the contract by the parties themselves. In many cases, however, law imports conditions and warranties in a contract of sale of goods where the parties are silent about them. When so imported, the conditions and warranties are called **implied.**

(i) *As to title.* In every case of sale, there is an implied condition that the seller has a right to sell the goods and in every case of an agreement to sell, the seller will have a right to sell at the time when the property in the goods is to pass. It is not necessary for the seller to be the owner of the goods. He might as well sell as an agent of the owner authorized to sell the goods. *In Roland V. Vidoll,* the defendant sold a motor car to the plaintiff. After some time the plaintiff discovered that the car was stolen and he was compelled to return it to the owner. It was held that the contract could be repudiated by the plaintiff for non-fulfilment of the condition regarding title and he could recover the price from the defendant.

(ii) *As to quality or fitness.* As a general rule, in a contract of sale, there is no implied condition or warranty as to the quality or fitness of the goods supplied for any particular purpose. The buyer is generally bound by the principle of *Coveat Emptor.* (Purchaser beware). But where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are such as the seller normally supplies, there is an implied condition that the goods will be reasonably fit for such purpose. For illustration, A goes to the shop of B normally dealing in fans and asks for a desk-fan that makes no sound while revolving, so that it may be used on B's writing table. Here there will be an implied condition that the fan, if supplied, is fit for the purpose for which it is bought.

But where a specific article is sold under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose. (*Chanter V. Hopkings*, 1838, 4 *M. N. W*, 399).

An implied condition or a warranty as to quality or fitness for a particular purpose may be annexed by the usage of the trade concerned.

(iii) Where goods are sold by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality. But if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed.

A sale by description means that a fair sketch or account of the goods is given by words or in writing.

In *Peer Mohammad* V. *Dalloram* (47, *C.* 455), it was held that the condition relating to merchantibility had been violated where black yarn was sold by description and the same was found damaged by white ants.

(iv) In a sale of goods by description there is an implied condition that the goods shall correspond with the description and if the sale is by sample as well as by description, the goods shall correspond with both the sample and the description.

It is not enough that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. Thus, A contracts to sell B Egyptian cotton according to the sample produced by him. The cotton, when delivered,a grees with the sample but is not Egyptian cotton. In this case, though the goods agree with the sample, they do not correspond with the description and hence, B, the buyer, is entitled to reject the goods for non-fulfilment of conditions.

Implied warranty. In a contract of sale of goods, there is an implied warranty:

(i) that the buyer shall have quiet possession and enjoyment of the goods ;

(ii) That the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

An implied warranty as to quality or fitness for a particular purpose may also be annexed by the usage of trade. Thus in *Jones V. Bowden* (1903, 1 *K. B.* 610), it was shown that in auction sales of certain drugs, as pigments, it was usual to state in the catalogue whether they were sea-damaged or not, and in the absence of a statement that they were sea-damaged, they would be assumed to be free from that defect. Fair samples had been shown but sea-damage could not be detected by examination. On this evidence, the court held that freedom from sea-damage was an implied warranty in the sale.

It is to be remembered that an express condition or warranty is not negatived by a condition or warranty implied by the sale of Goods Act unless it is inconsistent with the Act.

"F. o. b" contracts. Various conditions, derived from custom and practice of merchants, are attached to contracts for the sale of goods which are to be shipped from a foreign port. One of the most usual of them is the f. o. b. contract. These letters stand for "free on board" and according to Halsbury, when the goods are shipped by the seller on these terms "the risk *prima facie* attaches to the buyer on the shipment, whether the goods are at that time specific or unascertained".

In *Stock* V. *Inglis* (1884, 12 Q. B. D., 563), it has been held that "if the goods dealt with by the contract were specific goods .....the words 'free on board', according to the general understanding of merchants, would mean more than merely that the shipper was to put them on board at his expense ; they would mean that he was to put them on board at his expense on account of the person for whom they were shipped ; and in that case the goods so put on board under such a contract would be at the risk of the buyer whether they were lost or not on the voyage".

With reference to unascertained goods, it has been said in the same case : "Is there any mercantile or legal reason why a person should not agree to sell so much out of a bulk cargo on board, or *ex* such a ship, upon the terms that if the cargo be lost, the loss shall fall upon the purchaser, and not upon the seller ? I can see no reason why he should not". Therefore,

with reference to unascertained goods also the same rule applies as is applicable to ascertained goods.

"C. i. f." or "c. f. i" contract : Under the c. i. f. or c. f. i. contract, the seller agrees to ship the goods at the port of shipment, procure the contract of affreightment under which the goods would be delivered at the destination, arrange for insurance and to tender these documents to the buyer in order to enable him to obtain delivery of the goods if they arrive, or recover for their loss if they are lost. Against such a tender of the documents the buyer must be ready and willing to pay the price.

As per Halsbury, "where the price is to include the freight and the insurance or, as it is said, on c. f. i. or c. i. f. terms, the seller, as between himself and the buyer, is chargeable with the amount of the freight and the insurance charges, and the buyer if he has been paid either of these charges, may take credit therefor".

In *Steel Bros & Co., V. Dayal Khatav & Co.* (25, *Bom. L. R.* 1963), the incidents of this form of contract have been laid down as follows : "A c. i. f. contract is not a mere sale of documents. It is still a contract for the sale of goods, though it is to be performed by transfer of proper documents. The documents must be tendered as soon as possible after the seller has destined the cargo to the buyer. If there is a mail the seller must transmit the documents by mail. The contract is performed, in fact, and the date of its performance is the date when the documents would come forward, the seller making every reasonable effort to forward them. In case of non-delivery, the contract is broken at the time when the documents ought to have been tendered, and not when the goods arrive, and damages must be estimated accordingly. The buyer is bound to pay on tender of shipping documents, and he is not entitled to refuse payment until he is given an opportunity for inspecting goods" "The goods comprised in a c. f. i. contract must also be covered by an effective policy of insurance ; an open cover taken out by the seller protecting all goods shipped by him is not sufficient. The policy must be tendered even if the goods arrive safely".

Remedies for breach of contract of sale :

(*i*) Where under a contract of sale the property in the goods **has passed** to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods (Sec. 55-1).

(*ii*) Where under a contract of sale the property in the goods **has not passed** to the buyer, but the contract requires the price to be paid on a certain day irrespective of delivery, the seller can sue the buyer for the price if the buyer refuses or neglects to pay the price on or before the appointed day. (Sec. 55-II)

(*iii*) Where the buyer **wrongfully** neglects or refuses to accept delivery and pay for the goods, the seller may sue him for damages for non-acceptance. (Sec. 56).

(*iv*) Where the seller **wrongfully** neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery. (Sec. 57).

(*v*) Where the seller is ready and willing to deliver the goods and the buyer neglects or refuses to take delivery even after a request from the seller, the buyer is liable to the seller for any loss occasioned by his neglect or refusal to take delivery and custody of the goods. (Sec. 44).

(*vi*) In some cases the court may compel the seller to deliver goods and complete the sale by a decree of specific performance if the seller refuses to deliver the goods to the buyer. A decree of specific performance will, however, be granted only where ordinary damages for non-delivery will not sufficiently compensate the iniury suffered by the buyer. But no decree of specific performance can be granted to compel the buyer to buy the goods, where he refuses to accept delivery. (See. *ante : specific performance*).

(*vii*) Where either party to a breach of contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery or he may treat the contract as rescinded and sue for damages for the breach. (See *ante : Anticipatory breach of contract*).

(*viii*). Where there is a breach of warranty by the seller, the

buyer may (a) set up against the seller the breach of warranty in diminution or extinction of the price, or (b) sue the seller for damages for breach of warranty (Sec. 59). The fact, however, that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

(*ix*) In a suit for the breach of the contract the seller or the buyer may recover interest or special damages in any case when such interest or special damages are recoverable by law.

Auction Sale. In a sale by auction, where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale.

As soon as the auctioneer announces the completion of the sale by the fall of the hammer or in any other customary manner, the sale is complete and until such announcement is made any bidder may retract his bid.

A right to bid may be expressly reserved by the seller or on his behalf and unless so reserved, it will be unlawful for the seller to bid at the auction or anybody else to bid on his behalf.

An auction sale may be notified to be subject to a reserved or upset price. If the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

NEGOTIABLE INSTRUMENTS

NEGOTIABLE INSTRUMENTS

(THE NEGOTIABLE INSTRUMENTS ACT, 1881)

Introduction :

The concept of negotiable instruments was born in the West as far back as the 13th and the 14th centuries, generally under the exigency of the growth of western trade and industry. The law governing such instruments is, therefore, of western origin, attributable to (i) the principles of Common Law applicable to ordinary contracts and (ii) the principles of *Lex mercatoria* or 'Law Merchant', as far as they were recognized and applied by the 'Market Fair courts' and adopted by subsequent judicial forums. (For discussion of *Lex mercatoria*, see 'Law of Contract').

Among the various instruments so far known, the first to come into use was the Bill of Exchange. It was devised in the 13th century by the merchants trading in the Mediterranean countries, wherefrom it gradually travelled to England. A Bill of Exchange was originally used to transfer trade debts between traders in different countries. In course of time, the system was extended to inland trade debts, and gradually to private debts also. The necessity of such credit instruments was felt, more and more with the passage of time, when trade flourished and commerce expanded and the supply of currency could not keep pace with their expanding demand.

Shortly after the Bill of Exchange, the promissory note appeared in the market. Though recognized in England once or twice, in 1703 Chief Justice Holt declared that promissory notes were of no validity as a species of negotiable instruments and thereafter the courts of England persistently refused to enforce the undertakings of such notes. To tide over this situation, the Statute of 3 and 4 Anne C8 was passed whereby negotiable instruments were made assignable by endorsement. The latest of the series were the cheques which came with the introduction of banking business in England in the 17 th century.

In the Indo-Pakistan Subcontinent, the Negotiable Instruments Act, 1881, was the first to define clearly the law relating to Bills of Exchange, Promissory Notes and cheques. Before the passing of the Act, the courts used to apply the Law Merchant in cases of Europeans and in cases of the local people, their personal laws. But where the instrument was in English form, English Law was applied even if the parties were non-Europeans.

There is a class of instruments, called *Hundis*, which have been current in this country since long past. These instruments are nothing but bills of exchange written in oriental languages and were governed by trade usages prevalent among the merchants of different communities other than Europeans. These customs were not, however, uniform but varied from place to place. With the growth of trade and commerce necessitating an extensive use of the negotiable instruments, it came to be felt that there should be one uniform law regarding them throughout the whole of the then British India. This wide feeling of necessity ultimately led to the passing of the Negotiable Instruments Act, 1881, which is based entirey on the principles of English Law on the subject and differing from it on but very few points. Hence it has been aptly put that the Act "is the fitting of the English boot to an Indian foot, the dressing of an oriental figure in a london-made suit". Subsequent exeprience has, however, shown that the fitting and the dressing were rather done well.

Since its birth, this Act has been supplying and regulating the law relating to negotiable instruments in this subcontinent. The Act has undergone amendments from time to time both before and after the birth of Pakistan and with these amendments and adaptations read into its body, the Negotiable Instruments Act, 1881, is now the law by which negotiable instruments in our country are governed.

Negotiable Instruments. Section 13 of the Act describes that "a 'negotiable instrument' means a promissory note, bill of exchange or cheque payable either to order or to bearer". The Section does not define negotiable instrument but only describes as to what the term includes. Further, it makes no mention of

'Hundis' which is a very common and important form of negotiable instrument prevailing in this country. Hence we have to turn to other authorities for a proper definition of the term.

"A negotiable instrument", says Judge Willis, "is one, the property in which is acquired by any one who takes it bona fide and for value, notwithstanding any defect of the title in the person from whom he took it ; from which it follows that an instrument cannot be negotiable unless it is such and in such a state that the true owner could transfer that contract or engagement contained therein by simple delivery of the instrument". An analysis of this definition renders the following characteristics of a negotiable instrument.

(*i*) Property in the instrument passes from hand to hand by mere delivery.

(*ii*) The holder in due course is not affected by defects in title of his transferor or of previous holders.

(*iii*) The holder in due course can sue in his own name.

(*iv*) The holder in due course is not affected by certain defences which might be available against previous holders, e. g., fraud to which he is not a party.

(*v*) It passes from hand to hand like cash and can be conveniently assigned in discharge of debts.

Promissory Note. A 'promissory note' is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument (Sec. 4). An analysis of this definition shows that a promissory note must have the following essential features :

(*i*) It must be an instrument **in writing**—not being a bank note or a currency note. Mere verbal promise to pay is not enough.

(*ii*) The instrument must contain **an unconitional undertaking** to pay. If the promise to pay is dependent on certain conditions which may or may not happen, the instrument is not to be considered as a promissory note. A promise to pay on the happening of an event which, in the ordinary course, is bound to

happen is not a conditional promise. Nor is a note made payable through another—marfatder—a conditional one (*Mela Ram* V. *Brijalal*, 54, I. C. 976). Thus, a promise to pay Rs. 5000/- "after my marriage with C" is a conditional promise for the marriage may never come about but a promise to pay the amount "on my father's death" has been held to be an unconditional promise.

Use of the word "promise" in the instrument is not necessary; if the promise can be gathered either from express words used in the instrument or by necessary implication, the instrument is a pronote (*Mathur* V. *Dalpat*, 3 Bom. L. R. 839).

(iii) The instrument must not merely contain an acknowledgment of a debt in writing but must also show **a promise to pay**. Thus, if A writes, "Iowe B Rs. 1000/-", the instrument will not be a promissory note. A mere acknowledgement of a receipt of money or of indebtedness or an admission that the executant is accountable to the other party will not constitute the document into a promissory note (*Govind* V. *Balabant*, 22 Bom, 986).

(iv) The undertaking must be to pay **a certain and definite sum of money only.** Thus if I write, "I promise to pay Rs. 500/- and all other sums which shall be due to him", the document is not a promissory note, as the amount promised to be paid is uncertain. Nor will the instrument be a pronote if there is a promise to pay not only a definite sum of money but also something in addition, say, paddy (*Muttu Chatti* V. *Muttan Chetti*, 4 Mad. 296). But the sum does not become uncertain because in addition to the amount specified in the instrument, there is also a promise to pay future interest at a stipulated rate (*Lakshminath* V. *Benares Bank*, 7 Pat. 41).

(v) The instrument **must be signed by the maker.** The person who gives the promise is known as the maker and the person to whom the promise is made is known as the **payee.** The signature of the maker is an essential condition for the completion of the instrument so that if the maker writes out the whole body of the note with his name therein but does not sign it, the instrument is not a promissory note. The signature includes thumb mark, initials or any other mark (*Sadananda* V. *Emperor*,

32 Cal. 550) and may be in any part of the document (*Gangaram* V. *Lachiram*, 19 C.W.N. 642) and it may be in pencil, ink lithograph, stamp or even in printing if these are adopted by the maker (*Nirmal* V. *Sarat Moni*, 2 C.W.N. 642).

(vi) The payment is to be made to the person in whose favour it is executed or to the order of such person or to the bearer of the instrument.

Certainty is of the essence of a pronote. It is to be certain not as to the amount alone but also as regards the person by whom and to whom it is made (*Harkishore* V. *Guru Mia*, 35 C. W.N. 63). If the maker and the payee are sufficiently indicated, even though misnamed or designated by description the instrument is a pronote. Thus, where a pronote was made in favour of a person described by his office, it is one made in favour of a certain person. A note made payable to either of two persons or to several individuals is a pronote (*Bankidas* V. *Tanab Pal*, 1929, Nag. 274).

Apart from the above, certain other things are essenialt to the validity and enforceability of a promissory note.

First, the promise to pay made in the promissory note must be for lawful consideration. Where the defendant executant has not received any consideration for the promissory note, the instrument does not create any obligation between the holder and the defendant (*Amir Chand* V. *Krishna*, 1936, Cal. 315).

Secondly, revenue stamps of requisite value under the Stamp Act of the country should be affixed. An unstamped or understamped promissory note is inadmissible in evidence and no claim can be founded on the documents although, under certain conditions, a suit will lie on the original consideration (*East Bengal Commercial Bank* V. *Surendra*, 39 C.W.N. 1235).

It is necessary to cancel all the stamps affixed on the note. A person may cancel an adhesive stamp by writing on or across the stamp his name or initials or the name or initials of his firm with the true date of his writing or in any other effectual manner (Indian Stamp Act, Sec. 12-III).

Some specimen pronotes.

(*i*) **On Demand** I, A. B. promise to pay C. D. or his order the sum of Rs. 2000/- for value received.

A. B

Stamp

(*ii*) I, A, B, promise to pay C D, Rs. 2000/-.

(*iii*) I, A, acknowledge myself to be indebted to B in Rs. 2000/- and promise to pay the said amount **on demand** for value received.

(*iv*) At three months after date I, A, promise to pay B the sum of Rs. 2000/- only. Value received.

No particular form is prescribed for a promissory note, provided the essential conditions described above are satisfied. It is also not necessary to put the words "on demand" in the pronote as a matter of form (Sec. 19). If the date of execution is not mentioned, the document is not invalid and independent evidence of the date is admissible under Section 92 of the Evidence Act. A pronote may be antedated or postdated (*Raghu* V. *Aravas mutha*, 34, I.C. 617). Mention of the place of execution is unnecessary except for the purpose of determining the forum ; and parties are free to insert in the instrument as place of execution any place even other than where it is actually executed (*Meenakshi Ginning and Pressing Co.* V. *Sreeram Naidu*, 28 Mad. 19).

Bill of Exchange. A 'bill of exchange' is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument (Sec. 5).

An analysis of the above definition shows the following to be the prerequisites of a bill of exchange :

(*i*) It must be in writing ;

(*ii*) It must carry an unconditional order to pay.

(*iii*) It must be signed by the drawer who must be a certain person.

Name ?

(*iv*) The drawee must be certain.

(*v*) The payee must be certain.

(*vi*) The amount payable must be certain.

(*vii*) The order must be to pay money and money only.

Distinction between a Bill and a Pronote :

(*i*) There are only two parties in a pronote, namely, the maker and the payee. But, in a bill, there may be three parties where a third person is mentioned as the payee, namely, the drawer, the drawee and the payee.

(*ii*) In a promissory note, the maker of the note unconditionally undertakes to pay, whereas in a bill of exchange the drawer issues an unconditional order directing a certain person (other than himself) to pay. The liability of the maker of the promissory note is thus absolute because he unconditionally binds himself to pay whereas the obligation undertaken by the drawer of a bill of exchange is conditional since he becomes only a surety for payment in case of default by the drawee. The maker of the promissory note is the principal debtor, whereas the drawee of a bill of exchange becomes, on acceptance, the principal debtor as he accepts the primary liability to pay according to the tenor of the bill. It is only when the drawee fails to pay that the drawer becomes liable as his surety (*Radhakishan* V. *Hiralal*, 58, I. C. 313).

(*iii*) A promissory note is always presented for payment without any prior acceptance by the maker. But a bill of exchange payable after sight has to be accepted by the drawee or somebody else on his behalf before it can be presented for payment. In default of such presentment, the holder of the bill cannot make any party liable thereon.

An inland bill of exchange is generally drawn and dealt with in the following way. A buys goods from B for Rs. 5000/-. The arrangement is that A should have a credit for 60 days after the date of the delivery of the goods and that a bill should pass between them. Therefore, B, when delivering goods to A, presents an invoice for the goods he has sold and also a draft drawn

on A. This draft is a bill of exchange drawn by B which has to be accepted by A and returned to B. The draft as drawn would generally be in the following form.

stamp

Dacca, March, 21, 1963

Sixty days after date pay to me or my order (or to C or to his order) the sum of Rs. 5000/- for value received.

To
Mr. A.

Sd/ B.

When the bill is drawn, the drawer of it, i.e., B, has to present it to A for the latter's acceptance. If A writes across the bill, "Accepted", it will mean that A binds himself to pay Rs. 5000/- to B or his order, sixty days after date. Instead of directing the money to be paid to him, B may direct the payment to be made to a third person, C or his order, in which case C becomes the payee. It may also happen that A might ask a third person, D, to accept the bill for him. In that case D will become the acceptor.

Now, B, the holder of the bill after it is accepted and returned to him, may either wait for the recovery of the amount due till the end of the stipulated sixty days (with which, of course, must be added three days of grace) or negotiate it earlier. Discussion on the latter process will soon follow.

Cheque. A cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand, (Sec. 6). The person who draws the cheque is known as the drawer, the bank on which the cheque is drawn is known as the drawee, and the person to whom or to whose order the cheque is made payable is known as the payee. If no payee is mentioned in the cheque, the bank must pay the bearer of the cheque. A cheque is always payable on demand and unless restricted, it is negotiable by endorsement and delivery.

Distinction between a cheque and a bill :

Although a cheque and a bill have several things in common, they differ from one another in many respects :

(*i*) A cheque is always drawn on a bank but a bill can be drawn on any person.

(*ii*) A cheque does not require acceptance ; in the ordinary course it is never accepted. But a bill payable after sight must be accepted by the drawee before it is presented for payment. In default of such presentment for acceptance, the holder of the bill cannot make any party liable thereon.

(*iii*) A cheque is given for immediate payment ; it is not entitled to days of grace. But in the case of a bill a grace of three days after maturity is allowed for the purpose of payment.

(*iv*) A bill is an order on the debtor by the creditor to pay him or to a third person the sum of money due from the former to the latter. Though apparently a cheque is also an order of the same nature, yet, in the ordinary understanding of persons it is more like an appropriation of what is stated as ready money in the hands of the banker.

(*v*) In the case of a bill the drawer is discharged from all liability to the payee if it is not presented within a reasonable time. But the drawer of a cheque is discharged from all liability to the payee only if the delay in presentment causes him loss and injury.

Negotiation. When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated, (Sec. 14). As laid down in Sec. 47 of the Act, if an instrumen is payable to bearer, it can be negotiated by mere delivery. Thus A, the holder of a negotiable instrument **payable to bearer** delivers it to B. The instrument has been negotiated to B. But where the instrument is payable to order, both endorsement and delivery thereof are necessary for its negotiation.

Indorsement. When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip

of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to **indorse** the same, and is called the indorser (Sec. 15).

Indorsement is meant as a guarantee by the indorser to the indorsee that (i) at the time of the indorsement the indorser has a good title to the instrument, (ii) that the instrument is a genuine one, (iii) that all prior indorsements are genuine.

To constitute a valid indorsement, it must be on the back or face of the instrument except in the case of Government Promissory notes where the indorsement must always be on the back or on a slip of paper annexed thereto but not on a copy of the instrument, (*Ardeshir* V. *Khosaldas*, 32 Bom. 247). Indorsemen must be by the maker or holder or by the drawer, the indorsee or the payee but not by a stranger (*Suppai* V. *Kandaswami*, 19-24, Mad. 617). Even if a stranger puts his signature he does not make himself liable on the instrument but he may take the liability if he guarantees payment (*Brajendra* V. *hindusthan Co. Ins. Society*, 44 Cal 978).

There are **two kinds of indorsemenst,** namely, **indorsement "in blank"** and **indorsement "in full".** As laid down by section 16 of the Act, if the indorser signs his name only, the indorsement is said to be "in blank" and if he adds a direction to pay the the amount mentioned in the instrument to, or to the order of, a specified person, the indorsement is said to be "in full" ; and the person so specified is called he "indorsee" of the instrument.

When the indorsement is "in blank", the instrument passes by mere delivery, as if it were a bearer note. It has, therefore, been held that a transferee by mere delivery of such instrument is not a party to it ; the payee is neither liable under it nor is he entitled to the privileges of the same (*Valjee* V. *Harsook*, 62 M. L. J. 239). But a bona fide holder of an instrument, endorsed in blank, may constitute himself the assignee by making it payable to himself by inserting over the signature of the indorser "Pay to A or order".

No particular form is prescribed for an indorsement in full.

All that is necessary is that it must contain a direction to pay. Thus, an indorsement stating that a note is made over to X on a particular date and signed by the payee is an indorsement in full and will operate as a negotiation when the instrument is delivered (*Srinivasa* V. *Venkatammal*, 24 M.L.J. 296).

An indorsement in full prevents the bill from being transferred by anybody but the indorsee ; and none but the special indorsee or his legal representative can sue on it.

Holder. The holder of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction, (Sec. 8).

As defined in this section, to be a holder he must possess two rights : (i) He must be entitled to the possession of the instrument by his own right ; (ii) He must be entitled to recover the money due on the instrument. Thus, in case of a pronote payable to A or his order, A will become the holder as soon as he comes into possession of the note. But if A keeps the note with his agent B for safe custody, B will not become the holder although the instrument is in his possession. The reason is that A has not indorsed the instrument in favour of B and as such B cannot sue for the money due on the instrument. But had A indorsed the note in favour of B, he would have become the holder.

Joint holders : Where in a bill there are several payees or indorsees, all of them are joint holders and none of them can alone negotiate or sue on it. Under Section 45 of the Contract Act, all of them must join together to negotiate the instrument or sue on it. If one of them be dead, all the legal representatives of the deceased must join with the surviving payee or indorsee to negotiate the instrument or sue on it. (*Kandhiya* V. *Chandur* 7 All. 313). All the members of a joint family are holders of a note in the name of the joint family firm (*Francis* V. *Vadilal*, 1939, Bom. 147).

Blank indorsement. In the case of blank indorsement, the person to whom the instrument has been delivered for negotiation must be deemed to be the holder, he being the person in actual possession. The person to whom an instrument is transferred by operation of law is the holder and entitled to recover the amount by suit (*Lodd Govinda* V. *Munasami*, I. M. L. T. 169)

Holder in due course. Any person who, for consideration, becomes possessor of a negotiable instrument payable to bearer is known as a holder in due course of such instrument, provided: (i) he comes into possession before the amount payable is due and (ii) he has no notice of any defect in the title of the person from whom he derives his title.

Where the instrument is *payable to order*, a holder in due course means any person who, for consideration, becomes the *payee or indorsee* thereof, before the amount mentioned therein becomes payable, and without having any notice of any defect in the title of the person from whom he derived his title.

Thus, X draws a bill on Y for Rs. 2000/00 payable to Z three months after date. Z is the payee for consideration and when he gets possession of the instrument before the date of payment, he becomes the holder in due course, provided he had no sufficient notice of any defect of A's title to the instrument. Z may indorse it in favour of Q for valuable consideration. Q, the indorsee, will become the holder in due course if he gets possession of the bill before the date of payment and did not believe that Z's title to the bill was defective.

Maturity of Negotiable Instruments :

A promissory note or bill of exchange is said to mature on the day on which it falls due.

Instruments which are payable on demand mature on the very day of their execution. Those that are payable at sight or on presentment mature when presented and payment is demanded. Promissory notes or bills of exchange which are not expressed to be payable on demand, at sight or on presentment are at maturity **on the third day** after the day on which they are expressed to be payable.

The three days allowed after the date on which a bill of exchange or promissory note is payable are called the days of grace. Instruments payable at sight or on presentment are not entitled to days of grace and become payable at once. Where a note is payable by instalments days of grace are allowed after each instalment falls due in spite of the use of the word 'punctually, (*Scheverien* V. *Morris*, 1921, 37 T.L.R., 366). No days of grace are allowed for cheques which are always payable on demand.

Parties to Negotiable Instruments :

(a) *Promissory Note :*

(*i*) The maker : He is the person who draws the note.

(*ii*) The payee : He is the person to whom the note is payable.

(*iii*) The holder : He is either the payee or some one to whom the payee has indorsed the note.

(*iv*) Indorser and indorsee : When the holder indorses the note to someone he becomes the indorser and the person to whom it is indorsed becomes the indorsee.

(b) *Bill of Exchange :*

(*i*) The drawer : He is the person who draws the bill.

(*ii*) The drawee : He is the person on whom the bill is drawn.

(*iii*) The Acceptor : He is the person who accepts the bill. Generally, the drawee is also the acceptor. But a stranger also can become the acceptor on behalf of the drawee.

(iv) The payee : He is the person to whom the sum mentioned in the bill is payable. The drawer may make the bill payable to himself or to his order or may mention any other person to whom or to whose order the bill payable.

(v) The holder : He is either the original payee or any one to whom the original payee has indorsed the bill. If a bill is payable to the bearer, the bearer is always the holder thereof.

(vi) The indorser and the indorsee : When the holder indorses the bill to any one else he becomes the indorser.

The person to whom the bill is indorsed becomes the indorsee.

(c) *Cheque :*

(*i*) The drawer : He is the person who draws the cheque.

(*ii*) The drawee : The bank is always the drawee of a cheque.

(*iii*) The payee : He is the person to whom the cheque is payable.

(*iv*) The holder : He is either the payee himself or someone to whom the cheque has been indorsed by the payee.

(*v*) The indorser and the indorsee : When the holder indorses the cheque to someone he becomes the indorser and the person to whom it is indorsed becomes the indorsee.

Persons competent to be parties to Negotiable Instruments :

Section 26 of the Act lays down that "every person capable of contracting, according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque".

Section 11 of the contract provides that every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject. In Pakistan, therefore, the disqualified persons are : (i) minors. (ii) persons of unsound mind by reason of lunacy, idiocy, intoxication etc. (iv) Alien enemies and married women, being disqualified under the common law. (4) Persons disqualified by statute law, such as **proprietors** debarred by the Court of Wards Act or **insolvents** disqualified by the Insolvency Laws. **Corporations** are disqualified to be party to an instrument by Section 26 of the Negotiable Instrument Act, "except in cases in which, under the law for the time being in force, they are so empowered".

The disqualification of all persons noted above is not of the same degree or nature. It is, therefore, necessary to state their respective disqualification as done below:

1. *Minors.* A minor can bind all parties except himself. That is, he is not prohibited from being a party to a negotiable instrument but he cannot be made liable thereon. It is not clear

as to whether any promissory notes or bill made or drawn by a minor for necessaries supplied to him is binding on him. The better opinion is that the payee of the note or the bill can sue the minor for the money on the original consideration which the minor received from him for necessaries, but he cannot recover from the minor on the instrument executed by him.

(*ii*) *Persons of unsound mind.* A lunatic or a drunken person or any other person who is incapable of forming a rational judgment as to the effects of a contract or any other commitment at the time of making it, stands on the same footing as a minor and hence a bill or promissory note executed by such a person is not binding on him. He differs with a minor in that while a minor can bind all parties except himself, he can bind neither himself nor others.

(*iii*) *Alien Enemy.* A contract with an alien enemy being contrary to law or public policy, a person cannot draw a bill of exchange upon another with whose country the country of the drawer is at war, nor can be accept a bill drawn by an alien enemy or indorse a bill or a note to such an enemy or be an indorsee from him. An alien, who is not an enemy, is, however, exempt from such restrictions.

(*iv*) *Insolvent.* When a person is declared insolvent, any negotiable instrument of which he may be a holder vests in his assignee. But if the insolvent has no beneficial interest in the instrument, the title to such an instrument remains with him and he may indorse a negotiable instrument accepted for his accommodation so as to make the acceptor liable to the indorsee. An insolvent cannot, however, sue on a negotiable instrument nor can he pass title to such instrument by indorsement or otherwise. But if he indorses an instrument to any bona fide holder without notice, such bona fide holder acquires a valid title to the instrument so indorsed to him.

Corporation. A corporation is not competent to make, indorse, or accept a promissory note or bill of exchange unless specific authority for the same has been given to it by the Articles of Association or, in the absence of specific authority, such power

can be found to be necessary and incidental to the purpose for which it has been created. In the absence of such express or implied authority, a corporation will not be bound by a note or a bill drawn by a managing agent of the company even to a holder in due course. When such specific or implied authority exists, it must be exercised by the officers duly authorized in this behalf and in the name of the company (*Ramasami* V. *Municipal Council*, 29 Mad. 360). The liability of the company should be made plain on the face of the instrument ; otherwise it will not be liable with regard to third persons (*Srilal* V. *Lister Antisceptic Co.*, 52, Cal, 802). In this connexion, it is material to consider whether the corporation is a trading comapny or a non-trading company. A trading company may exercise such power, but a non-trading company cannot, unless such power is expressly conferred by the Articles of Association.

If a corporation exceeds its power and executes an instrument such an instrument is void and even a bonafide holder for value cannot make the Corporation liable ; for all persons dealing with a Corporation are bound to ascertain its capacity to executs such instruments. But where such authority exiss in the Memorandum of Association, a person dealing with the company is not bound to enquire whether it has been exercised in accordance with the prescribed procedure. Thus, where the Articles of Association empowered the directors to authorize one of themselves to draw a bill of exchange for the company and the managing director drew a bill without express authorization, it was held that the company was nevertheless liable to the holder of the bill as the holder was entitled to presume that the managing director has been authorized in due course (*Dey* V. *Pullinger Engineering Co. Ltd.*, 1921, I. K. B. 77).

In a trading partnership one partner has an implied authority to bind the others by signing or indorsing notes and bills.

Agency. Every person capable of binding himself or of being bound as mentioned in Sec. 26, may so bind himself or be bound by a duly authorized agent acting in his name.

A general authority to transact business and to receive and

discharge debts does not confer upon an agent the power of accepting or endorsing bills of exchange so as to bind his principal.

An authority to draw bills of exchange does not of itself import an authority to indorse, (Section. 27).

Liability of. (*i*) *An agent.* An agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief, that the principal only would be held liable, (Sec. 28).

(*ii*) *A legal representative.* A legal representative of a deceased person who signs his name to a promissory note, bill of exchange or cheque is liable personally thereon unless he expressly limits his liability to the extent of the assets received by him as such, (Section. 29).

(*iii*) *The drawer.* The drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof to compensate the holder, provided that the holder gives the drawer due notice of such dishonour, (Section. 30).

(*iv*) *The drawee.* **The drawee of a bill of exchange** is liable to the drawer or any indorsee from the drawer for the amount mentioned in the bill. But, unless payable on demand or at sight or on presentment, a bill of exchange must be presented to the drawee for acceptance by the drawer or any other holder within a reasonable time after it is drawn. The drawee is not liable to pay unless the bill is presented to him for acceptance.

The drawee of a cheque having sufficient funds of the drawer in his hands, properly applicable to the payment of such cheque, must pay the cheque when duly required to do so, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default, (Sec. 31). The drawee of a cheque is always the banker. Besides the conditions stated above a bank will be justified in refusing payment if:

(*i*) there is a countermand order, i.e., an order to stop payment ;

(*ii*) there is notice of customer's death which vests the fund in his legal representatives ;

(*iii*) the customer becomes a bankrupt and the bank has notice of such bankruptcy.

(*iv*) the customer becomes insane and the bank has notice of it.

(*v*) there is an order from any court prohibiting payment;

(*vi*) a post-dated cheque is presented before due date ;

(*vii*) the cheque is irregular as unstamped, ambiguous or materially altered ;

(*viii*) in case of joint account only one draws the cheque ;

(*ix*) the drawer limits the right of drawing cheques by an agreement with the drawee, e.g., if he binds himself to draw only two cheques in a week, the banker will be at liberty to refuse payment on the third cheque of the week.

(x) The drawer is a trustee in charge of a trust fund but he draws the cheque for any purpose other than that of the trust.

5. *The maker of a promissory note.* Ordinarily, the liability of a maker of a note is absolute and unconditional from the time of making of the note. By executing a note in favour of a certain person and delivering the same to him the maker becomes a debtor and binds himself absolutely to make the payment to him according to the apparent tenor of the document. Thus the maker of a promissory note must pay the money to the bearer at maturity if the note is payable to bearer. If the note is payable to a specific person or his order, he must pay at maturity to the specific person or to his order.

6. *The acceptor of a bill.* The acceptor of a bill of exchange who accepts before maturity is liable to pay the amount of the bill at maturity according to the apparent tenor of the acceptance. This means that payment should be made to the person whose name appears on the face of the bill. The acceptor who accepts at or after maturity must also pay according to the apparent tenor of the acceptance.

7. *The indorser.* In the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without expressly excluding or making conditional his own liability is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor or maker to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given by, or received by, such indorser, (Sec. 35).

8. *Prior parties.* When a negotiable instrument has passed some hands by delivery or indorsement, all the previous holders or indorsers are liable to pay the holder for the time being in case the drawee dishonours the bill either by refusing to accept or by refusing to pay after acceptance, (For details, see 'dishonour', *poste*).

Acceptance :

Acceptance means acknowledgment of the sum mentioned in a bill by the drawee or any other person on his behalf. The drawee is not liable on the bill unless the bill is presented to him for acceptance and he actually accepts it.

Who can accept? No person except the drawee of a bill of exchange, or all or some of several drawees, or a person named therein as a drawee in case of need, or an acceptor for honour, can bind himself by an acceptance, (Sec. 33).

Where there are several drawees of a bill of exchange who are not partners, each of them can accept it for himself, but none of them can accept it for another without his authority, (Sec. 34).

But when the several drawees are partners, acceptance by one as such will bind the rest, because in a partnership there is an implied authority of every partner to act for every one else.

Two kinds of Acceptance :

1. *General Acceptance.* A general acceptance means an unqualified acceptance. When the drawee or any other person on his behalf signs his name across the bill, without stipulating any condition regarding payment, the acceptance is general.

2. *Conlitional* or *qualified acceptance.* A Conditional or qualified acceptance means that the drawee or any one on behalf of the drawee accepts the bill subject to a condition or qualification. The condition may relate to:

(a) the amount to be paid, e. g., if the bill is drawn for Rs. 5000/00, the drawee may accept it for Rs. 3000/00 only ;

(b) the time within which the payment is to be made, e. g., if the bill is payable one month after date, the drawee may accept it as payable three months after date or as payable when the goods are sold or as payable when the drawee has funds ;

(c) the place where the payment is to be made, e. g., the drawee may accept it as payable at United Bank Ltd., Chitta gong, only.

The holder of a bill may decline to recognise a qualified acceptance and treat the bill as dishonoured and sue the drawer acordingly. But when the bill has already been negotiated and passed through several hands, the holder for the time being cannot make the drawer or any previous indorser liable on the bill if he has recognized a qualified acceptance without their consent. If, however, the holder obtains the consent of the drawer and his previous indorsers for such qualified acceptance, he can make them liable on the bill if the drawer subsequently dishonours the bill. For example, A draws a bill on B for Rs. 5000/00 and transfers it to X and X transfers it to Y. Y presents the bill to B for acceptance. B accords a conditional acceptance to which Y agrees without the consent of A and X. Subsequently B refuses to pay. Y cannot sue A and X on the bill. But if Y obtained the consent of A and X prior to his agreeing to the conditional acceptance, he could sue A and X on the bill.

Presentment. Presentment means presenting or placing a negotiable instrument. It may be (i) for allowing the drawe to judge for himself whether he will accept it or not, or (ii) for the purpose of getting payment, if the instrument presented has already been accepted. Presentment may, therefore, be of two kinds : (1) Presentment for acceptance, and (2) Presentment for payment.

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2. *A legal representative.* A legal representative of a deceased person who signs his name to a promissory note, a bill of exchange or a cheque is liable personally thereon unless he expressly limits his liability to the extent of the assets received by him as such (Section 29).

3. *The drawer.* The drawer of a bill of exchange or a cheque is bound, in case of dishonour by the drawee or the acceptor thereof to compensate the holder, provided that the holder gives the drawer due notice of such dishonour (Section 30).

4. *The drawee.* The drawee of a bill of exchange is liable to the drawer or any indorsee from the drawer for the amount mentioned in the bill. But, unless payable on demand or at sight or on presentment, a bill of exchange must be presented to the drawee for acceptance by the drawer or any other holder within a reasonable time after it is drawn. The drawee is not liable to pay unless the bill is presented to him for acceptance.

The drawee of a cheque having sufficient funds of the drawer in his hands, properly applicable to the payment of such cheque, must pay the cheque when duly required to do so, and in default of such payment, must compensate the drawer for any loss or damage caused by such default (Section 31). The drawee of a cheque is always the banker. Besides the conditions stated above, a bank will be justified in refusing payment if :

When can a bank refuse payment ?

(*i*) there is a countermand order, i.e., an order to stop payment ;

(*ii*) there is notice of customer's death which vests the fund in his legal representatives ;

(*iii*) the customer becomes a bankrupt and the bank has notice of such bankruptcy ;

(*iv*) the customer becomes insane and the bank has notice of it ;

(*v*) there is an order from any court prohibiting payment ;

(*vi*) a post-dated cheque is presented before due date ;

(*vii*) the cheque is irregular as unstamped, ambiguous or materially altered ;

(*viii*) in case of joint account only one draws the cheque ;

(*ix*) the drawer limits the right of drawing cheques by an agreement with the drawee, e.g., if he binds himself to draw only two cheques in a week, the banker will be at liberty to refuse payment on the third cheque of the week ; and,

(*x*) the drawer is a trustee in charge of a trust fund but he draws the cheque for any purpose other than that of the trust.

5. *The maker of a promissory note.* Ordinarily, the liability of a maker of a note is absolute and unconditional from the time of the making of the note. By executing a note in favour of a certain person and delivering the same to him the maker becomes a debtor and binds himself absolutely to make the payment to him according to the apparent tenor of the document. Thus the maker of a promissory note must pay the money to the bearer at maturity if the note is payable to the bearer. If the note is payable to a specific person or his order, he must pay at maturity to the specific person or to his order.

6. *The acceptor of a bill.* The acceptor of a bill of exchange who accepts before maturity is liable to pay the amount of the bill at maturity according to the apparent tenor of the acceptance. This means that payment should be made to the person whose name appears on the face of the bill. The acceptor who accepts at or after maturity must also pay according to the apparent tenor of the acceptance.

7. *The indorser.* In the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without expressly excluding or making conditional his own liability is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor or maker to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given by, or received by, such indorser (Section 35). When a person guarantees the payment in a promissory note as a surety and not as an indorser, he is liable therefor when default in payment is made by the maker of the promissory note (17 D. L. R., S. C., 531).

8. *Prior parties.* When a negotiable instrument has passed some hands by delivery or indorsement, all the previous holders or indorsers are liable to pay the holder for the time being in case the drawee d shonours the bill either by refusing to accept or by refusing to pay after acceptance. (For details, see 'dishonour', *poste*).

Acceptance :

Acceptance means acknowledgement of the sum mentioned in a bill by the drawee or any other person on his behalf. The drawee is not liable on the bill unless the bill is presented to him for acceptance and he actually accepts it.

Who can accept ? No person except the drawee of a bill of exchange, or all or some of several drawees, or a person named therein as a drawee in case of need, or an acceptor for honour, can bind himself by an acceptance (Section 33).

Where there are several drawees of a bill of exchange who are not partners, each of them can accept it for himself, but none of them can accept it for another without his authority (Section 34).

But when the several drawees are partners, acceptance by one as such will bind the rest, because in a partnership there is an implied authority of every partner to act for every one else.

Two kinds of Acceptance :

1. *General Acceptance.* A general acceptance means an unqualified acceptance. When the drawee or any other person on his behalf signs his name across the bill, without stipulating any condition regarding payment, the acceptance is general.

2. *Conditional* or *qualified acceptance.* A conditional or qualified acceptance means that the drawee or any one on behalf of the drawee accepts the bill subject to a condition or qualification. The condition may relate to :

(a) the amount to be paid, e. g., if the bill is drawn for Rs. 5,0,000 00, the drawee may accept it for Rs. 3,000·00 only ;

(b) the time within which the payment is to be made, e. g., if the bill is payable one month after date, the drawee may accept it as payable three months after date or as payable when the goods are sold or as payable when the drawee has funds ;

(c) the place where the payment is to be made, e. g., the drawee may accept it as payable at United Bank Ltd., Chittagong, only.

The holder of a bill may decline to recognise a qualified acceptance and treat the bill as dishonoured and sue the drawer

accordingly. But when the bill has already been negotiated and passed through several hands, the holder for the time being cannot make the drawer or any previous indorser liable on the bill if he has recognized a qualified acceptance without their consent. If, however, the holder obtains the consent of the drawer and his previous indorsers for such qualified acceptance, he can make them liable on the bill if the drawer subsequently dishonours the bill. For example, A draws a bill on B for Rs. 5000·00 and transfers it to X and X transfers it to Y. Y presents the bill to B for acceptance. B accords a conditional acceptance to which Y agrees without the consent of A and X. Subsequently B refuses to pay. Y cannot sue A and X on the bill. But if Y obtained the consent of A and X prior to his agreeing to the conditional acceptance, he could sue A and X on the bill.

Recognition of qualified acceptance

Presentment. Presentment means presenting or placing a negotiable instrument. It may be—(i) for allowing the drawee to judge for himself whether he will accept it or not, or (ii) for the purpose of getting payment, if the instrument presented has already been accepted. Presentment may, therefore, be of two kinds : (1) Presentment for acceptance, and (2) Presentment for payment.

(*i*) *Presentment for acceptance.* This species of presentment is necessary only in the case of a bill of exchange payable after sight, i.e., not payable at sight or on demand. It does not apply to a cheque or a pro-note.

If no time or place is specified for presentment, a bill of exchange payable after sight must be presented to the drawee thereof for acceptance, if he can be found after reasonable search. The presentment must be made by a person entitled to demand acceptance, within a reasonable time after it is drawn, and in business hours on a business day. In default of such presentment no party thereto is liable thereon to the person making such default.

Business hours mean the time during which by a custom or usage business is carried on, for instance, between 10 a.m. and 6 p.m. on week days. A business day excludes all public holidays and also any day on which business is stopped by custom.

If, after reasonable search, the drawee cannot be found, the bill is to be deemed as dishonoured.

If the bill is directed to the drawee at a particular place, it must be presented at that place ; and, if at the date due for presentment, he cannot be found there after reasonable search, the bill is to be deemed as dishonoured.

The usual mode of presenting a bill is to exhibit it to the drawee so that he may judge for himself whether he should accept it or not. Thus conceived presentment means personal presentment or presentment by messenger. But if authorized by agreement or usage, a presentment through the post office by means of a registered letter is sufficient (Section 61).

All bills need not be presented for acceptance :

Bills payable on demand or payable a certain number of days after the date on which it was drawn or payable on a fixed date need not be presented for acceptance. A bill need not also be presented for acceptance where : (i) the drawee is a fictitious person, or (ii) he cannot be found on a reasonable search, or (iii) the drawee is incompetent to contract, e.g., he is a minor or a person of unsound mind, or (v) the drawee becomes insolvent or is dead.

Time for acceptance. Under Section 63 of the Act, the drawee is entitled to 48 hours' time, exclusive of public holidays, to consider whether he will accept it or not. The ordinary practice is to leave the bill with the drawee during the period of deliberation (*Ram Ravji V. Pralhaddas*, 20 Bom., 133).

Effect of non-acceptance. If a bill is not accepted within forty-eight hours of its due presentation the holder may treat it as dishonoured. The holder may also treat it as dishonoured if the bill is accepted conditionally.

(ii) *Presentment for payment.* Section 64 of the Act lays down that promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively, by or on behalf of the holder. In default of such presentment the maker or acceptor or drawee, as the case may be, is not liable to pay.

A bill can only be presented for payment when it has been accepted and not dishonoured by non-acceptance.

Section 66 lays down that a promissory note or a bill of exchange made payable at a specified period after date or sight thereof, must be presented for payment at maturity.

Section 65 of the Act provides that presentment for payment must be made during the usual business hours or if the drawee or acceptor or maker is a banker, during banking hours and on a business day (exclusive of public holidays).

Bills, promissory notes and cheques must be presented within a reasonable time after they are received by the holder. But a promissory note payable on demand and not payable at a specified place need not be presented at all.

Presentment of cheques. Section 72 of the Act lays down that a cheque must be presented at the bank upon which it is drawn. In default of such presentment, the drawer cannot be made liable. The presentment must also be made before the relation between the drawer and the banker is altered to the prejudice of the drawer.

When the drawer's liability ceases

If the holder does not present the cheque for payment within a reasonable time and in the meantime the relation between the drawer and the banker is altered and the drawer suffers actual damage due to the delay, the drawer will not be liable if the bank fails to honour the cheque. For example, A draws a cheque for Rs.1000·00 and, when the cheque ought to be presented, has funds at the bank to meet it. B delays unusually in presenting the cheque and the bank fails before the cheque is presented. The drawer is discharged. But the holder can still put in his claim when the bank is wound up. But, supposing A draws a cheque at Dacca on a bank in Karachi. The bank fails before the cheque could be presented in ordinary course (say, through the holders's bank at Dacca). A is not discharged, for he has suffered the loss not because of any delay in presenting the cheque. Further, suppose at the time when A drew the cheque he had only Rs. 500·00 in the bank. If the damage can be shown to have been caused by the delay in presenting the cheque,

A will be released from liability for Rs. 500·00. For the remaining sum, he will still be liable to B.

When presentment for payment is not necessary :

In the following cases presentment of a negotiable instrument for payment is not necessary (Section 76) :—

(*i*) where the maker of a promissory note or the drawee or the acceptor of a bill intentionally prevents the presentment of the instrument ;

(*ii*) where the instrument being payable at his place of business or at some other specified place, the maker, the drawee or the acceptor, as the case may be, closes such place on a business day during the usual business hours or cannot be found at some other specified place ;

(*iii*) where the maker, the drawee or the acceptor has agreed to pay even if there is no presentment ;

(*iv*) where the maker, the drawee or the acceptor, as the case may be, makes a part payment or promises to pay in part or full after knowing that the instrument has not been presented although it has become mature, or in any other way waives his right to demand presentment ;

(*v*) where the drawer could not suffer damage for non-payment, any holder can make the drawer liable without presentment, e.g., where the drawer draws the bill on himself or where the drawee is a fictitious person ;

(*vi*) where a promissory note is payable on demand and is not payable at a specified place (Section 64).

In the above cases noted under (i), (ii), (iii), (iv) and (v), the instrument is regarded as dishonoured and the holder can avail himself of the remedies open to him in case of dishonour.

Dishonour :

A negotiable instrument is said to be dishonoured when the drawee either refuses to accept it or to make payment upon it. Dishonour gives rise to cause of action for suit against the drawer or previous holders. But notice of dishonour must be served on the drawer or previous holders if they are sought to be made liable on the dishonoured instrument. In certain cases, however, notice of dishonour is not necessary to be given.

Dishonour by non-acceptance. Under Section 91 of the Act, a bill of exchange is said to be dishonoured by non-acceptance in any of the following cases :—

Cases of dishonour by non-acceptance

(*i*) when the drawee or one of several drawees not being partners fails to accept the bill within forty-eight hours of its due presentment for acceptance ;

(*ii*) where presentment is excused and the bill remains unaccepted ;

(*iii*) when the acceptance is qualified and not unconditional the holder may treat the bill as dishonoured ;

(*iv*) when the drawee is incompetent to contract, for instance, when he is a minor or a lunatic, the bill is deemed to have been dishonoured. Similarly, when the drawee is a fictitious person or one who is dead or is a bankrupt or one who cannot be found after reasonable search, the bill is deemed to have been dishonoured.

Dishonour by non-payment. Under Section 92 of the Act, a promissory note, a bill of exchange or a cheque is said to be dishonoured by non-payment when the maker of the pro-note, the acceptor of the bill or the drawee of the cheque makes default in payment upon the instrument being duly presented for payment.

This section requires that to enforce payment on a negotiable instrument, it must be validly presented for payment. Now, the valid presentment for payment of a bill of exchange prerequires its presentment for acceptance by the drawee. When the drawee accepts the bill he becomes the principal debtor liable to pay the bill at maturity when it has to be presented to him for payment. If on such presentment at maturity he fails to make payment the bill is dishonoured by non-payment. Similarly, when the maker of a promissory note fails to make payment on the due date the note is dishonoured. When the banker refuses to make payment of a cheque on presentment the cheque is dishonoured.

If presentment for payment is excused, the instrument is dishonoured if payment is not made when it is overdue.

Dishonour by a drawee in case of need. If the drawee of a bill of exchange refuses to accept the bill, the holder can proceed against the drawer. But in some cases, the drawer mentions an alternative drawee to whom the holder can present the bill for acceptance in case the actual drawee refuses to accept or refuses to pay after acceptance. Such an alternative drawee is known as a drawee in case of need. If such a drawee is mentioned, a bill dishonoured by the actual drawee must be presented to him before the drawer can be made liable thereon. A bill may as well be dishonoured by non-acceptance or by non-payment if the drawee in case of need refuses to accept it or to pay on it after acceptance.

Who is a drawee in case of need ?

Distinction between dishonour by non-acceptance and dishonour by non-payment :—

In the case of a dishonour by non-payment, the holder can proceed against the drawee because by his acceptance he has become a party to the bill, in fact, the principal debtor on it. But in the case of dishonour by non-acceptance the holder cannot make the drawee liable because he is yet a stranger to the bill. He can proceed only against the drawer and all other previous endorsers.

Notice of dishonour :

Under Section 93 of the Act, when a promissory note, a bill of exchange or a cheque is dishonoured by non-acceptance or non-payment, the holder of the instrument or some party thereto who remains liable thereon, must give notice of dishonour to all the other parties except the maker, the acceptor or the drawee of a note, bill or cheque respectively, whom the holder of the instrument seeks to make liable. In default of such notice, all the parties other than the maker, the acceptor and the drawee, who do not require any notice of dishonour under this section, will be discharged from liability.

Any party receiving notice of dishonour must, in order to render any prior party liable to himself, give notice of dishonour to such party within a reasonable time. For example, A draws a bill on B for Rs. 5000 00. A endorses it to X and X to Y and

Y to Z. Z presents the bill to B for acceptance and B refuses. Z must notify A, X and Y if he wants to make them all liable. If, however, he wants to make only Y liable, he must notify Y alone. If Y wants to make A and X liable, he must notify them and so on.

Mode in which notice may be given. Notice of dishonour may be given to the person to whom it is required to be given or to his duly authorized agent or to his legal representative in case of his death or to his assignee where he has been declared an insolvent. The notice may be oral or written. If written, it may be sent by post and if it is duly addressed and directed. it will operate as a valid notice even if it is lost or miscarried.

The notice may be in any form ; but it must inform the party to whom it is addressed, either in express terms or by reasonable intendment, that the instrument has been dishonoured indicating therein the way in which it has been dishonoured and also that he will be held liable thereon.

The notice must be given within a reasonable time after dishonour at the place of business or, in case such party has no place of business, at the residence of the party for whom it is intended (Section 94).

When notice of dishonour is not necessary. Under Section 98 of the Act, notice of dishonour is not necessary :—

(*i*) when it is dispensed with by the party entitled thereto, e. g., when an endorser writes at the time of endorsement, "no notice of dishonour required," the endorsee can make him liable without giving him notice of dishonour ;

(*ii*) when the party charged could not suffer damage for want of notice ;

(*iii*) in order to charge the drawer when he has countermanded payment ;

(*iv*) when the party entitled to notice cannot after due search be found ; or the party bound to give notice is, for any other reason, unable without any fault of his own to give it ;

(*v*) in order to charge the drawer when the drawer draws the bill on himself or his agent, i.e., where the acceptor is the drawer ;

(*vi*) in the case of a promissory note which is not negotiable ;

(*vii*) when after knowing the facts, the party entitled to notice promises unconditionally to pay the amount due on the instrument.

Noting : Under Section 99 of the Act, when a promissory note or a bill of exchange has been dishonoured by non-acceptance or non-payment, the holder, besides giving a notice of dishonour to the parties entitled to such notice, may, if he so chooses, cause such dishonour to be noted by a notary public who is appointed by the Central Government for this purpose.

Noting means authentication of the fact of a bill having been dishonoured. It consists of making a note on the instrument itself or on a slip of paper attached to the instrument or partly upon each, specifying in it : (i) the fact of dishonour, (ii) the date of dishonour, (iii) the reasons, if any, assigned for dishonour, (iv) if the instrument has not been expressly dishonoured the reasons why the holder treats it as dishonoured, and (v) the notary's charges.

What is noting ?

Protest : Under Section 100 of the Act, when a promissory note or a bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may, within a reasonable time, cause such dishonour to be noted and certified by a notary public. Such certificate is called a protest.

What is protest ?

Protest for better security. When the acceptor of a bill of exchange has become insolvent, or his credit has been publicly impeached, before the maturity of the bill, the holder may, within a reasonable time, cause a notary public to demand better security of the acceptor and on its being refused may, within a reasonable time, cause such facts to be noted and certified. Such a certificate is called a protest for better security.

Contents of protest. A protest made under Section 100 must contain (Section 10) :

(a) either the instrument itself, or a literal transcript of the instrument and of everything written or printed thereupon ;

(b) the name of the person for whom and against whom the instrument has been protested ;

(c) a statement that payment or acceptance or better security, as the case may be, has been demanded of such person by the notary public ; the terms of his answer, if any, or a statement that he gave no answer, or that he could not be found ;

(d) when the note or bill has been dishonoured, the place and time of dishonour and, when better security has been refused, the place and time of refusal ;

(e) the subscription of the notary public making the protest ;

(f) in the event of an acceptance for honour or of a payment for honour, the name of the person by whom, of the person for whom and the manner in which such acceptance or payment was offered and effected.

A notary public may make the demand mentioned in clause (c) of this section either in person or by his clerk or, where authorized by agreement or usage, by registered letter.

Notice of protest. When the law requires that a pro-note or a bill should be protested, it is the notice of such protest and not the notice of dishonour that should be given by the holder to fix the liabilities of the antecedent parties to the note or the bill, as the case may be. Such a notice can be given either by the holder or by the notary who makes the protest (Section 102).

The rules that govern notice of dishonour also govern notice of protest. It, therefore, follows that conditions under which notice of dishonour is excused will also excuse a notice of protest. (For circumstances excusing notice of dishonour, see *ante*.)

Discharge of parties from liability :

Discharge of the maker, acceptor or the endorser

1. Under Section 82 of the Act, the maker, acceptor or the endorser respectively of a negotiable instrument is discharged from liability thereon in the following ways :—

(a) *By cancellation.* An endorser or an acceptor is discharged from liability to holder, or any one claiming under him who cancels such endorser's or acceptor's name with the intention of discharging him.

(b) *By release.* A maker or an endorser or an acceptor is discharged from liability to a holder who discharges such maker,

acceptor or endorser otherwise than by cancellation and to all parties deriving title under such holder after notice of such discharge.

(c) *By payment.* All parties to a negotiable instrument are discharged when the acceptor, the drawee or the maker pays the amount due, on the maturity of the instrument, to the holder. In case of an instrument payable to bearer, payment to any one in possession discharges all parties.

2. *By default of holder.* (*i*) Under Section 83 of the Act, if the holder of a bill allows the drawee more than forty-eight hours, exclusive of public holidays, to consider whether he will accept the same, all previous parties not consenting to such allowance are thereby discharged from liability to such holder.

(*ii*) Under Section 84, if the holder of a cheque fails to present it before the relation between the drawer and the banker is altered to the prejudice of the drawer and the drawer suffers damage due to such delay, the drawer is discharged of all liabilities to the holder.

(*iii*) Under Section 86, if the holder of a bill agrees to a qualified acceptance, all previous parties whose consent is not obtained to such acceptance are discharged as against the holder and those claiming under him.

(*iv*) Under Section 93, if the holder fails to give notice of dishonour to such parties as are antecedent to him such parties are discharged as against holder and those claiming under him. This rule does not, however, apply to the maker, acceptor or the drawee of a note, bill or cheque respectively, their liability being fixed by the last clause of this section.

3 *By material alteration.* Under Section 87 of the Act, any material alteration of a negotiable instrument, while in the possession of the holder, discharges the liability of all parties prior to or at the time of such alteration who do not consent to such alteration, unless it was made to carry out the common intention of the original parties. Alteration in : (i) date, (ii) the time of payment, (iii) the place of payment, (iv) the amount payable, (v) the medium and method of payment, and (vi) of parties, have been regarded as material alterations.

What are material alterations ?

In some cases, however, even material alterations do not discharge the liabilities of the parties. These may be stated as follows :—

(i) Alteration made before its completion, i. e., before the issue, delivery or negotiation of the instrument.

(ii) Alteration made in order to correct a *bona fide* error.

(iii) Alteration made with the consent of the parties to the instrument.

(iv) Alteration made by way of converting an endorsement in blank into an endorsement in full.

(v) Alteration made by way of crossing a bearer cheque.

Acceptance for honour :

When a bill of exchange has been noted or protested for non-acceptance or for better security, any person not being a party already liable thereon may, with the consent of the holder, by writing on the bill, accept the same for the honour of any party thereto (Section 108). The purpose of such acceptance is to save the honour of any party liable on the bill and most usually to save the prestige of the drawer.

A person desiring to accept for honour must, by writing on the bill under his hand, declare that he accepts under protest the protested bill for the honour of the drawer or of a particular endorser whom he names or generally honours (Section 109).

Where the acceptance does not express for whose honour it is made, it shall be deemed to be made for the honour of the drawer (Section 110).

There is no form of such acceptance. If the formalities noted above are complied with, the acceptance is valid. Such acceptance may be written across the bill or on any part of the bill. 'Accepted supra protest', 'accepted S. P.' or 'Accepted Supra Protest for the honour of A for Rs.—' are sufficient. But in each case, the acceptance must bear the signature of the acceptor.

Liability of an acceptor for honour :

An acceptor for honour is liable to all parties subsequent to the party for whose honour he accepts to pay the amount of the bill if the drawee makes default in payment. For example, A draws a bill on B. A endorses it to C and C to D and D to

E and E to F. B refuses to accept the bill. Then X steps in to accept it for the honour of D. X is liable to E and F, and he can sue A and C for payment in case B refuses to pay.

The liability of an acceptor for honour is, however, a qualified one. His liability will arise if : (i) the bill is presented to the drawee for payment at its maturity, (ii) the drawee refuses payment whereupon the bill is duly noted and protested for non-payment and (iii) the bill is presented to acceptor for honour. If these conditions are not fulfilled, the acceptor for honour will not be made liable (Section 112).

Qualified liability

Payment for honour :

When a bill of exchange has been noted or protested for non-payment, any person may pay the same for the honour of any party liable to pay thereon, provided that the person so paying or his agent in that behalf has previously declared before a notary public the party for whose honour he is paying and also that such declaration has been recorded by such notary public (Section 113).

Any party paying for honour is entitled to all the rights, in respect of the bill, of the holder at the time of such payment and may recover from the party for whose honour he pays all sums so paid, with interest thereon and with all expenses properly incurred in making such payment (Section 114).

Instruments obtained by unlawful means or for unlawful consideration :

When an instrument has been lost or has been obtained from any maker, acceptor or holder thereof by means of an offence or fraud or for unlawful consideration, no possessor or endorsee who claims through the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder or from any party prior to such holder, unless such possessor or endorsee is, or some person through whom he claims, was a holder thereof in due course (Section 58).

From an analysis of the law laid down above it is clear that the legal position of a possessor or an endorsee of a negotiable

instrument which has been lost or has been obtained by means of an offence or fraud or unlawful consideration is different from that of a holder in due course under similar circumstances. Let us now examine each of the above conditions separately.

Different position

Lost instrument :

(*i*) Negotiable instruments payable to bearer are transferable by mere delivery and no endorsement is necessary. When the finder of such an instrument passes it to another who takes it *bona fide* for value and without notice of the loss, he becomes a holder in due course. He thus acquires a valid title to it and can retain the instrument as against the rightful owner and is also entitled to payment from parties liable thereon.

(*ii*) When a bill or note not payable to bearer is lost, the finder acquires no title to it as against the rightful owner, nor can he claim payment from the acceptor or the maker. The rightful owner is entitled to recover the instrument from the finder.

(*iii*) When the finder of a lost bill or note gets payment from the acceptor or maker who pays it in due course, such acceptor or maker is discharged from all liabilities to the rightful owner. But the rightful owner can always proceed against the finder for recovery of the money so paid to him.

(*iv*) When the finder of a lost bill or note which is payable to order and is, therefore, transferable by endorsement and delivery, forges the instrument and endorses it to *bona fide* transferee for value, the latter will not acquire any title to it, for, the endorser himself had no title which he could transfer, and forgery can confer no title.

(*v*) When a holder loses a bill he should notify the loss to all parties liable thereon.

(*vi*) When a holder loses a bill he must apply to the drawee for payment at maturity and if the drawee refuses he must give notice of dishonour to all the parties liable thereon. Otherwise he will forfeit his remedy against the drawer and all the prior parties.

Stolen instruments. The position of stolen instruments in the hands of the thief and subsequent holders is exactly similar to that of the lost instruments. If the instrument is a completed one, payable to bearer and it passes from the custody of the thief to a holder in due course, the latter can retain it and enforce payment against all prior parties ; but if it is payable to order and there is no endorsement on it, or if the document is not complete when it is stolen, no title will pass.

Instrument obtained by fraud. Fraud vitiates all contracts. When the issue or any subsequent negotiation of a bill is obtained by fraud or in breach of faith, the bill is said to be vitiated by fraud. In such cases the holder subsequent to the fraud cannot enforce payment against any party thereto, nor can he retain the bill against the true owner (*Dawes V. Harness*, 1875, L. R. 10 C. P., 166). When an instrument is obtained by fraud even for the purpose of defrauding a third party, the person who thus obtains it, has a defective title and cannot enforce it ; but if subsequently the instrument passes to a holder in due course, he can enforce it and the plea of fraud will not avail against him (*Krishnappa V. Adimula*, 20 Mad., 84).

Burden of proof

It should be noted that the party which alleges fraud against the holder must prove it, as the presumption of law is that a holder is a holder in due course.

Instruments obtained for an unlawful consideration :

Consideration may be unlawful either because it is immoral or opposed to public policy or because it is expressly or impliedly forbidden by law or is fraudulent (*Bal Gangadhar V. Srinivas*, 39 Bom., 441). "An instrument given for unlawful consideration is void except in the hands of a holder in due course who, therefore, can enforce it against all prior parties. Unlike other contracts, a negotiable instrument is thus not absolutely void for unlawful consideration." (*G. C. Das—The Negotiable Instruments Act*, pp 151-52).

Forged Instruments. A person who forges an instrument cannot confer a valid title even on a *bona fide* transferee for value

without notice of the forgery. If the holder obtains payment on the forged instrument, the rightful owner can recover the money from him.

Where endorsement of an instrument is forged a *bona fide* transferee for value acquires no valid title if the instrument is payable to order and hence negotiable only by endorsement and delivery. But where the instrument is payable to bearer and as such negotiable by mere delivery, a *bona fide* transferee for value acquires a valid title though the instrument is forged. He can retain the instrument as against the rightful owner and can enforce payment from any party liable thereon.

Crossed cheques :

A cheque is said to be crossed when two parallel transverse lines are drawn across the face of the cheque, with or without words like "& Co." or "not negotiable" inserted between them.

The purpose of crossing a cheque is to prevent any one but the payee from cashing it. A cheque is crossed in order to give a direction to the banker on whom it is drawn not to make the payment across the counter but to pay it only to a banker. The obvious advantage of this system of payment is to insure against the risk of loss or theft of the cheque in the course of circulation, for, it may always be found out to whose use the proceeds of the cheque has gone.

Manner of crossing

Crossing done by means of drawing two parallel lines as above is called *general crossing*. But when the crossing prescribes a particular bank to which alone the payment is to be made, the crossing is known as *special crossing*. A special crossing need not have the two parallel lines drawn across its face and it may or may not contain the words "not negotiable" (Section 124).

A cheque can be crossed at the time of issue or any time thereafter before presentment to the banker. It may be crossed by the drawer or any holder subsequent to him. If a cheque is crossed generally, the holder may cross it specially. Where a cheque is crossed generally or specially, the holder may add the words "not negotiable". Where a cheque is crossed specially,

the banker to whom it is crossed may again cross it specially to another banker, his agent, for collection (Section 125).

Where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn must refuse payment thereof (Section 127).

Liability of bankers : Where a cheque is crossed generally, the banker on whom it is drawn must not pay it to any one except to a banker and where a cheque is crossed specially, the banker on whom it is drawn must not pay it to any one except to the banker to whom it is crossed or his agent for collection (Section 126). If the banker on whom a crossed cheque is drawn has paid the same in due course, i.e., in the way specified by Section 126 of the Act, the banker is not liable any more to the drawer, no matter whether the payment has been received by the true owner or not. But if the banker pays the cheque otherwise than according to the provision of Section 126, he will be liable to the drawer if the latter sustains any loss on account of such payment (Section 128 and 129)

Effect of crossing with the words "not negotiable" :

A person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable", shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had (Section 130).

The phrase "not negotiable" does not make the cheque non-transferable ; it only takes away the negotiable character of the instrument, that is, a holder with a defective title cannot confer a good title on a holder in due course.

Hundis :

Character of Hundi

Hundis are negotiable instruments written in some oriental language, being sometimes bills of exchange and sometimes promissory notes, and are subject to local usages and are not affected by the provisions of the Negotiable Instruments Act (*Mangal V. Ganeski*, 1936, All. 396).

Hundis have been in existence in this sub-continent from time immemorial and local customs and usages have grown up around Hundi transactions. Thus, under a Murshidabad Custom, the Court allowed interest on a hundi payable many days after sight (*Dhanput V. Maharaja Gagat*, 8, W. R. 86). Recognizing a usage at Dacca the Court relieved a *Gomastha* of his personal liability when he drew a hundi on his principal without signing as agent thus violating the ordinary rule (*Hari V. Kishan*, 17, W. R., 442).

The Negotiable Instruments Act has not touched the customs and usages governing hundis though they militate against some important provisions of the Act. Thus, oral acceptance of a hundi may be recognized by Courts though the act lays down definitely that acceptance must be in writing. The rights and duties of parties to hundis are also regulated strictly by such customs and usages. But the Act lays down that the parties to a hundi may exclude the operation of such custom and usage by any words in the instrument indicating a clear intention that the legal relation of the parties shall be governed by the Negotiable Instruments Act.

Kinds of Hundis :

Hundis are first divisible into two broad groups :—

(a) *Darshani hundis*, i. e., hundis payable at sight, and,

(b) *Muddati* or *Miadi hundis*, i. e., hundis payable after sight or a certain time after presentment,.

Each of the two above groups is sub-divisible into several classes, such as mentioned below :

(*i*) *Shahjog Hundi.* This kind of hundi is drawn by a merchant on another merchant directing the latter to pay the hundi only to a respectable holder (*shah*) and not to any bearer. Before making payment, the drawee must make sure that the holder is a man of substance and respectability. Otherwise the drawee will not be entitled to recover the money paid by him if the holder turns out to be a man below standard.

(*ii*) *Namjog Hundi.* Just as a *Shahjog Hundi* is payable only to a *shah* or a respectable person, a *Namjog Hundi* is payable only

to the person named in the document. It is payable also to the order of the payee and can be negotiated like a bill of exchange by endorsement and delivery. But if the hundi is accompanied by a script bearing the description of the person in whose name it is granted, it cannot be endorsed or transferred. In that case it is payable to that person alone.

(*iii*) *Dhanijog Hundi. Dhani* means a holder. This kind of hundi is payable to any one who holds it. It can, therefore, be negotiated as an instrument payable to bearer.

(*iv*) *Firman Jog Hundi. Firman* means an order. A *firman Jog Hundi* is payable to the order of a person.

(*v*) *Jawabee Hundi.* It is like a letter of recommendation to a banker for payment of a particular sum to a person to whom money has to be paid.

(*vi*) *Zikri chit.* It is a request to a certain person residing in the town at which a hundi is addressed or made payable by the drawer of a hundi to accept it for honour in case it is dishonoured by the drawee.

(*vii*) *Dekhandor Hundi.* It is also payable to bearer or presenter.

(*vtii*) *Jokhmi Hundi. Jokhmi* means "against risk" or "against goods". This kind of hundi is drawn on condition that the money shall be payable only in the event of the arrival of the goods against which it is drawn (*Jadowji V. Jetha*, 4 Bom., 333). These hundis are similar to Insurance Policies.

Instrument acquired after dishonour or when overdue :

The holder of a negotiable instrument who has acquired it after dishonour, whether by non-acceptance or non-payment, with notice thereof, or after it has become overdue by maturity has, as against the other parties, only those rights as his transferror or endorser had at the time of transfer. But any person who, in good faith and for consideration, becomes the holder, after maturity, of a promissory note or a bill of exchange made, drawn or accepted without consideration, for the purpose of enabling some party thereto to raise money thereon, he may re'cover the amount of the note or bill from any prior party (Section 59).