BOOK V

THE LAW RELATING TO CARRIAGE

1 CARRIAGE BY LAND

LEGISLATION RELATING TO CARRIAGE

The law relating to carriage may be studied under three heads : (*i*) Carriage by Land, including inland navigation, (*ii*) Carriage by Sea and (*iii*) Carriage by Air. This is a convenient classification because these three branches of the law of carriage are governed by different principles and different statutes.

Indian statutes relating to the law of carriage are mentioned below :

1. Carriage by Land—
   (*i*) The Common Carriers Act, 1865, which deals with Common carriers of goods over land and inland waterways.
   (*ii*) The Railways Act, 1890, which deals with carriage by railways.
2. Carriage by Sea—
   (*i*) The Indian Bills of Lading Act, 1856.
   (*ii*) The Carriage of Goods by Sea Act, 1925.
   (*iii*) The Merchant Shipping Act, 1958.
   (*iv*) The Marine Insurance Act, 1963.
3. Carriage by Air—Carriage by Air Act, 1972.

The statutes mentioned above are not exhaustive. On all points not specifically covered by them, Indian courts apply principles of English law as rules of equity and goods conscience.

CARRIERS : DEFINITION, CLASSIFICATION AND CHARACTERISTICS

Definition

Any person or an organisation, by an express or implied contract, with or without remuneration, carries goods and/or passengers, is called a Carrier. Government services can be called carrier if it comes within the above definition, e.g., Indian Railways, Calcutta State Transport Corporation, C. T. C. etc.

Classification

Carriers may be classified into carriers of goods and carriers of passengers. The same carrier may of course carry both goods and passengers.

It is more usual to classify carriers into Common Carriers or Public Carriers, and Private Carriers.

Common Carriers or Public Carriers

In English law a Common carrier is defined as one who undertakes to carry for hire, from place to place, the goods of anyone who employs him. The essential features of a common carrier, according to English law, is that he is prepared to carry the goods of anyone without discrimination. If a carrier reserves to himself the right to reject an offer (even if there is accommodation in the carriage and the offeror is prepared to pay the usual freight) he is not a common carrier. *Belfast Ropework Co.,* v. *Bushell.*[1] Example : A lorry of a Transport Company or a Tempo.

In Indian law the term common carrier is used in a restricted sense. The Common Carriers Act of 1865 defines a common carrier as any individual, firm, or company (other than the government) who transport goods, as a business, for money, over land or inland waterways, without discrimination between different consignors.

Is the Post-Office a Common Carrier ?

The post office is not a common carrier. It is not an agent of the sender to deliver a postal article to the addressee. It is really a branch of the Public Service providing postal services subject to the provisions of the Post Office Act and the rules made thereunder.

A resident of India sent value-payable article to an addressee in Pakistan and the Pakistan Government, though realised the value of the article, did not hand it over to the Government of India. Held, the Government of India is not liable. *Union of India* v. *Mohd. Nazim.*[2]

Characteristics of Common Carriers

The characteristics of a common carrier in India are as follows :

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[1] (1918) 1 K.B. 210 [2] AIR (1980) Supreme Court, 431

1. It may be a firm or an individual or a company. But the government is not included in the category. The post office is not a common carrier, although it may carry goods.

2. Only carriers of goods come within the definition. A carrier of passengers is not a common carrier.

3. A common carrier is one who carries goods for business and money. From this it follows that one who carries goods occasionally is not a common carrier. Also one who carries goods free is not a common carrier.

4. A common carrier is one who is ready to carry the goods of any person without any discrimination.

5. The term common carrier is applied only in the case of carriage by land and over inland water-ways.

Private Carrier

A private carrier is one who does not do regular business as a carrier but occasionally carries goods for money. Suppose that a contractor has a lorry which he uses mainly for transporting his own goods but sometimes he lets it out on hire to others. The contractor is a private carrier. From the occasional nature of a private carrier's job, it follows that he can discriminate between different hirers. He is not bound to carry the goods of any and everybody. A common carrier (subject to certain exception) is bound to do so. *Example* : A private lorry.

Gratuitous Carrier

A gratuitous carrier is one who carries goods (or passengers) without any charge. The owner of a motor car who gives a lift to a friend is a gratuitous carrier.

DIFFERENCES BETWEEN COMMON CARRIERS AND PRIVATE CARRIERS

1. A common carrier is one whose business is carriage of goods for hire. A private carrier is an occasional carrier.

2. A common carrier is bound to carry the goods of any person who is ready to pay the usual freight, provided certain conditions (relating to space, type of goods, etc.) are fulfilled. A private carrier is free to carry goods or not as he pleases.

3. The liabilities of a common carrier are determined by the Common Carriers Act, 1865. A private carrier is not governed by this Act. His position is that of a bailee.

DUTIES OF A COMMON CARRIER

The duties of a common carrier in India are determined by the Common Carriers Act and (as regards points not covered by this Act) by the rules of English law. The duties can be summed up as follows :

1. Must carry goods without Discrimination

A common carrier is bound to carry the goods of every person, without any distinction. But certain exceptions are recognised. A common carrier can refuse to carry under the following circumstances :

(*a*) if the customer is not willing to pay reasonable charges for the carriage ;

(*b*) if there is no accommodation in the carriage ;

(*c*) if the goods are dangerous or are of a type which the carrier is not accustomed to carry ; and

(*d*) if the goods are to be carried over a route with which the carrier is not familiar. (A carrier is entitled to confine himself to the carriage of a particular type of goods and/or over particular route. In such cases the carrier can refuse to carry the goods over unaccustomed routes and to carry goods which he does not usually carry.)

If a carrier, without any of the reasons mentioned above, refuses to carry the goods of a person, he can be sued and the customer can recover damages. *G. W. Rly Co.* v. *Sutton.*[1]

2. Within time and at the place

The carrier must deliver the goods at the agreed time or (if no time had been agreed upon) within a reasonable time. The place of delivery is subject to contract. *Bontex Knitting Works Ltd.* v. *St. John's Garage.* See p. 164.

3. With Safety

The goods must be carried with reasonable precautions for their safety and over the usual and ordinary route.

4. Must Insure

According to English Common Law a common carrier of goods is an insurer, i.e., he is bound to indemnify the owner

[1] (1869) 4 H.L. 226

in full for loss or damage to the goods in course of carriage. This liability is to subject to certain exceptions. (See next section). This principle has been applied in a Madras Case. *B. Chalapathi* v. *Official Assignee.*[1] There is no decision on the subject in the Supreme Court of India yet.

5. Without Deviations

Deviations are not permitted unless rendered necessary by exceptional circumstance.

RIGHTS OF A COMMON CARRIER

1. *When not bound to carry goods* : A common carrier is not bound to carry goods under certain circumstances, *e.g.*, when he has no room, when the goods are dangerous or not of a type he is accustomed to carry, or when he is asked to carry goods to a destination to which he does not ordinarily travel.

2. *Entitled to reasonable charges* : He is entitled to reasonable charges for his work. He can allow concession rates to some customers but cannot demand unreasonably high payments from anybody. What is reasonable depends on the circumstances of the case.

3. *Has lien* : He has lien on the goods for his remuneration and can refuse to deliver the goods until his dues are paid. This is known as the Carrier's Lien.

4. *Steps for refusal of delivery* : If the consignee refuses to accept delivery of the goods, the carrier is at liberty to take such steps as are reasonable and prudent under the circumstances. He can recover all reasonable expenses incurred by him in this connection from the party with whom the contract of carriage was entered into.

5. *Damages* : The carrier is entitled to recover damages from the consignor if the goods given for carriage are dangerous or are loosely packed and the carrier suffers injury therefrom. *Bamfield* v. *Goole & Sheffield Transport Co.*[2]

6. *Exemptions* : The carrier can, subject to the provisions of the Carriers Act, enter into special contracts exempting him from liability under stated circumstances.

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[1] AIR (1978) Mad. 112 [2] (1910) 2 K.B. 94

THE LIABILITIES OF A COMMON CARRIER

English Law

According to English Common Law a common carrier of goods is an insurer, i.e., he is bound to indemnify the owner in full for any loss or damage to the goods in course of carriage. This rule of full liability is subject to certain exceptions. The carrier is not liable in the following cases :

(*a*) When damage is caused by an Act of God, by which is meant a natural calamity like a storm or earthquake.

(*b*) When damage is caused by the enemies of the state, *e.g.*, during wars.

(*c*) When damage is caused by some inherent defect in the goods or negligence of the consignor.

(*d*) When there is a special agreement limiting the liability of the carrier.

(*e*) There is no liability for damages caused after the goods arrive at their destination.

Indian Law

The liabilities of a common carrier of goods in India are laid down in the Common Carriers Act of 1865. This Act divides goods into two categories : Scheduled and Non-schedule. Scheduled goods are certain articles enumerated in a schedule to the Act. They are valuable articles like gold, silver, jewellery, paintings, silk, title deeds, currency notes and coins, etc. All other articles are non-scheduled.

Rules : The rules regarding the liability of common carriers in India are summarised below :

1. For Scheduled articles exceeding Rs.100 in value, the carrier is liable for all loss and damage,

(*a*) If the value and the description of the goods are disclosed by the consignor to the carrier, or

(*b*) If the loss or damage is due to a criminal act of the carrier, his agent or servant.

2. The common carrier can charge extra for carrying scheduled articles but cannot limit his statutory liability by any special agreement.

3. "The liability of a common carrier can be limited by agreement under the provisions of Sections 6 and 8 (of the Act

of 1965) but that there must be a limitation of the liability". *M. G. Brothers Lorry Service* v. *Prasad Textiles.*[1]

4. The common carrier is responsible for loss or damage caused by negligence of criminal acts done by himself, his agents or servants. *Bontex Knitting Works Ltd.* v. *St. John's Garage.*[2] (See p. 164)

5. In case of loss or damage, the claimant must notify the carrier within six months of the date of knowledge of the loss or damage.

6. The above rules apply only to common carriers as defined by the Common Carriers Act of 1865. Thus, they do not apply to carrier of passengers or to railways.

7. **Measure of damages** : The measure of damages for delay for goods lost or damaged, is the difference between the value of the goods at the time when they ought to have been delivered and at the time when they were actually delivered. *Wilson* v. *Lancashire and Yorkshire Railway Co.*[3]

"It is well settled that it is the market price at the time the damage occurred which is the damage to be awarded." *Union of India* v. *West Punjab Factories Ltd.*[4]

See also *Hadley* v. *Baxendale.*[5] (See p. 132)

RIGHTS, DUTIES AND LIABILITIES OF OTHER CARRIERS

Private Carrier

A private carrier is not governed by the Common Carriers Act, 1865. Hence his position is that of a bailee. He has the same rights, duties and liabilities as a bailee under the Contract Act. Thus he is bound to take as much care of the goods entrusted to him as a man of ordinary prudence would take under similar circumstances, of his own goods of the same quality, bulk and size. (Sections 151, 152, and 161, Contract Act. See pp. 162, 164)

Gratuitous Carrier

A gratuitous carrier is in a position of a bailee. But if such a carrier agrees to carry the goods, he must also do the duties

[1] AIR (1984) Supreme Court 15
[2] (1944) 2 All E. R. 690
[3] C.B. (N.S) 632
[4] AIR (1966) Supreme Court 395
[5] (1854) 9 Ex. 341

of the carrier. If a person undertakes to perform a voluntary act, he is liable if he performs it improperly. Negligence by the carrier is actionable.

It is to be noted that an agreement of carriage with a gratuitous carrier is void because of want of consideration. Therefore no action can be taken against him for refusing to carry the goods' even though he has undertaken to do so.

CARRIERS OF PASSENGERS

A carrier of passengers may be a common carrier or a private carrier or a gratuitous carrier. A common carrier of passengers is one who is ready and willing to accept anybody as a passenger, *e.g.*, a bus, a train or a taxi. A private carrier of passengers is one who occasionally carries passengers for hire. A gratuitous carrier of passengers is one who takes a passenger without charge.

Carriers of passengers are not subject to the Common Carriers Act of 1865. Some rules concerning such carriers are to be found in local statues like the Motor Vehicle Acts and the Police Acts. The important rules regarding carriage of passengers are given below :

1. In the absence of any Indian statute dealing with the matter, the general principles concerning carriage of passengers must be deduced from the English common law.

2. A common carrier of passengers is bound to carry any member of the public who is desirous of being carried, except in the following cases :

(*a*) When the passenger is not willing to pay the stated fare.

(*b*) When the passenger is unfit, *i e.*, suffering from some disease or infirmity.

(*c*) When there is no accommodation.

3. The common carrier of passengers is not an Insurer. He must, however, take due care and exercise due diligence. He is liable for injuries caused by negligence to paid passengers and also to passengers travelling free with his knowledge and consent. But a passenger who, without the consent of the carrier is travelling without payment, is a trespasser and is not entitled to damages even though caused by negligence

4. A passenger injured by negligence is not entitled to damages if he is himself guilty of negligence. This is known as the principle of contributory negligence.

5. The common carrier of passengers can limit his liabilities by contract with his passenger.

6. Private and gratuitous carriers of passengers are not bound to accept any person as passenger. They can choose which passenger to carry. But they are liable for loss or damage to the passenger in case of negligence.

DUTIES OF RAILWAYS

Under the Railways Act, the railway administration has certain *statutory duties*. These duties are similar to the duties of a common carrier as provided under the Common Carriers Act of 1865 and the rules of English common law. Section 28 of the Railways Act of 1890 provides as follows :

"A railway administration shall not make or give any undue or unreasonable preference or advantage to, or in favour of, any particular person of railway administration, or any particular description of traffic, in any respect whatsoever, or subject to any particular person or railway administration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The railway administration is bound (like a common carrier) to carry goods of every person provided the necessary freight is paid and the regulation concerning packing etc, are observed. The railway administration is also bound to carry every passenger who pays the necessary fare. It cannot discriminate between different passengers on any ground. It can therefore be said that the railway administration is a common carrier, so far as its duties are concerned.

LIABILITIES OF RAILWAYS

The responsibility of the railway administration as carriers is stated in detail in Ch. VII of the Railways Act. The important provisions are summarised below.

1. Responsibility as Bailee

A railway administration is responsible as a bailee under sections 151, 152 and 161 of the Contract Act for the loss, destruction, damage, deterioration of non-delivery of goods carried by railway within a period of seven days after the termination of transit. This rule does not apply in the case of goods carried at owner's risk rates, certain valuable goods, animals and dangerous goods. (See below under paras 6, 13 and 14).

2. General Responsibility

Subject to the rules stated in para 3, a railway administration is responsible for the loss, destruction, damage, deterioration or wastage in bulk or weight due to inherent defect, to the administration to be carried by railway, arising from any cause *except the following* : (*a*) act of God ; (*b*) act of war ; (*c*) act of public enemies ; (*d*) arrest, restraint or seizure under legal process ; (*e*) orders or restrictions imposed by the Central Government or a State Government or by any officer or authority subordinate to them, authorised in this behalf ; (*f*) act or omission or negligence of the consignor or the consignee or their agent or servant ; (*g*) natural deterioration or wastage in bulk or weight due to inherent defects, quality or vice of the goods ; (*h*) latent defects ; (*i*) fire explosion or any unforeseen risk.—Sec. 73.

3. Reasonable Foresight and Care

Even in the exceptional cases noted above, the railway administration shall not be relieved of its responsibility unless it proves that it has used reasonable foresight and care in the carriage of the animals or goods.—Sec. 73.

4. When not Responsible for Damages

Notwithstanding any of the provisions stated above, the railway administration is *not* responsible for damages in the following cases :

(*a*) Where goods have been despatched with a description which is materially false, and the damages have been brought about by such false description.

(*b*) Where there has been fraud practised by the consignor or the consignee or their agents.

(*c*) Where it is proved that damages or non-delivery is caused by (*i*) improper loading or unloading by the consignor or the consignee or their agents, or (*ii*) riot, civil commotion, strike, lockout, stoppage or restraint of labour from whatever cause, partial or general.

(*d*) For any indirect or consequential damages or for loss of particular market.—Sec. 78.

5. Forwarding Note

Every consignor of goods or animals must execute a Forwarding Note in the form prescribed by the railway administration and approved by the Central Government. Four types of Forwarding Notes are in general use. Each type covers a particular kind of goods. Each Forwarding Note contains (*a*) particulars of the goods carried and (*b*) the terms of carriage including a statement of the extent of the liability of the railway administration for loss or damage.—Sec. 72.

6. Goods at Owner's Risk Rates

Goods may be carried, if the sender so requests, at what is called owner's risk rates. The rates are low and the railway administration is not responsible for any loss except in cases of negligence and misconduct by the railway or its servants. When goods are sent at owner's risk rates, a particular form of Forwarding Note is used. If goods, carried at owner's risk rates, are damaged, the railway administration is bound to disclose how the consignment was dealt with during carriage. Where, from the disclosure made, it cannot fairly be inferred that there was negligence or misconduct the burden of proof that there was negligence or misconduct is upon the consignor.—Secs.74, 76F.

7. Delay or Detention

The railway administration is responsible for damages caused by delay or detention in transit unless it proves that the delay or detention arose without negligence or misconduct on its part or any of its servants.—Sec. 76.

8. Deviation

There is no breach of contract by reason only of deviation of route, if such deviation is due to reasons beyond the control of the administration, *e.g.*, congestion in the yard.—Sec. 76A.

9. Forgery or defective Receipt

When delivery is given to the person who produces the original railway receipt, the railway administration is not responsible if it turns out that he was not legally entitled to delivery or that the endorsement on the receipt was forged or otherwise defective.—Sec. 76B.

10. Termination of Transit

The railway administration is not responsible for damage after the wagon is placed at the siding where delivery is to be taken and the owner has been informed in writing.—Sec. 76C.

The Railway administration is not responsible in any case for damage etc. after the expiry of seven days after the termination of transit.—Sec.77. (The Railway Act was amended on 22nd December, 1972, providing that the period of termination of transit is 7 days. Formerly it was 30 days).

11. Defective Goods

When the goods are in a defective condition or are defectively packed and the fact is noted in the forwarding note, the railway administration is not responsible for loss or damage except upon proof of negligence or misconduct on its part or on the part of its servant.—Sec. 77C.

12. Open Trucks

When goods which, under ordinary circumstances, would be carried in closed trucks are at the request of the sender carried in open trucks, the railway administration is not responsible for damages that may arise from such carriage in open trucks.—Sec. 75A.

13. Animals

In the case of animals, the railway administration is not liable for loss or damage beyond certain amounts mentioned in the 1st Schedule to the Act. They are as follows : elephants Rs. 1500 per head ; horses—Rs. 750 per head ; mules, horned cattle, and camels—Rs. 200 per head ; and in all other cases—Rs. 30 per head. The railway may accept a higher liability if the animal is specially valuable. In such cases the value of the animal must be mentioned in the forwarding note and a higher freight must be paid. The railway is in no case responsible if the loss or damage is due to any action of the animal itself.—Sec. 77A.

14. Valuable Goods

When the parcel or package delivered for carriage contains goods of the kind mentioned in the 2nd schedule to the Act, the consignor is required (if the value of the goods exceeds

Rs. 500) to disclose the value and contents of the parcel or package. (The goods mentioned in the schedule are valuable goods like gold, silver, silk, coins and notes etc.) The railway can demand additional freight for such consignments. When such additional freight is paid and the requisite declaration is made, the railway is liable to make good any loss or damage to the article. If no declaration is made, the railway is not responsible. The railway officials may examine the contents of the package to be sure of the description and valuation.—Sec. 77B.

15. Passengers' Luggage

The railway administration is responsible for luggage which is booked and handed over to it for carriage in the luggage van. For goods carried by the passenger in his charge, the railway is not responsible unless it is shown that damage was caused by negligence or misconduct on its part or any of its servants.—Sec. 75.

16. Injury and Death in Accidents

The railway administration is liable to pay compensation for death and personal injury to a passenger and damages to goods and animals (owned by the passenger and accompanying him) caused by a railway accident. The compensation will have to be paid even if the accident is not caused by wrongful act, neglect or default of the railway administration. The maximum amount for which the railway is liable is Rs. 50,000 in respect of any one person. But according to the Indian Railways (Amendment) Act, 1983, the amount have been raised to Rs. 1 lakh in respect of any one person.—Sec. 82A.

17. Compensation

The Government of India has framed certain Rules under the Railways Act for injuries in accidents which compensation will be paid. Some examples are stated below—amputation before shoulder—Rs. 40,000 ; loss of one eye—Rs. 20,000 ; loss of thumb—Rs. 15,000 etc.

Examples :

(*i*) Some goods were consigned on a railway at "owner's risk". At night the goods were stolen. There was no watchman at that time. Held, the loss of goods was due to negligence of the Railway Administration. *Juggal Kishore* v. *Union of India.*[1]

[1] AIR (1965) Pat. 196

(*ii*) Some goods were destroyed by fire. The Railway extinguish the fire after six hours. There was no explanation for the delay. For negligence, damages were awarded. *Union of India* v. *Shri Ramesh Cotton Mills Ltd.*[1]

RIGHTS OF RAILWAYS

The Act gives certain privileges to the railway administration. Bye-laws may be framed regarding the mode of carriage of goods and passengers. No person is allowed to carry dangerous or offensive goods. Violation of the provision of the Railways Act and of the bye-laws are punishable by the court (*e.g.*, travelling without tickets, carrying dangerous goods etc.). The railway possesses a lien on the goods carried, for freight and other charges, if any.

Notice of Claim

In case of loss, destruction, damage, deterioration or non-delivery of animals or goods, there must be notice in writing within six months of the date of delivery. The claim must be submitted to the railway administration (*a*) to whom goods were delivered for carriage, or (*b*) to the station which is likely due to arrive.

Disposal of Unremoved Goods

The Indian Railways Act was amended in 1976 providing that essential goods booked to certain notified stations must be removed within seven days from the termination of transit. Essential goods means food stuffs, sugar etc. Stations means certain prescribed stations. If the goods are not removed within seven days, the goods are to be confiscated and to be sold by public auction. The sale is to be notified to local newspapers or any other prescribed manner. The goods may be sold to co-operatives. The sale proceeds will be given to the owners, less the expenses of the railways.—Sec. 56 B to E.

EXERCISES

1. (*a*) What do you mean by a common carrier ? (*b*) State the rights and liabilities of a common carrier ? (Pages 365, 368-370)

[1] AIR (1978) Supreme Court 1491

2. What are the liabilities of a common carrier ? Is a common carrier bound to deliver goods to the consignee at the place of destination ? (Page 369 ; Para 4, page 368)
3. State the liabilities of common carriers with reference to leading cases. (Page 369)
4. What are the liabilities of a private carrier in Indian Law ? (Page 370)
5. How do you distinguish between common carrier and private carrier ? To what extent do Railways in India discharge the duties of carriers ? (Pages 366, 372)
6. What are the rights and liabilities of the Railway in India. (Pages 372-377)
7. Discuss the rights and liabilities of common carriers. (Page 369)
8. Write notes on : Common Carrier ; Private Carrier ; Gratuitous Carrier ; Carriers of Passengers. (Pages 365, 366, 370, 371)
9. Objective questions. Give short answers.
   (*i*) Give one example of each of common carrier and private carrier. (Page 365)
   (*ii*) Is the Post Office a common carrier ? (Page 365)
   (*iii*) "A common carrier has a lien in the goods carried for his charges". True or False ? (Page 368)

2 CARRIAGE BY SEA

LAW RELATING TO SEA CARRIAGE

Carriage of goods by sea from any port in India to any other port, in or outside India, is governed by the Carriage of Goods by Sea Act of 1925. This Act is based upon the recommendations of the International Conference on Maritime Law held in Brussels in 1922. The conference drew up a draft convention for adoption by the leading maritime nations of the world. The object was to secure uniformity of laws as regards the rights and liabilities of carriers by sea and the rules regarding bills of lading.

The Merchant Shipping Act of 1958 was passed with the object of amending and consolidating the Indian law relating to merchant shipping.

THE CONTRACT OF AFFREIGHTMENT

The contract to carry goods by sea is called the Contract of *Affreightment*. The consignor (or his agent) and the shipowner (or his agent), are the two parties to the contract. The consideration paid for the carriage is called the *Freight*.

The contract of affreightment may be incorporated in a formal document containing the terms of the agreement between the parties. Such a document is called a *Charter-Party*. Sometimes, there is no formal document ; the shipowner merely gives a receipt for the goods and in the receipt (known as the *Bill of Lading*) some of the terms of the contract are written down.

CHARTER-PARTY

Definition

A Charter-party may be defined as an agreement in writing for the purpose of hiring an entire ship or a part thereof for the purpose of carriage of goods. The person hiring the ship or a part of it is called the charterer.

Classification

The following types of charter-party are found :

1. A charter-party for a particular period of time is called a Time Charter.

2. A charter-party for a particular voyage is called a Voyage Charter.

3. (The terms of the Charter-party may amount to a lease or demise of the whole ship to the charter for a stated period. In this case, the charterer becomes for the time being the owner of the vessel and the captain and the crew become his servants during the charter period.) If the terms of the Charter-party do not amount to a lease or demise, the charterer only gets the right to have his goods conveyed by the ship and the captain and the crew do not become his servants, although their services are at the disposal do the charterer for the purpose of carriage.

Terms of charter-party

A charter-party is deemed to contain all the terms of the contract between the charterer and the shipowner. The clauses in a charter-party usually deal with the following matters :

1. Name of the parties and of the ship.
2. Nationality of the ship.
3. The class of charter-party, and its *rating* in the Lloyd's Register.[1]
4. A statement on the location of the ship and the place of loading.
5. The shipowner's guarantee of fitness.
6. The manner in which the voyage is to be conducted.
7. The duties of the Master or the Captain.
8. The carrying capacity of the ship.
9. The liabilities of the charterer regarding freight etc.
10. The excepted perils *i.e.*, an enumeration of the circumstances under which the shipowner will not be liable to pay compensation for loss or damage to goods.
11. The terms regarding loading, unloading, lay days and demurrage.
12. Circumstances under which the contract will be cancelled and the penalties to which the parties may be liable for non-fulfilment of the terms.

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[1] See pages 349-350

~~THE~~ BILL OF LADING

Definition

A Bill of Lading is a receipt for goods delivered to a ship for carriage. A bill of lading is used when the goods shipped form only a part of the cargo of the ship.

Characteristics

A bill of lading has the following characteristics :

1. *Signature* : It is signed by the shipowner or his agent. Usually the captain of the ship, as the shipowner's agent signs the bill of lading.

2. *Evidence* : The bill of lading is evidence of the contract for the carriage of goods. Some of the terms may be written down on the bill of lading. The Carriage of Goods by Sea Act of 1925 provides that the following particulars must be incorporated in every bill of lading issued from an Indian port :

(*i*) The leading marks necessary for the identification of the goods (such marks being stamped or otherwise shown on the goods or on the cases or packages) :

(*ii*) the number of packages or pieces or the quantity or weight as furnished by the shipper ; and

(*iii*) the apparent order and condition of the goods.

3. *Acknowledgement* : The bill of lading is *prima facie* evidence of the receipt of the goods by the carrier.

4. *Document of title* : The bill of lading is a document of title to the goods covered by the bill. The ownership of the goods can be transferred by endorsement and delivery of the bill of lading. The shipowner is discharged from his liabilities by delivering the goods to the person who produces the bill of lading. But the shipowner is not bound to deliver the goods to the holder of the bill of lading if there is any payment due for the carriage of the goods or if the consignor, in exercise of the right of stoppage in transit, gives instructions not to deliver. (The Indian Bills of Lading Act, 1856).

Functions

A Bill of Lading, as explained above, has three important functions *viz.*, (*i*) it is an evidence of the contract of carriage, (*ii*) it is an acknowledgement of the goods from the carrier, and (*iii*) it is a document of title to the goods.

Examples :

(*i*) A bill of lading was qualified by the words "weight or quality unknown". Held, it was not a *prima facie* evidence of the quantity shipped. *New Chinese Antimony Co. Ltd.* v. *Ocean Steamship Co. Ltd.*[1]

(*ii*) Orange juice in barrels was shipped. Some of the barrels were old and defective, yet the shipowner gave a "clean bill of lading". Held, the shipowner was estopped from denying that the barrels were not in good order and condition. *Brown Jenkinson and Co. Ltd.* v. *Percy Dalton Ltd.*[2]

(*iii*) A bill of lading contained a printed clause which stated that "Contents" weight and value of goods unknown". There were 499 packages of Indian Polyethylene in six ply paper bags. There was an admission by the Shipping Company that (1) the goods shipped were polyethylene (2) the quantity and weight was mentioned in the bill of lading, and (3) freight was charged on the basis of the particulars supplied by the shipper. Held, the Company cannot disclaim the liability and the company was liable for short delivery. *Union Carbide Ltd.* v. *Jayanti Shipping Co.*[3]

(*iv*) Where the bill of lading issued by a common carrier, owner of vessel, stated that a certain party consigned the goods to self or to its agent at destination Calcutta, that party so referred to would be deemed to have retained the possession and reserved the right of disposal of the goods till the completion of the voyage. *Great India Trading Co. Pvt. Ltd.* v. *Angus Co. Ltd. and another.*[4]

IS THE BILL OF LADING A NEGOTIABLE INSTRUMENT ?

A bill of lading possesses some of the characteristics of a negotiable instrument. It is a document of title and it can be transferred by endorsement and delivery. But it is not a true negotiable instrument because of the following reasons :

1. It is not included in the definition of the term negotiable instrument as given in the Negotiable Instruments Act.

2. The transferee of a bill of lading gets only the rights of the transferor of the instrument. If the title of the transferor is defective, the transferee gets a defective title. But in the case of a negotiable instrument a bonafide purchaser for value without notice of defect, becomes a holder in due course and gets a good title in cases where the title of the transferor is defective.

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[1] (1917) L.R. 2 K.B.D. 664
[2] (1957) 2 Q.B.D. 621
[3] (1970) 74 C.W.N.
[4] AIR (1983) Cal 408

DIFFERENCES BETWEEN A CHARTER PARTY AND A BILL OF LADING

1. A Charter Party is a *formal document* by which the charterer enters into a contract with the shipowner for the hire of the whole or part of the ship. A Bill of Lading is only a *receipt* for goods taken on board a ship.

2. In a Charter Party the ship can be hired for fixed period. The captain and the crew then become the *servants of the charterer.* In a bill of lading the cargo-owner is not the servant of the captain and the crew.

3. A Charter Party contains *all* the terms of the contract between the Charterer and the shipowner. A Bill of Lading *may* or *may not* contain *any* of the terms. But it is evident that there is a contract for the carriage of goods by sea. (affreightment).

4. A Bill of Lading is *a document of title* (the ownership of the goods covered by the bill can be transferred by transferring the bill). A Charter Party is not a document of title to any goods.

5. A Bill of Lading possesses some of the *features of a negotiable instrument.* For example, it can be transferred by endorsement and delivery. A Charter Party does not possess any of the characteristics of a negotiable instrument.

6. *The stamp* to be affixed in a Bill of Lading is much lower than in a Charter Party.

IMPLIED WARRANTIES

English Law

Under English common law there are three implied undertakings by the carrier in all contracts of affreightment :

1. The ship is seaworthy. It is the duty of the shipowner to make the ship fit for the contemplated voyage.

2. The ship shall be ready to proceed upon and complete the voyage with reasonable despatch.

3. The ship shall complete the voyage in the usual customary manner and without any unnecessary deviation from the usual route.

Indian Law

The Marine Insurance Act, passed in India in 1963, contains provisions regarding the warranty of seaworthiness, permissible deviations etc. and the effects of their breach. (See Book VI. Ch. 3. pp. 429-430)

DUTIES OF A CARRIER BY SEA

The Carriage of Goods by Sea Act of 1925 imposes the following *duties* on the carrier of goods by sea from an Indian port :

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(*a*) make the ship seaworthy ;

(*b*) properly man, equip and supply the ship ;

(*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. After receiving the goods in his charge, the carrier or the master of agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading containing the prescribed particulars.

The Merchant Shipping Act of 1958 provides for the adoption of various measures for the safety of life and cargo at sea. In 1966, the Act has been amended so as to include therein the provisions of the International Convention for the Safety of Life at Sea signed in London in June, 1960. [*Examples* : Provision of radio telegraph ; special rules regarding nuclear ships etc.]

LIABILITIES OF A CARRIER BY SEA

The Carriage of Goods by Sea Act of 1925 lays down the following rules regarding the *liabilities* of a carrier of goods by sea from an Indian port :

1. Any clause in the contract of affreightment by which the carrier is relieved from the liability to pay compensation for loss or damage arising from negligence, fault or failure to perform the duties prescribed by the Act, is void and inoperative.

2. The shipowner is not liable for damage arising from unseaworthiness of the ship unless such damages are due to a failure to perform the statutory duties of the shipowner. Thus in India the liability to keep the ship seaworthy is not absolute.

Whenever damage is caused by unseaworthiness, the burden of proving the exercise of due diligence is on the shipowner.

3. The carrier is not responsible for loss or damage arising from the following causes : neglect or default of the servants of the carrier in the navigation and management of the ship ; fire, unless caused by the fault or privity of the carrier ; perils, dangers and accidents of the sea or other navigable waters ; act of God ; act of war ; act of public enemies ; arrest or restraint of princes, rulers or people or seizure under legal process ; quarantine restrictions ; act or omission of the shipper or his agents ; strikes or lockouts ; riots or civil commotions ; saving or attempting to save life or property at sea ; inherent defect in the goods ; insufficiency in packing ; insufficiency or inadequacy in making ; latent defects in the goods not discoverable by due diligence ; any other cause arising without the actual fault or privity of the carrier.

4. The carrier is not responsible for any loss or damage to goods exceeding £ 100 or its equivalent unless the nature and value of such goods have been declared by the shipper and inserted in the bill of lading.

5. A carrier is at liberty to surrender in whole or in part all or any of his rights, and to increase his responsibilities and liabilities, provided such surrender or increase is embodied in the bill of lading issued to the shipper.

6. The carrier and the ship shall be discharged from all liability for loss or damage unless suit is brought within one year of the delivery of the goods or the date when the goods should have been delivered.

CERTAIN TERMS

The Shipowner's Lien

As a carrier, the shipowner has a lien on the goods carried for the freight and other charges. The lien can be enforced by not parting with the goods until his dues are paid. There is no lien when the freight has been paid in advance or when freight has been agreed to be paid after delivery of the goods.

Maritime Lien

A maritime lien is a right which specifically binds a ship, including its machinery, furniture, cargo and freight, for the payment of a claim based upon maritime law. Maritime lien is possessed by the following persons—seamen for their wages; the holder of a bottomry bond for his dues; claimants for damages in cases of collision with the ship concerned; persons who rescue ships or property from the sea.

A maritime lien is not a possessory lien, *e.g.*, it can be exercised even without possession by filing suit in the appropriate court. In cases of maritime lien the rule is that the *last* in time ranks *first* in payment.

Mate's Receipt

When goods are delivered to a ship for carriage, a receipt for it is sometimes given by the Mate, who is an officer of the ship under the captain. The Mate's receipt can be subsequently exchanged for a regular bill of lading.

Clean Bill of Lading

When it is stated in the bill of lading that the goods are in good order and condition, the bill is said to be a Clean Bill of Lading. When a clean bill of lading has been issued, the shipowner is estopped from claiming later on that the goods were in a bad condition. (See cases in p. 381)

Through Bill of Lading

Sometimes goods have to be carried partly by sea and partly by land. A bill of lading which covers both carriages is called a Through Bill of Lading.

Deviation

Deviation means departure from the usual and customary route or from the route agreed upon in a charter-party. Deviation is permitted to avoid the perils of the sea. Under Indian law deviation is permitted for the purpose of saving life and property. Damages can be claimed for unnecessary or unauthorised deviation. Charter-parties usually contain a clause regarding deviation. (See under "Voyage" in Book VI, Ch. 3)

Perils of the Sea

This term includes the dangers (apart from the ordinary actions of the wind and waves) which have to be faced in course of a sea voyage. *Examples* : storms ; collision with a sunken rock or an iceberg ; entry of water through a hole made by rats or a sword fish etc. A shipowner is generally exempted from liability when damages are caused by Perils of the Sea.

Excepted Perils

A charter-party usually specifies the circumstances under which the shipowner is not liable for loss of, or damage to goods. These circumstances are known as the Excepted Perils. *Examples* : acts of God ; action of the enemies of the State ; perils of the sea, etc.

Barratry

Barratry means wilful act of damages done by the crew in course of a mutiny or fight with the captain and the shipowner or among themselves.

Jettison

To jettison means to throw out. Goods may be jettisoned during a voyage in order to avoid the danger of the ship sinking or heeling during storms. Goods may also be jettisoned if they are dangerous.

Salvage

When some persons save a ship or any of its appliances or cargo from shipwreck, capture (by enemies or pirate) or loss from any other cause, they become entitled to a reward. The reward is called Salvage. The Salvors, *i.e.*, the persons saving the property, have a maritime lien on the ship, cargo and freight for the reward. The amount of salvage is generally determined by the courts, but the parties may settle the amount among themselves.

Primage

The charterer usually gives some extra remuneration to the captain of the ship, calculated at a fixed percentage of the regular freight. The extra remuneration is a reward to the captain of the ship for his care and diligence. It is called primage.

Freight

Freight means the consideration paid to the carrier, by the shipper for the carriage of goods. Freight is payable only if the goods are delivered in accordance with the terms of the contract. When the goods are lost the carrier is not entitled to recover the freight, even though the loss might have occurred under circumstances which exempt the carrier from liability for the loss. But delivery of the goods in a damaged condition does not prevent recovery of the freight, unless the damage is so great that the nature of the goods is completely altered.

By agreement the freight may be payable in advance. Advance Freight can be retained by the carrier if the goods are lost by an excepted peril.

When a charterer agrees to pay a lump sum for the use of a ship, irrespective of the amount of cargo loaded, it is called a Lump Sum Freight.

The shipper and the carrier may agree that if the cargo is delivered at a place other than the place agreed upon, the amount of freight will be charged in proportion to the distance actually covered. Such a freight is called a Pro Rata Freight.

If a shipper fails to load the amount of cargo he promised, he is liable to pay damage to the shipowner for the unfilled space. This is known as Dead Freight.

Freight is ordinarily payable by the person with whom the shipowner has entered into the contract of affreightment. But by agreement, freight may be payable by some other person, *e.g.*, the consignee.

Dunnage

Dunnage is any light material wedged between the cargo to keep it from rolling when stored. Grass is a kind of Dunnage. *Union of India* v. *Ratilal Jaddavji.*[1]

Lay Days

The term "lay days" means the days allowed for loading or unloading a ship. The number of days to be allowed as lay days is fixed by agreement and is usually mentioned in the charter-party where there is one. Where there is no agreement as regards lay days, a reasonable time is given for the purpose. Lay days begin from the time when the ship arrives at the place agreed upon and the shipper has notice of it.

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[1] (1971) 75 C.W.N. 634

Demurrage

If the loading or unloading is not completed within the lay days agreed upon, the carrier is entitled to damages. Such damages are called Demurrage. Demurrage is usually calculated upon the number of days the ship is detained beyond the agreed lay days or reasonable time. Railways in India charge demurrage if goods are not loaded or unloaded within the time mentioned in the Railway Receipt.

Bottomry and Respondentia Bonds

The shipowner or the captain of a ship may find it necessary to borrow money on the security of the ship or the cargo or the freight. A bond by which the *cargo only* is pledged for the repayment of the money, is called Respondentia. A bond by which the *ship and the freight* are pledged is called a Bottomry Bond. (The term 'bottomry' comes from the word 'bottom', which means the keel of the ship and therefore stands for the whole ship). The moneys due on a Bottomry or Respondentia Bond are payable only if the ship reaches its destination safely. The rate of interest is therefore very high generally. If there are more than one Bottomry Bonds, the later bondholders get priority over the earlier bondholders.

Particular Average Loss and General Average Loss

Goods may be lost in course of a voyage (thrown overboard or destroyed) by accident or by deliberate intent. In some cases the loss has to be borne by the owner of the goods lost. In some cases the loss of the owner has to be made up by contributions from the owners of the remaining cargo. The first type of loss is called a Particular Average Loss. The second type of loss is called a General Average Loss.

Cases of Particular Average Loss : When a particular article is lost by accident, the owner must bear the loss. For example, if a boat belonging to the ship is lost during a storm the loss falls on the shipowner and he cannot claim contribution from the cargo-owners. Similarly if an article is thrown overboard because it is dangerous, the loss must be borne by the owner. These are cases of particular average loss.

Cases of General Average Loss : When goods are thrown overboard or destroyed in order to save the ship or protect the adventure undertaken, it is called a general average loss. *Example* : goods thrown overboard in order to make a ship lighter during a storm so that it will not sink. The loss of the owner of the goods in all such cases must be compensated by contributions from the other cargo-owners. The following conditions must be satisfied before a general average contribution can be claimed :

1. There must have been a common danger. The danger must be real and not an imagined danger.

2. The danger must not have been due to a fault of the goods destroyed. A horse which turns mad in course of the voyage is a common danger but if it is destroyed, its owner cannot claim contribution.

3. The sacrifice of the property concerned was voluntary and responsible.

4. Owners of cargoes which are not saved, cannot be called upon to contribute.

The fixation of the amount to be contributed by each cargo-owner is a complicated process. It is done by experts known as Average Adjusters. It is usually provided in the contract of affreightment that the adjustments of general average loss will be done according to a set of rules known as the York-Antwerp rules. These rules were drawn up in international conferences held in York, Antwerp and certain other places. If the contract of affreightment does not contain any such provision, the adjustment is done according to the law of the country where the adjustment is made.

EXERCISES

1. What is a Charter Party ? Mention the usual terms in a Charter Party. (Pages 379-380)
2. Distinguish between a Bill of Lading and a Charter Party. (Page 383)
3. What are the warranties implied in a Charter Party ?(Page 383)
4. Is the Bill of Lading a "negotiable instrument"? (Page 382)
5. Write notes on : General Average Loss ; Particular Average Loss ; Respondentia and Bottomry Bonds ; Excepted Perils ; Charter Party ; Perils of the sea ; Salvage ; Deviation ; Demurrage. (Pages 385-390)
6. Objective Question :
   (*a*) What is a Charter Party ? (Page 379)

3 CARRIAGE BY AIR

LAW RELATING TO AIR CARRIAGE

Application

The Carriage by Air Act, (Act no. 69 of 1972) was passed with objectives of getting power to apply the rules contained in the Warsaw Convention as amended by the Hague Protocol also to non-international carriages subject to exceptions, adaptations and modifications.

Convention

This is a set of rules drafted and agreed in an assembly of delegates or representatives of different States, for the purposes of regulating a subject. In air carriage several rules (or the convention) were adopted in the Treaty at Warsaw (1929) and Hague (1955).

Warsaw Convention

The law relating to carriage by air in India was based upon a draft convention drawn up in the international conference held in Warsaw in 1929. The Warsaw Convention was given effect to in India by the enactment of the Indian Carriage by Air Act, 1934. The provisions of that Act were extended *to domestic carriage*, subject to certain exceptions, adaptations and modifications, issued by a notification on 1st March, 1964.

Hague Protocol

A diplomatic conference under the auspices of International Civil Aviation Organisation was held at Hague in September, 1955 which adopted a protocol to amend the provisions of the Warsaw Convention. The Hague Protocol was opened for signature on 28th September, 1955, and came into force between the ratifying States on 1st August, 1963.

High Contracting Party

This means those parties (that is representatives of the states) who attended and were the signatories to the convention of

Warsaw Convention and the Protocol of the Hague Convention—Rule 1(1) and (2), 2nd Schedule, Protocol of the Hague Convention.

Fifty-seven countries have already ratified in Hague Protocol and passengers travelling between those countries were ensured of the higher limit of compensation.

International Carriage by Air. (See p. 394)

THE DOCUMENTS OF CARRIAGE

The Act of 1972 provides that certain documents are to be issued when goods and passengers are carried by air. They are as follows :

The Passenger Ticket

Whenever a passenger is carried, he must be given a ticket and the ticket must contain the following particulars ; the place and date of issue ; the names of the places of departure and destination ; the agreed stopping places and their changes; the name and address of the carrier, and a statement that the carriage is subject to the provisions of the Act of 1972 and to its Schedules.

The Luggage Ticket or Baggage Check

For all luggages other than personal goods in charge of the passenger, a luggage ticket must be issued. The luggage ticket must contain all the particulars necessary to be included in a passenger ticket and in addition must mention, the number and weight of the packages and a statement that the luggage shall be delivered to the holder of the luggage ticket.

The Air Consignment Note or Air Waybill

Whenever goods are carried, the carrier can insist upon the consignor making out three copies of a Note or Waybill containing the following particulars ; the place and date of its issue ; the places of departure, destination and stoppages ; the names and addresses of carriers ; the names and addresses of the consignor and the consignee ; the nature of the goods, including a statement of the number of packages, the method of packing, their weight, quantity, volume and dimensions and the apparent condition of the goods ; the amount of the freight and the persons liable to pay it ; the period of the carriage and the route ; and a statement that the carriage is subject to the rules contained in the Act.

The Air Consignment Note or Air Waybill to be issued in triplicate. One copy is to be kept by the carrier ; one copy signed by both the carrier and the consignor is to accompany the goods ; and the third copy is to be kept by the consignor. The consignor is responsible for the correctness of the particulars in the Note and is liable to pay all damages, if any, arising from incorrect statements.

"The air waybill is *prima facie* evidence of the conclusion of the contract, of the receipt of the cargo and of the conditions of carriage."—Rule 11(1), 2nd Schedule.

"The statements in the air waybill relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated ; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far they both have been, and the contract of carriage, the consignor has the right to dispose of the presence of the consignor, or relate to the apparent condition of the cargo."—Rule 11(2), 2nd Schedule.

See cases on Bill of Lading, p. 381.

RIGHTS AND DUTIES

Consignor

The consignor may withdraw the goods from the custody of the carrier at the place of departure or destination or at any intermediate station. He may change the name of the consignee. He cannot however exercise any of these rights in such a way as to prejudice the interests of the carrier. The consignor must also pay all necessary expenses.

Consignee

The consignee is entitled to take delivery of the goods at the place of destination. If the goods are lost or do not arrive at the place of destination within seven days of the date of delivery, he can enforce his rights under the contract of carriage.

INTERNATIONAL CARRIAGE BY AIR

Definition

Under the carriage by Air Act of 1972, 'International Carriage' means, 'Carriage when the place of departure and the place of destination of an aircraft are situated within the territory of two high contracting parties or within the territory of a single high contracting party if there is agreed of stopping place within the territory subject to the sovereignty suzerainty, mandate or authority of another power."

Other features of international carriage are stated below :

1. The rules of the Carriage by Air Act of 1972 apply to baggage or cargo performed by aircraft for reward.

2. The rules also apply gratuitous carriage by aircraft performed an air transport undertaking.

3. "Carriage to be performed by several successive air carriers is deemed, for the purposes of these rules, to be one undivided carriage if it has been regarded by the parties as a single operation."—Rule 1(4), 2nd Schedule.

4. "These rules apply to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in rule 1, (above). These rules shall not apply to carriage of mail and postal packages."—Rule 2(1) and (2), 2nd Schedule.

When liable

The Protocol of Hague Convention provides that the carrier by air is, subject to certain rules mentioned below, liable to pay damages in the following cases :

1. Death or bodily injury suffered by a passenger, if the accident which caused the injury occurred during carriage or during embarking or disembarking.

2. Destruction or loss of, or damage to, any registered luggage or any goods during the time they are in charge of the carrier, on the plane, in the aerodrome or elsewhere.

3. Delay in the carriage of passengers, luggage or goods.

Rules limiting the liability of the Carrier

In International carriage by Air, the carrier is not liable to pay any damages in the following cases :

1. If he proves that he and his agents have taken all necessary

measures to avoid the damage or that it was impossible for him or them to take such measures.

2. If he proves that there was contributory negligence on the part of the injured persons. In this case the Court may, in accordance with the provisions of its own law, exonerate the carrier from liability either wholly or partially.

Liability in case of death

(Sec. 5, Carriage by Air Act, 1972). Notwithstanding anything contained in the Fatal Accidents Act, 1855 or any other enactment or rule of law in force in any parts of India, the rules contained in the First Schedule and in the Second Schedule shall in all cases to which those rules apply, determine the liability of a carrier in respect of the death of a passenger.

The liability shall be enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of his death.

The expression "member of a family" means wife or husband, parent, step-parent, grand-parent, brother, sister, half-brother, half-sister, child, step-child, and grandchild. (The expression includes illegitimate persons and adopted persons.)

The amount recovered in any such action, after deducting any costs not recovered from the claimant, shall be divided between the persons entitled in such proportion as the court may direct.

Quantity of Damages

The maximum amounts of damages payable by the carrier, as limited by the Act, are stated below :

(*i*) Death or injury of a passenger—1,25,000 francs (by the Warsaw Convention as in the First Schedule to the Act) and 2,50,000 francs (by the Protocol of Hague, as stated in Second Schedule to the Act).

(*ii*) Luggages in custody of a passenger—up to 5000 francs.

(*iii*) Goods of a passenger delivered to the air carrier—250 francs per kg.

(*iv*) Franc means $65\frac{1}{2}$ milligram of gold.

(*v*) Where the liability of the carrier is limited to 2,50,000 francs, the court may award it in a form of periodical payment, with equivalent capital value of the above.

The carrier may, by a special agreement, increase his liability but cannot reduce it.

INTERNAL CARRIAGE BY AIR

The Carriage by Air Act of 1934 is applicable to international air carriage (summarised above) and not to internal carriage by air. The Government of India extended the law of international carriage by air to the internal carriage by air by notification with the effect to 1st March, 1964. *Prior to* the above date, the liabilities of the internal air carrier are still governed by the Common law. According to that law, the internal carrier by air may, by special agreement, reduce or exclude his liabilities.

Before the notification of 1st March, 1964, came into force, the plaintiff had no remedy for his claim even if there was negligence on the part of the carrier. *Indian Airlines Corporation* v. *Jothaji Maniram.*[1] *Mukul Dutta Gupta* v. *Indian Airlines Corporation.*[2] When the deceased had by a contract during his life time excluded himself from the right to claim damages, his heirs or personal representatives were not entitled to claim damages even under the Fatal Accidents Act, 1855. *Indian Airlines Corporation* v. *Madhuri Chowdhuri and others.*[3]

THE PROCEDURE FOR REALISING DAMAGES

The person entitled to damages must complain to the carrier within 7 days of the date of delivery in case of loss of or damage to luggage, 14 days in a similar case regarding goods, and 21 days in cases where damages are claimed for delay in transit.

Suits may be filed in the court having jurisdiction over the place of destination or over the place of business or residence of the carrier. In case of the death of a passenger, the suit for compensation may be filed by his legal representative.

Suits must be filed within two years of the date of arrival of the carrier at the place of destination or the date on which it should have arrived or the date on which the carriage stopped.

When there are successive carriages with different carriers covered by the same documents or carriages :

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[1] AIR (1959) Mad. 259 [2] AIR (1962) Cal. 311
[3] AIR (1965) Cal. 252

(*a*) actions for damages to passengers are to be brought against the carrier at the time of the accident, unless otherwise agreed ; and

(*b*) in actions for damage to luggage and goods, the consignor is to sue the first carrier ; the consignee, the last carrier ; but passengers may sue all the carriers.

EXERCISES

1. Write notes on : Warsaw convention ; Hague Protocol ; The Passenger Ticket ; The Luggage Ticket ; Baggage Check ; The Air Consignment Note ; Air Waybill. (Pages 391-392)
2. State the rules regarding the liabilities of the carrier by air under international carriage and internal carriage. (Pages 394-397)

BOOK VI

THE LAW OF INSURANCE

1 PRINCIPLES OF INSURANCE

THE RATIONALE OF INSURANCE

The advantages and the objects of Insurance are as follows :

1. *Covers risk* : Insurance is a method of eliminating or reducing risk. By insurance a person can protect himself (and his dependants) from loss arising from future uncertain events like fire, accident or early death.

2. *Small loss* : Insurance converts an uncertain risk into a certain and ascertained sum of money. A ship going out to sea may or may not be lost. If it is uninsured and is lost, the entire loss will fall on the owner. If it is insured and is lost, the owner will recover the value of the ship from the insurer but he has to pay to the insurer a certain sum of money called the premium. In case the ship is not lost the premium paid is a 'loss'. But this loss is small as compared to the loss that will be incurred if the ship is sunk. The premium is considerably less than the value of the ship which is insured. Thus by insurance a person exchanges an *uncertain heavy loss for a certain small loss.* This is the general principle on which insurance contracts are based.

3. *Small premium* : As regards the insurer, he can undertake the risk for a small premium because all the ships going out to sea are not lost. The insurer knows that he will not have to pay *all* shipowners who insure their ships. There are statistical methods of calculating how many ships are likely to be lost. The insurer fixes the amount of premium on the basis of these calculations. Therefore in the long run he makes a profit on the risks that he undertakes. Thus insurance is advantageous to the insurer and also to the insured.

4. *Expansion of insurance business* : The great advantages of insurance have led in recent times to an *enormous expansion* of the volume of insurance business and the evolution of many different types of insurance.

THE CONTRACT OF INSURANCE

Definition

A Contract of Insurance is a contract between two parties whereby one party, called the *Insurer*, agrees to pay to the other party a certain sum of money on the happening of a specified contingency, or agrees to indemnify the other party from losses arising from certain specified events. The other party to the contract, called the *Insured or Assured*, pays an agreed sum of money, called the Premium, as consideration.

Characteristics

The characteristics of a Contract of Insurance are enumerated below :

1. Essential requirements

A contract of insurance must fulfil all the essential requirements of a contract as laid down in the law of contract. Thus, there must be a proposal and acceptance, the parties must be capable of contracting, the object must not be illegal or immoral etc.

Examples :

(*i*) A contract of insurance is formed as soon as the insurer accepts the premium or in any other way shows that the proposal to insure has been accepted. *Hindusthan Co-operative Insurance Society* v. *Shyamsundar*.[1]

(*ii*) A contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Though in certain human relationships silence to a proposal might convey acceptance but in the case of insurance proposal, silence does not denote consent and no binding contract arises until the person to whom an offer is made says or does something to signify his acceptance. Mere delay in giving an answer cannot be construed as an acceptance, as, *prima facie*, acceptance must be communicated to the offeror. Similarly the mere receipt and retention of premium until after the death of the applicant or the mere preparation of the policy document is not acceptance. *Life Insurance Corporation of India* v. *Raja Vagireddy Komalavalli Kamba and others*.[2]

2. Good faith

A contract of insurance is a contract *uberrimae fidei* (*i.e.*, one based on good faith). It is the duty of the insured person to disclose all material facts concerning the subject matter of the insurance. The disclosure must be *full and fair*. If a material

[1] (1952) 56 C.W.N. 418 [2] AIR (1984) Supreme Court 1014

fact is not disclosed, or if there is misrepresentation or fraud, the insurer can avoid the contract.

Material fact : What is a material fact, depends on the circumstances of the case. Generally speaking, a material fact is one which affects *the nature or incidence of the risk.* Any fact which the insurer will take into account when considering whether to accept the risk or not and any fact which has a bearing on the *amount of premium* which the insurer will charge, must be considered a material fact to be disclosed. Thus, an applicant for a fire insurance policy must disclose all facts regarding the susceptibility of the property (to be insured) as regards fire.

The insured or assured must disclose all facts which a *reasonable man* would regard as material. *Joel* v. *Law Union Insurance Co.*[1]

The disclosure of facts must be substantially accurate. Misleading statements amount to a breach of duty. But unimportant misstatements or omissions may be excused. *Dawson's Ltd.* v. *Bonnin.*[2]

Examples :

(*a*) The applicant for an insurance policy was asked whether he had applied to any other company for insurance and whether such application has been accepted. He answered that he was insured with two companies but failed to disclose that his application was rejected by several other companies. It was held that there was material concealment and the policy was set aside. *London Assurance Co.* v. *Mansel.*[3]

(*b*) The deceased, knowing that he had suffered from a heart disease, stated in the proposal that he did not suffer from any heart disease. Held, that this was a statement on a material matter and that he had fraudulently suppressed the fact which was material to be disclosed and the insured knew the statements to be false when he made them. Under the above circumstances the insurer is entitled to avoid the policy. *Krishna Wanti Puri* v. *L.I.C.*[4]

(*c*) A person, aged about fifty-six years, died of heart failure within two years of taking the insurance policy. He was suffering from carbuncle and diabetes. However, he failed to disclose about the said disease in his proposal of the insurance policy. Held, that, this does not amount to misrepresentation. Therefore the policy money must be paid. *Kamala Wanti* v. *L.I.C.*[5]

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[1] (1908) 2 K.B. 863
[2] (1922) A.C. 413
[3] (1879) 11 Ch. D. 363
[4] AIR (1975) Delhi 19
[5] AIR (1981) All. 366.

The duty of disclosure exists at the time when the contract of insurance is entered into. Material facts coming to the knowledge of the insured subsequent to the contract need not be disclosed.

Section 45 of the Insurance Act provides that no policy of *life* insurance can be called into question by the insurer two years after the date it was effected on the ground of misstatement unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose.

3. Indemnity

Life insurance is a *contingent contract*. The money is payable on the happening of a contingency (*viz.*, death) the date of which is uncertain.

Other forms of insurance (*e.g.*, fire or marine) are *contracts of indemnity*. The insurer in these cases promises to indemnify the insured person against the consequence of fire, accident or some mischance and misfortune. "The contract of insurance contained in a marine or fire policy is a contract of indemnity and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified but shall never be more than fully indemnified." *Castellain v. Preston.*[1]

Suppose that a house is insured against fire for Rs. 20,000. It is burnt down but it is found that Rs. 15,000 will restore it to its original condition. The insurer is liable to pay only Rs. 15,000, unless otherwise agreed under the contract of insurance.

But if the contract of insurance provides for the payment of a *fixed* sum of money on the happening of an event (like fire, accident or burglary) the contract is not one of indemnity. Thus a fire, marine or accident insurance may, in particular cases, be a contingent contract.

In the case of life insurance, the insurer is liable to pay whatever sum is mentioned in the policy as being payable upon

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[1] (1883) 11 Q.B.D. 390

the contingency specified. Thus life insurance is always a contingent contract.

4. Insurable Interest

In every contract of insurance the policy-holder must possess an Insurable Interest. Insurable interest means some *proprietory or pecuniary (monetary) interest.* The object of insurance is *to protect* the insurable interest. If there is no insurable interest there can be no insurance. *X* cannot insure *Y*'s house. But if *Y*'s house is mortgaged to *X*, *X* has an interest to protect and he may insure the house. A man cannot insure the life of a stranger but he can insure the life of himself and of persons in whose life he has a pecuniary interest. It has been held that for the purposes of life insurance insurable interest exists in the following cases; husband in the life of his wife and wife in the life of her husband; parent in the life of the child if there is any pecuniary benefit derived from the life of the child; creditor in the life of the debtor; employer in the life of his employee; surety in the life of the principal debtor; etc.

In the case of life insurance, insurable interest must exist at the time when the insurance is effected. The policy remains good even if the insurable interest ceases to exist subsequently. The assignee of a life policy need have no insurable interest because when the policy was effected there was an insurable interest.

In the case of fire or marine insurance, the insurable interest must exist at the time when the claim is made. If this condition is satisfied the insurer must pay the claim even if the policy-holder had no insurable interest at the time when the contract was entered into.

A contract of insurance entered into without any insurable interest is a wagering agreement and is void.

Persons, who have insurable interest in different types of properties, are enumerated below.

(1) Immovable properties—owners; mortgagors and mortgagees; landlords and tenants; vendors and purchasers.

(2) Movable properties—owners; pledgors and pledgees; bailors and bailees; carriers; all lien holders.

(3) Business—a shareholder has an insurable interest in his share; an agent in his commission; a businessman in his stock-in-trade and in his profits.

(4) Ships—In marine insurance contracts the following persons have insurable interest; owners; crew of the ship for their wages; owners of cargoes; holders of bottomry and respondentia bonds, etc.

5. Commencement of Risk

The risk of insurer commences after the contract of insurance is entered into, i.e., after the proposal to insure is accepted. (See pp. 406-408)

6. Causa Proxima

The insurer is liable only for those losses which directly or reasonably follow from the event insured against. The insurer is not liable for remote consequences and remote causes. (See p. 408)

7. Payment of Premium

The policy-holder must pay the premium according to the terms of the contract. Subject to certain conditions, the policy lapses if the premium is not paid. (See p. 407)

8. Right to Contribution

If a property is insured by several insurers against the same risk, the insurers must share the burden of payment in proportion to the amount assured by each. If any of the insurers pays the whole loss, he is entitled to contribution from the other insurers. (See p. 410)

9. The Principle of Subrogation

In marine and fire insurance contract after the policy-holder is indemnified in full, the insurer becomes entitled to the remnant of the property insured and all rights and claims which the policy-holder may have against third parties. The insurer is subrogated to the position of the insured. (See pp. 410-411)

10. Mitigation of Loss

In case of accident and mischance, it is duty of the policy-holder to take steps for reducing the loss as much as possible. For example, when fire occurs the policy-holder must safeguard the remaining property.

[The items 5-10 are also discussed below in pp. 409-411]

EXPLANATION OF CERTAIN TERMS

Certain terms, used in connection with contracts of insurance, are explained below.

Insurer

The party that promises to pay money to or indemnify the other party upon the occurrence of some specified event is called the Insurer. In marine insurance contracts the insurer is sometimes called the underwriter. Life Insurance Corporation for life insurance and the Corporations set up by the Government for general insurance are the Insurers in India.

Insured or Assured

The person who under a contract of insurance will receive money or indemnity upon the occurrence of some specified event is called the insured or assured person. Since the contract of insurance is incorporated in a document called the Policy, the insured or the assured may also be called the policy-holder. The term policy-holder includes an assignee from a policy-holder, where such assignment is absolute and indefeasible.

Insurance Policy

The terms of a contract of insurance are usually written down in a document known as the Insurance Policy. The policy is stamped and signed by the insurer and handed over to the insured. The Policy is evidence of the fact of insurance. Except in cases of marine insurance, it is not legally compulsory to issue a policy. The terms of a contract of insurance (except a marine insurance) can be proved by oral evidence. It is, however, the general practice in India to issue a policy after a contract of insurance is entered into.

Risk

The date of issue of the policy is not necessarily the date from which the risk is covered. *The risk attaches* from the time the contract of insurance is entered into, *i.e.*, the proposal is accepted. The policy may be issued later. The production of the policy is not a condition precedent to the recovery of the money. The identity of the claimant and the fact of insurance may be proved by oral evidence.

Premium

The consideration payable by the insured person to the insurer is called the Premium. Usually the consideration is a sum of money but there is nothing in insurance law which prevents the acceptance of consideration in any other form. The premium may be a fixed amount or it may vary (increase or decrease) according to circumstances agreed upon. The time of payment depends upon agreement. Payments may be made monthly, quarterly or annually or by a single lump sum. The premium has to be paid by a fixed date but usually the insurer allows a certain number of *days of grace* beyond the agreed date. For premia payable quarterly one month's extra time is usually given. Ordinarily a policy lapses if the premium due is not paid within the due time plus the grace period. But after a policy acquires a surrender value (see below) non-payment of premium does not involve lapse of the policy.

The amount of premium is determined by an actuarial calculation of the risk involved.

Cover Note

The insurer may give a written acknowledgement stating that (*i*) the proposal has been accepted, (*ii*) the first premium has been received, and (*iii*) the regular policy will be issued later on. The risk is covered immediately with acknowledgement. The written acknowledgement is called a Cover Note.

TYPES OF INSURANCE

The three most important type of insurance are Life, Fire and Marine insurance. In addition to these three, there are various miscellaneous types of insurance, *e.g.*, accident, motor vehicles, burglary, etc. (See Ch. 4, pp. 446-450)

Formerly all types of insurance business were used to be carried on by private insurers and companies. From January 1956, life insurance has been nationalised. The objects and functions of the Life Insurance Corporation have been detailed in Chapter 2.

All other types of insurance *i.e.*, General-Insurance has been nationalised from 13th May, 1971.

THE INSURANCE ACT

The Insurance Act was passed in 1938. It contains certain provisions regarding the laws of insurance, *e.g.*, definition of insurer and insured person, proof of age, surrender value, etc. These provisions have been discussed in these chapters. The Act also contained laws relating to the constitution and management of insurance companies in India. But insurance has been nationalised for Life and also General insurance. Therefore the Insurance Act now has no effect regarding the constitution and management of insurance companies in India.

INSURANCE AND WAGER

A contract of insurance appears to be similar to a wagering contract. The policy money is payable on the happening of a future uncertain event. In the case of whole life insurance the date of occurrence of the event on which the money is payable, is uncertain. In the case of fire, marine and other forms of insurance the happening of the event upon which the money is payable, is itself uncertain. In an early case on insurance it was observed that, "Insurance is a contract on speculation". [Lord Mansfield in *Carter* v. *Boehn*.[1]] But the modern view is that insurance contracts are not speculative or wagering contracts. The points of distinction between a contract of insurance and a wagering contract are mainly the following :

1. *Insurable Interest* : In an insurance contract there always exists an insurable interest. In a wagering contract there is none.

2. *Protection of Interest* : In an insurance contract the object is to protect an interest. In a wagering contract the object is to gamble for money.

3. *Indemnity* : A contract of insurance is based on the principle of indemnity, (excepting life and certain other insurances). In a wager there is no question of indemnity because it does not cover any risk.

4. *Good Faith* : A contract of insurance is based upon good faith. In a wager there is no question of faith.

5. *Scientific Calculation* : A contract of insurance is based upon calculation of risks and the premium payable. The amount of risk and premium is calculated on actuarial principle. In a wager there is no scientific calculation. It is a gamble only.

6. *Public Policy* : Wagering contracts are void because they are considered to be against public policy. Insurance contracts are considered to be in the public interest and are therefore valid.

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[1] (1765) Sm. L.C. 546

OBLIGATIONS OF THE INSURER

The obligations of the insurer are determined by the terms of the contract of insurance. The most important obligation of the insurer is to pay the money due on the policy upon the happening of the contingency specified in it. The liability to pay is subject to the following conditions :

1. Fulfilment of essentials

The insurer is liable to pay only if the contract of insurance fulfils all the essential elements of a valid contract. If there is non-disclosure of material facts or fraud the contract is voidable.

2. Commencement of risk

The risk of insurer commences after the contract of insurance is entered into, *i.e.*, after the proposal to insure is accepted. Mere submission of a proposal to the insurer is not enough. The insurance agent usually has no authority to accept a policy.

3. Causa proxima

The insurer is liable only for those losses which directly and reasonably follow from the event insured against. The insurer is not liable for remote consequences and remote causes. The principle is expressed in the maxim, "*Causa proxima non remota spectatur*".

Examples :

(*i*) A ship was carrying meat and was delayed on account of a severe storm. The meat was damaged and had to be thrown into sea. The court held that the loss of meat was not due to sea perils. *Taylor* v. *Dunbar.*[1]

(*ii*) A ship was insured against losses resulting from collision. There was a collision and the ship was delayed for a few days. Owing to the delay a cargo of oranges in the ship became unfit for human consumption. Held, the insurer was not liable for the loss because the proximate cause of the loss was delay and not collision. *Pink* v. *Fleming.*[2]

(*iii*) A ship was insured against damage by enemy action. It was injured by passing over a torpedoed ship. Held, no damages were recoverable because the damages in this case were not due directly to enemy action but to the fact that a sunken vessel lay at a particular place. *William and Co.* v. *North of England etc. Ass.*[3]

[1] (1869) 4 P.C. 206 [2] (1899) 25 Q.B.D. 396
[3] (1917) 2 K.B. 527

(*iv*) In the above case it was also held that when the enemy had purposely sunk a vessel at the entrance of a port with a view to damaging ships entering that port, any damage actually suffered by collision with such a vessel must be deemed to be directly due to enemy action and the insurer must pay compensation.

4. Return of premia

Under certain circumstances the insurer is bound to return the premia received, *e.g.*, when the contract of insurance is set aside on the ground of fraud by the insurer. If an insurance policy becomes void on the ground of non-disclosure of material facts or fraud by the insured person, the premia are not returnable.

RIGHTS OF INSURER

The insurer has the following right :

1. The Payment of Premium

The policy-holder must pay the premium according to the term of the contract. Upon non-payment the policy lapses. In life insurance contracts, after the premia have been paid for two consecutive years, the policy acquires a surrender value and a certain proportion of the amount insured for is payable to the policy-holder. (See p. 418)

2. The Right to Contribution

A particular property may be insured with two or more insurers against the same risk. In such cases the insurers must share the burden of payment in proportion to the amount assured by each. If any one of the insurers pays the whole loss, he is entitled to contribution from the other insurers.

Example :

A house is insured against fire for Rs. 20,000 with *X* and for Rs. 10,000 with *Y*. A fire occurs and the damage is estimated at Rs. 6,000. *X* and *Y* share the loss in the proportion of 20,000 : 10,000 *i.e.* 2 : 1, *X* will pay Rs. 4,000 and *Y* will pay 2,000. The policy-holder can sue both *X* and *Y* together or any one of them. Suppose that he sues *X* and recovers from him Rs. 6,000. *X* can claim contribution from *Y* to the extent of Rs. 2,000.

3. The Principle of Subrogation

Subrogation is a form of substitution. In marine and fire insurance contracts after the policy-holder is indemnified in full, the insurer becomes entitled to the remnants of the property insured and all rights and claims which the policy-holder may have against third parties. The insurer is subrogated to the position of the insured.

The principle of subrogation is based upon equity. If the insurer pays the indemnity in full, he ought to get whatever remains of the damaged property. Also, the policy-holder ought not to get more than the value of the property because that will enable him to make a profit out of the insurance.

The principle of subrogation applies only on payment of the whole loss. In case of partial losses the principle does not apply. The principle also does not apply in cases where the contract of insurance is not a contract of indemnity.

Examples :

(*i*) *P* insured his house against fire with *Q*. Subsequently he entered into a contract with *R* for the sale of the house. Before the sale could be completed the house was burnt and *Q* paid the full value of the house to *P*. *P* then obtained from *R* the value of the house as per the contract of sale with him. It was held by the court that *P* must refund to *Q* he amount the obtained from *R*. *Castellain* v. *Preston*.[1]

(*ii*) A ship insured against total loss is sunk. The insurer pays the value in full. If the ship is subsequently salvaged, the insurer is entitled to the sale proceeds of the remnant, if any. The same rule applies to goods.

4. No return of premiums paid

The Supreme Court has held that in case of fraud, the policy-holder cannot claim the refund of the premiums paid. *Mithoolal Nayak* v. *L.I.C.*[2], *Sparenbory* v. *Edinburgh Life Insurance Co.*[3]

DUTIES OF THE POLICY-HOLDER

1. Disclosure

The policy-holder must disclose all material facts. The statement of facts made by him in the proposal form must be correct.

2. Premium

The policy-holder must pay the premium on the due dates.

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[1] (1883) 11 Q.B.D. 380 [2] AIR (1962) Supreme Court 814
[3] (1912) 1 K.B. 195

3. Protection

In the case of fire, marine, burglary and other forms of insurance of property, the policy-holder must take reasonable measures for the protection of the property. The duties of the policy-holder in cases of such insurance are usually written down in the policy and form part of the term and conditions of the contract of insurance.

4. Mitigation of loss

In case of accidents or mischance it is duty of the policy-holder to take steps for reducing the loss as much as possible. For example when fire occurs the policy-holder must safeguard the burnt properties.

5. No commission

Under Section 41 of the Insurance Act of 1938, the policy-holder is not allowed to receive any part of the commission payable on the policy or any rebate on the premium. If he accepts any such payment he may be punished with a fine which may extend to Rs. 500.

RIGHTS OF THE POLICY-HOLDER

1. Payment

In case of life insurance, policy-holders or their heirs, nominees and assignees are entitled to receive the money stipulated for in the policy on the happening of the specified contingency. In the case of other forms of insurance, the policy-holder is entitled to be indemnified for all losses sustained from the peril insured against.

2. Assignment

The policy-holder is entitled to assign the policy, whereupon the assignee becomes entitled to all the benefits of the policy. (See Ch. 2).

3. Bar to questions

After the lapse of two years from the date of contract, an insurance policy cannot be questioned on the ground of any misstatement unless such misstatement was fraudulent.—Sec.45. Insurance Act.

4. Documents

Under the Insurance Act of 1938, policy-holders are entitled to get the following documents—copies of the proposal and the medical report ; notice regarding default of premium ; written acknowledgement from the insurer of transfer, assignment and nomination etc.

5. Surrender value

A life insurance policy does not lapse for non-payment of premium after it acquires a surrender value.—Sec.113. (See p. 418)

DOUBLE INSURANCE

Definition

When the *same risk and the same subject-matter* is insured with more than one insurer, there is said to be double insurance. *P*, the owner of a house, insures it against fire for Rs. 30,000 with *X* and Rs. 10,000 with *Y*. This is double insurance.

Rules

The following rules apply in cases of double insurance :

1. *Life—no limit* : In case of life insurance there may be *any number of policies* for any amounts. A man is entitled to place any value he likes upon his life and therefore upon death, all the policies are payable whatever the total amount may be.

2. *Property—not more than actual loss* : A person is free to insure his property with any number of insurers. But in case of loss occurring he will not be allowed to recover more than the actual loss from all the insurers together. Thus if in the above example the actual value of the house is found to be Rs. 20,000, the insurers will pay, in case of total loss by fire, only Rs. 20,000. This amount will be shared between the insurers in proportion to the value of each insurer's policy. If any one of the several insurers pays the whole loss, he is entitled to contribution from the other insurers.

3. *No profit* : The insured is *never allowed to make a profit* out of a fire or any other mischance.

4. *Trust* : According to the Marine Insurance Act of 1963, where the assured receives any sum in excess of the indemnity allowed by the Act he is deemed to hold such sum *in trust* for the insurers, according to their right of contribution among themselves.

REINSURANCE

Definition

Reinsurance means the *transfer of a part of the risk* by the insurer. Suppose that a ship has been insured for Rs. 10 lakhs. The insurer may feel that the risk is too heavy to be borne by him alone. If so, he can transfer a part of the risk to another insurer.

Rights of reinsurers

1. Reinsurer is entitled to get a proportionate part of the premium.

2. Reinsurer gets the benefits of the conditions and terms of the original policy.

3. Reinsurer is entitled to subrogation.

4. If for any reason the original policy lapses, the reinsurance comes to an end.

Liabilities of the reinsurer

1. Reinsurer is liable to pay the portion of the risk transferred to him.

2. Reinsurer is liable only to the first insurer because there is no privity to contract between the insurer and the originally insured person.

DISTINCTION : DOUBLE INSURANCE AND REINSURANCE

1. If the same risk and the same subject is insured by the policy-holder, it is called Double Insurance. Reinsurance means the transfer of the part of the risk by the insurer.

2. In insurance of properties, if there are double insurances, the loss will be shared by all the insurers. In case of life insurance all the insurers are liable. In reinsurance, the reinsurer is entitled to get a proportionate part of the premium, and will be liable for a proportion of part of the loss.

3. The reinsurer is liable only to the first insurer. In double insurance each insurer is liable directly to the policy-holder.

4. Double insurance is a method of assuring the benefit of insurance. In case of Life insurance the insured may have any number of policies and for any amount. Reinsurance is a method of reducing of the risk of the insurer.

EXERCISES

1. (*a*) Define a contract of insurance. (*b*) Briefly describe different kinds of contract of insurance. (Pages 400, 407, 408)
2. Is an insurance a contract ? Give reasons for your answer. (Pages 400-405)
3. "Insurance is a contract on speculation." Discuss. (Pages 408-409)
4. What is meant by insurable interest ? (Page 404)
5. Is a contract of insurance a wager ? (Page 408)
6. A contract of insurance is not merely a gamble on an uncertain future event. Explain. (Page 408)
7. Explain with illustrations : (*a*) Insurable interest. (*b*) General Average Loss. (*c*) Reinsurance. (Pages 404-405, 414)
8. (*a*) "Insurance is indemnity and indemnity only." Comment. (Pages 403-404)

   (*b*) "A contract of insurance is a contract uberrimae fidci". Explain. (Pages 401-402)
9. Write short notes on (*i*) Double-Insurance, (*ii*) Reinsurance. (*iii*) Subrogation. (Pages 413, 414, 410)
10. (*a*) What do you understand by 'insurable interest' in connection with Life, Fire and Marine Insurance ? (Page 404)

    (*b*) Is a contract of insurance a wager ? (Page 408)
11. Objective Question :

    (*a*) State whether the contract of life insurance is a contract of indemnity. (Page 403)

    (*b*) In what cases can a person effect an insurance on another's life ? (Page 404)

    (*c*) What is re-insurance ? (Page 414)

    (*d*) Define 'Fire Insurance'. (Page 446)

    (*e*) Define 'Floating Policy'. (Page 433)

2 LIFE INSURANCE

WHAT IS LIFE INSURANCE

Definition.

"Life insurance business" means the business of effecting contracts of insurance upon human life. It includes,

(*i*) any contract whereby the payment of money is assured upon death (except death by accident only); or the happening of any contingency dependent on human life;

(*ii*) any contract which is subject to the payment of premiums for a term dependent on human life;

(*iii*) any contract which includes the granting of disability and double or triple indemnity accident benefits; the granting of annuities upon human life, and the guaranteeing of superannuation allowances.—Sec. 2(11), Insurance Act.

Difference between life insurance and property insurance, e.g., fire insurance

Life insurance differs fundamentally from other forms of insurance. The points of difference can be summed up as follows :

1. Life insurance is a contract depending upon human life. Most of the other forms of insurance relate to property.

2. In the insurance the liability of the insurer to pay the sum assured arises upon death of the person concerned or the attainment by him of a certain age. The event upon which the money is payable is certain to occur but the date of occurrence is uncertain. In other forms of insurance the peril insured against may or may not occur.

3. Life insurance is a contingent contract. The full amount mentioned in the policy must be paid on the happening of the contingency stipulated in the policy. Other forms of insurance are usually contracts of indemnity and the insurer is only liable to make good the actual loss suffered.

4. In life insurance, there must be insurable interest at the time the contract of insurance is entered into. In fire and marine insurance, insurable interest must exist at the time the loss occurs.

5. Life insurance contracts are long term contracts. Fire, marine, accident and other forms of insurance are generally entered into for one year subject to renewal at the end of the year.

TYPES OF LIFE INSURANCE POLICIES

There are various types of life insurance. The principal types are described below.

The Whole Life Policy

A whole life policy is one under which a lump sum of money is payable upon the death of the assured to his heirs or nominees.

The Endowment Policy

An endowment policy is one under which a lump sum of money is payable to the assured upon his attaining a certain age, or in the event of his dying earlier, to his heirs or nominees upon his death.

Policies, with profit or without profit

In profit policies, the policy-holder gets the bonuses declared from the profit of the insurer. The bonuses are paid on the maturity of the policies.

The Joint Life Policy

A Joint Life Policy involves the insurance of two lives simultaneously. The policy money is payable upon the death of any one of the lives insured. If there is a joint life policy of *A* and *B*, the money is payable upon the death of either *A* or *B*. *A* and *B* may be husband and wife or partners in a firm. Partners very often enter into this form of insurance. The premium is paid by the firm and money is payable to the firm. Upon the death of any partner the insurance money is used to buy out the heirs of the deceased partner and the firm goes on with the remaining partners. If there were no insurance the heirs of the deceased partner would have had to be paid out of the partnership assets and this might have led to the dissolution of the firm.

Annuities

An annuity policy is one under which the policy money is payable to the assured by monthly or annual instalments after he attains a certain age. The assured pays premium up to a certain age or (sometimes) a lump sum of money. The insurer pays a certain sum monthly or annually to the assured after he attains a certain age. The usual object of annuities is to provide for one's old age.

Limited Payment Policies

In some life policies the obligation to pay premium ceases after the assured attains a certain age. Such policies are called Limited Payment Policies.

Miscellaneous Types

Insurance Policies may be effected for the purpose of the education of children or the marriage expenses of daughters. The insurer agrees to pay a certain sum for the purpose when the children attain a certain age. Premiums are payable by the person entering into the contract of insurance. If he dies before the maturity of the policy no further premium is payable. Policies of this type help the education and marriage of children in cases of premature death of parents.

SURRENDER VALUE

Prior to the passing of the Insurance Act of 1938 non-payment of premium at any time involved cancellation of the contract of insurance and forfeiture of the premia paid. As this involved considerable hardships, the section 113 of the Act provides that a life insurance policy will not lapse for non-payment of premiums if certain conditions are fulfilled. Policies issued by the Life Insurance Corporation of India provide that surrender value will be acquired if premiums have been paid for at least two years or to the extent of one-tenth of the total number stipulated for in the policy, provided such one-tenth exceeds one full year's premium.

After premiums have been paid for the requisite period, the policy acquires what is called a Surrender Value. The surrender value is obtained by multiplying the sum assured by a fraction. The premia actually paid is the numerator of the fraction and the premia payable is the denominator. Thus the surrender value bears to the sum assured the same proportion as the premia paid bears to the premia payable. The surrender value of bonuses, declared before default, are to be added.

Example :

> Suppose that *X* takes out an endowment policy for 15 years for Rs. 15,000 and the premium payable is Rs. 1,200 per annum. He pays premium for three years and then stops. The premium paid is 3× Rs. 1,200 = Rs. 3,600. The premium payable is 15 × Rs. 1,200 = Rs.18,000. The ratio between the two is Rs. 3,600 ÷ Rs. 18,000 = 1/5. The surrender value of the policy is 1/5 × Rs.15,000 = Rs. 3,000. Surrender value of bonuses, already accrued, are to be added to this figure.

If the conditions laid down for the acquisition of surrender value are fulfilled the policy does not lapse. It becomes what is known as a paid up policy. The insurer will pay, upon the happening of the contingency mentioned in the policy, to the assured or his heirs or nominee, the surrender value of the policy.

ASSIGNMENT OF LIFE POLICIES

In an old English case, *Ashely* v. *Ashley*,[1] it was observed that life insurance policies are marketable commodities which can be validly assigned, with or without consideration, to persons who have no interest in the life insured. The principle, *viz*., the assignability of life insurance policies, is accepted in modern times and permitted by law.

The Insurance Act of 1938 contains the following rules regarding assignment of life policies.—Sec. 38 :

1. Procedure

A transfer or assignment of a policy of life insurance, whether with or without consideration, may be made only by an endorsement upon the policy itself or by a separate instrument, signed in either case by the transferor or by the assignor or his duly authorised agent and attested by at least one witness, specifically setting forth the fact of transfer or assignment.

2. Notice

The transfer or assignment shall be binding upon the insurer after a notice in writing and endorsement on the instrument or a certified copy thereof is delivered to him.

[1] (1829) 3 Sim 149

3. Priority

In case of more than one assignment the priority of the claims of the assigness shall be governed by the order in which the notice to the insurer is delivered.

4. Written acknowledgement

Upon the receipt of the notice, the insurer shall record the fact of transfer together with the date and the name of the assignee. The insurer is also bound to give a written acknowledgement of the receipt of the notice if the person giving the notice or the assignee demands such acknowledgement and pays a fee not exceeding Rupee one.

5. Recognition

From the date of the notice the insurer shall recognise the assignee named in the notice as the only person entitled to benefit under the policy. The assignee can, if necessary, sue without the consent of the assignor.

6. Conditional assignment

Conditional assignments are valid. There may be an assignment in favour of a person subject to the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the lifetime of the person whose life is insured.

7. Survivorships

There may be an assignment in favour of the survivors of a number of persons. *Bai Lakshmi* v. *Jaswantlal T. Das.*[1]

NOMINATION BY THE POLICY-HOLDER

Definition

The holder of a policy of life insurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death. This is known as Nomination by the Policy-holder. The person named is called the Nominee.

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[1] (1947) Bom. 369

Rules

The Insurance Act contains the following rules regarding nomination.—Sec. 39 :

1. Procedure

The nomination may be incorporated in the text of the policy or be made by an endorsement on the policy. In the latter case the fact of nomination must be communicated to the insurer. A written acknowledgement of such communication shall be made by the insurer upon payment of a fee exceeding Rupee one.

2. Discharge from liabilities

The insurer is discharged from his liabilities under the policy by paying to the recorded nominee or nominees. But if the policy matures for payment during the life time of the insured the insurer shall pay the money to the policy-holder. If the nominee or all the nominees die before the policy matures the insurer shall pay the money to the policy-holder or his heirs or legal representatives or the holder of a succession certificate as the case may be.

3. Cancellation and change

A nomination can be cancelled or changed by a further endorsement on the policy or by a will. The insurer will be bound in such cases only after notice is given to him of the cancellation or change.

4. Automatic cancellation

A transfer or assignment of a policy automatically cancels a nomination (except an assignment to the insurer to secure a loan).

Case Laws

A nominee is only an agent to receive the policy money. The money remains a part of the estate of the assured and is distributable among his heirs. But if it appears from the language used in the nomination that the assured intended to benefit the nominee or to create trust in his favour, he is entitled to the money not the heirs. *Cleaver* v. *Mutual Reserve Fund Life Association.*[1]

[1] (1892) 1 Q.B. 147

The law relating to nomination of life insurance has been clarified and summarised by the Supreme Court of India in the case of *Sarbati Devi and another* vs. *Usha Devi.*[1] The judgement is quoted below :

A mere nomination made under Section 39 does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them.

The summary of the relevant provisions of Section 39 establishes clearly that the policy-holder continues to hold interest in the policy during his lifetime and the nominee acquires on sort of interest in the policy during the lifetime of the policy holder. If that is so, on the death of the policy holder the amount payable under the policy becomes part of his estate which is governed by the law of succession applicable to him. Such succession may be testamentary or interstate. There is no warrant for the position that Section 39 of the Act operates as a third kind of succession which is styled as a 'statutory testament'. The provision in sub-section (6) of Section 39 which says that the amount shall be payable to the nominee or nominees does not mean that the amount shall belong to the nominee or nominees. The language of Section 39 is not capable of altering the course of succession under law.

DIFFERENCE BETWEEN NOMINATION AND ASSIGNMENT

1. Transferability

The assignment of life policy involves the transfer of all its rights of the policy-holder to the assignee. Nomination does not involve the transfer of the policy-holder's rights.

2. Right of action

The assignee is entitled to all benefits of the policy and can sue in his own name. The nominee can sue by his own name

[1] AIR (1984) Supreme Court 346

but he gets the money only by the constructive trustee on the behalf of the beneficiaries of the policy.

3. Cancellation and change

A nomination can be cancelled or changed. An assignment cannot be changed, although there can be a re-assignment under certain circumstances.

4. Object

Assignment is done with the purposes of giving a benefit to the intended beneficiaries. The nomination is made to provide the insurer with a convenient method of discharging has obligations. The insurer can pay to the nominee without waiting for a succession certificate.

5. Consideration

Assignment of a policy may be with or without consideration. Nomination is done without consideration.

6. Procedure

Assignment can be made on the policy or by a separate deed. Nomination is done by indorsement on the policy with notice to the insurer.

7. Automatic cancellation

Nomination is automatically cancelled if the policy-holder is alive at the time and is able to get the policy money. Assignment does not depend upon the life of the policy-holder. In conditional assignment *e.g.*, for mortgaging the policy, it is cancelled when the money is paid to the creditor.

EFFECTS OF SUICIDE

A life insurance policy may contain a clause providing that no payment will be made in case the assured commits suicide. Such a clause is binding and where there is such a clause, the policy is avoided in case of suicide. The onus of providing suicide is upon the insurer.

Where there is no clause in the policy relating to suicide, it has been held in English cases that the policy becomes bad upon suicide and no money is payable. *Horn's case.*[1] The contract

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[1] (1861) L.J. Ch. 511

of insurance is avoided even though the policy may have excepted suicide for a limited period only. *Beresford* v. *Royal Insurance Co.*[1] The English decisions are based upon the fact that suicide by a person of sound understanding is regarded as self-murder, which is a felony under common law. A contract by which money is payable upon the commission of a felony is against public policy and is therefore bad in law. Even if a policy expressly provides for payment in case of suicide, it is unenforceable.

In India suicide is not a crime. Only the attempt to commit suicide is a crime. Therefore it has been held in a case that a policy cannot be avoided on the ground of suicide unless there is a clause in the policy to that effect. *Northern India Assurance Co.* v. *Kanhayalal.*[2]

A policy issued by the Life Insurance Corporation of India contains a clause regarding suicide. If the policy-holder commits suicide the Corporation is not liable for the policy money, whether the policy-holder was insane or not. If the policy-holder had assigned the policy to some person for valuable consideration, it is valid. But the assignee will have to prove that he had accepted the policy bonafide and that the assignee has given notice to the Corporation of the assignment in due time.

THE PAYMENT OF CLAIMS

Claims are payable according to the terms of the contract of insurance. In case of an endowment policy, the money must be paid to the assured or, if the policy was assigned, to the assignee. In case of whole life insurance, the money is payable to the assignee or the nominee or, in the absence of assignment or nomination, to the legal representatives of the assured.

The death of the assured must be proved. Proof of death may be given by oral testimony or by a death certificate or by presumptive evidence, *viz.*, absence for a period of seven years or more. The insurer may claim the production of a succession certificate.

Section 47 of the Insurance Act provides that where an insurer is of opinion that, by reason of conflicting claims to or insufficiency of proof of title or any other reason, it is impossible for the insurer to obtain a satisfactory discharge for the payment

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[1] (1938) A.C. 586 [2] (1938) Lah 561

of the money insured for, the insurer may apply to pay the money in the court having jurisdiction over the place where the money is payable. The application of the insurer must contain all particulars regarding the policy and must be filed at least six months *after* the maturity of the policy or the notice of death. The court shall give notice of the deposit of money to all the claimants and decide all questions relating to the disposal of the claims. Pending payment to the successful claimant the money may be invested in government securities.

PROOF OF AGE

The age of assured is a material fact. It is particularly important in endowment policies under which the money is payable on the assured attaining a certain age. Age may be proved by any evidence which is satisfactory *e.g.*, the production of horoscope or a birth certificate (where available) or any family record or document. The age is recorded in the policy. After satisfactory evidence is given of the age the insurer generally writes on the policy, "age admitted" or similar words. Once the age is admitted in this manner it cannot be challenged, except in cases of fraud. Section 45 of the Insurance Act provides that a statement made in the policy cannot by questioned after two years unless there is fraud or a fraudulent concealment.

THE LIFE INSURANCE CORPORATION ACT, 1956

Life Insurance business in India has been brought under State-ownership and State-management by the Life Insurance Corporation Act of 1956.

Objects

The object of the Act is to nationalise the business of life insurance in India with a view (*i*) to ensure absolute security to the policy-holder, (*ii*) to spread insurance much more widely and in particular to the rural areas, and (*iii*) to secure a more effective mobilisation of public savings and the investment of such savings under the five year plans.

The Act creates a Life Insurance Corporation with is responsible for all life insurance in India. Section 30 of the Act provides that the Corporation shall have the *exclusive privilege* of carrying on life insurance business in India.

Constitution of the Life Insurance Corporation

The Corporation consists of not more than 16 persons appointed by the Central Government, one of whom shall be appointed Chairman. Only those persons shall be appointed members who have no financial or other interest of such a nature as to affect prejudicially the exercise of their functions as members of the Corporation.—Sec. 4.

Capital

The original capital of the Corporation was Rs. 5 crores to be provided by the Central Government. The Government may, on the recommendation of the Corporation, reduce the capital to the extent and in such manner as the Government may determine.—Sec. 5.

Functions of the Corporation

Subject to the rules, if any, made by the Central Government, it shall be the duty of the Corporation to carry on life insurance business whether in or outside India, and the corporation shall so exercise its powers under the Act as to secure that life insurance business is developed to the best advantage of the community.—Sec. 6.

In the discharge of any of its functions the Corporation shall act so far as may be on business principles.—Sec. 6.

Direction

In the discharge of its functions under the Act, the Corporation shall be guided by such direction in matters of policy involving public interest as the Central Government may give to it in writing; and if any question arises whether a direction relates to a matter of policy involving public interest, the decision of the Central Government thereon shall be final.

Powers

Without prejudice to the generality of the provisions mentioned above, the Corporation shall have power :

(*a*) to carry on capital redemption, annuity and reinsurance business ;

(*b*) to take such steps as are expedient for the protection or realisation of its investments, including the taking over and administering any property offered as security ;

(*c*) to acquire, hold and dispose of any property for the purpose of its business ;
(*d*) to transfer the whole or any part of the life insurance business carried on outside India to any other person or persons if it is expedient to do so ;
(*e*) to advance or lend money upon the security of movable or immovable property or otherwise ;
(*f*) to borrow or raise money in such manner and upon such security as the Corporation may think fit ;
(*g*) to carry on either by itself or through any subsidiary any other business in any case where such business was being carried on by a subsidiary of an insurer whose controlled business has been transferred to and vested in the Corporation under the Act ;
(*h*) to carry on any other business which may seem to the Corporation to be capable of being conveniently carried on in connection with its business and calculated directly or indirectly to render profitable the business of the Corporation ;
(*i*) to do such things as may be incidental or conductive to the proper exercise of any of the powers of the Corporation.

In the act a new section was inserted in the Public Financial Institutions Laws (Amendment) Act, 1975.

Sec.6A.—In entering into any arrangement, under section 6 with any concern, the Corporation may impose such conditions as it may think fit, necessary or expedient for protecting the interest of the Corporation, and for securing that the accommodation granted by it is put to the best use by the concern. The Corporation can appoint any director of the concern, holding office during the pleasure of the Corporation without any obligation of liability of the person.

Administration

The central office of the Corporation shall be at a place to be decided by the Central Government. There shall be zonal offices at Mumbai, Kolkata, Delhi, Kanpur, Chennai, and such other places as the Corporation may decide. There may be divisional offices and branches within each zone.—Sec. 18.

The Corporation may entrust the general superintendence and direction of its affairs to an executive committee consisting of not more than five of its members. There may be other committees *e.g.*, an investment committee. The Corporation may appoint one or more Managing Directors and Zonal Managers. The Corporation shall have its own funds and its accounts shall be audited by chartered accountants. A copy of the audit report and annual report must be sent to the Central Government and laid before Parliament.

Accounts and Audit

The Corporation shall, once at least in two years, cause an investigation to be made by actuaries into the financial condition of the business of the Corporation, including a valuation of the liabilities of the Corporation. The actuarial report shall be sent to the Central Government.

EXERCISES

1. What is life insurance? (Page 416)
2. What are the differences between the following :
   (*a*) Life Insurance and Property Insurance. (Page 416)
   (*b*) Nomination and Assignment of a life insurance policy. (Page 422)
3. Discuss the liability of insurers on a life insurance policy in case of suicide of the assured. (Pages 423-425)
4. Write Notes on : Whole Life Policy ; Endowment Policy ; Annuities ; Surrender value ; Payment of claims ; Proof of Age ; The Life Insurance Corporation Act, 1956. (Pages 417 ; 417 ; 417 ; 418 ; 424 ; 425 ; 425)
5. Objective Question.
   (*a*) "Suicide is no crime". True or False? (Page 423)

3 MARINE INSURANCE

APPLICATION

Marine insurance is an important branch of insurance. In Great Britain the law relating to marine insurance is covered by statutes (*e.g.*, the British Marine Insurance Act of 1906). In India, until recently, there was no statute relating specifically to marine insurance. The subject was governed by the provisions of the British Act mentioned above, the Contract Act and certain provisions of the Insurance Act. In 1963, an Act was passed known as the Marine Insurance Act (Act II of 1963). It came into force from 1st August, 1963. By this Act, the rules relating to marine insurance in India have been codified. The provisions of the Act are summarised below.

DIFFERENCES BETWEEN MARINE INSURANCE AND LIFE INSURANCE

1. A marine insurance policy covers risks arising from a marine adventure. Life insurance is a contract depending upon human life.

2. Marine insurance contracts are usually contracts of indemnity. Life insurance is a contingent contract.

3. In life insurance, details of the subject matter have to be given (usually by answering a set of printed questions). This is generally not required in marine insurance where the insurer relies on the policy-holder's duty of disclosure.

4. There are certain express and implied warranties in all marine insurance contracts.

5. Marine insurance contracts are usually subject to average. (See Average Policy under Fire Insurance, p. 448)

6. Marine insurance policies may, under certain circumstances, be assigned even after loss has occurred.

7. A marine policy may be obtained without disclosing the name of the ship. (See Floating Policy, below). In non-marine insurance the subject matter of the risk has to be disclosed.

8. Marine insurance contracts can be avoided on many grounds (like deviation) not available in cases of non-marine insurance.

DIFFERENCES BETWEEN MARINE INSURANCE AND FIRE INSURANCE

1. A marine insurance policy covers risks arising from a marine adventure. A fire insurance covers risks of fire on properties.

2. A fire insurance is usually done for one year only. Marine insurance is done for a fixed period or for a fixed voyage.

3. In fire insurance details of the subject matter have to be given (usually by answering a set of printed questions). This is generally not required in marine insurance where the insurer relies on the policy holder's duty of discloser.

4. Marine insurance policies may, under certain circumstances, be assigned even after loss has occurred. This cannot be done in fire insurance.

5. A marine policy may be obtained without disclosing the name of the ship (See Floating Policy, below). In fire insurance, the subject matter of the risk has to be disclosed.

6. Marine insurance contracts can be avoided on many grounds (like deviation) not available in cases of fire insurance.

DEFINITIONS

Marine Insurance

A contract of marine insurance is an agreement whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, losses incidental to marine adventure.—Sec. 3.

A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or any land risk which may be incidental to any sea voyage.—Sec. 4(1).

A marine insurance policy may cover a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure.

Insurable Property

For the purposes of the Marine Insurance Act, insurable property means any ship, goods or other movables which are exposed to marine perils. Sec. 2(c).

Marine Adventure

According to Section 2(d), marine adventure includes any adventure where—

(*i*) any insurable property is exposed to marine perils;

(*ii*) the earnings or acquisition of any freight, passage money, commission, profit or any pecuniary benefit, or the security for any advances, loans or disbursements is endangered by the exposure of insurable property to marine perils;

(*iii*) any liability to a third party that may be incurred by the owner, or other person interested in or responsible for insurable property by reason of maritime perils.

Maritime Perils

This term means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detainments of princes and peoples, jettisons, barratry and other perils which are of the like kind or may be designated by the policy.—Sec. 2(e). "Perils of the seas" refer only to fortuitous accidents or casualties on the seas. It does not include the ordinary action of the wind and waves.

Other Terms See p. 385.

FEATURES AND REQUISITES OF A MARINE POLICY

A marine insurance policy to be valid must fulfil the following requirements.

1. Essential elements

A contract of marine insurance must fulfil all the essential elements of a valid contract, for example, the marine adventure which is the subject matter of insurance, must be lawful.

2. Time of contract

A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy is then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip, covering note or other customary memorandum of the contract although it be unstamped.—Sec. 23.

3. The Policy

The contract must be written in a document called a sea policy or a marine policy. Sections 24 to 33 of the Act lay down the rules regarding the policy. The document must be stamped in accordance with the provisions of the Stamp Act.

4. Insurable interest

A marine policy is enforceable only if the policy-holder has an insurable interest at the time when the claim is made.

5. Good faith

The contract of marine insurance is a contract *uberrimae fidei* and the insured must disclose all material facts.—Sec. 19.

6. Not to be a wagering contract

The contract must not be a wagering contract. A contract of marine insurance is deemed to be a wagering contract (*a*) where the assured has not an insurable interest as defined by the Act, and the contract is entered into with no expectation of acquiring such an interest ; or (*b*) where the policy is made with terms like, "interest or no interest", "without further proof of interest than the policy itself", or "without benefit of salvage to the insurer" etc. (But where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.)—Sec. 6.

TYPES OF MARINE INSURANCE POLICIES

There are certain standard forms of marine insurance policies. As early as 1779, members of the Lloyd's started using printed forms of marine policies of different kinds. The Marine Insurance Act of 1963 mentions certain types of policies.

1. Voyage Policy

Where the contract is to insure the subject matter, "at and from" a place, or from one place to another or others, the policy is called a Voyage Policy.

2. Time Policy

Where the contract is to insure the subject matter for a define period of time, the policy is called a Time Policy. A Time Policy made for any time exceeding twelve months is invalid.—Sec. 27.

A contract for both voyage and time may be included in the same policy.

3. Valued Policy

A Valued Policy is a policy which specifies the agreed value of the subject matter insured. As between the insurer and the assured, the valuation is conclusive, unless there is fraud.—Sec. 29.

Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.

4. Unvalued Policy

An Unvalued Policy or an Open Policy is a policy which does not specify the value of the subject matter insured, but subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner laid down in the Act.—Sec. 30.

5. Floating Policy by ship or ships

(1) A Floating Policy is a policy which describes the insurance in general terms and leaves the name or names of the ship or ships and other particulars to be defined by subsequent declaration.

(2) The subsequent declaration or declarations may be made by endorsement on the policy, or in other customary manner.

(3) Unless the policy otherwise provides, the declarations must be made in the order of despatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or an erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

(4) Unless the policy otherwise provides, when a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject matter of that declaration.—Sec, 31.

6. Wagering Policies

Sometimes marine insurance contracts are entered into with persons who have no insurable interest. Such policies are void according to law but the insurer may fulfil his obligations out of considerations of honour. One typical form of a wagering policy is known as the P.P.I. Policy (policy proof of interest).

INSURABLE INTEREST

Who can insure an interest ?

Section 7 of the Act defines insurable interest as follows :

1. Subject to the provisions of the Act, every person has an insurable interest who is interested in a marine adventure.

2. In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by detention thereof, or may incur liability in respect thereof.

Types of interest

Apart from the general provisions stated above, the Act lays down that the following types of interest are insurable ;

1. A defeasible or a contingent interest. A buyer of goods has an insurable interest notwithstanding that he might have rejected the goods under certain circumstances.

2. A partial interest of any nature.

3. The insurer has an insurable interest in his risk and may reinsure in respect of it.

4. The lender of money on bottomry or respondentia bond has an insurable interest in respect of the loan.

5. The master and the crew have insurable interest as regards their wages.

6. The person advancing freight has an insurable interest in so far as such freight is not repayable in case of loss.

7. The assured has an insurable interest in the charges of the insurance.

8. The owner of insurable property has insurable interest in respect of its full value. So also has the mortgagor. The mortgagee has interest up to the amount of his dues. Persons having an insurable interest may insure on behalf of other persons having an interest.

When interest must attach

Section 8 of the Act provides as follows :

The assured must be interested in the subject matter insured *at the time of loss,* though he need not be interested when the insurance is effected.

Where the subject matter is insured "lost or not lost", the assured may recover even though he may have acquired his interest after the loss ; unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

Where the assured has no interest at the time of the loss, he cannot acquire any interest by any act or election after he is aware of the loss.

MEASURE OF INSURANCE VALUE

Section 18 of the Act provides that, subject to any express provision of valuation in the policy, the insurable value of the subject matter insured must be ascertained as follows :

1. Ship

In insurance on ship—the value, at the commencement of the risk, of the ship, including all outfits, provisions, stores, money advanced for wages and other disbursements, plus the charges for insurance. In case of steamships, the value of boilers, machinery, coal etc. and other special requisites, if any, must also be included.

2. Freight

In insurance on freight—the gross freight plus insurance charges.

3. Goods

In insurance on goods—prime cost of the property insured plus expenses of shipping and the insurance charges.

4. Other subjects

In insurance on any other subject matter—the amount at the risk of the assured when the policy attaches plus insurance charges.

DISCLOSURE AND REPRESENTATIONS

A contract of marine insurance is a contract based upon the utmost good faith and if the utmost good faith is not observed by either party, the contract may be avoided by the other party.—Sec. 19. Thus a contract of marine insurance is a contract *uberrimae fidei.*

Duty of Disclosure

Section 20 provides that the assured must disclose to the insurer every material circumstance which is known to the assured. The assured is deemed to know every circumstance which in the ordinary course of business ought to be known to him. The term "circumstance" includes any communication made to or information received by the assured. If the assured fails to make such disclosure the insurer may avoid the contract.

What is a material circumstance ?

Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

In the absence or enquiry the following circumstances need not be disclosed :

(*a*) any circumstance which diminishes the risk :

(*b*) any circumstance which is known or presumed to be known to the insurer (the insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business as such, ought to know) ;

(*c*) any circumstance as to which information is waived by the insurer ;

(*d*) any circumstance which is superfluous to disclose by reason of any express or implied warranty.

Agent's duty of disclosure

The agent effecting insurance must also disclose all material circumstances known to him. He need not disclose circumstances which the assured is not bound to disclose.—Sec. 21.

Representations

Section 22 provides that every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract, is concluded, must be true. If it be untrue, the insurer may avoid the contract.

A representation is material which would influence the judgement of a prudent insurer in fixing the premium, or determining whether he will take the risk.

A representation may be either as to a matter of fact or as to a matter of expectation or belief.

A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer. A representation as to a matter of expectation or belief is true if it be made in good faith.

A representation may be withdrawn or corrected before the contract is concluded. Whether a particular representation be material or not is, in each case a question of fact.

THE POLICY

A contract of marine insurance shall not be admitted in evidence unless it is embodied in a marine policy in accordance with this Act. The policy *must be executed and issued* either at the time when the contract is concluded or afterwards.—Sec. 24.

A marine *policy must specify*—(1) the name of the assured, or of some person who effects the insurance on his behalf ; (2) the subject matter insured and the risk insured against ; (3) the voyage, or period of time, or both, as the case may be, covered by the insurance ; (4) the sum or sums insured ; (5) the name or names of the insurer or insurers.—Sec. 25.

A marine policy *must be signed* by or on behalf of the insurer. Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured.—Sec. 26.

The subject matter insured must be *designated* in a marine policy *with reasonable certainty*. The nature and extent of the interest of the assured in the subject matter insured need not be specified in the policy.—Sec. 28.

Where an insurance is effected *at a premium* or additional premium to be arranged and no arrangement is made, a reasonable premium or additional premium is payable.—Sec. 33.

CONSTRUCTION OF TERMS IN POLICY

In a Schedule to the Act a model form of marine policy is given. The Schedule also contains explanations of various terms generally used in a marine policy. The explanations are given.

"Lost or not Lost"

A marine insurance policy may contain a clause providing that the policy will be valid even if the goods are (unknown to the parties) already lost or have already reached their destination. Such a clause is called the "lost or not lost" clause. The Act provides that if in such a case the loss has occurred before the contract is concluded, the risk attaches unless at such time the assured was aware of the loss and the insurer was not.

The Duration of the Risk

The time from which the liability of the insurer commences and the period during which the insurer remains liable depends on the language of the policy. Where the subject matter is insured "from" a particular place the risk does not attach until the ship starts on the voyage insured.

Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not at that place when the contract is concluded, the risk attaches as soon as she arrives in good safety (even if she is insured under another policy). The same rules apply when chartered freight is insured.

Where goods or other movables are insured "from the loading thereof", the risk does not attach until such goods or movables are actually on board and the insurer is not liable for losses in transit from shore to ship.

Where the risk on goods or other movables continue "until they are safely landed", they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed, the risk ceases.

THE LLOYD'S POLICY

During the 18th and the 19th century marine insurance business in Great Britain was mostly done by an association of underwriters known as the Lloyd's of London. From 1779 the members of the Lloyd's started using printed policy forms in which the terms of the contract of insurance were incorporated. At present marine insurance is undertaken not only by the Lloyd's underwriters but also by many insurance companies. The policy forms used are mostly based upon the forms used by the Lloyd's.

A Lloyd's Policy contains clauses dealing with all essential matters concerning the contract of insurance. Thus it includes the name of the insured or his agent ; the name of the ship ; the subject-matter of insurance ; the extent and the duration of the risk ; the express warranties ; and, various conditions which limit and modify the liability of the insurer. Some special clauses usually found in a Lloyd's policy are explained below.

The "Inchmaree" clause

Ordinarily the insurer under a marine insurance policy is liable only for loss or damage caused by a sea-peril.

Example :

> The ship "Inchmaree" was lying at anchor at port and her donkey engine was pumping water into the boilers. The engineer in charge was negligent and kept a valve of the engine closed whereas it should have been kept open. As a result water forced into the engine and the pump was broken. The shipowner claimed compensation from the insurer. It was held that the loss was not due to a sea-peril and so the insurer was not liable. *Thames and Mersey Marine Insurance Co.* v. *Hamilton Fraser& Co.*[1]

Since the decision in the above case it has become customary to include a clause in all marine insurance policies by which the insurer agrees to pay compensation for loss or damage arising from causes which are not sea-perils or similar to sea-perils. Such a clause is called the Inchmaree clause.

The "Sue, Labour and Travel for" clause

This is a clause in a marine insurance policy which permits the captain to stop the ship, lower boats and engage mariners to sue, labour and travel in order to recover goods fallen overboard accidentally.

The F. C. & S. clause

A clause in a marine insurance policy may exempt the insurer from liability in case the ship is captured by enemies during war. Such a clause is called the F. C. & S. clause ("Free of Capture and Seizure").

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[1] (1887) 12 A.C. 484

The F. P. A and the F. A. A. clause

A policy may exempt the insurer from liability from particular or general average contribution. F. P. A. stands for "Free from particular average" contribution and F. A. A for "Free from all average" contribution.

The Memorandum or the N. B. clause

The memorandum or the N. B. (*nota bene)* clause exempts insurer from liability for partial losses in the case of perishable goods. In a Lloyd's policy it is usually stated that the insurer will not be liable for losses to goods like sugar, hemp, tobacco etc. unless the loss is 5% or more of the value of the goods. The N.B. clause may limit the liability in any other way.

The Running Down clause

A clause in the policy may make the insurer liable for negligent actions of the captain and crew of the insured ship. For example if by negligence a collision occurs the insurer may agree to indemnify the insured. Such a clause is called "Running Down" clause.

WARRANTIES IN A CONTRACT OF MARINE INSURANCE

In marine insurance contracts, the term Warranty is used to denote certain *conditions* which are considered to be *essential* to the contract of insurance.

According to section 35(1) of the Marine Insurance Act, Warranty, "means a promissory warranty, that is to say a warranty by which the assured undertakes that some particular things shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts."

A warranty in a marine insurance contract may be Express or Implied. Express Warranties are those which are expressly mentioned in the policy of insurance or incorporated in some document referred to in the policy. Implied Warranties are stipulations which are by law, custom or general agreement assumed to be included in the insurance contract although not mentioned in the policy.

Express Warranties

The following conditions are generally included in marine insurance policies as express warranties.

1. The ship is fit and seaworthy.
2. The ship will sail on a specified day and will proceed to the destination without unnecessary deviation.
3. The ship is a neutral vessel and the cargo is neutral and will remains so during the voyage.

There may be other stipulations expressly mentioned.

Implied Warranties

In a contract of marine insurance, the following warranties are implied.

1. When a ship is expressly warranted neutral, there is an implied warranty that she shall carry the documents needed to prove it.—Sec.38.

2. In a voyage policy there is an implied warranty that the ship is seaworthy at the time of commencement of the voyage and that while at port the ship is fit to encounter the ordinary perils of the port where she is. As regards the goods carried, there is an implied warranty that the ship is fit to carry the goods to the agreed destination.—Secs. 41, 42(2).

3. There is an implied warranty that the voyage is lawful—Sec.43.

4. Where the subject matter is insured by a voyage policy "at and from" or "from" a particular place, there is an implied condition that the adventure shall be commenced within a reasonable time. This condition does not apply if the delay was caused by circumstances known to the insurer before the contract was concluded or if he had waived the condition.—Sec.44.

There is no implied warranty about the nationality of the ship or any undertaking that the nationality will not be changed during the subsistence of the policy.—Sec. 39.

In a policy on goods or other movables there is no implied warranty that the goods or movables are seaworthy.—Sec. 42(1).

Effects of a Breach of Warranty

A warranty is a condition which must be exactly complied with, whether it is material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.—Sec. 35(3).

When Breach of Warranty is Excused

Section 36 provides that in the following cases breach of warranty is excused :

1. When by reason of change of circumstances, the warranty ceases to be applicable.
2. When compliance with the warranty is rendered unlawful by any subsequent change of law.
3. When the insurer waives the breach.

When a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with before loss.

THE VOYAGE

Rules regarding the voyage, as laid down in sections 44 to 51 of the Marine Insurance Act are summarised below.

1. If the ship sails from a place other than the place specified in the policy, no risk attaches.—Sec. 45.

2. If the ship sails for a destination other than the one specified in the policy, no risk attaches.—Sec. 46.

3. Where after the commencement of the risk the destination of the ship is voluntarily changed, there is said to be change of voyage. Unless the policy otherwise provides, where there is change of voyage, the insurer is discharged from liability as from the time of change.—Sec. 47.

4 .If there is unreasonable delay in the prosecution of the voyage, the insurer is discharged from liability.—Sec. 50.

5. *Deviation* : (Sections 48, 49, 51), Deviation occurs under the following circumstances :

(*a*) where the course of the voyage is specifically designated by the policy, and that course is departed from ;

(*b*) where the course is not specifically designated, but the usual and customary course is departed from ;

(*c*) where there are several ports of discharge, the ship must proceed to them in the order designated by the policy ; if she does not (without sufficient reason) there is deviation ;

(*d*) where the policy only specifies ports of discharge within a given area, the ports must be visited in the geographical order ; if the ship does not do so (without sufficient reason) there is deviation.

Consequences of deviation : Where a ship, without lawful excuse deviates from the voyage contemplated by the policy, the insurer is, discharged from liability as from the time of deviation. The intention to deviate is immaterial ; there must be deviation in fact.

Excuse for deviation or delay : Deviation or delay is excused under the following circumstances :

(*a*) where authorised by any special term in the policy ;

(*b*) where caused by circumstances beyond the control of the master and his employer ;

(*c*) where reasonably necessary in order to comply with an express or implied warranty ;

(*d*) where reasonably necessary for the safety of the ship or subject matter insured ;

(*e*) for the purpose of saving human life or aiding a ship in distress where human life may be in danger ;

(*f*) where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship ;

(*g*) where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

When the cause excusing deviation or delay ceases to operate, the ship must resume her course and prosecute her voyage with reasonable despatch.

ASSIGNMENT OF POLICY

A marine policy may be transferred by assignment, unless, such transfer is prohibited by the policy. Assignment may be either before or after loss. The assignee of a marine policy can sue in his own name and can defend an action on any ground available to the transferor. The policy may be transferred by endorsement thereon or in other customary manner. The transfer of the policy holder's interest in the subject matter does not automatically transfer the policy. Such a transfer must be made specifically. Where the assured loses his interest in the subject matter by transfer or otherwise, he cannot subsequently assign the policy.—Secs. 17, 52, 53.

LIABILITY OF INSURER

Unless the policy otherwise provides, the insurer is *not* liable for the following :

(*a*) losses not caused proximately by the peril insured against ;

(*b*) loss attributable to the wilful misconduct of the assured ; (the insurer is liable for losses caused by misconduct or negligence of the master and the crew) ;

(*c*) loss caused proximately by delay, although delay is caused by the peril insured against ;

(*d*) losses due to ordinary wear and tear, ordinary leakage and breakage, inherent vice or the subject matter insured or for any loss caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils. —Sec. 55.

The Act contains rules, by which the extent of liability of the insurer for total loss and partial loss can be calculated. (See p. 389)

Rights of the insurer on payment : Upon payment, the insurer becomes entitled to subrogation and contribution. (See pp. 410-411)

THE PREMIUM

Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium.—Sec. 54.

Under certain circumstances the premia paid are returnable. (*e.g.*, for failure of consideration.)—Sections 82-84.

LOSSES

The liability of the insurer arises when there is loss. Loss may be of two kinds : Total or Partial.

Total loss is again of two kinds : Actual Total Loss and Constructive Total Loss. Actual Total Loss occurs when the subject matter of the insurance is totally destroyed or is so damaged that it ceases to be the thing which was insured. Constructive Total Loss occurs when the thing insured has to be abandoned or where it cannot be retained without unreasonable expense.

Partial Loss occurs when the subject-matter of insurance is partially lost. Partial Loss may be either a particular average loss or a general average loss. (See p. 389)

EXERCISES

1. What are the points of difference between marine and life insurance ? (Page 429)
2. Discuss the legal nature of a marine insurance. (Pages 430-431)
3. Distinguish between marine insurance and fire insurance. Enumerate the various classes of marine insurance policy. (Page 430)
4. What do you understand by "Insurable interest" in connection with Marine Insurance ? (Page 434)
5. Write notes on any two of the following : Floating Policy of Marine Insurance. ; Implied warranties in a voyage policy : General Average Loss and Particular Average Loss.

   (Pages 433 : 440 ; 389)

4 FIRE AND OTHER INSURANCE

FIRE INSURANCE

Definition

Fire insurance means insurance against any loss caused by fire. Section 2(6A) of the Insurance Act defines fire insurance as follows : "Fire insurance business means the business of effecting, otherwise than incidentally to some other class of business, contracts of insurance against loss by or incidental to fire or other occurrence customarily included among the risks insured against in fire insurance policies."

What is 'Fire' ?

The term fire in a Fire Insurance Policy is interpreted in the literal and popular sense. There is fire when something burns. In English cases it has been held that there is no fire unless there is ignition. *Stanley* v.*Western Insurance Co.*[1] Fire produces heat and light but either of them alone is not fire. Lightning is not fire. But if lightning ignites something, the damage may be covered by a fire-policy. The same is the case with electricity.

CHARACTERISTICS OF FIRE INSURANCE

1. Fire insurance is a *contract of indemnity.* The insurer is liable only to the extent of the actual loss suffered. If there is no loss there is no liability even if there is a fire.

2. A fire insurance is a contract of good faith (*uberrimae fidei).* The policy-holder and the insurer must disclose all the material facts known to them.

3. A fire insurance policy is usually made for one year only. The policy can be renewed according to the terms of the policy.

4. The contract of insurance is embodied in a *policy* called the fire policy. Such policies usually cover specific properties for a specified period.

5. **Insurable Interest :** A fire policy is valid only if the policy-holder has an insurable interest in the property covered.

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[1] (1868) L.R. 3 Ex 71

Such interest must exist at the time when the loss occurs. In English cases it has been held that the following persons have insurable interest for the purposes of fire insurance—owner; tenants, bailees, including carriers; mortgages and charge-holders.

6. In case of several policies for the same property, each insurer is entitled *to contribution* from the others. After a loss occurs and payment is made, the insurer is *subrogated to* the rights and interests of the policy-holder. An insurer can reinsure a part of the risk.

7. Fire policies cover losses *caused proximately by fire.* The term loss by fire is interpreted liberally.

Example :

> A woman hid her jewellery under the coal in her fireplace. Later on she forgot about the jewellery and lit the fire. The jewellery was damaged. Held, she could recover under the fire policy. *Harris* v. *Poland.*[1]

8. Nothing can be recovered under a fire policy if the fire is caused by *a deliberate act* of the policy-holder. In such cases the policy-holder is liable to criminal prosecution.

9. Fire policies generally contain a condition that the insurer will not be liable if the fire is caused by riot, civil disturbances, war and explosions. In the absence of *any specific exception* the insurer is liable for all losses caused by fire, whatever may be the cause of the fire.

10. **Assignment :** According to English law a policy of fire insurance can be assigned only with the consent of the insurer. In India such consent is not necessary and the policy can be assigned as a chose-in-action under the Transfer of Property Act. The insurer is bound when notice is given to him. But the assignee cannot recover damages unless he has an insurable interest in the property at the time when the loss occurs. A stranger cannot sue on a fire policy.

11. **Payment of Claims :** Fire policies generally contain a clause providing that upon the occurrence of fire the insurer shall be immediately notified so that the insurer can take steps to salvage the remainder of the property and can also determine the extent of the loss. Insurance companies keep experts on their staff to value the loss. If in a policy there is an intentional over-

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[1] (1941) 1 K.B. 462

valuation of the property by the policy-holder, the policy may be avoided on the ground of fraud.

TYPES OF FIRE POLICIES

There may be various types of fire policies. The principal types are described below.

Specific Policy

A specific policy is one under which the liability of the insurer is limited to a specified sum which is less than the value of property.

Valued Policy

A valued policy is one under which the insurer agrees to pay a specific sum irrespective of the actual loss suffered. A valued policy is not a contract of indemnity.

Average Policy

Where a property is insured for a sum which is less than its value, the policy may contain a clause that the insurer shall not be liable to pay the full loss but only that proportion of the loss which the amount insured for, bears to the full value of the property. Such a clause is called the average clause and policies containing an average clause are called average policies. The phrase "subject to average" is equivalent to the insertion of an average clause. Lloyd's Fire Policies are usually expressed to be "subject to average".

Reinstatement or Replacement Policy

In such policies the insurer undertakes to pay not the value of the property lost, but the cost of replacement of the property destroyed or damaged. The insurer may retain an option to replace the property instead of paying cash.

Floating Policy

When one policy covers property situated in different places it is called a floating policy. Floating policies are always subject to an average clause.

Combined Policies

A single policy may cover losses due to a variety of cases, *e.g.*, fire together with burglary, third party losses, etc. A fire policy may include loss of profits, *i.e.*, the insurer may undertake to indemnify the policy-holder not only for the loss caused by fire but also for the loss of profits for the period during which the establishment concerned is kept closed owing to the fire.

MISCELLANEOUS INSURANCE

Insurance Against Personal Accidents

A contract of personal accident insurance is a contract by which the insurer promises to pay a certain sum of money to the insured in case of injury by accident and to the dependants of the insured in case of death by accident. A personal accident insurance is not a contract of indemnity because the insurer has to pay a fixed sum of money. He is not required to indemnify the assured. The contract of insurance is made in the same manner as other forms of insurance, *i.e.*, by the payment of premium and taking out a policy. The contract must satisfy all the essential requirements of an insurance contract *e.g.*, there must be no concealment of any material fact. In U.K. accident insurance policies for a specified journey can be effected easily by filling out a form and paying the premium. For railway journeys a coupon for accident can be purchased along with the purchase of the ticket. In India insurance against railway accidents is almost unknown but insurance against accidents during air journeys is very popular.

Accident insurance policies generally contain various conditions safeguarding the interests of the insurer. For example, the policy may provide that the insurer will not be liable for accidents if the assured engages in any unusual trade or occupation involving more than ordinary dangers or if the assured incurs accident while under the influence of drink.

The insurer in an accident policy is liable only if the injury or death is due to an accident and not due to natural causes. It is difficult to define what is an accident. Lord Macnaughten has defined an accident as an "unlooked for mishap, or an untoward event which is not expected or designed." *Fenton* v. *Thorley*.[1] If a man deliberately jumps down from the roof of a house and dies, it is not an accident; but if he slips and falls from the roof without intending to do so, it is an accident.

[1] (1903) A.C. 448

Insurance against personal accident may be and usually is, a part of motor car insurance.

Burglary Insurance

Goods may be insured against theft or robbery. The policy in such cases lays down what risks are covered. The policy-holder is usually required to take all reasonable precautions against loss by theft or robbery. In burglary and accident insurance there is usually a provision that notice of loss or accident must be given to the insurer immediately or as soon as possible.

Fidelity Insurance

A contract of Fidelity Insurance promises to indemnify the employer against loss caused by misappropriation of funds or damage to property committed by an employee. Such insurance may be effected by the employee or by the employer with the insurance company. There may be a collective policy covering all employees.

Motor Car Insurance

A policy of motor car insurance may cover three different types of risks, *viz*, (*i*) loss of or damage to the car by accident (*ii*) injuries to or death of any passenger by accident and (*iii*) damages payable to third parties by the owner of the car for accidents. The same policy may cover all three risks. The last item mentioned above is called insurance against third party risks. According to the Motor Vehicles Act of 1939 every owner of a motor vehicle must take out a policy covering third party risks. Insurance against the other two forms of risk is optional.

Where an insurance policy covers third party risks, the third party who has suffered damage can sue the insurer even though he was not a party to the contract of insurance.

Insurance Policy for Workmen's Compensation

This type of policies cover the compensation which has to be paid for injuries or death of employees according to the Workmen's Compensation Act and the Employees' State Insurance Act.

The All in One Policy

An insurance policy may cover different types of risks simultaneously. Thus there may be a policy combining insurance against fire, accident, burglary, third party losses, etc.

BOOK VII

THE LAW OF INSOLVENCY