

**PRINCIPLES
OF
COMMERCIAL LAW**

Prof. MAFIZUL ISLAM

EAST BENGAL PUBLISHERS


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OF
COMMERCIAL LAW

Prof. MAFIZUL ISLAM,

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DEDICATED
to
The hallowed memory
of
The late Mr. Justice
M. R. KAYANI,

the valiant soul who illumined our
course during some of the darkest years
of our history and died fighting to
uphold the cause of 'Rule of Law'.

PREFACE

This humble work is the outcome of an attempt, modest but assiduous, to organize and squeeze into a moderate compass the most essential among the numerous rules and practices that constitute the magnificent body of what is comprehensively called the 'Commercial Law'. Nothing more than such restricted treatment was, however, called for since the book being primarily designed as a text-book for B. Com. and LL.B. students, its scope has of necessity to conform to the examinational requirements of such students. Notwithstanding that the book will, I hope, respond fairly to the basic requirements of the practitioners in Commercial Law.

It cannot be controverted that the field of study of any single branch of law is not only quite extensive but also, by its very nature, perpetually expanding, for, not only new rules of law are being daily enacted to most new conditions and problems as they crop up but ever-increasing adornments are being added from day to day to its splendid superstructure through the never-ceasing machinery of interpretation and application of law as done by the competent branches of the judiciary, national and international. Dynamism is, in short, the very essence of law. This is all the more true in the case of Commercial Law, for, the very driving force of modern civilization being commerce, within and without, the branch of law which governs the commercial activities of individuals and nations is in a continuous process of operation affording the evolution of fresh rules and practices and thus causing its volume to swell from day to day. So prolific is the process of change and growth resulting from this motion that while other departments of law may remain more or less static over such long periods as forty or fifty years Commercial Law has registered a sharp tendency to change from decade to decade, more often than not, from year to year, sometimes so much so that text-books on the subject has

called for major revision from one edition to another even though within the span of two to three years. Having, therefore, to write my humble book against such a baffling background, I can hardly lay any claim to its adequacy even for the present because it is next to impossible to compress into its brief space the prodigious mass of commercial laws and practices that have so far grown. As for its sufficiency for any long period of time, even half a decade, I have no such hope, for, as the book has passed through a couple of editions, the entire structure of Commercial Law at home and abroad may be so radically altered both by legislation and judicial decision that a thoroughly revised edition may immediately be called for. In spite of all these handicaps, present and prospective, I have undertaken this venture, mostly at the matchless boldness shown by my publishers Mr. Surendra Nath Ghosh and Mr. Rabindra Nath Das, out of one paramount consideration. Recently as a student and currently as a lawyer I have keenly felt that our students and legal practitioners need a complete handbook in which the law of Commerce as applied in Pakistan can be found in its essential outlines—a book hitherto unavailable, even at the 16th year of our independence with the result that those who require the service of such a volume has to turn to Indian contributions, though the dissimilarity between Indian and Pakistani Commercial Law is already very wide and is sure to grow wider and wider with the passage of time. In fact, this most humble work of mine is the first complete text-book on the subject, however meagre may be its range of coverage.

One word of explanation regarding the scope of the book will not perhaps be out of place. Though dealing with the law governing commercial transactions, it has devoted quite a handsome space to the 'Law of Contract'. This may appear incongruous, for, the law of contract applies to all agreements, commercial and non-commercial. The reason of my doing so is simple. The LL.B. Syllabus provides for separate study of this law but the B. Com. Syllabus assimilates it within the scope of Commercial Law. Taking into consideration the question of convenience of both these groups of students, I have chosen to follow the framers of

the B. Com. Syllabus which also has been done by recognised Indian authors, notably Prof. A. K. Sen.

Though all the branches of Commercial Law have already been fairly encompassed by statutory enactments, not much being left to customs and usages, and have also been further freed from uncertainty by an abundant collection of case-laws, it is admittedly an absurd attempt to prepare any useful book on the subject without the aid of relevant classics, commentaries and text-books by reputed authors. I have accordingly consulted at length and taken extensive assistance from a large variety of available books on the subject, to the authors of all of which I feel profoundly indebted. Of such books particular mention must, however, be made of 'The Indian Contract Act, by Sir Frederick Pollock and Sir D. F. Mulla, 'The Indian Contract Act' by A. C. Dutt, 'Laws of England' by Halsbury,' 'The Negotiable Instruments Act' by G. C. Das. 'The Indian Partnership Act' by H. T. Desai, Topham's 'Company Law' and last but not the least Prof. A. K. Sen's 'Hand-Book of Commercial Law' and S. R. Davar's 'Elements of Indian Mercantile Law'.

It has been said that an author's achievement is never entirely his own. I find reason enough to agree with the view when, looking back through the days during which the book was written I discover the amount of debt I owe on its various accounts to my friend Prof. Syed Mynuddin Hossain, M.A., my younger brother, Mr. Nurul Islam, B.A., my niece Miss Roushan Ara Islam (Puspa), my friend Mr. Mohammed Ullah, B.A., and no less to my publisher Mr. Rabindra Nath Das.

With these few prefatory words, and obviously none about its merit for I am in favour of the pudding speaking for itself, this humble product of my unsparring labour and my publishers' ungrudging investment is committed in all humility to the judgment of teachers, students and practitioners of law.

Professor Para,
Comilla.

Mafizul Islam
(Advocate)

CONTENTS

	<i>Subject</i>	<i>Page</i>
	Introduction	1
	Law of Contract	
CHAPTER I	Kinds of Contract ..	5
CHAPTER II	Elements of a valid Contract ..	9
CHAPTER III	Consideration ..	31
CHAPTER IV	Legality of Object ..	36
CHAPTER V	Parties Competent to Contract ..	49
CHAPTER VI	Classification of Contracts ..	55
CHAPTER VII	Parties affected by Contract ..	61
CHAPTER VIII	Contract of Agency ..	68
CHAPTER IX	Dissolution of Contract ..	86
CHAPTER X	Remedies for Breach of Contract ..	102
CHAPTER XI	Bailment ..	111
CHAPTER XII	Indemnity and Guarantee ..	120
	Partnership ..	131
	Sale of Goods ..	159
	Negotiable Instrument ..	189
	Company Law	
CHAPTER I	Preliminary ..	229
CHAPTER II	Constitution and Incorporation ..	233
CHAPTER III	Commencement of Business ..	243
CHAPTER IV	Capital ..	250
CHAPTER V	Members and Shareholders ..	256
CHAPTER VI	Management and Administration ..	268
CHAPTER VII	Books, Accounts and Auditors ..	279
CHAPTER VIII	Meetings and Proceedings ..	288
CHAPTER IX	Debentures ..	297
CHAPTER X	Winding up or Liquidation ..	303
CHAPTER XI	Miscellaneous ..	319
	Law of Insolvency ..	325
	Arbitration ..	347
	Mortgage ..	359
	Insurance	
CHAPTER I	Introductory ..	369
CHAPTER II	Life Insurance ..	377
CHAPTER III	Marine Insurance ..	387
CHAPTER IV	Fire Insurance ..	405
CHAPTER V	Some Modern Insurances ..	414
CHAPTER VI	Insurance Organisation ..	418
	Carriage of Goods	
CHAPTER I	Carriage of Goods ..	431
CHAPTER II	Railways ..	437
CHAPTER III	Carriage of goods by sea ..	442
CHAPTER IV	Carriage of goods by Air ..	460
	Banking Business ..	471
APPENDIX	University Questions ..	1-30

TABLE OF CASES

(As cited in this book)

1. Law of Contract

<i>Parties</i>	<i>Page</i>
1. Satyadev V. Tribeni	10
2. Herman V. Jenchner.	10
3. Bhudeb V. Kala Chand	10
4. Harvey V. Facey	12
5. Harvis V. Nickerson	12
6. Spencer V. Harding	12
7. Kundan V. Secretary of State	12
8. Carbollic Smoke Ball Case	12
9. Fitch V. Snedarar	13
10. Lal Mohan Subla V. Gouri Dutta	13
11. Hood V. Anchor Lines	14
12. Eliason V. Henshaw	14
13. Soma V. Provincial Govt.	15
14. Lucas V. James	16
15. Stevenson V. Mclean	16
16. Brogden V. Metropolitan Rly. Co.	16
17. Payne V. Cave	17
18. Bird V. Boulter	16
19. Carlill V. Carbollic Smoke Ball Co.	16
20. Household Fire Insurance Co. V. Grant	17
21. Muhammad V. Hateem	18
22. Harilal V. Mulchand	19
23. Ramanuj V. Gajaraja	19
24. Foster V. Mackinnon	19
25. Cundy V. Lindsay	20
26. Philips V. Brooks	20
27. Smith V. Hughes.	21

(ii)

<i>Parties</i>	<i>Page</i>
28. Paget V. Marshall	22
29. Monomohandas. V. Mcleod	27
30. Miller V. Grand Trunk Rly.	29
31. Currie V. Misa	31
32. England V. Davidson	32
33. Lampleight V. Braithwait	33
34. Wing V. Nill	33
35. Sindha V Abraham	34
36. Chinnya V. Ramyya	34
37. Chonda-Lovada V. Chanda Lovada	36
38. Trinidad Shipping Co. V. Alston	37
39. Kamala V. Kalu	37
40. Uega V. Vankama	37
41. Begbie V. Phosphate Swage	37
42. Mani Ram V. Purshotam	37
43. Ram Surup V. Bansi	37
44. Kali V. Manmohinee	37
45. Chogalal V. Pyari	37
46. Gaur V. Madhumani	37
47. Williams V. Bayby	38
48. Lachman V. Narain	38
49. Guy V. Churchill	39
50. Ram Coomar V. Chander Canto	39,40
51. Bhagwat V. Debi Dayal	39
52. Banarasi V. Sitla	40
53. Chedambara V. Renja	40
54. Hiralal V. Dagdoo	40
55. Hermana V. Charlesworth	40
56. Bakshi Das V. Nadu Das	40
57. Pitambar V. Jagjiwan	40
58. Baldeo V. Jumna	41
59. Mulji V. Gomti	41
60. Umed V. Nagindas	41
61. Jügessur V. Panch Cowree	41
62. Visvanathan V. Swaminathana	41

(iii)

<i>Parties</i>	<i>Page</i>
63. Jagannath V. Munno	41
64. Thuri Kothands V. Thesu Reddiar	41
65. Hempden V. Walsh	42
66. Mutsaddi V. Bhagirath	44
67. Bisseswar V. Basir	44
68. Mannubhai V. Keehabji	44
69. Narandas V. Ghanashyam	44
70. Regents Canal V. Ware	45
71. Attar V. Haku	47
72. Kalagara V. Kalagara	47,48
73. Joseph V. Joseph	48
74. Warisali V. Mohammed	48
75. Jennings V. Rundall	50
76. Burnard V. Haggis	50
77. Mohori Bibee V. Dhurmodas	50
78. Ganesh V. Bapu	51
79. Gadigeppa V. Balaugowda	51
80. Dhurmodas V. Brahma Dutt	51
81. Vaikuntarama V. Authimoolam	51
82. Jagarnath V. Lalta	51
83. Penchelu V. Chitootr	52
84. Tenner V. Turner	56
85. Lowe V. Peers	56
86. Latafa V. Shaharb	56
87. Mahaboob V. Rajcoomer	56
88. Brahmaputra Tea Co. Vs. Scarth	56
89. Pragji V. Pranjiwan	56
90. Vancouver B. Co. V. V. Breweries	57
91. Collius V. Locke	57
92. Hilton V. Eckersley	57
93. Abinash V. Auto Supply	57
94. Milton & Co. V. O. A. Engineering Co.	57
95. Tilakram V. Kadu Mal	57
96. Dreyfus & Com. V. Miran.	58
97. National Petroleum Co. V. Rebello	58

<i>Parties</i>	<i>Page</i>
98. Jainarain V. Mahabir	59
99. Cundy V. Lindsay	60
100. Phillips V. Brooks	60
101. Tweedle V. Atkinson	61
102. Bowen V. Hall	62
103. Quinn V. Leathem	62
104. Brimelow V. Casson	62
105. Maung Nyi V. E. I. Films	62
106. Motilal V. Ghellabhai	63
107. Krishna V. Sanat	64
108. Richards V. Heather	65
109. Owen V. Wilkinson	65
110. Addison V. Gibson	65
111. Jaffar V. Budge-Budge Jute Mills	66
112. Goolbai V. Pestonji	68
113. Galerial and Sons V. Churchill	70
114. Morris V. Cleasby	70
115. Dayton Price & Co. V. Rohomotollah	72
116. Shidheshar V. Ram Chandra	73
117. Ahmedabad Jubilee S. & W. Co. V. Chhotalal	73
118. Premila V. People's Bank	73
119. Dibbins V. Dibbins	73
120. Soanes V. L.S.W.R.	74
121. Wattean V. Fenwick	74
122. Fruman V. Loder	74
123. Tucker V. Bennet	75
124. Prager V. Blatspiel	75
125. Collen V. Wright	80
126. Kishori V. Secretay of State	80
127. Barwick V. English Joint Stock Bank	80
128. Emperor V. Babu Lal	81
129. Carpenter's Co. V. B. M. Banking Co.	81
130. Shim Gyi V. Emperor	81
131. Stastup V. Machonald	87
132. Mewa V. Ablak	88

<i>Parties</i>	<i>Page</i>
133. Watson & Co. V. Dhonendra	88
134. Kashiram V. Hurmundroy	88
135. Lal Chand V. Kersten	88
136. Motumal V. Ruttanji	88
137. Kishan V. Purnendu	91
138. Fakir V. Abdullah	91
139. Raghbir V. Sundar	91
140. Alliboy V. Doulatram	92
141. Mahadeb V. Narain	92
142. Stickney V. Keeble	92
143. Abdul V. Brown	92
144. Commercial Bank V. Jones	94
145. Kursell V. Timber operators	94
146. Taylor V. Caldwell	94
147. Rabinson V. Davison	95
148. Farrow V. Wilson	95
149. Kreu V. Henry	95,97
150. Baily V. De Crespigny	95
151. Tamplin S.S. Co. V. A.M.P. Product	96
152. Hussainbhoy V. Haridas	98
153. Noor V. Sonu	98
154. Parshotam V. M.C. Balata	98
155. Fibrosa Spicka Akcyina V. Fairbain Lawson combe Barbour Ltd.	98
156. Chandler V. Webster	99
157. Hocheater V. De La Tour	100
158. Geet Kumari Poddar V. Chittagong Engineering & Electric Supply	103
159. Hadley V. Baxendale	103
160. Medina V. Comet	103
161. Habibun V. Baldeo	106
162. Devendra V. Gulab	112
163. Coggs V. Bernard	112
164. Halliday V. Holgate	116
165. Haripada V. Anath	117

<i>Parties</i>		<i>Page</i>
166. Armory V. Delamirie	119
167. Nandalal V. Surajmal	120
168. Durga V. Durga	122
169. Mohammad V. Mohammad	122
170. Guild V. Conrad	123
171. Harburg & Co. C. Martin	123
172. Prafulla V. Gopee	124

2. Partnership

1. Green V. Briggs	132
2. Lyon V. Knowles	132
3. Massam V. Thorley's Cattle Food Co.	134
4. Bemola V. Mohim	135
5. Karishna V. Krishnawamy	135
6. Samalbhai V. Someshsar	135
7. Burdon V. Burkus	136
8. Oppenheimer V. Frazer	137
9. Green V. Howell	137
10. Govinda Chandra V. Haridas	139
11. Bentley V. Craven	139
12. Mohammed Kamil V. Hedayetullah	140
13. Pulin V. Mahendra	140
14. Chundee Charan V. Eduljee	141
15. Mohammad Ibrahim. V. Bazlul	144
16. Wood V. Wood	149
17. Rawlins V. Wickham	153
18. Churton V. Dogulas	154
19. Trego V. Hunt	154

3. Sale of Goods

1. Cundy V. Lindsay	166
2. Commonwealth Trusts Ltd. V. Akotey		167
3. Floks V. King	167
4. Lake V. Simmons	168

<i>Parties</i>	<i>Page</i>
5. Chotmans V. L. Y. R. Co.	176
6. James V. Griffin	176
7. Withehead. V. Anderson	176
8. Richardson V. Goss	176
9. Statesman V. Lancashire	177
10. Exparte Rosevear China Clay Co.	177
11. Roland V. Vidoll	181
12. Chanter V. Hopkings	182
13. Peer Mohammad V. Dalloram	182
14. Jones V. Bowdan	183
15. Stock V. Inglis	183
16. Steel Bros & Co. V. Dayal Khatav & Co.	184

4. Negotiable Instrument

1. Mela Ram V. Brijalal	192
2. Mathur V. Dalpat	192
3. Govind V. Balabant	192
4. Muttu Chatti V. Muttan Chetti	192
5. Lakshminath V. Benares Bank	192
6. Sadananda Vs. Emperor	193
7. Nirmal V. Sarat Moni	193
8. Harkishore V. Gurumia	193
9. Bankidas V. Tanab Pal	193
10. Amir Chand V. Krishna	193
11. East Bengal Commercial Bank V. Surendra	193
12. Raghu V. Aravas Mutha	194
13. Meenakshi Ginning and Pressing Co.	194
V. Sreeram Naidu	194
14. Radha Kishan V. Hiralal	195
15. Ardeshir V. Khosaldas	198
16. Suppai V. Kandaswami	198
17. Brajendra V. Hindustan Co. Ins. Society	198
18. Valjee V. Harsook	198
19. Srinivasa V. Venkatammal	199
20. Kandhiya V. Chandur	199

<i>Parties</i>	<i>Page</i>
21. Francis V. Vadilal	199
22. Lodd Govinda V. Munsasami	200
23. Scheveroin V. Morris	201
24. Ramasami V. Municipal Council	204
25. Dey V. Pullinger Engineering Co. Ltd... ..	204
26. Dawes V. Harness	221
27. Krishnappa V. Adimula	221
28. Bal Gangadhar V. Srinivas	221
29. Mangal V. Ganeski	224
30. Dhanput V. Maharaja Gagat	224
31. Hari V. Krishan	224
32. Jodawji V. Jetha	225
5. Company Law	
1. Twyeross V. Grant	234
2. Ashbury Railway Carriage Co. V. Riche	234,236
3. London Financial Association V. Kelk.. ..	236
4. Foster V. London Chatham and Dover Railway Co.	236
5. Attorney-General V. London County Council	237
6. Brown V. British Abrasive Wheel Co.	241
7. Peek V. Gurney	247
8. Broland's Trustee V. Steel Brother & Co.	250
9. South London Fish Market Co.	257
10. Dawson V. African Consolidated Co.	262
11. Alexander V. Automatic Telephone Co.	262
12. Lamplough V. Kent Water	264
13. Municipal Freehold Land Co. Ltd. V. Pollington	265
14. Oxford Benefit Building Society	265
15. Mazham V. Grant	265
16. Dent V. London Tramway Co.	266
17. Lee V. Newchatel Ashlta Co.	266
18. Lubbock V. British Bank of South America	266
19. City Equitable Case	269
20. Re Barney	269
21. Geo Newman & Co.	272
22. York Tramways Co. V. Willows	296

<i>Parties</i>	<i>Page</i>
23.* Peruvian Railways Co., Exparte International Contract Co.	296
6. Law of Insolvency	
1. Yarmati V. Chandra Papayya ..	328
2. Thompson V. Freeman	335
3. Marks V. Fieldman	336
7. Insurance	
1. Prudential Insurance Co. V. Inland Revenue	370,371
2. Castillion V. Preston	373
3. Wilson V. Jones	373
4. Charusila Dasi V. Jyotish Chandrn ..	384
5. Surajmaull V. Triron Insurance Co.	389
6. Samuel V. Dumas	398
7. Combridge V. Anderton	398
8. Bugwandas V. Netherlands India Sea and Fire Insurance Co.	405
9. Castellain V. Preston	407
10. New Castle Fire Insurance Co. V. Macmorran & Co.	408
11. Mayal V. Milford	408
12. Rajnor V. Preston	410
13. Castellion V. Preston	410
14. Event V. London Assurance Co.	411
15. Busk V. Royal Exchange Assurance Co.	411
16. Jamson V. Royal Insurance Co.	411
17. Oldfield V. Price	412
18. Sinclair V. Maritime Insurance Co.	416
8. Carriage of Goods	
1. Watkins V. C. Lottell	431
2. Coggs V. Barnard	432
3. Mackillican V. The Compagine Das Messageries Maritimes De Grance	432
4. Alamgir Footwear and Co. V. Secretary of State	432
5. G. W. Ry Co. V. Cutton	432
6. Skinner V. Upshare	432

<i>Parties</i>	<i>Page</i>
7. G. W. Ry Co. V. Sutton	432
8. Taylor V. Great Northern Railway	433
9. Mitchell V. L. & S. Ry Co.	433
10. Irrawady Flotilla Co. V. Bhagwandas	433
11. Mitchell V. Lanckshire and Yorkshire	434
12. Price & Co. V. Union Lighterage Co.	434
13. India General Steam Navigation Co. V. Joy Kristo Saha	435
14. The River Steam Navigation Co. V. Choutmull Doogar	436
15. Dumchand V. Secy. of State	441
16. N. & S. M. Rly Co. Ltd V. Rangaswami Chetti	441
17. Peare Lal Gopi V. E. I Rly. Co.	441
18. Bumvall V. Gilchrist & Co.	442,444
19. Swell V. Burdic	443
20. Sandeman V. Sewar	444
21. Samuel V. West Hartlepool Steam Navigation Co.	445
22. Wagstaff V. Anderson	445
23. Brown V. Powell coal Co.	446
24. Valleri V. Boyland	446
25. Curney V. Behrend	447
26. Behu V. Burness	448
27. Sugar V. Duthie	448
28. Phelps, James & Co. V. Hill	450
29. Brass V. Mainland	450
30. Oriental S. S. Co. V. Taylor	458
31. Byene V. Schiller	458
32. Rodocanachi V. Mulburn	458
33. Sanders V. Vanzehar	459

9. Banking Business

1. Taribell V. London Suburban Bank	475
2. Backhouse V. Charlton	475
3. Houghton & Co. V. Nothard Lowe & Wills Ltd.	475
4. Plunkett V. Barclay's Bank	476
5. Thompson V. Clydesdale Bank Ltd.	476
6. Coleman V. Bucks and Oxen Union Bank	476

<i>Parties</i>	<i>Page</i>
7. Clough V. Bond	476
8. British American Elevator Co. Ltd. V. Bank of British North America	477
9. Marcantile Bank of India V. Central Bank of India	477
10. Alexander V. Buchfield	479
11. Lubbock V. Tribe	479
12. Brandao V. Barnett	481
13. Cuthbert V. Roberts Lubbock & Co.	481
14. Lucas V. Dorrien	481
15. Burdick V. Sewell	481
16. Morgan V. Lariviere	482
17. Orr V. Union Bank of Scotland	482
18. Chestire V. Baiby	482
19. Stephen V. Hurt	483
20. Akvo Kerri (Atlantic) Bank Ltd. V. Economic Bank	485
21. Shunker V. Punjab National Bank	485
22. Mowji Shamji V. National Bank of India	485
23. Kepittagala Subber Estates Ltd. V. National Bank of India Ltd.	485

COURSES OF STUDY IN COMMERCIAL LAW

Commerce : Paper III—Commercial Law

- (i) Principles of the Law of Contract (including contracts made through agents and the effects of bankruptcy and winding up of business concerns).
 - (ii) Sales of goods ; Negotiable instruments — Legal Relation of Bankers and customers, Carriage of goods by land and by Sea. Insurance—Partnership and Insolvency. Law of Arbitration.
 - (iii) General Principles of Company Law relating to formation, management and winding up (the subject will be treated from a Commercial standpoint).
-

INTRODUCTION

1. What is Commercial Law ?

Taken in its etymological acceptation, the term 'Commercial Law' may be, and has, in fact, been taken generally to mean, a body of rules which civilized peoples have accepted as applying to multifarious transactions relating to trade and commerce. But this view of the term remains encumbered with a degree of vagueness, unless the scope of the wide phrase 'commercial transaction' is properly explained, for, certain laws apply to both commercial and extra-commercial deals. The Law of Contract, for instance, is a branch of commercial law but it applies to merchants and non-merchants equally. There may be contracts which are absolutely divested of any commercial purpose but the Law of Contract will apply there.

The term law, understood in its real aspect, is nothing but a body of enforceable principles applicable in adjudicating upon the rights of parties to a suit or proceeding instituted in a Court of law. Now, there are suits of various nature, one of which arises from commercial transactions and are called commercial suits. As quoted by Ormond in his "The Rules of The Calcutta High Court", the Supreme Court in England defined Commercial suits as follows: "Commercial suits include suits arising out of the ordinary transactions of merchants, bankers and traders; amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, carriage of goods by land, insurance, banking and mercantile agency, and mercantile usages, and debts arising out of such transactions". Derived from this authoritative opinion on what is properly denoted by the term 'Commercial suits', we can formulate our definition of commercial as follows :—Commercial Law means the law applicable to the

various kinds of transactions of merchants, traders and bankers and includes that branch of the Civil Law which relates to the rights of Commercial property and the relations of persons engaged in Commerce.

2. Branches of Commercial Law :

While it is difficult to formulate an incontrovertible list of the different branches of Commercial Law, through usage the following branches have come to be regarded as included in it. They are (a) Company Law, (b) Law of Contract, (c) Partnership Law, (d) Law relating to sale of goods, (e) Law of Insurance, (f) Law relating to carriage of goods, (g) Law relating to negotiable instruments, (h) Law of Banking, (i) Contract of affreightment, (j) Law relating to commercial securities and (k) Law relating to arbitration.

3. Sources of Commercial Law :

When we speak of Commercial Law as a general term, it means the European Commercial Law as it developed in course of the mercantile history of western and northern Europe and has been regarded as a *jus gentium* or the law of nations since the very inception of international trade. This Law may be said to have grown out of the following sources, among others:—

(a) *Maritime usages and customs*. Known as *consuetudines*, these were collected and compiled for the use of merchants and lawyers. They were widely practised and obeyed in Europe during the fourteenth and the fifteenth centuries. They may be divided into two broad categories : (i) those which were collected in the Mediterranean ports, and (ii) those which were compiled for use by the merchants of northern Europe.

(b) *Roman Law*. In all cases where customary rules failed to solve difficulties, reference was made to Roman Law for guidance and rules of the said law were obeyed like judicial precedents. "The writers on mercantile law here (England) and in the continent" writes Smith in his 'Mercantile Law', "sought in Roman Law solutions for difficult and novel problems and often found them".

(c) *Equity*. In cases in which neither custom nor Roman Law could provide solution, English Judges applied the principles

of Justice, equity and good conscience. Once applied, the decision thus made became a precedent and acquired a legal status as such. Thus arose a voluminous mass of equitable principles for solving commercial tangles.

(d) *The Fair Court Decisions.* In England, before the end of the thirteenth century, *Lex Mercatoria* or the "Law Merchant" was already conceived as a body of rules—a special law for mercantile transactions. This law consisted chiefly of "rules of evidence, rules about the proof to be given of sales and other contracts, rules as to the legal value of the tally and the God's penny". (Pollock and Maitland: "History of English Law.")

These special rules, supposed to have been known to all merchants, were administered in fairs and markets by mercantile courts composed of merchants. Procedure was informal and justice was summary. The principles evolved in these fair courts of the mediaeval times gradually found accommodation in the body of Commercial Law.

4. Sources of Pakistani Commercial Law :

The Commercial Law of Pakistan is derived from the following sources :—

(i) *Statutes.* This constitutes by far the most important source of our commercial law. The mercantile statutes in force in this country have been based mostly on English Law. The Contract Act, The Companies Act, The Sale of Goods Act, The Partnership Act and the Negotiable Instruments Act are instances of the manner in which English Commercial Law has gradually been incorporated into the Mercantile Law of India, adapted in Pakistan after the achievement of independence.

(ii) *English Common Law.* Where statutory law provides no guidance or are too ambiguous to justify application, the courts in Pakistan readily take the help of English Common Law relevant to the subject, if there is any. Even in the matter of interpreting statutes, English decisions are followed and greatly honoured.

(iii) *Local Customs and Usages.* Where an undisputed custom of ancient origin exists, such custom, unless its application is barred by any statute or otherwise, always governs commercial transactions.

The law relating to hundies as prevalent in East Pakistan is an appropriate illustration on the point.

(iv) *Equity*. As in England, so in Pakistan, equity fills up the gaps left by the preceding three sources. Before statutes were passed, and when Common Law was the principal source of reference, no provision was available in it for various transactions like trusts, mortgages, partnerships and so on. These gaps were filled up by the rules of equity based upon reason and natural justice. In course of time, however, the domains of both Common Law and Equity came to be increasingly narrowed down by definite statutes.