Chapter I

OF COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS

Communication, acceptance and revocation of proposals.

3. The communication of proposals, the acceptance of proposals, and the revocation of proposals, and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

What is communication.—In sec. 2 (a) and (b) we have seen that a promisor has to signify his willingness and a promisee has to signify his assent. It is therefore necessary to define what is meant by such signification and the mode of such signification. This is described as communication.

The words "signifies to another" clearly imply that the willingness or the assent, as the case may be, must be brought to the notice of the other, in other words "is communicated to the other." This section lays down the principle that an acceptance of the offer made ought to be notified to the person who makes the offer, in order that the two minds may come together and agree upon the same thing in the same sense (as stated in sec.13). If there be no "meeting of minds" no contract may result.[1] This section provides two general modes of communication viz. (i) any act or (ii) omission intending thereby to communicate to the other or which has the effect of communicating it to the other. The first mode "any act" would include any conduct[2] and words, written or oral. Written words would include letters, telegrams, telex messages, advertisements etc. Oral words would include telephone messages. Any conduct would include positive acts or signs so that the other person understands what the person acting or making signs means to say, or convey. Omission would not mean silence[3] but would include such conduct[2] or forbearance on one's part that the other person takes it as his willingness or assent. It is a matter of the commonest experience that the communication of intentions may be effectually made in many other ways besides written, spoken, or signalled words. For example, delivery of goods by their owner to a man who has offered to buy them for a certain price will be understood by everyone as acceptance by act or conduct,[4] unless there be some indication to the contrary. No words are needed, again, to explain the intent with which a man steps into a ferry-boat or a tramcar, or a public vehicle or drops a coin into an automatic machine. These are instances of communicating by conduct. It is also pos-

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[1] *Bhagwandas* v. *Girdharlal & Co.* A.66.S.C. 543 and 547, Para 6.

[2] *Bishan Pado Haldar* v. *Chandi Prasad & Co.* 42 All. 187.

[3] *Haji Mahomed Haji Jiva* v. *E. Spinner,* 24 Bom. 510 (524); *Bank of india* v. *Rustom Fakirji,* 57 Bom. L.R. 850 (866).

[4] *Harvey* v. *Johnston,* (1848) 6 C.B. 295 (305).

sible for parties to hold communication by means of pre-arranged signs not being any form of cipher or secret writing, and not having in themselves any commonly understood meaning. This does not often occur in matters of business. Means of communication which a man has prescribed or authorized are generally taken as against him to be sufficient. Post, telegram, telephone, telex and radio are the modern means of communications and hence these means can be used for the purpose of communicating the offer, acceptance or revocation. But acceptance of an offer cannot be by serving copy of a plaint in the suit through court because it is not usual to accept an offer by filing of a plaint.[5] The offer as well as acceptance should precede the institution of suit.[6]

The words "which has the effect of communicating it" clearly refer to an act or omission or conduct, which may be indirect but which results in communicating it to the other. The said words would include communication to an agent.[7] A mere mental but unilateral act of assent in one's own mind will not amount to a communication as it cannot have the effect of communicating it to the other.[8] A resolution passed by a bank to sell land to A remained uncommunicated to A and it was held that there was no communication and no contract.[9]

Notification of acceptance is required for the benefit of the person who makes the offer. The words "which has the effect of communicating it" have been further elaborated in sections 4, 7, 8, 9. The person making the offer may, however, either dispense with the notice of acceptance or may provide a particular mode of acceptance as sufficient to make the bargain binding. Sec. 7 provides for that contingency. Sec. 8 provides for a contingency of acceptance by the mode of performance of the condition contained in the proposal.

Communication of special conditions.—There has been a series of cases in which the first question is whether the proposal of special terms has been effectually communicated. This arises where a contract for the conveyance of a passenger, or for the carriage or custody of goods, for reward, is made by the delivery to the passenger or owner of a ticket containing or referring to special conditions limiting the undertaker's liability, and nothing more is done to call attention to those conditions. English authorities have established that it is a question of fact whether the person taking the ticket had (or with ordinary intelligence would have) notice of the conditions, or at any rate that the other party was minded to contract only on special conditions to be ascertained from the ticket. In either of these cases his acceptance of the document without protest amounts to a tacit acceptance of the conditions, assuming them to relate to the matter of the contract, and to be of a more or less usual kind.[10] But he is not liable if the ticket is so printed or delivered to him in such a state, as not to give reasonable notice on the face of it that it does embody some special conditions.[11] A party cannot unilaterally after the conclusion of the contract impose upon the other special conditions which are onerous to the other

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[5] *Visweswaradas* v. *Narayan Singh* A.69, S.C. 1157.

[6] Ibid. p 1159, para 7.

[7] *Henthorn* v. *Fraser*, (1892) 2 Ch. 27 (33).

[8] *Brogden* v. *Metrop. R. Co.* (1877) 2 App. Ca. at pp. 691, 692, per Lord Blackburn; *Bhagwandas* v. *Girdharlal & Company* A. 1966 S.C. 543 at 547, Para 6.

[9] *Central Bank, Yeotmal* v. *Vyankatesh* (1949) A. Nag. 286.

[10] See *Gibaud* v. *G. E. R. Co.* (1920) 3 K.B. 689.

[11] In *Henderson* v. *Stevenson* (1875) L.R. 2 Sc. & D. 470, where an endorsement on a steamboat ticket was not referred to on its face, and *Richardson* v. *Rowntree* (1894) A.C. 217, where the ticket was folded up so that no writing was visible without open-

without his consent.[12] Also the special conditions must be on a contractual document. If a document is one which a person receiving it would scarcely expect to contain any condition e.g. merely a receipt for payment of money, it cannot be said that the notice given was reasonably sufficient and so the defendant cannot rely upon it to meet the plaintiff's case.[13]

A passenger purchased of the defendant company a ticket by steamer, which was in the French language. Towards the top of the ticket were the words to the effect that "this ticket in order to be available, must be signed by the passenger to whom it is delivered."[14] At the foot of the ticket there was an intimation in red letters that the ticket was issued subject to the conditions printed on the back. One of those conditions was that the company incurred no liability for any damage which the luggage might sustain. The vessel was wrecked by the fault of the company's servants, and the plaintiff's baggage was lost. The plaintiff sued the defendant company for damages. The ticket was not signed by him, and he stated that he did not understand the French language, and that the conditions of the ticket had not been explained to him. It was held that the plaintiff had reasonable notice of the conditions and that it was his own fault if he did not make himself acquainted with them. As to the absence of the plaintiff's signature, it was held that the clause requiring the passenger's signature was inserted for the benefit of the company and that they might waive it if they thought fit. The decision seems also to imply that a French company is entitled to assume that persons taking first-class passage either know French enough to read their tickets or, if they do not ask for a translation at the time, are willing to accept the contents without inquiry. This seems reasonable enough in the particular case.

In respect of an airlines travel ticket, special conditions of carriage were printed in small letters on the ticket and were displayed in big types in the airlines office, it was held that the terms were duly communicated to, and were impliedly accepted by, the passenger.[15]

A launderer had given to his customer a receipt for goods received for washing; special conditions for this were printed on the reverse of the receipt. It was therefore held that the special conditions were duly communicated to the customer who had impliedly accepted the same.[16]

Where a carrier after accepting the goods for transport without any conditions issued subsequently a circular to owners of goods limiting his liability for goods, it was held that the special conditions were not communicated prior to the date of contract for transport and were hence not binding on owners of goods.[17]

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ing it, a finding of fact that the passenger knew nothing of any conditions was supported. See *Madras Railway Co.* v. *Govinda Rau* (1898) 21 Mad. 172, 174, and for a general summary of the law *Hood* v. *Anchor Line* (1918) A.C. 837, where both the contract and a notice on the envelope enclosing it pointedly called attention to the conditions. Inability to read is no excuse: *Thompson* v. *L.M. & S.R. Co.* (1930) 1 K.B. 41, C.A.

[12] *Olley* v. *Marlborough Court Ltd.* (1949) 1. K.B. 532, *Chapelton* v. *Barry U.D.C.* (1940) 1.K.B. 532.

[13] *Chapelton* v. *Barry U.D.C. supra.*

[14] *Mackillican* v. *Compagnie des Messageries Maritimes de France* (1880) 6 C.W.N. 227: 6 Cal. 227.

[15] *Mukul Dutta* v. *Indian Airlines* (1962) A. Cal. 314

[16] *Lily White* v. *R. Muthuswami* (1966) A. Mad. 13.

[17] *Raipur Transport Co.* v. *Ghanshyan* (1956) A. Nag. 145.

4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

Communication when complete.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

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

as against the person to whom it is made, when it comes to his knowledge.

Illustrations

(a) *A* proposes, by letter, to sell a house to *B* at a certain price. The communication of the poposal is complete when *B* receives the letter.

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

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

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

(c) *A* revokes his proposal by telegram. The revocation is complete as against *A* when the telegram is despatched. It is complete as against *B* when *B* receives it.

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

Agreement between parties at a distance.—The definition is very important. It helps one in deciding whether the contract is concluded or not. The definition provides two stages. The communication of the proposal is the first stage. Receipt of the communication by the acceptor is the second stage. Where certain managers of a school selected a person for appointing him as date about his selection.[18] It was held that there was no contract as there had been no authorised communication on the part of the managers.[18] Non-authorisation of communication was held to imply that the managers reserved power to reconsider the matter.[18] The candidate coming to know indirectly of the selection was held to be not material.[18] Whether a proposal has or has not come to the knowledge of the person to whom it was made is purely a question of fact.

The rest of the section is intended, as shown by the illustrations, to meet the questions raised by the formation of agreements between parties at a distance by correspondence through post. It has done this, as regards acceptance, by enacting (in combination with s. 5) that for a certain time—namely, while the acceptance is on its way—"the receiver" of the acceptance (i.e. proposer) shall be bound and the sender (i.e. Acceptor) not. This can be regarded only as a deliberate and rather large departure, for reasons of convenience, from the common law rule which requires the promise and the consideration to be simultaneous. In India though proposer (i.e. promisor) is bound when letter of

[18] *Powell* v. *Lee* 99 L.T. 284 (K.B.).

acceptance is posted by acceptor (i.e. promisee), the acceptor is not bound by mere posting of the letter of acceptance. Acceptor is bound only when the letter of acceptance comes to the knowledge of the proposer (see section 4). The gap of time between the posting and delivery of acceptance to proposer can be utilised by acceptor if he wants to revoke his earlier acceptance by a speedier means of communication which reaches faster or earlier than the letter of acceptance.[19] The acceptor is able to do this against the promisor because under section 4 of the Act, the contract is not complete, as against the acceptor, when the letter of acceptance is posted.[20] The words "put in a course of transmission" imply that an acceptance may be communicated by post or by a telegram.[21] That would be on the basis that the post office would be a carrier common to both.[22] The rule in England is that such service should be expressly or impliedly authorised.[22] This rule would further imply that a communication should be posted at the correct address[23] or the last known address[22] and should be duly posted[24] or wired[21] as the case may be. In the second para, 'communication' is divided into two parts but until the offeror or proposer comes to know of 'acceptance,' the contract is not complete. The case of an acceptance being "put in a course of transmission to" the proposer, but failing to reach him, is not expressly dealt with. It seems to result from the language of the second paragraph that the proposer must be deemed to have received the acceptance at the moment when it was despatched so as to be "out of the power of the acceptor," and that accordingly it becomes a promise on which the acceptor can sue, unless some further reason can be found why it should not. In respect of a contract formed by correspondence through the post, the posting of a letter—accepting an offer constitutes a binding contract, the reason being that the post office is the common agent of both parties.[25] The post office being the common agent, as soon as the letter of acceptance is delivered to the post office the contract is as complete and binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. The acceptor in posting the letter has put it out of his control and power and done an extraneous act which shows that he is bound thereby. A casualty in the post, whether resulting in the delay, which is often as bad as no delivery, or in non-delivery, cannot unbind the parties.[26] Upon balance of conveniences and inconveniences the contract would be complete as soon as the acceptance is posted.[26] It is impossible in transactions which pass between parties at a distance and have to be carried on through the medium of correspondence to adjust conflicting rights between innocent parties so as to make the consequences of mistake on the part of the post office, a mutual agent, fall equally upon the shoulders of both.[26] A letter not correctly addressed by an acceptor cannot be said to have been put in the course of transmission.[27]

If the wrong address is not due to the fault of the acceptor, the letter could be said to be in the course of transmission,[28] even though there might be some delay in the

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[19] See *Kamisetti Subbiah* v. *Katha Venkatswami* (1903) 27 Mad. 355 at 359.

[20] Ibid

[21] *Bruner* v. *Moore* (1904) 1 Ch. 305 (316).

[22] *Henthorn* v. *Fraser* (1892) 2 Ch. 27; *Powell* v. *Lee*, Supra.

[23] *Tricumdas Mills* v. *Haji Saboo Siddick*, 4 Bom. L.R. 215 (220).

[24] *Re London and Northern Bank* (1900) 1 Ch. 220.

[25] *Dunlop* v. *Higgins*, 1 H.L.C. 381; *Re National Savings Bank Association:* Hebb's Case, (1867) L.R. 4 Eq. 12.

[26] *Household Fire Insurance Co.* v. *Grant*, (1879) 4 Ex. D. 216.

[27] *Ram Das* v. *The Official Liquidator* (1887) 9 All. 366 (384).

[28] *Townsend's Case* (1871) L.R. 13 Eq. 148;

letter reaching the addressee.[29] Where the agreement is to consist in mutual promises, a binding contract appears to be formed by a letter of acceptance despatched in the usual way, even if it does not arrive at all, unless the proposal was expressly made conditional on the actual receipt of an acceptance within a prescribed time, or in due course, or unless the acceptor sends a revocation as provded for by the latter part of the section and explained by illustration (c). This last qualification is probably a departure from the English law. When the proposal and acceptance are made by letters, the contract is made at the time when and the place where the letter of acceptance is posted.[30]

In *Haridwar Singh* v. *Bagum Sumbrui* [31] Appellant's highest bid but less than the reserved price for the settlement of bamboo coup was accepted by the Divisional Forest Officer subject to the confirmation by the Government. Later on, while the Government was considering the matter of confirmation of this bid, Appellant by his communication expressed his desire for the settlement of coup even at the reserved price. The minister directed that the coup may be settled with the Appellant at the reserved price and a telegram was sent to the conservator of Forests, confirming the auction sale to appellant at the reserved price. However, as no intimation was received by the Divisional Forest officer regarding the minister's telegraphic approval of the Appellant's bid, he did not communicate the minister's acceptance of Appellant's bid at the reserved price to him. It was held that the minister's telegram to the Conservator of Forest accepting the Appellant's bid at the reserved price can not be considered as the communication of the acceptance of that offer to the Appellant, as the acceptance of the offer was not even put "in a course of transmission" to the Appellant.

English Rules.—The rules as now settled in England are as follows:—

"A person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn.[32] In other words, the revocation of a proposal is effectual only if actually communicated before the despatch of an acceptance; and the time when the revocation was despatched is immaterial. But where an acceptance, without notice of the offer being revoked, is despatched in due course by means of communication, such as the post, in general use and presumably within the contemplation of the parties, the acceptance is complete from the date of despatch, notwithstanding any delay or miscarriage in its arrival from causes not within the acceptor's control.[33]

A letter of acceptance misdirected by the acceptor's fault cannot be deemed to have been effectually put in the course of transmission to the proposer".[34]

Instantaneous communication on phone or on telex.—A communication by means of telephone or telex is an instantaneous mode of communication.[35] This sort of communication has not been dealt with by the statute.[36] The communications on phone

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Tricumdas Mills v. *Haji Saboo Siddick*, 4 Bom. L.R. 215 (220).

[29] *Dunlop* v. *Higgins*, 1 H.L.C. 381. *Bruner* v. *Moore (1904) 1 Ch. 305.*

[30] *Kamisetti Subbiah* v. *Katha Venkataswamy* (1903) 27 Mad. 355. English authority, so far as it goes, is to the same effect.

[31] (1973) 3 S.C.C. 889

[32] Lord Herschell in *Henthorn* v. *Fraser* (1892) 2 Ch. 27, 31.

[33] *Henthorn* v. *Fraser*, note (c) above; *Protap Chandra* v. *Kali Charan* (1952) A.C. 32.

[34] *Townsend's Case* (1871) L.R. 13 Eq. 148.

[35] *Entores Ltd.* v. *Miles Far East Corporation* (1955) 2 Q.B. 327; *Firm Kanhaiyalal* v. *Dineshchandra* (1959) A.M.P. 234; *Bhagwandas* v. *Girdharlal & Company*, A.I.R. 1966 S.C. 543.

[36] *Firm Kanhaiyalal* v. *Dineshchandra supra; Bhagwandas* v. *Girdharlal & Com*

or telex machines are direct between the parties and hence instantaneous. In respect of the communication by post or telegram, a third party is involved. Communications by phone or telex would fall under the first para i.e. as if the parties make oral offer and acceptance. Communications by post or telegram would fall under the latter paras of the section. If an acceptance on phone is drowned by noise of a flying aircraft or is spoken into a telephone after the line has gone dead or is so indistinct that the proposer does not hear it, or the telex machine has gone out of order, there is no contract.[35] The acceptor should ensure that the acceptance should be audible, heard and understood by the offeror[36] the reason being that the acceptance should be absolute and unconditional which in its turn requires that it should not be based on any mistake or misrepresentation.

Mode of acceptance.—See Sec. 8.

Revocation arriving before acceptance.—One point remains unsettled in England. It has never been decided whether a letter of acceptance having been despatched by post, a telegram revoking the acceptance and arriving before the letter is operative or not. In India, however, such a revocation is made valid by the express terms of secs. 4 and 5 of the Act. Simultaneous arrival of letter of acceptance and letter revocation of acceptance cancels one another There would be no binding contract.[37]

Statutory consents.—The validity of consents required by special statutory provisions and revocations thereof, is governed by the terms of the statutes, and not by this or the following section.[38]

Revocation of proposals and acceptances.

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

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

Illustrations

A proposes, by a letter sent by post, to sell his house to *B*.

B accepts the proposals by a letter sent by post.

A may revoke his proposal at any time before or at the moment when *B* posts his letter of acceptance, but not afterwards.

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

Revocation of offers.—It is implied in this section that the proposer of a contract cannot bind himself (unless by a distinct contract made for a distinct consideration) to keep his offer open for any definite time and that any words of promise to that effect can operate only for the benefit of the proposer and as a warning that an acceptance after the specified time will be too late (s. 6, sub-s. 2). Such is undoubtedly the rule of the Common Law. The reason is that an undertaking to keep the offer open for a certain time is a promise without consideration, and such a promise is unenforceable. *A* gives an undertaking to *B* to guarantee, for 12 months, the payment of *M*'s bills, which may be discounted by *B* at *A*'s request. This is not a binding promise, but a standing proposal which

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pany, A.I.R. 1966 S.C. at 550, Para 14.

[37] *Countess of Dunmore* v. *Alexander*, (1830) 9 S. 190.

[38] *Lingo Ravji Kulkarni* v. *Secretary of State* (1928) 30 Bom. L.R. 570.

becomes a promise or series of promises as and when *B* discounts bills on the faith of it. *A* may revoke it at any time subject to his obligations as to any bills already discounted. "The promise"—or rather offer—"to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend".[39] *Z* offers to take *A*'s house on certain terms, an answer to be given within six weeks. *A* within that time writes *Z* a letter purporting to accept, but in fact containing a material variation of the terms (see s. 7, sub-s. 1, below); *Z* then withdraws his offer; *A* writes again, still within the six weeks, correcting the error in his first letter and accepting the terms originally proposed by *Z*. No contract is formed between *Z* and *A*, since *A*'s first acceptance was insufficient, and the proposal was no longer open at the date of the second.[40] *A* statutory power to make rules for the conduct of departmental business, will, however, justify a local Government in prescribing among the conditions of tenders for public works, that a tender shall not be withdrawn before acceptance or refusal.[41] If, however, there is no statutory power to make such rules, the ordinary law applies and the bidder can withdraw his offer before it is accepted.[42]

An offer to purchase shares was withdrawn by a letter posted on 26th October and it reached the acceptor (addressee) on the next day at 8-30 a.m.: The acceptor actually posted the letter of acceptance of the offer after 8-30 a.m.; the offer was duly revoked.[43]

Sale by Auction, etc.—The liberty of revoking an offer before acceptance is well shown in the case of a sale by auction. Here, the owner of each lot put up for sale makes the auctioneer his agent to invite offers for it and "every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to."[44] Hence a bidder may withdraw his bid at any moment before the fall of the hammer.[45]

The English rule that a bid may be withdrawn at any time before the fall of the hammer is followed in India.[46]

A bid in an auction sale held by a court of law in execution of a decree can be withdrawn before it is accepted by the court by an order confirming the sale.[47]

In two Madras cases, it has been held that where a bid has, to the knowledge of the bidder, been conditionally accepted, the agreement is complete once the condition has been fulfilled, and no communication to the offeror of the absolute acceptance is necessary. In *Chittibobu Adenna* v. *Garimalla Jaggarayadu*,[48] a bench decision, *D*, a bidder for a piece of land, was notified of *X*'s acceptance of his bid 'subject to the approval and orders of the special agent *V*'. *V* did approve, and a document embodying his approval was drawn up, but was not communicated to *D*, and the land was sold by *X* to *P*. *P* sought to eject *D*, relying on s. 4, but the Court held for *D*, on the ground that the contract was complete on the fulfilment of the condition subsequent. The decision was followed in *Rajanagram Village Co-operative Society* v. *Veerasami*.[49] There, the property was

[39] *Offord* v. *Davies* (1862) 12 C. B.N.S. 748. See *Stevenson* v. *McLean* (1880) 5 Q.B.D. 346, 351.

[40] *Routledge* v. *Grant* (1828) 4 Bing. 653, 29 R.R. 672.

[41] *Secretary of State* v. *Bhaskar Krishnaji* (1925) 49 Bom. 759.

[42] *Somasundaram Pillai* v. *Provincial Govern ient of Madras* (1947) Mad. 837 ('47) A.M. 366.

[43] In *Re: London and Northern Bank* (1900) 1 Ch. 220.

[44] *Mackenzie* v. *Chamroo Singh* (1889) 16 Cal. 702.

[45] *Payne* v. *Cave* (1789) 3 T.R. 148 = 100 E.R. 502.

[46] *Agra Bank* v. *Hamlin* (1890) 14 Mad. 235.

[47] *Raja of Bobbili* v. *A. Suryanarayana Rao*, (1919) 42 Mad. 776.

[48] A.I.R. 1916 Mad. 55.

[49] A.I.R. 1951 Mad. 322.

knocked down to *P*, the highest bidder at an auction, 'subject to the approval of the C.D. bank'. The bank passed a resolution accepting the bid, but rescinded it before it was communicated to *P*. The Court nevertheless gave specific performance in favour of *P*, on the ground that communication of acceptance twice was not needed, once when the conditional acceptance was given and again when the condition was fulfilled.[49]

It is submitted that these two cases were wrongly decided. In the 1916 bench decision, the Court misunderstood the nature of a condition subsequent. A condition subsequent predicates a pre-existing obligation, which is to terminate upon the occurrence of some event. It is a resolutive condition, as distinct from a suspensive condition or condition precedent, which prevents the existence of any obligation until the condition is satisfied. Yet the court clearly decided that there was no binding agreement at any rate until *V*, the special agent, approved. In other words, their Lordships held that the condition was a condition precedent, for had the condition been a condition subsequent, there would have been a binding contract the moment *D*'s bid was accepted, liable to be defeated by *V*'s failure to approve. Appropriate wording to impose a condition subsequent would have been to the effect that the bid was accepted, but if *V* should not approve the contract was to be at an end.

It is submitted that in both the cases there was a condition precedent, and that the bidder could have retracted his offer before the final acceptance by *V* and the *C. D.* bank respectively, as in *Somasundaram* v. *Provincial Government of Madras*.[50] S. Rao, J., in the *Rajanagram Case* seeks to escape from this conclusion by drawing a distinction, which he purports to find in the *Somasundaram Case*, between a provisional and a conditional acceptance. An acceptance, in his opinion, is provisional where the offeree has no authority to accept the bid: he is a mere conduit-pipe like the Sub-Collector in the *Somasundaram Case*. In the meantime, the offeror can withdraw his bid. But where the offeree has full power to accept the offer, yet gives only a qualified acceptance, although the offeree is not finally bound, the offeror cannot withdraw. This reasoning is, with respect, erroneous. An acceptance is either absolute or conditional. There is no halfway house between the two. If an acceptance is conditional, the offeror can withdraw at any moment until absolute acceptance has taken place. Authority, if it be needed, is supplied by the English case of *Hussey* v. *Horne-Payne*.[51] There *V* offered land to *P*, and *P* accepted 'subject to the title being approved by my solicitors'. *V* later refused to go on, and the Court of Appeal held that the acceptance was conditional and there was no binding contract: *V* could withdraw at any time until *P*'s solicitors had approved the title. According to the reasoning of S. Rao, J., this would be a case of conditional rather than provisional acceptance, as clearly *P* was no 'conduit-pipe', but the prospective owner of the property, with full power to accept *V*'s offer if he chose, S. Rao, J., would hold that *V* cannot withdraw, contrary to the decision of the Court of Appeal.[51]

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[50] (1947) Mad. 837, A.I.R. 1947 Mad. 366. See also *Union of India* v. *Narain Singh*, A.I.R. 1953 Punj. 274.

[51] (1878) 8 Ch. D. 670. This case is discussed at length *(infra)*, and the law as to the effect of an agreement 'subject to the approval of the purchaser's solicitor' is considered. There are two lines of decisions, one based on the Court of Appeal in this case, holding that such words import a condition, the other, based on the view of Lord Cairns in the same case in the House of Lords, that the words do not import a condition at all. In this edition, the Court of Appeal view is preferred, but even if Lord Cairns is right, this does not destroy the value of the Court of Appeal decision as an authority contrary to the view of S Rao, J., in (1947)

Standing offers.—A writing whereby *A* agrees to supply coal to *B* at certain prices and up to a stated quantity, or in any quantity which may be required for a period of twelve months, is not a contract unless *B* binds himself to take some certain quantity, but a mere continuing offer which may be accepted by *B*, from time to time by ordering goods upon the terms of the offer. In such a case, each order given by *B* is an acceptance of the offer; and *A* can withdraw the offer, or, to use the phraseology of the Act, revoke the proposal, at any time before its acceptance by an order from *B*.[52] The same principle was affirmed by the Judicial Committee on an appeal from the Province of Quebec, where French-Canadian law is in force. A printer covenanted to execute for the Government of the Province, during a term of eight years, the printing and binding of certain public documents on certain terms expressed in a schedule. In the course of the same year the Lieutenant-Governor cancelled the agreement. The printer sued the Crown by petition of right, and it was ultimately held, reversing the judgment below, that he had no ground of action.[53] The Supreme Court has laid down the same principles.[54]

Advertisements of rewards and other so-called "general offers" have also raised questions whether particular acts were proposals capable of becoming promises by acceptance or merely the invitation of proposals. This will be more conveniently dealt with under sec. 8.

Indian Oaths Act.—If *A* offers to be bound by a special oath taken by *B*, and *B* accepts the offer, A cannot resile from the agreement. Having regard, however, to the provisions of the Indian Oaths Act, *B* may be allowed by the Court to resile from the agreement.[55]

6. A proposal is revoked—

Revocation how made.

(1) by the communication of notice of revocation by the proposer to the other party;

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Notice of revocation.—Here sub-sec. (1) appears to make it a condition of revocation being effectual that it shall be communicated by the proposer or by his authority.

Lapse of time for Acceptance.—It is implied in this sub-section that a proposer is not bound to keep his proposal open indefinitely. This rule is based on the principle that

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Mad. 837.

[52] *The Bengal Coal Co.* v. *Homee Wadia & Co.* (1899) 24 Bom. 97; *Joravia Mell Champalal* v. *Jeygopaldas Ghanshamdas* (1922) 43 Mad. L.J. 132, 45 Mad. 799.

[53] *R. Demers* (1900) A.C. 103, 108. Followed in *Secretary of State* v. *Madho Ram* (1928) 10 Lah. 493.

[54] *Union of India* v. *Maddala Thathiah:* (1964) 3 S.C.R. 774 (786): (1966) A.S.C. 1724.

[55] *Mahadeo Prasad* v. *Srjug Prasad* ('52) A. Pat. 208.

an undertaking to keep open an offer indefinitely would be a promise without a consideration and hence such a promise would be unenforceable (*vide* sec. 25). On the point of an acceptance after the expiration of a reasonable time being too late, there is one direct English authority, where it was held that a person who applied for shares in a company in June was not bound by an allotment made in November. [56] This case was followed by the Bombay[57] and Nagpur[58] High Courts.

Condition precedent to Acceptance.—A condition precedent is a condition which prevents any obligation to come into existence until the condition is satisfied. Conditions such as payment of deposit or earnest money or filling in a certain form or executing a certain document or time limit within which to communicate acceptance are often laid down by offerors and failure to satisfy any such conditions may make a proposal lapse.

It may also happen that the other party may do something obviously inconsistent with performing some or one of the things requested. This amounts to a tacit refusal, and accordingly the proposal is at an end, and the parties can form a contract only by starting afresh. If the fact amounts to a refusal, there is no manifest reason for calling it a failure to fulfil a condition precedent.

Death or insanity of proposer.—The provision made by sub-sec. (4) is quite clear. In a Madras case of an auction sale held by the court, the bid was subject to its sanction or acceptance by the Court but before the court could accept it, the bidder died and it was held that on the death of the bidder his bid stood revoked.[59] The position in the English law regarding the death and insanity of the party is different.[60]

Revocation distinct from refusal.—The rejection of a proposal by the person to whom it is made is wholly distinct from revocation, and is not within this section. A counter-offer proposing different terms has the same effect as a merely negative refusal; it is no less a rejection of the original offer, and a party who, having made it, changes his mind, cannot treat the first offer as still open.[61]

Acceptance must be absolute.

7. In order to convert a proposal into a promise, the acceptance must —

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribed the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.[62]

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[56] *Ramsgate Victoria Hotel Co.* v. *Montefiore* (1866) L.R. 1 Ex. 109.

[57] *Indian Co-operative Navigation and Trading Co. Ltd.* v. *Padamsey Premji* (1934) 36 Bom. L.R. 32, 150 I.C. 645 ('34) A.B. 97.

[58] *Ramlal Sao* v. *Malak* (1939) 183 I.C. 748 ('39) A. N. 225.

[59] *Raja of Bobbili* v. *A. Suryanarayana Rao* (1919) 42 Mad. 776.

[60] See Anson, *Law of Contract* (23rd Ed.) Pp. 55, 210; Cheshire & Fifoot, *Law of Contract* (9th Ed.) Pp. 56, 428.

[61] *Hyde* v. *Wrench* (1840) 3 Beav. 334; not otherwise in India. *Nihal Chand* v. *Amar Nath* (1926) 8 Lah. L.J. 434.

[62] "These sections (7, 8 and 9) must be read

Certainty of Acceptance.—The rule in the first sub-section is based on the principle that unless the parties have *consensus ad idem* i.e. are of one mind, there cannot be an agreement between them.[63] The rule is in itself obviously necessary, for words of acceptance which do not correspond to the proposal actually made are not really an acceptance of anything and therefore, can amount to nothing more than a new proposal, or, as it is frequently called, a counter offer.[64] Where an offer to purchase a house with a condition that possession shall be given on a particular day was accepted varying the date for possession[65] or an offer to sell 'good' barely was accepted with the hope that 'fine' barley would be delivered[66] or an offer to buy a property was accepted upon a condition that the buyer signed an agreement which contained special terms as to payment of deposit, making out title, completion date, the agreement having been returned unsigned by the buyer[67] or an offer to sell rice was accepted with an endorsement on the sold and bought note that yellow or wet grain will not be accepted.[68] it has been held that the acceptance was not absolute and unqualified and that the variations were counter proposals. Where an acceptance of a proposal for insurance was accepted in all its terms subject to the condition that there shall be no assurance till the first premium was paid the said condition was held to be in the nature of a counter proposal.[69]

A composite offer, each part whereof is dependant upon the other, if accepted in part only, the acceptance would not be absolute and unqualified.[70]

Where a lessee who was offered a renewed lease on condition of paying the upset price and annual rent within a specified time, did not pay the amounts and approached the higher authorities, there is no absolute acceptance.[71]

Sometimes additional words that seem at first sight to make the acceptance conditional are no more than the expression of what the law implies, as where in England an offer to sell land is accepted "subject to the title being approved by our solicitors." The reasonable meaning of this appears to be not to make a certain or uncertain solicitor's opinion final, but only to claim the purchaser's common right of investigating the title with professional assistance and refusing to complete if the title proves bad.[72] Again, the offer of a new contract, may be annexed to an absolute acceptance so that there is a concluded contract whether the new offer is accepted or not.[73] But an acceptance on condition, coupled with an admission that the condition has been satisfied, may be in effect unconditional.[74] However, immaterial additions or phrases in the acceptance

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without reference to the English law on the subject. Ashworth J., *Gaddar Mal.* v. *Tata Industrial Bank* (1927) 49 All. 674, 677.

[63] *Deep Chandra* v. *Sajjad Ali Khan* (1951) A. All 93 (108).

[64] *Haji Mahomed* v. *E. Spinner* (1900) 24 Bom. 510.

[65] *Routledge* v. *Grant* (1828) 130 E.R. 920: 4 Bing. 653.

[66] *Hutchinson* v. *Bowker* (1839) 151 E.R. 227.

[67] *Jones* v. *Daniel* (1894) 2 Ch. 332.

[68] *Ah Shain* v. *Moothia Chetty*, 2 Bom. L.R. 556 (P.C.): 27 I.A. 30.

[69] *Sir Mohamed Yusuf* v. *S. of S. for India*, 22 Bom. L.R. 872: 45 Bom. 8: A. (1921) Bom. 200.

[70] *General Assurance Society* v. *L.I.C. India* (1964) 5 S.C.R. 125: A.I.R. (1964) S.C. 892.

[71] *Badrilal* v. *Indore Municipality*, (1973) 2 S.C.C. 388: (1973) A.S.C. 508.

[72] *Hussey* v. *Horne Payne* (1879) 4 App. Ca. 311, 322, per Lord Cairns [followed, *Treacher & Co.* v. *Mahomedally* (1911) 35 Bom. 110].

[73] *Sir Mahomed Yusuf* v. *Secretary of State* (1920) 45 Bom. 8.

[74] *Roberts* v. *Security Co.* (1897) 1 Q.B. 111, C.A. see *The Equitable Fire and Accident Office* v. *The Ching Wo Hong* (1907) A.C. 96, 101.

letter may be ignored if they do not impair reasonableness of contract as a whole.[75] Annexing collateral terms along with an absolute acceptance may be said to convert an absolute acceptance into a conditional or qualified one.[76] A seller, who accepted a works order from the purchaser and who consigned part of the goods and who sent a letter to purchaser stating that if prices increased, the purchaser shall be liable to pay the increased price, demanded increased price in respect of the two consignments already supplied, it was held that the acceptance of the works order was absolute, the said letter did not make the absolute acceptance into a conditional one.[77] There is a distinction between a clause which is meaningless and a clause which is yet to be agreed upon. The former does not affect certainty but the latter would affect certainty of a contract.[75]

A provisional acceptance of a bid at an auction sale would not be an absolute acceptance.[78] Where a contract was concluded but subsequently fresh negotiations were started with regard to stamp duty on the transfer deed and the said negotiations did not fructify, it was held that the concluded contract was not affected.[79]

Modes of Acceptance.—This sub-section in the first instance throws the burden upon the offeror, or promisor to prescribe a mode of acceptance. If he does not prescribe any specific method, the acceptor has to follow usual and reasonable mode. The offeror cannot impose upon the acceptor the penalty that in the event of his silence, he would be deemed to have accepted the proposal.[80]

Acceptance in a prescribed manner.—Although there can be no contract without a complete acceptance of the proposal, it is not universally true that complete acceptance of the proposal makes a binding contract; for one may agree to all the terms of a proposal, and yet decline to be bound until a formal agreement is signed,[81] or some other act is done. There may be an express reservation in such words as these: "This agreement is made subject to the preparation and execution of a formal contract."[82] Where there is no precise clause of reservation, but the acceptance is not obviously unqualified, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form,[83] or whether they should be subject to a new agree-

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[75] *Nicolene Ltd.* v. *Simmonds* (1953) 2 W.L.R. 717: (1953) 1 Q.B. 543: (1953) 1 All E.R. 822; *Clive* v. *Beaumont*, 1 De G. & S. 39.

[76] *Jainarain* v. *Surajmull* (1949) F.C.R. 379: A. (1949) F.C. 211; *Namayya* v. *Union of India*, A. (1958) A.P. 533.

[77] *R. N. Ganekar* v. *Mls. Hindustan Wires Ltd.*; (1974) 1 S.C.C. 309 = A.I.R. (1974) S.C. 303.

[78] *Raghunandhan* v. *State of Hyderabad* A.I.R. (1963) A.P. 110; *Raja of Bobbili* v. *A. Suryanarayana Rao*, 42 Mad. 776; *Haridwar Singh* v. *Begum Sumbai*, (1972) 3 S.C.R. 629 = (1973) 3 S.C.C. 889, *State of Orissa* v. *Harinarayan Jaiswal*, (1972) A. S.C. 1816.

[79] *Jainarain* v. *Surajmull*, A. (1949) F.C. 211: (1949) F.C.R. 379.

[80] *Haji Mahomed* v. *E. Spinner*, 24 Bom. 510; *Felthouse* v. *Bindley* (1862) 11. C.B.N.S. 869.

[81] *Jawaharlal* v. *Union of India*, A.I.R. (1962) S.C. 378.

[82] *Hatzfeldt-Wildenburg* v. *Alexander* (1912) 1 Ch. 284; *Rossdale* v. *Denny (1921) 1 Ch. 57 C.A.*; *Namayya* v. *Union of India*, A.I.R. (1958) A.P. 533; *Financings Ltd.* v. *Stimson* (1962) 1 W.L.R. 1184.

[83] *Harichand Mancharam* v. *Govind Laxman Gokhale* (1922) 50 I.A. 25, 47, Bom. 35[illegible]; *Currimbhoy & Co. Ltd.* v. *L. A. Creet* (1930) 60 I.A. 297, 60 Cal. 980, ('33) A.P.C. 29; *Subimalchandra* v. *Radhanath* (1933) 60 Cal. 1357, 149 I.C. 999, ('34) A.C. 235; *Shankarlal* v. *New Mofussil Co. Ltd.* (1946) 73 I.A. 91, 48 Bom. L.R. 456, 224 I.C. 598 ('46) A.P.C. 97; *Jawaharlal* v. *Union of India*, A.I.R. (1962) S.C. 378.

ment, the terms of which are not expressed in detail, and this must be determined by examination of the whole of the continuous correspondence or negotiation. It will not do to pick out this or that portion which, if it stood alone, might be sufficient evidence of a contract.[84]

Where, however, there is no such stipulation express or implied, the mere circumstance that the parties intended to put the agreement into writing or in a formal instrument will not prevent the agreement from being enforced, assuming, of course, that an agreement otherwise complete and enforceable is proved.[85] Where, however, the formalities are not of the parties' selection, so that nothing turns upon the intention of the parties, no inference against a concluded agreement can be drawn from the non-completion of these formalities.[86] The offeror cannot prescribe that the offeree's silence shall be taken as acceptance.[87]

In applying the rule of acceptance in a prescribed manner, the Court must decide what object the offeror had in view. An expression "reply by letter sent by return of post" may have been used with a view to get a quick reply and hence acceptance by telegram may do.[88] If, however, the offeror expressly dislikes telegrams, an acceptance by telegram may not suffice. The question would be whether the prescribed mode is mandatory, or directory.[89]

Therefore, if the proposer chooses to require that goods shall be delivered at a particular place, he is not bound to accept delivery tendered at any other place.[90] It is not for the acceptor to say that some other mode of acceptance which is not according to the terms of the proposal will do as well.

Usual and reasonable manner.—This expression includes what must have been within the contemplation of the parties according to the ordinary practice followed in a particular trade or business or place. This may cover a case of acceptance "by beginning to perform"[91] or by opening a letter of credit or by actual forbearance or by payment of earnest money or deposit, as the case may be. A personal message through the acceptor's agent was deemed to be under this expression, the promisor having not prescribed any mode.[92]

In *L.I.C. of India* v. *Rajavasireddy*[93] the Supreme Court of India observed as follows :—

"Contract of insurance will be concluded only when a party to whom an offer has

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[84] *Hussey* v. *Horne-Payne* (1879) 4 App. Cas. 311; *Aryodaya S. & W. Co.* v. *Javalprasad* (1903) 5 Bom. L.R. 909.

[85] *Whymper* v. *Buckle* (1879) 3 All. 469 citing *Brogden* v. *Metropolitan Railway Co.* (1887) 2 App. Ca. 666.

[86] *Thota Venkatachellasami* v. *Krishnaswamy* (1874) 8 M.H.C. 1.

[87] *Felthouse* v. *Bindley*, (1862) 11 C.B. N.S. 869.

[88] *Law of Contract*, by Treitel (2nd. edn.).

[89] *Yates Building Co. Ltd.* v. *Pulleyn & Sons Ltd.*, The Times, February 27, 1975.

[90] *Eliason* v. *Henshaw* (1819) Sup. Ct. U.S. 4 Wheaton, 225. A communication by post of any demand or offer generally authorises the post as a proper mode of conveying the answer, but a general authority to pay a sum due by remittance through the post will not authorise the unusual practice of enclosing considerable sums of coin or negotiable notes in a post letter; *Mitchell Henry* v. *Norwich Union Insurance Society* (1918) 2 K.B. 67 C.A.

[91] *Principles of Contract*, by Pollock, 13th ed. p. 19.

[92] *Surendra Nath* v. *Kedar Nath*, A.I.R. (1936) Cal. 97.

[93] A.I.R. 1984 S.C. 1014.

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 contract arises when the person to whom offer is made says or does something to signify his acceptance. Mere delay in giving an answer cannot be construed as 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."

Acceptance by performing conditions or receiving consideration.

8. Performance of the conditions of a proposal, of the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Scope and object.—The object of this section is complimentary to the preceding section. If a proposer has not prescribed a mode, an acceptor has to adopt some usual and reasonable mode. This section prescribes one of such methods in the form of an implied acceptance. This section recognises a distinction between acceptance of an offer which asks for a promise and an offer which asks for an act on condition of the offer becoming a promise.[94]

Acceptance by performance.—The terms of this section are very wide. In the absence of illustrations, their intended scope is not very clear. "Performance of the conditions of a proposal" seems to be nothing else than doing the act requested by the proposer as the consideration for the promise offered by him, as when a tradesman sends goods on receiving an order from a customer. The only previous definition of acceptance in the Act is that a proposal is said to accepted when the person to whom it is made "signifies his assent thereto" [s. 2(b)]. This has to be read with the provisions as to communication in secs. 4 and 7. The present section appears, in its first branch, to recognise the fact that in the cases in which the offeror invites acceptance by the doing of an act, "it is sometimes impossible for the offeree to express his acceptance otherwise than by performance of his part of the contract."[95] Where a promisor stated that he had purchased a particular immovable property for the promisee and although it was kept in his name 'for the present', it would be transferred to the name of the promisee after the death of the promisor, and the promisee accordingly went to reside with the promisor in the said property, it was held that the promisee had accepted the offer by going to, and residing in, the property with the promisor i.e., by compliance with the promisor's stipulations and terms.[96] The most obvious example is where a reward is publicly offered to any person, or to the first person, who will recover a lost object, procure certain evidence, or the like. Here, the party claiming the reward has not to prove anything more than that he performed the conditions on which the reward was offered, which conditions may or may not include communication by him to the proposer. In the simple case of a reward proposed for something in which the proposer has an obvious interest, there is not likely to

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[94] *State of Bihar* v. *Bengal Chemical and Pharmaceutical Works Ltd.* (1954) A. Pat. 14 (S); *Hindusthan Co-operative Insurance Society* v. *Shyam Sunder*, A.I.R. (1952) Cal. 691.

[95] Anson, *Law of Contract*, p. 25, 17th ed.

[96] *Venkatayyamma* v. *Appa Rao*, 43, I.A.138. See *Errington* v. *Errington* (1952) 1 K.B. 290.

be any other question than what the terms were, and whether they have been satisfied by the claimant. There is some authority for construing the terms liberally in favour of a finder.[97] In England an open letter of credit authorizing the addressee to draw on the issuer to a special extent and requesting "parties negotiating bills under it to endorse particulars," has been held to amount to a general invitation or request to advance money on the faith of such bills being acccepted, and to constitute a contract with anyone so advancing money while the credit remained open.[98]

The nature of acceptance required in such cases was considered by the English Court of Appeal in *Carlill* v. *Carbolic Smoke Ball Co.*[99] The defendant company, being the proprietor of the "carbolic smoke ball," a device for treating the nostrils and air passages with a kind of carbolic acid snuff, issued an advertisement offering £100 reward to any person who should contract influenza (or similar ailments as mentioned) after having used the ball as directed. It was also stated that £1,000 was deposited with a named bank, "showing our sincerity in the matter." The plaintiff bought one of the smoke balls by retail, did use it as directed, and caught influenza while she was still using it. Hawkins, J.[1] held in a considered judgment that she was entitled to recover £100 as on a contract by the company. The Court of Appeal confirmed that judgment.

It was objected in this case that the plaintiff had not communicated her acceptance of the offer to the defendant company. But Bowen, L.J., said that notification of acceptance is required for the benefit of the person who makes the offer, and that he may dispense with notice to himself. When the proposal is made in consideration of some act to be done, dispensation of notice may be inferred from the nature and circumstances of the proposal.[2] In another case the information given by the plaintiff passed through his fellow policemen as his agents to forward it to the proper officer, Penn.[3] The information ultimately reached Penn at the time when the plaintiff knew of the offer of reward for the information and hence the plaintiff was held to be entitled to the reward.[3]

Acceptance in Ignorance of offer.—Does an act done by a person in ignorance of the proposal amount to "performance of the condition of the proposal" within the meaning of this section? According to the High Court of Allahabad it does not. The plaintiff in that case was in the defendant's service as a *munib*. The defendant's nephew absconded, and the plaintiff volunteered his services to search for the missing boy. In his absence the defendant issued handbills offering a reward of Rs. 501 to anyone who might find out the boy. The plaintiff traced him and claimed the reward. The plaintiff did not know of the handbills when he found out the boy. Held that the plaintiff was not entitled to the reward.[4] In an Australian case one Clarke who knew of the offer of a reward

[97] Offer of reward to any one tracing a lost boy and bringing him home held to be earned by finding and prompt notification (facts insufficiently stated): *Har Bhajan Lal* v. *Har Charan Lal* (1925) 23 All. L.J. 655.

[98] *Re Agra and Masterman's Bank. Exparte Asiatic Banking Corporation* (1867) L.R. 2 Ch. 391

[99] (1893) 1 Q.B. 256.

[1] The facts were not disputed. See the report in the Court below, *Carlill* v. *Carbolic Smoke Ball Co.* (1892) 2 Q.B. 484.

[2] Compare in the case of a contract of guarantee *Mclver* v. *Richardson* (1813) 1 M. & S. 557 (communication necessary) with *Ranga Ram Thakar Das* v. *Raghbir Singh* (1928) 113 I.C. 780 ('28) A.L. 938 (communication not necessary).

[3] *Gibson* v. *Proctor* (1891) 55 J.P. 616. (64. L.T. 594 not a full and accurate report).

[4] *Lalman Shukla* v. *Gauri Dutt* (1913) 11 All. L.J. 489.

gave the information to clear himself of the suspicion of the charge against himself and without any thought of claiming the reward. The claim for reward made by Clarke failed because he did not give the information in exchange of the offer.[5]

Acceptance by receiving consideration.—The second branch of the section as to "acceptance of any consideration," etc. is rather obscure. It is generally sound principle, no doubt, that what is offered on conditions must be taken as it is offered. The use of the word "reciprocal" is curious, for it hardly fits the most obvious class of cases, as where goods are sent on approval, and the receiver keeps them with the intention of buying them. Here the seller need not and commonly does not offer any promise, and there is therefore no question of a reciprocal promise as defined in the Act [s. 2(f)]. The section has been applied to the case of a bank's customer receiving notice, which he did not answer, of an increase in the rate of interest on overdrafts, and afterwards obtaining a further advance; held that he accepted a consideration offered by the bank within the terms of this section.[6]

Promises, express and implied.

9. In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

Express and tacit promises.—This section assumes that both proposals and acceptances may take place by words or without express words. The words may be spoken or written between the parties. An implied promise, in the sense of the Act, is a real promise, though not conveyed in words. An implied promise is therefore to be inferred from certain facts such as a course of dealings between the parties. In other words where there is an express contract in existence, there is no question of an implied contract. An implied promise must be distinguished from the promises frequently said in English books to be implied by law, which were fictions required by the old system of pleading to bring cases of "relations resembling those created by contract" or quasi contracts (ss. 68-72, below) within the recognized forms of action and sometimes to give the plaintiff the choice of a better form of action.

Implied contracts and express ones are both equally binding upon the parties. The difference between them is confined to the manner of proving them.

A tacit promise may be implied from a continuing course of conduct as well as from particular acts. Thus an agreement between partners to vary the terms of the partnership contract may "either be expressed or be implied from a uniform course of dealing." Again, when a customer of a bank has not objected to a charge of compound interest in accordance with the usual course of business, there is an implied promise.[7] Where parties have acted on the terms of an informal document which has passed between them, but has never been executed as a written agreement or expressly assented to by both, it is a question of fact whether their conduct establishes an implied agreement to be bound

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[5] *R.* v. *Clarke*, 40 C.L.R. 227 (241).

[6] *Gaddar Mal* v. *Tata Industrial Bank* (1927) 49 All. 674.

[7] *Haridas Ranchordas* v. *Mercantile Bank of India* (1920) L.R. 47 I.A. 17; I.L.R. 44 Bom. 474 (compound interest with monthly rests); *Hulas Kunwar* v. *Allahabad Bank* ('58) A.C. 644 (Where the customer operated upon an overdraft account after the rate of interest had been increased); *Hiralal* v. *Lachmi Prasad*, 31 Bom. L.R. 905 (P.C.) (with annual rests).

by those terms.[8] Questions may arise whether all the terms of another document are incorporated in a contract, when the contract refers to that document. The terms of a document can be incorporated by reference, when they are not inconsistent with the express terms of the incorporating document, and are not repugnant to the transaction which that document represents.[9]

Where a contract is partly oral and partly in writing, it is necessary to consider the whole of the negotiations for the purpose of determining whether the parties have truly agreed on all the material points.[10]

Place of Contract.—Having regard to the provisions of sec. 4, a question arises as to where a contract can be said to take place. Determination of this question in its turn helps in deciding jurisdiction of courts.

A contract is said to take place at the place where the communication of acceptance is received.[11] Where a proposal emanated at one place was sent to a promisee at another place, the proposal is made where it is received.[12] Where a proposal was made at Midnapore but was received and accepted at P, it was held that the contract took place at P.[13] The Madras High Court has held that where a contract is entered into by correspondence, the contract is made at the time, and at the place where, the letter of acceptance is posted.[14]

Conflict of Law.—Incidents of a contract are governed by the law of the State where the contract is made.[15] This applies to conflict of laws of different provinces or States.[15]

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[8] *Brogden* v. *Metropolitan Railway Co.* (1877) 2 App. Ca. 666.

[9] *Dwarkadas & Co.* v. *Daluram*, A.I.R. 1951 Cal. 10, 19.

[10] *Scamell* v. *Ouston* (1941) A.C. 251.

[11] *Firm Kanhaiyalal* v. *Dineshchandra*, A.I.R. (1959) M.P. 34; *Entores Ltd.* v. *Miles Far East Corp.* (1955) 2 Q.B. 327 (332); *Bhagwandas* v. *Girdharlal & Company*, A.I.R. 1966, S.C. 543

[12] *Premchand Roychand* v. *Moti Lal*, 52 Bom. L.R. 643.

[13] *Sitaram Marwari* v. *Thomson* (1905) 32 Cal. 884.

[14] *Kamisetti Subbiah* v. *Katha Venkataswamy*, 27 Mad. 355.

[15] *Shankar* v. *Manekla*, 42 Bom. L.R. 873.

Chapter II

OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS

What agreements are contracts.

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

Enforceable Contract.—We have seen in section 2(h) that this Act makes a distinction between an agreement and a contract. The test is 'enforceable by law'.

This section adds further qualifications about the contracts. The said qualifications are as under:—

(1) Free consent of the contracting parties (*vide* sections 13 to 22);

(2) Competency to contract (*vide* section 11);

(3) For a lawful consideration (*vide* section 23);

(4) Not declared void (*vide* sections 20, 26, 27, 28, 29, 30 and 56);

(5) In writing if so required by law [e.g. Art. 299 (1) of Constitution of India; sec. 17 of Indian Registration Act; Municipal Acts, Companies Act].

Written contracts.—Where the contract has been reduced to writing the deed must be construed and given effect to as it stands, even if the result be that the document is found to embody a bargain intended by neither of the parties to it.[1] There is no principle of construction which permits a document contrary to its actual wording to be read as though it followed a proposed precedent unless between the parties it has been rectified or at least is such as would be rectified by the Court.[2] But if a party to an agreement embodied in a document is told that any stipulation in the agreement would not be enforced, he cannot be held to have assented to it. The document does not amount to real agreement between the parties and the other party cannot sue on it.[3]

As to contracts required to be in writing.—See sec. 25, sub-secs. 1 and 3, and sec. 28, Exception 2 of the Indian Contract Act 1872. See also Indian Companies Act I of 1956, sec. 15, as to memorandum of association, sec. 30 as to articles of association, and

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[1] *Sunitabala Debi* v. *Manindra Chandra* (1930) 52 Cal. L.J. 435.

[2] *Adaikappa* v. *Thomas Cook & Son, Ltd.* (1933) 64 M.L.J. 184, 142 I.C. 660 ('33) A.P.C. 78.

[3] *Tyagaraja* v. *Vedathanni* (1936) 63 I.A. 126 : 59 Mad. 446: ('36) A.P.C. 70.

sec. 46 as to contract by companies. In this connection may also be noted the provisions of the Transfer of Property Act which require a writing in the case of a sale (s. 54), of a mortgage (s. 59), lease (s. 107) and gift (s. 123), and the provisions of the Indian Trusts Act which require a trust to be created in writing (s. 5); but these are not cases of contract in the proper sense of the word. Acknowledgments to save the law of limitation are required to be in writing by sec. 18 of the Limitation Act, XXXVI of 1963. Submissions under the Arbitration Act 10 of 1940 are similarly required to be in writing. Validity of a contract under seal depends upon the form and manner of its execution.

Variance between print and writing.—Print and other mechanical equivalents of handwriting are generally in the same position with regard to rules of evidence and construction. But where a contract is partly printed in a common form and partly written, the words added in writing are entitled, as Lord Ellenborough said in a judgment repeatedly approved,[4] if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words; inasmuch as the written words are the immediate language and words selected by the parties themselves for the expression of their meaning, and the printed words are general formula adapted equally to their case and that of all other contracting parties upon similar occasions. But the print is not to be discarded altogether, and the Court should discover the real contract of the parties from the printed as well as from the written words.[5]

As to the law relating to Registration.—Section 17 of the Indian Registration Act XVI of 1908 specifies documents which are required to be registered; and sec. 49 of the same Act provides that no document required by sec. 17 to be registered shall effect any immovable property, unless it has been registered in accordance with the provisions of that Act.

11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

Who are competent to contract.

Competency to Contract.—This section deals with personal capacity in three distinct branches: (a) disqualification by infancy; (b) disqualification by insanity; (c) other special disqualifications prescribed by law.

"To Contract."—That is, to bind himself by promise.

Infancy.—As to infancy, the terms of the Act as compared with the Common Law, were long a source of grave difficulty. By the Common Law, an infant's contract is generally not void but voidable at his option; if it appears to the Court to be for his benefit, it may be binding, and especially if the contract is for necessaries. The literal construction of the present section requires being of the age of majority according to one's personal law as a necessary element of contractual capacity. Since the Act as a whole purports to consolidate the English law of contracts, with only such alteration as local circumstances require, the Indian High Courts endeavoured to avoid a construction involving so wide a departure from the law to which they had been accustomed; but the Judicial Committee in 1903 declared that the literal construction is correct, and suggested that it was intended

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[4] *Robertson* v. *French* (1803) 4 East 130; approved in H.L. *Glynn* v. *Margetson* (1893) A.C. 351-357; *Noorbhai* v. *Allabux* (1917) 19 Bom. L.R. 845.

[5] *Paul Beier* v. *Chotalal Javerdas* (1906) 30 Bom. 1.

to give effect to the rule of Hindu law on the subject.[6] In this connection, the Privy Council in the leading case of *Mohori Bibee* v. *Dharamdas Ghosh* observed as under:

"The construction which they have put upon the Indian Contract Act seems to be in accordance with the old Hindu laws as declared in laws of Manu and Colebrok's Digest Book II, Chapter 4, Section 2 Article 3, verses 53, 57 although there are no doubt decisions of some weight that before the Indian Contract Act, infant's contract was voidable only in accordance with English law as it then stood."[7]

Age of majority.—This is now regulated by the Indian Majority Act IX Of 1875. Section 3 of the Act declares that every person *domiciled in India* shall be deemed to have attained his majority when he shall have completed his age of eighteen years, and not before. In the case, however, of a minor of whose person or property or both a guardian has been appointed by a Court, or of whose property the superintendence is assumed by a Court of Wards, before the minor has attained the age of eighteen years, the Act provides that the age of majority shall be deemed to have been attained on the minor completing his age of twenty-one years.

"Law to which he is subject."—The age of majority as well as the disqualification from contracting is to be determined by the law to which the contracting party is subject. The general principle is that the capacity of a person to enter into a contract is decided by the law of his domicile, and not the law governing the substance of the contract, but the later trend of authority is not to recognise the law of domicile as having an exclusive prerogative in all cases. There is a body of English opinion favouring the *lex loci contractus*, the place where the contract is made, in the case of ordinary mercantile contracts, while in the case of contracts relating to land the *lex situs*, the place where the land is situated.[8] Thus in *Kashiba* v. *Shripat*[9] a Hindu widow above the age of sixteen and under the age eighteen years, whose husband had his domicile in British India, executed a bond in Kolhapur (outside British India), where she was then residing. The question arose whether her liability on the bond was to be governed by the law of Kolhapur *(lex loci contractus)*, or by the law of British India (law of her domicile). According to the law obtaining in Kolhapur, she would have been liable on the bond, as the age of majority according to that law is sixteen years, and the bond was executed by her after she completed her sixteenth year. According to the law in British India, namely, the Contract Act, she was not liable, as the contract was made when she was under the age of eighteen years, and was not ratified by her after she attained her majority. It was held that her capacity to contract was regulated by the Contract Act, being the law of her domicile, and that under the Act she was not liable on the bond. It has been held by the Madras High Court[10] that in ordinary mercantile contracts the age of majority is to be determined by the *lex loci contractus*. Thus where a person aged 18 domiciled in British India endorsed

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[6] *Mohori Bibee* v. *Dhurmodas Ghose* (1903) 30 Cal. 539; L.R. 30 I.A. 114; followed in *Mir Sarwarjan* v. *Fakharuddin Mahomed* (1912) 39 Cal. 232; *Ma Hnit* v. *Hashim* (1920) 22 Bom. L.R. 531 (P.C.)

[7] (1903) 30 Cal. at 549-550.

[8] See Dicey: *Conflict of laws*, 7th ed; pp. 740-745 *Cooper* v. *Cooper* (1883) 13 App. Cas at 105, 108; *Bank of Africa* v. *Cohen* (1909) 2 Ch. 129; *Republic of Gautemala* v. *Nunez* (1927) 1 K.B, 669; In re *Auziani* (1930) 1 Ch. 407. Regarding mercantile contracts see *Male* v. *Roberts* (1790) 3 Esq. 163.

[9] (1894) 19 Bom. 697. See also *Rohilkhand and Kumaun Bank, Ltd.* v. *Row* (1885) 7 All. 490.

[10] *T. N. S. Firm* v. *Muhammad Hussain* (1933) 65 M.L.J. 458, 146 I.C. 608, ('33) A.M. 756.

certain negotiable instruments in Ceylon, by the laws of which he was a minor, he was held not to be liable as endorsee.

Minor's agreement.—If the first branch of the rule laid down in the section be converted into a negative proposition, it reads thus: *No* person is competent to contract who is *not* of the age of majority according to the law to which he is subject; in other words, a minor *is not competent* to contract. This proposition is capable of two constructions: either that a minor is absolutely incompetent to contract, in which case his agreement is *void*, or that he is incompetent to contrat only in the sense that he is not liable on the contract though the other party is, in which case there is a voidable contract. If the agreement is void, the minor can neither sue nor be sued upon it, and the contract is not capable of ratification in any manner;[11] if it is voidable, he can sue upon it, though he cannot be sued by the other party, and the contract can be ratified by the minor on his attaining majority. The former current of Indian decisions was that, as under the English law, a minor's contract is only voidable at his option. But in 1903, the Judicial Committee ruled that "the Act makes it essential that all contracting parties should be competent to contract," and especially provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. It was accordingly held that a mortgage made by a minor is void, and a moneylender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money under secs. 64 and 65 on a decree being made declaring the mortgage invalid.[12] This decision leaves no doubt that a mortgage by a minor being void, no decree can be passed on the mortgage either against the mortgagor personally or against the mortgaged property.

The main reason for holding a minor's agreement void is that where an agreement by a minor involves a promise on his part or his promise is a necessary part of the agreement, it is void because a minor is incapable of giving a promise imposing a legal obligation upon himself.[13] But in the Patna High Court case a minor mortgagee had paid consideration of the mortgage at the time of the execution of mortgage deed. He was entitled to sue on his mortgage as the consideration furnished by the minor was not a promise but had actually done something and so such a contract would be a valid contract. On this reasoning the High Court of Patna distinguished the Mohori Bibee Case.

Agreement on behalf of minor.—Where a minor who gives value, without promising any further performance or promise on his part, to a person competent to contract, is entitled to sue him.[14]

Contracts of betrothal of minors by their parents and guardians have been upheld on the ground of the custom of the community.[15] But until marriage takes place, the agreement remains *nudum pactum*.[16]

Contracts on behalf of minors in respect of their property have been upheld provided it is competent for the guardian or the manager of the estate to do so and the transaction

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[11] *Suraj Narain* v. *Sukhu Ahir* (1928) 51 All. 164; cf. *Bindeshri Bakhsh Singh* v. *Chandika Prasad* (1926) 49 All. 137.

[12] *Mohori Bibee* v. *Dhurmodas Ghose* (1903) 30 Cal. 539: 30 I.A. 114.

[13] *Satyadeva Narayana* v. *Tirbeni Prasad* (1936) A. Pat. 153 (mortage in favour of a minor and not against a minor).

[14] *Bhola Ram* v. *Bhagat Ram* (1926) 8 Lah. L.J. 539; *Satyadeva Narayana* v. *Tirbeni Prasad* (1936) A. Pat. 153.

[15] *Rose Fernandes* v. *Joseph Gonsalves*, 26 Bom. L.R. 1035: 48 Bom. 673; *Khimji Kuverji* v. *Lalji Karamsi*, 43 Bom. L.R. 35: (1941) Bom. 211: A.I.R. (1941) Bom. 129; *Daniel* v. *Mariamma* (1951) A. Mad. 466.

[16] *Janak Prasad* v. *Gopi Krishna* (1947) A. Pat. 132.

is for a legal necessity[17] or for his benefit.[18] In the aforesaid two cases it was held that there being no necessity nor benefit, the guardian was not competent to contract.[19] A family settlement entered into by an elder brother acting as a *de facto* guardian of the minor, although continued for a long time, was held void *qua* the minor and the parties *sui juris* as well even though it was for the benefit of the minor, the parties were governed by Mohamedan law.[20] In *Raj Rani* v. *Prem Adib*,[21] a film producer entered into an agreement with a minor girl to act in a film, and the same agreement was entered into by the father of the minor on her behalf with the producer. On a breach of the agreement, the minor sued the producer through her father as next friend. Desai, J., held that the agreement with the father was void, seeing that the consideration moving from the father was the minor's promise to act, and as the minor could not in law promise, there was no consideration. On the other hand, had the consideration moved from the father in the shape of an undertaking by him that his daughter should act, the father could have sued, but could recover only the damages *he* had suffered.

Fraudulent Representation.—The Privy Council while holding in *Mohori Bibee's* case that a minor's contract is void referred to the Court's discretion under secs. 38 and 41 of the Specific Relief Act, 1 of 1877[22] to award compensation. Their Lordships held that the Calcutta High Court had correctly exercised their discretion in refusing compensation as the money had been advanced with full knowledge of the infancy of the borrower. It was further held that the equitable principle to restore will not apply in case of contracts which are void *ab initio*.[23] This pronouncement has been held to justify the award of compensation when the cancellation of an instrument has been adjudged at the instance of a minor.[24] If a mortgage[25] or a sale[26] of his property by a minor is set aside the Court may award compensation if satisfied that the minor had made a fraudulent representation as to his age. His liability to restore is based purely and simply on his fraud.

It is well established in English law that an infant cannot be made liable for what was in truth a breach of contract by framing the action *ex delicto*. "You cannot convert a contract into a tort to enable you to sue an infant"[27] In *R. Leslie, Ltd.* v. *Sheill*[28] the Court of Appeal held that where an infant obtains a loan by falsely representing his age, he cannot be made to pay the amount of the loan as damages for fraud, nor can he be compelled in equity to repay the money. "Restitution stopped where repayment began."[29] The principle of that decision was applied by the Judicial Committee to a case from the Straits Settlements where the loan was secured by a mortgage of the

[17] *Gopalkrishna* v. *Tukaram (1956) A. Bom. 566. Gujoba* v. *Nilkanth*, 59 Bom L.R. 1123: (1958) A. Bom 202; *Suryaprakasam* v. *Gangaraju*, A.I.R. (1956) A.P. 33; *C. I. T.* v. *Shah Mohandas*, A.I.R. (1966) S.C. 15: (1965) 2 S.C.J. 314.

[18] *Gujoba* v. *Nilkanth, supra; Lachuram* v. *Madharam Nath* (1962) A. Ass. 41; *Great American Insurance Co.* v. *Madanlal* 37 Bom. L.R. 461.

[19] *Gopalkrishna* v. *Tukaram, supra; Lachuram* v. *Madhuram, supra.*

[20] *Mohd. Amin* v. *Vakil Ahmad* (1952) S.C.R. 113: A.I.R. (1952) S.C. 358.

[21] *Raj Rani* v. *Prem Adib* (1949) 51 Bom. L.R. 255, A.I.R. 1949 Bom. 215.

[22] Corresponding to secs. 30 and 33 of the Specific Relief Act, XLVII of 1963.

[23] *Mohori Bibee* v. *Dhurmodas* 30 I.A. 114 (126): 30 Cal. 539, 549.

[24] See *Dattaram* v. *Vinayak* (1903) 28 Bom. 181, at p. 190.

[25] *Kamta Prasad* v. *Sheo Gopal Lal* (1904) 26 All. 342; *Vaikuntarama* v. *Authimoolam* (1915) 38 Mad. 1071.

[26] *Muhammad Said* v. *Bishambhar Nath* (1923) 45 All. 644.

[27] *Jennings* v. *Rundall* (1799) 8 T.R. 335.

[28] (1914) 3 K.B. 607.

[29] (1914) 3 K.B. 607 at 618 per Lord Sumner.

minor's property.[30] The Lahore High Court has, however, held that as the contract is wiped out the *status quo ante* should be restored and that the Court has jurisdiction to adjust the equities between the parties and to order a fraudulent minor to restore the benefit he has received[31] or to make compensation for it.[32] In some cases[33] the Courts have taken the view that in such a case the fraudulent minor cannot be ordered to make compensation. It is submitted, however, that the latter view is incorrect. In India the Court derives its power from a statutory enactment which is expressed in the widest terms, and the word used is "compensation", not "restitution".

Estoppel.—There were many conflicting decisions as to whether a minor was estopped by a false representation as to his age. The question is now settled by the case of *Sadiq Ali Khan* v. *Jai Kishore*[34] where the Privy Council observed that a deed executed by a minor is a nullity and incapable of founding a plea of estoppel. The principle underlying the decision is that there can be no estoppel against a statute. The Bombay High Court has followed the Privy Council ruling and reversed its former course of decisions.[35] In a Calcutta case[36] the Court said: "It is unnecessary to consider whether a minor can be estopped in any case, but we think that the law of estoppel must be read subject to other laws, such as the Indian Contract Act, and that a minor cannot be made liable upon a contract by means of an estoppel under sec. 115 of the Indian Evidence Act, when some other law (the Contract Act) expressly provides that he cannot be made liable in respect of the contract." A minor who procures a loan by falsely representing that he is of full age is not estopped from pleading his minority in a suit upon a promissory note passed by him.[37]

Mortgages and sales in favour of minors.—A person incompetent to contract may yet accept a benefit and be a transferee and so although a sale or mortgage of his property by a minor is void, a duly executed transfer by way of sale[38] or mortgage[39] in favour of a minor who has paid the consideration money is not void, and it is enforceable by him or any other person on his behalf. A minor, therefore, in whose favour a deed of sale is

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[30] *Mahomed Syedol Ariffin* v. *Yesh Ooi Gark* (1916) 43 I.A. 256, pp. 263-64; 21 C.W.N. 257. See *Radha Shiam* v. *Behari Lal* (1918) 40 All. 558, 559-560.

[31] *Mohori Bibee* v. *Dhurmodas Ghose*, 30 I.A. 114: 30 Cal. 539; *Khan Gul* v. *Lakha Singh*, 9 Lah. 701; *Limbaji* v. *Rahi*, 27 Bom L.R. 621: 49 Bom. 576; *Manmatha Kumar* v. *Exchange Loan Co. Ltd.*, A.I.R. (1936) Cal. 567.

[32] *Khan Gul* v. *Lakha Singh* (1928) 9 Lah. 701 (721-22); *Mo Maung U* v. *Ma Bla On* (1939) 185 I.C. 733 ('39) A.R. 399; *Harimohan* v. *Dulu Miya* (1935) 61 Cal. 1075, 155 I.C. 1017, ('35) A.C. 198.

[33] *Ajudhiya Prasad* v. *Chandan Lal* (1937) All. 860, 170 I.C. 934, ('37) A.A. 610 (F.B.) *Tikki Lal* v. *Komalchand* (1940) Nag. 632, ('40) A.N. 327.

[34] (1928) 30 Bom L.R. 1346, 109, I.C. 387, ('28) A.P.C. 152; *Khan Gul* v. *Lakha Singh* (1928) 9 Lah. 701.

[35] *Gadigeppa* v. *Balangowda* (1931) 55 Bom. 741 : 33 Bom. L.R. 1313.

[36] *Golam Abdin* v. *Hem Chandra* (1916) 20 C.W.N. 418.

[37] *Kanhaya Lal* v. *Girdhari Lal* (1912) 9 All. L.J. 103; *Vaikuntarama* v. *Authimoolam* (1915) 38 Mad. 1071; *Manmatha Kumar* v. *Exchange Loan Co.* Ltd., A.I.R (1936) Cal. 567.

[38] *Munni Koer* v. *Madan Gopal* (1916) 38 All. 62; *Munia* v. *Perumal* (1914) 37 Mad. 390; *Bholanath* v. *Balbhadra*, A.I.R. (1964) All. 527.

[39] *Raghava Chariar* v. *Srinivasa* (1917) 40 Mad. 308 (F.B.); *Madhab Koeri* v. *Baikuntha Karmaker* (1919) 4 Pat. L.J. 682; *Zafar Ahsan* v. *Zubaida Khatun* (1929) 27 All. L.J. 1114.

executed is competent to sue for possession of the property conveyed thereby.[40] And it has been held by a Full Bench of the Madras High Court that a mortgage executed in favour of a minor who has advanced the mortgage money is enforceable by him or by any other person on his behalf.[41]

The Allahabad High Court held that where a minor executed an agreement of purchase of immovable property, the transaction was void and it could not be enforced either by the minor or against the minor as there is lacking mutuality.[42]

Minor—Partnership.—A partnership agreement admitting a minor as a full-fledged partner would be invalid.[43] However, a minor may be admitted to the benefits of a partnership by his guardian provided it is supported by necessity or benefit.[44]

Minor—Insurance.—A contract of insurance by a *de facto* guardian of a minor in respect of the minor's goods being for the benefit of the minor would be valid and the minor would be entitled to sue thereon.[45]

Minor—Surety bond.—A bond passed by a minor and surety will be void *vis-a-vis* the minor but it can be enforced against the surety.[46]

Minor—Joint documents.—Documents jointly executed by a minor and an adult major person would be void *vis-a-vis* the minor but they could be enforced against the major person who has jointly executed the same provided there is a joint promise to pay by such a major person.[47]

Ratification.—As a minor's agreement is void there can be no question of its being ratified.[48] In a Madras case[49] a person gave a promissory note in satisfaction of one executed by him when a minor for money then borrowed. The Court held that the obligee could not enforce it as it was void for want of consideration.

Where a minor entered into a partnership and carried on the partnership business for nine years after he obtained majority, it was held that he had ratified the partnership.[50] It is submitted that the question of ratification was beside the point as the suit was in respect of dealings between persons *sui juris*.

Payment of debt incurred during minority.—It is permissible at law for a person after attaining majority to elect to pay the debt incurred by him during his minority. Hence where a vendor after attaining majority had paid the amount due on the basis of the mortgage entered into during his minority he cannot subsequently bring a suit for the refund of that amount because a contract entered into by a minor is void and not unlawful.[51]

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[40] 38 All. 62, *supra;* 37 Mad. 390. *supra.*

[41] *Raghava Chariar* v. *Srinivasa* (1917) 40 Mad. 308; *Hari Mohan* v. *Mohini Mohan* (1918) 22 C.W.N. 130.

[42] *Bholanath* v. *Balbhadra Prasad,* A.I.R. (1964) All. 527.

[43] *C.I.T. Bombay* v. *Dwarkadas Khetan & Co.* A.I.R. (1961) S.C. 680.

[44] *C.I.T.* v. *Shah Mohandas Sadhuram,* A.I.R. (1966) S.C. 15: (1965) 2 S.C.J. 314.

[45] *Great American Insurance Co.* v. *Madanlal,* 59 Bom. 656: 37 Bom. L.R. 461; *Vijaykumar* v. *New Zealand Insurance Co.,* 56 Bom. L.R. 341: A.I.R. (1954) Bom. 347.

[46] *Kashiba* v. *Shripat* (1894) 19 Bom. 697.

[47] *Jamna Bai* v. *Vasanta Rao* (1916) 39 Mad. 409 (P.C): 43 I.A. 99. *Sain Das* v. *Ram Chand* (1923) 4 Lah. 334: (1924) A.L. 146: 85 I.C. 701.

[48] *Indian Cotton Co.* v. *Raghunath,* 33 Bom. L.R. 111.

[49] *Arumugan* v. *Duraisinga* (1914) 37 Mad. 38.

[50] *Maganlal* v. *Ramanlal,* 45 Bom. L.R. 761.

[51] *Anant Rai* v. *Bhagwan Rai* (1939) A.L.J. 935, 187 I.C. 4, ('40) A.A. 12.

Specific Performance.—A minor's agreement being void cannot be specifically enforced.[52] But a contract may be entered into on behalf of a minor by his guardian or by a manager of his estate. In that case if the contract is within the competence of the guardian or manager and for the benefit of the minor it may be specifically enforced by or against the minor. But if either of these two conditions is wanting the contract cannot be specifically enforced at all.[53] Thus it has been held that a contract entered into by a certificated guardian of a minor with the sanction of the Court for the sale of property belonging to the minor, the contract being for the minor's benefit, may be enforced by either party to the contract.[54] But a guardian of a minor has no power to bind the minor by a contract for the *purchase* of immovable property, and the minor therefore, is not entitled to specific performance of the contract: so held by the Judicial Committee in *Mir Sarwarjan* v. *Fakharuddin Mohamed*.[55] Nor can the guardian of a minor enter into a valid contract of service on her behalf.[56]

Where, however, a sale deed was executed in favour of *A* and his minor brother (*A* acting as guardian of the minor brother) and they had also agreed to reconvey the property on the happening of certain events, it was held decreeing specific performance of the agreement to reconvey that the minor could not be heard to say that he would take benefit under the sale deed and repudiate the contract of reconveyance on ground of want of mutuality.[57]

Necessaries.—Section 68 provides for liability in respect of necessaries supplied to person *incapable of entering into a contract*. A minor is a person incapable of contracting within the meaning of that section,[58] and, therefore, the provisions of that section apply to his case. It will be observed that the minor's property is liable for necessaries, and no personal liability is incurred by him.[59] Section 70 cannot be read so as to create any personal liability in such a case. Under English law the liability is not on the express promise, if any there be; the obligation is *quasi ex contractu* to pay a reasonable price for necessary goods supplied. Necessaries must be things which the minor actually needs; whether any article amounts to a necessary or not as contemplated by this section is a mixed question of law and fact.[60] Necessaries include articles required to maintain a particular person in the state, degree and station in life in which he is.[60] It must be determined with reference to the fortune and circumstances of a particular infant.[60] Therefore it is not enough that they be of a kind which a person of his condition may reasonably want for ordinary use; they will not be necessaries if he is already sufficiently supplied with things of that kind, and it is immaterial whether the other party knows this or not.[60] Wedding presents for a minor bride[60] and a house for a minor to reside and con-

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52 See note no 42.

53 *Subramanyam* v. *Subba Rao* (1948) 75 I.A. 115, (1949) Mad. 141, A.I.R. 1948, P.C. 95; *Etwaria* v. *Chandra Nath* (1906) 10 C.W.N. 763; *Babu Ram* v. *Said-un-Nissa* (1913) 35 All. 499; *Gopalkrishna* v. *Tukaram*, A.I.R. (1956) Bom. 566.

54 35 All. 499, *supra*; *Innatunnessa* v. *Janaki Nath* (1918) 22. C.W.N. 477.

55 (1912) 39 Cal: 232; 39 I.A.1; *Gopalkrishna* v. *Tukaram*, A.I.R. (1956) Bom. 566.

56 *Raj Rani* v. *Prem Adib* (1949) 51 Bom. L.R. 256 ('49) A.B. 215.

57 *Sitarama Rao* v. *Venkatarama*, A.I.R. (1956) Mad. 261.

58 *Watkins* v. *Dhunnoo Baboo* (1881) 7 Cal. 140, 143.

59 *Mohori Bibee* v. *Dhurmodas Ghose*, 30 I.A. 114 (124): 30 Cal. 539.

60 *Johnstone* v. *Marks* (1887) 19 Q.B.D. 509, followed in *Jagon Ram* v. *Mahadeo Prasad* (1909) 36 Cal. 768 (778, 779).

tinue his studies[61] have been held to be necessaries. Objects of mere luxury cannot be necessaries nor can objects which, though of real use, are excessively costly. The fact that buttons are a normal part of many usual kinds of clothing, for example, will not make pearl or diamond buttons necessaries.[62] See notes to sec. 68, below.

"Of sound mind."—See sec. 12 for the definition of soundness of mind. By English law a lunatic's contract is not void, but voidable at his option, and this only if the other party had notice of his insanity at the time of making the contract.[63] But, after the decision that this section makes a minor's agreement wholly void, it is clear that a person of unsound mind must in India be held absolutely incompetent to contract. And it has in fact been so held.[64] A mortgage in favour of a lunatic has been held to be valid.[65]

Persons otherwise "disqualified from contracting."—The capacity of a woman to contract is not affected by her marriage either under the Hindu or Mahomedan law. A Hindu female is not, on account of her sex, absolutely disqualified from entering into a contract; and marriage, whatever other effect it may have, does not take away or destroy any capacity possessed by her in that respect. It is not necessary to the validity of the contract that her husband should have consented to it. When she enters into a contract with the consent or authority of her husband, she acts as his agent, and binds him by her act; and she may bind him by her contract, in certain circumstances,[66] even without his authority, the law empowering her on the ground of necessity to pledge her husband's credit. Otherwise a married woman cannot bind her husband without his authority, but she is then liable on the contract to the extent of her *stridhanam* (separate property).[67] In the same way a married Mahomedan woman is not by reason of her marriage disqualified from entering into a contract.

Turning next to persons of other denominations, there are two Indian enactments that create the separate property of married women, and impliedly confer upon them, as an incident of such property, the capacity to contract in respect thereof. The one is the Indian Succession Act XXXIX of 1925, sec. 20 and the other, the Married Women's Property Act III of 1874. Neither of them applies to any marriage one or both of the parties to which professed, at the time of the marriage, the Hindu, Mahomedan, Buddhist, Sikh, or Jain religion.[68] Section 20 of the Succession Act provides that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. The effect of this was that all married women to whose marriages the Act applied became absolute owners of all property vested in, or acquired by, them, and their husbands did not by their marriage acquire any interest in such property.[69] The Married Women's Property Act enacted that the wages and earnings of any married woman acquired or gained by her in any employment, occupation, or trade carried on by her, and all money or other property acquired by her through the exercise of

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[61] *Kunwarlal* v. *Surajmal*, A.I.R. (1963) M.P. 58.

[62] The classical English authority is *Ryder* v. *Wombwell* (1868) L.R. 4 Ex. 32.

[63] *Imperial Loan Co.* v. *Stone* (1892) 1 Q.B. 599, C.A., confirming previous authorities.

[64] *Machairan* v. *Usman Beari* (1907) 17 Mad. L.J. 78; *Amina Bibi* v. *Sayidi Yusuf*, 44 All. 748 (Lease void).

[65] *Sheoratan* v. *Kali Charan*, 79 I.C. 955 (Oudh).

[66] *e.g.* pressing necessity: *Pusi* v. *Mahadeo Prasad* (1880) 3 All. 122, at p. 124.

[67] Per Cur. in *Nathubhai* v. *Javher* (1876) 1 Bom. 121.

[68] See Act III of 1874, s. 2 and Act XXXIX of 1925, s. 20.

[69] See the Preamble to Act III of 1874.

any literary, artistic, or scientific skill, should be deemed to be her separate property (s. 4). The Act also provides that a married woman may sue and may be sued in her own name in respect of her separate property (s. 7), and that a person entering into a contract with her with reference to such property may sue her, and to the extent of her separate property recover against her, as if she were unmarried (s. 8).

By the usage and etiquette of his profession a barrister is debarred from suing for his fees. But a barrister enrolled as an advocate of the Allahabad High Court who can both plead and act and combines the function of a barrister and solicitor can make a valid contract for his fees which he can enforce by suit.[70]

A contract entered into by a statutory corporation is required to be within the objects of the company; if it is outside its objects, it would be *ultra vires* and void.[71] A company incorporated to make clothes could not manufacture veneers.[72] Such *ultra vires* contracts being void cannot be enforced by, any more than against, the company.[73] These principles are looked upon with disfavour, see European Community Act, 1972, and Corporate Bodies Contract Act, 1960.

Contracts with Government are required to comply with certain formalities, if such formalities are not complied with, such contracts would be void.[74] The same principle applies to contracts with municipalities.[75]

The disability of alien enemies to sue in our Courts without licence is a matter of general public policy not coming under this head.

What is a sound mind for the purposes of contracting.

12. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.[76]

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.[77]

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

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

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

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[70] *Nihal Chand* v. *Dilawar* (1933) 55 All. 570, 143 I.C. 727 ('33) A.A. 417; *Gauba* v. *J. Vasica* 57 Bom. L.R. 941; (1956) A. Bom. 34.

[71] *Ashbury Rly. Carriage & Iron Co.* v. *Riche* (1875), L.R. 5 H.L. 653.

[72] *In re. Jon Beauforte Ltd.* (1953) Ch. 131.

[73] *Bell Houses Ltd.* v. *City Wall Properties Ltd.* (1965) 3 W.L.R. 1065.

[74] Art. 299 (1) Constitution of India; *Bhikhraj* v. *Union of India* (1962) 2, S.C.R. 880: A.I.R. (1962) S.C. 113; *Karamshi* v. *State of Bombay*, A.I.R. (1964) S.C. 1714.

[75] *Ramaswamy* v. *Municipal Council of Tanjore*, (1906) 29 Mad. 360.

[76] As to evidence of unsound mind see *Ram Sunder Saha* v. *Raj Kumar Sen* (1928) 55 Cal. 285.

[77] See illustration in *Jai Narain* v. *Mahabir Prasad* (1926) 2 Luck. 226.

Burden of proof.—The presence or absence of the capacity mentioned in this section at the time of making the contract is in all cases a question of fact. Where a person is usually of sound mind the burden of proving that he was of unsound mind at the time of execution of a document lies on him who challenges the validity of the contract.[78] Where a person is usually of unsound mind, the burden of proving that at the time he was of sound mind lies on the person who affirms it. In cases, however, of drunkenness or delirium from fever or other causes, the onus lies on the party who sets up that disability to prove that it existed at the time of the contract.

Contract in lucid interval.—The second paragraph of the section provides that a person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. Thus, even a patient in a lunatic asylum may contract during lucid intervals [see illustration (a)].

"Consent" defined.

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

Apparent and real consent.—If the section is to cover all kinds of contracts, the word "thing" must obviously be taken as widely as possible. We must understand by "the same thing" the whole contents of the agreement, whether it consists, wholly, or in part, of delivery of material objects, or payment, or other executed acts or promises.[79]

Generally parties who have concurred in purporting to express a common intention by certain words cannot be heard to deny that what they did intend was the reasonable effect of those words; and that effect must be determined, if necessary, by the Court according to the settled rules of interpretation. Whoever becomes a party to a written contract "agrees to be bound, in case of dispute, by the interpretation which a Court of law may put upon the language of the instrument," whatever meaning he may attach to it in his own mind,[80] unless it is proved that the mind of the person signing did not accompany his signature.[81]

Ambiguity.—An apparent agreement can be avoided by showing that some term (such as a name applying equally to two different ships) is ambiguous, and there has been a misunderstanding without fault on either side. Such cases, however, are extremely rare. It usually turns out that there is no real ambiguity, for either (1) the terms have an ascertained sense by which the parties are bound whatever they may profess to have thought, or (2) the proposal was never accepted according to its terms, as when a broker employed to sell goods delivered to the intending purchaser and the intending seller sold notes describing goods of different qualities.[82] "The contract," said the Court, "must be on the one side to sell, and on the other side to accept, one and the same thing." No such contract being shown on the face of the transaction, there was no need to say, and the Court did not say, anything about mistake. Similarly, if the addressee of a cipher or code message conveying a proposal misreads the proposal not unreasonably, and accepts it

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[78] *Tilok Chand* v. *Mahandu* ('33) A.L., 458.

[79] *Central National Bank* v. *United Industrial Bank* (1954) S.C.R. 391: A.I.R. (1954) S.C. 181.

[80] Per Lord Watson, *Stewart* v. *Kennedy* (1890) 15 App. Ca. 108, 123; *Sunitabela Debi* v. *Manindra Chandra* (1930) 52 Cal. L.J. 435 P.C.

[81] *Chimanram* v. *Diwanchand*, 56 Bom. 181 (190); *Banku Behari* v. *Krishto*, *30 Cal. 433 (438)*.

[82] *Thornton* v. *Kempster* (1814) 5 Taunt, 786.

according to his own understanding, he cannot be held bound to the contract which the proposer intended. If the terms are really ambiguous, there is nothing in such a case which either party can enforce.[83]

Fundamental error.—In certain classes of cases there may be all the usual external evidence of consent, but the apparent consent may have been given under a mistake, which the party is not precluded from showing, and which is so complete as to prevent the formation of any real agreement "upon the same thing". Such fundamental error may relate to the nature of the transaction, to the person dealt with, or to the subject-matter of the agreement.

As to the nature of the transaction.—A man who has put his name to an instrument of one kind understanding it to be an instrument of a wholly different kind may be entitled, not only to set it aside against the other party on the ground of any fraud or misrepresentation which caused his error, but to treat it as an absolute nullity, under which no right can be acquired against him by anyone. In one case the defendant had purported to endorse a bill of exchange which, he was told, was signing as a guarantee. The plaintiff was a subsequent holder for value, and therefore the fact that the defendant's signature was obtained by fraud would not have protected him in this action. But the Court held that his signature, not being intended as an endorsement of a bill of exchange, or as a signature to any negotiable instrument at all, was wholly inoperative, as much so as if the signature had been written on a blank piece of paper first, and a bill or note written on the other side afterwards.[84]

If an executing party is told that the document will not be enforced, the document does not represent the real agreement and hence the parties did not agree to the same thing.[85] Where a person is illiterate or blind or ignorant of the language of the document, such a document would not bind the signatory by reason of his signature thereto unless he was negligent.[86] Where such a document was read over but it is different from the one pretended to be read over, the signature would be of no force as there is an error as to the nature of the transaction.[86]

Consent and estoppel.—The Indian Courts have followed English authority in holding that, in normal circumstances, a man is not allowed to deny that he consented to that which he has in fact done, or enabled to be done with his apparent authority. Thus when a person entrusts to his own man of business a blank paper duly stamped as a bond and signed and sealed by himself in order that the instrument may be drawn up and money raised upon it for his benefit, if the instrument is afterwards duly drawn up and money obtained upon it from persons who have no reason to doubt the good faith of the transaction, it is presumed that the bond was drawn in accordance with the obligor's wishes and instructions.[87]

Error as to the person of the other party.—There can be no real formation of an agreement by proposal and acceptance unless a proposal is accepted by the person, or one of a class or number of persons, to whom it is made. Similarly, the acceptance must be

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[83] *Falck* v. *Williams* (1900) A.C. 176.

[84] *Foster* v. *Mackinnon* (1869) L.R. 4 C.P. 704; *Oriental Bank Corporation* v. *John Fleming* 3 Bom. 242 (267); *Palal Bala Debi* v. *Santimoy*, A.I.R. (1956), Cal. 575.

[85] *Tyagaraja Mudaliar* v. *Vedathanni*, 63 I.A. 126: A.I.R. (1936) P.C. 70.

[86] *Dagdu* v. *Bhana*, 28 Bom. 420; *Chimanram* v. *Diwanchand*, 56 Bom. 181 (189-90); *Banku Behari* v. *Krishto Gobindo*, 30 Cal. 433 (438).

[87] *Wahidunnessa* v. *Surgadass* (1879) 5 Cal. 39.

directed to the proposer, or at least the acceptor must have so acted as to entitle the proposer to treat the acceptance as meant for him. The acceptance of an offer not directed to the acceptor may occur by accident, as where a man's successor in business receives an order addressed to his predecessor by a customer who does not know of the change, and executes it without explaining the facts. Here no contract is formed.[88] But the buyer would be bound, as on a new contract if after notice he treated the sale as subsisting.[89] Acceptance intended for a person other than the person actually making the offer might possibly happen by accident, but in the reported cases it has been the result of fraudulent personation. The proposer has obtained credit, in effect, by pretending to be some person of credit and substance known to the acceptor, or the agent of such a person. In *Cundy* v. *Lindsay*,[90] one Blenkarn closely imitated the address of a known respectable firm of Blenkiron & Co., and wrote his signature so as to look like theirs. A dealer to whom he wrote ordering goods thought, as Blenkarn intended, that the order came from Blenkiron & Co., and sent the goods to the address given. However the goods were obtained by Blenkarn as he had the business in the same street as that of Blenkiron & Co., but only a different door number. Blenkarn sold the goods to the defendant who took the goods in good faith. The Plaintiff Respondent sued the defendant-appellant for conversion. The question arose whether a contract between plaintiff (Lindsay & Co) and Blenkarn was void as being vitiated by mistake as contemplated by plaintiff, in that case the ownership in the goods would not pass to Blenkarn and much less to defendant, (Cundy & Co.) But if the contract be voidable, as being vitiated by fraud, it will be good until it is set aside and the ownership would pass from plaintiff to Blenkarn and from him to defendant. It was held by the Court of Appeal and the House of Lords that, as the senders thought they were dealing with Blenkiron & Co., and knew nothing of Blenkarn, and had no intention of dealing with him, there was no contract, and Blenkarn acquired no property in the goods. Similarly, in a Punjab case, where *A* entered into a contract with *B*, a brother of *C*, on the representation of *B* that he was *C* himself, the Chief Court of the Punjab held that the case came within the section, and that there was no contract between *A* and *B*.[91]

But if the mistake is not as to identity of the other party but as to his attributes e.g. solvency or social position, the mistake is insufficient as a defence.[92] In *Phillips* v. *Brooks*, Ltd., a man called North entered the plaintiff's shop and selected pearls and a ring. He then produced a cheque book, claiming himself to be Sir George Bullough, a wealthy man known to the plaintiff, and gave Sir George Bullough's address. The plaintiff had only heard of Bullough and upon consulting a directory found that he lived at the address given. The plaintiff then said: "Would you like to take the article with you?" North replied: "You had better have the cheque cleared first, but I should like to take the ring, as it is my wife's birthday tomorrow." The plaintiff let him do so. North pledged the ring to defendant who had no notice of the fraud. The plaintiff sued and claimed that there was no contract between him and North and so latter had no title to the ring which he could pass to the defendant. But the Court held that the plaintiff had contracted to sell and deliver the ring to the person who came into his shop by means of false pretence that he was Sir George Bullough. The Plaintiff's intention was to sell to the person present

[88] *Boulton* v. *Jones* (1857) 2 H. & N. 564.

[89] See *Mitchell* v. *Lapage* (1816) Holt, N.P. 253.

[90] (1878) 3 App. Ca. 459.

[91] *Jaggannath* v. *Secretary of State* (1886) *Punj.* Rec. no. 21.

[92] *Phillips* v. *Brooks, Ltd.* (1919) 2 K.B. 243; See also *Lewis* v. *Averay* (1972) 1 Q.B. 198.

and identified by sight and hearing. Thus the plaintiff failed.

As to the subject-matter of the agreement.—It is quite possible for the parties to a contract to be under a common mistake of this kind. If the mistake is not common, it may happen, in very exceptional cases, that by reason of an ambiguous name, or the like, each party is mistaken as to the other's intention, and neither is estopped from showing his own intention.[93] Otherwise a contract (assuming the other conditions for the formation of a contract to be satisfied) can be affected by such a mistake, not common to both parties, only where it is induced by fraud or misrepresentation. We shall find (see below on s. 18) that wilful acquiescence in the other party's mistake is equivalent to misrepresentation under certain circumstances.

If the mistake is common, it can seldom, if ever, be said that there was no consent. Thus if both parties agree to sell and to buy a horse not knowing that the horse is dead, the agreement fails not for want of consent but because the nature of the agreement implied that it referred to a living horse. Similarly, where parties entered into a contract on the understanding that a particular procession will pass through a particular road while the route of the said procession was already cancelled,[94] or on the basis that the land in question was capable of producing a particular quantity of product per month while the land was not capable of so producing.[95]

"Free consent" defined.

14. Consent is said to be free when it is not caused by —

(1) coercion, as defined in section 15, or

(2) undue influence, as defined in section 16, or

(3) fraud, as defined in section 17, or

(4) misrepresentation, as defined in section 18, or

(5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

Free consent.—Not only consent but free consent is declared by sec. 10 to be necessary to the complete validity of a contract. Where there is no consent or no real and certain object of consent there can be no contract at all. Where there is consent, but not free consent, there is generally a contract voidable at the option of the party whose consent was not free. This section declares in general the causes which may exclude freedom of consent, leaving them to be more fully explained by the later sections referred to in the text.

A father consenting to a settlement in respect of a bank's claim against his son who forged his father's signatures on the pronotes and thereby defrauded the bank although no threat of prosecution was held out, was held to be not a free agent to consent to the settlement.[96]

"Coercion defined.

15. "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code,

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[93] *Falck* v. *Williams* (1900) A.C. 176; *Jamuna Das* v. *Ram Kumar* (1937) 169 I.C. 396, ('37) A.P. 358.

[94] *Griffith* v. *Brymer* (1903) 19 T.L.R. 434.

[95] *Sheikh Bros. Ltd.* v. *Ochsner* (1957) A.C. 136.

[96] *Keshowji Tulsidas* v. *Harjivan Mulji* 11 Bom. 566.

or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Illustrations

A, on board an English ship on the high seas, causes *B* to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code. *A* afterwards sues *B* for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code was not in force at the time when, or at the place where, the act was done.

Extent of "coercion" under the Act.—The words of this section are far wider than anything in the English authorities; it must be assumed that this was intended. As the definition stands the coercion invalidating a contract need not proceed from a party to the contract[97] or be immediately directed against a person whom it is intended to cause to enter into the contract or any member of his household, or affect his property, or be specifically to his prejudice. In England the topic of "duress" at Common Law has been almost rendered obsolete, partly by the general improvement in manners and morals, and partly by the development of equitable jurisdiction and under the head of Undue Influence detaining property is not duress.

Act forbidden by the Penal Code.—The words "act forbidden by the Indian Penal Code" make it necessary for the Court to decide in a civil action, if that branch of the section is relied on, whether the alleged act of coercion is such as to amount to an offence. The mere fact that an agreement to refer matters in dispute to arbitration was entered into during the pendency, and in fear, of criminal proceedings is not sufficient to avoid the agreement on the ground of "coercion," though the agreement may be void as opposed to public policy within the meaning of sec. 23.[98] It must further be shown that the complainant or some other person on his behalf took advantage of the state of mind of the accused to apply pressure upon him to procure his consent.[99] So if a false charge of criminal trespass is brought against a person and he is coerced into agreeing to give half of his house to the complainant the agreement will not be enforced.[1]

In a Madras case the question arose whether if a person held out a threat of committing suicide to his wife and son if they refused to execute a release in his favour, and the wife and son in consequence of that threat executed the release, the release could be said to have been obtained by coercion within the meaning of this section. Wallis, C.J., and Seshagiri Aiyar, J., answered the question in the affirmative, holding in effect that though a threat to commit suicide was not *punishable* under the Indian Penal Code, it must be deemed to be *forbidden*, as an attempt to commit suicide was punishable under the Code (s. 309). Oldfield, J., answered the question in the negative on the ground that the present section should be construed strictly, and that an act that was not punishable

[97] *Chuni Lal* v. *Maula Bakhsh*, 161 I.C. 347.

[98] *Gobardhan Das* v. *Jai Kishen Das* (1900) 22 All. 224; *Masjidi* v. *Mussammat Ayisha* (1882) Punj. Rec. no. 135.

[99] 22 All. p. 227, citing *Jones* v. *Merionethshire Building Society* (1893) 1 Ch. 173.

[1] *Sanaullah* v. *Kalimullah* (1932) A.L. 446.

under the Penal Code could not be said to be forbidden by that Code.[2] That view seems to be correct. A penal code forbids only what it declares punishable.

A demand by workers under the Industrial Dispute Act backed by a threat of strike being not illegal, the threat of strike would not amount to coercion.[3]

Unlawful detaining of property.—A refusal on the part of a mortgagee to convey the equity of redemption except on certain terms is not an unlawful detaining or threatening to detain any property within the meaning of this section.[4]

However, refusal by the outgoing agent, whose term expired, to hand over the account books to the new incoming agent until, the principal gave him a complete release would amount to 'coercion'.[5]

Causing any person to enter into an agreement —In *Kanhaya Lal* v. *National Bank of India* the Privy Council has laid down that the word 'coercion' in sec. 72 is not controlled by the definition given in sec. 15 and it is used there in a general sense and it is not necessary that coercion should have been used for bringing about a contract between the parties.[6]

"Undue Influence" defined.

16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other[7] and uses that position to obtain an unfair advantage.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another —

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

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

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable,[8] the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

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[2] *Amiraju* v. *Seshama* (1917) 41 Mad. 33.

[3] *Workmen of Appin Tea Estate* v. *Presiding Officer*, Industrial Officer, Assam, A.I.R. (966) Assam and Nagaland, 115.

[4] *Bengal Stone Co. Ltd.* v. *Joseph Hyam* (1918) 27 Cal. L.J. 78, 80-82.

[5] *Muthiah Chettiar* v. *Karupan Chetti* (1927) 50 Mad. 786.

[6] 40 I.A. 56: 40 Cal. 598 (611): 15 Bom. L.R. 472.

[7] This is an essential condition for the application of the section; no further question arises until it is satisfied. *Raghunath Prasad* v. *Sarju Prasad* (1923) L.R. 51 I.A. 101, 3 Pat. 279; *Sanwal Das* v. *Kure Mal* (1927) 9 Lah. 470.

[8] This condition is essential for throwing the burden of proof on the person who was in dominating position. Otherwise the actual use of that position must be proved as a fact: *Poosathurai* v. *Kannappa Chettiar* (1919) L.R. 47 I.A. 1, 43 Mad. 546; *Mahmudun-Nissa* v. *Barketullal* (1926) 48 All. 667.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872.

Illustrations

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

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

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

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

Illustrations (a) and (b) of the present section are elementary law. Illustrations (c) and (d) are evidently intended to explain the application and the limits of part 3.

The doctrine of undue influence in England and India.—"The equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud."[9] It applies alike to acts of pure bounty by way of gift and to transactions in the forms of contract which are clearly more advantageous to one party than to the other.

The English authorities are numerous, and many of them are complicated by questions on the one hand of actual fraud or on the other hand of breach of some special duty, such as that of an agent, which is independent of the state of mind of the parties. It will be sufficient for the present purpose to refer to a few of the leading authorities on the various points dealt with by the text of the Act.

The first paragraph of the section lays down the principle in general terms; the second and third define the presumptions by which the Court is enabled to apply the principle. It is obvious that the same power which can "dominate the will" of a weaker party is often also in a position to suppress the evidence which would be required to prove more constraint in a specific instance. Modification of the ordinary rules of evidence is accordingly necessary to prevent a failure of justice in such cases. Where the special presumptions do not apply, proof of undue influence on the particular occasion remains admissible, though strong evidence is required to show that, in the absence of any of the relations which are generally accompanied by more or less control on one side and submission on the other, the consent of a contracting party was not free.

The essential ingredients under this section are as under:—

(1) One of the contracting parties dominates the will and mind of another; or
One of the contracting parties has a real or apparent authority over the other; or
One of the contracting parties stands in fiduciary position to the other, e.g. minor and guardian, trustee and beneficiary; husband and wife; or

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[9] Lindley, L.J., in *Allcard* v. *Skinner* (1887) 36 Ch. Div. 145, 183.

One of the contracting parties is strong enough and upon whom the other has to depend because of some infirmity mental or physical.

(2) The dominating party has taken an unfair advantage over the weaker party or the transaction is unconscionable.

Sub-sec 1: Undue influence generally.—The first paragraph gives the elements of undue influence: a dominant position and the use of it to obtain an unfair advantage. The words "unfair advantage" must be taken with the context. They do not limit the jurisdiction to cases where the transaction would be obviously unfair as between persons dealing on an equal footing. "The principle applies to every case where influence is acquired and abused, where confidence in reposed and betrayed,"[10] or, as Sir Samuel Romilly expressed it in his celebrated argument in *Huguenin* v. *Baseley*, which has been made authoritative by repeated judicial approval,[11] "to all the variety of relations in which dominion may be exercised by one person over another." "As no Court has ever attempted to define fraud, so no Court has ever attempted to define undue influence, which includes one of its many varieties."[12]

Some form of pressure which the law would regard as improper would be undue influence. An unconscientious use of pressure exercised under certain circumstances and conditions whereby the defendant was victimised by the plaintiffs, unfair and improper conduct,[13] the nature of benefit gained by the plaintiff, or the age or capacity or health and the surrounding circumstances of the defendant are to be taken into account.[13] The doctrine of undue influence does not protect persons who deliberately and voluntarily agree to the terms out of folly, imprudence or lack of foresight.[13]

Contracts containing unconscionable, unfair and unreasonable terms "are rarely induced by undue influence even if at times they are between parties, one of whom hol ls a real or apparent authority over the other." The court felt that "such contracts are entered into by the weaker party under pressure of circumstances, generally economic, which results in inequality if bargaining power. Such contracts will not fall within... undue influence."[14] Such contracts incorporating a set of rules entered into by a party having superior bargaining power with a large number of persons who have far less bargaining power, are injuries to public interest and be adjudged void (as opposed to public policy) and thus would avoid multiplicity of litigation if such contracts were declared as voidable (induced by undue influence).[15]

Sub-Sec. 2 : Different forms of influence.—The second paragraph of the present section makes a division of the subject-matter on a different principle according to the origin of the relation of dependence, continuing or transitory which makes undue influence possible. Such a relation may arise (a) from a special authority or confidence committed to the donee, or (b) from the feebleness in body or mind of the donor. Practically the most important thing to bear in mind is that persons in authority, or holding confidential employments such as that of a spiritual, medical or legal adviser, are called on to

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10 Lord Kingsdown in *Smith* v. *Kay* (1859) 7 H.L.C. 750, at p. 779. This was a case of general control obtained by an older man over a younger one during his minority without any spiritual influence or other defined fiduciary relation.

11 (1807) 14 Ves. 285; per Wright, J. (1893) 1 Ch. 752.

12 Lindley, L.J., in *Allcard* v. *Skinner* (1877) 36 Ch. Div. at p. 183.

13 *Ganesh Narayan* v. *Vishnu*, 9 Bom L.R. 1164: 32 Bom. 37.

14 *Central Inland Water Transport Corp. Ltd.* v. *Brojo Nath*, A.I.R. 1986 S.C. 1571 at 1611, para 92.

15 See ibid.

act with good faith and more than good faith in the matter of accepting any benefit (beyond ordinary professional remuneration for professional work done) from those who are under their authority or guidance. Relationships of guardian and ward, father and son, trustee and *cestui que trust*, patient and medical adviser and solicitor and client are the recognised relationship for the purposes of this section.[16] Relationships of husband and wife[17] and paramour and mistress[18] also fall in the same category. In fact, their honourable and prudent course is to insist on the other party taking independent advice.[19] Following these principles, the High Court of Allahabad set aside a gift of the whole of his property by a Hindu well advanced in years to his *guru*, or spiritual adviser, the only reason for the gift as disclosed by the deed being the donor's desire to secure benefits to his soul in the next world.[20] Similarly, where a *cestui que trust* had no independent advice, it was held that a gift by him to the trustee of certain shares forming part of the trust funds was void, though in the same case a gift of shares which did not form part of the trust fund was upheld.[21] The case of *Wajid Khan* v. *Ewaz Ali*,[22] in which the Judicial Committee set aside a deed of gift executed by an old illiterate Mahomedan lady in favour of her confidential managing agent, comes under this head, Himachal Pradesh High Court set aside a gift deed obtained by the son from their aged, old illiterate and ailing mother.[23] The same principles apply to agreements for remuneration between an attorney and a client[24] and between a managing clerk in an attorney's office and a client[25] and between an eldest sister's husband who was the manager of the estate and two younger sisters,[26] A parent stands in fiduciary relation towards his child, and any transaction between them by which any benefit is procured by the parent to himself or to a third party at the expense of the child will be viewed with jealousy by courts of equity, and the burden will be on the parent or third party claiming the benefit of showing that the child in entering into the transaction had independent advice, that he thoroughly understood the nature of the transaction, and that he was removed from all undue influence when the gift was made.[27] Upon these principles the High Court of Madras refused to enforce against an adopted son a deed of trust of joint family property executed by him and his adoptive father whereby annuities were created in favour of certain relations of the father. The suit was brought by the relations after the father's death, but

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[16] *Ganesh* v. *Vishnu, supra; Dent* v. *Bennet*, 41 E.R. 105: 4 My. & Cr. 269 (surgeon and patient); *Sandersons* and *Morgans*. v. *Mohanlal*, A.I.R. (1955) Cal. 310 (solicitor and client)

[17] *Tungabai* v. *Yeshwant*, 47, Bom. L.R. 242: A (1945) P.C. 8.

[18] *Shivgangawa* v. *Basangowda*, 40 Bom L.R. 132.

[19] In the case of a *gift* from client to solicitor it is an essential condition to the validity of the gift that the client should have competent independent advice: *Liles* v. *Terry* (1895) 2 Q.B. 679 C.A. The principle of *Liles* v. *Terry* was followed in *Rajah Papamma Row* v. *Sitaramayya* (1895) 5 Mad. L.J. 234; *Babu Nisar Ahmed Khan* v. *Babu Raja Mohan Manucha* (1941) 73 Cal. L.J. 121, (1941) All. L.J. 316 (1941) 43 Bom. L.R. 465, ('40) A.P.C. 204.

[20] *Mannu Singh* v. *Umadat Pande* (1890) 12 All. 523.

[21] *Raghunath* v. *Varjivandas* (1906) 30 Bom. 578.

[22] (1891) 18 Cal. 545, L.R. 18 I.A. 144.

[23] *Kartari* v. *Kewal Krishan*, (1972) A.H.P. 117.

[24] *Shamaldhone Dubt* v. *Lakshimani Debi* (1908) 36 Cal. 493.

[25] *Harivalabhdas* v. *Bhai Jivanji* (1902) 26 Bom. 689.

[26] *Palanivelu* v. *Neelavathi* (1937) 39 Bom. L.R. 720, 167 I.C. 5, ('37) A.P.C. 50.

[27] *Mariam Bibi* v. *Cassim Ebrahim* (1939) 184 I.C. 171, ('39) A.R. 278.

although the deed had been executed by the son after he had attained majority, it was dismissed as there was no evidence to show that the son had independent advice, or that he understood the nature of the transaction, or that his father's influence had ceased when the document was executed.[28] This equally applies to persons in *loco parentis*.[29] Where an elder brother obtained from his younger brother, who was of feeble mind, a transfer of his half share in family properties for a small maintenance allowance, the Chief Court of Oudh set aside the transaction as being obtained by undue influence.[30] But the presumption of undue influence does not apply to a gift by a mother to her daughter. If such a gift is sought to be set aside on the ground of undue influence, the burden lies upon those who seek to avoid it to establish domination on the part of the daughter and the subjection of the mother.[31] Age and capacity are important elements in determining whether consent was free in the absence of any confidential relation, but as against the presumption arising from the existence of such a relation they count for very little.[32] Clause (b) of this paragraph seems to include the principle, established by a series of English decisions, that "where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity will set aside the transaction."[33] Infirmity of body or mind on the vendor's part will make it still more difficult to uphold any such contract. When the people who are nursing an elderly invalid get a transfer of practically the whole of his property in their favour without the knowledge and to the complete exclusion of his heir, it is for them to prove the *bona fides* of the transfer.[34] There is no absolute rule as to the necessity or sufficiency of independent advice.[35] It is not the only possible proof of a donor's competence and understanding; on the other hand, advice relied on to support the transaction must not only be independent, but "must be given with knowledge of all relevant circumstances, and must be such as a competent and honest adviser would give if acting solely in the interests of the donor."[36] The fact that the contents of the document were read over and explained to the donor does not mean that he received independent advice.[37] Again, the independent advice must have been given before the transaction, for the question is as to the will of the party at the time of entering into the disputed transaction.[38]

The acts of undue influence must range under one or the other of the heads "coercion" or "fraud".[39]

Mental distress.—"A state of fear by itself does not constitute undue influence. Assuming a state of fear amounting to mental distress which enfeebles the mind, there must further be action of some kind, the employment of pressure or influence by or on

[28] *Lakshmi Doss* v. *Roop Loll* (1907) 30 Mad. 159, on app. from 29 Mad. 1.

[29] *Karnal Distillerry Co.* v. *Ladli Prasad* ('58) A. Punj. 190.

[30] *Tribhuvan* v. *Someshwar* ('31) A.O. 34.

[31] *Ismail Mussajee* v. *Hafiz Boo* (1906) 33 Cal 733; L.R. 33 I.A. 86.

[32] *Rhodes* v. *Bate* L.R. 1 Ch. at p. 257; *Ladli Parshad Jaiswal* v. *Karnal Distillery Co. Ltd.* ('63) A.S.C. 1279.

[33] Per Kay, J., *Fry* v. *Lane* (1888) 4 Ch. D. 312, 322.

[34] *Maung Aung Bwin* v. *Maung Than Gyaung* ('33) A.R. 90; *Abdur Rauff* v. *Aymona Bibi* ('37) A.C. 492.

[35] *Kali Baksh Singh* v. *Ram Gopal*, 41 I.A. 23: 36 All. 81; *Sajjid Husain* v. *Wazir Ali Khan*, 39 I.A. 156.

[36] *Inche Noriah* v. *Shaik Allie Bin Omar* (1929) A.C. 127, 135. See also *Ram Sumran Prasad* v. *Gobind Das* (1926) 5 Pat. 646, 661.

[37] *Bhola Ram* v. *Peari Devi* ('62) A. Pat. 168.

[38] *Jean MacKenzie* v. *Royal Bank of Canada* ('34) A.P.C. 210.

[39] *Someshwar Dutt* v. *Tribhovan Dutt*, A.I.R. (1934) P.C. 130.

behalf of the other party to the agreement." The mere fact, therefore, that a submission was executed by the defendant during the pendency and under fear of a criminal prosecution instituted against him by the plaintiff will not avoid the transaction on the ground of "undue influence."[40] The pendency of the criminal proceedings did not put the plaintiff in a position to dominate the will of the defendant; but even if it did, there was no evidence that the plaintiff used that position to obtain an unfair advantage, "The law says that (1) not only the defendant must *have a dominant position*, but (2) he must use it."[41]

Both these elements were present in the case where the High Court of Madras refused to enforce an agreement entered into by a Hindu widow to adopt a boy to her husband, it appearing on evidence that the relatives of the boy obstructed the removal of her husband's corpse from the house unless she consented to the adoption.[42] A deed of settlement executed in favour of Respondent, one of the grandsons of an executant (Appellant) who was of weak intellect due to old age and had ailments including diabetes, was set aside as induced by undue influence by the Supreme Court in *Lakshmi Amma* v. *T. Narayana*,[43] in the following circumstances:—

(1) Respondent took executant, Appellant, from his residence along with his wife to a Nursing Home. Some unidentified person made an application to joint sub-Registrar for registration of the deed at the Nursing Home. In the Court neither the name of the applicant was disclosed nor an application was produced to know the reasons for registration to be done at the Nursing Home.

(2) Evidence of the wife of executant was believed by court which showed how executant having an infirm mind was pressurised to execute the document. In fact executant looked scared and Respondent shouted at him and told him to sign it. Executant was not in a fit condition to realize what he was doing or disposing of.

(3) Respondent himself got the draft prepared at his own initiative and without the approval or instruction of the executant. Scribe who prepared the deed stated in court that he met executant only on the date of registration and not on the date when he wrote out the deed of settlement. He stated that he prepared deed not on the instruction of an executant but another person.

(4) Doctors had not given satisfactory explanation as to why they did not examine the mental condition of executant at the time he executed the document. They had done the attestation on the deed of settlement but had never cared to ascertain whether the signature had been subscribed by executant while he was of a sound disposing mind.

(5) The trial Judge found executant blank and he did not answer, when asked, what his name was. Regarding his age the old man stated in the court that he was 25 to 30 years of age.

(6) The entire property was settled by deed in favour of Respondent to the exclusion of the issues of executant himself and other grand children. Negligible provision was made for his wife and there was no provisions for her right to reside. Executant debarred himself from dealing with his property during his life.

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[40] *Gobardhan Das* v. *Jai Kishen Das* (1900) 22 All. 224.

[41] *Amjadennessa Bibi* v. *Rahim Buksh* (1915) 42 Cal. 286. See also *Bara Estate, Ltd.* v. *Anup Chand* (1917) 2 Pat. L.J. 663, at p. 670.

[42] *Ranganayakamma* v. *Alwar Setti* (1889) 13 Mad. 214.

[43] A. 1970 S.C. 1367.

These circumstances raised a grave suspicion regarding genuineness of the document. The Court found deed of settlement an unnatural and unconscionable document.

Proof of undue influence.—In dealing with cases of undue influence there are four important questions which the Court should consider, namely, (1) whether the transaction is a righteous transaction, that is, whether it is a thing which a right-minded person might be expected to do; (2) whether it was improvident, that is to say, whether it shows so much improvidence as to suggest the idea that the donor was not master of himself and not in a state of mind to weigh what he was doing; (3) whether it was a matter requiring a legal adviser; and (4) whether the intention of making the gift originated with the donor.[44] All these are questions of fact.[45]

Transaction with parda-nishin women.—The principles to be applied to transactions with parda-nishin women are not merely deductions from the law as to undue influence but have been said by the Privy Council to be founded upon the wider basis of equity and good conscience.[46] The test laid down by the Privy Council is that the disposition must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it.[47] In the earliest decision of the Privy Council on the subject a Mahomedan lady sued her husband to recover the value of company's paper alleging that the paper was her property and that she had endorsed and handed it over to him for collection of interest. The husband's defence was that he had purchased the paper from his wife. Their Lordships held, upon a review of the evidence, that although the wife had failed to prove affirmatively the precise case set up by her, nevertheless, as the wife was *parda-nishin*, the husband was bound to prove something more than mere endorsement and delivery and that he had failed to discharge the *onus probandi*, which was on him, that the sale had been *bona fide* and that he had given value for the paper.[48] A few years later the Privy Council said with reference to deeds executed by *parda-nishin* women that it was necessary to see "that the party executing them has been a free agent, and duly informed of what she was about."[49] "If a feature of the transaction affecting in a high degree the expediency of her entering into it is not understood by the lady, the bargain cannot be divided into parts or otherwise reformed by the Courts so as to uphold certain portions of it while rejecting others. Her answer to a suit upon the deed is not that she has an equitable defence to the enforcement of a certain stipulation but that it is not her deed."[50] Although it is desirable that there should be independent legal advice, independent legal advice is not in itself essential. The sole

[44] Per Lord Macnaghten in *Mahomed Buksh* v. *Hosseini Bibi* (1888) 15 Cal. 684, at pp. 698-700; L.R. 15 I.A. 81, at pp. 92-93, see *Vencatrama Aiyar* v. *Krishnammal* (1927) 52 Mad. L.J. 20.

[45] There is really no law in such a case as *Narayana Doss Balakrishna* v. *Buchraj Chorida Sowcar* (1927) 53 Mad. L.J. 842; though the facts may call for a careful judgement; another such is *Prabhu* v. *Puttu* (1926) 1 Luck. 144.

[46] *Tara Kumari* v. *Chandra Mauleshwar* (1931) 58 I.A. 450, 11 Pat. 227.

[47] *Faridunnissa* v. *Mukhtar Ahmad* (1925) 52 I.A. 342, 47 All. 703; *Tara Kumari* v. *Chandra Mauleshwar, supra; Ramanamma* v. *Viranna* (1931) 33 Bom. L.R. 960, ('31) A.P.C. 100.

[48] *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum* (1867) 11 M.I.A. 551.

[49] *Geresh Chunder* v. *Bhuggobutty* (1870) 13 M.I.A. 419 431; *Annoda Mohun Rai* v. *Bhuban Mohini Debi* (1901) 28 I.A. 71, 28 Cal. 546; *Lachmeshwar* v. *Moti Rani* (1939) 41 Bom. L.R. 1068, 43 C.W.N. 729, 181 I.C. 359, ('39), A.P.C. 157.

[50] *Hem Chandra Roy Chaudhury* v. *Surabhani Debya* ('40) A.P.C. 134.

question is whether there is sufficient evidence to show that she understood and agreed to the terms contained in the deed.[51]

The law as to the burden of proof is summarized in a decision of the Judicial Committee:[52] "In the first place, the lady was a *parda-nishin* lady, and the law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to shew affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor,. The law as just stated is too well settled to be doubted or upset." In another case the Privy Council said: "It is only when they have established the grantor's (i.e. the *parda-nishin* lady's) intelligent understanding of the deed that the question of undue influence having affected such intelligent understanding can arise. In this case the Appellant has failed in the first step, and the second step does not arise.[53]

Who is a parda-nishin.—The expression "parda-nishin" connotes complete seclusion. It is not enough to entitle a woman to the special care with which the Courts regard the disposition of a *parda-nishin* woman that she lives in some degree of seclusion.[54] Thus a woman who goes to Court and gives evidence, who fixes rents with tenants and collects rents, who communicates, when necessary, in matters of business, with men other than members of her own family, could not be regarded as a *parda-nishin* woman.[55] Her training, habit of mind and surrounding circumstances are the elements to be considered.[56]

Sub-sec. 3: Rule of evidence.—The third paragraph of the present section does not lay down any rule of law but throws the burden of proving freedom of consent on a party who, being in a dominant position, makes a bargain so much to his own advantage that, in the language of some of the English authorities, it "shocks the conscience." But until it has been established that the one party was "in a position to dominate the will of the other," no assistance on the issue of undue influence is available to the person attempting to avoid the contract. The issue, in other words, remains with the burden of proof on him.[57]

"Unconscionable bargains."—Illustration (c) contemplates the case of a person already indebted to a money-lender contracting a fresh loan with him on terms on the face of them unconscionable. In such a case a presumption is raised that the borrower's consent was not free. The presumption is rebuttable, but the burden of proof is on the party who has sought to make an exorbitant profit of the other's distress. The question is not fraud, but of the unconscionable use of superior power. Inadequacy of consideration, though it will not of itself avoid a contract (s. 25, expl. 2 below), has great weight in this

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[51] *Ramanamma* v. *Viranna* (1931) 35 C.W.N. 633, 33 Bom. L.R. 960, 131. I.C. 401, ('31) A.P.C. 100.

[52] *Kali Baksh* v. *Ram Gopal* (1914) L.R. 41 I.A. 23, 28-29, 36 All. 81, 89.

[53] *Bank of Khulne, Ltd.* v. *Jyoti Prokash Mitra* (1941) 45 C.W.N. 253, ('40) A.P.C. 147.

[54] *Shaik Ismail* v. *Amirbibi* (1902) 4 Bom. L.R. 146, 148.

[55] *Ismail Musajee* v. *Hafiz Boo* (1906) 33 Cal. 773, 783, L.R. 33 I.A. 86; *Shaik Ismail* v. *Amirbibi* (1902) 4 Bom. L.R. 146.

[56] *Kali Baksh Singh* v. *Ram Gopal*, 41 I.A. 23: 36 All. 81.

[57] *Gafur Mohomed* v. *Mahomed Sharif* (1932) 34 Bom. L.R. 1194: ('32) A.P.C. 202.

class of cases as evidence that the contract was not freely made. Relief in cases of unconscionable bargains is an old head of English equity. The general principles of equity in dealing with what are called "catching bargains" remain and the third clause of the section now before us is apparently intended to embody them. In fact, Indian High Courts have acted on these principles, both before and since the passing of the Contract Act, without any express authority of written law. Thus, where the interest was exorbitant, relief was granted by reducing the rate of interest in cases where the loan was made to an illiterate peasant,[58] and to a Hindu sixteen years old.[59] Acting upon the same principles, the High Court of Bombay held that a covenant in a mortgage executed by an illiterate peasant in favour of a money-lender to sell the mortgaged property to the mortgagee at a gross undervalue in default of payment of interest was inequitable and oppressive and the mortgage was set aside to that extent.[60] The High Court of Allahabad disallowed compound interest payable at 2 per cent per mensem with monthly rests in the case of a bond executed by a spendthrift and a drunkard eighteen years old,[61] and in another case reduced 25 per cent compound interest to 12 per cent simple where the debtor was old and illiterate and involved in litigation.[62] Where a poor Hindu widow borrowed Rs. 1,500 from money-lender at 100 per cent per annum for the purpose of enabling her to establish her right to maintenance, the High Court of Madras allowed the lender interest at 24 per cent.[63] The relief, however, has not been confined to money-lending transactions, and so far back as the year 1874 the Judicial Committee set aside a bond obtained by a powerful and wealthy banker from a young zamindar who had just attained his majority and had no independent advice, by threats of prolonging litigation commenced against him by other persons with the funds and assistance of the banker.[64] The question whether a transaction should be set aside as being inequitable depends upon the circumstances existing at the time of the transaction, and not on subsequent events.[65]

As between parties on an equal footing high interest, and even the holding of securities for a greater sum than has been actually advanced, will not suffice to make the Court hold a bargain unconscionable.[66] Similarly, though the agreement by a mortgagor for sale of his equity of redemption to the mortagee may be upon onerous terms, the Court will not therefore refuse specific performance if the bargain is not unconscionable and there is no evidence to show that the mortgagee took an improper advantage of his posi-

[58] *Lalli* v. *Ram Prasad* (1886) 9 All. 74. See also the observations of the Judicial Committee in *Kamini* v. *Kaliprossunno Ghose* (1885) 12 Cal. 225, 238, 239; L.R. 12 I.A. 215, where the loan was made to a *pardanishin* lady.

[59] *Mothoormohun Ray* v. *Soorendra Narain Deb* (1875) 1 Cal. 108.

[60] *Kedari Bin Ranu* v. *Atmarambhat* (1866) 3 B.H.C.A.C. 11.

[61] *Kirpa Ram* v. *Sami-ud-din* (1903) 25 All. 284.

[62] *Rukmisa* v. *Mohib Ali Khan* (1934) A. A. 938.

[63] *Rannee Annapurni* v. *Swaminatha* (1910) 34 Mad. 7. See, further; as to the test of what is excessive: *Din Muhammad* v. *Badri Nath* (1929) 120 I.C. 417 ('30) A.L. 65. Exact definition is not possible: *Ramkishun Ram* v. *Bansi Singh* (1929) 110 I.C. 43, ('29) A.P. 340.

[64] *Chedambara Chetty* v. *Renja Krishna Muthu* (1874) 13 B.L.R. 509; L.R. 1 I.A. 241.

[65] *Ganga Baksh* v. *Jagat Bahadur Singh* (1895) 23 Cal. 15; L.R. 22 I.A. 153.

[66] *Hari Lahu Patil* v. *Ramji Valad Pandu* (1904) 28 Bom. 371. As to the rate of interest, cp. *Lala Balla Mal* v. *Ahad Shah* (1919) 21 Bom. L.R. 558, where the Privy Council held 2 per cent per mensem not to be unusual, also that compound interest was not necessarily unconscionable.

tion or of the mortagor's difficulties.[67]

On examining the cases relating to money-lending transactions cited in the preceding paragraph, it will be observed that in each of them the lender was "in a position to dominate the will" of the borrower, and the bargain was "unconscionable" within the meaning of cl. (3) of the present section. It is only the concurrence of these two elements that can justify the Courts in raising the presumption under sub-sec. (3),[68] or in granting relief to the borrower.[69] The mere fact that the rate of interest is exorbitant is no ground for relief under this section,[70] unless it be shown that the lender was in a position to dominate the will of the borrower. And it has been held by the highest tribunal that urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of this section.[71] The law on this subject, however, has been considerably altered since the enactment of the Usurious Loans Act, 1918.

Lapse of time and limitation.—Delay and acquiescence do not bar a party's right to equitable relief on the ground of undue influence, unless he knew that he had the right, or, being a free agent at the time, deliberately determined not to inquire what his rights were or to act upon them.[72] Lapse of time is not a bar in itself to such a relief. There must be conduct amounting to confirmation or ratification of the transaction.[73] In a Privy Council case a Hindu widow having a widow's estate entered into a lease which was neither prudent nor beneficial to the estate, but with full knowledge of the lease the widow, and after her, her reversioners, accepted rent under the lease. Their Lordships held that such conduct amounted to a confirmation of the transaction by conduct both by the widow and her reversioners.[74] If there be no such conduct, it is open to the party, though he may not sue to set aside the transaction within the period of limitation, to plead undue influence as a defence in a suit brought against him to enforce the transaction.

"Fraud" defined.

17. "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

(1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

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

(4) any other act fitted to deceive;

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67 *Davis* v. *Maung Shwe Go* (1911) 38 Cal. 805; L.R. 38 I.A. 155.

68 *Ladli Parshad* v. *Karnal Distillery*, A.I.R. (1963) S.C. 1279 (1290).

69 *Poosathurai* v. *Kannappa Chettiar* (1919) 43 Mad. 456; L.R. 47. I.A. 1.

70 As to relief where a stipulation for the payment of interest amounts to a penalty, see s. 74 below and the notes thereon.

71 *Sundar Koer* v. *Rai Sham Krishen* (1907) 34 Cal. 150; L.R. 34 I.A. 9; *Chatring* v. *Whitchurch* (1970) 32 Bom. 208; *Debi Sahai* v. *Ganga Sahai* (1910) 32 All. 589; *Ramalingam Chettiar* v. *Subramania Chettiar* (1927) 50 Mad. 614; *Sitaram* v. *Ramrao* ('31) A.N. 91.

72 *Lakshmi Doss* v. *Roop Loll* (1907) 30 Mad. 169.

73 *Allcard* v. *Skinner* (1887) 36 Ch. Div. 145. at pp. 181, 182, 186; *Kunja Lal* v. *Havalal*, A. 1943 Cal. 162.

74 *Juggal Kishore* v. *Charoo Chandra* (1939) 42 Bom. L.R. 1055, 181 I.C. 341; ('39) A.P.C. 159.

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

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

Illustrations

(a) *A* sells, by auction, to *B*, a horse which *A* knows to be unsound. *A* says nothing to *B* about the horse's unsoundness. This is not fraud in *A*.

(b) *B* says to *A*—"If you do not deny it, I shall assume that the horse is sound." *A* says nothing. Here, *A*'s silence is equivalent to speech. Here, the relation between the parties would make it *A*'s duty to tell *B* if the horse is unsound.

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

Ingredients of fraud.—(1) The words "with intent to deceive" in the principal part of the section and the words "any other act fitted to deceive" in clause (4) indicate that an intention to deceive is an essential ingredient;

(2) the act may be done by a party to a contract or with his connivance by some one or by his agent;

(3) a *suggestio falsi;*

(4) an active concealment of a fact which it is his duty to disclose *(suppressio veri);*

(5) a false promise;

(6) any act or omission which the law may declare as fraudulent;

(7) pursuant to any of the above elements, the party defrauded or his agent must have entered into a contract or must have done some act.

Fraud in general.—Fraud is committed wherever one man causes another to act on a false belief by a representation which he does not himself believe to be true. Under the Contract Act we are concerned with the effects of fraud only so far as consent to a contract is procured by it. We have already pointed out[75] that the result of fraudulent practice may sometimes be a complete misunderstanding on the part of the person deceived as to the nature of the transaction undertaken, or the person of the other party. Such cases are exceptional. Where they occur, there is not a contract voidable on the ground of fraud, but the apparent agreement is wholly void for want of consent, and the party misled may treat it as a nullity even as against innocent third persons. Thus when *A* sold land to *B* who covenanted to accept title as it was, the fact that *A* had previously sold the land to *C* was held to be active concealment amounting to fraud.[76] But there was in fact no consent for the covenant implied that *A* had some title.[77]

Sub-secs. 3, 4, 5.—Fraud, as a cause for the rescission of contracts, is generally reducible to fraudulent misrepresentation. Accordingly we say that misrepresentation is

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[75] See *supra* page 45, f.n. 84, *Foster* v. *Mackinnon* and *other* cases cited.

[76] *Akhtar Jahan Begum* v. *Hazari Lal* (1927) 25 All. L.J. 708.

[77] *Motivahoo* v. *Vinayak* (1888) 12 Bom. 1.

either fraudulent or not fraudulent. If fraudulent, it is always a cause for rescinding a contract induced by it; if not, it is a cause of rescission only under certain conditions, which the definitions of sec. 18 are intended to express. There are, however, forms of fraud which do not at first sight appear to include any misrepresentation of fact, and sub-secs. 3, 4 and 5 are intended to cover these. With regard to a promise made without any intention of performing it (sub-s. 3), it may fairly be said that promise, though it is not merely a representation of the promisor's intention to perform it, includes a representation to that effect. It is fraud to obtain property, or the use of it, under a contract by professing an intention to use it for some lawful purpose when the real intention is to use it for an unlawful purpose.[78] "There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at particular time is, but if it can be ascertained it is as much a fact as anything else." Accordingly it is fraud to obtain a loan of money by misrepresenting the purpose for which the money is wanted, even if there is nothing unlawful in the object for which the money is actually wanted and used.[79] In particular, it is well settled in England that buying goods with the intention of not paying the price is a fraud which entitles the seller to rescind the contract.[80]

Acts and omissions specially declared to be fraudulent.—Sub-sec. 5 applies to cases in which the disclosure of certain kinds of facts is expressly required by law, and non-compliance with the law is expressly declared to be fraud. Thus by sec. 55 of the Transfer of Property Act (IV of 1882) the seller of immovable property is required to disclose to the buyer "any material defect in the property of which the seller is and the buyer is not, aware, and which the buyer could not with ordinary care discover," and the buyer to disclose to the seller "any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest," and "omission to make such disclosures . . . is fraudulent," and this, it seems, even if the omission be due merely to oversight.[81] Similarly, under sec. 55 (1) (c) the seller is bound to answer truthfully any requisition with regard to the income or rental of the property and if he gives information which is false to his knowledge, he commits fraud.[82]

Mere non-disclosure.—There are special duties of disclosure (of which we have just seen an instance) in particular classes of contracts,[83] but there is no general duty to disclose facts which are or might be equally within the knowledge of both parties. Silence as to such facts, as the Explanation to the present section lays down, is not fraudulent. There are at least two practical qualifications of this rule. First, the suppression of part of the known facts may make the statement of the rest, though literally true so far as misleading as an actual falsehood. In such a case the statement is really false in substance, and the wilful suppression which makes it so is fraudulent.[84] Secondly, a duty to dis-

[78] See *Feret* v. *Hill* (1854) 15 C.B. 207.

[79] *Edgington* v. *Fitzmaurice* (1885) 29 Ch. Div. 459, 480, 483, per Bowen, L.J.

[80] *Clough* v. *L. & N. W. R. Co.* (1871) L.R. 7 Ex. 21, in Ex. Ch.; *Ex parte Whittaker* (1875) L.R. 10 Ch. at. p. 449.

[81] Note that an agreement between vendor and purchaser that the vendor is not to be liable for defective title will not excuse active concealment: *Akhtar Jahan Begum* v. *Hazari Lal* (1927) 25 All. L.J. 708.

[82] *Premchand* v. *Ram Sahai* ('32) A.N. 148.

[83] e.g. Contract of fire insurance: *Imperial Peessing Co.* v. *British Crown Assurance Corporation* (1913) 41 Cal. 581. See also s. 143 below.

[84] *Peek* v. *Gurney* (1873) L.R. 6 H.L. 392 403.

close particular defects in goods sold, or the like, may be imposed by trade usage. In such a case omission to mention a defect of that kind is equivalent to express assertion that it does not exist.[85] Again, non-disclosure may be coupled with a representation that is fraudulent. *A*, knowing that an insolvent's decree is fully secured, suppresses the fact of the security and induces the Official Assignee to assign it to him at 20 per cent of its face value by representing that the decree is practically unrealizable. *A* was under no duty to disclose the security. Nevertheless, his statement that the decree was practically unrealizable was false and made with intent to deceive and therefore a fraud.[86]

18. "Misrepresentation" means and includes—

"Misrepresentation" defined.

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

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

(3) causing however innocently a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Misrepresentation.—The words "means and includes" suggest that the definition is exhaustive. The misrepresentation, as defined, is of three kinds as follows:—

(a) an unwarranted positive assertion of what is not true, even though he might believe it to be true; or

(b) committing a breach of duty which misleads another to his prejudice or to the prejudice of any one claiming under him; or

(c) causing a party to the contract to make a mistake as to the subject matter of the agreement.

Principles of English law as to misrepresentation.—The Common Law recognizes a general duty not to make statements which are in fact untrue, with the intent that a person to whom they are made shall act upon them to the damage of the person so acting, and without any belief that they are true. The breach of this duty is the civil wrong known as fraud or deceit. But, if belief is there, it is not required by any general rule of law to be founded on any reasonable ground, though want of any reasonable ground may be evidence of want of belief.[87] With regard to contracts, the general principle is that if one party has induced the other to enter into a contract by misrepresenting, though innocently, any material fact specially within his own knowledge, the party misled can avoid the contract. In certain classes of contracts, where the facts are specially within one party's knowledge, a positive duty of disclosure is added, and the contract is made voidable by mere passive failure to communicate a material fact. But there is no positive duty of disclosure between contracting parties where the facts are not by their nature more accessible to one than to the other, though one party may have acquired information

[85] *Jones* v. *Bowden* (1813) 4 Taunt. 847.

[86] *Subramanian* v. *Official Assignee* ('31) A.M. 603.

[87] *Derry* v. *Peek* (1889) 14 App. Ca. 337. Such is the law settled for England by the house of Lords.

which he knows that the other has not.[88]

Sub-sec. 1.—What is meant by "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true"? This clause seems to mean that innocent misrepresentation does not give cause for avoiding a contract unless the representation is made "without any reasonable ground." The High Court of Calcutta has held that an assertion cannot be said to be "warranted" for the present purpose where it is based upon mere hearsay.[89]

We may refer to a Punjab case to illustrate the meaning of the expression "positive assertion." *A* sells a mare to *B*. Before the sale *A* writes to *B* as follows, in answer to inquiries from *B*: "I think your queries would be satisfactorily answered by a friend if you have one in the station and I shall feel more satisfied. All I can say is that the mare is thoroughly sound." The letter is "positive assertion" of soundness coupled with a recommendation to *B* to satisfy himself before purchasing; but it does not amount to a warranty.[90]

Sub-sec. 2.—This sub-section was considered in a Bombay case[91] by Sargent, J.: "The second clause of sec. 18 is probably intended to meet all those cases which are called in the Court of Equity, perhaps unfortunately so, cases of 'constructive fraud,' in which there is no intention to deceive, but where the circumstances are such as to make the party who derives a benefit from the transaction equallly answerable in effect as if he had been actuated by motives of fraud or deceit."

This sub-section presupposes that (i) a representor owes a duty to the representee in respect of the statement, (ii) the representor makes a statement, negligent or fraudulent or innocent, (iii) the representee is misled to his prejudice, and (iv) the representor gains an advantage.

The basis of "duty of care" implies some kind of relationships between the parties e.g., buyer and seller, landlord and tenant, owner and hirer, banker and client, professional and client, lender and borrower. The requirement that the representee should be misled to his prejudice implies that the misrepresentation should be material. In *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[92] where a party gave credit to a limited company after obtaining a reference from a bank as the latter gave a good reference subject to the condition "without responsibility" and the party suffered a loss, the House of Lords, while declining to accept a narrow view of the duty of care and the scope of liability for negligent statements, observed in that case that the bank would have owed some duty had the reference not contained the words "without responsibility."

The expression 'breach of duty' carries within it contracts involving a duty on the part of the contracting party to disclose all material facts. Such contracts are contracts of insurance, family arrangement, allotment of shares by a limited company, sale of immovable property, sale of other things wherein the purchaser depends upon the implied warranties on the part of the seller. Contracts of insurance are examples of contracts *uberrimae fidei*. In a family arrangement, the party owes a duty to the other to make a complete disclosure of every material fact of which he is aware. In cases of allotment of shares of a limited company, the latter or its promoters are under a duty to make a full true and fair disclosure of the position of the company and of every material fact which

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88 *Laidlaw* v. *Organ*, 2 Wheat, 98. See also *Turner* v. *Green* (1895) 2 Ch. 205.

89 *Mohun Lall* v. *Sri Gungaji Cotton Mills Co.* (1899) 4 C.W.N. 369.

90 *Currie* v. *Rennick* (1886) Punj. Rec. No. 41.

91 *Oriental Bank Corporation* v. *Flemming* (1879) 3 Bom. 242, 267.

92 (1964) A.C. 465.

throws light on the business to be undertaken by the company. In contracts for sale of immovable property, vendor owes a duty to the purchaser to disclose defects in title, latent defects in the property, encumbrances, easements etc.

Sub-sec. 3.—This sub-section was applied in *The Oceanic Steam Navigation Co.* v. *Soonderdas Dhurumsey*.[93] In that case the defendants in Bombay chartered a ship wholly unknown to them from the plaintiffs, which was described in the charter-party, and was represented to them, as being not more than 2,800 tonnage registered. It turned out that the registered tonnage was 3,045 tons. The defendants refused to accept the ship in fulfilment of the charter-party. It was in evidence that defendants had entered this charter-party as they were assured that the vessel was not more than 2,800 tonnage registered. It was held that they were entitled to avoid the charter-party by reason of the erroneous statement as to tonnage. As further illustrating the rule laid down in the present sub-section we might cite an earlier case, where it was held by the Allahabad Court that an agreement by the defendant to sell and deliver a boiler to the plaintiff at Rajghat was voidable at the option of the defendant, the plaintiff having represented (though innocently) to the defendant that there was a practicable road all the way, while, as a matter of fact, there was at one point a suspension bridge on a part of the way not capable of bearing the weight of the boiler.[94]

Misrepresentation of fact or law.—It used to be said in English books that misrepresentation which renders a contract voidable must be of fact; but there does not seem to be really any dogmatic rule as to representations of law. The question would seem on principle to be whether the assertion in question was a mere statement of opinion or a positive assurance—especially if it came from a person better qualified to know—that the law is so and so. It seems probable in England, and there is no doubt here that at any rate deliberate misrepresentation in matter of law is a cause for avoiding a contract. Where a clause of re-entry contained in a *Kabuliyat* (counterpart of a lease) was represented by a zamindar's agent as a mere penalty clause, the Judicial Committee held that the misrepresentation was such as vitiated the contract, and the zamindar's suit was dismissed.[95]

Where an executing party to a deed signed the deed upon a representation that the deed will not be enforced, there is a mistake as to the substance of the agreement, apart from the question that there was no consensus of mind.[96]

Fraud and misrepresentation distinguished.—The principal difference between 'fraud' and misrepresentation' is that in the one case the person making the suggestion does not believe it to be true and in the other he believes it to be true, though in both cases, it is a misstatement of fact which misleads the promisor.[97] 'Intention to deceive' is essential in fraud, while that is not necessary in 'misrepresentation.' Although in both the cases, the contract can be avoided, in case of misrepresentation or a fraudulent silence, the contract cannot be avoided if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Voidability of agreements without free consent.

19. When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

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[93] (1890) 14 Bom. 241.

[94] *Johnson* v. *Crowe* (1874) 6 N.W.P. 350.

[95] *Pertab Chunder* v. *Mohendranath Purkhait* (1889) 17 Cal. 291, L.R. 16 I.A. 233.

[96] *Tyagaraja* v. *Vedathanni* (1936) 59 Mad. 446. 63 I.A. 126, ('36) A.P.C. 70.

[97] *Naiz Ahmed* v *Parshottam* (1931) 53 All. 374: A.I.R. (1931) All. 154.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if the thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

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

Illustrations

(a) *A*, intending to deceive *B*, falsely represents that 500 maunds of indigo are made anuually at *A*'s factory, and thereby induces *B* to buy the factory. The contract is voidable at the option of *B*.

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

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

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

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

Scope of the section.—The section states the legal effect of coercion, fraud, and misrepresentation, in rendering contracts procured by them voidable,[98] the foregoing sections have only laid down their respective definitions. Section 19 of the Act does not now refer to undue influence. It was deleted from S. 19 of the Act by Act VI of 1899. The said amendment inserted in the Indian Contract Act Section 19A giving power to the Court to set aside a contract induced by undue influence. Perhaps the most important parts of the section, certainly those which need the most careful attention, are the exception and the explanation. These mark the limits within which the rule is applied. The party entitled to set aside a voidable contract may affirm it if he thinks fit. That is involved in the conception of a contract being voidable. And if he affirms it, he may require the performance of the whole and every part of it (subject to the performance in due order of whatever may have to be performed on his own part) or, in default thereof,

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98 Fraud in the *performance* of a contract is no ground for rescission: *Jamsetji* v. *Hirjibhai* (1913) 17 Bom. L.R. 158, 169; *Fazal* v. *Mangaldas* (1921) 46 Bom. 489, 508.

damages for non-performance.[99] If, as may well be the case, the default is wholly or partly due to the non-existence of facts which the defaulting party represented as existing, this party can obviously not set up the untruth of his own statement by way of defence or mitigation; and, if the case is a proper one for specific performance, and if it is in his power to perform the contract fully, though with much greater cost and trouble than if his statement had been originally true, he will have to perform it accordingly.[1]

Other remedies.—Apart from the remedies provided in this section the aggrieved party may have the agreement rescinded under sec. 27 of Specific Relief Act, 1963; or he may refuse to carry out the agreement and defend a suit brought against him for specific performance and or for compensation.[2]

Exception : Means of discovering truth.—In English law the principle is that if a man makes a positive statement to another, intending it to be relied on, he must not complain that the other need not have relied upon it. "The Purchaser is induced to make a less accurate examination by the representation which he had a right to believe".[3] But when a purchaser chooses to rely upon his own judgement or of his agent, he cannot afterwards say that he relied upon a previous representation made by the vendor.[4] Again the possession of obvious means of knowledge may lead, in some cases, to a fair inference that those means were used and relied on. But still the real point to be considered is whether the party misled did put his trust in the representation made to him of which he complains, or in other information of his own. In the latter case the misrepresentation did not really cause his consent.

The exception to Section 19, though ambiguously worded, is not intended to depart from the well established rule of English Law.[5]

The exception lays down that the contract is not voidable but is binding to a party whose consent was caused by misrepresentation (as defined in s. 18 of the Act) or by silence fraudulent (i.e. silence amounting to fraud) within the meaning of S. 17 of the Act if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.[6]

The reasoning for this conclusion, according to these High Courts, is that the word "fraudulent" (within the meaning of S. 17 of the Act) appearing in Section 19 applies to the preceding word "silence" exclusively, and not to the word "misrepresentation". Also, the Legislature has used the preposition "by" twice i.e. both before "misrepresentation" and also before "silence". If the expression "fraudulent within the meaning of S. 17 were to qualify the word "misrepresentation", the result would be startling as due deligence would be required where misrepresentation became fraudulent but not when the misrepresentation fell within S. 18 of the Act and it was not fraud. Thus to sum up, the plaintiff is required to exercise due diligence to find out the truth when his consent was caused by active misrepresentation as defined in S. 18 of the Act or by silence amounting to fraud as defined in S. 17 of the Act.

The ordinary diligence of which the Exception speaks may be taken to be such diligence as a prudent man would consider appropriate to the matter having regard to the

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[99] See the Specific Relief Act, 1963, s. 21.

[1] See the Specific Relief Act, 1963, s. 20.

[2] *Rangnath* v. *Govind* (1940) 28 Bom. 639.

[3] *Dyer* v. *Hargrave* (1805) 10 Ves. 505, 510.

[4] *Redgrave* v. *Hurd* (1881) 20 Ch. Div. 1.

[5] *Niaz Ahmed Khan* v. *Parshottam Chandra* A.I.R. 1931 Allah. 154, 157.

[6] *Niaz Ahmed Khan* v. *Parshottam Chandra* A. 1931 All. 154; *J.M. Apcar* v. *L.C. Malchus A.* 1939 Cal. 473; *Venkataratnam* v. *Sivaramudu* A. 1940 Mad. 560; *Niranjan* v. *Tirilochan* A. 1956 Oris. 81.

importance of the transaction in itself and of the representation in question as affecting its results. A possibility of discovering the truth by inquiries involving trouble or expense out of porportion to the value of the whole subject-matter would not, it is conceived, be "means of discovering the truth with ordinary diligence." The standard of diligence required is not that of a person learned in the law who might be able to discover it after careful examination of legal authorities.[7] Where a purchaser was misled by certain statements of the accredited agents of the Court made at the auction sale held under orders of the Court, it was held that the purchaser hand no means of discovering the truth while the sale was going on.[8] Where a vendor leased a plot of land to a third party and thereafter sold the same land to a purchaser, without disclosing the fact of the prior lease, it was held that the vendor could not plead that the purchaser could have discovered it with diligence.[9] Where a purchaser of rice stored up at a place to which he had an easy access refused to take delivery on the ground that the rice was of an inferior quality to that contracted for, it was held that he could not rescind the contract, for he could have discovered the inferiority of the quality by using "ordinary diligence".[10]

On the other hand, as the learned authors, Sir Frederick Pollock and Sir Dinshah Mulla in their work on the Contract Act say:

"the exception does not apply to cases of active fraud as distinguished from misrepresentation which is not fraudulent."

Cases of deliberate active fraud and of misrepresentation which is fraudulent are not within the exception to S. 19 of the Act. Here plaintiff's failure to exercise due diligence to discover the truth will not be a good defence to the defendant. The aforesaid principle was applied in the following cases. In *John Minas Apcar* v. *Louis Caird Malchus*.[11] Defendant who wanted to sell his property caused letters to be written to him in which fictitious offers for the property at high prices were made with the sole purpose of showing it to an intending purchaser. According to the Calcutta High Court this was fraud under S. 17 of the Act an exception to S. 19 was not applicable.

In *Venkataratnam* v. *Sivaramudy*,[12] a vendor not only failed to disclose that he has leased away the land which was being sold, but stated that immediate possession would be given. The Madras High Court did not allow the vendor to take the defence that the vendee had failed to exercise due diligence and vendee was allowed to treat the contract as voidable. In *Niranjan Samal* v. *Tirilochan*,[13] Plaintiff filed a suit to set aside compromise decree on the ground that he agreed to compromise the suit with the defendant on the assurance that the other civil and criminal cases would be withdrawn but this was an empty assurance with the intention of not fulfilling it. It was held plaintiff could set aside the compromise decree as it was a case of fraud and the defendant's defence that a plaintiff failed to exercise ordinary diligence was not accepted. In *Ganpat* v. *Mangilal*,[14] contract was vitiated by fraud on account of a false statement that property to be sold was free from mortgage. The court held the contract voidable and exception to S. 19 was not applicable on account of the fraud of the vendor.

Further exceptions:

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[7] In *Re: Nursey Spg. & Wvg. Co Ltd.*, 5 Bom. 92 (98).

[8] *Kala Mea* v. *Harperink*, 36 Cal. 323 (P.C.).

[9] *Venkataratnam* v. *Sivaramudu*, A.I.R. (1940) Mad. 560; *John Minas Apcar* v. *Louis Caird* (1939) 1 Cal. 389.

[10] *Shoshi Mohun Pal* v. *Nobo Kristo* (1878) 4 Cal. 801.

[11] See Supra f.n. 6.

[12] See Supra f.n. 6.

[13] See Supra f.n. 6.

[14] A. 1962 M.P. 144.

Loss of right to rescind.—In some cases defaults or acts or delay on the part of the aggrieved party would disable him from rescinding the contract e.g. where restitution is impossible or a third party has *bona fide* and for value acquired possessory title or where it is inequitable to do so. Where a purchaser of a lorry knowingly accepted the serious defects existing in it, but went on the journey in it. When it broke down completely, it was held that it was too late for the purchaser to rescind and secondly restitution was not possible.[15] Where a purchaser of a picture wanted to rescind the contract after waiting for five years, it was held that it was too late for him to rescind and it would be very unreasonable to do so.[16] A shareholder wishing to repudiate the contract of sales of shares by declining to pay call money was disentitled to do so after the company went into liquidation and the creditors of the company under liquidation had acquired certain rights.[17]

In case of one University, a student filled in the form for examination, the form was passed by the head of department and university authorities and the student was allowed to appear. Subsequently finding that the form was filled in by the student making certain wrong statement, the University authorities cancelled the candidature of the student, it was held that the University authorities could have easily discovered the infirmities in the admission form but they and the head of department overlooked the infirmities and allowed the student to appear and hence they could not complain of fraud and could not withdraw the candidature of the student.[18]

Explanation : as to "causing consent."—A false representation, whether fraudulent or innocent, is merely irrelevant if it has not induced the party to whom it was made to act upon it by entering into a contract or otherwise. He cannot complain of having been misled by a statement which did not lead him at all. Hence an attempt to deceive which has not in fact deceived the party can have no legal effect on the contract, not because it is not wrong in the eye of the law, but because there is no damage. This rule is applicable where a seller of specific goods purposely conceals a fault by some contrivance, in order that the buyer may not discover it if he inspect the goods, but the buyer does not in fact make any inspection.[19] "Deceit which does not affect conduct cannot create liabilities."[20] "If it is proved that the defendants with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. . . . Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act."[21] There is no rule of law that any particular kind of statement is necessarily material in some cases and immaterial in others. In general one man's money is as good as another's, and in a contract of loans the lender's personality is indifferent to the borrower; but where a money-lender who has acquired an evil repute for hard dealing in his own name advertises and lends money in assumed names, it is a permissible inference of fact that the concealment of his identity was a fraud inducing the borrower to contract with him.[22]

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[15] *Long* v. *Lloyd*, (1958) 1 W.L.R. 753.
[16] *Leaf* v. *International Galleries*, (1950) 2.K.B. 86.
[17] *Oakes* v. *Turquand*, (1867) L.R. 2 H.L. 325.
[18] *Shri Krishan* v. *Kurukshetra University*, (1976) 1 S.C.C. 311.
[19] *Horsfall* v. *Thomas* (1862) 1. H. & C. 90.
[20] Anson, p. 207, 17th ed.
[21] *Smith* v. *Chadwick* (1884) 9 App. Ca. 187, 196 (Lord Blackburn).
[22] *Gordon* v. *Street* (1899) 2 Q.B. 641 C.A.

Rescission of voidable contracts.—As to the consequences of the rescission of voidable contracts, see sec. 64.

Specific performance.—As to the effect of fraud and misrepresentation on the rights of a party to claim or resist specific performance, see Specific Relief Act, XLVII of 1963, secs. 18(a), 26 and 27 (1) (a).

Power to set aside contract induced by undue influence.

19-A. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely, or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court[23] may seem just.

Illustrations

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

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

Contract induced by undue influence.—This section appears to be intended to give express sanction to the constant practice of Indian as well as English Courts in cases of unconscionable money-lending, namely to relieve the borrower against the oppressive terms of his contract, but subject to the repayment to the lender of the money actually advanced with reasonable interest. (See the illustrations.) The rate of interest allowed by the High Courts as reasonable has varied, according to circumstances, from 6 and 12 per cent in Bengal to 24 per cent in Bombay, Madras and Uttar Pradesh.[24]

The second paragraph of the section is virtually a reproduction of secs. 35 and 38 of the Specific Relief Act. The combined effect of those two sections is that a contract in writing may be rescinded at the suit of a party when (amongst other causes) it is voidable, but that the Court may require the party rescinding to make any compensation to the other which justice may require. It may be noted that under the present section the contract need not be in writing. See also sec. 64 below, which leaves no discreation to the Court in the matter of restitution.

Contract procured by undue influence is only a voidable one and only gives the person under undue influence a right of choice or election. Such a right once exercised is exhausted. So, if by notice expressly given or implied by conduct, the Promisor elects

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[23] The refusal of terms suggested by the Court leaves this discretion free: *Sunder Rai* v. *Suraj Bali Rai* (1925) 47 All. 932.

[24] *Raja Mohkam Singh* v. *Raja Rup Singh* (1893) 15 All. 352, L.R. 20 I.A. 127 (where 20 per cent was allowed); *Maneshar Bakhsh Singh* v. *Shadi Lal* (1909) 31 All. 386, L.R. 36 I.A. 96 (where 18 per cent was allowed); *Poma Dongra* v. *William Gillespie* (1907) 31 Bom. 348 (where 24 per cent was allowed); *Rannee Annapurni* v. *Swaminatha* (1910) 34 Mad. 7 (where 24 per cent was allowed).

to affirm, he cannot afterwards claim to avoid; Similarly, if he has once elected to avoid, he cannot afterwards be allowed to affirm in his own interest.[25]

Who can raise the plea.—A plea of undue influence can only be raised by a party to the contract and not by a third party.[26] A registered gift deed cannot be challenged by a third party, it can be challenged by the donor.[27]

Heirs and legal representatives of deceased contracting party.—Benefit and burden of promises devolve on legal representative of a deceased contracting party (*vide* secs. 37, 42, 45) and hence that principle would apply to sections 19 and 19A.[28] Heirs of a deceased vendor could therefore file a suit to set aside the sale deed executed by the deceased vendor on the ground of undue influence.[28]

Agreement void where both parties are under mistake as to matter of fact.

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

Explanation—an erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.[29]

Illustrations

(a) *A* agrees to sell to *B* a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of these facts. The agreements is void. [*Couturier* v. *Hastie* (1856) 5. H.L.C. 673].

(b) *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void. [Pothier, Contract de Vente, cited 5 H.L.C. 673].

(c) *A*, being entitled to an estate for the life of *B*, agrees to sell it to *C*. *B* was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void [*Strickland* v. *Turner* (1852) 7 Ex. 208; *Cochrane* v. *Willis* (1865) L.R. 1 Ch. 58].

Mistake of fact.—In order to render a contract void on the ground of mistake, there should exist three things as under:—

(1) Both parties to the contract must be under a mistake;

(2) Mistake should be one of fact and not of law;

(3) Mistake should be essential to the agreement.

Mutual mistake.—A mistake known at the time of making a contract to the other party is to be established.[30] If mistake is unilateral,[31] agreement is not rendered void. See sec. 22 *infra*.

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[25] *Kunja Lal* v. *Hara Lal*, A. 1943 Cal. 162.

[26] *Kotumal* v. *Dur Mahomed* (1931) A.S. 78.

[27] *Trimbak* v. *Shanker Shamrav*, 36 Bom. 37; *Venkatasubbiah* v. *Subbamma*, A.I.R. (1956) A.P. 195.

[28] *Shravan Goba* v. *Kashiram Devji* (1927) 51 Bom. 133 (140); *Mahboolkhan* v. *Hakim Abdul*, A.I.R. (1964) Raj. 250.

[29] See *Harilal Dalsukhram Sahiba* v. *Mulchand* (1928) 52 Bom. 883. See also *Soorath Nath Banarjee* v. *Bharasankar Goswami* (1928) 33 C.W.N. 626.

[30] *Dagdu* v. *Bhana*, 28 Bom. 420; *Lakshmana Prasada* v. *Achutan Nair*, A.I.R. (1952) Mad. 779.

[31] *China & Southern Bank* v. *Te Thve Seng*, (1925) 3 Rang. 477; *Bell* v. *Lever Bros. Ltd.* (1932) A.C. 161.

Mistake of fact.—Where moneys were paid under an unilateral mistake of law, it was held that the mistake did not come under this section.[32] Where there was a mistake with regard to the law of registration of a document upon validity of assignment deed and where a prior lease was treated as forfeited upon the assignment of the term on the ground of breach of the lease and upon such assumption a new lease was granted to a new party and it turned out that the lessor had no right to forfeit the prior lease, as assumed, it was held that there was no mistake of fact but there was a mistake of law.[33] Ignorance of a private right was on par with a mistake of fact.[34] So in *Cooper* v. *Phibbs* *X* agreed to take a lease of a fishery from *Y*, although, unknown to both the parties, it already belonged to *X*. It was held that the lease must be set aside as both the parties contracted under a mutual mistake and misapprehension as to their relative and respective rights.

Mistake essential to agreement.—It is not that a mistake has any special operation because it is a mistake, but that the true intention of the parties was to make their agreement conditional on the existence of some state of facts which turns out not to have existed at the date of the agreement. Where the contract was for the sale of an object not existing, or which has ceased to exist according to the description by which it was contracted for, the result is still more easily apprehended if we say that there was nothing to buy and sell.

This section is based on a mistake at the time of the formation of contract but not on a mistake coming into existence subsequently.[35] Where a specific article is offered for sale without any express warranty or without specifying the purpose for which the purchaser required the article and the buyer had full opportunity to inspect the sample of the article and he agreed to purchase it relying upon his own judgement, the rule of *caveat emptor* applied.[36] If a contracting party tells the other party "I am well known to the . . . Bank in your city" and upon such statement the other party enters into a contract, it was held that there was no mistake of fact, the said statement was a statement of his own opinion of his creditworthiness.[37]

The mistake must be "as to a matter of fact *essential* to the agreement." It is not enough that there was an error "as to some point, even though a material point, an error as to which does not affect the substance of the whole consideration."[38] Where a property agreed to be sold had been notified for acquisition under the Calcutta Improvement Act, and neither the vendor nor the purchaser was aware of the notification at the date of their agreement, the notification was held to constitute a matter of fact essential to the agreement within the meaning of this section and the agreement was declared void.[39] Upon the same principles a compromise of a suit will be set aside if it was brought about under a mistake as to the subject-matter of the agreement.[40] Not only a compromise,[41]

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[32] *Raja Rajeswara* v. *Secretary of State for India*, A.I.R. (1929) Mad. 179: 56 Mad. L.J. 269.

[33] *Kalyanpur Lime Works* v. *State of Bihar* (1954) S.C.R. 958: A.I.R. (1954) S.C. 165.

[34] *Cooper* v. *Phibbs* (1867) 2 H.L. 149.

[35] *Babshetti* v. *Venkataramana*, 3 Bom. 154: *Bell* v. *Lever Bros. Ltd.* (1932) A.C. 161 (191); *Dagdu* v. *Bhana*, 28 Bom. 420 (426): 6 Bom. L.R. 126.

[36] *Smith* v. *Hughes* (1871) 6 Q.B. 597.

[37] *Hope Prudhomme* v. *Earnest Max* (1915) 29 I.C. 575.

[38] Per Blackburn, J., in *Kennedy* v. *Panama Mail Co.* (1867) L.R. 2 Q.B. 580, 588.

[39] *Nursing Dass* v. *Chuttoo Lall* (1923) 50 Cal. 615.

[40] *Bibee Solomon* v. *Abdool Azeez* (1881) 6 Cal. 687, 706.

[41] *Hickman* v. *Berens* (1895) 2 Ch. 638.

but an order of the Court made by consent.[42] may be set aside if the arrangement was entered into under a one-sided mistake of counsel to which the other party, however innocently, contributed, or even otherwise if the mistake was such as to prevent any real agreement from being formed. *A fortiori* it is so in the case of the mistake being common to both parties.[43] A mistake as to an existing fact renders the contract void *ab initio*, but if the mistake is as to some future event, it is a binding contract, which may be avoided at some future date if the expected event does or does not occur.[44]

Where a mistake related not to the subject-matter of the service contract but to quality of service contract, it is not a mistake essential to the agreement.[45] Where a contract is entered into upon the basis that a certain price is the controlled price while it turns out that the controlled price was actually lower, it was held that the mistake was essential to the agreement.[46] If there is a misdescription of the property, the question is whether it affects the subject-matter of the contract and whether but for such misdescription, the purchaser would not have agreed to purchase, in such a case the misdescription would be essential to the agreement.[47] In *Sheikh Brothers Ltd.* v. *Ochsner*,[48] an appeal from Kenya, the Privy Council construed S.20 of the Indian Contract Act in the following facts. Appellants contracted with Respondent to grant him a licence to cut, process and manufacture all Sisal grown on the particular estate of which they were the lessees. In return, Respondent deposited some amount and undertook to deliver to Appellants 50 tons of Sisal fibre, manufactured by him, each month. The estate was, in fact, not capable of producing such a quantity of Sisal as would meet this requirement. It was held that the Contract was void.

Specific Performance.—As to the right of a party to resist specific performance of a contract on the ground of mistake, see Specific Relief Act, XLVII of 1963, sec. 18 (a).

Rectification.—The courts will not rectify an instrument on the ground of mistake unless it is shown that there was an actual concluded contract antecedent to the instrument sought to be rectified, and that the contract is inaccurately represented in the instrument. What is rectified is not the agreement but the mistaken expression of it.[49] Ordinarily this mistaken expression would be in the form of a document, but the existence of a real oral agreement prior to the document is necessarily implied.[49] The rectification consists in bringing the document into conformity with this prior agreement, where the expression in the document is contrary to the concurrent intention of all the parties.[49] Thus in a Bombay case[50] the plantiffs chartered a steamer from the defendants to sail from Jedda on "the 10th August 1892 (fifteen days after the *Haj*)," in order to convey pilgrims returning to Bombay. The plaintiffs believed that "the 10th August 1892" corresponded with the fifteenth day after the *Haj* but the defendants had no belief on the subject, and contracted only with respect to the English date. The 19th July 1982, and not the 10th August 1892, in fact corresponded with the fifteenth day after the *Haj*.

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[42] *Wilding* v. *Sanderson* (1897) 2 Ch. 534.

[43] *Huddersfield Banking Co.* v. *H. Lister & Son* (1895) 2 Ch. 273.

[44] *Chandanmull* v. *Clive Mills Co. Ltd.* (1948) 52 C.W.N. 521, ('48) A.C. 257.

[45] *Bell* v. *Lever Bros. Ltd.* (1932) A.C. 161 (191).

[46] *Lakshmana Prasada* v. *Achutan Nair*, A.I.R. (1952) Mad. 779.

[47] *Krishnaji Gopinath* v. *Ramchandra*, A.I.R. (1932) Bom. 51.

[48] (1957) A.C. 136.

[49] *Dagdu* v. *Bhana*, 28 Bom. 420: 6 Bom. L.R. 126.

[50] *Haji Abdul Rahman Alarakhia* v. *The Bombay and Persia Steam Navigation Co.* (1892) 16 Bom. 561.

On finding out the mistake the plaintiffs sued the defendants for rectification of the charter-party. It was held that the agreement was one for the 10th August, 1892; that the mistake was not mutual, but on the plaintiff's part only; and, therefore, that there could be no rectification. The court observed that plaintiff seeking rectification must show that there was an actual concluded contract earlier to the instrument sought to be rectified and such a contract is inaccurately represented in the instrument. This was not so in the facts of the case. The Court further expressed its opinion that even if both the parties were under the mistake the Court would not rectify, but only cancel the instrument, as the agreement was one for the 10th August 1892, and that date was a matter materially inducing the agreement. See also Specific Relief Act, Ch. III, and the undermentioned case.[51]

Compensation.—Note, in connection with the present section, the provision of sec. 65 that when an agreement is discovered to be void any person who has received any advantage under the agreement is bound to restore it, or to make compensation for it, to the person from whom he received it. A deficiency in quantity of land (or anything) sold which can be adequately dealt with by compensation does not come within this section at all.[52]

Effect of mistakes as to law.

21. A contract is not voidable because it was caused by a mistake as to any law in force in India; but a mistake as to a law not in force in India has the same effect as a mistake of fact.

Illustration

A and *B* make a contract grounded on the erroneous belief that a particular debt is barred by the Indian law of limitation; the contract is not voidable.

Effect of mistake of law.—It is a citizen's business to know, by taking professional advice or otherwise, so much law as concerns him for the matters he is transacting. No other general rule is possible, as has often been observed, without enormous temptations to fraud. But it is to be observed that the existence of particular private rights is a matter of fact, though depending on rules of law, and for most civil purpose ignorance of civil rights—a man's ignorance that he is heir to such and such property, for instance—is ignorance of fact. A man's promise to buy that which, unknown to him, already belongs to him is not to be made binding by calling his error as to the ownership a mistake of law.[53] It is a mistake of fact as to title and the agreement is void.

The section does not say that misrepresentation, at any rate, wilful misrepresentation, of matter of law, may not be ground for avoiding a contract under sec. 17 or sec 18.

The cases in which the present section has actually been applied have been fairly simple. An erroneous belief that judgement-debtor is bound by law, to pay interest on the decretal amount, though no interest has been awarded by the decree, is a mistake of law, and a contract grounded on such belief is not voidable. Such a belief is not a belief as to a matter of fact essential to the agreement within the meaning of sec. 20: the Judicial Committee so held in *Seth Gokul Dass* v. *Murli*.[54] If a mortgage advances moneys under the erroneous belief that a prior unregistered mortgage deed would not take precedence even if registered subsequently, he cannot avoid the mortgage transaction.[55] The

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[51] *Madhavji* v. *Ramnath* (1906) 30 Bom. 457.

[52] *U Pur.* v. *Maung Po Tu* (1927) 100 I.C. 327, ('27) A.R. 90.

[53] See *Cooper* v. *Phibbs*, L.R. 2 H.L. 149.

[54] (1878) 3 Cal. 602; L.R. 5 I.A. 78.

[55] *Jowand Singh* v. *Sawan Singh* ('33) A.L. 836.

erroneous belief that the tribunal under a Debt Conciliation Act had jurisdiction over a non-agriculturist is a mistake of law.[56]

Mistake of foreign law.—As to the second clause of the section, Indian jurisprudence has adopted the rule of the Common Law that foreign law is a matter of fact, and must be proved or admitted as such, though the strictness of the rule has been somewhat relaxed by the Evidence Act.[57]

Contract caused by mistake of one party as to matter of fact.

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. (See comments under sec. 20.)

As an illustration of the rule, see *Haji Abdul Rahman Allarakhia* v. *The Bombay and Persia Steam Navigation Co.*[58] See p. 71 above. Similarly the court did not allow the contract to be avoided when petitioner alone was under a bonafide mistake that auction was held on the basis that the rental for the auction of the fishery right was for three years and not for one year. The respondent who was the other party to the contract did not share this mistake. The court reiterated that under s. 22 of the Act a contract is not voidable when one party alone was mistaken as to a fact.[59]

What considerations and objects are lawful and what not.

23. The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or

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

is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.

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

Illustrations

(a) *A* agrees to sell his house to *B* for 10,000 rupees. Here *B's* promise to pay the sum of 10,000 rupees is the consideration for *A's* promise to sell the house, and *A'* promise to sell the house is the consideration for *B's* promise to pay the 10,000 rupees. These are lawful considerations.

(b) *A* promises to pay *B* 10,000 rupees at the end of six months, if *C*, who owes that sum to *B*, fails to pay it. *B* promises to grant time to *C* accordingly. Here the promises of each party is the consideration for the promise of the other party and they are lawful considerations.

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

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[56] *Ghanshyam* v. *Girijashanker* (1944) Nag. 244, A.I.R. 1944 Nag. 247.

[57] Indian Evidence Act, s. 38.

[58] (1892) 16 Bom. 561.

[59] *A. Singh* v. *Union of India* A.I.R. 1970 Manipur 16 at 21.

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

(e) *A*, *B* and *C* enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void as its object is unlawful.

(f) *A* promises to obtain for *B* an employment in the public service, and *B* promises to pay 1,00 rupees to *A*. The agreement is void, as the consideration for it is unlawful.

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

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

(i) *A*'s estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. *B*, upon an understanding with *A*, becomes the purchaser, and agrees to convey the estate to *A* upon receiving from him the price which *B* has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.[60]

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

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

Unlawful objects.—By sec. 10 an agreement is a contract (i.e. enforceable) only if it is made for a lawful consideration and with a lawful object. The present section declares what kinds of consideration and object are not lawful.

The word "object" in this section is not used in the same sense as "consideration," but it is used as distinguished from "consideration," and it means "purpose" or "design".[61]

With regard to a consideration being forbidden by law, it is to be observed that, where the consideration is a promise, it may be forbidden in one of two distinct senses: (1) the promise may be something which it is unlawful to perform or (2) though the performance is not unlawful, the law for reasons of public policy will not enforce it. Thus agreements of wager, or in restraint of trade (apart from the limited sanction given to them) are not unlawful but no legal obligation attaches to them as the law will not enforce them.

An agreement may be rendered unlawful by its connection with a past as well as with a future unlawful transaction. Thus the giving of security for money purporting to be payable under an agreement whose purpose was unlawful is itself an unlawful object, even though it was not stipulated for by the original agreement.[62]

With regard to the tendency of an agreement to "defeat the provision of any law,"

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[60] See *Mohan Lal* v. *Udai Narayan* (1910) 14 C.W.N. 1031, which is a parallel case.

[61] *Jaffer Meher Ali* v. *Budge Budge Jute Mills Co.* (1906) 33 Cal. 702, 710; see on appeal (1907) 34 Cal. 289; *Sreenivasa Rao* v. *Rama Mohana* A.I.R. 1952 Mad. 579.

[62] *Fisher* v. *Bridges* (1854) 3 E. & B. 342; *Geere* v. *Mare* (1863) 2 H. & C. 399.

these words must be taken as limited to defeating the intention which the Legislature has expressed, or which is necessarily implied from the express terms of an act. It is unlawful to contract to do that which it is unlawful to do; but an agreement will not be void merely because it tends to defeat some purpose ascribed to the Legislature by conjecture, or even appearing, as a matter of history, from extraneous evidence, such as legislative debates or preliminary memoranda not forming part of the enactment.

There is no department of the law in which the Courts have exercised larger powers of restraining individual freedom on grounds of general utility and it is impossible to provide in terms for this discretion without laying down that all objects ate unlawful which the Court regards as immortal or opposed to public policy. The epithet "immoral" points, in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment. "Public policy" points to political, economical or social grounds of objection, outside the common topics of morality, either to an act being done or to a promise to do it being enforced. Agreements or other acts may be contrary to the policy of the law without being morally disgraceful or exposed to any obvious moral censure.

English authorities on the subject of agreements being held unenforceable as running counter to positive legal prohibitions, to morality, or to public policy, are inapplicable to the circumstances of India; because under the conditions of Indian manners and society such facts as are dealt with by certain classes of English decision do not occur.

(1st Clause)

"Forbidden by Law."—An act or undertaking is equally forbidden by law whether it violates a prohibitory enactment of the Legislature or a principle of unwritten law. But in India, where the criminal law is codified, acts forbidden by law seem practically to consist of acts punishable under the Penal Code and of acts prohibited by special legislation, or by regulations or orders made under authority derived from the Legislature. Parties are not, as a rule, so foolish as to commit themselves to agreements to do anything obviously illegal, or at any rate to bring them into Court; so the kind of question which arises in practice under this head is whether an act, or some part of a series of acts, agreed upon between parties does or does not contravene some legislative enactment or regulation made by lawful authority. Broadly speaking, that which has been forbidden in the public interest cannot be made lawful by paying the penalty for it; but an act which is in itself harmless does not become unlawful merely because some collateral requirement imposed for reasons of administrative convenience has been omitted.

Cases under this head have arisen principally in connection with Excise Acts, and they have almost all been decided with reference to English law. The principles may be stated thus: "When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed; but they are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, e.g. the convenient collection of the revenue."[63]

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[63] See Pollock on Contract, 11th Edn., p. 275; 28 (F.B.).
Fakirchand v. *Bansilal*, A.I.R. 1955 Hyd.

The High Court of Bombay acted on these principles[64] where the question arose whether an agreement by a lessee of tolls from Government under the Bombay Tolls Act, 1875, to sub-let the tolls was valid and binding between the lessee and sub-lessee. Section 10 of the Act empowered the Government to lease the levy of tolls on such terms and conditions as the Government deemed desirable. One of the conditions of the lease was that the lessee should not sub-let the tolls without the permission of the Collector previously obtained, and another condition empowered the Collector to impose a fine of Rs. 200 for a breach of the condition. The lessee sub-let the tolls to the defendant without the permission of the Collector, and then sued him to recover the amount which he had promised to pay for the sub-lease. It was contended on behalf of the defendant that the sub-lease was unlawful, as it was made without the permission of the Collector, and that the lessee was not therefore entitled to recover the amount claimed by him. But the contention was overruled as the Act did not forbid the transaction but merely imposed a condition for administrative purposes. Similarly, where a licence to cut grass was given by the Forest Department under the Forest Act,1878, and one of the terms of the licence was that the licensee should not assign his interest in the licence without the permission of the Forest Officer, and a fine was prescribed for a breach of this condition, it was held that there being nothing in the Forest Act to make it obligatory upon the parties to observe the conditions of the licence, the assignment would be binding upon the parties, though it was competent to the Forest Officer to revoke the licence if he thought fit to do so.[65] The above Acts, which are intended solely for the protection of revenue, must be distinguished from Abkari and Opium Acts, which have for their object the protection of the public as well as the revenue. Thus an agreement to sub-let a licence to sell arrack issued under the Madras Abkari Act, 1886,[66] or a licence to manufacture and sell country liquor granted under the N.-W.P. Excise Act, 1887,[67] or a licence to sell opium issued under the Opium Act, 1878,[68] or a licence to manufacture salt under the Bombay Salt Act, 1890,[69] without the permission of the Collector, is illegal and void, the sub-lease in each case without such permission being prohibited by statute, and no suit will lie to recover any money due or any sum deposited under such an agreement. A breach of a condition of a licence granted under the Bombay Abkari Act, 1877, is penal under that Act. Therefore if the licensee enters into a partnership in breach of the terms of his licence the agreement is void as forbidden by law.[70] Nor does it make any difference if the partnership was entered into before the licence was obtained.[71] A contract which is illegal at its inception, because it is forbidden by a Government regulation, does not become valid after the expiry of the regulation.[72] In such cases parties cannot recover

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[64] *Bhikanbhai* v. *Hiralal* (1900) 24 Bom. 622; followed, *Abdullah* v. *Allah Diya* (1927) 8 Lah. 310; *Bhagwani Genuji* v. *Gangabisan* (1940) 42 Bom. L.R. 750, 191 I.C. 806, ('40) A.B. 369.

[65] *Nazaralli* v. *Baba Miya* (1916) 40 Bom. 64.

[66] *Thithi Pakurudasu* v. *Bheemudu* (1902) 26 Mad. 430.

[67] *Debi Prasad* v. *Rup Ram* (1888) 10 All. 577. As to what amounts to a sublease, see *Radhey Shivam* v. *Mewa Lal* (1929) 51 All. 506.

[68] *Raghunath* v. *Nathu Hirji* (1894) 19 Bom. 626.

[69] *Ismalji* v. *Raghunath* (1909) 33 Bom. 636; *Rabiabibi* v. *Gangadhar* (1922) 24 Bom. L.R. 111.

[70] *Hormasji* v. *Pestonji* (1887) 12 Bom. 422; *Vishwanathan* v. *Namakchand*, A.I.R. (1955) Mad. 536; *Maniam Hiria* v. *Naga Maistry*, A.I.R. (1957) Mad. 620.

[71] *Velu Padayachi* v. *Sivasooriam* (1950) Mad. 987, ('50) A.M. 444 (F.B.).

[72] *Krishan Lal* v. *Bhanwar Lal* ('52) A. Raj. 81.

any moneys paid under agreements, which are void as being forbidden by law.[73]

In the case of contracts with public departments the breach of a condition is sometimes the subject of a pecuniary penalty. It does not follow that an agreement in breach of such a condition is immoral or opposed to public policy and therefore void. If the condition is imposed for administrative purposes such an agreement is valid and the consequences are limited to the specific penalty.[74]

Agreement between partners providing that one of them shall enter into a wagering transaction on behalf of the firm with an outsider and profit and loss resulting from the transaction would be borne by them in equal shares is void and unenforceable, but it is not forbidden by law under the first clause of S.23 of the Act and so it is not unlawful under S.23 of the Act.[75] The word void cannot be equated with the expression 'forbidden by law'.[75] Even a partnership formed to carry on a wagering transaction is not unlawful.[76]

(2nd Clause)

"Defeat the provisions of any law."—The term "law" in this expression would seem to include any enactment or rule of law for the time being in force in India. This branch of the subject may thus be considered under three heads according as the object or consideration of an agreement is such as would defeat, (1) the provisions of any legislative enactment, or (2) the rules of Hindu and Mahomedan law, or (3) other rules of law for the time being in force in India.

1. Legislative enactment.—An agreement to pay a cess which the law has declared to be illegal is void. So when the manager of a temple at Broach sued to establish a right to levy duty on cotton exported from Broach, the Court held that, even if the defendant had impliedly assented to pay, the agreement was unlawful as defeating the provisions of the Bombay Town Duties Act XIX of 1844, which had abolished all cesses not forming part of the land revenue.[77] Again, if a suspect who is ordered to furnish security for good behaviour under the Code of Criminal Procedure deposits the amount of the security bond with the surety, he will not be able to recover it by a suit. This is because the effect of the agreement of deposit is to defeat the provisions of the Code by rendering the surety, a surety only in name.[78] Similarly, if a bail-bond is forfeited owing to the failure of the accused to appear, the surety cannot recover the amount from a person who agreed to indemnify him.[79] But when an agreement is merely "void" as distinguished from "illegal," e.g. an agreement to give time to a judgement-debtor without the sanction of the Court under the old Civil Procedure Code—either party on performing his part of the contract can enforce it as against the other party.[80] Under sec. 11 (2) of the Indian Companies Act, 1956, a trading partnership of more than 20 persons is illegal unless registered as a company. It has been held that suit will not lie for the dissolution of such a partnership as it would defeat the provisions of the Companies Act.[81] But the

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73 *Venkata* v. *Attar Sheik* ('49) A.M. 252.

74 *Bhikanbhai* v. *Hiralal* (1900) 24 Bom. 622 approving *Gangadhar* v. *Damodar* (1896) 21 Bom. 522.

75 *Gherulal Parakh* v. *Mahadeodas* A.I.R. 1959 S.C. 781, 785, Para 8 and 792, Para 20.

76 Ibid.

77 *Swami Shri Purushotamji Maharaj* v. *Robb* (1884) 8 Bom. 398.

78 *Fateh Singh* v. *Sanwal Singh* (1878) 1 All. 751.

79 *Bhupati Ch. Nandy* v. *Golam Ehibor Chowdry* (1919) 24 C.W. N 368.

80 *Bank of Bengal* v. *Vyabhoy* (1891) 16 Bom. 618.

81 *Mewa Ram* v. *Ram Gopal* (1926) 48 All. 735.

illegality of the partnership affords no reason why it should not be sued by an innocent person who is not aware of the illegality which affects the firm.[82]

The policy of the Insolvent Debtors Act is to make the relief of the insolvent conditional on all his property being available for rateable distribution among all his creditors. Therefore an agreement made by an insolvent to pay one creditor in full in consideration of his not opposing his discharge is void as inconsistent with the policy of the Act.[83] An agreement by a debtor not to plead limitation is not a restraint of legal proceedings under s. 28 but it is void under s. 23, as it would defeat the provisions of the Limitation Act.[84]

Where a discharged insolvent agrees to pay his old debt in consideration of the creditor entering into a fresh transaction, the transaction is valid.[85] In a partition suit a decree was passed against one of the parties for Rs.1,000 for the marriage expenses of another party. In order to evade the Child Marriage Restraint Act (XIX of 1929) the marriage of the party in whose favour the decree was passed was performed in a Native State, where there was no prohibition against such a marriage. It was held that the decree could be executed for the marriage expenses.[86]

Contracts forbidden by regulations under the Defence of India Act are illegal.[87] Agreements in contravention of the Jute Control Order and the Oil Seeds Order are void, and so are any references to arbitration contained in such agreements.[88] The principal could not recover moneys received by the agent by means of sale of quota rights contrary to Imports and Exports Act.[89]

Agreements in contravention of Agra Tenancy Act,[90] Bengal Tenancy Act,[91] West Bengal Premises Rent Control Act.[92] would not be enforced. Agreement entered into by the State Road Transport Corporation with another to run his bus as a nominee of the Corporation on the route in respect of which permit was issued in favour of the Corporation for 5 years was contrary to sections 42 and 59 of the Motor Vehicles Act 1939.[93] Corporation cannot allow its nominee to run the vehicles against payment of some amount to Corporation. There is no statutory provision authorising the Corporation to grant of such permit as it would be exercising power of the Regional Transport Authority and Corporation cannot indirectly clutch at jurisdiction of the Regional Transport Authority.[94]

The well known doctrine in *pari delicto potior est conditio defentis* ["where the circumstances are such that the court will refuse to assist either party, the consequences must in fact be that party in possession will not be disturbed." Stroud's Judicial Dictionary 4th edition (1973) Vol. III p. 1317] was considered by the Supreme Court in two

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[82] *Appa Dada Patil* v. *Ramkrishna Vasudeo Joshi* (1929) 53 Bom. 652.

[83] *Naoroji* v. *Kazi Sidick Mirza* (1896) 20 Bom. 636.

[84] *Ballapraguda* v. *Thumnana* (1917) 40 Mad. 701; *Jawahar Lal* v. *Mathura Prasad* ('34) A.A. 661 (F.B.).

[85] *Hashim Ismail* v. *Chotalal* (1938) 174 I.C. 863, ('38) A.R. 11.

[86] *Anandaramayya* v. *Subbayya* (1940) 2 M.L.J. 353, ('40) A.M. 901.

[87] *Abdulla Saheb* v. *Guruvappa*, A.I.R. 1944 Mad. 387.

[88] *Birla Jute Manufacturing Co.* v. *Dulichand* A.I.R. (1953) Cal. 450; *Hussain Kasam Dada* v. *Vijayanagaram Commercial Association*, A.I.R. 1954 Mad. 528.

[89] *M/s. Nathumal Bhairon Bux & Co.* v. *Kashi Ram* (1973) A. Raj. 271.

[90] *Motichand* v. *Ikram-Ullah*, (1917) 39 All. 173 (P.C).

[91] *Kristodhone* v. *Brojo Gobindo*, 24 Cal. 395.

[92] *Saleh* v. *Manekji* (1923) 50 Cal. 491.

[93] *Brij Mohan* v. *M.P. Road Transport*, A.I.R. 1987, S.C. 29.

[94] Ibid.

appeals from the same statute called Bihar Buildings, (Lease, Rent and Eviction) Contro' Act 1947. In *Budhwanti* v. *Gulab Chand*,[95] Supreme Court found that there was no compulsion or exploitation and parties had contravened the provisions of the said Act for their mutual advantage. If that be the evidence, the excess rent paid voluntarily and without any protest under a mutual agreement in violation of the said Act cannot be recovered back by a tenant nor can he ask for adjustment of such amount towards the rent. In *Mohd. Salimuddin* v. *Mistrilal*[96] tenant in order to secure tenancy advanced certain amount to his landlord in violation of the prohibition of the aforesaid Act. An agreement between them contained a stipulation that the loan amount was to be adjusted against the rent which accrued. The amount so advanced was sufficient to cover a landlord's claim for arrears of rent. However a landlord filed a suit for eviction against a tenant. It was held that tenant was entitled to claim adjustment of the loan amount against the rent. In this case, tenant cannot be said to be in arrears of rent after such adjustment of loan amount towards the rent. Here the exception of the doctrine was applicable as the position of the parties to an agreement was unequal and the statute was enacted for the benefit of the tenant. Also, the tenant was acting not voluntarily but under compulsion of circumstances and was obliged to succumb to the will of the landlord who was in a dominating position who made the tenant to advance money to him perforce to secure a lease. On the other hand, Supreme court in *Lachoo Mal* v. *Radhey Shyam*[97] found agreement between landlord and tenant neither illegal nor unlawful nor defeating the provision of any law within S. 23 of the Indian Contract Act in the following facts. A tenant had surrendered possession of his shop to landlord for reconstruction of rooms on the upper storey of shop for his own residence under a written agreement. It also provided that tenant would be redelivered possession of his shop on the same rental basis and a landlord shall not be entitled to derive benefits from the U.P. Rent Control and Eviction Act 1947. Upon completion of construction landlord redelivered possession but claimed higher rent from tenant inspite of written agreement. The question for the Supreme Court was whether this agreement was unlawful as tending to defeat the provision of the said Act or it operated to waive the advantage of law, without infringing any public right or public policy. The Court found the latter interpretation to be correct one as the U.P. Rent Act was for the protection of tenant who required to be protected. A landlord could waive the benefit intended by the Act. A private advantage, not involving public considerations, may be released or waived by a landlord.

2. Rules of Hindu and Mahomedan law.—An agreement that would defeat the provisions of Hindu law is unlawful within the meaning of the present clause. A contract to give a son in adoption in consideration of an annual allowance to the natural parents is an instance of this class, and a suit will not lie to recover any allowance on such a contract, though the adoption may have been made.[98]

A contract entered into by Hindus living in Assam, by which it is agreed that, in the event of the husband leaving the village in which the wife and her friends resided the marriage shall become null and void, is contrary to the policy of Hindu law.[99]

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95 A.I.R. 1987 S.C. 1485.

96 A.I.R. 1986 S.C. 1019, see for similar P.C. decision *Kiriri Cotton Company Ltd.* v. *Ranchhoddas Dewani* (1960) A.C. 192.

97 A.I.R 1971 S.C. 2213.

98 *Sitaram* v. *Harihur* (1910) 35 Bom. 169, at pp. 179, 180; *Raghubar Das Mahant* v. *Raja Natabar Singh* (1919) 4 Pat. L.J. 42; *Narayan* v. *Gopalrao* (1922) 24 Bom. L.R. 414, 46 Bom. 908.

99 *Sitaram* v. *Mussamut Aheeree Heerahnee* (1873) 11 B.L.R. 129, 134, 135.

An agreement entered into before marriage between a Mahomedan wife and husband that the wife shall be at liberty to live with her parents after marriage, is void, and does not afford an answer to a suit for restitution of conjugal rights.[1] Upon the same principle an agreement between a Mahomedan husband and wife for a future separation is void, and the wife cannot on separation recover the maintenance allowance provided by the agreement.[2] But an agreement contemporaneous with the marriage that in case of strained relations between the husband and his wife, the wife would be entitled to claim the customary maintenance allowance is not void.[3]

3. Other rules of law in force in India.—It is a well established rule of law that, unless a will is proved in some form, no grant of probate can be made merely on the consent of parties. Hence an agreement or compromise as regards the genuineness and due execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful so as to be enforceable under the provisions of sec. 375 of the Civil Procedure Code [now O. 23, r. 3].[4] Similarly, a receiver being an officer of the Court, the Court alone is to determine his remuneration, and the parties cannot by any act of theirs add to, or derogate from, the functions of the Court without its authority.[5] A promise, therefore, to pay the salary of a receiver without leave from the Court, even if unconditional, being in contravention of the law, is not binding on the promisor.[6]

(3rd Clause)

"Fraudulent."—Where the object of an agreement between *A* and *B* was to obtain a contract from the Commissariat Department for the benefit of both, which could not be obtained for both of them without practising fraud on the Department, it was held that the object of the agreement was fraudulent, and that the agreement was therefore void.[7] But an agreement between *A* and *B* to purchase property at an auction sale jointly, and not to bid against each other, is perfectly lawful.[8]

(4th Clause)

"Injury to the person or property of another."—The general term "injury" means criminal or wrongful harm. Evidently there is nothing unlawful in agreeing to carry on business lawful in itself, though the property of rivals in that business may, in a wide sense, be injured by the consequent competition. A bond which compels the executant to daily attendance, and manual labour until a certain sum is repaid in a certain month and penalizes default with overwhelming interest is unlawful and void. "Such a condition," the Court said, "is indistinguishable from slavery and such a contract is, in our opinion, opposed to public policy and not enforceable."[9] An agreement between

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[1] *Abdul* v. *Hussenbi* (1904) 6 Bom. L.R. 728.

[2] *Fatma* v. *Ali Mahomed* (1912) 37 Bom. 280; contra *Muhammad Muni-ud-din* v. *Jamal Fatima* (1921) 43 All. 650; followed *Muhammad Ali Akbar* v. *Fatima Begum* (1929) 11 Lah. 85.

[3] *Jamila* v. *Abdul* (1939) 184 I.C. 105, ('39) A.L. 165.

[4] *Monmohini Guha* v. *Banga Chandra Das* (1903) 31 Cal. 357.

[5] See Civil Procedure Code, O. 40, r. 1.

[6] *Prokash Chandra* v. *Adlam* (1903) 30 Cal. 696.

[7] *Sahib Ram* v. *Nagar Mal* (1884) Punj. Rec. no. 63.

[8] *Nanda Singh* v. *Sunder Singh* (1901) Punj. Rec. no. 37.

[9] *Ram Sarup* v. *Bansi Mandar* (1915) 42 Cal. 742; *Satish Chandra* v. *Kashi Sahu* (1918) 3 Pat. L.J. 412.

two companies that they would not without the written consent of the other "at any time employ any person who during the then past five years shall have been a servant of yours" is unlawful.[10]

(5th Clause)

"Immoral."—A landlord cannot recover the rent of lodgings knowingly let to a prostitute who carries on her vocation there.[11] Similarly, money lent to a prostitute expressly to enable her to carry on her trade cannot be recovered.[12] On like grounds, ornaments lent by a brothel-keeper to a prostitute for attracting men and encouraging prostitution cannot be recovered back.[13] An assignment of a mortgage to a woman for future cohabitation is void, and it can be set aside at the instance of the assignor though partial effect may have been given to the illegal consideration.[14] Similarly, where the plaintiff advanced moneys to the defendant, a married woman, to enable her to obtain a divorce from her husband, and the defendant agreed to marry him as soon as she could obtain a divorce, it was held that the plaintiff was not entitled to recover back the amount, as the agreement had for its object the divorce of the defendant from her husband, and the promise of marriage given under such circumstances, was *contra bonos mores*.[15] An agreement to pay money upon the consideration that the plaintiff would give evidence in a civil suit on behalf of the defendant cannot be enforced. Such an agreement may be for giving true evidence, and then there is no consideration, for "the performance of a legal duty is no consideration for a promise"; or it may be for giving favourable evidence either true or false, and then the consideration in vicious.[16] An agreement to sell a share in the managing agency of a company to a person who is appointed to enquire into a dispute between the vendor and another in respect of the managing agency is void.[17]

A consideration which is immoral at the time, and, therefore, would not support an immediate promise to pay for it, does not become innocent by being past; and so in *Husseinali* v. *Dinbai*,[18] and again, in *Kisondas* v. *Dhondu*[19] it was held that past cohabitation is not a good consideration for a transfer of property. Bonds and covenants given in consideration of future co-habitation are void in law.[20] The English view of such cases is that the alleged consideration is bad simply as being a past consideration. In a Patna case[21] a person had agreed to pay a maintenance allowance to his discarded mistress. The was considered a contract to compensate the woman for the social position that she

10 *Kores Manufacturing Co.* v. *Kolok Manufacturing Co.* (1957) 3 All. E.R. 158.

11 *Gaurinath Mookerji* v. *Madhumani Peshaker* (1872) 9 B.L.R. App. 37; *Bani Mancharam* v. *Regina Stanger* (1907) 32 Bom. 581, at p. 586 *et seq.*; *Choga Lal* v. *Piyari* (1908) 31 All. 58.

12 *Bholi Baksh* v. *Gulia* (1876) Punj. Rec. no. 64.

13 *Alla Baksh* v. *Chunia* (1877) Punj. Rec. no. 26.

14 *Kandaswami* v. *Narayanaswami* (1923) 45 Mad. L.J. 551 See also *Alice Mary Hill* v. *William Clark* (1905) 27 All. 266.

15 *Bai Vijli* v. *Nansa Nagar* (1885) 10 Bom. 152.

16 *Sashannah Chetti* v. *Ramasamy Chetty* (1868) 4 M.H.C. 7.

17 *Gulabchand* v. *Kudilal*, ('59) A. Madh. p. 151.

18 (1923) 25 Bom. L.R. 252.

19 (1920) 44 Bom. 542; *Sabava* v. *Yamanappa* (1933) 35 Bom. L.R. 345, ('33) A.B. 209.

20 *Istak Kamu* v. *Ranchhod Zipru*, A.I.R. (1947) Bom. 198.

21 *Godfrey* .. *Mt. Parbati* (1938) 17 Pat. 308, 178 I.C. 574, ('38) A.P. 502. The distinction between past cohabitation as being a consideration and loss of social status as being a consideration is fine.

had lost as the result of being a man's mistress, and contract was considered valid.

"Opposed to public policy."—The general head of public policy covers a wide range of topics. Agreements may offend against public policy by tending to the prejudice of the State in time of war (trading with enemies, etc.), by tending to the perversion or abuse of municipal justice (stifling prosecutions, champerty and maintenance) or, in private life, by attempting to impose inconvenient and unreasonable restrictions on the free choice of individuals in marriage, or their liberty to exercise any lawful trade or calling. In a suit between private parties, the Court will not enforce, on the ground of public policy, a contract which involves the doing in a foreign and friendly country of an act which is illegal by, and violates, the law of that country.[22] The doctrine of public policy is not to be extended beyond the classes of cases already covered by it. No Court can invent a new head of public policy;[23] it has even been said in the House of Lords that "public policy is always an unsafe and treacherous ground for legal decision."[24] This does not affect the application of the doctrine of public policy to new cases within its recognised bounds.

In *Gherulal Parakh* v. *Mahadeodas Maiya* the Supreme Court observed that the doctrine of public policy is a branch of common law and like any other branch of common law, it is governed by precedents.[25] Its principles have been crystallized under different heads and though it is permissible for courts to expound and apply them to different situations, it should be invoked in clear and incontestable cases of harm to the public.[25] Even if it is permissible for courts to evolve a new head of public policy, it should be done under extraordinary circumstances giving rise to incontestable harm to the society.[25]

Recently the Supreme Court made certain fundamental observations on the question of public policy. According to the Supreme Court the expression public policy is incapable of precise definition. It varies from time to time. Transactions which were once considered against public policy are now being (it is submitted it should be, it may be) upheld. Similarly where there has been a well recognised head of public policy, Courts will extend it to new transactions and changed circumstances. It may invent a new head of public policy in consonance with public conscience and public good and certainly the preamble to the Constitution, fundamental rights and the directive principles of state policy. Public policy, however, is not the policy of a particular government.[26]

1. Trading with enemy.—It is long settled law that all trade with public enemies without licence of the Crown is unlawful. "The King's subjects cannot trade with an alien enemy, i.e. a person owing allegiance to a Government at war with the King, without the King's licence."[27] This includes shipping a cargo from an enemy's port even in a neutral vessel.[28] If the performance of a contract made in time of peace is rendered unlawful by the outbreak of war, the obligation of the contract is suspended or dissolved

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[22] *Regazzoni* v. *K. C. Sethna Ltd.* (1957) 3 All. E.R. 286.

[23] Lord Halsbury, *Janson* v. *Driefontein Consolidated Mines* (1902) A.C. 484, 491. See also *Shrinivasdas Lakshmi Narayan* v. *Ramchandra Ramrattandas* (1920) 44 Bom. 6; *Abdul Rahim* v. *Raghunath Sukul* ('31) A.P. 22.

[24] Lord Davey (1902) A.C. at p. 500.

[25] *Gherulal Parakh* v. *Mahadeodas Maiya* (1959) 2 S.C.R (Supp.) 406; A.I.R. (1959) S.C. 781.

[26] *Central Inland Water Transport Corp, Ltd.* v. *Brojo Nath Ganguly*. A.I.R. 1986 S.C. 1571, 1612, para 93.

[27] Lord Macnaghten, *Janson* v. *Driefontein Consolidated Mines* (1902) A.C. at p. 499.

[28] *Esposito* v. *Bowden* (1857) 7 E. & B. 763.

according as the intention of the parties can or cannot be substantially carried out by postponing the performance till the end of hostilities.[29] The recent development of cases of this class is dealt with under sec. 56 below. The rules under this head become applicable only when an actual state of war exists. A contract of insurance made before war cannot be vitiated, as regards a loss by seizure before any act of public hostility, by the fact that war did break out shortly afterwards.[30]

2. Stifling prosecution.—Agreements for stifling prosecutions are a well known class of those which the Courts refuse to enforce on this ground. The principle is "that you shall not make a trade of a felony."[31] In England the compromise of any public offence is illegal. If the accused person is "innocent, the law [is] abused for the purpose of extortion; if guilty, the law [is] eluded by a corrupt compromise screening the criminal for a bribe."[32]

A compromise of proceedings which are criminal only in form, and involve only private rights, may be lawful.[33] This perhaps is of no importance in Indian practice, where we have a statutory list of compoundable offences.[34] "The criminal law of this country makes a difference between various classes of offences. With regard to some, it allows the parties to come to an agreement and either not to take proceedings or to drop the proceedings after institution in a few instances even without the leave of the Court, and, in other instances, with the leave of the Court. But there are other cases which cannot be compounded or arranged between the parties. . . . If the offence [is] compoundable and [can] be settled in or out of the Court without the leave of the Court, there seems no reason why [a compromise] should be regarded as forbidden by law or as against public policy, the policy of the criminal procedure being to allow such a compromise in such cases.[35] Thus, where *A* agreed to execute a *Kabala* of certain lands in favour of *B* in consideration of *B* abstaining from taking criminal proceedings against *A* with respect to an offence of simple assault which is compoundable, it was held that the contract was not against public policy and could be enforced.[36] The same principle was applied where the offence was compoundable with the permission of the Court and was so compounded.[37] But where the offence is non-compoundable as where the charge is one of criminal breach of trust and the offence is compounded by the accused passing a bond to the complainant, the latter cannot recover the amount of the bond.[38] An arbitration

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29 *Esposito* v. *Bowden* (1857) 7 E. & B. 763.

30 *Janson* v. *Driefontein Consolidated Mines* (1902) A.C. 484, followed in *Wolf & Sons* v. *Dadyba Khimji & Co.* (1920) I.L.R. 44, Bom. 631.

31 Lord Westbury, *williams* v. *Bayley* (1866) L.R. 1 H.L. 200, 220; *Mohanlal* v. *Kashiram* (1950) Nag. 105 ('50) A.N. 71.

32 *Windhill Local Board* v. *Vint* (1890) 45 Ch. Div. 357.

33 *Fisher & Co.* v. *Apollinaris Co.* (1875) L.R. 10 Ch. 297, as qualified by *Windhill Local Board*, v. *Vint* (1890) 45 Ch. Div. 351. See also *Tek Chand* v. *Harja Rai Arjau Das* (1929) 117 I.C. 74, ('29) A.L. 564.

34 See s. 320, Criminal Procedure Code, 1973, see also Penal Code, ss. 213, 214.

35 Per Cur. *Amir Khan* v. *Amir Jan* (1898) 3 C.W.N. 5, followed in *Ahmed Hassan* v. *Hassan Mahomed* (1928) 52 Bom. 693; *Harbans Singh* v. *Bawa Singh* ('52) A.C. 73.

36 Ibid.

37 *Ouseph Poulo* v. *Catholic Union Bank* (1965) A.S.C. 166 = (1964) S.C.R. 745.

38 *Majibar* v. *Syed Muktashed* (1912) 40 Cal. 113; *Mottai* v. *Thanappa* (1914) 17 Mad. 385; *Ahmed Hassan* v. *Hassan Mahomed* (1928) 52 Bom. 693; *Habidad Khan* v. *Abdul Rahman* (1931) 53 All. 130. ('31) A.A. 128; *Mishrimal* v. *Sohanraj*, I.L.R (1959) Raj. 934.

agreement to stifle a non-compoundable offence cannot be enforced.[39] In the Supreme Court case a partner *R* filed a complaint against his co-partners including an Appelant in the Magistrate's Court alleging that the accounts of the partnership were fraudulently altered. Later on, an agreement was executed by all the partners referring their dispute to an arbitrator and *R* agreed to withdraw the aforesaid complaint pending before the Magistrate Court. When the question of enforcement of an arbitrator's award arose, Appellant alleged for setting aside the award of an arbitrator on the ground that the arbitration agreement was invalid under S. 23 of the Act insofar as arbitration was the result of an agreement to stifle prosecution. The Supreme Court accepted the Appellant's contention. As the offence charged by *R* against the Appellant was non-compoundable offence, the withdrawal of such proceeding was a consideration for the arbitration agreement to which S. 23 would be attracted. Once the machinery of the criminal law is set for non-compoundable offence, it is for the criminal courts alone to deal with the allegation and that decision cannot be taken out of the hands of the criminal court and dealt with by private individuals.[40] A bond in discharge of a pre-existing liability is valid although on execution of the bond a prosecution of the executant for a non-compoundable offence is withdrawn. This is because the withdrawal of the prosecution may be the motive but is not the consideration or object of the bond.[41]

As a suit will not lie on an agreement to stifle a prosecution so an agreement of this class will not avail as defence to a suit. Thus, where in a suit for damages for wrongful arrest and confinement the defendant pleaded an agreement under which the plaintiff was to give up all claims against the defendant for his arrest and confinement in consideration of the defendant withdrawing charges of criminal trespass and being a member of an unlawful assembly preferred against the plaintiff, it was held that, the latter offence being non-compoundable, the agreement could not be set up as an answer to the suit.[42]

3. **"Champerty and Maintenance."**—The practices forbidden under these names by English law may be summarily described as the promotion of litigation in which one has no interest of one's own. Maintenance is the more general term; champerty, which in fact is the subject of almost all the modern cases, is in its essence "a bargain whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action."[43] Agreements of this kind are equally illegal and void whether the assistance to be furnished consists of money, or, it seems, of professional assistance, or both.[44] They are in practice often found to be also disputable on the ground of fraud or undue influence as between the parties.[45]

The specific rules of English law against maintenance and champerty have not been adopted in India,[46] but the principle, so far as it rests on general grounds of policy, is

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[39] *V. Narasinha Raju* v. *V. Gurumurthi Raju* (1963) 3 S.C.R. 687 : A.I.R. (1963) S.C. 107.

[40] Ibid.

[41] *Shaikh Gafoor* v. *Mt. Hemanta* ('31) A.C. 416; *Deb Kumar* v. *Anath Bandhu* (1931) 35 C.W.N. 28, ('31) A.C. 421; *Ouseph Poulo* v. *Catholic Bank* ('65) A.S.C. 166.

[42] *Dalsukhram* v. *Charles de Bretton* (1904) 28 Bom. 326; V. *Narasimharaju* v. *Gurumurthy* ('63) A.S.C. 107.

[43] *Hutley* v. *Hutley* (1873) L.R. 8 Q.B. 112, per Blackburn, J.: and see per Chitty J., *Guy* v. *Churchill* (1888) 40 Ch. D. at p. 488.

[44] *Stanley* v. *Jones* (1831) 7 Bing. 369, may be considered the leading modern case; *Re Attorneys and Solicitors Act* (1875) 1 Ch. D. 573.

[45] *Rees.* v. *De Bernardy* (1896) 2. Ch. 437; *U. Pe Gyi* v. *Maung Thein Shiv* (1923) 1 Rang. 565.

[46] *Ram Coomer Coondoo* v. *Chunder Cantu*

regarded as part of the law of "justice, equity, and good conscience" to which the decisions of the Court should conform. The leading judgement to this effect is in *Fischer* v. *Kamala Naicker*,[47] an appeal from the Sudder, Dewanny Adawlut, Madras. In *Bhagwat Dayal Singh* v. *Debi Dayal Sahu*,[48] the Judicial Committee clearly laid it down that an agreement champertous according to English law was not necessarily void in India; it must be against public policy to render it void here. A present transfer of property for consideration by a person who claims it as against another in possession thereof, but who has not yet established his title thereto, is not for that reason opposed to public policy.[49] Similarly, agreements to share the subject of litigation, if recovered in, consideration of supplying funds to carry it on are not in themselves opposed to public policy.[50] "But agreements of this kind ought to be carefully watched and when found to be extortionate and unconscionable so as to be inequitable against the party, or to be made, not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefore, but for improper objects, as for the purpose of gambling in litigation or of injuring or oppressing others by abetting and encouraging unrighteous suits so as to be contrary to public policy, effect ought not to be given to them."[51] But it is essential to have regard not merely to the value of the property claimed but to the commercial value of the claim. "The uncertainties of litigation are proverbial; and if the financier must needs risk losing his money he may well be allowed some chance of exceptional advantage."[52] Where a claim was of a simple nature and in fact no suit was necessary to settle the claim, an agreement to pay Rs. 30,000 to the plaintiff for assisting in recovering the claim was held to be extortionate and inequitable.[53] A contract to assist a litigant so as to delay the execution of a decree against him is opposed to public policy and cannot be enforced.[54]

Agreements between legal practitioners subject to the Legal Practitioners Act, 1879, (corresponding now to the Advocates Act, 1961) and their clients, making the remuneration of the legal practitioner dependent to any extent whatever on the result of the case in which he is retained, are illegal as being opposed to public policy.[55]

4. Interference with course of justice.—It needs no authority to show that any

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Mookerjee (1876) L.R. 4 I.A. 23; 2 Cal. 233; for one recent example see *Banarsi Das* v. *Sital Singh* (1920) 121 I.C. 295; ('30) A.L. 392.

47 (1860) 8 M.I.A. 170.

48 (1908) 35 Cal. 420; L.R. 35 I.A. 48.

49 *Achal Ram* v. *Kazim Hussain Khan* (1905) 27 All. 271; L.R. 32 I.A. 113, as explained in *Bhagwant Dayal Singh* v. *Debi Dayal Sahu, supra.*

50 *Kunwar Ram Lal* v. *Nil Kanth* (1893) L.R. 20 I.A. 112; *Inder Singh* v. *Munshi* (1920) 1 Lah. 124; *Raja Venkata* v. *Shri Venkatapathi Raju* (1924) 48 Mad. 230 (250).

51 *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876) L.R. 4 I.A. 23; 2 Cal. 233; *Baldeo Sahai* v. *Harbans* (1911) 33, All. 626; *Marina Viranna* v. *Valliuri Ramanamma* (1927) 109 I.C. 87 ('28) A.M. 437; *Ramanamma* v. *Viranna* (1931) 33 Bom. L.R. 960, ('31) A.P.C. 100; *Amrita* v. *Pratap* (1931) 52 C.L.J. 492, ('31) A.C. 144; *Lucy Moss* v. *Mah Nyein* ('33) A.R. 418.

52 *Ram Sarup* v. *Court of Wards* (1940) 67 I.A. 50, (1940) Lah. 1. 185 I.C. 590, ('40) A.P.C.

53 *Harilal Nathalal* v. *Bhailal Pranlal* (1940) 42 Bom. L.R. 165, 188 I.C. 217, ('40) A.B. 143; *Venkataswamy* v. *Nagi Reddy*, A.I.R. (1962) A.P. 457.

54 *Nand Kishore* v. *Kunj Behari* (1933) All. L.J. 85 ('33) A.A. 303.

55 *Ganga Ram* v. *Devi Das* (1907) Punj. Rec. no. 61; In the matter of Mr. 'G' Advocate, A.I.R. (1954) S.C. 557; 56 Bom. L.R. 838; *R. B. Basu* v. *P. K. Mukerji*, A.I.R. (1957) Cal. 449 (Chartered Accountant).

agreement for the purpose, or to the effect, of using improper influence of any kind with judges or officers of justice is void. An agreement to pay a fee to a holy man for prayers for the success of a suit is not an interference with the course of justice.[56]

Similarly, an agreement which is in contravention of a statute or opposed to its general policy will not be enforced by a court of law.[57] A compromise decree enabling the decree holder to attach moneys in contravention of the provisions of sec. 60 of the Civil Procedure Code has been held to be unlawful and not enforceable.[58]

5. **Marriage brocage contracts.**—Agreements to procure marriages for reward are undoubtedly void by the Common Law, on the ground that marriage ought to proceed, if not from mutual affection, at least from the free and deliberate decision of the parties with an unbiassed view to their welfare. In England, however, this topic is all but obsolete. Such questions have come before Indian Courts in several modern cases, with not quite uniform results. In all those cases, it will be observed, the parties to the suit have been Hindus, a community in which the consent of the marrying parties has rarely anything to do with the marriage contract, which is generally arranged by the parents or friends of the parties before they themselves are of an age to give a free and intelligent consent.[59] But it has been held by the High Courts in India that an agreement to pay money to the parent or guardian of a minor in considerations of his consenting to give the minor in marriage, is void as being opposed to public policy.[60] So also an agreement to pay a penalty in case a minor daughter is not given in marriage to a particular person is void.[61] Again, there is no doubt that an agreement by a person to pay money to a stranger hired to procure a wife is opposed to public policy and will not be enforced by any of the Indian Courts.[62]

6. **Agreement tending to create interest against duty.**—One of the reasons suggested for not enforcing agreements to reward parents for giving their children in marriage is that such agreements tend to a conflict of interest with duty. The same principle is applied by the Common Law to dealings of agents and other persons in similar fiduciary positions with third persons. An agent must not deal in the matter of the agency on his own account without his principal's knowledge. In the present Act the rules on this head are embodied in the chapter on Agency,[63] and will accordingly be considered in that place. If a person enters into an agreement with a public servant which to his knowledge might cast upon the public servant obligations inconsistent with the public duty, the agreement is void.[64]

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[56] *Balsundra Mudaliar* v. *Mahomed Oosman* (1930) 54 Mad. 29, 57 Mad. L.J. 154.

[57] *Motichand* v. *Ikram Ullah* (1917) 39 All. 173 (P.C.) contrary to the provision of Agra Tenancy Act; *Kristodhone* v. *Brojo Gobindo*, 24 Cal. 895, contrary to Bengal Tenancy Act and Agra Tenancy Act; *Saleh* v. *Manekji* 50 Cal. 491, contrary to the Bengal Rent Act.

[58] *M. & S. M. Rly.* v. *Rupchand Jitaji & Co.* 51 Bom. L.R. 1024.

[59] *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas* (1896) 21 Bom. 23.

[60] *Dholidas* v. *Fulchand* (1897) 22 Bom. 658; *Baldeo Das* v. *Mohamaya* (1911) 15 C.W.N. 447; *Kalvangunta Venkata* v. *Kalvangunta Lakshmi* (1908) 32 Mad. 185; *Abbas Khan* v. *Nur Khan* (1920) 1 Lah. 574.

[61] *Devarayan* v. *Muthuraman* (1914) 37 Mad. 393, 18 I.C. 515; *Fazal Rahim* v. *Nur Mohammad* ('33) A. Pesh. 121.

[62] *Vaithyanathan* v. *Gungarazu* (1893) 17 Mad. 9; *Pitamber* v. *Jagjiwan* (1884) 13 Bom. 131; *Bhan Singh* v. *Kaka Singh* ('33) A.L. 849.

[63] Ss. 215, 216.

[64] *Sitarampur Coal Co., Ltd.* v. *Colley* (1908) 13 C. W. N. 59.

In respect of acquisition of property by a government servant, a distinction has been made between a transaction contrary to statutory prohibition and a transaction in contravention of government servant's conduct rules. In the former, a transaction would be void and in the latter, it would not be void.[65] If the carrying out of an agreement involved violation of public policy (offering a bribe for a favourable report in the inquiry proceedings), such an agreement cannot be enforced.[66]

7. Sale of public offices.—Traffic by way of sale in public offices and appointments obviously tends to the prejudice of the public service by interfering with the selection of the best qualified persons; and such sales are forbidden in England by various statutes said to be in affirmance of the Common Law.[67] The cases in India on this branch of the subject have arisen principally in connection with religious offices. The sale of the office of a *sebait* has been held invalid by the High Court of Madras.[68] Similarly, the office of *mutwali* of a *wakf* is not transferable,[69] nor the land which is the emolument of a religious office.[70]

An agreement to pay money to a public servant to induce him to retire and thus make way for the appointment of the promisor is virtually a trafficking with reference to an office, and is void under this section.[71] Similarly, an agreement by co-sharer in a *mahal* to pay an annuity to another co-sharer in consideration of the latter withdrawing his candidature for lambardarship is opposed to public policy and void.[72] If *A* pays money to *B* who promises to use his influence and to secure *A*'s son an appointment in the public service, *A* cannot recover the money if his son does not secure the appointment.[73]

8. Agreements tending to create monopolies.—Agreements having for their object the creation of monopolies are void as opposed to public policy.[74]

9 Agreement not to bid.—An agreement between persons not to bid against one another at an auction sale is not necessarily unlawful.[75] Such an agreement is not unlawful if the object is merely to make a good bargain.[76] But it is unlawful, if the object is to defraud a rival decreeholder.[77]

10. Suicide.—In England suicide by a sane person is *felode se*, and it has accordingly been held that the heirs or assigness of an assured, who has committed suicide, cannot enforce the insurance policy, even though on its true construction the insurers had

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[65] *Dharwar Bank* v. *Mahomed* A.I.R. (1931) Bom. 269.

[66] *Ratanlal* v. *Firm Mangilal*, A.I.R. (1963) M.P. 323.

[67] See Pollock on Contract, 11th Edn., pp. 305-306.

[68] *Kuppa Gurukal* v. *Dora Sami* (1822) 6 Mad. 76. See also *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (1900) 23 Mad. 271, L.R. 27 I.A. 69.

[69] *Wahid Ali* v. *Ashruff Hossain* (1882) 8 Cal. 732.

[70] *Anjaneyalu* v. *Sri Venugopala Rice Mill, Ltd.* (1922) 45 Mad. 620.

[71] See *Venkatramanayya* v. *J.M. Lobo*, A.I.R. 1953 Mad. 506.

[72] *Puttulal* v. *Raj Narain* (1931) 53 All. 609, (1931) A.A. 428.

[73] *Ledu* v. *Hiralal* (1916) 43 Cal. 115.

[74] *Somu Pillai* v. *The Municipal Council, Mayavaram* (1905) 28 Mad. 520; *Devi Dayal* v. *Narain* (1927) 100 I.C. 859, ('28) A.L. 33; District Board, *Jhelum* v. *Hari Chand* ('34) A.L. 474; *Kameshwar Singh* v. *Mahomed Yasin Khan* (1938) 17 Pat. 225, 179 I.C. 431, ('38) A.P. 473.

[75] *Hari* v *Naro* (1894) 18 Bom. 342; *Doorga Singh* v. *Sheo Pershad* (1889) 16 Cal. 194, 199.

[76] *Mohomed Meera* v. *Savvasi Vijaya* (1900) 23 Mad. 227, 27 I.A. 17; *Maung Sein Hlin* v. *Che Pan Ngaw* (1925) 3 Rang. 275.

[77] *Ram Lal* v. *Rajendra Nath* (1933) 8 Luck. 233, ('33) A.O. 124.

agreed to pay in such an event.[78] This was on the ground that suicide was a crime, and it would be against public policy to enforce such a contract of insurance. In India, however, suicide is not a crime, nor is it against public policy to enforce a contract of insurance where the assured has committed suicide.[79]

Waiver of illegality.—Agreements which seek to waive an illegality are void on grounds of public policy.[80] Whenever an illegality appears, whether from the evidence given by one side or the other, the disclosure is fatal to the case. A stipulation of the strongest form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Wherever the contamination reaches, it destroys. It is therefore open to a Court itself to take objection when it appears that the contract is tainted with illegality or immorality.[81]

Void Agreements

Agreements void, if considerations and objects unlawful in part.

24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration

A promises to superintend, on behalf of *B*, a legal manufacturer of indigo, and an illegal traffic in other articles. *B* promises to pay *A* a salary of 10,000 rupees a year. The agreement is void, the object of *A*'s promise and the consideration for B's promise being in part unlawful.

Entire or divisible agreements.—This section is an obvious consequence of the general principle of sec. 23. A promise made for an unlawful consideration cannot be enforced, and there is not any promise for a lawful consideration if there is anything illegal in a consideration which must be taken as a whole. On the other hand, it is well settled that if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable. The test is whether a distinct consideration which is wholly lawful can be found for the promise called in question. "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good.[82]

An agreement with a pleader to pay a fee of Rs. 500 if he wins the suit and also to transfer to him part of the property in dispute, is not severable and is wholly void.[83] Where a part of a consideration for an agreement was the withdrawal of a pending criminal charge of trespass and theft, it was held that the whole agreement was void.[84]

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[78] *Beresford* v. *Royal Insurance Co. Ltd.* (1938) A.C. 586. (But now the position is altered in England by Suicide Act 1961).

[79] *Scottish Union & National Insurance Co.* v. *Roushan Jahan* (1945) 20 Luck. 194, A.I.R. 1945 Oudh 152.

[80] *Dhanukdhari* v. *Nathia* (1907) 11 C.W.N. 848; *La Banque* v. *La Banque* (1887) 13 App. Ca. 111.

[81] *Narayana Rao* v. *Ramachandra Rao* ('59) A. Andhra 370.

[82] Wiles J., in *Pikering* v. *Ilfracomb Ry. Co.* (1868) L.R. 3 C.P. 235 at p. 250.

[83] *Kathu Jairam Gujar* v. *Vishwanath Ganesh Javadekar* (1925) 49 Bom 619.

[84] *Srirangachariar* v. *Ramasami Ayyangar*

Where *A* promised to pay Rs. 50 per month to a married woman *B*, in consideration of *B* living in adultery with *A* and acting as his house-keeper, it was held that the whole agreement was void, and *B* could not recover anything even for services rendered to *A* as house-keeper.[85] Similarly, a suit will not lie to recover money advanced as capital for the purposes of a partnership which is partly illegal.[86]

25. An agreement made without consideration is void unless—

Agreement without consideration void, unless it is in writing and registered,

(1) it is expressed in writing and registered under the law for the time being in force for the registration of documents and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

or is a promise to compensate for something done,

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless

or is a promise to pay a debt barred by limitation law.

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations

(a) *A* promises, for no consideration, to give *B* Rs. 1,000. This is a void agreement.

(b) *A*, for natural love and affection, promises to give his son, *B*, Rs. 1,000. *A* puts his promise to *B* into writing and registers it. This is a contract.

(c) *A* finds *B*'s purse and gives it to him. *B* promises to give *A* Rs. 50. This is a contract.

(d) *A* supports *B*'s infant son. *B* promises to pay *A*'s expenses in so doing. This is a contract.

(1894) 18 Mad. 189; *Bindeshari Prasad* v. *Lekhraj Sahu* (1916) 1 Pat. L.J. 48, 60; *Bani Ramachandra* v. *Jayawanti* (1918) 42 Bom. 339.

[85] *Alice Mary Hill* v. *William Clarke* (1905) 27 All. 266.

[86] *Gopalrav* v. *Kallappa* (1901) 3 Bom. L.R. 164.

(e) *A* owes *B* Rs. 1,000 but the debt is barred by the Limitation Act. *A* signs a written promise to pay *B* Rs. 500 on account of the debt. This is a contract.

(f) *A* agrees to sell a horse worth Rs. 1,000 for Rs. 10. *A*'s consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) *A* agrees to sell a horse worth Rs. 1,000 for Rs. 10. *A* denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not *A*'s consent was freely given.

Consideration.—This section declares, long after consideration has been defined [s. 2, sub-s. (d)], that (subject to strictly limited exceptions) it is a necessary element of a binding contract. The present section goes on to state the exceptional cases in which consideration may be dispensed with. The most obvious example of an agreement without consideration is a purely gratuitous promise given and accepted. This section embodies the principle that an agreement without valuable consideration is void or what is known as *Nudum pactum* and it cannot be enforced but the Explanation states that if there is consideration, however, inadequate the agreement will not be void. The inconvenience suffered by the plaintiff in using the ball [in *Carlill* v. *Carbolic Smoke Ball Co.* (1893) 1 QB 256] or in using special comb for a certain period (*Wood* v. *Letrick*, the Times January 13, 1932) were held to be sufficient. It is not enough that something, whether act or promise, appears on the face of the transaction, to be given in exchange for the promise. That which is given need not be of any particular value; it need not be in appearance or in fact of approximately equal value with the promise for which it is exchanged (see commentary on explanation 2, below); but it must be something which the law can regard as having some value, so that the giving of it effects a real though it may be a very small change in the promisee's position; and this is what English writers mean when they speak of consideration as good, sufficient, or valuable. An apparent consideration which has no legal value is no consideration at all. A performance or promise of this kind is sometimes called an "unreal" consideration.

Forbearance and compromise as consideration.—Compromise is a very common transaction, and so is agreement to forbear prosecuting a claim, or actual forbearance at the other party's request, for a definite or for a reasonable time. The giving up, or forbearing to exercise, an actually existing and enforceable right is certainly a good consideration;[87] but what if the claim is not well founded? Can a cause of action to which there is a complete defence be of any value in the eye of the law? If a man bargains for reward in consideration of his abandonment of such a cause of action, does he not really get something for nothing, even if he believes he has a good case? The answer is that abstaining or promising to abstain from doing anything which one would otherwise be lawfully free to do or not to do is a good consideration, and every man who honestly thinks he has a claim deserving to be examined is free to bring it before the proper Court, and have the judgement of the Court on its merits, without which judgement it cannot be certainly known whether the claim is well founded or not; for the maxim that every man is presumed to know the law, not a very safe one at best, is clearly inapplicable here. That which is abandoned or suspended in a compromise is not the ultimate right or claim

[87] *Jagadindra Nath* v. *Chandra Nath* (1903) 31 Cal. 242; *Balarama* v. *Vasudeva* ('48) A.P.C. 7.

of the party, but his right of having the assistance of the Court to determine and, if admitted or held good, to enforce it. "If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong".[88]

The principle thus stated is followed by the Indian Courts.[89] An agreement in the nature of compromise of a *bona fide* dispute as to the right of succession to a priestly office is not without consideration;[90] nor is a mutual agreement to avoid further litigation invalid on this ground;[91] nor a family arrangement providing for the marriage expenses of female members of a joint Hindu family on a partition of the joint family property;[92] nor an agreement entered into by a Hindu husband with his wife in settlement of a doubtful claim for maintenance.[93]

Promise to perform existing duty.—It is well settled in England[94] that the performance of what one is already bound to do, either by general law or by a specific obligation to the other party, is not a good consideration for a promise, for such performance is no legal burden to the promisee, but, on the contrary, relieves him of a duty. Neither is the promise of such performance a consideration, since it adds nothing to the obligation already existing. Moreover, in the case of the duty being imposed by the general law, an agreement to take private reward for doing it would be against public policy. A person served with a subpoena is legally bound to attend and give evidence in a court of law, and a promise to compensate him for loss of time or other inconvenience is void for want of consideration.[95] Similarly, an agreement by a client to pay to his vakil after the latter had accepted the *vakalatnama* a certain sum in addition to his fee if the suit was successful is without consideration.[96]

But if a man, being already under a legal duty to do something, undertakes to do something more than is contained therein, or to perform the duty in some one of several admissible ways—in other words, to forego the choice which the law allows him—this is a good consideration for a promise of special reward.[97]

If *A* is already bound to do a certain thing, not by the general law, but under a contract with *Z*, it seems plain that neither the performance of it nor a fresh promise thereof without any addition or variation will support a promise by *Z*, who is already entitled to claim performance. For *Z* is none the better thereby in point of law , nor *A* any worse.

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88 *Bowen, L.J.* in *Miles* v. *New Zealand Alford* Estate Co. (1886) 32 Ch. Div. 266, 291.

89 *Olati Pulliah Chetti* v. *Varadarajulu* (1908) 31 Mad. 474, at p. 476, 477; *Krishna Chandra* v. *Hemaja Sankar* (1917) 22 C.W.N. 463 (where the claim was not *bona fide*).

90 *Rameshwar Prosad* v. *Lachmi Prosad* (1904) 31 Cal. 111, 131-132; *Bhiwa Mahadshet* v. *Shivaram Mahadshet* (1899) 1 Bom. L.R. 495, 497.

91 *Bhima* v. *Ningappa* (1868) 5 B.H.C., A.C.J. 75.

92 *Anantanarayana* v. *Savithri* (1913) 36 Mad. 151.

93 *Indira Bibi* v. *Makarand* ('31) A.N. 197.

94 *Collins* v. *Godefroy* (1831) 1.B. & Ad. 950.

95 *Sashannah Chetti* v. *Ramasamy Chetti* (1868) 4 M.H.C. 7; *Collins* v. *Godefroy* (1831) 1.B. & Ad. 950.

96 *Ramchandra Chintaman* v. *Kalu Raju* (1877) 2 Bom. 362.

97 *England* v. *Lavidson.* (1840) 11 A. & E. 856 (reward to constable for services beyond duty; *Glasbrook Brothers Ltd.* v. *Glamorgan County Council,* (1925) A.C. 270.

Transfer of immovable property.—The section has been referred to in some cases of sale and mortgage of immovable property which have been said to be void for want of consideration; but this is incorrect. The Transfer of Property Act says that some of its sections shall be read as part of the Contract Act but does not say that any of the provisions of the Contract Act shall be read into the Transfer of Property Act. In *Tatia* v. *Babaji*[98] Farran, C.J., explained the difference between a completed conveyance and an executory contract. (See Mulla's *Transfer of Property Act*, 5th Ed., p. 47.)

Negotiable instruments.—In the case of negotiable instruments proof of consideration is not necessary, for consideration is presumed to have been received. This presumption is enacted both in sec. 118 of the Negotiable Instruments Act, XXVI of 1881, and in illustration (c) to sec. 114 of the Indian Evidence Act, 1872.

Consideration dispensed with.—The English doctrine that a contract in the form of a deed, i.e under seal is valid without consideration has never been accepted in India.[99] But under the Contract Act consideration is dispensed with in the following cases:

(a) Registered writing.—The fact that a contract is in writing and registered dispenses with consideration only if it is made for natural love and affection. *A* registered agreement between a Mahomedan husband and his wife to pay his earning to her is within the provisions of cl. (1) of the section.[1] So is a registered agreement whereby *A* on account of natural love and affection for his brother, *B*, undertakes to discharge a debt due by *B* to *C*. In such a case, if *A* does not discharge the debt, *B* may discharge it, and sue *A*, to recover the amount.[2] It is not to be supposed that the nearness of relationship necessarily imports natural love and affection. Thus, where a Hindu husband executed a registered document in favour of his wife, whereby, after referring to quarrel and disagreement between the parties, the husband agreed to pay her for a separate residence and maintenance, and there was no consideration moving from the wife, it was held in a suit by the wife brought on the agreement that the agreement was void as being made without consideration. The recitals in the agreement showed that it was not made on account of natural love and affection.[3] So the agreement was not covered by the exception (1) to S. 25 of the Act.[3]

But a different view is taken by the Bombay High Court in *Bhiwa* v. *Shivaram*,[4] where though bad terms existed between the two brothers their agreement was considered to have been made for natural love and affection and S. 25(1) of the Act was applicable. The view of Allahabad High Court may be noted. In *Smt. Mania* v. *Dy. Director, Consolidation*[5] a mother disposed of certain immovable property to one of her daughters. This caused quarrel and even beating between the two sisters. Later on, a compromise was made and sale deed was executed transferring some plots reportedly for some amount in favour of the other sister. (Non-petitioner). A sister transferring the property (Petitioner) challenged her own sale deed. The trial court held that the deed was made due to compromise, there wa consideration and it was valid in law. In the High Court,

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[98] (1896) 22 Bom. 176.

[99] *Kaliprasad Tewari* v. *Raja Sahib Prahlad* Sen (1869) 2 B.L.R. P.C. 11, 122.

[1] *Poonoo Bibee* v. *Fyez Buksh* (1874) 15 B.L.R. App. 5.

[2] *Venkatasamy* v. *Rangasamy* (1903) 13 Mad. L.J. 428.

[3] *Rajlukhy Dabee* v. *Bhootnath* (1900) 4 C.W.N. 488; see *Gopal Saran* v. *Sita Devi* (1932) 36 C.W.N. 392, 34 Bom. L.R. 470, ('32) A.P.C. 34.

[4] (1899) 1 Bom. L.R. 495.

[5] A.I.R. 1971 All. 151.

it was argued by the Petitioner Sister that since no cash consideration was paid to her for the sale-deed by non-petitioner sister, the sale deed was void as being without consideration. Negativing the argument the Allahabad High Court held that even if there may be no consideration the transaction fell within S. 25 (1) of the Act as it was signed and registered document and thus a valid one. The other requirement of S. 25 (1) that the transaction is made on account of natural love and affection between parties was probably not examined by the Court as it found support by its earlier decisions that a family arrangement entered for the preservation of peace and honour of family or avoidance of litigation constitutes consideration.

(b) Compensation for voluntary service.—If the services have been rendered at the request of the promisor they are considered under sec. 2 (d)—see note "Past Consideration" at pp. 10-11. The services here referred to must have been rendered voluntarily and the clause appears to cover services rendered without the knowledge of the promisor.[6] Services rendered for a person other than the promisor are not within the clause.[7] Again, the promisor must have been in existence when the voluntary act was done, so that work done by a promoter of a company before its formation is not work done for the company.[8] The act must have been done for a person competent to contract. Therefore a promise to repay money advanced during the minority of the promisor does not come within the exception.[9] It is unncessary to refer to English cases as the exception does not follow the common law rules. In a Privy Council case *B* agreed to give his son in adoption, if *A* agreed to advance moneys to defend any litigation challenging the adoption. There was litigation and *A* advanced moneys towards it. Thereafter *A* died and *A*'s son advanced moneys to the adopted son. While the adoption suit was pending before the Privy Council, the adopted son passed a promissory note in favour of *A*'s son, who agreed that if the adopted son was unsuccessful before the Privy Council, the promissory note would not be enforced. The adopted son was successful, and *A*'s son filed a suit on the promissory note. It was held that sec. 25 (2) was not applicable because to invoke the aid of that provision it had to be proved that the payments had been made voluntarily. As the moneys were not advanced voluntarily but because of the undertaking given by *A*, the section did not apply.[10]

(c) Promise to pay a time-barred debt.—Sub-sec. (3) reproduces modern English law. This exception applies only where the promisor is a person who would be liable for the debt if not time-barred, and does not cover promises to pay time-barred debts of third persons.[11] But the Madras view[12] is different. It emphasised that the words "by the person to be charged therewith" of S. 25 (3) are wide enough and it is not necessary that the promisor must be a person originally liable to pay the debt.

A promise to pay a debt due by a third person is void for want of consideration; but if a Hindu son promises to pay a time-barred debt due by his father he is liable under Hindu law to the extent of the ancestral property in his hands.[13]

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6 *Sindha* v. *Abraham* (1895) 20 Bom. 755, per Farran, C.J.

7 *See Gajadhar* v. *Jagannath* (1924) 46 All. 755.

8 *Ahmedabad Jubilee S. & W. Co.* v. *Chhotalal* (1908) 10 Bom. L.R. 141, 143.

9 *Indran Ramaswami* v. *Anthappa Chettiar* (1906) 16 Mad. L.J. 422; *Suraj Narain* v. *Sukha Ahir* (1928) 51 All. 164.

10 *Raja of Venkatagiri* v. *Krishnayya* ('48) A.P.C. 150, 50 Bom L.R. 517.

11 *Pestonji* v. *Bai Meherbai* (1928) 30 Bom. L.R. 1407.

12 *Paliyath Govinda Nair* v. *Parekalalhil Nair* A.I.R. 1940 Mad. 678.

13 *Abani Bilas* v. *Kanti Chandra* (1934) 38

The distinction between an acknowledgment under sec.19 of the Limitation Act and "promise" within the meaning of this section is of great importance. Both an acknowledgment and a promise are required to be in writing signed by the party or his agent authorised in that behalf; and both have the effect of creating a fresh starting point of limitation. But while sec. 18 of the Limitation Act requires that an acknowledgment should be made before the expiry of the period of limitation, a promise under this section may be made after the period of limitation has expired. The Privy Council in *Maniram* v. *Seth Rupchand*.[14] has said that an unconditional acknowledgment implies a promise to pay. But this implied promise is not a promise under this section. A promise under this section to pay a time-barred debt must be express promise. Therefore if there is no express promise, a promise implied from an acknowledgment cannot be the basis of a suit under sec. 25 of this Act.[15] To support a suit there must be a distinct promise and not a mere acknowledgment.[16] The Bombay High Court had held that *khata* balance or account stated was a mere acknowledgment which could not form the basis of a suit.[17] But this case must be treated as no longer law, for the Privy Council has held that, even when the balance of indebtedness throughout the account is on one side, a statement of account is an agreement that the items on one side are discharged by the items on the other side and that the balance only is payable. This arrangement constitutes a new cause of action as on an account stated for which limitation is under Art. 64[18] of the Limitation Act.[19] On the other hand, where a tenant wrote to his landlord in respect of rent barred by limitation, "I shall send by the end of *Veyshak* month", it was held that the words constituted a promise under this section.[20] The words "balance due payable by two instalments"[21] or the words "Nagad Rokda Polia Lidha Te deva sahi" meaning thereby "the moneys received in cash are agreed to be paid"[22] import a promise to pay. Under sub-sec. (3) it is not necessary that person charged with should know that the debt for which he was passing the writing was already time-barred. An agreement between a creditor and a debtor entered into before the expiry of the period of limitation, whereby the date of payment is extended beyond the period of limitation, is valid though verbal, if there is a consideration for the agreement, e.g. payment of interest up to the extended date. Such an agreement is not an acknowledgment within the meaning of sec. 19[23] of the Limitation Act nor is it a promise to pay a barred debt; it may be enforced at any time within three years

C.W.N. 253, ('34) A.C. 178; See *Champaklal* v. *Rayachand* (1932) 34 Bom. L.R. 1005. ('32) A.B. 522.

[14] (1906) 33 I.A. 165, 172; 33 Cal. 1047, 1058.

[15] *Maganlal Harjibhai* v. *Amichand Gulabji* (1928) 52 Bom. 521, *Deoraj Tewari* v. *Indrasan Tewari* (1929) 8 Pat. 706; *Girdhari Lal* v. *Firm Bishnu Chand* (1932) 54 All. 506, ('32) A.A. 461.

[16] *Gobind Das* v. *Sarju Das* (1908) 30 All. 268; *Mithin Lal* v. *Marguerite Dairy Farm* ('32) A.A. 38; *Allah Baksh* v. *Hamid Khan* ('31) A.A. 160.

[17] *Jethibai* v. *Putlibai* (1912) 14 Bom. L.R. 1020.

[18] Corresponding to Art. 26 of the Limitation Act, 1963.

[19] *Bishun Chand* v. *Girdhari Lal* (1934) 61 I.A. 273; 56 All. 376, 33 Bom. L.R. 723; *Shivjiram* v. *Gulabchand* (1941) Nag. 114, ('41) A.N. 100; *Balkrishna* v. *Jayshanker* (1938) 40 Bom. L.R. 1010, 178 I.C. 174, ('38) A.B. 460; *Shanti Prakash* v. *Harnam Das* (1938) Lah. 193, 174 I.C. 277, ('38) A.L. 234 (F.B.).

[20] *Appa Rao* v. *Suryaprakasa Rao* (1899) 23 Mad. 94. See also *Laxumibai* v. *Ganesh Raghunath* (1900) 25 Bom. 373.

[21] *Nagindas Dharamchand* v. *Tricumdas* (1877) P.J. 239.

[22] *Kasturchand* v. *Manekchand*, 45 Bom. L.R. 837.

[23] Corresponding to sec. 18 of the Limitation Act, 1963.

from the date on which it was made.[24] A promise to pay, may be absolute or conditional. If it is absolute, if there is no 'but' or 'if,' it will support a suit without anything else: if it is conditional, the condition must be performed before a suit upon it can be decreed.[25]

Debt.—The expression "debt" here means an ascertained sum of money. A promise, therefore, to pay the amount that may be found due by an arbitrator on taking accounts between the parties is not a promise to pay a "debt" within this section.[26] The word debt in this section has been defined as a sum payable in respect of a money demand recoverable by action,[27] and includes a judgement debt. Therefore a promise to pay the amount of a timebarred decree is valid and enforceable.[28]

Explanation 2.—This explanation declares familiar principles of English law and equity. If there is some consideration which the law regards as valuable, the Court will not inquire into its adequacy but will leave the parties to make their own bargain. But inadequacy of consideration may be evidence that the promisor was the victim of some imposition. It may be evidence that the promisor was the victim of some imposition. It may be evidence that the promisor's consent was not free; but it is not in itself conclusive, and standing alone mere inadequacy of consideration is not a bar even to a suit for specific performance. In a suit[29] to set aside a conveyance on the ground of inadequacy of consideration the Judicial Committee observed: "The question then reduces itself to whether there was such an inadequacy of price as to be a sufficient ground of itself to set aside the deed. And upon that subject it may be as well to read a passage from the case of *Tennent* v. *Tennents* (L.R. 2 Sc. & D. 6) in which Lord Westbury very shortly and clearly stated the law upon this subject. He says: 'The transaction having been clearly a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition.' Their Lordships are unable to come to the conclusion that the evidence of inadequacy of price is such as to lead them to the conclusion that the plaintiff did not know what he was about or was the victim of some imposition."

Agreement in restraint of marriage void.

26. Every agreement in restraint of the marriage of any person, other than a minor, is void.

An agreement by a Hindu at the time of his marriage with his first wife not to marry a second wife whilst the first was living would be void according to the literal terms of this section. It may be doubted whether such a result was ever contemplated by the Legislature. A restraint on marriage which is absolute is different from a restraint on remar-

[24] *Ibrahim Mallick* v. *Lalit Mohan Roy* (1923) 50 Cal. 974.

[25] *Maniram* v. *Seth Rupchand* (1906) 33 I.A. 165, 172, 33 Cal. 1047, 1058; *Ballapragada* v. *Thammana* (1917) 40 Mad. 701.

[26] *Doraisami* v. *Vaithilinga* (1917) 40 Mad. 31 (F.B.).

[27] *Doraisami* v. *Vaithilinga* (1917) 40 Mad. 31, 39, I.C. 220 (F.B.); *Bharat National Bank* v. *Bishan Lal* (1932) 13 Lah. 448, ('32) A.L. 212.

[28] *Heera Lall* v. *Dhunput Singh* (1878) 4 Cal. 500; *Shripatrav* v. *Govind* (1890) 14 Bom. 390.

[29] *The Administrator-General of Bengal* v. *Juggeswar Roy* (1877) 3 Cal. 192, 196.

riage.[30] A condition is a wakf that the widow of the co-sharer would forfeit her right of maintenance if she remarried is valid. An agreement contemporaneous to marriage executed by a husband providing that in the event of strained relations between him and his wife, the latter would be entitled to her customary maintenance allowance is not in restraint of marriage.[31] It would seem therefore, that a provision in a *Kabinnamah* by which a Mahomedan husband authorises his wife to divorce herself from him in the event of his marrying a second wife is not void, and if the wife divorces herself from the husband on his marrying a second wife, the divorce is valid, and she is entitled to maintenance from him for the period of *iddat*.[32]

27. Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Agreement in restraint of trade void.

Exception 1.—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Savings of agreement not to carry on business of which goodwill is sold.

Exceptions (2) and (3) are repealed by Partnership Act.

Agreement in restraint of trade.—The section is general in its terms, and declares all agreements in restraint of trade void[33] *pro tanto*, except in the case specified in the exception. The object appears to have been to protect trade. It has been said that "trade in India is in its infancy; and the Legislature may have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained."[34]

To escape the prohibition, it is not enough to show that the restraint created by an agreement is partial, and not general; it must be distinctly brought within one of the exceptions. "The words 'restraint from exercising a lawful profession, trade or business' do not mean an absolute restriction and are intended to apply to a partial restriction, a restriction limited to some particular place, otherwise the first exception would have been unnecessary." This view of the section was expressed by Couch, C.J., in *Madhub Chunder* v. *Rajcoomar Doss*.[35] The parties in that case carried on business as braziers in the same quarter of Calcutta. The defendants suffered loss from the plaintiff's competition and agreed that if the plaintiff closed his business in that quarter they would pay him all the advances he had made to his workmen. The plaintiff complied but the defendants failed to pay. The plaintiff sued to recover the amount of the advances, but the restriction, though confined to a particular quarter, was held to be void. In other case the

[30] *Latafatunnissa* v. *Shaharbanu* A.I.R. (1932) Oudh 108 (112).

[31] *Jamila Khatoon* v. *Abdul Rashid*, A.I.R. (1939) Lah. 165: 184 I.C. 105.

[32] *Badu v. Badarannessa* (1919) 29 C.L.J. 230.

[33] Certainly not "illegal": *Haribhai Manekkal* v. *Sharafali Isabji* (1897) 22 Bom. 861, 866.

[34] Per Kindersley, J., in *Oakes & Co* v. *Jackson* (1876) 1 Mad. 134, 145.

[35] (1874) 14 B.L.R. 76, 85, 86.

plaintiff agreed with the defendant not to carry on the business of *dubash* for three years and for the same period to act as stevedore of five ships assigned to him by the defendant and no others. It was held that the agreement was void, as the first branch imposed an absolute, and the second a partial, restraint on the plaintiff's business.[36]

Restraint during term of service.—An agreement of service by which an employee binds himself, during the term of his agreement , not to compete with his employer directly or indirectly is not in restraint of trade. Such an agreement may be enforced by injunction where it contains a negative clause, express or implied,[37] providing that the employee should not carry on business on his own account durring the term of his engagement.[38] Thus in *Charlesworth* v. *MacDonald*[39] the defendant agreed to serve the plaintiff, a physician and surgeon practising at Zanzibar, as an assistant for three years. The letter which stated the terms which the plaintiff offered and the defendant accepted contained the words, "The ordinary clause against practising must be drawn up." No formal agreement was drawn up and at the end of a year the defendant ceased to act as the plaintiff's assistant and began to practise in Zanzibar on his own account. It was held that the plaintiff was entitled to an injunction restraining the defendant from practising in Zanzibar on his own account during the period of the agreement.[40]

Public policy.—The present section is very strong; it invalidates many agreements which are allowed by the Common Law; and it does not seem open to the Courts to hold that any agreement *in pari materia,* not coming within the terms of the section, is void on some unspecified ground of public policy. "So far as restraint of trade is an infringement of public policy, its limits are defined by section 27."[41]

Agreement not in restraint of trade.—This section aims at "contracts, by which a person precludes himself altogether either for a limited time or over a limited area from exercising his profession, trade, or business and not contracts by which in the exercise of his profession, trade, or business, he enters into ordinary agreements with persons dealing with him which are really necessary for the carrying on of his business."[42] A reasonable construction must be put upon the section, and not one which would render void the most common form of mercantile contracts.[43] Thus, a stipulation in an agreement whereby the plaintiffs agreed that they would not sell to others for a certain period any goods of the same description as they were selling to the defendant is not in restraint of trade.[44] Similarly, an agreement to sell all the salt manufactured by the defendant during a certain period to the plaintiff at a certain price is not in restraint of trade.[45]

Trade combinations.—An agreement between manufacturers not to self their

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[36] *Nur Ali Dubash* v. *Abdul Ali* (1892) 19 Cal. 765.

[37] See Specific Relief Act, 1963, s. 42, ill. (d); *Subha Naidu* v. *Haji Badsha* (1902) 26 Mad. 168, 172; *Pragji* v. *Pranjiwan* (1903) 5 Bom. L.R. 878.

[38] *General Billposting Co.* v. *Atkinson* (1909) A.C. 118.

[39] (1898) 23 Bom. 103. See also *The Brahmaputra Tea Co. Ltd.* v. *Scarth* (1885) 11 Cal. 545, 550.

[40] The Bombay Court based its decision on the authority of *Lumley* v. *Wagner* (1852) 1 D.M.G. 604. See *Ehrman* v. *Bartholomew* (1898) 1 Ch. 671.

[41] Per Jenkins, C.J., in *Fraser & Co.* v. *The Bombay Ice Manufacturing Co.* (1904) 29 Bom. 107, at p. 120.

[42] Per Handley J., in *Mackenzie* v. *Striramiah* (1890) 13 Mad. 472, 475.

[43] *Mackenzie* v. *Striramiah* (1890) 13 Mad. 472 at p. 474.

[44] Carlisles, *Nephews & Co.* v. *Ricknauth Bucktearmull* (1882) 8 Cal. 809.

[45] *Sadagopa Ramanjiah* v. *Mackenize* (1891) 15 Mad. 79.

goods below a stated price, to pay profits into a common fund and to divide the business and profits in certain proportions, is not avoided by this section, and cannot be impeached as opposed to public policy under sec. 23.[46] In *Fraser & Co.* v. *The Bombay Ice Manufacturing Co.*[47] Sir Lawrence Jenkins, C.J., expressed a decided opinion that a stipulation restraining the parties to a combination agreement from selling ice manufactured by them at a rate lower than the rate fixed in the agreement was not void under this section. A stipulation not to gin cotton or to sell ice for less than a fixed rate does not restrain any party to the contract from ginning cotton or from selling ice; in other words, none of the parties is restrained from exercising his business of ginning cotton or selling ice. What it does provide for is that in the exercise of the business certain terms shall be observed. In an Allahabad case it has been held that agreements such as the above were neither in restraint of trade nor opposed to public policy.[48]

"To that extent."—The meaning of these words is that if the agreement can be broken up into parts, it will be valid in respect of those parts which are not vitiated as being in restraint of trade. Where the agreement is not so divisible, it is wholly void.[49]

Exception 1.—This exception deals with a class of cases which had a leading part in causing the old rule against agreements in restraint of trade to be relaxed in England. The question in England is always whether the restraint objected to is reasonable with reference to the particular case and not manifestly injurious to the public interest.[50]

The law of India, however, is tied down by the language of this section to the principle of a hard and fast rule qualified by strictly limited exception; and, however mischievous the economical consequences may be, the Courts here can only administer the Act as they find it.

The kind of cases covered by this exception be illustrated by the following decision where it was held that a covenant by the defendants on the sale of the goodwill of their business of carriers to the plaintiff not to convey passengers to and fro on the road between Ootacamund and Mettupalaiyam was not in restraint of trade: "So partial a restraint is not really adverse to the interests of the public at large."[51] In a later and similar case the business disposed of was that of a ferry and the restraint on the seller was limited to three years; but the Judicial Committee had no difficulty in holding that the transaction amounted to a real sale of goodwill and was enforceable.[52]

Reasonableness of limits.—Reasonableness of restraint imposed must be ascertained in every case by a reference to the nature of the business in question, by the character and nature of business or if its customers and the situation of the parties.[53] The test of reasonableness is as between the parties and injury to public interest.[54] Any attempt to suppress competition and monopolize the market would be injurious to public interest.[53]

The word 'reasonable' would mean that it is in the interests of the parties i.e. the

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[46] *Fraser & Co.* v. *Bombay Ice Manufacturing Co.* (1904) 29 Bom. 107; *Bhola Nath* v. *Lakshmi Narain* (1931) 53 All. 316, ('31) A.A. 83.

[47] (1904) 29 Bom. 107.

[48] *Kuber Nath* v. *Mahali Ram* (1912) 34 All. 587.

[49] *Parasullah* v. *Chandra Kant* (1917) 21 C.W.N. 979, 983.

[50] *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (1894) A.C. 535.

[51] *Auchterlonie* v. *Charles Bill* (1868) 4 M.H.C. 77.

[52] *Chandra Kanta Das* v. *Parasullah Mullick* (1921) L.R. 48 I.A. 508, 48 Cal. 1030.

[53] *Shaikh Kalu* v. *Ram Saran*, 13 C.W.N. 388 (393-94).

[54] *Connors Bros Ltd.* v. *Bernard* A.I.R. (1941) P.C. 75.

covenantor subjects himself to the restraint which is no wider than is required to give adequate protection to the interest of the covenantee. The restraint should be in no way injurious to public interest.

Agreements in restraint of legal proceedings void.

28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Saving of contract to refer to arbitration dispute that may arise.

Exception 1.—This section shall not render illegal a contract by which two or more persons agree that any dispute which may raise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Suits barred such contracts.

When such a control has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit. [This part of Exception I was repealed by the Specific Relief Act, 1887, but is reprinted here as the Contract Act was in force in certain Scheduled Districts to which the Specific Relief Act, 1887, did not apply. The Act of 1887 is now repealed by the Specific Relief Act of 1963 which applies to the whole of India except the State of Jammu and Kashmir.]

Saving of contract to refer questions that have already arisen.

Exception 2.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen or affect any provision of any law in force for time being as to references to arbitration.

Agreement in restraint of legal proceedings.—This section applies to agreements which wholly or partially prohibit the parties from having recourse to a court of law. "If, for instance, a contract were to contain a stipulation that no action should be brought upon it, that stipulation would, under the first part of section 28, be void, because it would restrict both parties from enforcing their rights under the contract in the ordinary legal tribunals. The section before us affirms the Common Law. Its provisions 'appear to embody a general rule recognised in the English Courts which prohibits all agreements purporting to oust the jurisdiction of the Court.' It does not affect the validity of compromises of doubtful rights, and this view is supported by the provisions of the Civil Procedure Code, which enable parties to a suit to go before the Court and obtain a decree

in terms of a compromise.[55] If a contract were to contain a double stipulation that any dispute between the parties should be settled by arbitration, and neither party should enforce his rights under it in a court of law, that would be a valid stipulation so far as regards its first branch, viz. that all disputes between the parties should be referred to arbitration, because that of itself would not have the effect of ousting the jurisdiction of the Courts, but the latter branch of the stipulation would be void because by that the jurisdiction of the Court would be necessarily excluded."[56]

Agreements to refer to referee or arbitrator.—A contract whereby it is provided that all disputes arising between the parties should be referred to two competent London brokers, and that their decision should be final, does not come within the purview of this section.[57] Nor does a contract whereby it is provided that all disputes arising between the parties "should be referred to the arbitration of the Bengal Chamber of Commerce, whose decision shall be accepted as final and binding on both parties to the contract;"[58] still less is it wrong for the parties to a pending suit to give the Court itself, if they choose so to agree, full power to decide the whole matter without further appeal.[59] But a stipulation that parties to a reference shall not object at all to the validity of the award on any ground whatsoever before any court of law, does restrict a party absolutely from enforcing his rights in ordinary tribunals, and as such, is void. The Courts have power, in spite of such a stipulation, to set aside an award on the ground of misconduct on the part of the arbitrator. It was so held by the Madras High Court in a case[60] in which the agreement to submit to arbitration contained a restrictive stipulation of the above character.

Agreement to file suit in a Court of one place.—Where there are two Courts, both of which would normally have jurisdiction to try a suit, an agreement between the parties that the suit should be filed in one of those Courts alone and not in the other does not contravene the provisions of this section.[61]

"Rights under or in respect of any contract."—Note that this section applies only to cases where a party is restricted from enforcing his rights under or in respect of any *contract*. It does not apply to cases of wrongs or torts. Nor does it apply to decrees. The expression "contract" does not include rights under a decree.[62]

Limitation of time to enforce rights under a contract.—Under the provisions of this section, an agreement which provides that a suit should be brought for the breach of any terms of the agreement within a time shorter than the period of limitation prescribed

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55 *Anant Das.* v. *Ashburner & Co.* (1876) 1 All. 267.

56 Per Garth, C.J. in *Coringa Oil Co., Ltd.* v. *Koegler* (1876) 1 Cal. 466, 468, 469; *Mulji Tejsing* v. *Ransi Devraj* (1909) 34 Bom. 13.

57 *Coringa Oil Co Ltd.* v. *Koegler,* last note; *William Jacks & Co.* v. *Harrowing Steamship Co. Ltd.* ('32) A.S. 111.

58 *Champsey* v. *Gill & Co.* (1905) 7 Bom. L.R. 805; *Chaitram* v. *Bridhichand* (1915) 42 Cal. 1140.

59 *Bashir Ahmad* v. *Sadiq Ali* (1930) 5 Luck. 391, 120 I.C. 826, ('29) A.O. 451; *Bhirgunath Prasad.* v. *Annapurna ('34) A.P. 644.*

60 *Burla Ranga Reddi* v. *Kalapalli Sithaya* (1883) 6 Mad. 368.

61 *Milton & Co.* v. *Ojha Automobile Co.* (1930) 57 Cal. 1280, ('31) A.C. 279; *Lakshmivillas Mills Co.* v. *Vinayak* (1935) 37 Bom. L.R. 157, ('35) A.B. 198; *Musaji* v. *Durga Das* (1948) Lah. 281, 223 I.C. 284, ('46) A.L. 57 (F.B.); *Libra Mining Works* v. *Baldota Bros.* ('62) And. Prad. 452; *Hakam Singh* v. *Gammon (India) Ltd. (1971)* 3 S.C.R. 314 = (1971) A.S.C. 740.

62 *Ramghulam* v. *Janki Rai* (1884) 7 All. 124, 131.

by law is void to that extent. The effect of such an agreement is absolutely to restrict the parties from enforcing their rights after the expiration of the stipulated period, though it may be within the period of limitation. Agreements of this kind must be distinguished from those which do not limit the time within which a party may *enforce* his rights, but which provide for a *release or forfeiture* of rights if no suit is brought within the period stipulated in the agreement. The latter class of agreements are outside the scope of the present section, and they are binding between the parties. Thus, a clause in a policy of fire insurance which provides that "If the claim is made and rejected, and an action or suit be not commenced within three months after such rejection all benefits under this policy shall be *forefeited*" is valid, as such a clause operates as a release or forfeiture of the rights of the assured if the condition be not complied with, and a suit cannot be maintained on such a policy after the expiration of three months from the date of rejection of the plaintiff's claim. It was so held by the High Court of Bombay in the *Baroda Spg. & Wvg. Co.'s case.*[63]

No provision is made in the section for agreements extending the period of limitation for enforcing rights arising under it. In a case before the Judicial Committee[64] their Lordships expressed their opinion that, an agreement that in consideration of an enquiry into the merits of a disputed claim, advantage should not be taken of the Statue of Limitation in respect of the time employed in the inquiry is no bar to the plea of Limitation, though an action might be brought for breach of such an agreement. There is hardly any doubt that an agreement which provides for a longer period of limitation than the law allows does not lie within the scope of this section. Such an agreement certainly does not fall within the first branch of the section. There is no restriction imposed upon the right to sue; on the contrary, it seeks to keep the right to sue subsisting even after the period of limitation. Nor is this an agreement limiting the time to enforce legal rights. It would, however, be void under sec. 23 as tending to defeat the provisions of the Limitation Act, 1908.[65, 66] A restriction in a grant of maintenance which debarred the grantee from suing for maintenance more than one year in arrear was held to be void under this section.[67]

Exception 1.—This exception "applies only to a class of contracts, where, as in *Scott* v. *Avery*,[68] the parties have agreed that no action shall be brought until some question of amount has first been decided by a reference, as for instance, the amount of damage which the assured has sustained in a marine or fire policy. Such an agreement does not exclude the jurisdiction of the Courts; it only stays the plaintiff's hand till some

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[63] *Baroda Spg. & Wvg. Co., Ltd.* v. *Satyanarayan Marine & Fire Insurance Co., Ltd.* (1914) 38 Bom. 344, Foll. in *Girdharilal* v. *Eagle Star & British Dominions Insurance Co., Ltd.* (1923) 27 C.W.N. 955; *G. Rainey* v. *Burma Fire & Marine Insurance Co.* (1925) 3 Ran. 383; *Shakoor* v. *Hinde & Co.* (1932) 34 Bom. L.R. 634, ('32) A.B. 330 *Western India Prospecting Syndicate Ltd.* v. *Bombay Steam Navigation Co. Ltd* ('51) A. Saur. 83; *The Unique Motor Insurance* v. *Raymo* ('50) A. Kutch 32; *New India Assurance Co. Ltd.* v. *R.M. Khandelwal.* (1974) A. Bom. 228.

[64] *East India Co.* v. *Odichur Paul* (1849) 5 M.I.A. 43, 70.

[65] Repealed and re-enacted as the Limitation Act, 1963.

[66] *Ballepragada* v. *Thammana* (1917) 40 Mad. 701.

[67] *Saroj Bandhu* v. *Jnanda Sundari* (1932) 36 C.W.N. 555, ('32) A.C. 720.

[68] (1885) 5 H.L. 811; *Cipriani* v. *Bennett* (1933) 64 M.L.J. 284, ('33) A.P.C. 91.

particular amount of money has been first ascertained by reference."[69]

The point is very similar to those which so frequently occur in England where an engineer or architect is constituted the arbitrator between a contractor and the person who employs him as to what should be allowed in case of dispute for extras or penalties. It must not be supposed that the use of such terms as "sole judge" necessarily imposes any duty of proceeding in a quasi-judicial manner.

This class of cases must be distinguished from those where the obligation of a promisor, such as the duty of paying for work to be done or goods to be supplied is made, by the terms of the contract, to depend on the consent or approval of some person, as in a builder's contract, the certificate of the architect, that the work has been properly done. Here there is no question of referring to arbitration, or anything like arbitration, a dispute subsequent to the contract, but the contract itself is conditional, or, in the language of the Act, contingent (ss. 31-36, below).

Agreements void for uncertainty.

29. Agreements, the meaning of which is not certain, or capable of being or make certain, are void.

Illustrations

(a) *A* agrees to sell to *B* "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) *A* agrees to sell to *B* one hundred tins of oil a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) *A*, who is a dealer in coconut-oil only, agrees to sell to *B* "one hundred tons of oil." The nature of *A*'s trade affords an indication of the meaning of the words, and *A* has entered into a contract for the sale of one hundred tons of coconut-oil.

(d) *A* agrees to sell to *B* "all the grain in my granary at Ramnagar." There is no uncertainty here to make the agreement void.

(e) *A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by *C*." As the price is capable of being made certain there is no uncertainty here to make the agreement void.

(f) *A* agrees to sell to *B* "my white horse for rupees five hundred or rupees one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

Construction of contract.—The Court must give effect to the plain meaning of the words in the instruments however it may dislike the result. When the bargain is in writing, the intention of the parties is to be looked for in the words used. A right to terminate at will cannot be restricted to a right to terminate for a reasonable cause.[70] In construing business contracts it is no doubt important to appreciate the methods and the point of view of businessmen but this is merely a prudent way of qualifying the mind to construe their words and so to determine their meaning but this is rather different from postulating that reasonable men would or would not have agreed.[71] If the meaning is doubtful, the

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[69] Per Garth, C.J., in *Coringa Oil Co., Ltd.* v. *Koegler* (1876) 1 Cal. 466, 469; *Cooverji* v. *Bhimji* (1882) 6 Bom. 528, 536.

[70] *Central Bank of India* v. *Hartford Fire Insurance Co.* (1965) A.S.C. 1288.

[71] *Hurnandrai* v. *Pragdas*, 50 I.A. 9 = 25 Bom. L.R. 537 = (1923) A.P.C. 54; *China Cotton Exporters* v. *Beharilal Cotton Mills*, (1961) 3 S.C.R. 845 = (1961) A.S.C. 1295.

Court may have regard to the surrounding circumstances.[72]

Ambiguous contracts.—Section 93 of the Evidence Act provides that when the language of a document is ambiguous or defective no evidence can be given to explain or amend the document. See also secs. 94-97 of the same Act. Neither will the Court undertake to supply defects or remove ambiguities according to its own notions of what is reasonable; for this would be not to enforce a contract made by the parties, but to make a new contract for them. The only apparent exception to this principle is that when goods are sold without naming a price, the bargain is understood to be for a reasonable price. [See sec. 9 (1) of the Indian Sale of Goods Act, 1930.]

Where the defendant passed a document to the Agra Savings Bank whereby he promised to pay to the manager of the bank the sum of Rs.10 on or before a certain date "and a similar sum monthly every succeeding month," it was held that the instrument could not be regarded as a promissory note, as it was impossible from its language to say for what period it was to subsist and what amount was to be paid under it.[73] But if the agreement is capable of being made certain the section does not apply.[74] In a contract of sale, price was to be fixed by a named person, the plea of uncertainty of conditions was negatived.[75]

An agreement to grant a lease when no date of commencement is expressly or impliedly fixed cannot be enforced.[76] But when the commencement of a lease is dependent upon a contingency, which has occurred, the agreement can be enforced.[77] An agreement to pay a certain amount, after deduction as would be agreed upon between the parties is void for uncertainty.[78] It has also been held that an agreement to refer an arbitration to a person, who has been described in uncertain terms is void.[79] But where the proprietor of an indigo factory mortgaged to *B* all the indigo cakes that might be manufactured by the factory from crops to be grown on lands of the factory from the date of the mortgage upto the date of payment of the mortgage debt, it was held that the terms of the mortgage were not vague, and that the mortgage was not void in law.[80]

A term in an agreement that a dispute arising out of the contract be settled by arbitration according to a specified Association is not vague or uncertain.[81] A contract containing the words "subject to usual force majeure clause" is not vague or uncertain.[82] Similarly, an agreement between a landlord and a tenant to adjust the cost of repairs of the new construction to be made by the tenant against the rent payable by the tenant to

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[72] *Raja* v. *Venkata* v. *Venkatapathi Raju*, (1924) A.P.C. 162 = 48 Mad. 230.

[73] *Carter* v. *The Agra Savings Bank* (1883) 5 All. 562.

[74] *Rami Naidu* v. *Seethan Naidu* (1935) 154 I.C. 821, ('35) A.M. 276.

[75] *Sobhat Devi* v. *Devi Phal*, (1971) A. S.C. 2192; *M. Sham Singh* v. *State of Mysore* (1972) A.S.C. 2440 (Salary to be fixed by Govt.).

[76] *Giribala Dasi* v. *Kalidas Bhanja* (1920) 22 Bom. L.R. 1332, 57 I.C. 626, A.I.R. 1921 P.C. 71; *Central Bank Yeotmal Ltd.* v. *Vyankatesh* (1949) Nag. 106, A.I.R. 1949 Nag. 286; *Marshall* v. *Berridge* (1881) 18 Ch. D. 233, C.A.

[77] *Sitlani* v. *Viroosing* (1947) 225 I.C. 264, A.I.R. 1947 Sind. 6.

[78] *Kalpana Devara* v. *Krishna Mitter* (1945) Mad. 521, 219 I.C. 231, A.I.R. 1945 Mad. 10 Distinguished in *East Asiatic Co.* v. *Rugnath* A.I.R. 1953 Sau 122.

[79] *Governor-General in Council* v. *Simla Banking & Industrial Co. Ltd.*, A.I.R. 1947 Lah. 215, 266 I.C. 444.

[80] *Baldeo Parshad* v. *Miller* (1904) 31 Cal. 667, 676-678.

[81] *M. Golodetz* v. *Serajuddi*, 63 C.W.N. 128.

[82] *Dhanrajmal Gobindram* v. *Shamji Kalidas & Co.* (1961) 3 S.C.R. 1020: 64 Bom. L.R. 169: A.I.R. (1961) S.C. 1285.

the landlord would not be void for uncertainty as the cost of repairs could be ascertained after the repairs are carried out.[83]

'A contract to negotiate,' supported by consideration, is too uncertain and not enforceable.[84] Court held there was no contract as there was no agreement between the parties upon a fundamental matter as to price in a building contract nor regarding the method by which price was to be calculated.[84]

30. Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Agreements by way of wager void.

This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or towards any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Exception in favour of certain prizes for horse-racing.

Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294-A of the Indian Penal Code apply.

Section 294-A of the Indian Penal Code not affected.

Wagering contracts.—This section represents the law of wagering contracts now in force in India, supplemented in the Maharashtra State by Act III of 1865. It superseded Act 21 of 1848 (an Act for avoiding wagers).

There is no technical objection to the validity of a wagering contract.[85] It is an agreement by mutual promises, each of them conditional on the happening or not happening of an unknown event. So far as that goes, promises of this form will support each other as well as any other reciprocal promises.

What is a wager.—A wager has been defined as a contract by *A* to pay money to *B* on the happening of a given event, in consideration of *B* paying to him money on the event not happening.[86] But Sir William Anson's definition, "a promise to give money or money's worth upon the determination or ascertainment of an uncertain event," is neater and more accurate. To constitute a wager "the parties must contemplate the determination of the uncertain event as the sole condition of their contract. One may thus distinguish a genuine wager from a conditional promise or a guarantee". Anson, *Law of Contract*, 22nd ed. 301, 302. "But if one of the parties has the event in his own hands, the transaction lacks an essential ingredient of a wager."[87] "It is of the essence of a wager that each side should stand to win or lose according to the uncertain or unascer-

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[83] *Chandra Sheikhar* v. *Gopi Nath*, A.I.R. (1963) All. 248.

[84] *Courtney and Fairbairn Ltd.* v. *Tolani Bros.* (Hostels) Ltd. (1975) 1 W.L.R. 297.

[85] *Gherulal Parakh* v. *Mahadeodas Maiya* (1959) 2 S.C.R. (supp.) 406: A.I.R. (1959) S.C. 781.

[86] *Hampden* v. *Walsh* (1876) 1 Q.B.D. 189, 192. See also per Lord Brampton in *Carlill* v. *Carbolic Smoke Ball Co.* (1892) 2 Q.B. 484, 490.

[87] Per Birdwood J., in *Dayabhai Trikhovandas* v. *Lakhmichand Panachand* (1885) 9 Bom. 358, 363.

tained event, in reference to which the chance or risk is taken.[88] A wager may be even with respect to an event which has already happened in the past and so it may not be a future event. e.g. result of an election which is over but the parties may not be aware of its result.

Lastly, to amount to a wagering transaction it is necessary that the stake money for the contemplated event should come out of the pockets of the parties entering into the wagering transaction. If it is subscribed by outsiders, the agreement between parties is not a wager. So where two wrestlers agreed to play a wrestling match and apart from providing that the winner of them was to get a certain sum, they also provided that a party failing to appear on the fixed day was to forfeit Rs. 500 to the opposite party out of the gate money. The defendant failed to appear in the ring and plaintiff sued him for Rs. 500 only. It was held as the prize for success was not subscribed for by competitors themselves but by outsiders, viz., the gate money provided by the public, it was not a wager. Moreover, neither side stood to lose according to the result of the wrestling match. Thus, the plaintiff could recover Rs. 500/- from the defendant.

In *Alamai* v. *Positive Government Security Life Assurance Co.*[89] a case of life insurance, Fulton, J., said: "What is the meaning of the phrase 'agreements by way of wager' in sec. 30 of the Contract Act?" In *Thacker* v. *Hardy*,[90] Cotton, L.J. said that the essence of gaming and wagering was that one party was to win and the other was to lose upon a future event, which at the time of the contract was of an uncertain nature; but he also pointed out that there were some transaction in which the parties might lose and gain according to the happening of a future event which did not fall within the phrase. Such transactions, of course, are common enough including the majority of forward purchases and sales. If an agreement does not involve loss to either party, it is not a wager.

A certain class of agreement such as bets, by common consent, come within the expression 'agreements' by way of wagers.'

Others, such as legitimate forms of life insurance, do not, though looked at from one point of view they appear to come within the definition of wagers. The distinction is doubtless rather subtle, and probably lies more in the intention of the parties than in the form of the contract. In such doubtful cases it seems to me that the only safe course for the Courts in India is to follow the English decisions, and that when a certain class of agreement has indisputably been treated as a wagering agreement in England it ought to receive the same treatment in India.[91]

Contracts "By way of wager."—There is no distinction between the expression "gaming and wagering." used in the English Act and the repealed Indian Act XXI of 1848, and the expression "by way of wager," used in this section.[92]

Court to ascertain real nature and mutual intention.—Wagering contracts may assume a variety of forms, and a type with which the Courts have constantly dealt is that which provides for the payment of difference,[93] in stock exchange transactions, with or without colourable provisions for the completion of purchases. Such provisions, if inserted, will not prevent the Court from examining the real nature of the agreement as

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[88] Per Jenkins, C.J. in *Sassoon* v. *Tokersey* (1904) 28 Bom 616, p. 621.

[89] (1898) 23 Bom. 191.

[90] (1878) 4 Q.B.D. 685, 695.

[91] See *Trimble* v. *Hill* (1879) 5 App. Ca. 342; and also *Kathama Natchiar* v. *Dorasingu* (1875) L.R. 2 I.A. 169, 186.

[92] *Kong Yee Lone & Co.* v. *Lowjee Nanjee* (1901) 29 Cal. 461, L.R. 28 I.A. 239.

[93] *Doshi Talakshi* v. *Shah Ujamshi Velsi* (1899) 24 Bom. 227, 229.

a whole.[94] "In order to constitute a wagering contract neither party should intend to perform the contract itself, but only to pay the differences.".[95] It is not sufficient if the intention to gamble exists on the part of only one of the contracting parties. "Contracts are not wagering contracts unless it be the intention of *both* contracting parties at the time of entering into the contracts that under no circumstances to call for or give delivery from or to each other."[96] It is not necessary that such intention should be expressed. "If the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another, according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction but a wager on the rise or fall of the market." This was laid down by the Judicial Committee in *Kong Yee Lone & Co.* v. *Lowjee Nanjee*[97] and in *Sukdevdoss* v. *Govindoss.*[98] In *Doshi Talakshi* v. *Shah Ujamshi Velsi*[93] certain contracts were entered into in Dholera for sale and purchase of Broach cotton, a commodity which, it was admitted, never found its way either by production or delivery, to Dholera. The contracts were made on terms contained in a printed form which incorporated the rules framed by the cotton merchants of Dholera. Those rules expressly provided for the delivery of cotton in every case, and forbade all gambling in differences. The course of dealings was, however, such that none of the contracts was ever completed except by payment of differences between the contract price and the market price in Bombay on the *vaida* (settlement) day. It was held upon these facts that the contracts were by way of wager within the meaning of this section. On the other hand, the *modus operandi* may be such as to raise a presumption against the existence of a common intention to wager. This frequently happens when agreements of a speculative character are entered into through the medium of brokers, and when, according to the practice of the market, the principals are not brought into contract with each other, and do not know the name of the person with whom they are contracting until after the bought and sold notes are executed. Under circumstances such as these, when a party launches his contract orders he does not know with whom the contracts would be made.[99] And this presumption is considerably strengthened when the broker is authorised by the principal to contract with third persons in his (the broker's) own name; for the third person may in such case remain undisclosed even after the contract is made.[1] But the presumption may be rebutted by evidence of a common intention to wager, though the contract has been brought about by a broker.[2]

Teji Mandi transaction.—A *teji mandi* transaction involves a sale or a purchase, at the ruling rate of the date of the transaction, of a double option for a future date (Vaida

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[94] *Re Gieve* (1899) Q.B. 794, C.A. *Doshi Talakshi* v. *Shah Ujamsi Velsi* (1899) 24 Bom. 227, 232.

[95] *Perosha* v. *Manekji* (1898) 22 Bom. 899, 903; *The Universal Stock Exchange* v. *Strachan* (1896) A.C. 166; *Eshoor Doss* v. *Venkatasubba Rau* (1895) 18 Mad. 306; *Ganesh Das* v. *Har Bhagwan* (1932) 138 I.C. 542, ('32) A.L. 273.

[96] Ajudhia Prasad v. *Lalman* (1902) 25 All. 38; *Sassoon* v. *Tokersey* (1904) 28 Bom. 616; *Meghji* v. *Jadhowjee* (1910) 12 Bom. L.R. 1072; *Sitaram* v. *Chamanlal* ('52) A. Hyd. 95; *Perosha* v. *Manekji* (1898) 22 Bom. 899.

[97] (1901) 29 Cal. 461 467, L.R. 28 I.A. 239.

[98] (1918) 51 Mad. 96 (P.C.).

[99] *J. H. Tod* v. *Lakhmidas* (1892) 16 Bom. 441, 446.

[1] *Perosha* v. *Manekji* (1898) 22 Bom. 899; *Sassoon* v. *Tokersey* (1904) 28 Bom. 616.

[2] *Eshoor Doss* v. *Venkatasubba Rau* (1895) 18 Mad. 306.

day) in respect of certain goods or stock or commodity, such as cotton, gold, silver, hessian, groundnut etc. A purchaser of a double option pays a premium in respect of a unit of a commodity. He pays a premium of, say, Rs. 20/- per unit. On or before the settling-date (Vaida day) the buyer has the option to declare himself a buyer or a seller. If the market rate goes down on the settling date the buyer will declare himself as the seller. If the market rate goes up, he will declare himself as a buyer. Assuming the market rate on the date of the purchase of the double option to be Rs. 100/- per unit, if on the settling date (Vaida day) the market rate falls to Rs. 90/- or less than that, the buyer of the double option will declare himself as the seller and if the market rate rises above Rs. 100/-, he will declare himself as the purchaser. The decisions bearing on this point were considered in a case where it was held that the mere fact that a transaction was *teji mandi* did not make it a wagering transaction; to constitute it a wager it must be proved that there was a common intention to pay differences only. And this, it is submitted, is the correct rule.[3] *Teji mandi* contracts are also known as *nazarana* contracts.[4]

Agreements between Pukka Adatia and his constituents.—It was at one time held in some Bombay cases that a *pukka adatia* was merely the agent of his constituent, and that therefore no transaction between them could be a wagering transaction. In *Bhagwandas* v. *Kanji*,[5] however, it was held, on the evidence of custom, that as regards his constituent the *pukka adatia* was a principal and not a disinterested middleman bringing two principals together. Since that decision the High Court of Bombay held in two cases that a transaction between a *pukka adatia* and his constituent may be by way of wager like any other transaction between two contracting parties, and that the existence of the *pukka adat* relationship does not of itself negative the possibility of a contract being a wagering contract as between them.[6] One of those cases was taken to the Privy Council, which affirmed the principle laid down by the Bombay High Court.[7]

Agreements collateral to wagering contracts.—Thus far our observations are confined to suits between the principal parties to such a contract. Different considerations apply where the suit is brought by a broker or an agent against his principal to recover his brokerage or commission in respect of such a transaction entered into by him as such, or for indemnity for losses incurred by him in such transactions, on behalf of his principal.

Apart from a Bombay enactment to be presently noticed there is no statute which declares agreements collateral to wagering contracts to be void. Nor is there anything in the present section to render such agreements void. A subsequent promise to pay which is supported by consideration to pay money which was due originally under a wagering

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[3] *Manilal Dharamsi* v. *Allibhai Chagla* (1923) 47 Bom. 263, 24 Bom. L.R. 812, 68 I.C. 481, ('22) A.B. 408; approved *Sobhagmal Gianmal* v. *Mukundchand Balia* (1926) L.R. 53 I.A. 241, 51 Bom. 1, 28 Bom. L.R. 1376, 98 I.C. 338, ('26) A.P.C. 119; *Ram Prasad* v. *Ranji Lal* (1927) 50 All. 115, 103 I.C. 218, ('27) A.A. 795; *Narandas* v. *Ghanshyamdas* (1933) 35 Bom. L.R. 540, 147 I.C. 412, ('33) A.B. 348; *Baldeosahai* v. *Radhakrishan* (1939) 41 Bom. L.R. 308, 183 I.C. 22, ('39) A.B. 225.

[4] *Pirthi Singh* v. *Matu Ram* (1932) 13 Lah. 766, 138 I.C. 241, ('32) A.L. 356.

[5] (1905) 30 Bom. 205.

[6] *Burjorji* v. *Bhagwandas* (1914) 38 Bom. 204; *Chhogmal* v. *Jainarayan* (1915) 39 Bom. 1.

[7] *Bhagwandas* v. *Burjorji* (1918) L.R. 45 I.A. 29, 42 Bom. 373. See also *Manilal Raghunath* v. *Radha Kisson Ramjiwan* (1921) 45 Bom. 386; *Harcharan Das* v. *Jai Jai Ram* (1940) All. 136, 188 I.C. 29, ('40) A.A. 182.

transaction would be enforceable.[8] It has accordingly been held that a broker or an agent may successfully maintain a suit against his principal to recover his brokerage, commission, or the losses sustained by him, even though the contracts in respect of which the claim is made are contracts by way of wager.[9] Conversely, an agent who has received money on account of a wagering contract is bound to restore the same to his principal.[10] Such transactions are neither against the provisions of the present section nor of sec. 23.[11]

The law is, however, different in the State of Maharashtra. In that State, contracts collateral to or in respect of wagering transactions are prevented from supporting a suit by the special provisions of Bombay Act III of 1865. Sections 1 and 2 of the Act run as follows:—

Sec. 1: "All contracts, whether by speaking, writing, or otherwise knowingly made, to further or assist the entering into, effecting or carrying out agreements by way of gaming or wagering, and all contracts by way of security or guarantee for the performance of such agreements or contracts, shall be null and void; and no suit shall be allowed in any Court of justice for recovering any sum of money paid or payable in respect of any such contract or contracts or any such agreement or agreements as aforesaid."

Sec. 2: "No suit shall be allowed in any Court of justice for recovering any commission, brokerage free, or reward in respect of the knowingly effecting or carrying out or of the knowingly aiding in effecting or in carrying out or otherwise claimed or claimable in respect of any such agreements by way of gaming or wagering or any such contracts as aforesaid, whether the plaintiff in such suit or be not a party to such last-mentioned agreement or contract, or for recovering any sum of money knowingly paid or payable on account of any persons by way of commission, brokerage fee or reward in respect of any such agreement by way of gaming or wagering or contract as aforesaid."

But in order to make the sections of the Bombay Act applicable it must be shown that the transaction in respect of which the brokerage, commission, or losses are claimed must amount to a wagering agreement, and it is no answer to a suit by a broker in respect of such a claim against his principal that, so far as the defendant was concerned, he entered into the contracts as wagering transactions with the intention of paying the differences only, and that the plaintiff must have known of the inability of the defendant to complete the contracts by payments and delivery, having regard to his position and means. It must, further, be shown that the contracts which the plaintiff entered into with third persons on behalf of the defendant were wagering contracts as between the plaintiff and those third persons.[12] It has also been held that a deposit paid on a wagering con-

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[8] *Leicester & Co* v. *S.P. Mullick* (1922) 27 C.W.N. 442.

[9] *Daya Ram* v. *Murli Dhar* (1927) 49 All. 926, 102 I.C. 605, ('27) A.A. 823; *Chekka* v. *Gajjila* (1904) 14 Mad. L.J. 326; much more can the principal recover from the agent money deposited with him as security *Hardeo Das* v. *Ram Prasad* (1926) 49 All. 438, 100 I.C. 774, ('27) A.A. 238. See *Mutsaddi Lal-Sewa Ram* v. *Bhagirath* (1929) 10 Lah. L.J. 522, 115 I.C. 424, ('29) A.L. 375; *Ram Dev.* v. *Seth Kaku* ('50) A. East P. 92.

[10] *Bhola Nath* v. *Mul Chand* (1903) 25 All. 639; *Hardeo Das* v. *Ram Prasad* (1927) 49 All. 438, 100 I.C. 774, ('27) A.A. 238; *Muthuswami* v. *Veeraswami* (1936) 70 M.L.J. 433, 163 I.C. 251, ('36) A.M. 486.

[11] *Banj Madho Das* v. *Kaunsal Kishor Dhusar* (1900) 22 All. 452; *Gherulal Parakh* v. *Mahadeodas*, A.I.R. (1959) S.C. 781: (1959) 2 S.C.R. (Supp.) 406.

[12] *Perosha* v. *Manekji* (1898) 22 Bom. 889, 907; *Sassoon* v. *Tokersey* (1904) 28 Bom. 616.

Chart A — Agreement

AGREEMENT

Enforceable Contract—s. 2(h)	Not enforceable Void agreement — s. 2(g)	Enforceable by one party only Voidable contract—s. 2(i)	
Requisites	Invalidating Causes	Voidable in inception	Voidable by subsequent default
(a) Competent person — ss. 11 & 12	(a) Consideration or object unlawful—s. 23 as being (i) forbidden by law (ii) defeating the provisions of any law (iii) fraudulent (iv) Injurious to person or property of another (v) immoral or opposed to public policy	(a) consent caused by fraud — ss. 14, 17 & 19 (b) consent caused by coercion—ss. 14, 15 & 19	(a) where offer of performance is not accepted—S. 38 (b) when one party prevents performance of reciprocal promise—s. 53
(b) Free consent—s. 14	(b) Without consideration—s. 25 unless (i) by writing registered, between near relations out of natural love and affection (ii) to compensate a person for something voluntarily done for the promisor or which the promisor was bound to do (iii) in writing to pay a time-barred debt	(c) consent caused by misrepresentation—ss. 14, 18 & 19 (d) consent caused by undue influences—ss. 14, 16 & 19A	(c) when a party fails to perform at the time fixed if time is the essence of the contract—s. 55
(c) Lawful consideration—ss. 2(d) & 23	(c) in restraint of the marriage of a person not a minor—s. 26		
(d) Not declared to be void —ss. 25-30	(d) in restraint of trade—s. 27 (saving the sale of a goodwill) (e) in restrain of legal proceedings—s. 28 (saving references to arbitration) (f) by way of wager—s. 30 (g) of uncertain meaning—s. 29 (h) to do an act which is impossible or becomes impossible —ss. 35, 36 & 56 (i) mistake of both parties as to essential matter of fact—s. 20 (j) mistake of both parties to foreign law—s. 21		

tract cannot be recovered in a case subject to the provisions of sec. 1 of the Bombay Act, whether the person suing is a winner or a loser in the transaction.[13] An agreement to settle differences arising out of a nominal agreement for sale which was really a gamble is no less void than the original wagering transaction.[14]

The result therefore is that, though an agreement by way of wager is void, a contract collateral to it or in respect of a wagering agreement is not void,[15] except in the Maharashtra State and possibly in the state of Gujarat in view of Section 87 of the Bombay Reorganization Act (XI of 1960).

So in Rangoon Case, *K* owed money to *N*. On a betting transaction *K* refused to pay the said amount. *N* threatened to post *K* as defaulter before the Turf Club. So *K* gave a post dated cheque to *N* and requested *N* not to do so and moreover *K* promised to make payment on a certain day but he defaulted. It was held that plaintiff could recover on the cheque because the consideration for the passing of a cheque was the plaintiff's act in refraining from posting defendant before the Turf Club as plaintiff could have done so and the defendant's promise on such consideration is binding on defendant. It may be hoped that in any future revision of the Contract Act the provisions of the Bombay Act will be incorporated in the present section so as to render the law uniform on this subject in the whole of India.

Insurance policies.—The cases of life insurance and marine insurance afford illustration of another variety of wagering contracts.

In *Alamai* v. *Positive Government Security Life Insurance Co.*[16] the High Court of Bombay held that in India an insurance for a term of years on the life of a person in whom the insurer had no interest was void under this section. In that case the defendant company issued a policy for a term of 10 years for Rs. 25,000 on the life of Mehbub Bi, the wife of a clerk in the employ of the plaintiff's husband. About a week after, Mehbub Bi assigned the policy to the plaintiff. Mehbub Bi died a month later, and the plaintiff as assignee of the policy sued to recover Rs. 25,000 from the defendants. It was held on the evidence that the policy was not effected by Mehbub Bi for her own use and benefit, and that it was void as a wagering transaction, the insurer having no interest in the life of Mehbub Bi.

A third party liability insurance effected by the registered owner of motor vehicle under the Motor Vehicles Act is not void as a wagering contract, even though the registered owner was a benamidar for the real owner.[17] The registered owner even if he was a benamidar, had sufficient insurable interest to effect the insurance required under the Motor Vehicles Act.[17]

Promissory note for debt due on a wagering contract.—Agreements by way of wager being void, no suit will lie on a promissory note for a debt due on a wagering contract. Such a note must be regarded "as made without consideration": for "a contract which is itself null and void cannot be treated as any consideration for a promissory note."[18]

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[13] *Ramchandra* v. *Gangabison* (1910) 12 Bom. L.R. 590.

[14] *Jivanchand Ghambirmal* v. *Laxminarayan* (1925) 49 Bom. 689, 27 Bom. L.R. 941, 89 I.C. 885, ('25) A.B. 511

[15] *Leicester & Co.* v. *S. P. Mullick* (1922) 27 C.W.N. 442; followed in *W. Banward* v. *M. M. Moolla* (1928) 7 Rang. 263, 119 I.C. 215, ('29) A.R. 241.

[16] (1898) 23 Bom. 191.

[17] *Northern India General Insurance Co. Ltd.* v. *Kanwarjit Singh Sobti* (1973) A. All. 357.

[18] *Trikam Damodar* v. *Lala Amirchand* (1871) 8 B.H.C. A.C. 131. See also *Doshi*

Award on debt on wagering contract.—An arbitration clause in a wagering contract is not to be treated as a covenant distinct from the contract of wager and is therefore void. An award resulting from a reference in such a contract is void and a suit will lie to set it aside.[19]

Suit to recover deposit.—The prohibition contained in this section as regards the recovery of money deposited pending the event of a bet applies only to the case of winners. The winner of a wager or a bet cannot sue to recover the amount deposited by the loser with the stake-holder, but it is quite competent to the loser to recover back his deposit before the stake-holder has paid it over to the winner.[20] In a case, however, governed by the provisions of Bombay Act III of 1865, even a loser cannot recover back the deposit.[21]

Lottery.—A cross-word puzzle wherein prizes are awarded to a person whose solution corresponds closely to the set solution of the editor is a lottery because the prize did not depend upon the best solution of a competitor but upon the chance of his solution corresponding closely to a set solution.[22] But if a prize is awarded to the best solution and is not dependent upon a predetermined solution, it would not be a lottery because success depended upon an exercise of a substantial degree of skill.[23] A Kuri chit funds has been held to be a lottery.[24] A sweepstake has been held to be a lottery.[25] A contract to purchase a lottery authorized by the Government is null and void as it is a contract by way of a wager.[26]

Talakshi v. *Shah Ujamsi Velsi* (1899) 24 Bom. 227; *Kong Yee Lone & Co.* v. *Lowjee Nanjee* (1901) 29 Cal. 461, L.R. 28 I.A. 239.

[19] *Karunakumar* v. *Lankaran* (1933) 60 Cal. 856, 149 I.C. 61, ('33) A.C. 759.

[20] Of course not after payment: *Maung lo Hmein* v. *Maung Aung Mya* (1925) 3 Ran. 543, 93 I.C. 105, ('26) A.R. 48.

[21] *Ramchandra* v. *Gangabison* (1910) 12 Bom. L.R. 590.

[22] *Coles* v. *Odhams Press* (1936) 1 K.B. 416.

[23] *Witty* v. *World Services Ltd.* (1936) Ch. 303.

[24] *Sesha Aiyar* v. *Krishna Aiyar*, A.I.R. (1936) Mad. 225: 70 M.L.J. 36.

[25] *Kshiteendra* v. *Madaneshwar* (1937) 63 Cal. 1234.

[26] *Sir Dorabji J. Tata* v. *Edward Lance*, 42 Bom. 676.

Chapter III

OF CONTINGENT CONTRACTS

31. A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

"Contingent contract" defined.

Illustration

A contracts to pay *B* Rs. 10,000 if *B*'s house is burnt. This is a contingent contract.

Of the section in general.—We do not know why the word "contingent," familiar to English lawyers only in the law of real property, was preferred to "conditional." A promise is said to be absolute or unconditional when the promisor binds himself to performance in any event, conditional when performance is due only on the happening of some uncertain event in the future or if some state of facts not within the promisor's knowledge now exists.

A contract may be subject to a condition precedent or a condition subsequent or a condition concurrent. This chapter deals with condition precedent. If a contract provides that it is not to be binding until a specified occurs, it is subject to a condition precedent. If a contract provides for its determination on the occurrence of a specified event in future, it is subject to a condition subsequent. For example, where a contract provides that after the purchaser opens a confirmed letter of credit in favour of the seller, the latter will ship the goods, the opening of the letter of credit is a condition precedent.[1]

Event collateral to contract.—In the text of the Act the words "some event collateral to such contract" seem to mean that the event is neither a performance directly promised as part of the contract, nor the whole of the consideration for a promise. Thus, if I offer a reward for the recovery of lost goods, there is not a contingent contract; there is no contract at all unless and until someone, acting on the offer, finds the goods and brings them to me, Again, a contract to pay a man for a piece of work is very commonly made on the terms that he is to have no pay till the work is all done; but the completion of the work, being the very thing contracted for, is not collateral to the contract, and the contract is not properly said to be contingent, though the performance of the work may be, and often is, a condition precedent to the payment of the wages.

Where a contract provides that the goods would be delivered as and when they arrive,[2] or when received from the mill where they are under manufacture.[3] or as soon as they are received from the mill.[4] or that the goods will be shipped as soon as they are delivered by the vendor's sheller,[5] it is not a contingent contract but it merely pro-

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[1] *Trans Trust* v. *Danubian Trading Co. Ltd* (1952) 2. Q.B. 297 = (1952) 1 All E.R. 970.

[2] *Ranchhoddas* v. *Nathumal*, 51 Bom L.R. 491.

[3] *Hurnandrai* v. *Pragdas*, 25 Bom. L.R. 537: A.I.R. (1923) P.C. 54 = 50 I.A. 9.

[4] *Ganga Saran* v. *Ram Charan* (1952) S.C.R. 36.

[5] *Navnitlal & Co.* v. *Kishen Chand*, A.I.R. (1956) Bom. 151.

vides a particular mode of performance.

The illustration to the section is the ordinary one of a contract of fire insurance. All contracts of insurance.[6] and indemnity are obviously contingent. A wager is a contingent agreement, but sec. 30 prevents it from being a contract.

Contingency dependent on act of party.—Words of promise amount to no promise at all if their operation is expressed to be dependent on the mere will and pleasure of the promisor, as if a man says that for a certain service he will pay whatever he himself thinks right or reasonable.[7] But the operation of a promise may well be dependent on a voluntary act other than the mere declaration of the promisor's will to be bound. The act may be that of a third person: thus a promise to pay what *A* shall determine is perfectly good. The act may also be that of the promisor himself so long as it is not an act of mere arbitrary choice whether he will be bound or not, as in the common case of goods being sold an approval, where the sale is not completed until the buyer has either approved the goods or kept them beyond the time allowed for trial.[8] So, in the case of goods to be manufactured to order it may be a term of the contract that the work shall be done to the customer's approval and then the customer's judgment, acting "*bona fide* and not capriciously," is decisive.[9] On the same principle if a clause in a contract provides that a party's disability to perform his promise shall be a cause for annulling the contract but shall give no remedy in damages, this does not apply to a disability brought about by the promisor's own conduct.[10] A builder's right to recover for his work is often made conditional on the architect certifying that the work has in fact been done and properly done, and such a condition is good.[11] Payment of a policy of insurance may be conditional on proof of the claim satisfactory to the directors of the insurance company being furnished; this means such proof as they may reasonably require.[12]

Sale of boat "subject to satisfactory survey,"[13] sale of land "subject to the grant of the planning permission to use the land as a transport depot"[14] and sale of good "subject to export (import) licence"[15] are further examples of contingent or conditional contracts.

Government of H.E.H. the Nizam with the consent of the plaintiff decided to purchase plaintiff's book of Unani medicinal prescriptions and to float a public limited company to run the medicinal factory after taking over a concern run by plaintiff. Accordingly, H.E.H. the Nizam appointed a committee for determining the amount of compensation to be paid to plaintiff for his formulas and stocks and assets of plaintiff's Dawakhana and factory. On the basis of the report of committee Firman was issued to pay to plaintiff Rs. 2,00,000 (Rs. 50,000 for book to be paid in cash and for the rest

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[6] *Commissioner of Excess Profits Tax* v. *Ruby Gen. Insurance Comp. Ltd.* (1957) SCR 1002 1011.

[7] *Roberts* v. Smith (1859) 4 H. & N. 315.

[8] *Eliphick* v. *Barnes* (1880) 5 C.P.D. 321 See sec. 24 of the Indian Sale of Goods Act.

[9] *Andrews* v. *Belfield* (1857) 2 C.B.N.S 779.

[10] *New Zealand Shipping Co.* v. *Societe des Ateliers et Chantiers de France* (1919) A.C. 1; *Chunilal Dayabhai & Co.* v. *Ahmedabad Fine Spinning etc.* Co. (1921) I.L.R. 46 Bom. 806.

[11] *Clarke* v. *Watson* (1865) 18 C.B.N.S. 278.

[12] *Braunstein* v. *Accidental Death Insurance Co.* (1861) 1 B. & S. 782.

[13] *Astra Trust* v. *Adams and Williams,* (1969) 1 Ll. Rep. 81.

[14] *Hargreaves Transport Ltd.* v. *Lynch.* (1969) 1 W.L.R. 215; *Richard West & Partners (Inverness) Ltd.* v. *Dick,* (1969) 2.Ch. 424.

[15] *Charles H. Winds Chueql Ltd.* v. *Alexander Pickering Co. Ltd.* (1950) 84 Ll. L. Rep. 89 (92-93).

Rs. 1,50,000 to be paid in the shape of shares in the proposed company).

Accordingly, Rs. 50,000 was paid to plaintiff who sent the book. However, the proposal regarding the floating of Company did not materialise. Defendant returned the book to plaintiff who refused to take it back, as according to plaintiff, in pursuance of the agreement he had sold the book to defendant for Rs. 50,000 and he claimed the balance sum of Rs. 1,50,000 which had remained outstanding. The defendant—the state of A.P. counterclaimed to recover Rs. 50, 000 and defended the suit on the ground that the proposal to form a company did not materialise due to default of the plaintiff who had taken responsibility for floating the company. The Supreme Court went through the circumstances and the various firmans and found it was not apart of the agreement that the plaintiff had to float the Company. In pursuance of the scheme the government had appointed a Managing Director of the proposed company and had purchased the plaintiff's book. Though the book was bought for the company to be floated, it did not make the contract contingent. The government chose to carry out the contract piecemeal and purchased the book. But if the company could not be floated the plaintiff did not lose his right to enforce the contract.[16]

Enforcement of contracts contingent on an event happening.

32. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustrations

(a) *A* makes a contract with *B* to buy *B*'s horse if *A* survives *C*. This contract cannot be enforced by law unless and until *C* dies in *A*'s lifetime.

(b) *A* makes a contract with *B* to sell a horse to *B* at a specified price If *C*, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until *C* refuses to buy the horse.

(c) *A* contracts to pay *B* a sum of money when *B* marries *C*. *C* dies without being married to *B*. The contract becomes void.

There are some cases which may be dealt with either under this section or sec. 56, for it may be equally true to say that performance of a material part of the contract has become impossible, and that the contract was made on the contingency of an event which has become impossible.

This section applies when the contract is dissolved by its own force i.e., by the event contemplated in the contract itself;[17] section 56 comes into play when the contract crumbles down due to an impact of a violent nature with some outside force such as imposition of government restriction or some commercial impossibility.[17] See notes on sec. 56, below, and *Krell* v. *Henry*.[18] where a contract to hire the use of a room in London to view the intended coronation procession of June 1902, was held, in effect, to be conditional on the procession taking place. Whether a contract is of the kind specified in this section may be a question of fact or construction.[19] When parties enter into an agree-

[16] *Bashir Ahmed* v. *A.P. Govt.* AIR 1970 S.C. 1089; See also *Rajasara Ramjibhai* v. *Jani Narottamdas* A.I.R. 1986 S.C. 1912.

[17] *Smt. Durga Devi Bhagat* v. *J. B. Advani & Co. Ltd.* 76 C.W.N. 528.

[18] (1903) 2. K. B. 740.

[19] *Ranchoddas* v. *Nathmal* (1949) 51 Bom L.R. 491, ('49) A. B. 356; *Bisseswarlal* v. *Jaidayal* (1945) 1 Cal. 391, ('49) A. C. 407.

ment on the clear understanding that some other person should be a party to it, there is no contract, if the other person does not join the agreement.[20]

Enforcement of contracts contingent on an event not happening.

33. Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of the event becomes impossible, and not before.

Illustration

A agrees to pay *B* a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.

34. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies

Illustration

A agrees to pay *B* a sum of money if *B* marries *C*. *C* marries *D*. The marriage of *B* to *C* must now be considered impossible, although it is possible that *D* may die and that *C* may afterwards marry *B*.

Section 32 and 33 cannot be made plainer by any commentary. Section 34 is in accordance with very old English authority. A man who has contracted to sell and convey a piece of land to *A* on a certain date breaks his contract by conveying it to *Z* before that date, though he might possibly get the land back in the meantime. The application of the present section, or any section in this group, must obviously depend on the special facts and the construction of the contract.[21]

When contracts become void which are contingent on specified event not happening within fixed time.

35. Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced which are contingent on specified event not happening within fixed time.

Contingent to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations

(a) *A* promises to pay *B* a sum of money if a certain ship returns within a year. The

[20] *Jainarain* v. *Surajmull* (1949) F.C.R. 379, ('49) A.F.C. 211.

[21] See for instance *Jaunpur Sugar Factory. In re* (1925) 23 All. L.J. 608, 89, I.C. 438, ('25) A.A. 658.

contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) *A* promises to pay *B* a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

Agreements contingent on impossible events void.

36. Contingent agreements to do or not to do anything if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustration

(a) *A* agrees to pay *B* 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) *A* agrees to pay *B* 1,000 rupees if *B* will marry *A*'s daughter *C*. *C* was dead at the time of the agreement. The agreement is void.

The two last foregoing sections explain themselves.

Chapter IV

OF THE PERFORMANCE OF CONTRACTS

Contracts which must be Performed

Obligation of parties to contracts.

37. The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations

(a) *A* promises to deliver goods to *B* on a certain day on payment of Rs. 1,000. *A* dies before that day. *A*'s representatives are bound to deliver the goods to *B*, and *B* is bound to pay the Rs. 1,000 to *A*'s representatives.

(b) *A* promises to paint a picture for *B* by a certain day, at a certain price. *A* dies before the day. The contract cannot be enforced either by *A*'s representatives or by *B*.

Performance and discharge.—A contract being an agreement enforceable by law comprises of reciprocal promises. This chapter therefore deals with the different aspects of performance of such promises.

In order that a party could enforce the promises made to him, he should perform his promise or offer to perform his promise and it is after he has so performed, or offered to perform, his promise that he could ask the other party to carry out his promise. It is this principle which is embodied in this section. Either performance or readiness and willingness to perform the contract is the basic requirement. This section is to be read with the other sections in this chapter. The order in which the reciprocal promises are to be performed is given in sections 51 and 52. Section 50 provides for the manner of performance, sections 46 to 49 provide for time and place for performance Sections 40 to 45 show the extent of liability of the contracting parties in performing their promises. A contract being an agreement enforceable by law (s. 2, above creates a legal obligation, which subsists until discharged Performance of the promise or promises remaining to be performed is the principal and most usual mode of discharge.

As to performance by an agent, see sec. 40, below. The rule of the Common Law which is here affirmed in the second paragraph was stated in England in 1869, by Willes, J., a judge of very great learning and authority. "Generally speaking, contracts bind the executor or administrator though not named. Where, however, personal considerations are the foundation of the contract, as in cases of principal and agent, and master and servant, the death of either party puts an end to the relation; and, in respect of service

after the death the contract is dissolved, unless there be a stipulation express or implied to the contrary ''[1]

Such personal considerations as are here mentioned extend, as shown by illustration (b) to the present section to contracts involving special personal confidence or the exercise of special skill (*cp. s.* 40, below). They do not extend to mere exercise of ordinary discretion. The executors of a man who has ordered goods deliverable by instalments under a continuing contract may be bound to accept the remaining instalments, for the duty or discretion of seeing that the goods supplied are according to contract does not require any personal qualifications.[2]

The words ''dispensed with or excused'' used in respect of performance of a contract have been deliberately used. The legal consequence of performance is a discharge from the obligations created by mutual promises. Non-performance would amount to a breach of contract. If the performance is dispensed with or excused, its legal consequence is a discharge from the obligations. Such modes of discharge are as follows:—

(a) By proper performance (ss. 37-38).
(b) When performance becomes impossible or unlawful (s. 56).
(c) By death of the contracting party if the contract is personal in its character (s. 37).
(d) By rescission (s. 62).
(e) By novation (s. 62).
(f) By remission (s. 63).
(g) By accord and satisfaction (s. 63).
(h) By operation of other laws such as Presidency Towns Insolvency Act, Provincial Insolvency Act, Agricultural Debtors Relief Act, Rent Restriction Act, C.P. and Berar Reduction of Interest Act, etc.

Succession to benefit of contract.—Generally the representatives of a deceased promisee may enforce subsisting contracts with him for the benefit of his estate. It is no real exception to this rule that in some cases the nature of the contract is in itself, or may be made by the intention of the parties, such that the obligation is determined by the death of the promisee. The contract to marry is the most obvious example in the Common Law. Another more seeming than real exception is where performance by the other party is conditional on some performance by the deceased which was not completed in his lifetime and is of such a personal character that performance my his representatives cannot be equivalent. An architect's executor, for example, cannot insist on completing an unfinished design, even if he is a skilled architect himself; and accordingly he cannot fulfil the conditions on which payment, or further payment, as the case may be, would have become due. But a builder's executors may be entitled and bound to perform his contracts for ordinary building work, for they have only to procure workmen of ordinary competence and similarly in other cases. All rules of this kind are in aid of the presumed intention of the parties and if the parties have expressed a special intention it must prevail.

The rights of insolvent debtor's assignee to sue on his contracts depend, of course, on statute; but in the absence of more specific provisions they are governed by the same principles as an executor's.

Assignment of contracts.—Broadly speaking, the benefit of a contract can be assigned, but not the burden, subject to the same exception os strictly personal contracts that has been mentioned as affecting the powers and duties of executors. The principles

[1] *Farrow* v. *Wilson* L.R. 4. C.P. 744, 746. [2] *Wentworth* v. *Cock* (1859) 10 A. & E. 42.

were thus stated by the Court of Appeal in England: "Neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to someone else this can only be brought about by the consent of all three, and involves the release of the original debtor.... On the other hand, it is equally clear that the benefit of a contract can be assigned and wherever the consideration has been executed, and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned and can be put in suit by the assignee in his own name after notice.... There is, however, another class of contracts where there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi-privity with a substituted person..... To suits on these contracts, therefore, the original contractee must be a party whatever his rights as between him and his assignee. He cannot enforce the contract without showing ability on his part to perform the conditions performable by him under the contract. This is the reason why contracts involving special personal qualifications in the contractor are said, perhaps somewhat loosely not to be assignable."[3]

The Contract Act has no section dealing generally with assignability of contracts. A contract which, under section 40, is such that the promisor must perform it in person has been held not to be assignable. "When considerations connected with the person with whom a contract is made form a material element of the contract, it may well be that such a contract on that ground alone is one which cannot be assigned without the promisor's consent so as to entitle the assignee to sue him on it."[4]

In view of the principle that the burden of a contract cannot be shifted on to the shoulders of a third party without the consent of the contractee and the third party, it has been stated that a stranger to a contract cannot sue on the contract. Where *A* agrees to pay off the debt of *B* to *C*, *C* cannot enforce such a contract against *A* because *C* is not a party to the contract and cannot insist upon its performance.[5]

However, where a contract is intended to secure a benefit to a third party as a beneficiary under a family arrangement or partition, such a beneficiary may sue in his own right to enforce it.[6]

Where *A*, a salt manufacturer, agreed with *B*, to manufacture for him for a period of seven years such quantity of salt as *B* required in consideration of *B* paying him at a fixed rate, four months' credit after each delivery being allowed to *B* and of his paying Government taxes and dues, and executing all but petty repairs in *A*'s factory, it was held that the contract was based upon personal consideration, and that it was not therefore competent to *B* to assign the contract without *A*'s consent.[7] The court said: "There is not

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[3] *Tolhurst* v. *Associated Cement Manufacturers* (1902) 2. K.B. 660, 669 per Collins, M.R.

[4] *Toomey* v. *Rama Sahi* (1890) 17 Cal. 115, at p. 121.

[5] *Nathu Khan* v. *Thakur Burtonath*, 26 Cal. W.N. 514 (P.C); *Jamnadas* v. *Ram Autar*. 34 All 63. (P.C): 39 I.A. 7; *Duraiswami* v. *U.I.L. Assurance Co.*, A.I.R. (1956) Mad. 316; *National Petroleum Co. Ltd.* v. *Popatlal*. 60 Bom. 954: 38 Bom. L.R. 610: A.I.R. (1936) Bom. 344.

[6] *Din Kuer* v. *Sarala Devi*. A.I.R. (1947) P.C. 8: Khwaja Muhammad Khan v. *Hussaini Begam*. 37 I.A. 152: 32 All 410.

[7] *Namasivaya Gurukkal* v. *Kadir Ammal* (1894) 17 Mad. 168.

only credit given to (B) in the matter of payment, but other liabilities are thrown upon him, the discharge of which depended upon his solvency, and there is also a certain discretion vested in him in regard to the quantity of salt to be demanded"[8]. But where *A* agreed to sell certain gunny bags to *B*, which were to be delivered in monthly instalments for a period of six months, and the contract contained certain buyer's option as to quality and packing, it was held that the clause as to buyer's option did not preclude *B* from assigning the contract.[9] *R* agreed with *M* the proprietor of an indigo concern, to sow indigo, taking the seed from *M*'s concern, on four bighas of land out of his holding selected by *M* or his Amlah, and, when the indigo was fit for weeding and reaping, to weed and reap it according to the instructions of the Amlah of the concern, and if any portion of the said land was in the judgment of Amlah found bad, in lieu thereof to get some other land in his holding selected and measured by the Amlah. Held, contract was entered into with reference to the personal position, circumstances and qualifications of *M* and his Amlah and *M* could not assign the contract without the consent of *R*,[10] [See Specific Relief Act. sec 21 (b) (corresponding to sec. 14(1) (b) of the Act of 1963) and illustrations.]

Any other law.—The most important statutory discharge of contracts, outside the present Act, is that which follows on insolvency. See the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act 1920.[11] See also secs. 62 to 67. The rule of *damdupat* in Hindu law is also within the meaning of "other law."[12]

Effect of refusal to accept offer of performance.

38. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions:—

(1) it must be unconditional;

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

(3) if the offer is an offer to deliver anything to the promisee, the promisee must have reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

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

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[8] *ibid.* p. 174.

[9] *Jaffer Meher Ali* v. *Budge Budge Jute Mills Co.* (1906) 33 Cal. 702, affirmed on appeal 34 Cal. 289.

[10] *Toomey* v. *Rama Sahi* (1890) 17 Cal. 115.

[11] *See* Janefalkar v. *Deshpande* (1946) Nag. 334. ('46) A.N. 336. in which The Central Provinces & Berar Reduction of Interest (Amendment) Act of 1938 was held to be a law which under Sec. 37 of the Contract Act partially dispensed with the performance of the contract.

[12] *Bapurao* v. *Anant* (1946) Nag. 407. ('46) A.N. 210.

Illustration

A contracts to deliver to *B* at his warehouse, on the 1st March 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, *A* must bring the cotton to *B*'s warehouse on the appointed day, under such circumstances that *B* may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

Essentials of valid performance:—

(i) It should be unconditional (sec. 38);
(ii) It should be performance by promisor or by his representative (sec.40);
(iii) It should be performed at proper time specified in the agreement or within a reasonable time (secs. 46-47)
(iv) It should be performed at the place specified in the agreement or at the place to be appointed by the promisee (sec. 49);
(v) The promise must have reasonable opportunity to ascertain (a) the thing offered and (b) whether the performance is of the whole or of a part [s. 38(1) (3)]

Offer to perform or Tender.—The subject-matter of the present section is to be found under the head of 'Tender ' in English books.

The first sub-section is chiefly, though not exclusively, appropriate to an offer of payment; the second and third concern offers of other kinds of performance, such as delivery of goods.

The principles were laid down in England in 1843 in *Startup* v. *Macdonald*:[13] "The law considers a party who has entered into a contract to deliver goods or pay money to another as having substantially performed it, if he has tendered the goods or money to the party to whom the delivery or payment was to be made, provided only that the tender has been made under such circumstances that the party to whom it has been made has had a reasonable opportunity of examining the goods or the money tendered, in order to ascertain that the thing tendered really was that it purported to be": As to what are proper time and place, see secs. 46–49 below. Read sec. 67 which lays down a duty for the promisee to afford reasonable facilities for performance.

Offer must not be of part only.—With regard to the validity of an offer performance, it must be not only unconditional, but entire, that is, it must be an offer of the whole payment or a performance that is due.[14]

It has been held by the High Court of Calcutta that a creditor is not bound to accept a sum smaller than he is entitled to and therefore the tender of such a sum does not stop interest running on it.[15]

A so-called tender of less than the debtor admits to be due is not a tender at all, but an offer of payment on account, which the creditor may accept or not, and risks nothing, in point of law, by not accepting, though it is often, in point of fact, unwise not to take what one can get. He may take the debtor's offered payment without prejudice to his claim, such as it may be, to a further balance. The debtor is entitled to a receipt for what he pays, but not to a release. A tender will be vitiated by the addition of any terms which amount to requiring the creditor to accept the sum offered in full satisfaction, or to admit in any other way that no more is due.

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[13] (1843) 6 Man. & G. 593, 610; judgement of Rolfe, B.

[14] *Dixon* v. *Clark* (1848) 5 C.B. 365.

[15] *Watson & Co.* v. *Dhonendra Chunder Mookerjee* (1877) 3 Cal. 6, 16.

Offer must be unconditional.—"The person making a tender has a right to exclude presumptions against himself by saying: 'I pay this as the whole that is due': but if he requires the other party to accept it as all that is due, that is imposing a condition; and when the offer is so made, the creditor may refuse to consider it as a tender.".[16]

If a tender is accompanied by a condition which prevents it being a perfect and complete tender, the other party is entitled to reject it.[17] A cheque being subject to being honoured by the bank, it is a conditional tender.

Offer at proper time and place.—A tender of debt before the due date is not a valid tender and will not prevent interest from running on the loan.[18]

Able and willing.—Sub-Sec. (2) provides that the tender must be made under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do. A tender of money in payment must be made with an actual production of the money.[19] A plea of tender before action must be accompanied by a payment into Court after action, otherwise the tender is ineffectual.[20] The Calcutta High Court[21] did not accept the view of the Madras High Court in *Veerayya* v. *Sivayya*.[19] as the correct view of S. 38 of the Contract Act. According to the High court of Calcutta an offer made by Promisor, through his Solicitor, to pay a debt with interest due thereon at the date of offer, does not of itself afford a reasonable opportunity to the promisee of ascertaining that the promisor is able and willing then and there to perform his promise. The Calcutta High Court further observed that an offer of performance must fulfil certain conditions mentioned in S. 38 itself.

On a contract for the sale and purchase of Government paper providing for its delivery on a certain date, it is not necessary for the seller to prove that he took the paper to the purchaser's place of business and made an actual tender then and there. It is sufficient that the seller was ready and willing to deliver on that date and did his best to inform the purchaser by going to his place of business on that date.[22] Where a contract is made for the future delivery of shares, and the purchaser, before the delivery day, gives notice to the vendor that he will not accept the shares, the vendor is thereby exonerated from giving proof of his readiness and willingness to deliver the shares, and the issue as to readiness and willingness is in such a case immaterial.[23] Such a case falls under sec. 39.

Reasonable opportunity.—A tender of goods must be so made that the person to whom the goods are offered has a reasonable time to ascertain that the goods offered are goods of the quality contracted for. A tender made at such a later hour of the appointed day that the buyer has no time to inspect them is not good.[24]

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[16] *Bowen* v. *Owen* (1847) 11 Q.B. 130, 136 per *Erle, J.*; *Sati Prasad* v. *Monmotha Nath* (1913) 18 C.W.N. 84; *Bank of Mysore* v. *B. D. Naidu* A 1954 Mys. 168.

[17] *Narain Das* v. *Abinash*, 21 All. L.J. 201: 37 Cal. L.J. 457 (P.C.).

[18] *Eshahuq Molla* v. *Abdul Bari Haldar* (1904) 31 Cal. 183.

[19] A mere offer by post to pay the amount due is not a valid tender: *Veerayya* v. *Sivayya* (1914) 27 Mad. L.J. 482; *Kamaya* v. *Devapa*, 22 Bom. 440.

[20] *Haji Abdul Rahman* v. *Haji Noor Mahomed* (1891) 16 Bom. 141, at pp. 149-150; *Sabapathy* v. *Vanmahalinga* (1915) 38 Mad, 959 at p. 970; *Rakhal Chandra* v. *Baikuntha Nath* (1928) 32 C.W.N. 1082, ('28) A.C. 874.

[21] *Ismail Bhai Rahim* v. *Adam Osman* (1938) 2 Cal. 337, 181 I.C. 539, ('39) A.C. 131.

[22] *Juggernath Sew Bux* v. *Ram Dyal* (1883) 9 Cal. 791.

[23] *Dayabhai Dipchand* v. *Monikla Vrijbhukan* (1871) 8 B.H.C. A.C. 123.

[24] *Startup* v. *Macdonald* (1843) 6 Man. & G. 593.

Reasonable opportunity of inspection is all that the Act requires: it is the receiving party's business to verify, not the delivering party's to supply further proof that the goods are according to contract. The goods need not be in the delivering party's actual possession; control is enough.[25]

Tender of money.—Legal tender must be in the current coin of the country.[26] A creditor is not bound to accept a cheque because it is a conditional payment; but if a cheque is tendered and received, and the creditor or his agent objects only to the amount, or makes no immediate objection at all, he cannot afterwards object to the nature of the tender.[26] Downright refusal by the creditor to accept payment at all precludes any subsequent objection to the form of the tender.[27]

As regards the payment by cheque, in recent cases the tendency is to treat payment by cheque as an act of a prudent and reasonable man and a good tender of rent by a tenant.[28] Similarly tender rent by money order has been held to be a proper mode.[29]

Offer to one of several joint promisees.—A tender of rent by a lessee to one of several joint lessors[30] and of a mortgage debt by a mortgagor to one of several mortgagees[31] would be a valid tender under this section.

Validity of discharge by one of several joint promisees.—In *Barber Miran* v. *Ramana*,[32] it was held by the High Court of Madras that this section does not make it incumbent on the debtor to satisfy all the joint promisees before obtaining a complete discharge, and therefore a release of a mortgagor by one of two mortgagees on payment to him of the mortgage debt discharges the mortgagor as against the other mortgagee. This decision was based upon the English case of *Wallace* v. *Kelsall*.[33] The correctness of this decision has been doubted in a number of cases.[34] The correct view seems to be that a mere tender of a money debt to one of the joint creditors does not discharge the debt; the material section of the Contract Act, as regards the right to give a discharge in the name of joint debtors, is not sec. 38 but sec. 45. It must not be overlooked that in English law the rule that payment to one of joint creditors is a good discharge is still the general rule.[35] The principle of the decision in *Barber Miran* v. *Ramana Goundan* applies only where there are two or more joint promisees. It does not apply to the case of co-heirs who are not joint promisees, but the heirs of a single promisee, and a release therefor of

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25 *Arunachalam Chettiar* v. *Krishna Aiyar* (1925) 49 Mad. L.J. 530

26 *Jagat Tarini* v. *Naba Gopal* (1907) 34 Cal. 305.

27 *Venkatrama Ayyar* v. *Gopalakrishna Pillai* (1928) 52 Mad. 322, 90 I.C. 481, ('25) A.M. 1168, 116 I.C. 844, ('29) A.M. 230; *Krishnaswamy* v. *Mohanlal* (1949) Mad. 657, ('49) A.M. 535; *Narain Das* v. *Rikhabai* ('52) A. Raj. 72.

28 *Marutirao Bhaurao* v. *Akbarali*, 76 Bom. L.R. 35; *Parasram* v. *Damadilal*, (1971) R.C.J. 117 (M.P.).

29 *Ajitkumar Bhattacharya* v. *Rukmani Devi*. (1973) R.C.J. 70 (All.); *Bhikha Lal* v. *Munna Lal*, (1974) R.C.J. (All.); *Rajaram* v. *Ganpatlal*, A.I.R. (1973) M.P. 268.

30 *Krishnarav* v. *Manaji* (1874) 11 B.H.C. 106. But payment to a partner in fraud of his co-partners is not a valid discharge. *Chinnaramanuja Ayyangar* v. *Padmanabha Pillaiyan* (1896) 19 Mad. 471.

31 See *Barber Miran* v. *Ramana-Goundan* (1897) 20 Mad. 461.

32 (1897) 20 Mad. 461. See *Shrinivasdas* v. *Meherbai* (1917) 41 Bom. 300, L.R. 44 I.A 36.

33 (1840) 7 M. & W. 264.

34 *Sheik Ibrahim* v. *Rama Aiyar* (1911) 35 Mad. 685, 687; *Sitaram* v. *Shridhar* (1903 27 Bom. 292, 294. *Hossainara* v. *Rahimannessa* (1910) 38 Cal. 342, at pp. 349-350; *Mahadeosingh* v. *Balmukund* (1947) Nag. 553 ('48) A.N. 279.

35 *Powell* v. *Broadhurst* (1901) 2 Ch. at p. 164.

the debtor by one of the heirs of the deceased creditor on payment to him of the amount due on the bond is not a valid discharge to the debtor.[36]

In any case a payment to one of several joint creditors does not operate as a payment to them all where the payment is fraudulently made to him and not for the benefit of them all.[37]

Effect of refusal of party to perform promise wholly.

39. When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence.[38]

Illustrations

(a) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during next two months, and *B* engages to pay her at the rate of 100 rupees for each night. On the sixth night *A* wilfully absents herself. With the assent of *B*, *A* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through *A*'s failure to sing on the sixth night.

Refusal to perform contract.—As correctly laid down by the High Court of Calcutta, "this section only means to enact what was the law in England and the law here before the Act was passed, viz. that where a party to a contract refuses altogether to perform or is disabled from performing his part of it the other side has a right to rescind it."[39] English authorities are collected in the notes to *Cutter* v. *Powell* in Smith's Leading Cases.[40]

The words used by Garth, C.J., "where a party to a contract refuses altogether to perform.... his part of it," clear up a slight verbal ambiguity in the Act, where the words "his promise in its entirety" mean the substance of the promise taken as a whole. In one sense, refusal to perform any part of a contract, however small, is a refusal to perform the contract "in its entirety"; but the kind of refusal contemplated by this enactment is one which affects a vital part of the contract, and prevents the promisee from getting in substance what he bargained for. "It is slightly misleading to speak of entire and several contract."[41] Contract of carriage of goods, contract to serve upon the ship from its commencement of voyage to its destination, contract with respect to the quantity work and labour to be done (e.g. erecting building, interior decoration etc.) are illustrations of the entirety of obligation under a contract. It must be shown that the refusal is absolute and that the party to the contract had made quite plain his intention not to perform the

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[36] *Bapann* v. *Jaggiah* (1939) 2 M.L.J. 214 ('3) A.M. 818.

[37] *Sheikh Ibrahim* v. *Rama Aiyar* (1911) 35 Mad. 5.

[38] *See Boulton Bros. & Co.* v. *New Victoria Mills Co.* (1928) 26 All. L.J. 1119, 119 I.C. 837, ('29) A.A. 87

[39] *Per Garth, Co. in Soolton Chund* v. *Schiller* (1878) 4 Cal. 252, 255.

[40] Vol. II at p. 10, 12th edn. (1795) 6 T.R. 320.

[41] *G. H. Treitel's* Law of Contract, IVth edition page 535.

contract.[42] The refusal to perform the contract must be communicated to the other party to the contract.[43]

The leading case on this subject is *Withers* v. *Reynolds*.[44] The action was for not delivering straw to the plaintiff under an agreement whereby the defendant was to supply the plaintiff with straw from October 1829 to Midsummer 1830 in specified quantities, and the plaintiff was to pay a named sum per load "for each load of straw so delivered," which the Court read as meaning that he was to pay for each load on delivery. In January 1830, the straw having been regularly sent in, and the plaintiff being in arrears with his payment, the "defendant called upon him for the amount, and he thereupon tendered to the defendant £11.11s., being the price of all the straw delivered except the last load, saying that he should always keep one load in hand." The defendant took this payment under protest, and refused to deliver any more straw unless it was paid for on delivery. The Court held that this gave the plaintiff no right of action, in other words that the defendant was entitled to put an end to the contract. As Parke, J. (as he was then, afterwards better known as Baron Parke), said, "the substance of the agreement was that the straw should be paid for on delivery.... When, therefore, the plaintiff said that he would not pay on delivery (as he did, in substance, when he insisted on keeping one load in hand), the defendant was not obliged to go on supplying him."

As to failure in performing other particular terms of a contract, no positive general rule can be laid down as to its effect. The question is in every case whether the conduct of the party in default is such as to amount to an abandonment of the contract or a refusal to perform it, or, having regard to the circumstances and the nature of the transaction, to "evince an intention not to be bound by the contract."[45] Parties can undoubtedly make any term essential or non-essential; they can provide that failure to perform it shall discharge the other party from any further duty of performance on his part, or shall not so discharge him, but shall only entitle him to compensation in damages for the particular breach.

In *Sooltan Chund* v. *Schiller*[46] the defendants agreed to deliver to the plaintiffs 200 tons of linseed at a certain price in April and May, the terms as to payment being cash on delivery. Certain deliveries were made by the defendants between the 1st and 8th of May, and a sum of Rs. 1,000 was paid on account by the plaintiffs, which left a large balance due to the defendants in respect of linseed already delivered. This balance was not paid, and the defendants thereupon wrote to the plaintiffs cancelling the contract and refusing to make further deliveries under it. The plaintiffs answered expressing their willingness to pay on adjustment of a sum which they claimed for excess refraction (i. e. excess of impurities and an allowance for some empty bags. The defendants stated that they would make no further delivery, and the plaintiffs thereupon bought in other linseed and sued the defendants for damages for non-delivery of the remaining linseed. Upon these facts it was held, that there was no refusal on the part of the plaintiffs to pay for the linseed delivered to them as they were willing to pay the sum due as soon as their cross-claims were adjusted.

It may be further observed, with regard to the illustrations, that it would be rash to

[42] *Master* v. *Garret and Taylor Ltd.* (1936) 131 I.C. 220, ('31) A.R. 126.

[43] *Dhanraj Mills Ltd.* v. *Narsingh* (1949) 27 Pat. 723, ('49) A.P. 270.

[44] (1831) 2 B. & Ad. 882.

[45] *Freeth* v. *Burr* (1874) L.R. 9 C.P. 213, 214.

[46] (1878) 4 Cal. 252; *Burn & Co.* v. *Thakur Saheb Sree Lukdirjee* (1923) 28 C.W.N. 104, a case on rather similar lines; *Volkart Bros.* v. *Rutna Velu Chetti* (1894) 18 Mad. 63.

extend them. In England it has been held that a singer engaged to perform in concerts as well as in operas who has agreed, amongst other things, to be London six days before the beginning of his engagement, for the purpose of rehearsal, does not, merely by failing to be in London at the time so named, entitle the manager to put an end to the contract.[47] Wrongful dismissal of an employee has, on the other hand, been held to determine not only the contract of service, but a term restraining the employee from carrying on the same business after its termination.[48]

The principles set forth above were applied by the High Court of Calcutta in a case where the plaintiff had agreed to purchase from the defendant 300 tons of sugar, "the shipment [to] be made during September and October next in lots of about 75 tons in a shipment," the terms as to payment being cash before delivery. Notice of the arrival of the September shipment was given to the plaintiff, and he was called upon to pay before delivery. The plaintiff, was unable to pay, and asked for time, but the defendant declined and ultimately wrote to the plaintiff stating that he had cancelled the contract. On the arrival of the October shipment the plaintiff tendered payment for the same, but the defendant refused to accept the money, saying that the contract had been cancelled. The plaintiff thereupon sued the defendant for damages for refusing to deliver the October shipment. It was held, in accordance with the English authorities that mere failure on the part of the plaintiff to pay for and take delivery of the September shipment did not amount to "a refusal to perform the contract within the meaning of this section so as to entitle the defendant to rescind the contract, and that it did not exonerate him from delivering the October shipment.[49] Here the plaintiff's failure to pay before delivery cannot be construed as his refusal to perform the contract "in its entirety",.

It would not be correct to hold that any departure whatever from the terms of the contract will entitle the other party to set aside the contract.

Scope of the section.—The section is not confined to anticipatory breaches. It includes breaches before as well as after the time when the contract is to be performed. If the promisee takes no action on a repudiation before date of performance it is open to the promisor to change his mind and perform.[50] See note "Anticipatory Breach" below.

Reason for refusal to perform.—A buyer who has refused to receive goods on the ground that they were not tendered within the agreed time cannot afterwards change his ground and raise the objection that in fact the goods were not according to contract;[51] for the election to rescind, once made, is conclusive.[52]

"Disabled himself from performing."—Disability due to the party's own fault must be distinguished from inability to perform a contract. It is very old law that if a promisor disables himself from performance, even before the time for performance has arrived, it is equivalent to a breach.[53] But a person cannot by an unilateral act put an

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[47] *Bettini* v. *Gye* (1876) 1 Q.B.D. 183.

[48] *General Bill Posting Co.* v. *Atkinson* (1909) A.C. 118.

[49] *Rash Behary Shaha* v. *Nrittya Gopal Nundy* (1906) Cal. 477.

[50] *Phul Chand Fateh Chand* v. *Jugal Kishore Gulab Singh* (1927) 8 Lah. 501, 106 I.C. 10, ('27) A.L. 693.

[51] *Nannier* v. *Rayalu Iyer* (1925) 49 Mad. 781. 93 I.C. 673, ('26) A.M. 778. But as to a case where the vendor was not ready and willing to perform at all; see *British and Beningtons* v. *N. W. Cacher Tea Co.* (1923) A.C. 48, per Lord Summer, at p. 70.

[52] *See Narasimha Mudali* v. *Narayanaswami Chetty* (1925) 49 Mad. L.J. 720, 92 I.C. 333, ('26) A.M. 118, cp. *Jawahar Singh* v. *Secy. of State* (1926) 8 Lah. L.J. 114, 94 I.C. 635, ('26) A.L. 292

[53] Pollock on Contracts, 11th Edn., p. 222.

end to the contract. If the promisor commits a breach of the contract, the promisee can terminate the contract.[54]

"Promisee may put an end to the contract."—The common law rights of a promisee on refusal by the promisor to perform his promise were thus stated by Scotland, C.J., in a Madras case[55] of 1863, and the statement remains applicable under the Act:—

"If a vendor contracts to deliver goods within a reasonable time, payment to be made on delivery, and before the lapse of that time, before the contract becomes absolute, he says to the purchaser, 'I will not deliver the goods,' the latter is not thereby immediately bound to treat the contract as broken, and bring his action. The contract is not necessarily broken by the notice. That notice is, as respects the right to enforce the contract, a perfect nullity, a mere expression of intention to break the contract, capable of being retracted until the expiration of the time for delivering the goods. It cannot be regarded as giving an immediate right of action unless, of course, the purchaser thereupon exercise his option to treat the contract as rescinded, when he may go into the market and supply himself with similar goods, and sue upon the contract at once for any damage then sustained."

The said words comprehend a number of courses of action viz.

(i) The promise may refuse to perform his part of the promise'.
(ii) The promisee may reject the incomplete work done by promisor and refuse to pay for the same or may refuse further deliveries.
(iii) The promisee may return the defective goods.[56]

Although the right to rescind arises upon the promisor's refusal to perform, or his disability to perform the unexecuted part of the contract, the right to rescind refers to the executory as well as executed part of the contract as is indicated from the above three instances.

Besides the said right to rescind, the promisee may treat the refusal to perform as breach and sue for damages (for which read the provisions of Secs. 73 and 74).

Anticipatory breach.—The case of *Hochster* v. *De la Tour*[57] is now generally treated as the leading one on "anticipatory breach of contract." The rule shortly indicated by this phrase is that on the promisor's repudiation of the contract, even before the time for performance has arrived, the promisee may at his option treat the repudiation as an immediate breach, putting an end to the contract for the future and giving the promisee a right of action for damages. It must be remembered that the option is entirely with the promisee.

The law on the subject of "anticipatory breach" may be summed up as follows[58]:—

"The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequence of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his

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[54] *Ahamed* v. *Murugesa* ('58) A. Kerala 195.

[55] *Mansuk Das* v. *Rangayya Chetti* 1 M.H.C. 162. See also the observations of Mulla, J., in *Steel Brothers & Co. Ltd.* v. *Dayal Khatao & Co.* (1923 47 Bom. 924, a case of a contract on *c.i.f.* terms.

[56] Law of Contract by G. Treitel, 2nd edition, p. 597.

[57] 2 E. & B. 678.

[58] *Frost* v. *Knight* (1872) L.R. 7 Ex. 111; *Ratanlal* v. *Brijmohan* (1931) 33 Bom. L.R. 703, 133 I.C. 861, ('31) A.B. 386.

own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract and may at once bring his action as on a breach of it: and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." See notes to illustration (h) to section 73. When the promisee has so determined his choice, then, whether he sues for damages or not, it is not open to the promisor to go back on his refusal and treat the contract as subsisting.[59]

If the promisee does not treat the repudiation as an immediate breach and elects to keep the contract alive, the repudiation is a *brutum fulmen* i.e. the parties are left with their rights and liabilities as before; and if performance by the promisor is subject to a condition precedent, the promisee has no right of action till that condition is fulfilled.[60]

Contract of service.—The illustration to the section are both examples of contracts of service. In *Hochester* v. *De la Tour*[61] the defendant engaged the plaintiff as his courier on a Continental tour from June 1 for three months certain at £10 a month. Before that day came the defendant changed his mind and wrote to the plaintiff that he did not want him. The plaintiff, without waiting further and before June 1, sued the defendant for breach of contract. For the defendant it was argued that the plaintiff should have waited till June 1 before bringing his action, on the ground that the contract could not be considered to be broken till then. It was held, however, that the contract had been broken by express renunciation, and the plaintiff was not bound to wait until the day of performance.

Where a servant or a clerk who is engaged by the month leaves his employer's service wrongfully in the course of the then current month, he is not entitled to any salary for the broken portion of the month in the course of which he left the service.[62]

Waiver of right to rescind.—The words "unless he has signified, by words or conduct, his acquiescence in its continuance" indicate the circumstances under which the right of rescission referred to in the preceding words may be waived.

The said words indicate clearly an affirmative assertion or act. For example, a landlord may waive his right to forfeit the lease by demanding rent despite the breach brought to his knowledge;[63] a shipowner may waive his right to forfeit the charterparty by accepting payments due thereunder.[64]

Since the right to rescind the contract is preceded by the words "when a party to a contract has refused to perform..... in its entirety" clearly imply existence of those facts to the knowledge of the promisee who could put an end to the contract under the two preceding circumstances or conditions.

The words "refused to perform.... his promise" and "disabled himself from per-

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59 *Jhandoo Mal Jagan Nath* v. *Phul Chand Fateh Chand* (1924) 5 Lah. 497, 98 I.C. 118, ('25) A.L. 217.

60 *Edridge* v. *R. D. Sethna* (1933) 60 I.A. 368, 58 Bom. 101, 36 Bom. L.R. 127, 146 I.C. 739, ('33) A.P. 233.

61 (1853) 2 E. & B. 678.

62 *Ramji* v. *Little* (1873) 10 Bom. H. C. 57. *Dhumee* v. *Sevenoaks* (1886) 13 Cal. 80; *Ralli Bros.* v. *Ambika Prasad* (1913) 35 All. 132.

63 *David Blackstone Ltd.* v. *Burnetts* (1973 3 All E.R. 782.

64 *The Brimnes*, (1974) 3 All E.R. 86.

forming his promise'' refer to unexecuted or executory part of the contract.

Right to rescind is, however, not limited to executory part of the contract.

Measure of damage.—The measure of damages for ''anticipatory breach'' is not necessarily the same as it would be for a failure or refusal occurring at the time when the performance was due.[65] The plaintiff is entitled to measure his damages as they stand at the date of repudiation: *Ramgopal* v. *Dhanji Jadhavji Bhatia* (1928) 55 I.A. 299.

By whom Contracts must be Performed

Person by whom promise is to be performed

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

Illustrations

(a) *A* promises to pay *B* a sum of money. *A* may perform this promise, either by personally paying the money to *B* or by causing it to be paid to *B* by another; and, if *A* dies before the time appointed for payment, his representatives must perform the promise or employ some proper person to do so.

(b) *A* promises to paint a picture for *B*. *A* must perform this promise personally.

Personal contracts.—Contracts involving the exercise of personal skill and taste, or otherwise founded on special personal confidence between the parties, cannot be performed by deputy. But it is not always easy to say whether a particular contract is, in this sense, personal or not, or what is an adequate performance of a personal contract. A contract for personal agency or other service entered into with partners is generally determined by the death of a partner. On the other hand, a contract with a firm which has nothing really personal about it so far as regards the partners, for example, a contract to perform at a music-hall belonging to the firm, is not generally determined by the death of one member of the firm, especially if the individual members of the firm were not named in the contract and not known to the other party.[66] Every case must really be judged on its own circumstances.

A shipowner must perform a charterparty personally and cannot require the charterer to accept performance from the assignee of the ship.[67] If an owner of goods relies upon the skill and integrity of the warehouseman, the latter must perform the warehousing of the goods personally.[68] Where a garment cleaner accepted the uniform for cleaning, it was held that the contract of cleaning the uniform was to be performed personally.[69]

Vicarious performance.—Ordinary contracts for delivery of goods, payment for them and the like, may, of course, be performed by deputy.[70] ''There is clearly no per-

[65] *Millet* v. *Van Heek & Co.* (1921) 2 K.B. 369 C.A.

[66] *Phillips* v. *Alhambra Palace Co.* (1901) 1 K.B. 59

[67] *Fratelli Sorrentino* v. *Buerger*, (1915) 3 K.B. 367.

[68] *Edwards* v. *Newland*, (1950) 2 K.B. 534.

[69] *Davies* v. *Collins*, (1945) All E.R. 247.

[70] *Tod* v. *Lakhmidas* (1892) 16 Bom. 441, 451; followed in *Yaman* v. *Changi* (1925) 49 Bom, 862, 27 Bom. L.R. 1261, 91 I.C. 360, ('26) A.B. 97.

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sonal element in the payment of the price.[71]

Effect of accepting performance from third person.

41. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Acceptance of performance from a third person involves waiver of right of performance by the promisor.

Under section 41 of the Act when a promisee has accepted performance of the promise from a third person, the promisee cannot enforce it against the promisor even if the promisor has neither authorised nor ratified the act of third party.[72] S. 41 of the Act applies when contract was performed by a stranger.[73] It is essential that the performance under the contract should be in full and not in part.[74] So when a plaintiff (promisee) received Rs. 5500 out of the total price of Rs. 7600 from defendant 2 (a third person) towards the price of timber, it being not a full payment or performance, S. 41 was not held not applicable and for the balance sum plaintiff was, therefore, allowed to sue Defendant 1 who was a person with whom plaintiff had earlier agreed to supply timber at Rs. 7600.[74] However, if a promisee accepts from a third person a lesser sum in full satisfaction of a claim against the debtor (promisor), a promisee cannot recover the balance from his debtor after receiving payment in full satisfaction.[75]

According to the Calcutta High Court[76] a consignee after receiving compensation for the loss from an insurer cannot again sue the carrier who was actually liable for causing the loss of goods in transit. The Calcutta High Court considers S. 41 as a clear bar to such a suit because the plaintiff has accepted performance of the promise to pay compensation from insurer and so plaintiff cannot enforce the same claim against the carrier. The Madras High Court has taken a contrary view of S. 41 in *Sarada Mills Ltd.* v. *Union of India.*[77] According to the Madras view S. 41 has no application because the insurer's payment is not in discharge of the liability of carrier to take due care and caution. The Madras High Court relied on some observations of the Bombay High Court in *Parsram* v. *Air India Ltd*[78] for reaching this view. Of course under this view the plaintiff would prosecute the suit against defendant and pay to insurer whatever he would recover from defendant.

Devolution of joint liabilities.

42. When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract all such persons, during their joint lives, and after the death of any of them, his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly,

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[71] *Tolhurst* v. *Associated Portland Cement Manufacturers* (1902) 2 K.B. 660, 672.

[72] *Chegamull* v. *Govindaswami A.* 1928 Mad. 972, 974.

[73] *Harchandi Lal* v. *Sheoraj Singh A.* 1926 P.C. 68, 70.

[75] *Chandrasekhar Hebbar* v. *Vittaia Bhandari A.* 1966 Mys. 84.

[75] *Lala Kapurchand Godha* v. *Mir Nawab Himayatalikhan A.* 1963 S.C 250; See also *Hirachand Punam Chand* v. *Temple* (1911) 2 K.B. 330.

[76] *Textiles and Yarn (P.) Ltd.* v. *Indian National Steamship Company Ltd.* A. 1964 Cal. 362.

[77] A. 1966 M. 381.

[78] (1954) 56 Bom. L.R. 944, 954.

must fulfil the promise.

Liability of joint promisors.—This is a deliberate variation of the Common Law rule. In England "upon the death of one of several joint contractors the legal liability under the contract devolves on the survivors; and the representatives of the deceased cannot be sued at law either alone or jointly with the survivors. Consequently, the whole legal liability ultimately devolves upon the last surviving contractor, and after his death upon his representatives."[79] Parties can, of course, make their contracts what they please; but the presumption established for India by the present section appears to be more in accordance with modern mercantile usage.[80]

This section lays down the rule in respect of the liabilities of joint promisors to fulfil their joint promise while section 45 lays down the rule in respect of the rights of the joint promisees to claim performance.

Parties who should perform the promise.—

(1) The promisor personally in the case of a personal contract.
(2) In case of non-personal contracts,
(i) by the promisors jointly, or
(ii) by the promisor's man, or
(iii) by a third person on behalf of the promisors
(iv) in the event of the death of the promisor, by the legal representatives of the deceased promisor or promisors.

Any one of joint promisors may be compelled to perform.

43. When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

Each promisor may compel contribution.

Each of two or more joint promisors may compel every other joint Promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default on contribution.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations

(a) *A*, *B* and *C* jointly promise to pay *D* 3,000 rupees. *D* may compel either *A* or *B* or *C* to pay him 3,000 rupees.

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[79] Leake on Contracts, 8th Edn., p. 313.

[80] *Motilal* v. *Ghelabhai* (1893) 17 Bom. 91.

(b) *A*, *B* and *C* jointly promise to pay *D* the sum of 3,000 rupees. *C* is compelled to pay the whole. *A* is insolvent, but his assets are sufficient to pay one-half of his debts. *C* is entitled to receive 500 rupees from *A*'s estate, and 2,250 rupees from *B*.

(c) *A*, *B* and *C* are under a joint promise to pay *D* 3,000 rupees. *C* is unable to pay anything, and *A* is compelled to pay the whole. *A* is entitled to receive 1,500 rupees from *B*.

(d) *A*, *B* and *C* are under a joint promise to pay *D* 3,000 rupees, *A* and *B* being only sureties for *C*. *C* fails to pay. *A* and *B* are compelled to pay the whole sum. They are entitled to recover it from *C*

Joint promisors.—The series of section now before us materially varies the rules of the Common Law as to the devolution of the benefit of and liability on joint contracts.[81] As far as the liability under a contract is concerned, it appears to make all joint contracts joint and several.[82] It allows a promisee to sue such one or more of several joint promisors as he chooses, and excludes the right of a joint promisor to plead that all the promisors must have been made parties.[83] The minority of one of the joint promisors does not affect the liability of the others.[84] There is considerable difference of opinion amongst the Indian High Courts as to its consequential operation where a judgment has been obtained against some or one of joint promisors. These decisions are examined in the next topic.

Effect of decree against some only of joint promisors.—In *Hemendro Coomar Mullick* v. *Rajendro Lal Moonshee*[85] the High Court of Calcutta held, following the rule laid down in *King* v. *Hoare*,[86] that a decree obtained against one of several joint makers of a promissory note is a bar to a subsequent suit against others. This was followed by the High Court of Madras in a similar case in *Gurusami Chetti* v. *Samurti Chinna*.[87] Strachey, C.J., dissented from these decisions in *Muhammad Askari* v. *Radhe Ram Singh*.[88] In that case the question was whether a judgment obtained against some of several mortgagors and remaining unsatisfied against them was a bar to a second suit against other joint mortgagors, and the Court held that it did not constitute any bar and that a second suit was maintainable, as the doctrine of *King* v. *Hoare*[89] was not applicable in India, at all events in the Mufassal, since the passing of the Indian Contract Act.

The applicability to India of the rule in *King* v. *Hoare* was considered by the Bombay High Court in a case in which it was held that the present section merely took away the right of a joint promisor to have his co-promisor joined with him in the action, and did not enable the promisee to file separate actions against both. "It could not have been intended to deprive the second co-contractor of his right to plead the previous judg-

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[81] *Lukmidas Khimji* v. *Purshotam Haridass* (1882) 6 Bom. 700, 701.

[82] *Motilal Bechardass* v. *Ghellabhai Hariram* (1892) 17 Bom. 6, 11; *Raghunath Das* v. *Baleshwar Prasad* (1928) 7 Pat 353, 105 I.C. 424, ('27) A.P. 426.

[83] *Hemendro Coomar Mullick* v. *Rajendrolal Moonshee* (1878) 3 Cal. 353, 360; *Muhammad Askari* v. *Radhe Ram Singh* (1900) 22 All. 307. 315; *Dick* v. *Dhunji Jaitha* (1901) 25 Bom. 378, 386; *Jainarain* v. *Surajmull* (1949) F.C.R. 379, ('49) A.F.C. 211.

[84] *Jamna Bai* v. *Vasanta Rao* (1916) 43 I.A. 99, 39 Mad. 409; *Sain Das* v. *Ram Chand* (1923) 4 Lah. 334, 85 I.C. 701. ('24) A.L. 146; *Keka* v. *Sirajuddin* ('51) A.A. 618.

[85] (1878) 3 Cal. 353.

[86] (1844) 13 M. & W. 494.

[87] (1881) 5 Mad. 37; For contrary view see *Ramanjulu Naidu* v. *Aravamudu* (1910) 33 Mad. 317.

[88] (1900) 22 All. 307. See also *Abdul Aziz* v. *Basdeo Singh* (1912) 34 All. 604, 606.

[89] (1844) 13 M. & W. 494.

ment or to split up one case of action into as may causes of action as there are joint contractors.''[90] The Bombay High Court has adopted a contrary view in a later case.[91]

The provisions of sections 43 and 44 of this Act make a clear departure from the English law and declare that the liability of 'joint promisors' is 'joint and several'. That seems to be the reason why a decree obtained against one of the joint promisors and remaining unsatisfied would not deprive the promisee of his right to proceed against the other joint promisors to the extent of the unsatisfied claim of the promisee.[92]

We think it the better opinion that the enactment should be carried to its natural and logical consequences, and that, notwithstanding the English authorities founded on a different substantive rule, such a judgment, remaining unsatisfied, ought not, in India, to be held a bar to a subsequent action against the other joint promisor or promisors. The various judgments on either side are found in *Nil Ratan Mukhopadhyaya* v. *Cooch Behar Loan Office Ltd.*[93]

Suit against one of several partners.—In *Lukmidas Khimji* v. *Purshotam Haridas*[94] it was held in a suit brought upon a contract made by a partnership firm that a plaintiff may select as defendants those partners of the firm against whom he wishes to proceed. This decision was cited with approval by Farran, C.J., in *Motilal Bechardass* v. *Ghellabhai Hariram*[95] and was followed by the High Court of Madras in *Narayana Chetti* v. *Lakshmana Chetti*,[96] where it was held in a similar case that according to the law declared in sec. 43 of the Contract Act, it is not incumbent on a person dealing with partners to make them all defendants, and that he is at liberty to sue any one partner as he may choose. The same view of the section has been taken by the High Court of Lahore.[97]

Co-heirs.—This section speaks of two or more persons making a joint promise, and it has no application where parties become jointly interested by operation of law in a contract made by a single person. Hence the section does not apply to the case of several heirs of the original debtor, and they all must be joined as parties to the suit.[98]

Contribution between joint promisors.—Paras 2 and 3 represent the doctrine of English equity as distinct from that of the Common Law Courts.

Equity adopted the rule that the amount of contribution was the amount of the debt divided by the number of co-debtors who were solvent at the time the right to contribution arose.[99] For example, if the joint debt is of Rs. 1,000/- and the joint debtors are five; and one of them pays the debt, he would be entitled to recover Rs. 800/- from the remaining solvent joint debtors. If all the remaining four are not solvent but only three are solvent he would recover Rs. 750/- from the three solvent joint debtors.

The right to contribution contained in this section is subject to a contrary intention

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90 L.R. 370.

91 *In re Vallibhai*, 35 Bom. L.R. 881.

92 *T. Radhakrishna* v. *Muthukrishnan A.* 1970 Mad. 337.

93 A. 1941 Cal. 64.

94 (1882) 6 Bom. 700.

95 (1892) 17 Bom. 6. 11.

96 (1897) 21 Mad. 256. See also *Appa Dada Patil* v. *Ramkrishna Vasudku* (1930) 53 Bom. 652, 31 Bom. L.R. 1187, 121 I.C. 581, ('30) A.B. 5.

97 *Muhammad Ismail Khan* v. *Saaduddin Khan* (1927) 9 Lah. 217, 104, I.C. 700, ('27) A.L. 819; *Liquidator, Union Bank of India* v. *Gobind Singh* (1923) 4 Lah. 239, 77 I.C. 338, ('24) A.L. 148 (partners).

98 *Shaikh Sahad* v. *Krishna Mohan* (1916) 24 Cal. L.J. 371; *Devi Dayal* v. *Bhupinder Kumar*, (1970) A. Delhi 790.

99 *Hitchman* v. *Stewart* (1855) 3 Drew 271: 61 E.R. 907; *Lowe* v. *Dixon* (1885) 16 Q.B.D. 455 (458).

appearing in the contract between the parties

Joint tenants are joint promisors; therefore the liability is only to contribute to the performance of the promise. Hence if one of several persons jointly liable for a debt is sued and is compelled to satisfy the debt and the costs of the suit, he can only call on the others to contribute in respect of the debt, but not in respect of the costs.[1]

A decree holder (promisee) is entitled to execute his money decree from any of the joint judgment debtors (promisors). The judgment debtor who is thus compelled to pay is entitled to demand contribution from the remaining judgment debtors,[2] or the other judgment debtors were discharged from their liability by virtue of the provisions of the Relief of Indebtedness Act.[3]

When liability to contribute arises.—In a case decided before the enactment of the Contract Act, it was held that the mere existence of a decree against one of several joint debtors does not afford a ground for a suit for contribution against the other debtors. "Until he has discharged that which he says ought to be treated as a common burden, or at any rate done something towards the discharge of it, he cannot say that there is anything of which he has relieved his co-debtors, and which he can call upon them to share with him."[4] And the law under the Contract Act would appear to be the same see the illustrations to the section.[5]

The words "may compel other joint promisor to contribute equally with himself to the performance of the promise' read in the sequence of the first para show that in the first instance after one of the joint promisors is compelled to perform the promise that the right of the promisor, who was compelled to perform the promise, to the contribution from the other joint promisors arises. The liability of the remaining joint promisors to contribute should subsist when one of the joint promisor's liability subsisted at the time he was called upon to perform or was sued.[6]

Contribution between mortgagors.—Unless there is a contract to the contrary, the question of contribution by co-mortgagors, where one mortgagor has redeemed, is governed by secs. 28 and 92 of the Transfer of Property Act, and not by sec. 43 of the Contract Act.[7]

Contribution between tort feasors.—The rule of contribution contained section 43 applied to joint promisors provided there is a joint promise by them and that is also subject to the contract to the contrary amongst them as it appears from para two.

Once a decree has been passed against two or more tort feasors, which imposes a joint and several liability upon each one of the judgment-debtors, if one of them is made to pay the decretal debt he should be entitled to contribution from the remaining co-judgment debtors.[8] To what extent and in what proportion may depend upon the circumstances of each case.[9]

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[1] *Punjab* v. *Petum Singh* (1874) 6. N.W.P. 192; *Suryanarayana* v. *Bajalingam* (1933) 144 I.C. 726, ('33) A.M. 382.

[2] *Shanker Lal* v. *Moti Lal* (1957) *A. Raj.* 267; *Mo. Ichand* v. *Alwar Chetty* (1916) 39 Mad. 548.

[3] *Jan. bai* v. *Rama Manaji* (1948) A. Nag. 292; *Harcias* v. *Ramguljarilal*, (1947) A. Nag. 61.

[4] *Ram Pershad Singh* v. *Neerbhoy Singh* (1872) 11 B.L.R. 76.

[5] *See Abraham* v. *Raphial* (1916) 39 Mad. 288, 291.

[6] *Kunju Naina* v. *E. Chacko*, A.I.R. (1954) T.C. 499.

[7] *Kedar Lal* v. *Hari Lal* ('52) A.S.C. 47 (1952) S.C.R. 170.

[8] *Dharni Dhar* v. *Chandra Shekhar*, A.I.R. (1951) All. 774 (784); *Nani Lal De* v. *Tirathalal De*, A.I.R. (1953) Cal. 513.

[9] *Nani Lal De* v. *Tirathalal De, supra.*

Contribution between partners.—The principle of contribution does not apply to partners *inter se*. A partner, who has been compelled to pay, cannot file a suit for contribution but he has to file a suit for partnership accounts.[10]

Effect of release of one joint promisor.

44. Where two or more persons have made joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

We have here another variation of English law.[11] In England the releasing creditor must expressed reserve his rights against the co-debtors if he wishes to preserve them. The words "neither does it free the joint promisor or joint promisors" apply to the right of contribution amongest the joint promisors.

This section applies equally to a release given before or after breach. Thus where in a suit[12] for damages against several partners the plaintiff compromised the suit with one of them, and undertook to withdraw the suit as against him it was held that the release did not discharge the other partners and the suit might proceed as against them.

The principle of this section has also been applied to judgment debts. It has thus been held that release by decree holder of some of the joint judgment-debtors from liability under the decree does not operate as a release of the other judgment-debtors.[13] Similarly, where the debt of one judgment debtors was scaled down under the C.P. & Berar Relief of Indebtedness Act, the Judgment-creditor was held entitled to proceed against the remaining judgment-debtors for the remaining amount of the decree.[14]

Devolution of joint rights.

45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Illustration

A, in consideration of 5,000 rupees lent to him by *B* and *C*, promises *B* and *C* jointly to repay them that sum with interest on a day specified. *B* dies. The right to claim performance rests with *B*'s representatives jointly with *C* during *C*'s life and after the death of *C* with the representatives of *B* and *C* jointly.

Rights of joint promisees.—This section applies to all joint promisees whether they

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[10] *Mayyappa* v. *Palaniappa*, A.I.R. (1949) Mad. 109.

[11] See *Krishna Charan* v. *Sanat Kumar* (1917) 44 Cal. 162, 174.

[12] *Kirtee Chunder* v. *Struthers* (1878) 4 Cal 336.

[13] *Mool Chand* v. *Alwar Chetty* (1916) 39 Mad. 548; *Daulat* v. *P. N. Bank* (1933) 144 I.C. 981, ('33) A.L. 505.

[14] *Haridas* v. *Ramguljarilal* (1947) Nag. 229 I.C. 360, ('47) A.N. 61.

be partners,[15] co-sharers,[16] mortgagees,[17] joint lessors,[18] or members of a joint Hindu family carrying on business in partnership.[19] In a case where the owner of a single right dies, and several persons become entitled to it, it has been held that all of them must join in a suit to enforce the right, and if any of them refuses to join as plaintiff, he must be added as a defendant.[20] Obviously joint promisees cannot divide the debt among themselves and sue severally for the portions.[21]

As a Karta of a joint Hindu family can enforce a contract made with the joint family, this section would not apply to such a case.[22] This section would not govern the right of co-trustees to sue.[23]

Right to performance of promisees during joint lives.—As the right to claim performance of a promise in the case of joint promisees rests with them all during their joint lives, it follows that all the joint promisees should sue upon the promise.[24] Therefore if a suit is brought by some of them only, and the other promisees are subsequently added as plaintiffs on objection taken either by the defendant[25] or by the Court of its own motion,[26] the whole suit will be dismissed if it is barred by limitation as regards the other promisees who were added subsequently at the time of their joinder.

Suit by a surviving partner.—The general rule of English law is (contrary to the present section) that joint contracts are enforceable by the survivors or survivor alone. There is an equitable exception, founded on mercantile custom, as to debts due to partners; but even in this case "although the right of the deceased partner; devolves on his executor ... the remedy survives to his co-partner, who alone must enforce the right by action, and will be liable on recovery to account to the executor or administrator for the share of the deceased."[27] The present section extends the mercantile rule of substantive right to all cases of joint contracts. It seems to be the better opinion that the representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrues due to the partnership in the lifetime of the deceased.[28] The dissolved partnership firm may sue for the debt.

Deceased partner's estate.—The High Court of Bombay has decided, after full

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[15] *Motilal* v. *Ghellabhai* (1892) 17 Bom. 6, 13: *Aga Golam Husain* v. *A. D. Sassoon* (1897) 21 Bom. 412, 421.

[16] *Ramkrishna* v. *Ramabai* (1892) 17 Bom. 29.

[17] *Rameshwar Bux* v. *Ganga Bux* ('50) A.A. 598 (F.B.).

[18] *Moolchand* v. *Smt. Renuka Devi*, (1973) A. Raj. 13.

[19] *Kalidas* v. *Nathu Bhagvan* (1883) 7 Bom. 217; *Ram Narain* v. *Ram Chunder* (1890) 18 Cal. 86; *Alagappa Chetti* v. *Vellian Chetti* (1894) 18 Mad. 33.

[20] *Ahinsa Bibi* v. *Abdul Kader* (1902) 25 Mad. 26, 35; *Mahamed Ishaq* v. *Sheikh Akramul Huq* (1908) 12 C.W.N. 84, 86, 93.

[21] *Siluvaimuthu Mudaliar* v. *Muhammad Sahul* (1926) 51 Mad. L.J. 648. 98 I.C. 549. ('27) A.M. 84.

[22] *Kishan Parshad* v. *Har Narain* (1911) 33 All. 272 (P.C.).

[23] *Manikya Rao* v. *Adenna*, A.I.R. (1949) Mad. 654.

[24] *Dular Chand* v. *Balram Das* (1877) 1 All. 453; *Vyankatesh Oil Mill* v. *Velmahomed* (1927) 30 Bom. L.R. 117, 109 I.C. 99, ('28) A.B. 191.

[25] *Ramsebuk* v. *Ramlall Koondoo* (1881) 6 Cal. 815; *Fatmabai* v. *Pirbhai* (1897) 21 Bom. 580.

[26] *Imam-ud-Din* v. *Liladhar* (1892) 14. All 524; *Ram Kinkar* v. *Akhil Chandra* (1908) 35 Cal. 519.

[27] Williams on Executors, 11th ed. 638.

[28] *Motilal* v. *Ghellabhai* (1892) 17 Bom. 6; *Vaidyanatha Ayyar* v. *Chinnasami Naik* (1893) 17 Mad. 18; *Ugar Sen* v. *Lakshmichand* (1910) 32 All. 638; *Mool Chand* v. *Mul Chand* (1923) 4 Lah. 142, 71 I.C. 951, ('23) A.L. 197.

examination of the rule and the present section of the Act in the light of both Indian and English authorities, that where a partner has died before the commencement of a suit against the firm, the rule does not enable the Act to make the deceased partner's separate estate liable without adding his legal representatives as "parties."[29]

Suit by representative of deceased partner.—The representative of the estate if deceased partner may maintain a suit for the recovery of a partnership debt, and may join the surviving partners as defendants in the suit where they refuse to join as plaintiffs.[30]

Time and Place for Performance

Time for performance of promise where no application is to be made and no time is specified.

46. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question "what is a reasonable time" is, in each particular case, a question of fact.

Time for Performance.—This section proceeds upon the assumption that a contract not specifying the time of performance would not be bad for uncertainty.

This section would not apply to a case where the promisee has to apply to or call upon the promisor to perform the promise.

Reasonable time.—Where the defendants agreed to supply coal to the plaintiffs from the to time, as required by the plaintiffs on reasonable notice given to them, a notice given by the plaintiffs on the 22nd July 1898 for the supply of 2,648 tons of coal on or before 31st August 1898 was held not to be reasonable.[31] Where the defendant agreed to discharge a debt due by the plaintiff to a third party and in default to pay to the plaintiff such damages as he might sustain, and no time was fixed for the performance of the obligation, it was held that the failure of the defendant to perform it for a period of three years amounted to a breach of the contract, as that was a sufficient and reasonable time for performance.[32]

Engagement.—This word appears to be synonymous with "promise."

Time and place for performance of promise where time is specified and no application to be made.

47. When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Illustration

A promises to deliver goods at *B*'s warehouse on the 1st January. On that day *A* brings the goods to *B*'s warehouse, but after the usual hour for closing it and they are not

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[29] *Mathuradas* v. *Ebrahim Fazalbhoy* (1927) 51 Bom. 986, 29 Bom. L.R. 1296, 105 I.C. 305, ('27) A.B. 581.

[30] *Aga Gulam Husain* v. A. D. Sassoon (1897) 21 Bom. 412, 421.

[31] *The Bengal Coal Co., Ltd.* v. *Homee Wadia & Co.* (1899) 24 Bom. 97, 140; *Bank of India* v. *Chinoy* (1950) 77 I.A. 76, (1950) Bom. 606, ('50) A.P.C. 90.

[32] *Subramanian* v. *Muthia* (1912) 35 Mad. 639.

received. *A* has not performed his promise.

Application for performance on certain day to be at proper time and place.

48. When a promise is to be performed on a certain day, and promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation.—The question "what is a proper time and place" is in each particular case, a question of fact.

To ascertain whether time is of the essence of the contract or not, read sec. 55, *infra*.

Place for performance of promise where no application to be made and no place fixed for performance.

49. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Illustration

A undertakes to deliver a thousand maunds of jute to *B* on a fixed day. *A* must apply to *B* to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Place for Performance.—The legislature has used three different expression viz: "at the place at which the promise ought to be performed" (s. 47), "at a proper place" (s. 48) and "at a reasonable place" (s. 49). The said expressions imply that the place to be fixed should be reasonable.

The rule in this section is the one which, it was intended, should apply both to delivery of goods as well as to payment of money.[33] The common law rule requiring a debtor to find the creditor in the realm was not applied. In that case there was a specific agreement to pay at Hyderabad.[34] In case of Pakki Adat dealings, the place of payment is the place where the constituent resides unless the contract provides to the contrary.[35] In case of negotiable instruments, the rule of finding out the creditor would not apply.[36] If the obligation is to deliver heavy or bulky goods he must procure the creditor to appoint a place to receive them. The words "no place is fixed" and promisor to apply to the promisee to appoint a reasonable place" do not exclude any inference the Court may draw as to the intention of the parties from the nature and circumstances of the contract, especially where the obligation is to pay money.[37] A debtor cannot be held liable

[33] *Soniram Jeethmul* v. *R. D. Tata & Co.* 54 I.A. 265 = 29 Bom. L.R. 1027 = (1927) A.P.C. 156.

[34] *Bansilal* v. *Gulam*, 53 I.A. 58 = 53 Cal 88 = (1925) A.P.C. 290.

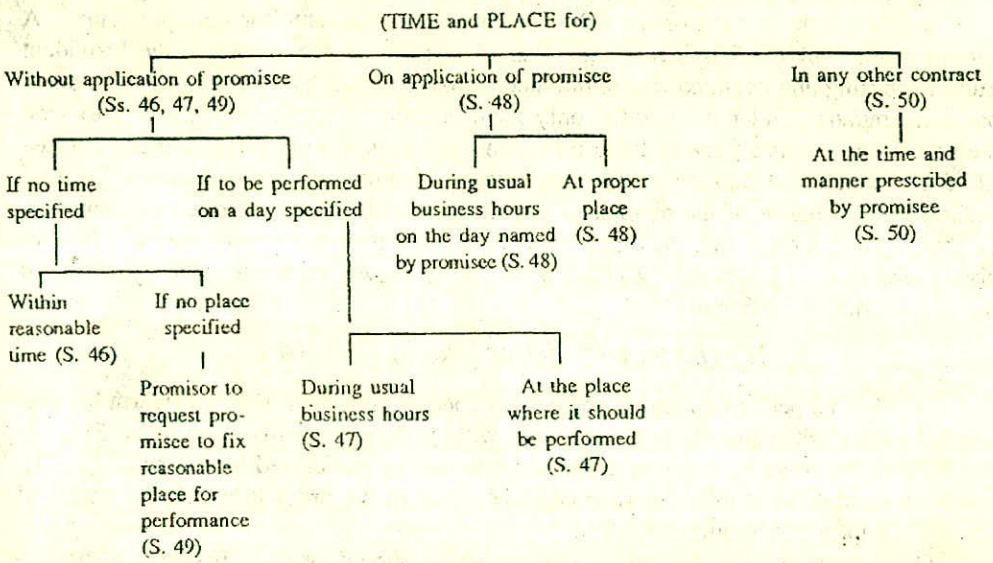
[35] *Kedarmal* v. *Govindram*, 9 Bom. L.R. 903.

[36] *Jivatlal* v. *Lalbhai*, 44 Bom. L.R. 495 (F.B): (1942) Bom. 620: A.I.R. (1942) Bom. 251.

[37] *Raman Chettiyar* v. *Gopalachari* (1908) 31 Mad. 223, at v. 228; *Soniram* v. *Tata & Co. Ltd.* (1927) 5 Rang. 451: 54 I.A. 265; *Nathubhai Ranchhod* v. *Chhabildas Dharamchand* (1935) 59 Bom. 365, 37 Bom. L.R. 357, 157 I.C. 248, ('35) A.B. 283; *Tuljaram* v. *Wadhumal* (1933) 142 I.C. 844, ('33) A.S. 62; *Bhagauti* v. *Chandika Prasad* (1933) 150 I.C. 289, ('33) A.A. 1 7.

to pay wherever the creditor may choose to shift his business.[38] The application of Common Law rule would be engrafting something on S. 20 of the Civil Procedure Code and in a vast country like India it will not only be inconvenient but oppressive.[39]

Place of delivery.—Where by an agreement for the sale of goods it was stipulated that the goods were "to be delivered at any place in Bengal in March and April 1891," and it was added, "the place of delivery to be mentioned hereafter," the Judicial Committee held that the buyer had the right to fix the place, subject only to the express contract that it must be in Bengal and to the implied one that it must be reasonable.[40]



Performance in manner or at time prescribed or sanctioned by promisee.

50. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations

(a) *B* owes *A* 2,000 rupees. *A* desires *B* to pay the amount to *A*'s account with *C*, a banker. *B*, who also banks with *C*, orders the amount to be transferred from his account to A's credit, and this is done by *C*. Afterwards, and before *A* knows of the transfer, *C* fails. There has been a good payment by *B*.

(b) *A* and *B* are mutually indebted. *A* and *B* settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to a payment by *A* and *B* respectively, of the sums which they owed to each other.

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[38] *Madan Lal* v. *Chawle Bank Ltd.* A. 1959 All 612.

[39] *Piyara Singh* v. *Bhagwandas* A. 1951 Punj. 33; *Narayan Singh* v. *Jagjit Singh* A. 1955 punj. 128.

[40] *Grenon* v. *Lachmi Narain Angurwala* (1896) 24 Cal. 8, 23 I.A. 119.

(c) *A* owes *B* 2,000 rupees. *B* accepts some of *A*'s goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d) *A* desires *B*, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as *B* puts into the post a letter containing the note duly addressed to *A*.

Payment to an agent, who to the debtor's knowledge had no authority to receive the payment, does not discharge the debtor.[41]

Manner of performance.—It is hardly needful to add that where the request is to send not the legal currency, but a cheque or other negotiable instrument, this does not imply any variation of the rule that payment by a negotiable instrument is conditional on its being honoured on presentation within due time.[42] Under S. 50. the payment of a debt may be made in cash or in such other manner as the creditor may prescribe.[43] A subscriber to Railway Provident Fund desired payment of his deposit in the Provident Fund in sterling and declared that remittance be made to him by a bank draft in a named bank in England. Under the law the only legal method of such remittance was to send the amount to Reserve Bank of India for payment to bank in England. Under S. 50 it justified the conclusion that by sending the cheques for the amount to Reserve Bank of India, in performance of the manner of payment prescribed by subscriber, the debt was discharged and money must be deemed to have been paid out to subscriber.[44] To support a plea of payment passing of cash need not be shown. Payment made by means of transfer entries is sufficient.[45]

Performance of Reciprocal Promises

(1) If to be performed simultaneously or concurrently, promisor to perform his promise when promisee is ready and willing to perform his promise (s. 51).
(2) If the order is fixed by contract, it should be performed in that order (s. 52).
(3) If contract is silent, performance be made in the order in which the nature of transaction requires. (s. 52).
(4) If promises are dependent, the one which should be done first should be performed first (s. 54).

51. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Promisor not bound to perform unless reciprocal promisee ready and willing to perform.

Illustrations

(a) *A* and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery.

A need not deliver the goods unless *B* is ready and willing to pay for the goods on delivery.

B need not pay for the goods unless *A* is prepared to deliver them on payment.[46]

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[41] *Mackenzie* v. *Shib Chunder Seal* (1874) 12 B.L.R. 360.

[42] *Kedarmal* v. *Surajmal* (1907) 9 Bombay. L.R. 905, [illegible].

[43] *Hairoon Bibi* v. *The United India Life Insurance Company Ltd.* A. 1947 Mad. 122.

[44] *Union of India* v. *Kashi Prosad* A. 1962 Cal. 169.

[45] *Narayandas* v. *Sangli Bank* A. 1966 SC 170.

[46] *Chengravelu Chetty* v. *Akarapu Venkana*

(b) *A* and *B* contract that *A* shall deliver goods to *B* at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver unless *B* is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment unless *A* is ready and willing to deliver the goods on payment of the first instalment.

Simultaneous performance.—This section expresses the settled rule of the Common Law. To understand the principle rightly, we must remember that in a contract by mutual promises the promises on either side are the consideration, and the only consideration, for one another. But the terms of a promise may express or imply conditions of many kinds; and the other party's performance of the reciprocal promise, or at least readiness and willingness to perform it, may be a condition. And if it appears on the whole from the terms or the nature of the contract that performance on both sides was to be simultaneous, the law will attach such a condition to each promise, with the operation laid down in the present section.

Performance of one party's promise may have to be complete or tendered before he can sue on the other's reciprocal promise. In that case it is said to be a condition precedent to the right of action on the reciprocal promise.[47]

Where the performances are intended to be simultaneous, as supposed in this section (goods to be delivered in exchange for cash or bills, and the like), they are said to be concurrent conditions, and the promises to be dependent.

Promises which can be enforced without showing performance of the plaintiff's own promise, or readiness or willingness or perform it, are said to be independent.

In order to apply the rule of this section we must know whether the promises are or are not "to be simultaneously performed." This is a question of construction, depending on the intention of the parties collected from the agreement as a whole.[48] In a case of sale of shares of a limited company, transfer of shares and payment of price were held to be simultaneous.[49]

Consequences of partial default in performance.—There is a distinct question from that of "condition precedent" namely, whether failure to perform some parts of a contract deprives the party in fault of any right to remuneration for that which he has performed, and entitles the other to put and end to the contract, or is only a partial breach which leaves the contract as a whole still capable of performance. In dealing with cases of this kind it may be very difficult to ascertain the true intention of the parties. We have to "see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for or whether it merely partially affects it and may be compensated for in damages.[50] *B* entered into a contract with *G*, director of the Royal Italian Opera in London. Under this, *G* had to render exclusively his services as a singer in operas and concerts for a period of over three

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& Sons (1925) 49 Mad. L.J. 300 86 I.C. 299, ('25) A.M. 971.

47 *Nathulal* v. *Phool Chand* A. 1970 S.C. 546. 86 I.C. 299 ('25) A.M. 971.

48 *Kaikhushroo* v. *C.P. Syndicate Ltd.* (1949) F.C.R. 501, 52 Bom. L.R. 189, ('50) A.F.C. 8.

49 *Imperial Banking Co.* v. *Atmaram*, 2 Bom. H.C.R. 246 (258).

50 Per Cur., *Bettini* v. *Gye* (1876) 1. Q.B.D. 183; Compare *Poussard* v. *Spiers and Pond* (1876) 1 Q.B.D. 410.

months. *B* also undertook that he would be in London six days at least before the commencement of this engagement, for rehearsals. *B* arrived two days before the commencement of the engagement. *G* thereupon refused to go with the contract. *B* sued *G* for breach. It was held that as the engagement was for over three months the term regarding previous attendance at rehearsals was not a fundamental term going to the root of the matter. Consequently *G* was not entitled to refuse to receive *B* into his service. All that *G* could do was to sue *B* for damages for breach of warranty. On the other hand, if *B*'s engagement had been only to sing in Operas, or if it had been only for a few performances, it might very well be that previous attendance at rehearsals with actors in company with whom he was to perform was essential.

Waiver of performance.—This section does not, of course, refer to any special remedy to a party who has chosen to perform his part without insisting on the reciprocal performance which was intended to be simultaneous with his own, as where a seller of goods "for cash on delivery" chooses to deliver the goods without receiving the price.[51]

Readiness and willingness.—If a party bound to do an act upon request is ready to do it when it is required, he will fully perform his part of the contract, although he might happen not to have been ready had he been called upon at some anterior period.[52] For a party to prove himself ready and willing to perform his obligation under a contract to purchase shares, he has not necessarily to produce the money or vouch a concluded scheme for financing the transaction.[53] But where the purchaser before the day fixed for delivery gives notice to the vendor that he will not accept the shares, the vendor is exonerated from giving proof of his readiness and willingness to deliver the shares.[54] Similarly as to goods, it is a still more elementary proposition that a vendor may be ready and willing to deliver without having the goods in his actual custody or possession, it is enough if he has such control of them that he can cause them to be delivered.[55]

Where goods are sold for "cash on delivery," and the vendor delivers a portion of the goods, and the purchaser offers to pay the price thereof if certain cross-claims set up by him are adjusted, it cannot be said that he is not ready and willing to perform his promise, so as to entitle the vendor to refuse delivery of the remaining goods.[56]

Order of performance of reciprocal promises.

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

Illustrations

(a) *A* and *B* contract that *A* shall build a house for *B* at a fixed price. *A*'s promise to build the house must be performed before *B*'s promise to pay for it.

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[51] *Soolkan Chund* v. *Schiller* (1878) 4 Cal. 252.

[52] *Jivraj Megji* v. *Poulkan* (1865) 2 B.H.C. 253, 256.

[53] *Bank of India* v. *Chinoy* (1950) 77 I.A. 76, (1950) Bom. 606, ('50) A.P.C. 90.

[54] *Dayabhai Dipchand* v. *Maniklal Vrijbhukan* (1871) 8 B.H.C.R.A.C. 123; *Zippel* v. *Kapur & Co.* (1932) 139 I.C. 114, ('32) A.S. 9.

[55] *Kanvar Bhan-Sukha Nand* v. *Ganpat Rai Ram Jivan* (1926) 7 Lah. 442, 94 I.C. 304, ('26) A.L. 318.

[56] *Soolkan Chund* v. *Schiller* (1878) 4 Cal. 255.

(b) *A* and *B* contract that *A* shall make over his stock-in-trade to *B* at a fixed price, and *B* promises to give security for the payment of the money. *A*'s promise need not be performed until the security is given, for the nature of the transaction requires that *A* should have security before he delivers up his stock.

Order of Performance.—If a contract expressly states the order of performance, that would govern the matter; if a contract is silent, one has to look to the nature of the transaction in order to decide the order of performance. In the latter event, the Court may look to the usual practice in the market also.

Subsequent conduct of the parties may not throw any light on the order in which the promises are to be performed.[57]

Liability of party preventing event on which the contract is to take effect.

53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration

A and *B* contract that *B* shall execute certain work for *A* for a thousand rupees. *B* is ready and willing to execute the work accordingly, but *A* prevents him from doing so. The contract is voidable at the option of *B*; and, if he elects to rescind it, he is entitled to recover from *A* compensation for any loss which he has incurred by its non-performance.

Impossibility created by act of party.—This is in substance the rule not only of the Common Law, but of all civilised law. No man can complain of another's failure to do something which he has himself prevented the other from doing or performing. The principle is not confined to acts of direct or forcible prevention, which are neither frequent nor probable, but extends to default or neglect in doing or providing anything which a party ought under the contract to do or provide, and without which the other party cannot perform his part. Where under the contract with the government, the government merely agreed to assist the contractor in obtaining the controlled articles necessary for execution. But the contractor demanded that the government should supply free of cost crane and iron materials. Hence S. 53 of the Act could not be of any assistance to the contractor when government refused to supply to him crane and iron materials free of cost.[58] Prevention by a third party may not help the other party in repudiating his part of the contract. A man agrees to sell standing wood; the seller is to cut and cord it, and the buyer to take it away and pay for it. The seller cords a very small part of the wood, and neglects to cord the rest the buyer may determine the contract and recover back any money he has paid on account.

"This was an entire contract; and as by the defendant's default the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract and recover back the money that they had paid under it; they were not bound

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[57] *Edridge* v. *R. D. Sethna* (1933) 60 I.A. 368, 58 Bom. 101, 36 Bom. L.R. 127, 146 I.C. 739, ('33) A.P.C. 233.

[58] *Namayya* v. *Union of India* A. 58 A.P. 533.

to take a part of the wood only.[59]

If the contract is between *A* and *B*, and *B* makes a default which prevents *A* from fulfilling a particular term or condition of the contract, *A* may treat that term or condition as fulfilled and require *B* to perform his part of the contract. On the other hand *A*'s non-fulfilment gives *B* no right to rescind or to take advantage of any agreed penalty by the contract.

A privy Council decision illustrates the circumstances in which a claim to compensation may be sustainable under this section. In *Kleinert* v. *Abosso Gold Mining Co.*,[60] *P* contracted with *D* to remove waste rock lying at a dump at *D*'s mine within two years, provided that there were not more than fifty thousand tons, *D* agreeing to supply a crusher. The crusher supplied by *D* was so inadequate, crushing only three tons per hour, that the work had to be stopped. *P* recovered damages for the expense to which he had been put in preparing for the work, and for the loss of profit he would otherwise have made by supplying crushed stone to a third party.

Voidable at option.—These words suggest that the other party so prevented has the option to avoid the contract, Such a party may or may not, avoid the contract. In the event of such party not avoiding the contract, the parties are left with their rights and liabilities as before.[61]

Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.

54. When a contract consists of reciprocal promises, such that one of them cannot be performed or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations

(a) *A* hires *B*'s ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by *A*, *B* receiving a certain freight for its conveyance. *A* does not provide any cargo for the ship. *A* cannot claim the performance of *B*'s promise, and must make compensation to *B* for the loss which *B* sustains by the non-performance of the contract.

(b) *A* contracts with *B* to execute certain builder's work for a fixed price *B* supplying the scaffolding and timber necessary for the work. *B* refuses to furnish any scaffolding or timber, and the work cannot be executed. *A* need not execute the work, and *B* is bound to make compensation to *A* for any loss caused to him by the non-performance of the contract.

(c) *A* contracts with *B* to deliver to him, at a specific price, certain merchandise on board a ship which cannot arrive for a month, and *B* engages to pay for the merchandise within a week from the date of the contract. *B* does not pay within the week. *A*'s promise to deliver need not be performed and *B* must make compensation.

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[59] *Giles* v. *Edwards* (1797) 7 T.R. 181.

[60] (1913) 58 Sol. Jo. 45, on appeal from the S.C. of the Gold Coast. The decision was based on common law principles as laid down in *Mackay* v. *Dick* (1881) 6 App. Cas. 251.

[61] *Edridge* v. *R. D. Sethna*, supra.

(d) *A* promises *B* to sell him one hundred bales of merchandise, to be delivered next day, and *B* promises *A* to pay for them within a month. *A* does not deliver according to his promise. *B*'s promise to pay need not be performed, and *A* must make compensation.

Default of promisor in first performance.—This section completes the declaration of the principles explained under sec 51. The words "cannot be performed," "cannot be claimed" and "till the other has been performed" clearly indicate that the performance of the other promise must be a condition precedent. Unless it is a condition precedent, the other promisor cannot refuse to perform his promise. In practice the difficulty is to know whether the promises in a case in hand are or are not "such that one of them cannot be performed," etc. One way in which the test is expressed in English authorities, is that if a plaintiff has himself broken some duty under the contract and his breach is such that it goes to the whole of the consideration for the promise sued upon, it is a bar to his suit; but if it amounts only to a partial failure of that consideration, it is a matter for compensation by a cross-claim for damages.[62]

Effect of failure to perform at fixed time, in contract in which time is essential.

55. When a party to contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.

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

Effect of acceptance of performance at time other than that agreed upon.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.[63]

Failure to perform in time.—Where time is of the essence of a contract, failure to perform at or before the specified time, entitles the promisee to avoid the contract; if the contract is not avoided, the promisee may accept performance subsequently but in the

62 See the observations of the Judicial Committee in *Oxford* v. *Provand* (1868) L.R. 2 P.C. 135, 156.

63 This clearly means that the promisee cannot claim damages for non-performance at the original agreed time, not that he cannot claim damages for non-performance at the extended time"; *Muhammad Habib Ullah* v. *Bird & Co.* (1921) L.R. 48 I.A. 175, 179.

latter event, the promisee cannot claim compensation unless he has reserved his right by giving notice at the time of accepting late performance.

Where time is not of the essence of the contract, the contract is not voidable although time of performance has expired, But promisee is entitled to claim compensation from promisor for the loss caused by failure or late performance.

Time—When not of essence of contract.—At common law in England stipulations as to time were normally regarded as "of the essence" of contracts for sale of land, unless the contract, on its true construction, provided otherwise.[64] In England accidental delays in the completion of contracts for the sale of land within the time named are frequent by reason of unexpected difficulties in verifying the seller's title under the very peculiar system of English real property law. Sharp practice would be unduly favoured by strict enforcement of clauses limiting the time of completion, and accordingly Courts of Equity have introduced a presumption, chiefly, if not wholly, applied in cases between vendors and purchasers of land, that time is not of the essence of the contract. But this presumption will give way to proof of a contrary intention by express words or by the nature of the transaction. Treitel states that since land has become an article of commerce and business (to develop quickly for business and industrial purposes) the distinction between "commercial" contracts and contracts for sale of land begins to look somewhat unrealistic.[65]

The Judicial Committee has observed[66] that this section does not lay down any principle, as regards contracts to sell land in India, different from those which obtain under the law of England. Specific performance of a contract of that nature will be granted, although there has been a failure to keep the dates assigned by it, if justice can be done between the parties and if nothing in (a) the express stipulations of the parties, (b) the nature of the property, or (c) the surrounding circumstances make it inequitable to grant the relief. In the Privy Council case, the Respondent agreed to sell to Appellant his interest in certain land which he held on lease from the Secretary of State for India for Rs. 85,000, of which Rs. 4,000 was paid as deposit or earnest money on execution of agreement. It was agreed that title was to be made marketable and Rs. 80,000 should be paid on the execution of the deed of sale which was to be prepared within two months from the date of agreement of sale. Requisitions on title were made by Appellant. (purchaser) but were not complied with by the Respondent (seller) who subsequently claimed, under the terms of the agreement, to put an end to the contract claiming time to be the essence of contract as the purchaser failed to complete the investigation and also to pay the amount of purchase money within two stipulated months. The purchaser (Appellant) brought a suit for specific performance of agreement. Reversing the appellate judgement of the High Court of Bombay, the Privy Council held that notwithstanding that a specific date is mentioned for the completion of the contract law will look not at the letter but at the substance of the agreement to ascertain the real intention of the parties. Accordingly, the contract did not make time of the essence of the contract and purchaser was entitled to specific performance of the contract, as the parties really intended that their contract should be performed within the reasonable time.

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[64] *Rightside Properties Ltd.* v. *Gray* (1974) 2 All E.R. 1169 (1184).

[65] The Law of Contract by G.H. Treitel, 4th edition, p. 569.

[66] *Jamshed* v. *Burjorji* (1916) L.R. 43 I.A 26; *Mahadeo* v. *Narain* (1919-20) 24 C.W.N. 330; *Sadiq Hussain* v. *Anup Singh* (1923) 4 Lah. 327, 76 I.C. 91, ('24) A.L. 151; *Raghbir Das* v. *Sunder Lal* (1930) 11 Lah. 699, 131 I.C. 371, ('31) A.L. 205.

In the Supreme Court case[67] a contract for sale of immovable property in which one of the terms was that the seller would apply for and obtain necessary permission of government to sell within two months. This contract could be specifically enforced even when application was made and withdrawn by the seller as the buyer was ready and willing to perform the contract and court found time not of the essence of the said contract. An intention to make time of the essence of the contract must be expressed in unmistakable language;[68] it may be inferred from what passed between the parties before, but not after, the contract is made. An option to repurchase (being an exceptional or concessional provision for the Seller's benefit) must be exercised strictly within the time limited.[69] Renewal of a lease is a privilege and must be claimed within the time limited for that purpose.[70] When goods are to be delivered 'as soon as possible' time in the sense of a definite date line was not the essence of contract. When by the terms of contract if there were late shipment due to force majeure or due to causes beyond the control of the supplier, the purchaser agreed to accept a late shipment or late supply of the goods without objection, purchaser cannot subsequently by unilateral action make time the essence of contract.[71]

In a contract for sale of goods, stipulations as to time for payment of price are not deemed to be of essence of such a contract unless a different intention appears from the terms of such a contract.[72]

Time—when of essence of contract.—There is no place, however, in mercantile contracts for the presumption that time is not of the essence of the contract.[73] This is especially so as to shipping contracts. In a contract for sale of goods, time for delivery is of essence of such a contract.[74] Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. Generally it is to be observed that in modern business documents men of business are taken to mean exactly what they say. "Merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance."[75] Defendant agreed to deliver his elephant to plaintiff for Kheda operations (to capture wild elephants) on 1st October and he subsequently obtained an extension of the time till 6th October but did not deliver the elephant till 11th October. It was held that the very circumstance that the defendent asked for extension of the time showed that time was intended to be of the essence of

[67] *Mrs. Chandnee Widya* v. *Dr. C. L. Katyal* A. 1964 S.C. 978.

[68] *Kishen Prasad* v. *Kunj Behari Lal* (1925) 24 All. L.J. 210, 91 I.C. 790, ('26) A.A. 278; *Burn & Co., Ltd.* v. *Thakur Sahib of Morvi State* (1925) 30 C.W.N 145, 90 I.C. 52, ('25) A.P.C. 188; *Shambhulal* v. *Secretary of State* (1940) 189 I.C. 785, ('40) A.S. 1.

[69] *Samarapuri Chhetiar* v. *Sudarsana Chariar* (1919) 42 Mad. 802; *Maung Wala* v. *Maung Sluve Gon* (1923) 1 Rang. 472, 82 I.C. 610, ('24) A.R. 57; *Protap Chandra* v. *Kali Charan* ('52) A.C. 32; *Krishna* v. *Ramgulam* ('58) A.M.P. p. 295; *Hasan Nurani Malik* v. *Mohan Singh*, (1974) Mh. L.J. 120 = (1974) A. Bom. 136 (reconveyance).

[70] *Caltex (India) Ltd* v. *Bhagwandevi* A. 1969 S.C. 405, 407

[71] *Mohankrishnan* v. *Chimanlal & Co.* A. 1960 Mad. 452, 454.

[72] See Sec. 11 of Indian Sale of Goods Act.

[73] *Reuter* v. *Sala* (1879) 4. C.P. Div. 239, 249, per Cotton, L.J.; Mercantile transactions are transactions in the course of business. *Lucknow Automobiles* v. *Replacement Parts Co.* (1940) 190 I.C. 554, ('40) A.O. 443; *Mahabir Rungta* v. *Durga Datta* (1961) A.S.C. 990.

[74] *Reuter* v. *Sala*, 4 C.P.D. 239; *Hurnandrai* v. *Pragdas*, 50 I.A. 9.

[75] Lord Cairns in *Bowes* v. *Shand* (1877) 2 App. Ca. at p. 463.

the contract and plaintiff was justified in refusing to accept the elephant on 11 October and was entitled to damages for the breach of contract.[76] Parties to mercantile contracts, therefore, cannot rely upon the present section to save them from the consequences of unpunctuality. On a sale of goods notoriously subject to rapid fluctuations of market price, the time of delivery is of the essence.[77] So in an agreement to exhibit a cinema picture time is of the essence.[78]

Performance is reasonable time.— Either party's general right to have the contract performed within a reasonable time according to the circumstances is, of course, unaffected by the fact of time not being of the essence; and in case of unnecessary delay by one party the other may give him notice fixing a reasonable time after the expiration of which he will treat the contract as at an end.[79] In determining the reasonableness of time so limited (in the notice), the court will consider not merely what remains to be done at the date of the notice but all the circumstances of the case, including the delay of the vendor, attitude of the purchaser and necessity of early completion and where there has been inordinate delay on both sides, it may be inferred that the contract has been abandoned, although no such notice has been given.[80]

Agreement to do impossible act.

56. An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.

Where one person has promised to do something, which he knew, or with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.[81]

Illustrations

(a) *A* agrees with *B* to discover treasure by magic. The agreement is void.

(b) *A* and *B* contract to marry each other. Before the time fixed for the marriage, goes mad. The contract becomes void.

(c) *A* contracts to marry *B*, being already married to *C*, and being forbidden by the

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[76] *Bhudar Chandra* v. *Betts* (1915) 22 Cal. L.J. 566; See also *Colles Cranes of India Ltd.* v. *Speedeo Spares Corp.* A. 1970 Cal. 321.

[77] *Balaram, Etc., Firm* v. *Govinda Chetty* (1925) 49 Mad. L.J. 200, 91 I.C. 257, ('25) A.M. 1232.

[78] *Sreedhara* v. *Thanumalayan* A. 1953 T.C. 90, 94.

[79] *Stickney* v. *Kaeble* (1915) A.C. 386; *Steedman* v. *Drinkle* (1916) A.C. 275 (J.C.); *Muhammad Habid Ullah* v. *Bird & Co.* (1921) 48 I.A. 175, 43 All. 257.

[80] *Pearl Mill Co.* v. *Ivy Tannerty Co.* (1919) 1 K.B. 78.

[81] The section does not, of course, enable a party to take advantage of impossibility caused by his own default: *Benarasi Prasad* v. *Mohiuddin Ahmad* (1924) 3 Pat. 581, 78 I.C. 723, ('24) A.P. 586.

law to which he is subject to practise polygamy. *A* must make compensation to *B* for the loss caused to her by the non-performance of his promise.

(d) *A* contracts to take in cargo for *B* at a foreign port. *A*'s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B*. On several occasions *A* is too ill to act. The contract to act on those occasions becomes void.

Impossibility in general.—This section varies the Common Law to a large extent, and moreover Act lays down positive rules of law on questions which English Courts have of late more and more tended to regard as matters of construction depending on the true intention of the parties. English authorities, therefore, can be of very little use as guides to the literal application of this section.[82] In India, the law dealing with frustration must primarily be looked at as contained in sections 32 and 56 of the Contract Act.[83] The rule in section 56 exhaustively deals with the doctrine of frustration of contracts and it cannot be extended by analogies borrowed from the English Common law.[84] The court can give relief on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract was frustrated by the instrusion or occurence of an expected event or change of circumstances which was not comtemplated by the parties at the date of the contract.[85] When such an event or change of circumstances which is so fundamental as to be regarded by law as striking at the root of the contract as a whole occurs, it is the court which can pronounce the contract to be frustrated and at an end. This is really a positive rule enacted in section 56 of the Act.[86]

Impossible in itself.—With regard to the first paragraph, we may say that parties who purport to agree to the doing of something obviously impossible must be deemed not to be serious or not to understand what they are doing, also that the law cannot regard a promise to do something obviously impossible as of any value, and such a promise is therefore no consideration, "Impossible in itself" seems to mean impossible in the nature of things. The case of performance being at the date of the agreement, impossible by reason of the non-existence of the subject-matter of the contract has been dealt with under the head of Mistake (s. 20).

Subsequent impossibility or unlawfulness.—The second paragraph has the effect of turning limited exceptions into a general rule. By the Common Law a man who promises without qualifications is bound by the terms of his promise if he is bound at all. If the parties do not mean their agreement to be unconditional, it is for them to qualify it by such conditions as they think fit. But a condition need not always be expressed in words; there are conditions which may be implied from the nature of the transaction; and in certain cases where an event making performance impossible "is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contract-

[82] *Satyabrata* v. *Mugneeram*, A.I.R. 1954 S.C. 44: (1954) 310.

[83] *Ganga Saran* v. *F. Ram Charan Ram Gopal*, (1952) SCR 36 at 42 = A. 1952 S.C. 9 at 11; *Naihati Jute Mills Ltd.* v. *Khyaliram* A. 1968 S.C. 522 at 526.

[84] *Raja Dhruv Dev Chand* v. *Raja Harmohinder Singh* A. 1968 S.C. 1024; contra *Parshotam Das Shankar Das* v. *Municipal Committee, Batala* (1949) A. E.P. 301, overruled on this point.

[85] *Naihati Jute Mills Ltd.* v. *Khyaliram A.* 1968 S.C 522 at 527; *Satyabrata Ghose* v. *Mugneeram A.* 1954 S.C. 44 at 48.

[86] *Naihati Jute Mills Ltd.* A. 68 S.C. at 527.

ing parties when the contract was made,"[87] performance or further performance of the promise, as the case may be, is excused. On this principle a promise is discharged if without the promisor's fault, (1) performance is rendered impossible by law;[87] (2) a specific subject-matter assumed by the parties to exist or continue in existence is accidentally destroyed or fails to be produced,[88] or an event or state of things assumed as the foundation of the contract does not happen or fails to exist, although performance of the contract according to its terms may be literally possible;[89] (3) the promise was to perform something in person, and the promisor dies or is disabled by sickness or misadventure.[90]

This clause contemplates a supervening impossibility or illegality.[91] This clause contemplates a frustration of a contract by intrusion or occurrence of an unexpected event or a change of circumstances beyond the contemplation of parties. Such event or change must be so fundamental as to be regarded by law as striking at the root of contract as a whole,[91] or the basis of the contract no longer exists.[92] In order to arrive at the finding of impossibility of performance, the court may rely upon the belief, knowledge and intention of the parties as pieces of evidence only.

Having regard to the unqualified language of the Act, it seems useless to enter at more length on the distinctions observed in English law. The illustrations do not indeed, appear to go beyond English authority, but this cannot detract from the generality of the enacting words. *H* agreed to hire the use of *K*'s rooms in London on the days of 26th and 27th June 1902, for the purpose of seeing the intended coronation processions. By reason of the King's illness no procession took place on either of those days. It was held that *K* could not recover the balance of the agreed rent, as the taking place of the processions "was regarded by both contracting parties as the foundation of the contract."[93] In India such a case would, perhaps, fall more appropriately under sec. 32. In a House of Lords case it has been held that in such a case if payment is made in advance the person making the payment would be entitled to a refund.[94]

Stoppage of work by strike.—A strike of the workman employed in executing work under a contract does not of itself make performance impossible for the purpose of this section.[95]

Frustration by total or partial prohibition.—In a state of war many contracts are affected by performance or further performance becoming wholly or in part unlawful. This may be under the general rules against intercourse with the enemy, or may be the result of express executive orders issued under powers of emergency legislation. In prin-

[87] *Baily* v. *De Crespigny* (1869) L.R. 4 Q.B. at p. 185; (a case of compulsory acquisition); *Taylor* v. *Caldwell* (destruction of Surrey Music Hall due to fire).

[88] *Taylor* v. *Caldwell* (1863) 3 B. & S. 826; *Howell* v. *Coupland* (1876) 1 Q.B. Div. 258; *Kimjilal Monohardas* v. *Durgaprasad Debiprasad* (1919-20) 24 C.W.N. 703; *Gurdit Singh* v. *Secretary of State* (1931) 130 I.C. 772, ('31) A. L. 347.

[89] *Krell* v. *Henry* (1903) 2 K.B. 740 C.A.: *Blackburn Bobin Co.* v. *T.W. Allen & Sons* (1918) 2 K.B. 467 C.A.

[90] *Robinson* v. *Davison* (1871) L.R. 6 Ex. 269.

[91] *Satyabrata Ghose* v. *Mugneeram Bangur* (1954) S.C.R. 310: A.I.R. (1954) S.C. 44; *Suramma* v. *Sitaramaswamy*, A.I.R. (1957) A.P. 71; *Sushila Devi* v. *Harisingh*, (1971) A.S.C. 1756 (India/Pakistan Partition).

[92] *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*, (1962) A.C. 166.

[93] *Krell* v. *Henry* (1903) 2. K.B. 740.

[94] *Fibrosa Sholka Akcyjna* v. *Fairbairn Lawson* (1943) A.C. 32, overruling *Chandler* v. *Webster* (1904) 1 K.B. 493.

[95] *Hari Laxman* v. *Secretary of State* (1927) 52 Bom. 142, 30 Bom L.R. 49, 108 I.C. 19, ('28) A.B. 61; *Rampratap Mahadeo* v. *Sasansa Sugar Works Ltd.* ('64) A. Pat. 250.

ciple the question is the same that we have noted above, whether the new state of things is such as the parties provided for or contemplated, and whether further performance, so far as the prohibition is not total, or when it is removed, would really be performance of the same contract. Where time is not of the essence of the contract and the suspension owing to military requirements is temporary, the contract is not frustrated.[96] Compulsory suspension of an engineering contract on a large scale, in order to direct the labour to producing munitions of war, was held to discharge the contracts.[97] So, too, a contract to deliver goods may be frustrated by emergency regulations restricting transport[98] or export.[99] But a continuing contract is not discharged by a prohibitive regualtion which may be determined or varied during the war and leaves a substantial part of the contract capable of execution.[1]

Frustration does not apply to:

(1) a lease because it is completed conveyance or transfer of interest in the land.[2] By express terms of S. 56 of the Act, frustration cannot apply to cases in which there is a completed transfer.[2] Lease is not a mere contract. Where the property leased is not destroyed or substantially and permanently unfit the lessee cannot avoid the lease because he does not or is unable to use the land for purposes for which it is let to him. Rights of parties do not, after the lease is granted, rest in contract. Section 4 of the Transfer of Property Act does not enact that the provisions of the contract Act are to be read into the Transfer of Property Act.[2] It may be that para two of this section may apply to performance of a covenant in a lease. A covenant under a lease to do an act, which after the contract is made, becomes impossible or unlawful. But on that account the transfer of property resulting from the lease is not declared void;[2]

(2) an arbitration clause in a contract is not affected by the frustration of the contract;[3]

(3) If the impossibility is brought about by an act of a party to the contract or it is self induced.[4]

"Becomes impossible."—The Indian decisions merely illustrate what amounts to supervening impossibility or illegality within the meaning of the second paragraph.

In a suit for damages for breach of a contract against a Hindu father to give his minor daughter in marriage to the plaintiff, it was held that the performance of the contract had not become impossible simply because the girl had declared her unwillingness to marry the plaintiff, and the defendant had declared that he could not compel her to change her mind.[5] If a man chooses to answer for the voluntary act of a third person, and does not in terms limit his obligation to using his best endeavours, or the like, there

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[96] *Mugneeram & Co.* v. *Gurbachan Singh* ('65) A.S.C. 1523.

[97] *Metropolitan Water Board* v. *Dick Kerr & Co.* (1918) A.C. 119.

[98] *Sannidhi Gundayya* v. *Subbayya* (1926) 51 Mad. L.J. 663, 99 I.C. 459, ('27) A.M. 89; *Ramayya* v. *Firm of M. S. Shaik Saib* ('58) A. Andhra 576.

[99] *Smt. Durga Devi Bhagat* v. *J. B. Advani & Co. Ltd.* 76 C.W.N. 528.

[1] *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban Council* (1916) 2 K.B. 428 A.C.

[2] *Raja Dhruv Dev* v. *Raja Harmohinder Singh* (1968) A.S.C. 1024.

[3] *Union Bank of India* v. *Kishorilal*, (1960) 1 S.C.R. 493 (514) = (1959) A.S.C. 1362 (1371).

[4] *Bootalinga Agencies* v. *Poriaswami Nadar* (1969) A.S.C. 110.

[5] *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas* (1896) 21 Bom. 23.

is no reason in law or justice why he should not be held to warrant his ability to procure that act. An agreement to sell a specified quantity of dhotis to be manufactured at a particular mill "to be taken delivery of as and when the same may be received from mills," cannot be read as meaning "If and when," especially when a time is named for the completion of delivery; and the failure of the mills to produce the goods is no excuse. The doctrine of frustration does not extend to the case of a third person on whose work the defendant relied preferring to work for someone else during the material time.[6] An agreement to sell Penang tin is not frustrated because Penang has been occupied by enemy action, unless it is an express or implied term of the contract that the goods were to be consigned from Penang. The impossibility of performance must be in respect of a term of the contract.[7]

Imposition by the Government of restrictions on export to Great Britain and hence refusal to issue export licence, were treated as a commercial impossibility by the Calcutta High Court.[7]

If one of the modes of performance has become impossible or unlawful, and the contract can be performed in other ways, the contract is not frustrated.[8]

Commercial impossibility.—The impossibility referred to in the second clause of this section does not include what is callex commercial impossibility. A contract, therefore, to supply freight cannot be said to become impossible within the meaning of the clause merely because the freight could not be procured except at an exorbitant price.[9] or by mere economic unprofitableness,[10] or the performance more onerous,[11] e.g. building cost becoming costlier.[12]

"Becomes unlawful."—By a contract made with the plaintiff the defendants agreed to carry from Bombay to Jedda in their steamer 500 pilgrims who were about to arrive in Bombay to Singapore in the plaintiffs' ship. The pilgrims arrived in Bombay, but the defendants refused to receive them on board their steamer on the ground that during the voyage of the plaintiffs' ship to Bombay there had been an outbreak of smallpox on board and that the pilgrims had been in close contact with those who had been suffering from the disease, and that the performance of the contract had under the circumstances become unlawful, having regard to the provisions of sec. 269 of the Indian Penal Code (Act XLV of 1860). That section provides that whoever unlawfully and negligently does any act which is, or which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment. It was held that the carrying of the pilgrims in the defendants' steamer would not have been in contravention of any law or regulation having the force of law, and that if special precautions were necessary to prevent infection it was the duty of the defendants to take those precautions and to perform the contract.[13]

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[6] *Hurnandrai Fulchand* v. *Pragdas Budhsen* (1922) 50 I.A. 9, 47 Bom. 344 A. 1923 P.C. 54; see also *Ganga Saran* v. *Ram Charan Ram Gopal*. A. 1952 S.C. 9.

[7] *Pragdas* v. *Jeewanlal* (1949) 51 Bom. L.R. 178, ('48) A.P.C. 217.

[8] *T.W.T. Co.* v. *Uganda Sugar Factory*, A.I.R. (1945). P.C. 144.

[9] *Karl Ettlinger* v. *Chagandas* (1916) 40 Bom. 301, 310, 311.

[10] *Sri Amuruvi Perumal* v. *K.R.P. Pillai* (1962) Mad. 252: A. (1962) Mad. 132.

[11] *Alopi Parshad* v. *Union of India* (1960) 2 S.C.R. 793 (807) = (1960) A. S.C. 589.

[12] *Davis Contractors* v. *Fareham U.D.C.* (1956) 1 Q.B. 302.

[13] *Bombay and Persia Steam Navigation Co., Ltd.* v. *Rubattino Co. Ltd.* (1889) 14 Bom. 147.

Certain statutory enactments define the effect of the present section. The Transfer of Property Act IV of 1882, sec. 108, provides as to property let on lease, that if by fire, tempest, or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lease, be void. The doctrine of frustration does apply to mere agreement of lease, where no interest in the property leased passes. In *Satyabrata* v. *Mugneeram* A.I.R. (1954) S.C. 44, 49, it was decided that the doctrine of frustration applies to a contract to sell land, as in India unlike England a mere contract to sell land does not create any estate in the buyer.

Frustration of contracts

Re: Personal contracts —

By death of the party or by permanent incapacity of the party e.g. madness.

Re: Other contracts —

(1) Impossible in itself.

(2) Supervening impossibility or illegality, involving actions contrary to law or public policy.

(3) Outbreak of war, war restrictions, illegal to trade with enemy etc.

(4) Destruction of subject matter by fire, explosion, spoilage of dates by water and sewage due to sinking of ship.

(5) Happening of event which rendered the contract impossible of performance but would not include hard and difficult cases of abnormal rise or fall or price, depreciation of currency, closure of Suez Canal involving longer route and journey involving more freight and delay.

(6) Unavailability due to lawful seizure, requisition, detention of chartered ship running aground.

(7) Imposition of Government restrictions or orders.

No frustration of contracts

(1) if events are, could be foreseen or provided for or might have been anticipated or guarded against. This is subject to supervenial illegality.

(2) Failure to unload goods due to strike.

(3) Self induced frustration i.e. frustration due to his own conduct or to the conduct of those for whom he is responsible or by party's deliberate or negligent act or election.

(4) Abnormal rise, or fall, in price or depreciation of currency, performance becoming more onerous or costly.

Effects of frustration.—As stated on the first two paras of the section, the contract becomes void, that is to say it determines and is not enforceable with regard to the rights not yet accrued. With regard to the rights already accrued, see the provisions of sec, 65 and the two paras hereunder.

Refund.—Where a contract, after it is made, becomes impossible, the party who has received nay advantage under it is bound to restore it to the other party under sec. 65 below. *A* buys a freight from *B* for Rs. 2,500 bales of cotton on a ship belonging to *B* to be carried from Bombay to Genoa. The freight is paid in advance and the goods are put on board the ship. While the ship is still lying in the harbour, the export of cotton to Genoa is prohibited by orders of the Government, and the voyage is abandoned. *A* is

entitled under sec. 65 to recover from *B* the freight paid in advance.[14] Similarly, where a contract becomes unlawful owing to the outbreak of war, either party is entitled under sec. 65 to recover from the other any deposit made by him as a security for the due performance of the contract.[15] And where tonga stands were leased by the Municipality to *A*, and the tongawallas refused to use those stands, the contract of lease was frustrated and *A* was held entitled to the refund of moneys paid to the Municipality.[16] Appellant had taken on lease an area of land in mountgomery district. Due to partition of India, he had to migrate from West Punjab. He claimed a refund of rent on the ground that consideration for the lease has failed. It was held that S. 56 of the Contract Act is not applicable to lease. Inability of appellant to cultivate the land or to collect the crops because of widespread riot cannot clothe him with the right to claim refund of the rent paid.[17]

The contract for sale of coal by the railways being not in the prescribed manner under sec. 175 of the Government of India Act, the purchaser was entitled to refund of the amount paid as deposit.[18]

Innocent Promisee entitled to Compensation.—The third para of this section is an exception to the doctrine of frustration. Although a promisor had known that his promise was impossible or unlawful, but the promisee did not know it to be impossible or unlawful, the promisee is entitled to claim compensation.

Reciprocal promise to do things legal, and also other things illegal.

57. Where persons reciprocally promise, firstly to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is void agreement.

Illustration

A and *B* agree that *A* shall sell *B* a house for 10,000 rupees, but that if *B* uses it as a gambling house, he shall pay *A* 50,000 rupees for it.

The first set of reciprocal promises, namely to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that *B* may use the house as a gambling house, and is a void agreement.

Scope of the section. This section applies to cases where the two sets of promises are severable and distinct. When the void part of an agreement can be properly separated from the rest, the latter does not become invalid; but when the parties themselves treat transactions, void as well as valid, as an integral whole, the Court also will regard them as inseparable, and wholly void.[19]

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[14] *Boggiano & Co.* v. *The Arab Steamers Co., Ltd.* (1916) 40 Bom. 529; followed in *Gandha Korliah* v. *Janoo Hassan* (1925) 49 Mad. 200, 91 I.C. 780, ('26) A.M. 175.

[15] *Textile Manfg. Co. Ltd.* v. *Solomon Brothers* (1916) 40 Bom. 570.

[16] *Parshotam Das* v. *Batala Municipality* ('40) A. East Punj. 301.

[17] *Raja Dhruv Dev Chand* v. *Raja Harmohinder Singh* A. 1968 S.C. 1024.

[18] *Har Prasad Chcubey* v. *Union of India* (1973) A.S.C. 2380.

[19] *Davlatsing* v. *Pandu* (1884) 9 Bom. 176. See also *Poonoò Bibee* v. *Fyez Buksh* (1874) 15 B.L.R. App. 5.

Alternative promise, one branch being illegal.

58. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration

A and *B* agree that *A* shall pay *B* 1,000 rupees, for which *B* shall afterwards deliver to *A* either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

Appropriation of Payments

Application of payment where debt to be discharged is indicated.

59. Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular dent, the payment, if accepted, must be applied accordingly.

Illustrations

(a) *A* owes *B*, among other debts, 1,000 rupees upon a promissory note which falls due on the 1st June *A* pays to 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) *A* owes to *B*, among other debts, the sum of 567 rupees. *B* writes to *A* and demands payment of this sum. *A* sends to *B* 567 rupees. This payment is to be applied to the discharge of the debt of which *B* had demanded payment.

Appropriation of payments.—In England "it has been considered a general rule since *Clayton's* case[20] that when a debtor makes a payment he may appropriate it to any debt he pleases, and the creditor must apply it accordingly."[21]

Debt.—Where money is paid by a debtor to his creditor with express intimation that the payment is to be applied to the discharge of some particular debt, and it is received and appropriated on that account, it is not in the power of the creditor, without the assent of the debtor,[22] to vary the effect of the transaction by altering the appropriation in which both the debtor and the creditor originally concurred. The same rule applies to payment of Government revenue.[23] The express intimation must be at the time of payment,[24] and not subsequently. If debtor has not intimated at the time of payment, creditor is entitled to appropriate it to the debt first in time.[25]

Several distinct debts.—This section deals only with the case of several distinct debts, and does not apply where there is only one debt, though payable by instalments. Interest is not a debt distinct from the principal.[26] Thus, where the amount of a decree was by consent made payable by five annual instalments, it was held that the decree-

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[20] (1816) 1 Mer. at p. 608.

[21] *Per Blackburn J., City Discount Co. v. McLean* (1874) L.R. 9 C.P. 692, 700.

[22] *Foster v. Chetty* (1924) 2 Rang. 204, 82 I.C. 660, (25) A.R. 4.

[23] *Mahomed Jan v. Ganga Bishun Singh* (1910) 38 Cal. 537, 38 I.A. 80.

[24] *Chhangur Sahu v. Ratan Sugar Mills Ltd.* (1958) All. L.J. 311.

[25] *Relu Mal v. Ahmad, A.* (1926) Lah. 183, vide Sec. 60.

[26] *Bansi Lal v. Sant Ram,* A. (1965) Punj. 375; *Cory Bros. & Co. v. The Mecca* (1897) A.C. 286 (294).

holder was not bound to appropriate the payments to the specific instalments named by the judgment debtor.[27]

Application of payment where debt to be discharged is not indicated.

60. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Creditor's right to appropriate.—"If the debtor does not make any appropriation at the time when he makes the payment, the right of application devolves on the creditor," and he may exercise that right until the very last moment, and need not declare his intention in express terms;[28] he may, indeed, exercise that right even when he is being examined at the trial of the case.[29] There were conflicting decisions in India on the question as to the time when the creditor may elect to appropriate. The point has now been concluded by a decision of the Privy Council,[30] in which after referring to provisions of sec. 60 their Lordships said: "This is the same rule as that laid down in English law by the House of Lords in *Cory & Bros. & Co.* v. *The Mecca*[31] and under it the creditor has a right to appropriate a payment by the debtor to the principal or to the interest of the same debt. There is no obligation upon the creditor to make the appropriation at once though when once he has made an appropriation and communicated it to the debtor he would have no right to appropriate it otherwise. Lord Macnaghten's language in that case is equally applicable under secs. 60 and 61 of the Contract Act. 'Where the election is with the creditor, it is always his intention express or implied or presumed and not any rigid rule of law that governs the application of the money'." But the creditor may do nothing at all, in which case a rule is necessary for the guidance of the Courts, and sec. 61 provides such a rule. The rule laid down in sec. 61 is in conformity with the English law.

Contract of guarantee.—A surety is bound by the creditor's appropriation.[32]

Principal and interest.—Where there is a debt carrying interest, money paid and received without any definite appropriation is to be first applied in payment of interest.[33] If the debtor appropriates a payment to principal, the creditor need not accept payment on those terms, but if he does not he must return the money; if he does accept he is bound by the appropriation.[34]

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[27] *Fazal Husain* v. *Jiwan Ali* (1906) All. W.N. 135; followed in *Harikisondas* v. *Nariman* (1927) 29 Bom. L.R. 950, 104 I.C. 673, ('27) A.B. 479.

[28] Lord Macnaghten in *Cory Bros. & Co.* v. *Owners of the "Mecca"* (1897) A.C. 286, 293; followed in *Manisty* v. *Jameson* (1925) 5 Pat. 326, 94 I.C. 273, ('26) A.P. 330.

[29] *Seymour* v. *Pickett* (1905) 1 K.B. 715.

[30] *Rama Shah* v. *Lal Chand* (1940) 67 I.A. 160, (1940) Lah. 470, 187 I.C. 233, ('40) A.P.C. 63.

[31] (1897) A.C. 286, 294.

[32] *Messrs. Kukreja Ltd.* v. *Said Alam* (1941) Lah. 323, I.C. 206., A.I.R. 1941 Lah. 16.

[33] *Venkatadri Appa Row* v. *Parthasarathi Appa Row* (1921) L.R. 48 I.A. 150, 153, 44 Mad. 570, 573; *Munno Bibi* v. *Income-tax Commissioner* ('52) A.A. 514; *Shanmugam* v. *Annalakshmi* (1949) F.C.R. 537, ('50) F.C. 38.

[34] *Nemi Chand* v. *Radha Kishen* (1921) I.L.R. 48 Cal. 839, 841.

Debt barred by the law of limitation.—Where not appropriation is made by the debtor, the creditor may apply the payment to any lawful debt, though barred by the law of limitation. This frequently happens where there is a running account extending over several years. The creditor may in such a case appropriate the payments to the earliest items barred by limitation and may sue for such of the balance as is not so barred.[35]

Application of payment where neither party appropriates.

61. Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payments shall be applied in discharge of each proportionately.

Scope of the section.—The section must be read continuously with sec. 60. It must be carefully observed that it does not lay down a strict rule of law, but only a rule to be applied in the absence of anything to show the intention of the parties. In order to ascertain the intention of the parties, not only any express agreement, but the mode of dealing of the parties, must be looked to. On the other hand, the circumstances may show that accounts which it was at a party's option to treat as separate were, in fact, treated as continuous, and then payments will be appropriated to the earliest unpaid item of the combined account.[36]

Mortgage of joint Hindu family property.—In a Full Bench case of the Allahabad High Court,[37] the question before the Court was "whether it is open to a mortgagee on a joint family property, under a mortgage deed executed by the manager of the joint family, when a portion of the mortgage debt was not raised for legal necessity, to appropriate during the pendency of the suit payments made by the mortgagor, towards the discharge of such portion of the debt as was not raised for legal necessity when no appropriation was made either by the mortgagor or the mortgagee till the date of the suit." The court decided that as long as the two portions of the debt had not been definitely ascertained it was not open to the creditor to appropriate a payment towards an unknown and unspecified portion of the debt. But after the two portions were definitely ascertained in such a way as to make them constitute two distinct debts he was entitled to appropriate the payment. As, however, the creditor had not appropriated the debt in the trial Court, it was held that the payment should be rateably distributed between the two portions of the debt.

Contracts which need not be performed

Effect of novation rescission and alteration of contract.

62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations

(a) *A* owes money to *B* under a contract. It is agreed between *A*, *B* and *C* that *B* shall

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[35] *Bishun Perkash* v. *Siddique* (1916) 1 Pat. L.T. 474; *Ramavel* v. *Pandyan Automobiles Ltd.*, (1973) A. Mad. 359.

[36] *Hooper* v. *Kecy* (1876) 1 Q.B. Div. 178.

[37] *Gajram Singh* v. *Kalyan Mal* (1935) All. 791, 166 I.C. 423, ('37) A.A. 1 (F.B.).

thenceforth accept *C* as his debtor instead of *A*. The old debt of *A* to *B* is at an end, and a new debt from *C* to *B* has been contracted.

(b) *A* owes *B* 1,000 rupees. *A* enters into an agreement with *B*, and gives *B* a mortgage of his *(A's)* estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) *A* owes *B* 1,000 rupees under a contract. *B* owes *C* 1,000 rupees. *B* orders *A* to credit *C* with 1,000 rupees in his books, but *C* does not assent to the arrangement. *B* still owes *C* 1,000 rupees, and no new contract has been entered into.

Assent of all parties.—Whether or not there is a novation of a contract it is in each case a question of fact.[38] This section requires assent of both the parties in respect of novation, alteration or rescission.

Discharge of existing contract.—The words "The Original Contract need not be performed" clearly indicate that by virtue of the three circumstances specified in this section, the old original contract is discharged completely and it is not to be performed. You have then to look at the new contract or the altered contract, as the case may be.

Novation.—The meaning of "novation," the term used in the marginal note to this section, and now the accepted catchword for its subject-matter, has been thus defined in the House of Lords: "that, there being a contract in existence, some new contract is substituted for it either between the same parties (for that might be) or between different parties, the consideration mutually being the discharge of the old contract. A common instance of it in partnership cases is where upon the dissolution of a partnership the persons who are going to continue in business agree and undertake as between themselves and the retiring partner, that they will assume and discharge the whole liabilities of the business, usually taking over the assets; and if, in that case, they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes a contract between the creditor who accedes and the new firm to the effect that he will accept their liability instead of the old liability, and on the other hand, that they promise to pay him for that consideration."[39] Substitution of one debtor for another or extinction of an existing debt by creation of new one is treated as novation. There is no novation when the creditor does not accept the new debtor for the original one. So where *A* owes *B* Rs. 300, *A* transfers the whole of his property by a registered instrument to *C*. The consideration for the transfer is Rs. 2000 out of which *C* agrees to pay Rs. 300 to *B*. Here there is no novation, for there is no contract between *A*, *B* and *C* that *B* shall accept *C* as his debtor instead of *A*. Thus *B* is entitled to recover the debt from *A*.[40]

Assignment and novation distinguished.—The assignment of a debt operates as an effective transfer of a debt without the consent of the debtor. A novation is effective if the debtor is a consenting party. In assignment there is a transfer of property and in a novation there is annulment of one debt and then the creation of a substituted debt in its place.[41]

New eforceable contract.—An attempted novation which fails to produce a new enforceable contract may put an end to the original contract if it was the intention of the

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[38] Lord Selborne in *Scarf* v. *Jardine* (1882) 7 App. Ca. 345, 351.

[39] *Roushan Bibee* v. *Hurray Kristo Nath* (1882) 8 Cal. 926; *Kshetranath Sikdar* v. *Harasukdas Bal Kissendas* (1926) 31 C.W.N. 803, 102 I.C. 871, ('27) A.C. 538.

[40] *Debnarayan Dutt* v. *Chunilal Ghose* (1914) 41 Cal. 137.

[41] *In re United Railways of the Havana & Regla Warehouses Ltd.* (1960) Ch. 52 at 84.

parties to rescind it in any event. Such intention must be clearly proved.[42]

A fresh contract which required to be compulsorily registered was not registered and hence it was held not to operate as a novatio.[43]

It has to be considered in every case not only whether a new debtor has consented to assume liability, but whether the creditor has agreed to accept his liability in substitution of the original debtor's. In some circumstances the creditor may be entitled to sue the retiring or the incoming partner in a firm at his option; mere continuing to deal with the firm as reconstituted will not preclude him from suing his original debtor.[44] Novation is not consistent with the original debtor remaining liable in any form.[45] It requires as an essential element that the right against the original contractor shall be relinquished, and the liability of the new contracting party accepted in his place.[46] Therefore, if a new contracting party has been accepted, the onus of proving that the original party remains liable lies heavily on the person asserting it.[47]

Election to accept the sole liability by new or surviving partners in a firm does not need very strong proof, but merely ambiguous acts will not do. *A* advanced Rs. 50,000 to a firm consisting of three partners. The sum of Rs. 50,000 was made up partly of securities handed over by *A* to the firm and partly of cash. The firm passed a note to *A* promising to return the securities and repay the cash with interest at 6 per cent per annum payable every six months. Thereafter one of the partners died, and *A* accepted from the surviving partners a promissory note in the firm's name for Rs. 50,000 to be paid in cash with interest at the same rate, but not payable with six monthly rests. This was a new contract with the surviving partners alone.[48]

Effect of unauthorised alteration of documents.—What if the document recording an agreement is altered without the consent of both parties? No answer to this question is given by the Contract Act, or anywhere in the Anglo-Indian Codes, but Indian practice follows the authorities of the Common Law. The rule is that any material alteration is an instrument (upon which claim can be founded) made by a party, or by anyone while it is in the party's custody or in that of his agent, disables him from relying on it either as plaintiff or as defendent,[49] though he may sue for restitution under sec. 65.[50] Any alteration is material which affects either the substance of a contract expressed in the document or the identification of the document itself, at all events where identification may be important in the ordinary course of business.[51] Alterations are immaterial if

[42] *Morris* v. *Baron* (1918) A.C. 1; *British and Benington*s v. *N.W. Cachar Tea Co.* (1923) A.C. 48, 68; *Mahabir Prasad* v. *Satyanarain* ('63) A. Pat. 131.

[43] *Abdul Kayum* v. *Bahadur* (1912) 14 Bom. L.R. 26; *Angan Lal* v. *Saran Behari* (1929) 51 All. 799: 121 I.C. 211: A.I.R. (1929) All. 503.

[44] *Scarf* v. *Jardine* (1882) 7. App. Ca. 345, 351.

[45] See *Commercial Bank of Tasmania* v. *Jones* (1893) A.C. 313.

[46] *Nadimulla* v. *Channappa* (1903) 5 Bom. L.R. 617. Accordingly a formal instrument is not annulled by a mere agreement to substitute something else for it at a future date; *Angan Lal* v. *Saran Behari Lal* (1929) 51 All. 799, 121 I.C. 221, ('29) A.A. 503.

[47] *Liladhar Nemchand* v. *Rawji Jugjiwan* (1935) 68 M.L.J. 530, 154 I.C. 1090, ('35) A.P.C. 93.

[48] *Markandrai* v. *Virendrarai* (1917) 19 Bom. L.R. 837, 843, 844.

[49] *Suffell* v. *Bank of England* (1882) 9 Q.B. Div. 555, where authorities are collected.

[50] *Anantha Rao* v. *Surayya* (1920) 43 Mad. 703.

[51] *Suffell* v. *Bank of England* (1882) 9 Q.B. Div. 555. A Bank of England note with the number altered is not substantially the same note.

they merely express what was already implied in the document, or add particulars consistent with the document as it stands, though superfluous, or are innocent attempts to correct clerical errors.[52] There may be cases of wilful fraud practised by a stranger where the rule will not be held to operate against the person who had the custody of the document.[53]

The Indian decisions on the subject may be divided into two classes. The first class comprises cases in which the suits were for bond debts brought upon the basis of altered documents. The second class relates to suits on documents which by the very execution thereof effect a transfer of interest in specific immovable property. As to the former class of cases, the Indian Courts have followed the principles of English law set out above, the point for decision in each case being whether the alteration was or was not material. Thus where a bond was passed to the plaintiff by one of three brothers, and the plaintiff forged the signature of the other two to the bond, and brought a suit upon it in its altered form against all the three brothers, it was held that the alteration avoided the bond.[54] In such a case the plaintiff is not entitled to a decree even against the real executant. Similarly, where the date of a bond was altered from 11th September to 25th September, it was held that the alteration was material, as it extended the time within which the plaintiff was entitled to sue; it did not matter that the period of limitation, though reckoned from 11th September, had not expired at the date of the suit.[55] But the fact that the signature of an attesting witness had been affixed after execution to a bond that does not require to be attested is not a material alteration, and does not make the bond void.[56] Besides the alteration being material, it must have been made in a document which is the foundation of the plaintiff's claim. A material alteration, therefore, in a written acknowledgement of debt does not render it inoperative, as the acknowledgement is merely evidence of a pre-existing liability.[57]

We shall next consider the cases where the effect of the execution of the altered document is to create an interest in the property comprised in the document. The rule to be derived from these cases may be stated as follows: A material alteration, though fraudulent, made in a mortgage or hypothecation bond does not render it void for all purposes, and the altered document may be received in evidence on behalf of the person in whose favour it is executed for the purposes of proving the right, title or interest created by, or resulting from the execution of the document, *provided that the suit is based on such right, and not on the altered document*. This rule is founded by Indian Courts on English decisions.[58] The reason is that the right, title or interest created by, or resulting from, the very fact of the execution of the document does not rest on a contract or a covenant, but arises by operation of law, and a subsequent alteration, therefore, does not divest the vested right.[59] A plaintiff sued to recover the principal and interest due on a mortgage

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[52] *Howgate and Osborn's Contract* (1902) 1 Ch. 451.

[53] *Lowe* v. *Fox* (1887) 12 App. Ca. 206 at p. 217, per Lord Herschell.

[54] *Gour Chandra Das* v. *Prasanna Kumar Chandra* (1906) 33 Cal. 812.

[55] *Govindasami* v. *Kuppusami* (1889) 12 Mad. 239; *Mt. Gomti* v. *Merghraj Singh* (1933) All. L.J. 907, 145 I.C. 147, ('33) A.A. 443.

[56] *Venkatesh* v. *Baba* (1890) 15 Bom. 44; *Ramayyar* v. *Shanmugam* (1891) 15 Mad. 70.

[57] *Atmaram* v. *Umedram* (1901) 25 Bom. 616; *Harendra Lal Roy* v. *Uma Charan Ghosh* (1905) 9 C.W.N. 695.

[58] *Agricultural Cattle Insurance Co.* v. *Fitzgerald* (1851) 17 Q.B. 432. See the cases in *Mangal Sen* v. *Shankar* (1903) 25 All. 580.

[59] *Christacharlu* v. *Karibasayya* (1885) 9 Mad. 399, 412.

bond by fraudulently doubling the rate of interest and inserting a condition making the whole sum payable upon default of payment of any one instalment. The suit was brought on the altered bond made by the plaintiff himself. The Full Bench confirmed the decision of the court below dismissing the plaintiff's entire claim.[59] Similarly a hypothecation bond was fraudulently altered by the plaintiff so as to, comprise a larger area of land than was acually hypothecated. The suit was brought on the altered bond and the High Court of Allahabad held that the suit was rightly dismissed by the lower court.[60] On the other hand where a mortgage bond was altered in a material respect but the suit was not based on the altered bond, the court allowed the bond to be used as proof of the mortgagee's right to sell the property.[61] Similarly, a puisne mortgagee brought a suit for sale against his mortgagors and impleaded therein as a defendant a prior mortgagee, offering to redeem the prior mortgage. The prior mortgage, when tendered in evidence by the prior mortgagee, was found to have been tampered with materially by somebody. It was held that such alteration did not render the instrument void in to, so as to justify the court in ignoring its existence and passing a decree in favour of the plaintiff for sale of the property comprised in it without payment of the amount due under it to the prior mortgagee.[62] In this last mentioned case it may be observed that the suit was not brought by the prior mortgagee nor was the suit based on the altered document.

In the case of negotiable instruments the English rule has been adopted to its full extent, as will be seen from secs. 87-89 of the Negotiable Instruments Act XXVI of 1881.

Novation before breach.—The very basis of this section is that the performance of the original contract should be affected and hence novation must be prior to the breach of the contract. Calcutta High Court has held that the novation should be previous to the breach of the contract,[63] while Madras High Court has held to the contrary.[64]

Rescission.—The basis for rescission under this section is mutual assent of the parties while the basis of rescission in section 64 is one-sided.[65]

Rescission may be express or may be inferred from the circumstances and conduct of the parties to the contract.

Promisee may dispense with or remit performance or promise.

63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Illustrations

(a) *A* promises to paint a picture for *B*. *B* afterward forbids him to do so. *A* is no longer bound to perform the promise.

(b) *A* owes *B* 5,000 rupees, *A* pays to *B*, and *B* accepts, in satisfication of the whole debt, 2,000 rupees paid at the time and place at which 5,000 rupees were payable. The whole debt is discharged.

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[60] *Ganga Ram* v. *Chandan Singh* (1881) 4 All. 62.

[61] *Subrahmania* v. *Krishna* (1899) 23 Mad. 137.

[62] *Mangal Sen* v. *Shankar* (1903) 25 All. 580.

[63] *Manohar* v. *Thakur Das* (1885) 15 Cal. 319; *Jitendra Chandra* v. *Banerjee*, A.I.R. (1943) Cal. 181.

[64] *K.M.P.R.N.M. Firm* v. *Theperumal*, (1921) 45 Mad. 180.

[65] *Jitendra Chandra* v. *Banerjee*, A.I.R. (1943) Cal. 181.

(c) *A* owes *B* 5,000 rupees. *C* pays to *B* 1,000 rupees, and *B* accepts them in satisfaction of claim on *A*. This payment is a discharge of the whole claim.

(d) *A* owes *B*, under a contract, a sum of money, the amount of which has not been ascertained. *A* without ascertaining the amount gives to *B*, and *B*, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) *A* owes *B* 2,000 rupees, and is also indebted to other creditors. *A* makes an arrangement with his creditors, including *B*, to pay them a composition of eight annas in the rupee upon their respective demands. Payment to *B* of 1,000 rupees is a discharge of *B*'s demand.

Rule of the Common Law.—This section makes a wide departure from the Common Law. In England, to quote an authoritative exposition, "it is competent for both parties to an executory contract by mutual agreement, without any satisfaction, to discharge the obligation of that contract"; in other words, as reciprocal promises are a sufficient consideration for each other, so are reciprocal discharges. "But an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment where the obligation is to be performed by payment"; but, by the law merchant, the obligation of a negotiable instrument may be discharged by mere waiver.[66] The intention of the present section to alter the rule of the Common Law is clear, and has been recognised in several Indian cases.[67]

Scope of the section.—The present section and sec. 62 must be construed so as not to overlap each other. This would be done by holding that agreements referred to in sec. 62 are agreements which more or less affect the rights of both parties under the contract discharged by such agreements; whilst those referred to in sec. 63 are such as affect the right of only one of the parties. The former case necessarily implies consideration, which may be either the mutual renunciation of right, or, in addition to this, the mutual undertaking of fresh obligations, or the renunciation of some right on the one side and the undertaking of some obligation on the other. It is only when the agreement to discharge affects the right of only one party that consideration might be found wanting, and there alone the Indian law departs from the English law by making provision for every such possible case in sec. 63.[68] No consideration is required for remission under this section.[69]

Remission of performance.—The words of the section, construed according to their natural meaning, imply that a promisee can discharge the promisor not only without consideration but without a new agreement.[70]

Where a promisee remits a part of the debt, and gives a discharge for the whole debt on receiving the reduced amount, such discharge is valid. The section, is intended not only to enable a promisee to release a debt at the instance of a third party, but also to enable the promisor, whose debt has been released at the instance of a third party, to take

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[66] *Foster* v. *Dawber* (1851) 6 Ex. 839.

[67] *Monohur Koyal* v. *Thakur Das Naskar* (1888) 15 Cal. 319, 326; *Davis* v. *Cundasami Mudali* (1896) 19 Mad. 398, 402; *Naoroji* v. *Kazi Sidik* (1896) 20 Bom. 636, 644.

[68] Per Cur. in *Davis* v. *Cundasami Mudali* (1896) 19 Mad. 398.

[69] *M/s. Hari Chand Madan Gopal & Co.* v. *State of Punjab* (1973) A.S.C. 381.

[70] *Chunna Mal, Firm* v. *Mool Chand, Firm* (1928) 55 I.A. 154; *Phoenix Mills Ltd* v. *M. H. Dinshaw & Co.* (1946) 48 Bom. L.R. 313, 226 I.C. 503, ('46) A.B. 469; *Sabaldas* v. *Sobhokhan* (1947) Kar. 182, ('48) A.S. 91.

advantage of that release.[71] Thus where a lessor, to whom rent is due under a registered lease, accepts a smaller amount of rent from the lessee in pursuance of a subsequent oral agreement to reduce the rent, and passes a receipt in full discharge of the rent due, the discharge will take effect independently of the prior oral agreement.[72] So also where money is accepted in full satisfaction of the claim, it is a discharge of the whole debt.[73]

A dispensation or remission under this section may well be contingent on the happening of a future event, just as an original promise may. The holder of a promissory note from the officers of a masonic lodge agreed in writing to make no claim "if the ... lodge building which has been burnt down is resuscitated." He cannot sue on his note after the lodge is rebuilt.[74]

Discharge from liability on negotiable instrument is specially dealt with in the Negotiable Instruments Act, 1881, secs. 82, 90.

Agreement to extend tit. —An agreement simply extending the time for performance of a contract is exempted by this section from any requirement of consideration to support it. No consideration is necessary to support such an agreement, exactly as none is required for the total or partial remission of performance.[75] This section does not entitle a promisee to extend the time for performance of his own accord for his own purposes. Thus, where a date is fixed for delivery of goods under a contract and the seller fails to deliver the goods, the buyer may not of his own accord give further time to the seller for giving delivery, so as to claim damages on the footing of the rate on the later date fixed by him; he is entitled to damages on the basis only of the rate prevailing on the date fixed for performance in the contract.[76]

Accept any satisfaction.—The last part of this section relates to what is known as the principle of "Accord and satisfaction" in English Law. Instead of insisting upon performance, a promisee may accept any other form of satisfation. Illustrations (d) and (e) to the section illustrate this principle. The essential element of 'satisfaction' is that the promisee must accept in unequivocally. If a promisor tenders something in full satisfaction but the promisee does not accept it or accepts in part performance, such a satisfaction will fall outside this part.[77]

Where the defendant company sent the bill for work done by the plaintiff in full and final settlement of all his claims under the contract but the plaintiff signed the bill and advance receipt with the words "under protest" and the defendant company sent the cheque nine months thereafter, it was held that there was 'no accord and satisfaction' in the sense of bilateral consensus of intentions.[78]

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[71] *In re Industrial Bank of Western India* (1930) 32 Bom. L.R. 1656, 129 I.C. 890, ('31) A.B. 123.

[72] *Karampalli* v. *Thekku Vitil* (1902) 26 Mad. 195. See *Basdeo Ram Sarup* v. *Dilsukh Rai Sevak Ram* (1922) 44 All 718.

[73] *Ishaq* v. *Madanlal* ('65) A.A. 34.

[74] *Abraham* v. *The Lodge "Good Will"* (1910) 34 Mad. 156.

[75] *Davis* v. *Cundasami Mudali* (1896) 19 Mad. 398, 402; *Jugal Kisore* v. *Chari & Co.* (1927) 49 All. 599.

[76] *Muthaya* v. *Lekha* (1914) 37 Mad. 412, 413, 417.

[77] *Shyamnagar Tin Factory* v. *Snowwhite Food Product*, A.I.R. (1965) Cal. 541.

[78] *Amar Nath* v. *M/s. Heavy Electricals Ltd.* A.I.R. (1972) All. 176.

Reference and footnote no. 79 has been deleted.

Consequences of rescission of voidable contract.

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit therunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

Scope of the section.—Contracts declared voidable [s. 2, clause (i)] under this Act may be divided into two groups, namely contracts voidable in their inception under secs. 19 and 19-A on the ground of fraud or the like, and contracts becoming voidable by subsequent default of one party, as mentioned in secs. 39, 53 and 55.

The direct application of this section, according to recognised canons of interpretation, is only to contracts declared voidable by the Act at the option of one of the parties; but the principle which it affirms is one of general jurisprudence and equity, and applicable in various other cases. The Privy Council held[80] the Section applies to cases of rescission under Section 39.

Minor's contract.—In *Mohori Bibee* case the Privy Council observed that the term 'person' in S. 64 or S. 65 of the Act does not comprise a minor but means such a person as is competent to contract under S. 11 of the Act. There is no liability upon a minor under both of these sections to make compensation to the other side.[81] It does not follow, however, that a minor is entitled both to repudiate his agreement and to retain specific property which he has acquired under it, or to recover money after receiving for it value which cannot be restored. General principles of equity seem incompatible with such a result, and it would certainly be contrary to English authority.[82]

Election to rescind.—The broad principle on which this and the following section rests, and which, as we have seen, is not confined to cases expressly included in either of them, was thus stated in England in one of the weightiest judgements:-

"No man can at once treat the contract as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he has obtained under it."[83]

For the same reason, a man cannot rescind a contract in part only. When he decides to repudiate it, he must repudiate it altogether. Whenever a party to a contract has an option to rescind it, the contract is voidable and when such a party makes use of that option, the agreement becomes void, the other party is freed from its obligation to perform its part and the resciding party is liable to restore the benefit received under such a contract. If such a rescinding party has put it out of his power to restore the former state of thing, either by acts of ownership or by adopting and accepting dealings with the sub-

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[80] *Muralidhar Chatterjee* v. *International Film Co. Ltd.* A. 1943 P.C. 34.

[81] See also *Motilal Mansukhram* v. *Maneklal Dayabrai* (1921) 45 Bom. 225.

[82] *See Valentani* v. *Canali* (1889) 24 Q.B. Div. 166; *Steinberg* v. *Scala (Leeds)* [1923] 2 Ch. 452, C.A. See *Chinaswami* v. *Krishnaswami* (1918) 35 Mad. L.J. 652. This does not mean that money lent to a borrower whom the law declares absolutely incapable of contracting a loan can be recovered under cover of equitable compensation or under the present section: *Limbaji Ravji* v. *Rahi* (1925) 49 Bom. 576, 27 Bom. L. R. 621, 88 I.C. 643, ('25) A.B. 499. See, however, *s.* 33 of the Specific Relief Act as to the discretion of the Court under that section, exercised in the case now cited.

[83] *Clough* v. *L. & N. W. R.* (1871) L.R. 7 Ex. 26.

ject-matter of the contract which alter its character, as the conversion of shares in a company, or if he has allowed a third person to acquire rights under the contract for value,[84] it is too late to rescind, and the remedy, if any, must be of some other kind.

Benefit received "thereunder."—The words 'benefit' and 'advantage' do not include any 'profit' or 'clear profit', nor does it matter what the party receiving the money may have done with it.[85] The Act requires that a party must give back whatever he received under the contract.[85] The benefit to be restored under this section must be benefit received under the contract. *A* agrees to sell land to *B* for Rs. 40,000. *B* pays to *A* Rs. 4,000 as a deposit at the time of the contract, the amount to be forfeited to *A* if *B* does not complete the sale within the specified period. *B* fails to complete the sale within the specified period, nor is he ready and willing to complete the sale within a reasonable time after the expiry of that period. *A* is entitled to rescind the contract and to retain the deposit. The deposit is not a benefit received under the concillary to the contract for the sale of the land.[86] However, if a person has elected to put an end to the contract under sec. 39, he is bound to return any benefit (part payment of price in advance) that he has received under the contract but he in his turn is entitled to damages for the defaulting party's breach.[87]

65. When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Obligation of person who has received advantage under void agreement or contract that becomes void.

Illustrations

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

(b) *A* contracts with *B* to deliver to him 250 maunds of rice before the 1st of May. *A* delivers 130 maunds only before that day, and none after. *B* retains the 130 maunds after the 1st of May. He is bound to pay *A* for them.

(c) *A*, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her a hundred rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B*, in consequence, resinds the contract. *B* must pay for the five nights on which she had sung.

(d) *A* contracts to sing for *B* at a concert for 1,000 rupees, which are paid in advance. *A* is too ill to sing. *A* is not bound to make compensation to *B* for the loss of the profits which *B* would have made if *A* had been able to sing, but must refund to *B* the 1,000 rupees paid in advance.

The illustrations to this section are rather miscellaneous. In (a) we have a simple

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[84] *Clarke* v. *Dickson* (1858) E.B. & E. 148.

[85] *Murlidhar Chatterjee* v. *International Film Co. Ltd.* (1943) 70 I.A. 35, 49, (1943) 2 M.L.J. 369, ('43) A.P.C. 34.

[86] *Natesa Aiyar* v. *Appavu* (1915) 38 Mad. 178.

[87] *Murlidhar Chatterjee* v. *International Film Co. Ltd.* (1943) 70 I.A. 35, 49, (1943) 2 M.L.J. 369, ('43) A.P.C. 34.

case of money paid under a mistake (*cf.* s. 72.) In (b) it does not seem that the contract has become void at all, but, on the contrary, that *B* has elected to affirm it in part and dispense with the residue. There is no new contract under which he is bound to pay for the 130 maunds of rice, as is shown by this, that what he does accept he is undoubtedly bound to pay for at the contract price. In (c) it is not clear whether the contract is to be treated as divisible, so that *A* is entitled for Rs. 100 for each night on which she did sing, or the Court is to estimate what, on the whole, the partial performance was worth. Illustration (*d*) is simple; English lawyers would refer it to the head of money paid on a consideration which fails.

Scope of the section.—This section applies to —

(i) where an agreement, which the parties intended to enforce, is found subsequently to be void.

e.g. where parties discover their mistake as to a matter of fact essential to the agreement (S. 20).

e.g. where a Court of law holds it to be void under any of the sections 23, 24, 25, 26, 27, 28, 29, 30.

In the first instance the word 'agreement' is used and in the second instance, the word 'contract' is used. But by the word 'agreement' is meant 'an enforceable agreement'.

(ii) A contract which subsequently becomes void by reason of supervening illegality, impossibility etc.

A contract or agreement which the parties know at the time of entering into it as void would not fall under either of the categories mentioned above.

It does not apply to cases where there is a stipulation that, by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract. An insurance company is not, therefore, bound under the provisions of this section to refund to the heirs of the assured the premiums paid on the policy of life assurance where the assured had committed a breach of the warranty by making an untrue statement as to his age.[88] (*c*). This section does not apply to a case where one of the parties—such as a minor known at the time so as to be — being wholly incompetent to contract, there not only never was but there never could have been any contract.[89] *K* had been granted mining lease by J. Company and *K* paid Rs. 80,000 to J. Company. Under Rule 45 of the Mineral Concession Rules, 1949, it was necessary that lessee should have certificate of approval from the provincial government. Rule 49 provided against payment of salami or premium except certain charges, or fees or rent specified in licence or lease. *K* had no such certificate. *K* did not get possession of the leased property. *K* filed a suit for recovery of possession of leased property or the refund of Rs. 80,000. The Supreme Court refused to invoke S. 65 of the Contract Act in favour of *K* as *K* either knew or should have known of illegality because *K* was already in the mining business and could have consulted his legal adviser and hence there was no occasion for him to be under any kind of ignorance of law. According to the Supreme Court *K*'s payment of money was not made lawfully which he was claiming by way of

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88 *Oriental Government Security Life Assurance Co., Ltd.* v. *Narasimha Chari* (1901) 25 Mad. 183, 214.

89 *Mohori Bibee* v. *Dhurmodas Ghose* (1903) 30 Cal. 539, L.R. 30 I.A. 114; *Punjabhai* v. *Bhagwandas* (1928) 53 Bom. 309, 31 Bom. L.R. 88, 117 I.C. 518, ('29) A.B. 89; *Gopaleswami* v. *Vaithilinga* (1940) 1 M.L.J. 547, ('40) A.M. 719.

refund. As *K* knew from the beginning the illegality of his agreement, it cannot be said that he entered into an agreement under the belief that it was a legal agreement. To invoke S. 65 of the Act, the invalidity of agreement should be discovered subsequent to the making of it. [90]

As this section refers to a restoration of any advantage, the contract or agreement may be executory or executed.[91]

Where an agreement is discovered to be void.—The expression "discovered to be void" presents some difficulty as regards agreements which are void for unlawful consideration (ss. 23 and 24). It seems that the present section does not apply to agreements which are void under sec. 24 by reason of an unlawful consideration or object[92] and there being no other section in the Act under which money paid for an unlawful purpose may be recovered back, the analogy of English law will be the best guide. According to that law money paid in consideration of an executory contract or purpose which is illegal may be recovered back upon repudiation of the transaction, as upon a failure of consideration. But if the illegal purpose or any material part of it has been carried out the money paid cannot be recovered back, for the parties are then equally in fault, and *in pari delicto melior est conditio possidentis*.[93] This principle applies to cases where a person transfers his property benami to another in order to defraud his creditor. In such cases, where the fraudulent purpose is not carried into execution, the transferee will be deemed to hold the property for the benefit of the transferor, as provided by sec. 84 of the Trusts Act. Where, however, the fraudulent object is accomplished, the transferee will not be disturbed in his possession.[94] The same principles have been held to apply to payments made under agreements which are void under sec. 30 as being by way of wager. This section applies to a contract which is void *ab initio*.[95] The words 'discovered to be void' mean nothing more or less than when the plaintiff comes to know, or finds out, that the agreement is void.[96] The word 'discovered' would imply the pre-existence of something which is subsequently found out. If knowledge is an essential requisite even an agreement *ab initio* void can be discovered to be void subsequently.[96]

Where moneys have passed from one party to another under a marriage brokage agreement[97] or where an alienation is declared void under Bhagdari Act, 1862,[98] the contracts would fall under this clause. A deed of mortgage was effected in the course of execution proceedings before a Collector but it was later discovered that the permission of the Collector under para II of Schedule III of C.P. Code, 1908 was not obtained and

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90 *Kuju Collieries Ltd.* v. *Jharkhand Mines Ltd.* (1974) A.S.C. 1892 = (197 2 S.C.C. 533; L.I.C. of India v. *Madhava Rao*, A.I.R. 1972 Mad. 112

91 *Mohanlal* v. *Yakubkhan* (1965) 6 Guj. L.R. 817: (1965) I.L.R. Guj. 961.

92 *Rudragawda* v. *Gangowda*, 39 Bom. L.R. 1124.

93 *Taylor* v. *Bowers* (1876) 1 Q.B.D. 291; *Kearley* v. *Thomson* (1890) 742; *Petherpermal* v. *Muniandi Servai* (1908) 35 I.A. 98, at p. 103; *Kedarnath* v. *Prahlad Rai* (1960) A.S.C. 213; *Sita Ram* v. *Radha Bai*, (1968) A.S.C. 534.

94 *Petherpermal* v. *Muniandi Servai* (1908) 35 I.A. 98; *Jadu Nath Poddar* v. *Rup Lal Poddar* (1906) 33 Cal. 976; *Girdharlal* v. *Manikamma* (1914) 38 Bom. 10; *Kalipada* v. *Kali Charan* ('49) A.C. 204.

95 *Shaikh Umar* v. *Shivdansingh*, A.I.R. (1958) M.P. 88; *Gulabchand* v. *Fulbai*, 11 Bom. L.R. 649; *Amolkachand Seth* v. *Prahlad Singh* (1972) M.P.L.J. 473; *L.I.C.* v. *Madhava Rao* (1972) A. Mad. 112.

96 *Ramaya Prasad* v. *Murli Prasad* (1974) A.S.C. 1320.

97 *Gulabchand* v. *Fulbai*, *supra*.

98 *Jijibhai Laldas* v. *Nagji*, 11 Bom. L.R. 393.

hence the mortgage is discovered to be void.[99]

A transferee of property which from its very nature is inalienable is entitled to recover back his purchase money from the transferor, if the transfer is declared illegal and void.[1] So also the purchaser of an expectancy.[2]

In the absence of special circumstances[3] the time at which an agreement is discovered to be void is the date of the agreement.[4]

"When a contract becomes void."—The expression "becomes void" includes cases of the kind contemplated by the second clause of sec. 56, and is sufficient to cover the case of a voidable contract which has been avoided.[5] On a suit to enforce a registered mortgage, the mortgage was found to be void because permission under para II of the third schedule to the Code of Civil Procedure had not been obtained. The claim on the personal covenant appeared to be time-barred and was formally abandoned by the mortgagee. The Privy Council held that the mortgagee had the right to refuse to be bound by the contract of loan when the basis of the contract had gone. "The lender who has agreed to make a loan upon security and has paid the money is not obliged to continue the loan as an unsecured advance. The bottom has fallen out of the contract and he may avoid it." The mortgagee was given relief under the section.[6] It was deemed applicable by the High Court of Bombay[7] to the case of a lease which was terminated by the lessee under the provisions of the Transfer of Property Act on the destruction of the property by fire. In that case the plaintiff hired a godown from the defendant for a period of twelve months and paid the whole rent to him in advance. After about seven months the godown was destroyed by fire, and the plaintiff claimed a refund from the defendant of a proportionate amount of the rent, and subsequently brought a suit for the same. The Court held that the plaintiff was entitled under this section to recover the rent of the unexpired part of the term. A contract also "becomes void" when a party disables himself from suing upon it by making an unauthorised alteration.[8] Where the defendant has sold stolen goods to the plaintiff, and the goods are recovered by the police, the contract is discovered to be void and the plaintiff is entitled to recover from the defendant the moneys paid to him.[9]

Contracts with corporations.—Act Common Law the contracts of corporations

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[99] *Nisar Ahmad Khan* v. *Manucha*, 67 I.A. 431: 43 Bom. L.R. 465 (P.C.); *Raja Mohan* v. *Manzoor Ahmad Khan*, 46 Bom. L.R. 170: 70 I.A. 1: A.I.R. (1943) P.C. 29.

[1] *Haribhai* v. *Nathubhai* (1914) 38 Bom 249; *Javerbhai* v. *Gordhan* (1915) 39 Bom 358; *Bai Diwali* v. *Umedbhai* (1916) 40 Bom 614; *Dyviah* v. *Shivamma A.* 1959 Mys. 186.

[2] *Harnath Kuar* v. *Indar Bahadur Singh* (1923) 50 I.A. 69, 45 All. 179. See also *Annada Mohan Roy* v. *Gour Mohan Mullick* (1923) 50 I.A. 239, 50 Cal. 929.

[3] *Harnath Kuar* v. *Indar Bahadur Singh* (1923) 50 I.A. 69, 45 All. 179.

[4] *Hansraj Gupta* v. *Official Liquidators, Dehra Dun - Mussoorie Electric Tramway Co.* (1933) 60 I.A. 13, 54 All. 1067, 35 Bom. L.R. 319, 142, I.C. 7, ('33) A.P.C. 63.

[5] *Satgur Prasad* v. *Har Narain* (1932) 59 I.A. 147, 7 Luck. 64, 34 Bom. L.R. 771, ('32) A.P.C. 89.

[6] *Raja Mohan Manucha* v. *Manzoor Ahmad Khan* (1943) 70 I.A. 1, (1943) 1 M.L.J. 508, ('43) A.P.C. 29. The mortgagee, however must not omit to repudiate within a reasonable time, otherwise his conduct may be treated as an election to affirm the contract based on the personal convenant *(Ibid)*.

[7] *Dhuramsey* v. *Ahmedbhai* (1898) 23 Bom. 15, followed in *Muhammad Hashim* v. *Misri* (1922) 44 All. 229.

[8] *Anantha Rao* v. *Surayya* (1920) 43 Mad. 703.

[9] *Chiranji Lal* v. *Hans Raj* ('61) A. Punj. 437.

must in general be under seal. To this, however, there are some exceptions. One of them is where the whole consideration has been executed and the corporation has accepted the executed consideration, in which case the corporation is liable on an implied contract to pay for the work done, provided that the work was necessary for carrying out the purposes for which the corporation exists.[10] The exception is based on the injustice of allowing a corporation to take the benefit of work without paying for it.[11] This exception, however, is in certain cases excluded by statute. Contracts with a corporation are often required by the Act creating it to be executed in a particular form, as for instance, under seal. The question in such cases is whether the Act is imperative and not subject to any implied exception when the consideration has been executed in favour of the corporation. If the Act is imperative and the contract is not under seal, the fact that the consideration has been executed on either side does not entitle the party, who has performed his part, to sue the other on an implied contract for compensation. This may work hardship but the provision of the Act being imperative, and not merely directory, it must be complied with. The present section, accordingly, does not apply to cases where a person agrees to supply goods to, or do some work for, a municipal corporation, and goods are supplied or the work is done in pursuance of the contract, but the contract is required by the Act under which the corporation is constituted to be executed in a particular form, and it is not so executed. In such cases[12] the corporation cannot be charged at law upon the contract, though the consideration has been executed for the benefit of the corporation. "The Legislature has made provisions for the protection of ratepayers, shareholders and others who must act through the agency of a representative body by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer.... The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement.[13] This view has been confirmed by the Supreme Court.[14]

Just as a corporation cannot be sued upon a contract which is required to be, but which is not under seal, though the consideration has been executed for its benefit, so it cannot sue upon the contract, though it has performed its own part of the contract so that the other party has had the benefit of it.[15] In *Mohamed Ebrahim Molla* v. *Commissioners for the Port of Chittagong*[16] the commissioners for the Port of Chittagong sued the defendant for the recovery of money due as hire of a tug lent to the defendant under a contract with him. The contract was not under seal as required by sec. 29 of the Chittagong Port Act, 1914. It was held that the Act was imperative in its terms and that the plaintiffs could not sue on the contract. It was held at the same time that the plaintiffs were entitled to payment upon a *quantum meruit*. The Calcutta High Court[17] held that a con-

[10] *Lawford* v. *Billericay Rural District Council* (1903) 1 K.B. 772.

[11] *Clarke* v. *Cuckfield Union* (1852) 21 L.J.Q.B. 349, 351.

[12] *Young & Co.* v. *Corporation of Royal Leamington Spa* (1883) 8 App. Ca. 517.

[13] *Ibid.*, per Lord Bramwell, at p. 528. The "wafer" is the common modern substitute for a waxen seal.

[14] *Rikhy, H. S. (Dr.)* v. *New Delhi Municipal Committee* (1962) 3 S.C.R. 604: A.I.R. (1962) S.C. 554: (1962) 1 S.C.J. 612.

[15] *Ramaswami* v. *Municipal Council of Kumbakonam* (1907) 30 Mad. 290; *Mohamad Ebrahim Molla* v. *Commissioners for the Port of Chittagong* (1927) 54 Cal. 189, 210 *et seq.* 103 I.C. 2, ('27) A.C. 465.

[16] (1927) 54 Cal. 189 *supra.*

[17] *Ranendra Nath* v. *Dhuliyah Municipality*, A. 1956 Cal. 203 following *Ram Nagina*

tract with a Municipality not in accordance with the form prescribed by Statute—not in writing, signed and sealed—is invalid but if the other party has performed his part of the contract, he is entitled to restitution under S. 65 of the Contract Act by way of compensation. The full bench of Allahabad High Court viewed the problem differently in *Gonda Municipality* v. *Bachchu.*[18]

By resolution of the municipal board of Gonda it was agreed to grant a contract to defendant for the realisation of the municipal dues leviable in mandi. A formal contract required under Section 97 of U.P. Municipalities Act 1916 was never made but defendent began his realisation and paid part of the dues. In a suit by the municipal board to recover the balance sum, defendent pleaded absence of execution of written contract as required by S. 97 of the U.P Municipalities Act 1916. The main question before the full bench was of S. 65 of the Contract Act has any application to the case of a contract which fails for non-compliance with the provisions of S. 97 of U.P Municipalities Act. The full bench was of the view that S. 65 of the Contract Act applies to a case in which agreement entered into by a statutory body is invalid by reason of non-observance of statutory provisions with regard to the execution of contracts, but does not apply when those provisions refer to the capacity of the statutory body to enter into an agreement. So where a statute creates a corporation and lays down that corporation has not got the capacity to enter into an agreement, unless it complies with a certain form or makes its will known in a particular manner, S. 65 of the Contract Act will not apply even if the Corporation might have received an advantage under an assumed agreement. However, where the form prescribed by the statute merely makes the agreement unenforceable by law against the Corporation, the statutory provision will not debar the applicability of S. 65 of the Contract Act because that section applies even though an agreement is void *ab initio*[19]. According to the full bench S. 97, U.P Municipalities Act, 1916, does not refer to the capacity of Municipal Corporation to enter into an agreement and so non-compliance with it does not render S. 65 of the Contract Act inapplicable. Where money has been loaned to a Municipality without a formal contract, the contract is void and the plaintiff is entitled to recover it.[20]

At all events, where a contract which fails to comply with the statutory formalities is only executory, neither party can enforce performance against the other.[21]

"Any person."—The obligation under this section to restore the advantage received under an agreement is not confined to parties to the agreement, but extends to any person that may have received the advantage.[22] A *sajadanashin* leased the property of a *khankah* and received *nazarana* for the same. Thereafter a Receiver was appointed who avoided the lease. The lessee was held entitled to recover the *nazarana* from the Receiver on the ground that the *khankah* had benefited from the *nazarana* and the person in charge of the *khankah* estate was bound to restore the advantage received.[23]

Agent.—Where on the instruction of a principal an agent entered into a transaction with a third party and paid money to the third party, it was held that the agent did not become liable to restore the money to the principal on the agreement being discovered

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Singh v. *Governor-General in Council* A. 1952 Cal. 306.

[18] A. 1951 Allah. 736.

[19] ibid p. 741.

[20] *Kishengarh Municipality* v. *Maharaja Kishengarh Mills Ltd.* ('61) A. Raj. 6.

[21] *Ahmedabad Municipality* v. *Sulemanji* (1903) 28 Bom. 618.

[22] *Giraj Baksh* v. *Kazi Hamid Ali* (1886) 9 All. 340, 347.

[23] *Devi Prasad* v. *Mehdi Hasan* (1940) 18 Pat. 654, 186 I.C. 674, (40) A.P. 8 .

to be void, since it could not be said that the agent had received any advantage.[24]

"Received any advantage."—The framers of this Act wisely and rightly laid down the rule in this section. In England a contrary rule which prevailed for many years has been since overruled by the House of Lords in *Fibrosa Spolka Akajjna* v. *Fairbairn Lawson*, (1943) A.C 32 = (1942) 2 All E.R 122. Viscount Simon L.C. observed in that case "I can see no valid reason why the right to recover the prepaid money should not equally arise on frustration arising from supervening circumstances as it arises on frustration from the destruction of the subject matter." The general rule of this section applies to such cases and that each party is bound to return any payment received prior to the contract becoming void or being discovered to be void.[25]

Where a contract is partially performed and is found to be void at a later stage, the Court may allow a proportionate part of the advantage received.[26]

Value of advantage, Burden of proof.—A party claiming the restoration of any advantage received after a contract has become void must prove the value of advantage received. In *Govindram* v *Edward Radbone*[27] the defendant had contracted to purchase machinery from Germany and the German firm had agreed to send a technician to India to set up the machinery. Part of the machinery arrived in India and thereafter, on war being declared, the contract was frustrated. The Custodian of Enemy Property filed a suit against the purchaser for the value of the machinery received, but failed to prove the advantage received by the defendant. Their Lordships said: "In estimating that value, a Court would have to take into account the fact that the balance of the machinery contracted to be supplied could not be supplied from Germany, and the fact that the appellants (purchasers) could no longer have the services of a qualified erector sent from Germany and of the sellers' Chief Chemist. Further, the Court would have to consider the question whether or not the appellants were able to procure from other sources the balance of the machinery contracted to be sent from Germany, and, if so, at what price and within what period of time, and what quantity and quality of products could be produced by the plant so assembled."

Mode of communication or revoking rescission of voidable contract.

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the rules, as apply to the communication or revocation of a proposal.

Effect of neglect of promisee to afford promisor reasonable facilities for performance.

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

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[24] *Harijivanlal* v. *Radhakison* (1938) A.L.J. 77, 172, I.C. 330, (38) A.P.C. 4

[25] *Wolf & Sons* v. *Dadyba Khimji* (1920) 44 Bom. 631.

[26] *Dhuramsey* v. *Ahmedbhai* (1898) 23 Bom. 15 (21); *Muhammad Hashim* v. *Misri* (1922) 44 All. 229. [Contra: *Lakshmanan* v. *Kamarajendra A.I.R.* (1955) Mad. 606.]

[27] (1947) 74 I.A. 295, (1947) Bom. 860, 50 Bom. L.R. 561, ('48) A.P.C. 56.

Illustration

A contracts with *B* to repair *B*'s house.

B neglects or refuses to point out to *A* the places in which his house requires repair.

A is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

Refusal or neglect of promisee.—A case exactly in point is that of an apprentice, whom a master workman has undertaken to teach his trade, refusing to let the master teach him. "It is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught."[28]

[28] *Raymond* v. *Minton* (1866) L.R. 1 Ex. 244.