Chapter V

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT

Quasi Contracts or Implied Contracts.—Chapter V does not deal with the rights or liabilities accruing from the Contract but those accruing from relations resembling those created by Contract.[1] These relations resembling contract are known as contract implied in law or a quasi contract. It is not a real contract or as it is called, a consensual contract based on agreement of the parties. These obligations come into existence by a fiction of law. It may become necessary to hold one person to be accountable to another, even without any agreement between them, on the ground that otherwise he would be retaining money or some other benefit which has come into his hands to which the law regards the other person as better entitled, or on the ground that without such accountability the other would unjustly suffer loss.[2] The law of quasi-contract exists to provide remedies in such circumstances.[3] In quasi-contracts, liability exists, according to some writers, [4] to prevent unjust enrichment and for this the courts do not take notice of the intention of the parties or their agreement. However, the other view is that it rests upon a hypothetical contract which is implied by law.[5] According to this restricted view quasi-contractual liability can only arise where a contract can be implied by law.[6]

Claim for necessaries supplied to person incapable of contracting, or on his account.

68. If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Illustrations

(a) *A* supplied *B*, a lunatic, with necessaries suitable to his conditions in life. *A* is entitled to be reimbursed from *B*'s property.

(b) *A* supplied the wife and children of *B*, a lunatic, with necessaries suitable to their conditions in life. *A* is entitled to be reimbursed from *B*'s property.

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[1] *State of W. Bengal* v. *B. K. Mondal* A. 1962 S C 779.

[2] Quoted in *Dhrangadhra Muni* v. *Dhrangadhra Chemical Works.* (1988) G.L.R. 388 at 400 from Anson's Contract, 25th edn.

[3] Anson's Law of Contract (23rd ed) 589.

[4] *Moses* v. *Macferlan* (1760) 2 Burr 1005, 1008 per Lord Mansfield; *Fibrosa Case* 1943 A.C. 32, 63 per Lord Wright; *United Australia Ltd.* v. *Barclays Bank Ltd.* (1941) A.C. 1, 28, per Lord Atkin, *Kiriri Cotton Company Ltd.* v. *Dewani* (1960) A.C. 192, 204, Per Lord Denning.

[5] *Sinclair* v. *Brougham* (1914) A.C. 398, 415, 452 Per Viscount Haldane and Lord Sumner, respectively; *Holt* v. *Markham* (1923) 1 K.B. 504, 513, Per Scrutton L.J.; *Re: Diplock* (1948) Ch. 465, 480.

[6] (1914) A.C. 398, 452; Lord Sumner: cf. Supreme Court of India's Approach, *State of W. Bengal* v. *B. K. Mondal* A. 1962 S C 779.

Person incapable of entering into contract.—Since the decision of the Judicial Committee in *Mohori Bibi* v. *Dhurmodas Ghose*[7] it is clear that this section applies to minors as well as to persons of unsound mind (see the illustrations) and other, if any disqualified from contracting by any law to which they are subject, e.g. a ward under U.P. Court of Wards Act.[8]

Necessaries."—Costs incurred in successfully defending a suit on behalf of a minor in which his property was in jeopardy are "necessaries" within the meaning of this section.[9] And so are costs incurred in defending him in a prosecution for dacoity.[10] So also is a loan to a minor to save his property from sale in execution of a decree.[11] Money advanced to a Hindu minor to meet his marriage expenses is supplied for "necessaries," and may be recovered out of his property[12] but without interest;[13] so also moneys advanced for the purposes of the marriage of Muslim girl.[14] But a distinction has been drawn, it would seem rightly, between the case of male and female minors on the ground that the Hindu text enjoined the marriage of the latter but not the former.[15] It is submitted that the passing of the Child Marriage Restraint Act, 1929, has made the child marriage as an offence, and a court would scarcely regard expenditure on a purpose forbidden by law as expenditure on necessaries.

As to the definition of necessaries in general, see notes to section 11, under the head "Necessaries."

Any one whom he is legally bound to support.—This expression is well illustrated by ill. (b). This expression covers cases of husband and wife.

Remedy, Nature of.—A supplier of necessaries has been given a remedy to proceed against the estate of the person under a disability; he is not entitled to proceed personally against such a person.

Reimbursement of person paying money due by the other, in payment of which he is interested.

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

Illustration

B holds land in Bengal, on a lease granted by *A*, the zamindar. The revenue payable by *A* to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of *B*'s lease. *B* to prevent the sale and the consequent annulment of his own lease, pays to the Gov-

[7] (1903) 30 Cal. 593, L.R. 30 I.A. 114.

[8] *Vishwanath Khanna* v. *Shiam Krishna* (1937) 166 I.C. 47.

[9] *Watkins* v. *Dhunnoo Baboo* (1881) 7 Cal. 140; *Phalram* v. *Ayub Khan* (1926) 49 All. 52, 98 I.C. 657, ('27) A.A. 55.

[10] *Sham Charan Mal* v. *Chowdhry Debya Singh* (1894) 21 Cal. 872.

[11] *Kidar Nath* v. *Ajudhia* (1883) Punj. Rec. no. 185.

[12] *Pathak Kali Charan* v. *Ram Deni Ram* (1917) 2 Pat. L.J. 627; cp. *Regd. Jessore Loan Co., Ltd.* v. *Gopal Hari Ghose Choudhuri* (1928) 30 C.W.N. 366, 94, I.C. 159 ('26) A.C. 657; *Meenakshi Ranga Ayyangar* ('32) A.M. 696, 139 I.C. 383; *Shriniwasrao* v. *Baba Ram* ('33) A.N. 285, 145 I.C. 350.

[13] *Ramchandra* v. *Hari* ('36) A.N. 12.

[14] *Rahima Bibi* v. *Sherfuddin* (1947) Mad. 541, ('47) A.M. 155.

[15] *Tikki Lal* v. *Komalchand* (1940) Nag. 632, ('40) A.N. 327.

ernment the sum due from *A*. *A* is bound to make good to *B* the amount so paid.[16]

[As to the date from which time runs for the purpose of limitation in cases within this section, see *Muthuswami Kavundan* v. *Ponnayya Kavundan* (1928) 51 Mad. 815.]

"Person . . . interested in the payment of money."—This section lays down a wider rule than appears to be supported by any English authority. The words "interested in the payment of money which another is bound by law to pay" might include the apprehension of any kind of loss or inconvenience, or at any rate of any detriment capable of being assessed in money.[17] This is not enough, in the Common Law, to found a claim to reimbursement by the person interested if he makes the payment himself. Authoritative statements in English books are much more guarded, for example: If *A* is compellable to pay *B* damages which *C* is also compellable to pay *B*, then *A*, having been compelled to pay *B*, can maintain an action against *C* for money so paid, for the circumstances raise an implied request by *C* to make such payment in his case. In other words, *A* can call upon *C* to indemnify him."[18]

But the English authorities do not cover a case where the plaintiff has made a payment operating for the defendant's benefit, but was not under any direct legal duty to do so, nor where the defendant was not bound to pay, though the payment was to his advantage. The assignee of a term of years mortgaged the premises by sub-lease. The mortgagees took possession, but did not pay the rent due under the principal lease. The original lessees, who of course remained liable to the lessors, had to pay the rent, and sued the morgagees to recover indemnity. It was held that the action did not lie,[19] for there was no obligation common to the plaintiff and the defendant. It was to the mortgagees' interest that the rent should be paid, but no one could call on them to pay it.

This section only applies to payments made *bona fide* for the protection of one's own interest. A person may be interested in the payment, but if in making the payment he is not actuated by the motive of protecting his own interest, he cannot recover, under this section.[20] Thus where *A* purchases property from *B*, and the sale is fictitious, *A* cannot recover from *B* money paid by him to save the property from being sold in execution of a decree against *B*.[21] It is, otherwise, however, if the sale is *bona fide*.[22] Where *A*'s goods are wrongfully attached in order to realise arrears of Government revenue due by *B* and *A* pays the amount to save the goods from sale, he is entitled to recover the amounts from *B*.[23]

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[16] *Faiyazunissa* v. *Bajrang Bahadur Singh* (1927) 1 Luck, 275, 104 I.C. 358, ('27) A.O. 609.

[17] The view propounded in the text was adopted by Stanley, C.J., in *Tulsa Kunwar* v. *Jageshar Prasad* (1906) 28 All. 563, by the Madras High Court in *Subramania Iyer* v. *Rungappa* (1909) 33 Mad. 232 and by the Calcutta High Court in *Pankhabati* v. *Nani Lal* (1914) 18 C.W.N. 778, 781; *Siti Fakir* v. *Chand Bewa* (1928) 32 C.W.N. 1087, 108 I.C. 46, ('28) A.C. 389.

[18] *Bonner* v. *Tottenham, etc., Building Society* (1898) 1 Q.B. 161, 167, per A. L. Smith, L.J.

[19] *Bonner's Case* (1898) 1 Q.B. 161, 167.

[20] See *Desai Himatsingji* v. *Bhavabhai* (1880) 4 Bom. 643, 652. See also *Secy. of State* v. *Rangaswami & Co.* (1927) 106 I.C. 657, ('28) A.M. 198.

[21] *Janki Prasad Singh* v. *Baldeo Prasad* (1908) 30 All. 167.

[22] *Subramania Iyer* v. *Rungappa* (1909) 33 Mad. 232.

[23] *Tulsa Kunwar* v. *Jageshar Prasad* (1906) 28 All. 563; *Abid Husain* v. *Ganga Sahai* (1928) 26 All. L.J. 435, 113 I.C. 441, ('28) A.A. 353; *Exall* v. *Partridge* (1799) 8 Term R. 308=(1775-1803) All. E.R. Rep. 341.

It is enough for a person claiming under the provisions of this section to show that he had an interest in paying the moneys *at the time of payment*. A mortgagee of a tenant's crop paid the amount due to Government in respect of a loan given to the tenant (mortgagor) and raised the attachment. The mortgagee being interested in payment was entitled to recover from the mortgagor (tenant) the amount so paid to the Government.[24] Thus moneys paid by a person while in possession of an estate under a decree of a court to prevent the sale of the estate for arrears of Government revenue may be recovered by him under this section, even though the decree may be subsequently reversed and he may be deprived of possession.[25] The section does not require that a person interested in a payment should at the same time have a legal proprietary interest in the property in respect of which the payment is made.[26] The Appellant Company had contracted to buy the mills but they were imminently threatened by the municipality to pay unpaid taxes on the mills relating to a period before the date of sale and so payable by the Respondent (i.e. the Maharaja). The Respondent, when approached by the Appellant, showed no sign of paying the taxes to the municipality. So the Appellant company paid the sum to avoid the stoppage of the supply of water to the mills and a forced sale which would defeat its purchase. Such payment made by the Appellant Company cannot be called a voluntary payment. The Appellant Company paid this sum as it was "interested in the payment." "The Company was interested in the taxes being paid at the time when they were paid since only through the payment could it realise the fruit of the contract that it had entered into."[27]

In *Ram Tuhul Singh* v. *Biseswar Lal*[28] the Judicial Committee, in dealing with the rights of parties making payments, observed: "It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a *voluntary* payment by *A* of *B*'s debt."

"Bound by Law."—The liability for which payment may be made under this section need not be statutory.[29] Contractual liability, on the other hand, is not a necessary element.[30] An action to recover money is not maintainable under this section unless the person from whom it is sought to be recovered was bound by law to pay it. And where the income-tax authorities assessed the widow of a deceased, notwithstanding remonstrances on her part that the outstandings had not come to her, but had been bequeathed under the will of the deceased to the defendants, the widow paid the tax, it was held that she could not recover the amount from the defendants under this section, for the defendants, not being the parties assessed, were not "bound by law" to pay the tax.[31] When

[24] *Sami Pillai* v. *R. Naidu* (1972) A. Mad. 4.

[25] *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (1893) 21 Cal. 142, L.R. 20 I.A. 160; *Nagendra Nath Roy* v. *Jugal Kishore Roy* (1925) 29 C.W.N. 1052, 90 I.C. 281, ('25) A.C. 1097.

[26] *Govindram* v. *State of Gondal* (1950) 77 I.A. 156, 52 Bom. L.R. 450, ('50) A.P.C. 99.

[27] *ibid.* A.I.R. 1950 P.C. 104.

[28] (1875) 15 B.L.R. 208, L.R. 2 I.A. 131; *Panchkore* v. *Hari Das* (1916) 21 C.W.N. 394, 399; *Ruabon S.S. Co.*, v. *London Assurance* (1900) A.C. 6, 15.

[29] *Mothooranath* v. *Kristokumar* (1878) 4 Cal. 369, 373.

[30] *Rasappa Pillai* v. *Doraisami Reddiar* (1925) 49 Mad. L.J. 88, 90 I.C. 545, ('25) A.M. 1041.

[31] *Raghavan* v. *Alamelu Ammal* (1907) 31 Mad. 35.

there is no joint family property in his hands, a Hindu father is not "bound by law" to get his minor daughter married and therefore a mother incurring expense to get daughter married cannot recover from the father under this Section.[32] A person purchasing property subject to a charge is alone liable to pay it off and so he cannot recover the amount paid by him from the person originally liable in respect thereof. So a mortgagee purchasing a property in execution of a mortgage decree cannot recover from the original tenant the amount which the mortgagee-purchaser pays to satisfy the rent decree held by a landlord for rents due prior to his purchase. A purchaser purchasing a property with the incumbrance of rent due from the original tenant with respect to property is deemed to have knowledge of the prior incumbrances and the existence of an incumbrance must have affected the price which he offered at the time of sale. Such a purchaser simply discharges his own liability and not that of the original tenant and therefore the former is not entitled to recover the prior rent charges paid by him from the latter.[33] Similarly a person buying immovable property subject to a charge for maintenance in favour of a widow cannot recover from the vendor maintenance money paid by him to the widow to save the property from sale at the instance of a widow.[34] The Maharajah was bound to pay this money in the sense that he had made a legally enforceable contract with Mr. Seksaria to pay it. "Unless the words 'bound by law to pay,' where they occur in the section, exclude those obligations of law which arise *inter partes*, whether by contract or by tort, and embrace no more than those public duties which are imposed by statute or general law, the Maharajah was a person from whom reimbursement could be claimed under the section. But their Lordships think that the words extend to any obligation which is an effective bond in law. Certainly the Common Law of England afforded a right of indemnity to one who had paid 'under compulsion of law' against the true obligor without limiting the circumstances in which the latter's liability had arisen. Certainly too, there is authority in the Courts of India for the proposition that *'bound by law'* covers *"obligations of contract or tort."*[35]

Obligation of person enjoying benefit of non-gratuitous act.

70. Where a person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Illustrations

(a) *A*, tradesman, leaves goods at *B*'s house by mistake. *B* treats the goods as his own. He is bound to pay *A* for them.

(b) *A* saves *B*'s property from fire. *A* is not entitled to compensation from *B*, if the circumstances show that he intended to act gratuitously.

Where a person lawfully does anything for another person. The word 'a person'

[32] *Sundaramma* v. *Suryanarayana*, A.I.R. 1950 Mad. 274.

[33] *Ranglal Sahu* v. *Kali Shankar Sahai*, A.I.R. 1924 Pat. 235.

[34] *Mangalathammal* v. *Narayana Swami* (1907) 17 Mad. L.J. 250.

[35] *Govindram* v. *State of Gondal* (1950) 77 I.A. 156, 52 Bom. L.R. 450, A.I.R. 1950 P.C. 99, 104, para 14.

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mean a person who actually supplies goods or renders service.[36] In the last case the plaintiff having admittedly not supplied the goods but the second defendant had done so, the suit was dismissed.[36] The expression 'another person' includes within its scope individuals as well as Government[37] and Municipalities[38] as well successor to the title of the person who received the benefit such as the Government and Gondia Municipality who succeeded to dispensary Fund Committee.[39]

Benefit: Acceptance of benefit need not be a voluntary act.[40]

Benefit arising as a result of the Government issuing a blanket licence instead of a restricted licence cannot be attributed to the act of the plaintiff and he is not entitled to the restoration of benefit arising due to issue of blanket licence.[41]

Non-gratuitous act done for another.—This section goes far beyond English law.[42] By the Common Law, if goods, work, or anything valuable be offered in the way of business and not as a gift, the acceptance of them is evidence of an agreement—a real, not a fictitious, agreement, though it need not be expressed in words—to pay what the consideration so given and taken is reasonably worth. A man is not bound to pay for that which he has not the option of refusing.[43] Under this section it would seem that whoever finds and restores lost property, apart from any question of a reward having been offered, is entitled to compensation for his trouble if he did not intend to act gratuitously. This is certainly not the Common Law rule.

"The terms of [this section] are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. It is, however, especially incumbent on final courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious.[44] It is plain that the Section ought not to be read as to justify the officious interference of one man with the affairs or property of another or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered.[45] In that case government repaired a tank from which were irrigated lands, some of which were Zamindari villages and others were raiyatwari villages held under government. The government effected the repairs as it was necessary for the purpose of preservation of the tank. It was found that government had carried out the repairs not gratuitously for the defendants who had enjoyed the benefit of it. In a suit by government to recover from defendants their share of the costs of repairs it was held that government was entitled under S. 70 of the Act to recover part of the costs incurred from the defendents on the basis of irrigable area of lands owned by plaintiff and defendants.[45] Upon the same principle, where a mort-

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[36] *Hansraj Gupta & Co.* v. *Union of India* (1973) A.S.C. 2724.

[37] *State of West Bengal* v. *B.K. Mondal & Sons*, (1962) A.S.C. 779 = (1962) 2 S.C.A. 375.

[38] *Piloo Sidhwa* v. *Poona Municipal Corporation*, (1970) 3 S.C.R. 415 = (1970) A.S.C. 1201 = 73 Bom. L.R. 301.

[39] *Pannalal* v. *Dy. Commissioner Bhandara*, (1973) 1 S.C.C. 639 = (1973) A.S.C. 1174. *Khader Khan* v. *Doraiswami* (1974) A. Mad. 371.

[41] *Srinivas & Co.* v. *Inden Biselers*, (1971) A.S.C. 2224.

[42] This was recognised in *Jarao Kumari* v. *Basanta Kumar Roy* (1905) 32 Cal. 374, 377.

[43] *Sumpter* v. *Hedges* (1898) 1 Q.B. 673, 676 per Collins L.J., see also *Falcke* v. *Scottish Imperial Insurance Company* (1887) 34 Ch. D. 234, 248, Bowen L.J.

[44] *Suchand* v. *Balaram* (1910) 38 Cal. 1 at 7.

[45] *Damodara Mudaliar* v. *Secretary of State for India* (1895) 18 Mad. 88, 93.

gage threatened to sell the land mortgaged to him and one of the co-sharers paid up the mortgage debt to prevent the mortgaged property from being sold, it was held that he was entitled to contribution from the other co-sharers.[46] Act was not gratuitous in the Calcutta Case. An entire tenure was sold in execution of rent decree obtained against some of the tenants. A plaintiff who was not a party to the rent suit deposited, with the approval of the court and lawfully, the prescribed amount under S. 310A of C. P. Code (XIV of 1882 to have the sales set aside to protect his own interest in the holding. The sales were set aside with the result that the liabilities of the defendants in respect of rent were discharged. It was held that plaintiff was entitled to contribution from defendants as per their share in the decretal debts.[47] The section does not apply where an act is done by one person at the express request of another. Thus if a client engages a pleader to act for him in a case, and if no fee is fixed, the pleader is entitled to reasonable remuneration not under this Section, but because the request implies a promise to pay such remuneration.[48] On the other hand, it can be seen that the act was done gratuitously in the following cases and so there was no liability under S. 70 of the Contract Act. So where under the agreement the purchasers of the property sold undertook to pay on behalf of their vendors a portion of the purchase price to a mortgagee who held the mortgage over some other property of the vendors which was not the subject of sale. Owing to delay in the registration of the sale deed which was caused by the action of the vendors, the purchasers did not immediately pay the stipulated sum to mortgagee. Subsequently when they tendered the sum to mortgagee, he refused to accept it without further payment of interest which had fallen due by this lapse of time. The purchasers paid the additional sum to the mortgagee but claimed it to recover from the vendors. It was held that there was no obligation upon the purchasers to pay to mortgagee any amount towards the payment of interest. Their liability was restricted to the stipulated sum only and the payment of interest was gratuitously made. It may be that vendors were benefited by the payment of interest to their creditors but this by itself is not sufficient ground to fasten them with liability.[49] So where out of three defendants *A*, *B* and *C*, in a previous suit, *A* had one-half interest in the disputed property of the litigation and in order to safeguard his interest *A* had to fight out the case in the best way he could; if incidentally and without any special effort on *A*'s part, *B* and *C* derive any advantage, it cannot be said that *A* had done something for the benefit of *B* and *C*.[50]

Essential conditions of this section.—By this section three conditions are required to establish a right of action at the suit of a person who does anything for another: (1) the thing must be done lawfully; (2) it must be done by a person not intending to act gratuitously; and (3) the person for whom the act is done must enjoy the benefit of it.[51]

Person liable to contribute.—In *Governor-General in Council* v. *Madura Municipality*[52] the Provincial Government wrongly purported to exercise their powers under

[46] *Khairat Hussain* v. *Haidri Begam* (1888) All W.N. 10.

[47] *Suchand* v. *Balaram* (1910) 38 Cal. 1.

[48] *Sibkisor Ghose* v. *Manik Chandra* (1915) 21 Cal. L.J. 618.

[49] *Suraj Bhan* v. *Hashmi Begam* (1918) 40 All. 555; See also *Nathu* v. *Balwantrao* (1903) 27 Bom 390.

[50] *Gulam Ali* v. *Inayat Ali* A.I.R. 1933 Lah. 95.

[51] *Damodara Mudaliar* v. *Secretary of State for India* (1894) 18 Mad. 88; *Ranjani Kant* v. *Rama Nath* (1914) 19 C.W.N. 458, 460; *Lakshmanan* v. *Arunachalam* ('32) A.M. 151, 135 I.C. 590; *Union of India* v. *Goswami* (1974) A. Cal. 131.

[52] (1949) 75 I.A. 213, (1949) Mad. 529, 51 Bom. L.R. 927, ('49) A.P.C. 39.

the Railways Act and required the Railway Company to widen a culvert. The Railway Company while stating that Government had no power to require such widening of the culvert agreed to do the work and charge either Government or the Municipality. After the work was completed the Railway Company filed a suit against the Municipality. Their Lordships held that although the Railway Company did not intend to do the work gratuitously, the work was not done for municipality and it did not enjoy the benefit of it except in an indirect sense and so municipality was not liable under S. 70 of the Act. The Division Bench of the High Court of Madras also took the same approach when the case was before it. Accordingly it stated:[53]

"This is a very indirect benefit, and Section 70 can in our opinion only have application where there is direct benefit to the person for whom the work is done. The persons who are enjoying the benefit of this work are the owners and occupiers of the buildings in the locality. It would be doing violence to the section to say that in these circumstances the work was done for the benefit of the municipality."

But in the Supreme Court case[54] the government was made liable under S. 70 of the Act as it had full and direct benefit. A part of the steel supplied by the government of India was utilized for manufacturing gas plants by the plantiff company and the rest of the unused steel was delivered under the government's direction viz. the Controller of Steel, Kanpur to another concern called G. Bros. which held the steel on behalf of the government of India. On a suit filed by the plaintiff company against the Union of India for steel delivered, the Union of India was defended in the Supreme Court that it was merely controlling the supply and distribution of iron and steel and that the liability to pay the price of goods dealt with by it in the exercise of its powers of control rested upon the party receiving the goods. However, the Supreme Court found that while directing the plaintiff company to deliver steel to another concern, the Controller of Steel, Kanpur, was dealing with the goods as if they belonged to the government of India and so it should be liable to pay for them when the plaintiff company was directed to deliver the goods to G. Bros. When G. Bros. held the supply of Steel made to them by the plaintiff company, they were holding the steel on behalf of the government of India who must have reaped full benefit of the delivery to G. Bros. According to the Supreme Court the defendant "had enjoyed the full benefit of the delivery of goods to G. Brothers and not merely an indirect benefit thereof."[55]

Where a contract is partly performed, the other party is not bound to pay unless it is shown that he has taken benefit of the part performance under circumstances sufficient to raise an implied promise to pay for the part performance.[56]

Quantum of Compensation.—Where a building contractor does 'extra work' over and above the work mentioned in the contract, he would be entitled to be paid at the market rate for such extra work.[57] Compensation is usually at the market price of the goods supplied.[58]

In respect of a contract for construction of drainage syphons, after acceptance of the tender, specifications were altered by the Engineer and this resulted in additional item of

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[53] A.I.R. 1945 Mad. 427, 430.

[54] *Union of India* v. *M/s. J.K. Gas Plant* (1980) 3 S.C.C. 459 = A.I.R. 1980 S.C. 1330.

[55] ibid. p. 475.

[56] *Krishna Menon* v. *Cochin Dewaswom Board* A.I.R. (1963) Ker. 181.

[57] *V. R. Subramanyam* v. *B. Thayappa* (1961) 3 S.C.R. 663: (1961) 2 S.C.J. 191.

[58] *Piloo Sidhwa* v. *Poona Municipal Corporation* (1970) A.S.C. 1201 = (1970) 3 S.C.R. 415 = 73 Bom. L.R. 301.

work, prolonging the duration of work and sharp rise in cost of material and labour.[59] The contractor claimed on the basis of increased rates of material and labour on the principle of quantum meruit.[59] It was held that so long as the contract remained and was not frustrated, it was not open to the contractor to ignore the express terms of the contract and claim payments at the rates different from those stipulated on the plea of equity.[59]

Quantum meruit can be awarded only if the contract does not provide a fixed price or a consideration for the work done.[60] In another case, where a formal lease was not executed, lessee was held to be not entitled to damages for breaches of oral lease but it was held that he was entitled to the return of security deposit.[61]

"Lawfully."—By the use of the word "lawfully" in this section the Legislature had in contemplation cases in which a person held such a relation to another as either directly to create or reasonably to justify the interference that by some act done for another person the person doing the act was entitled to look for compensation to the person for whom it was done.[62] Where a person managed the estate of his wife and his sisters-in-law and was under the impression that he would receive remuneration for his services, he was entitled to claim reasonable payment.[63] The word "lawfully" in this section is not mere surplusage. It must be considered in each individual case whether the person who made the payment had any lawful interest in making it, if not, the payment cannot be said to have been made lawfully.[64] A payment made by a person fraudulently and dishonestly with the intention of manufacturing evidence of title to land which belonged to the defendent, and to which he knew he had no claim, is not lawful within the meaning of this section.[65] So a tenant could not invoke S. 70 of the Act as his action was not lawful when he had effected rapairs amounting to renovation of building without previous permission of Rent Controller as required under S. 22 of Madras Buildings (Lease and Rent Control) Act 1960 and also disregarded objections of landlord.[66] The word "lawfully" indicates that after something is done or delivered to one person by another and the thing accepted and enjoyed, a lawful relationship arises between the two.[67] "There is no doubt that the thing delivered or done must not be delivered or done fraudulently or dishonestly nor must it be delivered or done gratuitously. Sec. 70 is not intended to entertain claims for compensation made by persons who officially interfere with the affairs of another or who impose on others services not desired by them. Sec. 70 deals with cases where a person does a thing for another not intending to act gratuitously and the other enjoys it. It is thus clear that when a thing is delivered or done by one person it must be open to the other person to reject it. . . . under Sec. 70 there is

[59] *State of Rajasthan* v. *Motiram*, (1973) A. Raj. 223.

[60] *Puran Lal Sah* v. *State of U.P.* (1917) A.S.C. 712.

[61] *State of Rajasthan* v. *Raghunath Singh* (1974) A. Raj. 4.

[62] *Chedi Lal* v. *Bhagwan Das* (1888) 11 All. 234, 243; see *Gordhanlal* v. *Darbar Shri Surajmalji* (1902) 26 Bom. 504, 518.

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

[64] *Panchkore* v. *Hari Das* (1916) 21 C.W. N. 394, 399. A reversioner expectant on the death of a Hindu widow has no such interest: *Gopeshwar Banerjee* v. *Brojo Sundari Devi* (1922) 49 Cal. 470.

[65] *Desai Himatsinji* v. *Bhavabhai* (1880) 4 Bom. 643, 653. See also *Jinnat Ali* v. *Fateh Ali* (1911) 15 C.W.N. 332, 334, 335.

[66] *Doraipandi Konar* v. *Sundara Pathar*, A.I.R. 1970 Mad. 291.

[67] *Shabhaz Khan* v. *Bhangi Khan* (1931) 135 I.C. 177, ('31) A.L. 344; *Nathibai* v. *Wailaja* (1937) Nag. 111, 169 I.C. 675, ('37) A.N. 330; *Bankey Behari* v. *Mahendra Prasad* (1940) 19 Pat. 739, 188 I.C. 772, ('40) A.P. 324 (F.B.).

no scope for claims for specific performance or for damages for breach of contract In the very nature of things claims for compensation are based on the footing that there has been no contract and that the conduct of the parties in relation to what is delivered or done creates a relationship resembling that arising out of contract.''[69]

Persons incompetent to contract.—This section does not apply to persons who are incompetent to contract. The section refers to circumstances in which the law implies a promise to pay, and where there could not have been a legally binding contract, a promise to pay cannot be implied.[67]

Contracts required to be in writing.—Where there is a mandatory provision in an Act requiring contracts to be in writing, an oral contract is void.[68] But it has been held by the Supreme Court[69] that where work has been done and accepted, sec. 70 is applicable and payment should be made for the work done. So where the Respondent, a firm of Contractors, had at the request of certain Officer of the government of Bengal (as it then existed) done certain construction work for government and the latter had taken the benefit of that work. These officers were not authorised by the government to make the request on its behalf and the Respondent was aware of such lack of authority. The Supreme Court invoked s. 70 of the Act for the Respondent against the Appellant.[69] Similarly, a contract entered into by *A* with the government of India for the supply of coal to Railway Administration was void and un-enforceable as it contravened S. 175 (3) of government of India Act, 1935. But if under the said void contract, *A* had performed his part and government had received the benefit of the performance of the contract by *A*, government was bound to make compensation to *A* in the form of the value of the said Coal under S. 70 of the Contract Act.[70] The said principle of invalidity of contract has not been extended to pro-notes which are not admissible under section 35 of the Stamp Act and especially where the loan was simultaneous or where it was not given by way of collateral security. The provisions of this section would not apply to such a case even on the basis of subsisting original contract.[71]

Responsibility of finder of goods.

71. A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.

Liability of finder.—As to who is a bailee and what are his responsibilities see Ch. IX below.

One *H* picked up a diamond on the floor of *K*'s shop and handed it over to *K* to keep it till the owner appeared. *H* is therefore the finder of goods.[72] Such a finder of goods is liable (i) to try and find out the true owner, and (ii) to take due care of the goods. Such a finder is entitled to the possession of such goods against all the world except the true owner.[72] Such a finder is entitled to a lien, retain the goods even against the true owner until he is paid by the owner compensation for the custody, care and preservation, although he is not entitled to sue for such compensation. Where, however, the owner has offered a reward to the finder, the finder could sue for the reward on the basis of a con-

68 *Chatturbhuj Vithaldas* v. *Moreshwar* ('54) A.S.C.235.

69 *State of West Bengal* v. *B. K. Mondal & Sons* ('62) A.S.C. 779, (1962) 2 S.C. A. 375.

70 *New Marine Coal Company Ltd.* v. *Union of India* A.I.R. 1964 S.C. 152

71 *Perumal Chettiar* v. *Kamakshiammal* (1938) A. Mad. 785 (F.B.); *L. Sambasiva Rao* v. *T. Balakotiah*, (1973) A.A.P. 342 (F.B.).

72 *Hollins* v. *Fowler*, L.R. 7 H.L. 757.

tract (offer and acceptance).[73] In English Law, once a finder accepts responsibility for the goods his liability is that of a gratuitous bailee. In *Newman* v. *Bourne & Hollingsworth*, *P*, a customer in *D*'s shop, put down a broach with the coat and forgot to pick it up. *D*'s assistant found it and it was placed in a drawer over the week-end. On Monday it was missing. *D* was held liable to *P* as *D* had failed to exercise ordinary care which a prudent man would have taken.[74]

Agency.—Respondent booked the goods at Quetta Railway Station for New Delhi just after partition of the country. The wagon containing the goods of the respondent seemed to arrive safe upto New Delhi, Via Amritsar. The wagon was unloaded on 20-2-1948 and on 7-6-1948 he was told to take delivery of the goods. When he went to collect the goods, the goods were not traceable. The owner sued the East-Punjab Railway which was handling the wagon from Indo-Pakistan Border into India. It was held that in the absence of any contract between the two governments or the railways, the respondent delivered the goods to the Receiving Railway (N.W.Rly.) with authority to create the Forwarding Railway (East Punjab Rly.) as his immediate bailee from the point the wagon was put on its rails.[75] The forwarding railway can be equated with the finder of goods within the meaning of S. 71 of the Indian Contract Act.[76] So the E.P. Rly. was liable for the loss as a bailee. Plaintiff's timber was lying on the land which was subsequently leased out to the defendant. The defendant gave notice to the owner of timber to remove it but it was not removed. The defendant then cleared the site and timber was "damaged' or "removed". The Plaintiff's claim under Section 71 of the Contract Act was dismissed as the defendant had not taken the goods into his custody.[77]

Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.

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

Illustrations

(a) *A* and *B* jointly owe 100 rupees to *C*. *A* alone pays the amount to *C*, and *B*, not knowing this fact, pays 100 rupees over again to *C*. *C* is bound to repay the amount to *B*.

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

Payment under mistake of fact or mistake of law.—The rule of the Common Law is that "money paid under mistake or ignorance of fact may be recovered back when the supposed state of fact is such as to create a liability to pay the money, which is reality is not due" but "a payment made under the influence of a mistake which does not create a supposed legal obligation, and which therefore as regards the motive of the party is voluntary, cannot be recovered back."[78]

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[73] *Har Bhajan* v. *Har Charan*, (1925) All. L.J. 655.

[74] (1915) 31 T.L.R. 209

[75] *Union of India* v. *Amar Singh* A.I.R. 1960 S.C. 233, 237, Para 11.

[76] *ibid* p. 238, para 15.

[77] *Union of India* v. *Mohammad Khan A.I.R.* 1959 or 103.

[78] Leake on Contracts, 8th Edn., pp. 68-69.

Bramwell B, in *Aiken* v. *Short*[79] stated :

> "In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money."

This dictum of Bramwell B. has sometimes been approved and sometimes criticised, but it seems probable that it no longer represents the law.[80] In *Morgan* v. *Ashcroft*[81] a bookmaker, through the error of his clerk, overpaid a client who was placing bets with him. The bookmaker sought to recover the excess payment as money paid under a mistake of fact. He failed because even if the supposed fact had been true, plaintiff-bookmaker would have been under no legal liability to pay as the excess payment was based on Gaming and Wagering contracts which are null and void by S. 18 of the Gaming Act, 1845. On these facts, the payment was a voluntary payment according to the Court of Appeal and so Plaintiff could not recover the excess payment. Though the dictum of Bramwell B. applied to the facts of the above case, both Lord Greene M.R. and Scot L.J. did not consider that dictum as laying down an exhaustive statement of law. According to Greene M.R. any mistake of fact which was sufficiently fundamental might allow a plaintiff to recover the money paid. He gave an instance. If *A* makes a voluntary payment (i.e. payment without any legal obligation to make the payment) of money to *B* under the mistaken belief that *B* is *C*, it may be that *A* can recover it.[82] This doubt expressed by the Court of Appeal in *Morgan* v. *Ashcroft* seems to have been confirmed partially by another decision of the Court of Appeal in *Larner* v. *London County Council*[83] where the existence of a belief on the part of the payer that he was morally bound to pay was sufficient to allow the recovery as the payment was not considered as a voluntary payment. In that case the defendants, the London County Council, resolved to pay all their employees who went on war service the difference between their war service pay and their former civilian pay. The plaintiff, an employee of the defendants went on war service and got this difference. The plaintiff as per resolution undertook to notify all changes in his war service pay but this he did not notify and so the defendants over-paid him. The whole of the over-payments had not been recouped at the time of plaintiff's demobilisation. When he returned to the service of the Council, the Council began to deduct weekly amounts from his wages on account of the balance outstanding. The plaintiff brought an action claiming repayment of the amount deducted from his wages and the Council counter-claimed for the balance and the sum over-paid then outstanding. Regarding counter-claim of the council to recover the amount overpaid to plaintiff, it was admitted by him that payments were made to him under a mistake of fact but he argued that they were voluntary payments which were not made in discharge of legal liability and so it fell within the words of Bramwell B., money which it was "merely desirable" that he should pay. The court held that the defendants were entitled to reclaim them as they were 'in honour bound' to keep their promise and payments should not be regarded as wholly gratuitous but made "as a matter of duty". But money paid under a mistake of law is

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[79] (1856) 1 H. & N. 210, 215.

[80] Cheshire and Fifoot's Law of Contract (9th ed. 1976) p. 646.

[81] (1937) 3 All. E.R. 92 = (1938) 1 K.B. 49.

[82] Ibid p. 99 = p. 66.

[83] (1949) 1 All. E.R. 964 = (1949) 2 K.B. 683; See also *Lady Hood of Avalon* v. *Mackinnon* (1909) 1 Ch. 476.

not recoverable.[84] So money paid under a mistake as to the effect of the Rent Act[85] or of the Income Tax Act[86] is irrecoverable.

According to the Gujarat High Court in *Dhrangadhra Municipality* v. *Dhrangadhra Chemical Works Ltd*,[87] it is further essential for a plaintiff seeking refund of illegal tax under S. 72 of the Contract Act to plead and prove that he would suffer legal injury or prejudice if restitution is not granted. A plaintiff who has paid alleged illegal tax but has himself not suffered the incidence of tax and has passed it on the consumers who have borne the burden of tax cannot legitimately contend that refusal of his request for restitution would prejudice him. In such a case the real plaintiffs should be those who have actually suffered the burden of the tax. They would be innumerable unidentifiable consumers bearing the burden of the tax and not intermediaries like traders and manufacturers who have merely passed on the burden of tax entirely to the consumers. If such pleading is not put forward, the requirements of S. 72 would remain uncomplied with and a plaint not disclosing the cause of action is liable to be rejected under O.7 R. 11 of the C.P. Code, 1908.[88] This section does not make any distinction between money paid under mistake of fact and money paid under mistake of law. In *Shiba Prasad* v. *Srish Chandra*[89] their Lordships drew a distinction between the provisions of sec. 21 and this section and said: "If a mistake of law has led to the formation of a contract, s. 21 enacts that the contract is not for that reason voidable. If money is paid under the contract, it cannot be said that, that money was paid under mistake of law; it was paid because it was due under a valid contract, and if it had not been paid payment could have been enforced. Payment 'by mistake' in s. 72 must refer to a payment which was not legally due and which could not have been enforced: the 'mistake' is in thinking that the money paid was due when in fact it was not due. There is nothing inconsistent in enacting on the one hand that if parties enter into a contract under mistake in law that contract must stand and is enforceable, but on the other hand that if one party acting under mistake of law pays to another party money which is not due by contract or otherwise, that money must be repaid. Moreover, if the argument based on inconsistency with s. 21 were valid, a similar argument based on inconsistency with s. 22 would be valid and would lead to the conclusion that s. 72 does not even apply to mistake of fact. The argument submitted to their Lordships was that s. 72 only applies if there is no subsisting contract between the person making the payment and the payee and that the Indian Contract Act does not deal with the case where there is a subsisting contract but the payment was not due under it. But there appears to their Lordships to be no good reason for so limiting the scope of the Act. Once it is established that the payment in question was not due, it appears to their Lordships to be irrelevant to consider whether or not there was a contract between the parties under which some other sum was due. . . . It may be well to add that their Lordships' judgment does not imply that every sum paid under mistake is recoverable no matter what the circumstances may be. There may in a particular case be circumstances which disentitle a plaintiff by estoppel or otherwise." In that case a lessee and his agents made over-payments in respect of rent and it was not clear why they made the over-payments. They may have acted on inadequate information. They may have taken a wrong view or

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[84] *Bilbie* v. *Lumbley* (1802) 2 East 469.

[85] *Sharp Bros.* v. *Chant* (1917) 1 K.B. 771.

[86] *National Pari-Mutuel Association Ltd.* v. *The King* 1930 47 T.L.R. 110. But now recovery is allowed in England by Income-Tax Act, 1952, S. 66 229 (5).

[87] (1988) 1 G.L.R. 388.

[88] *ibid* p. 400-402, Para 14, 15.

[89] (1949) 76 I.A. 244, 52 Bom. L.R. 17, (49) A.P.C. 287.

their legal rights or they may have continued paying at the old rates without giving any thought to the matter. But it was clear that there was no intention to make a present to the lessor of money which was not due. The money was paid under the belief that it was legally due. As this belief was mistaken, that was considered by their Lordships sufficient to bring the case within the provisions of the section. The Supreme Court held that sale tax amounts paid under a mistake of law were recoverable under this section.[90] On the other hand, every sum paid under mistake is not necessarily recoverable under all circumstances. There may be circumstances which disentitle a plaintiff from recovering on the ground of estoppel or because no more blame attaches to the defendant than to the plaintiff and the defendant no longer retains the money.[91]

Where moneys are paid voluntarily with full knowledge of all the facts relating to the voidness of the contract, there does not arise a mistake of law or fact and such moneys cannot be recovered back.[92] This would also apply to moneys paid under a compromise of doubtful or disputed rights or claims.[93] Ignorance of law and a deliberate disregard of law would not amount to a mistake of law.[94]

Where moneys are paid pursuant to orders of the Court, they would not fall under this clause.[95] But if they are paid in execution of the Court's decree or order, the payment might be one under coercion.

Coercion.—The Judicial Committee had laid down that the word 'coercion' in this section is used in its general and ordinary sense and its meaning is not controlled by the definition of "coercion" in sec. 15. Accordingly, where *A* who had obtained a decree against *B*, obtained an attachment against *C*'s property, and took possession of it to obtain satisfaction for the amount of the decree, and *C* on being ousted from his property paid the sum claimed under protest, *C* was held entitled to recover the sum as money paid under "coercion" within the meaning of this section.[96] In this case C sued for a declaration that the attachment was invalid and for a refund of the money paid. But if a defendant has had an opportunity of defending, of which he has not availed himself, he is not allowed to re-open the question in an action to get the money back. This is the foundation of the rule that money paid under pressure of legal process cannot be recovered.[97]

Money paid under O. 21, r. 89 of the Code of Civil Procedure, to set aside a sale is paid voluntarily and cannot be recovered as paid under coercion.[98]

Where a person who is charged with a non-compoundable offence is induced to pay money to the complainant to stifle the prosecution, he may recover the money so paid

90 *Sales Tax Officer Banaras* v. *Kanhaiyalal*, (1959) S.C.R. 1350: A.I.R. (1959) S.C. 135; *State of M. P.* v. *Bhailal Bhai*, A.I.R. (1964) S.C. 1006, (1010).

91 *Nagorao* v. *Governor-General in Council* A.I.R. 1951 Nag. 372.

92 *Anath Bandhu* v. *Dominion of India*, A.I.R. (1955) Cal. 626.

93 *Stapilton* v. *Stapilton*, 26 E.R. 1 : 1 Atk. 3; *Rameshar* v. *Babulal*, A.I.R. (1946) Pat. 97.

94 *Anath Bandhu* v. *Dominion of India*, A.I.R. (1955) Cal. 626 (629).

95 *Official Assignee* v. *Dayabhoy* (1937) A. Rang. 234; *S. of S.* v. *Tatya Saheb* 34 Bom. L.R. 791.

96 *Seth Kanhaya Lal* v. *National Bank of India* (1913) 40 I.A. 56; 40 Cal. 598; followed in *Ah Choon* v. *T. S. Firm* (1927) 5 Rang. 653, 106 I.C. 468, ('28) A.R. 55; *Satyam* v. *Perraju* ('31) A.M. 753, 135 I.C. 24.

97 *Marriot* v. *Hampton* (1797) 2 Smith L.C. 421; *Secretary of State* v. *Tatyasaheb* (1932) 56 Bom. 501, 34 Bom. L.R. 791, 140 I.C. 171, ('32) A.B. 386; *Bihar State* v. *Jhawarmal* ('58) A. Pat. 310.

98 *Shankarrao* v. *Vadilal* (1933) 57, Bom. 601, 35 Bom. L.R. 462, 148 I.C.74, ('33) A.B. 239.

under this section,[99] but not if no pressure or compulsion was exercised upon the accused.[1] As the right under this section is a statutory right it is not subject to equitable considerations.[2]

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[99] *Muthuveerappa* v. *Ramaswami* (1917) 40 Mad. 285.

[1] *Amjadennessa Bibi* v. *Rahim Buksh* (1915) 42 Cal. 286.

[2] *Kanhaya Lal* v. *National Bank of India, Ltd.* (1923) 50 I.A. 162, 4 Lah. 284.

Chapter VI

OF THE CONSEQUENCES OF BREACH OF CONTRACT

Compensation for loss or damage caused by breach of contract.

73. When a contract has been broken,[1] the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.

When an obligation resembling those created by contract has been incurred and has not been discharged, and person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.[2]

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying this inconvenience caused by the non-performance of the contract must be taken into account.

Breach of Contract and Remedies.—The illustration to the section illustrate various kinds of breaches. There are three kinds of remedies upon a breach of contract viz. (1) specific performance, (2) injunction, and (3) damages. This section deals with the last remedy. This section lays down the principle of ascertaining damages. The next section deals with what is known as liquidated damages i.e., the amount agreed upon between the parties to be paid in the event of a breach. The damages contemplated in the section are of pecuniary nature or of a loss of property. The remote or indirect damages such as for disappointment, vexation of mind, injured feelings[3] are excluded by this section.

Damages: two standards:—

This section provides for loss or damage

(1) which naturally arose in the usual course of things from the breach; or

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[1] This section is declaratory of the Common Law as to damages. *Jamal* v. *Moola Dawood Sons & Co.* (1916) 43 I.A. 6, 11; 43 Cal. 493, 503.

[2] See *Anrudh Kumar* v. *Lachhmi Chand* (1928) 50 All. 818, ('28) A.A. 500.

[3] *Hamlin* v. *Great Northern Railway*, 1 H. & N. 408 : 156 E.R. 1261; *Addis* v. *Gramophone Co. Ltd.* (1909) A.C. 488; *Kemp* v. *Sobers* (1851) 1 Sim. (N.S.) 517 (520); *Withers* v. *General Theatre Corporation Ltd.* (1933) 2 K.B. 536.

(2) which the parties knew when they made the contract, to be likely to result from the breach.

The first rule provides for usual losses and the second rule provides for additional loss as well. The words 'likely to result' have been deliberately used. It is not necessary to be proved upon a given state of knowledge, that the defendant, as a reasonable man, could foresee that a breach must 'necessarily' result in the loss. It is enough if the defendant could foresee that it was "likely so to result". In the second rule a criterion is "not what was bound necessarily to result" but "what was likely or liable to result". This foreseen knowledge must be "at the time when the parties made the contract".

Remedy provided by this section not the only remedy for breach of contract.—Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may, at his option, either sue for the price of the goods or for damages for non-acceptance. The present section prescribes the method of assessing the damages, and it does not take away the right of a seller to maintain an action for the price where the property in the goods has passed to the buyer.[4]

Rule in Hadley v. Baxendale.—The illustrations to this section were obviously considered of special importance. We have thought that several of the English and recent Indian decisions would be most usefully dealt with by stating them in the form of additional illustrations and inserting them, distinguished by inclusion within square brackets and by the reference to the report of each case, in the places which seemed most appropriate.

The intention of the farmers of the Act was plainly to affirm the rule of the Common Law as laid down by the Court of Exchequer in the leading case of *Hadley* v. *Baxendale*, decided eighteen years before the passing of this Act. That rule, expressly and carefully framed to be the guide to judges in directing juries, was as follows:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to damages in that case; and of this advantage it would be very unjust to deprive them."[5]

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[4] *P. R. & Co.* v. *Bhagwandas* (1909) 34 Bom. 192; *Finlay Muir and Co.* v. *Radhakissen* (1909) 36 Cal. 736.

[5] *Hadley* v. *Baxendale* (1854) 9 Ex. 341, 354.

So far as practicable, "a person with whom a contract has been broken has a right to fulfil that contract for himself as nearly as may be, but he must not do this unreasonably or oppressively as regards the other party, or extravagantly." It is even his duty to take all reasonable steps to mitigate the loss consequent on the breach; and then the effect in actual diminution of the loss he had suffered may be taken into account, and this apart from the question whether it was his duty to act.[6] "The question must always be whether what was done was a reasonable thing to do, having regard to all the circumstances," and one test is "what a prudent person uninsured," i.e. not having a claim for compensation or indemnity or anyone, "would do under the same circumstances."[7] It is not a reasonable thing, for example, to hire a special train to save an hour or so of time when there is no particular reason for being at one's destination at a certain hour; and expense so incurred cannot be recovered as damages.[7] In English law, if a buyer disappointed of his goods can buy in the market as a sum equal to or less than the contracted price, he has suffered no loss and can recover only nominal damages.[8]

Illustrations

(a) *A* contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price, to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

[**Note.—Market rate.**—Under a contract for the sale of goods the measure of damages upon a breach by the buyer is the difference between the contract price and the market price *at the date of the breach*. If the seller retains the goods after the breach, he cannot recover from the buyer any further loss if the market falls, nor is he liable to have the damages reduced if the market rises.[9]]

Generally it is quite settled that on a contract to supply goods[10] of a particular sort, which at the time of the breach can be obtained in the market, the measure of damages is the difference between the contract price and the market price at the time of the breach. But the subject-matter of the contract may not be marketable. In that case the value must be taken as fixed by the price which actually has to be paid for the best and nearest available substitute: *Hinde* v. *Liddell* (1875) L.R. 10 Q.B. 265, 269.

Again, if the buyer, after giving the seller time at his request, finally has to go into the market and buy at an advanced price, he may recover the whole difference between the contract price and the price he actually paid: *Ogle* v. *Earl Vane* Ex. Ch. (1868) L.R. 3 Q.B. 272. Accordingly, the decisive date for fixing the damages is the last date to which the contract was extended: *Kidar Nath-Behari Lal* v. *Shimbhu Nath-Nandu Mal* (1926) 8 Lah. 198, 99 I.C. 812, ('27) A.L. 176.

The fact that the buyer sustains no actual loss from the seller's failure to deliver the goods is no ground for awarding merely nominal damages to the buyer. The buyer is entitled, as indicated by illustration (a) to the section, to receive from the seller by way of com-

[6] *British Westinghouse, Etc., Co.* v. *Underground Electric Etc., Co.* ('912) A.C. 673, see per Lord Haldane at p. 689.

[7] *Le Blanche* v. *L. & N. W. R. Co.* (1876) 1 C.P. Div. 286, 309, 313; approved by the Judicial Committee in *Erie County Natural Gas, Etc., Co.* v. *Carroll* (1911) A.C. 105.

[8] *Erie County, Etc. Co.'s Case*, last note.

[9] *Jamal* v. *Moola Dawood Sons & Co.* (1916) 43 I.A. 6; 43 Cal. 493.

[10] Including shares in a company, see *Williams Bros.* v. *Ed. T. Agius* (1914) A.C. 510.

pensation the sum by which the contract price falls short of the price for which the buyer might have obtained goods of like quality at the time when they ought to have delivered.[11] But the Delhi High Court in *Union of India* v. *Tribhuvan Patel*[12] declared its disagreement with this view. According to a single Judge of the Delhi High Court, under S. 73 the plaintiff must prove the actual loss suffered by him. The court found justification for its view as the law disallows even remote or indirect loss and so it is obvious that plaintiff cannot be allowed recover damages if he has actually suffered no loss. Section 73 would become nugatory if there be different interpretation. Illustration (a) to S. 73 has to be construed in the light of this statutory provision so as to harmonise it with the principles laid down in S. 73 and not to enlarge the scope of the Section. While laying down the above interpretation the Delhi High Court found itself to be in the line with the basic principles of damages for the breach of contract, that it should not be penal but compensatory.

Market rate : limits of rule.—The market rate, however, is only a presumptive test: "it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed," and the rule as to market price "is intended to secure only an indemnity" to the purchaser. "The market value is taken because it is presumed to be the true value of the goods to the purchaser." If he does not get his goods he "should receive by way of damages enough to enable him to buy similar goods in the open market. Similarly, when delivery of goods purchased is delayed, the goods are presumed to have been at the time they should have been delivered worth to the purchaser what he could then sell them for, or buy other like them for, in the open market, and when they are in fact delivered they are similarly presumed to be, for the same reason, worth to the purchaser what he could then sell for in that market." There is an important exception "if in fact the purchaser, when he obtains possession of the goods, sells them at a price greatly in advance of the then market value." In such a case he must allow for the profit he actually makes and can recover only his actual loss; otherwise he would be placed in a better position than if the contract had been performed. So the law is explained by the Judicial Committee in *Wertheim* v. *Chicoutimi Pulp Co.* (1911) A.C. 301, 307, 308.

If no ready market.—The defendant contracted to deliver to the plaintiff 1,000 tons of coal by instalments from February to June. The coal was not delivered and there was in those months no ready market for coal of the contract quality. In the absence of other material, the Court, in order to ascertain the measure of damages, admitted evidence of rates fixed in sub-contracts made by the plaintiff for the sale of the coal: *Jagmohandas* v. *Nusserwanji* (1902) 26 Bom. 744.

(3) *A* hires *B*'s ship to go to Bombay, and there take on board on the first of January, a cargo which *A* is to provide, and to bring it to Calcutta, the freight to be paid when earned. *B*'s ship does not go to Bombay, but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect of such trouble and expense.

[11] *Hajee Ismail & Sons* v. *Wilson & Co.* (1918) 41 Mad. 709; *Errol Mackey* v. *Kameshwar* (1932) 59 I.A. 398, 11 Pat. 600, 34 Bom. L.R. 1596, 138 I.C. 658, ('32) A.P.C. 196; *Vishwanath* v. *Amarlal* A.I.R. 1957 M.B. 190.

[12] A.I.R. 1971 Delhi 120.

[**Note.—Actual loss.**—*A* contracts with *B* to sell and deliver goods which on the day appointed for delivery are worth Rs. 80 per ton. They are delivered later on a day when they are worth only Rs. 50 per ton, but meanwhile *A* has sold them for Rs. 70 per ton. *A* is entitled to damages only for his actual loss of Rs. 10 per ton: *Wertheim* v. *Chicoutimi Pulp Co.* (1911) A.C. 301 (see above).]

(c) *A* contracts to buy of *B*, at a stated price, 50 maunds of rice, on time being fixed for delivery. *A* afterwards informs *B* that he will not accept the rice if tendered to him. *B* is entitled to receive from *A*, by way of compensation, the amount, if any, by which the contract price exceeds that which *B* can obtain for the rice at the time when *A* informs *B* that he will not accept it.

[**Note.—Where no time fixed for delivery.**—If in the case put above *A* gives notice to *B* that he will not take delivery after a certain date, and *B* does not deliver by that date, the measure of damages would be the difference between the contract price and the market price on that date: *Gauri Datt* v. *Nanik Ram* (1916) 14 All.L.J. 597.]

(d) *A* contracts to buy *B's* ship for 60,000 rupees, but breaks his promise. *A* must pay to *B*, by way of compensation, the excess, if any, of the contract price over the price which *B* can obtain for the ship at the time of the breach of promise.

(e) *A*, the owner of a boat, contracts with *B* to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to *B* by *A* is the difference between the price which *B* could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

[**Note.—Late delivery, carriage by sea or land.**—There is no general rule that the measure of damages in the case of late delivery when the carriage is by sea is governed by different principles to those that apply when the carriage is by land: "wherever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of a sea as of land transit, there can be no reason why damages for late delivery should not be calculated according to the same principles in both cases": *Dunn* v. *Bucknall Bros.* (1902) 2 K.B. 614, 623 C.A.]

(f) *A* contracts to repair *B's* house in a certain manner, and receives payment in advance. *A* repairs the house, but not according to contract. *B* is entitled to recover from *A* the cost of making the repairs conform to the contract.

The above illustration refers to a case where work done does not conform to the contract.

(g) *A* contracts to let his ship to *B* for a year, from the first of January, for a certain price. Freights rise, and, on the first of January, the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B*, by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year on and from the first January.

(h) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A*, by way of compensation, the difference between

the contract price of the iron and the sum for which *A* could have obtained and delivered it.

[**Note.—Delivery by instalments—Anticipatory breach.**—If the iron was to be delivered by instalments at certain dates, e.g. at the end of the three months of September, October and November, the measure of damages is he sum of the differences between the contract and the market price of the several instalments of the respective final days for performance: *Brown* v. *Muller* (1872) L.R. Ex. 319; and the same rule is applied where the seller, before the expiration of the whole time for performance, has refused to complete the contract, and the buyer has treated the refusal as an immediate breach unless the seller can show that the buyer could have obtained a new contract on better terms: *Roper* v. *Johnson* (1873) L.R. 8 C.P. 167; *Krishna Jute Mills Co.* v. *Innes* (1911) 21 Mad. L.J. 182.] If a vendor has a specified time allowed to him to deliver goods (the option was to deliver in August or September), and before the expiry of that time he gives notice to the purchaser that he will be unable to perform the contract, and the purchaser does not rescind the contract (as he may do under S.39), the measure of damages is the difference between the contract price and the market price on the last day of the period limited (i.e, here last day of September). *Mackertich* v. *Nobo Coomar Roy* (1903) 30 Cal. 477.

(i) *A* delivers to *B*, a common carrier, a machine, to be conveyed, without delay to *A's* mill informing *B* that his mill is stopped for want of the machine. *B* unreasonably delays the delivery of the machine, and *A*, in consequence, loses a profitable contract with the Government. *A* is entitled to receive from *B*, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

[**Note.—Notice of special circumstances.**—The facts in *Hadley* v. *Baxendale*, 9 Ex. 341, were somewhat similar to those in illustration (i), except that the defendants did not know that the plaintiff's mill was stopped for want of part of the machinery which they were to supply. They were held not liable for loss of profit. It may be collected from the judgement that with such knowledge they would have been liable. As to the general rule there laid down see the commentary below. The loss of profits on a contract of which the defendant had no notice is clearly too remote. But where the defendant failed to supply an essential part of a machine which the plaintiff, to the knowledge of the defendant, was under contract to supply to a third person, and the plaintiff, by the defendant's default, lost the benefit of that contract, the defendant was held liable both for the loss of profit and for the plaintiff's charges in making other parts of the machine: *Hydraulic Engineering Co.* v. *McHaffie* (1878) 4 Q.B. Div. 670.]

B delivers to *A* several cases of machinery to be carried by sea from Bombay to Karachi for the purpose of building a mill. On arrival at Karachi one of the cases, containing indispensable parts of the machinery, was not found. *A* knew that the cases contained machinery, but did not know the specific contents of each case, *A* is liable to pay *B* by way of compensation the value of the lost case, freight and interest, but not the profits lost by the mill not having been set up at the time intended. See *British Columbia Saw Mill Co. Ltd.* v. *Nettleship* (1868) L.R. 3 C.P. 499.

Defendant (Respondent) entered into Contract with Plaintiff (Appellant) in July 1952 for sale of certain quantity of scrap iron for which controlled price was fixed. The defendant did not know, nor was he told, that the scrap iron was required by plaintiff for sale to Export Corporation for export. The Plaintiff also had no knowledge that he would subsequently contract with Export Corporation to sell the scrap iron purchased from the

defendant. Subsequently on 30-1-1953 Plaintiff contracted with the Export Corporation to sell them scrap iron. The defendant failed to supply the scrap iron, plaintiff sued him for damages for the breach. It was held that the loss which could have naturally arisen in the usual course of things from the breach of the contract by the defendant would be nil upon non-delivery of scrap iron as the plaintiff could have purchased the scrap iron from market at the same controlled price. Further, as the defendant was not informed by the plaintiff when they had entered into contract in July 1952 that the plaintiff was purchasing the scrap iron for export, the defendant was not liable for the consequent loss suffered by the plaintiff. *Karsandas* v. *Saran Engineering Company Ltd.* A.I.R. 1965 S.C. 1981.

A sent by railway a set of books to himself as consignee. On arrival it was found that three volumes were missing, making the whole set useless. *A* sued the railway authority for the price of the whole set. It was held that as the railway had no notice of the fact that loss of three volumes would make the whole set useless, invoice mentioning only a bundle of books, they were liable only for the price of the lost three volumes. *Dominion of India* v. *All India Reporter Ltd.* A.I.R. 1952 Nag. 32 = (1952) Nag. 125.

In *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* (1949) 2 K.B. 528 the defendants, an engineering firm, contracted to sell and deliver to the plaintiffs on a certain day a large boiler for their works. This, however, was damaged in the course of removal and was delivered five months after the agreed date. The defendants were aware of the nature of the plaintiff's business and they were informed that the boiler was required for use as soon as possible.

In consequence of this delay the plaintiffs lost the profits which they would have earned and, in particular, highly lucrative dyeing contracts which they could have obtained with the Government. The plaintiffs sued the defendants to recover these losses. It was held that the defendants knew at the time of the contract that the plaintiffs were laundrymen and dyers and required the boiler for immediate use in their business. From their own technical experience and the business relations existing between them, they must be presumed to have anticipated that some loss of profits would occur by this delay. But without special knowledge on their part, the defendants could not reasonably foresee the additional loss suffered by the plaintiffs because of their inability to accept the highly lucrative dyeing contract with the Government. Treitel in his Law of Contract (2nd ed. 1966-p. 663, 664) neatly distinguishes this case from *Hadley* v. *Baxendale*. Judging the defendants in both the cases from the facts known to them by the criterion of the reasonable man, the loss of profits was recovered in the Victoria Laundry case because the defendants knew that the boiler was required for immediate use, while in *Hadley* v. *Baxendale* defendants did not know that the delay in the delivery of the shaft would keep the mills idle. Secondly, in *Hadley* v. *Baxendale* the defendants were the Carriers less able to foresee the effects of delay than the defendants in the Victoria Laundry Case who were qualified engineers and knew more than the uninstructed layman of the purposes to which such boilers were put.

In *Jaques* v. *Millar* (1877) 6 Ch. D. 153 it was held that where an intending lessor knew that the lessee wanted the premises for a certain trade, and refused to deliver possession for several weeks after the lessee was entitled to it, the lessee could recover for the estimated value to him of the possession during that time.

(j) *A*, having contracted with *B*, to supply *B*, with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the purchase of 1,000 tons of iron at 80 rupees a ton, telling *C* that he does so for the purpose of performing his contract

with *B*. *C* fails to perform his contract with *A*, who cannot procure other iron, and *B*, in consequence rescinds the contract. *C* must pay to *A* 20,000 rupees, being the profit which *A* would have made by the performance of his contract with *B*. If the sub-sale was in contemplation, but the market price at the time fixed for delivery was only Rs. 90 a ton, it would depend upon the facts whether *A* was entitled to damages at the rate of Rs. 20 a ton; for example if he could honour his contract with *B* only by delivering the specific iron to be supplied by *C*, or at the rate of Rs. 10 a ton, for example, if he could honour his contract with *B* by purchasing similar goods in the market. *Kwei Tek Chao* v. *British Traders* (1954) 1 All E.R. 779, 797. per Devlin J.

Notice of contract of resale.—If *C* only knew generally that *A* wanted the iron for resale he would not be entitled to damages beyond the difference between the contract price and the market price at the date of the breach: *Thol* v. *Henderson* (1881) 8 Q.B.D. 457. If there is no market price the measure of damages is the difference between the resale price and the contract price: *Zippel* v. *Kapur & Co.* ('32) A.S. 9, 139 I.C. 114.

(k) *A* contracts with *B* to make and deliver to *B*, by a fixed day, for a specified price, a certain piece of machinery. *A* does not deliver the piece of machinery at the time specified, and, in consequence of this, *B* is obliged to procure another at a higher price than that which he was to have paid to *A*, and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had not been then communicated to *A*), and is compelled to make compensation for breach of that contract. *A* must pay to *B*, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by *B* for another, but not the sum paid by *B* to the third person by way of compensation.

(l) *A*, a builder, contracts to erect and finish a house by the first of January' in order that *B* may give possession of it at that time to *C*, to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C*. *A* builds the house so badly that, before the first of January it falls down and has to be rebuilt by *B*, who, in consequence, loses the rent which he was to have received from *C*, and is obliged to make compensation to *C*, and is obliged to make compensation to *C* for the breach of his contract. *A* must make compensation to *B* for the cost of rebuilding the house, for the rent lost, and for the compensation made to *C*.

Chain of contracts.—The following additional illustration is taken substantially from the headnote to *Kasler & Cohen* v. *Slavonski* (1928) 1 K.B. 78:—

B, a wholesale furrier, brought some dyed rabbit skins from *A* for the purpose, as *A* knew, of making them into fur collars. *B*, having made the fur collars, resold to *C*, *C* resold to *D*, and *D* to *E*, a draper.

E then sold a coat, with one of these fur collars attached, to *F*, a customer, for her own wear. *F* developed "fur dermatitis," owing to antimony in the fur. *F* sued *E* for damages for breach of warranty on the sale of the coat. *E* gave notice of the action to *D*, *D* to *C*, to *B*, and *B* to *A*. *F* recovered judgement for damages and costs. *E* claimed this sum, together with his own costs, from *D*, who paid the amount and recovered it from *C*, together with a further sum for his costs. *C* claimed from *B*, and *B* paid him and sued *A* for £699 damages for breach of the original warranty on sale of the skins.

The Court, having found as a fact the *E* has acted reasonably in defending the original action by *F*, held that *B* was entitled to recover from *A* (1) the damages recovered in the original action by *F* (2) the costs of both sides in the action; and (3) a sum in respect of costs incurred by themselves and *C* and *D* respectively in connection with the

claims against them.

(m) *A* sells certain merchandise to *B*, warranting it to be of a particular quality, and *B*, in reliance upon this warranty, sells it to *C* with a similar warranty. The goods prove to be not according to the warranty, and *B* becomes liable to pay *C* a sum of money by way of compensation. *B* is entitled to be reimbursed this sum by *A*.

[Note.—**Warranty.**—*A* sells a cow to *B*, whom he knows to be a farmer and likely to put the cow in a herd, with a warranty that she is free from foot and mouth disease. The cow in fact has the disease and communicates it to other cows with which she is placed, and several of them die. *B* can recover from *A* the whole loss, and not only the value of the cow sold, and it is immaterial whether *A* gave the warranty in good faith or not: *Smith* v. *Green* (1875) 1 C.P.D. 92.]

(n) *A* contract to pay a sum of money to *B* on a day specified. A does not pay the money on that day. *B* in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. *A* is not liable to make good to *B* anything except the principal sum he contracted to pay, together with interest up to the day of payment.

[Note.—**Delay in payment of money.**—"The law does not regard collateral or consequential damages arising from delay in the receipt of money": Per Cur., *Graham* v. *Campbell* (1878) 7 Ch. Div. at p. 494.] *A* gives an *Ijara Patta* of certain property to *B*. It is a condition of the Patta that *B* should pay to the superior landlord the rent. The superior landlord thereupon sues *A* for the rent, and, in execution of the decree obtained by him in the suit, the tenure is sold. *B* is not liable to *A* for the loss of the property, for *A* could have paid the rent on default by *B*, and saved the property from sale. *Girish Chandra* v. *Kunja Behari* (1908) 35 Cal. 683.

(o) *A* contracts to deliver 50 maunds of saltpetre to *B* on the first of January, at a certain price. *B* afterwards, before the first of January, contracts to sell the saltpetre to *C* at a price higher than the market price of the first of January. *A* breaks his promise. In estimating the compensation payable by *A* to *B*, the market price of the first of January, and not the profit which would have arisen to *B* from the sale to *C*, is to be taken into account.

[Note.—**Failure to deliver on agreed day.**—The illustration assumes that there was a market price on the first of January. If there was no market price on that day the difference between the resale price and the contract price would be the measure of damages. See notes under illustration (j) and also the note "Market price" and the case of 26 Bom. 744 there cited. In an English case[13] on a wilful default by a vendor of real estate to give possession a contract to resell was accepted as evidence of an advance of market value.]

(p) *A* contracts to sell and deliver 500 bales of cotton to *B* on a fixed day. *A* knows nothing of *B*'s mode of conducting his business. *A* breaks his promise, and *B*, having no cotton, is obliged to close his mill. *A* is not responsible to *B* for the loss caused to *B* by the closing of the mill.

(q) *A* contracts to sell and deliver to *B*, on the first of January, certain cloth which *B* intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. *B* is entitled to receive from *A*, by way of compensation, the difference between the contract price of the cloth and its market price at the

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[13] *Engell* v. *Fitch* (1869) L.R. 4 Q.B. 659 Ex. Ch.

time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparations for the manufacture.

[**Note.—Loss of profits on breach of contract.**—The market price is here the price as diminished by the want of demand consequent on the season being past.

Note.—No notice of special circumstances.—A tailor, expecting to make a large profit on the occasion of a festival that is to be held at a certain place delivers a sewing machine and a cloth bundle to a railway company to be conveyed to that place, and through the fault of the company's servants they are not delivered until after the conclusion of the festival. The company had no notice of the special purpose for which the goods were required. The tailor is not entitled to damages for the loss of profits nor for his expenses incidental to the journey to that place and back, as such damages could not have been in the contemplation of the parties when they made the contract, nor can they be said to have naturally arisen in the usual course of things from the breach: *Madras Railway Co.* v. *Govinda Rau* (1898) 21 Mad. 172.[14]

(r) *A*, a shipowner, contracts with *B* to convey him from Calcutta to Sydney in *A*'s ship, sailing on the first of January, and *B* pays to *A*, by way of deposit, onehalf of his passage money. The ship does not sail on the first of January, and *B*, after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. *A* is liable to repay to *B* his deposit, with interest and expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage money paid for the second ship over that agreed upon for the first, but not the sum of money which *B* lost by arriving in Sydney too late.[15]

In this illustration it seems to be assumed that *A* does not know *B*'s particular reason for wanting to be at Sydney by a Certain date. *A* contracts to sell by description to *B* sulphuric acid commercially free from arsenic. *A* does not know what *B* wants the acid for. *B* receives sulphuric acid from *A* under the contract, and uses it in producing a kind of sugar used by brewers. The acid is, in fact, not free from arsenic, the sugar manufactured with it is deleterious and useless, and *B* incurs liability to his customers, and the goodwill of his business is diminished in value and other goods of *B*'s are spoilt by being mixed with this acid. *B* is entitled to recover from *A* only the price of the acid and the value of the goods spoilt: *Bostock & Co.* v. *Nicholson & Sons* (1904) 1 K.B. 725.]

Explanation to sec. 73: "means which existed," etc.—This explanation has caused considerable difficulty in practice; the words "means which existed of remedying the inconvenience" have seemed obscure.

Duty to mitigate loss.—In this connection may be noted the observations of the Judicial Committee in *Jamal* v. *Moolla Dawood Sons & Co.*[16] "It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach.* If at that date the plaintiff could do something or did something which mitigated the

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[14] See also *Fazal Illahi* v. *East Indian Rly. Co.* (1921) 43 All. 623.

[15] This illustration does not affect the rule as to measure of damages where the contract is for the sale of goods: *Kandappa Mudaliar* v. *Muthuswami Ayyar* (1926) 50 Mad. 94, 99 I.C. 609, ('27) A.M. 99.

[16] (1916) L.R. 43 I.A. 6, 10; 43 Cal. 493, 592; *Murlidhar Chiranjilal* v. *Harishchandra Dwarkadas* (1962) 1 S.C.R. 653 : A.I.R. (1962) S.C. 366.

damage, the defendant is entitled to the benefit of it. *Staniforth* v. *Lyall*[17] is an illustration of this. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the latter contract."

In the case of an anticipatory breach, the duty to mitigate damages does not require the party who suffers from the breach to go into the market in search of another contract. Z, a millowner, agreed to put his mill at the disposal of *A*, a cotton merchant, for six months and to gin cotton which *A* would buy and bring to the mill. Z repudiated the contract soon after it was made. The Privy Council held that *A* was not obliged to prove that he had purchased cotton and tendered it to other mills so that damages might be assessed at a difference of rates. Their Lordships said that as it was an anticipatory breach *A* was entitled to damages assessed on an estimate of profit at the date of breach.[18]

Contracts relating to immovable property.—The rule as to damages as enunciated in *Hadley* v. *Baxendale*[19] does not apply in English law to contracts for the purchase of immovable property. It was finally settled by the decision of the House of Lords in *Bain* v. *Forthergill*[20] that a purchaser of real estate cannot recover damages for the loss of his bargain, but only his deposit and expenses; and that even if the vendor knew that he had no title not any means of acquiring it, the purchaser may have a further remedy by an action for deceit, but not on the contract. The reason for this exceptional rule is that the purchaser of real estate in England must expect some degree of uncertainty as to whether a good title can be effectively made by the vendor, whereas the vendor of a chattel must know, or at all events is taken to know, what his right to the chattel is.

The rule in *Bain* v. *Fothergill* was at one time assumed in the High Court of Bombay to be the law of India.[21] But sec. 73 is general in its terms, and does not exclude the case of damages for breach of a contract to sell immovable property, and in fact the rule was not settled beyond question in England when the Act was passed. "The Legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities."[22] Therefore, when a purchaser of land claims damages for the loss of his bargain, the question to be decided is whether the damage alleged to have been caused to his "naturally arose in the usual course of things from such breach"; and in an ordinary case it would be difficult to hold otherwise.

The view propounded above was approved by the High Court of Bombay in *Ranchhod* v. *Manmohandas*.[23] In that case the Court expressed the opinion that the rule in *Bain* v. *Fothergill*[24] was not law in this country. "As section 73 imposes no exception on the ordinary law as to damages, whatever the subject-matter of the contract, it seems to me that in cases of breach of contract for sale of immovable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages."[25] A similar view has been

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[17] (1830) 7 Bing. 169.

[18] *Ramgopal* v. *Dhanji Jadhavji Bhatia* ('928) 55 Cal. 1048, 55 I.A. 299 (P.C.) 30 Bom. L.R. 1389, 111 I.C. 480, ('28) A.P.C. 200.

[19] (1854) 9 Ex. 341, 96 R.R. 742.

[20] (1874) L.R. 7 H.L. 158.

[21] *Pitamber* v. *Cassibai* (1886) 11 Bom. 272.

[22] Per Farran, C.J., in *Nagardas* v. *Ahmedkhan* (1895) 21 Bom. 175, 185.

[23] (1907) 32 Bom. 165.

[24] (1874) L.R. 7 H.L. 158.

[25] Per Macleod, J., 32 Bom. 165, 171. See *Vallabhdas* v. *Nagardas* (1921) 23 Bom. L.R.

expressed by the High Court of Calcutta,[26] Lahore[27] and Madras.[28] Where a vendor of land guarantees his title to the purchaser, and the latter is evicted from his holding, he is entitled to recover the value of the land at the date of eviction, and not merely the purchase money paid for it.[29]

Interest by way of damage.—Act XXXII of 1839 provides for the payment of interest by way of damages in certain cases. Under that Act the Court may allow interest on debts or sums certain which are payable by an instrument in writing from the time when the amount becomes payable where a time is fixed for payment, or, where no time is fixed, from that date on which demand of payment is made in writing giving notice to the debtor that interest will be claimed. The decisions in India were at one time divided on the question whether interest was recoverable by way of damages under the present section [Illustration (n)]. It has now been decided by the Privy Council[30] that the illustration does not confer upon a creditor a right to recover interest upon a debt which is due to him when he is not entitled to such interest under any provision of law. With reference to the words "interest shall be payable in all cases in which it is now payable by law" occurring in the proviso in the Interest Act, their Lordships observed that the proviso applied to cases in which the Courts of Equity exercised jurisdiction to allow interest.

But in the case of breach of a contract of sale the Court may now award interest to a seller suing for the price and to a buyer suing for refund: Sale of Goods Act III of 1930, sec. 61.[31]

Although no interest by way of damages can be awarded under this section, where money is obtained by fraud and is retained by fraud[32] or where a debt is wrongfully detained,[33] interest by way of damages has been awarded by Courts on equitable principles.

Damages Recoverable Under Revenue Recovery Act.—In *State of Karnataka* v. *Shree Rameshwara Rice Mills*[34] the Supreme Court observed that when an agreement entered into between the Government and private party specifically provided for recovery or damages for breach of any condition of contract as arrears of land revenue, even if the damages become payable on account of breach of conditions of the contract, the liability to pay damages does not fall outside the terms of the contract but within the terms of the contract. So it follows that though damages become payable on account of breach of conditions of agreement they nevertheless constitute amounts payable under the contract and hence the damages can be recovered under the Revenue Recovery Act.

1213. In practice the assessment of damages for a defective title may have to be rough; see *Harilal Dalsukhram* v. *Mulchand* (1928) 52 Bom. 883, 30 Bom. L.R. 1149, 113 I.C. 27, ('28) A.B. 427.

[26] *Nabinchandra* v. *Krishna* (1911) 38 Cal. 458, at p. 465.

[27] *Jai Kishen Das* v. *Arya Priti Nidhi Sabha* (1920) 1 Lah. 380; *Mangal Singh* v. *Dial Chand* (1940) 188 I.C. 383, ('40) A.L. 159.

[28] *Adikesawan Naidu* v. *Gurunatha* (1918) 40 Mad. 338.

[29] *Nagardas* v. *Ahmedkhan* (1895) 21 Bom. 175.

[30] *Bengal Nagpur Railway Co., Ltd.*, v. *Rutanji Ramji* (1938) 65 I.A. 66, (1938) 2 Cal. 72, 173 I.C. 15, ('38) A.P.C. 67.

[31] As to the former Indian law, see *Kandappa Mudaliar* v. *Muthuswami Ayyar* (1927) 50 Mad. 94, 99 I.C. 609, ('27) A.M. 99.

[32] *Trojan & Co.* v. *Nagappa Chettiar*, A.I.R. (1953) S.C. 235: (1953) S.C.R. 789.

[33] *Purshottam* v. *Amruth Ghee Co.*, A.I.R. (1961) A.P. 143.

[34] A.I.R. 1987 S.C. 1359.

Compensation for breach of Contract where penalty stipulated.

74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.—When any person enters into any bailbond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations

(a) *A* contracts with *B* to pay *B* Rs. 1,000 if he fails to pay *B* Rs. 500 on a given day. *A* fails to pay *B* Rs. 500 on that day. *B* is entitled to recover from *A* such compensation not exceeding Rs. 1,000 as the Court considers reasonable.

(b) *A* contracts with *B* that, if *A* practises as a surgeon within Calcutta, he will pay *B* Rs. 5,000. *A* practises as a surgeon in Calcutta. *B* is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

(c) *A* gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) *A* gives *B* a bond for the repayment of Rs. 1,000 with interest at 12 per cent at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and *B* is only entitled to recover from *A* such compensation as the Court considers reasonable.

(e) *A*, who owes money to *B*, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and *B* is only entitled to reasonable compensation in case of breach.

(f) *A* undertakes to repay *B* a loan of Rs. 1,000 by five equal monthly instalments with a stipulation that, in default of payment of any instalments, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) *A* borrows Rs. 100 from *B* and gives him a bond for Rs. 200 payable by five

yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.[35]

Scope of this Section.—Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases, viz (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. The second category widens the amplitude of this section. The second category would comprise forfeiture of a right to money or other property already delivered, such as a forfeiture of earnest money, security deposit, instalments of hire etc.[36]

Under section 73, the actual loss or damage which naturally arose in the course of things has to be proved. But under this section the proof of actual loss or damage is not the *sine qua non* of awarding reasonable compensation. The words "Whether or not actual damage or loss is proved to have been caused thereby" contemplate cases where it may not be possible to assess the actual damages or loss, as stated in sec. 73. This section does not actually do away with the proof of actual loss or damage, if this is proved, the Court may take it into account in awarding 'reasonable compensation.'[37] But where it is not possible to prove actual loss or damage, and if the contract is the one which falls under this section, the Court is entitled to award 'reasonable compensation'.

The provisions of sec. 73 laid down the principle of compensation in case of a breach of a contract. This section also deals with compensation in respect of a breach of a contract but the contracts dealt with by this section are those containing a penalty or a named sum to be paid in the event of a breach of contract. The provisions of section 73, therefore, would extend to contracts wherein no named sum or a penalty is stated.

Penalty and liquidated damages.—This section contemplates cases where the parties to a contract anticipate possibility of a breach and prefer to name a particular amount to be paid to the injured party. The sum so fixed by the contract itself may be either

(i) a genuine estimate of the actual loss likely to be suffered by the aggrieved party; or

(ii) it may be less than the genuine estimate of loss, parties contemplating that the liability should not exceed; or

(iii) it may be greater than the genuine estimate of loss which the injured party may suffer; the sum was named so high as it was intended to operate as a threat to keep the potential defaulter to his bargain.

The amount so fixed or named in the contract is called (1) in the first case and the second case, 'liquidated damages' or 'reasonable compensation' and is awardable to the injured party under this section and (ii) in the third case 'a penalty' which may be relieved against under this section.

This section has provided a satisfactory solution to the vexed questions which arise in English law.

If the subject matter of a contract is of a definite or indefinite value and a fixed sum is payable on breach of the contract, the questions would be: (i) is this sum reasonable?

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[35] See as to a similar clause in a "chitfund" bond : *Ramalinga Adaviar* v. *Meenakshisundaram* (1924) 47 Mad. L.J. 833, 85 I.C. 261, ('25) A.M. 177.

[36] *Fateh Chand* v. *Balkishan Dass*, (1963) A.S.C. 1405; (1964) 1 S.C.R. 515; *Union of India* v. *Ghiam Sunder Lal*, (1963) All. L.J. 251; *Maung Ba* v. *Motor House Co.*, (1929) 7 Rang. 431.

[37] *Maula Bux* v. *Union of India*, (1970) 1 S.C.R. 928 = (1970) A.S.C. 1955; *Union of India* v. *Rampur Distillery & Chemical Co. Ltd.* (1973) A.S.C. 1098.

c: (ii) is this sum extravagant or unconscionable in amount in comparison with the maximum loss that could conceivably be proved as a result of the breach? or is it in excess of the value of the subject matter of the contract? or is the sum payable irrespective of the importance and significance of the breach of contract? If the sum named falls in the first category, it would be a liquidated damages and if it falls in the second category, it would be a penalty.[38] Penalty is a sum payable *in terrorem*, while liquidated damages is a genuine covenanted pre-estimate of damages.

Whether a sum is a penalty or liquidated damages is to be judged of as at the time of making of the contract and not as at the time of the breach.[38]

Whether a sum is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract.

This section has done away with all these difficult questions and has laid down the rule of awarding a reasonable compensation, not exceeding the sum so named, or the penalty named, in a contract.

Stipulations for forfeiture of earnest money, security deposit, withdrawal of concession are dealt with separately.

Stipulations for interest.—By far the largest number of cases decided under this section related to stipulations providing for interest. Those stipulations may be divided into the following five classes:—

I. Stipulations for payment of interest at a higher rate on default on the part of the debtor to pay the principal or part thereof or interest on the due date, and these may again be sub-divided into:

(a) Stipulations for payment of enhanced interest from the *date of the bond*, and

(b) Those for payment of such interest from the *date of default*.

II. Stipulations for payment on default of compound interest, which may be divided into:

(a) Stipulations for payment of compound interest at the same rate as simple interest, and

(b) Those for payment of compound interest at a rate higher than simple interest, or for payment of an increased-rate of interest and compound interest at that rate.

III. Stipulations for payment of interest at a specified rate if the principal or a part thereof is not paid on the due date.

IV. Stipulations for payment of interest at a lower rate, if interest paid on due dates.

V. Stipulations for payment of interest from the date of the bond, but at an exorbitant rate.

The stipulations comprised in the above classes are considered below:-

I. Stipulations for enhanced rate of interest.—Such a stipulation occurring in a contract may be of a twofold character: (1) it may either provide for payment of interest at an increased rate from the *date of the contract* on failure of the debtor to pay on the due date the interest or principal or an instalment of principal, or (2) it may provide for payment at a higher rate from the *date of default* only. Thus if *A* borrows Rs. 1,000 from *B* on 1st June 1902, *A* may give a bond to *B* for repayment of the loan on 1st June 1903, with interest at 12 per cent per annum, with a stipulation either that in case of default interest shall be payable at the rate of 25 per cent from the *date of the bond*, namely, 1st

[38] *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.* (1915) A.C. 79.

June 1902, *or* from the *date of default*, namely, 1st June 1903. In the former case it has been held that stipulation *always*[39] amounts to a penalty, and the provisions of sec. 74 apply, so that the Court may relieve the debtor, and award only such compensation to the creditor as it considers reasonable.[40] In the latter case, where the increased rate of interest is stipulated to have operation only from the date of default, the provision has not generally been regarded as a penalty.[41] But such a stipulation *may in* some cases be penal. Whether it is a penalty or not is a question of construction. "It is for the Court to decide on the facts of the particular case whether the stipulation is or is not a stipulation by way of penalty."[42] It will be held to be penal if the enhanced rate is unconscionable or if it is such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties.[43]

The law as to such stipulations may be stated as follows:—

(a) A stipulation for increased interest from the date of the bond is *always* in the nature of a penalty, and relief will be granted against it.

(b) A stipulation for increased interest from the date of default *may* be a stipulation by way of penalty, and whenever it is so relief will be granted under this section. Whether such a stipulation is penal is a question of construction dependent upon the consideration set out above.

II. Stipulations for compound interest[44]—A stipulation in a bond for payment of compound interest on failure to pay simple interest at the same rate as was payable upon the principal is not a penalty within the meaning of this section.[45] But a stipulation for the payment of compound interest at a rate higher than that of simple interest is a penalty within the meaning of this section, and would be relieved against. As observed by the Judicial Committee, in *Sunder Koer* v. *Rai Sham Krishen*,[46] "compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty."

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[39] The leading case on the subject is *Mackintosh* v. *Crow* (1883) 9 Cal. 689. The result of the cases will be found summarised in *Umarkhan* v. *Salekhan* (1892) 17 Bom. 106, 113, 114, and in *Abdul Gani* v. *Nandlal* (1902) 30 Cal. 15,17.

[40] *Rameshwar Prosad Singh* v. *Rai Sham Kishen* (1901) 29 Cal. 43, 50; *Trimback* v. *Bhagchand* (1902) 27 Bom. 21. See also *Sunder Koer* v. *Rai Sham Krishen* (1907) 34 Cal. 150, 157, L.R. 34 I.A. 9.

[41] *Abdul Gani* v. *Nandlal* (1902) 30 Cal. 15; *Umarkhan* v. *Salekhan* (1892) 17 Bom. 106; *Periasami Thallavar* v. *Subramanian Ansari* (1904) 14 Mad. L.J. 136; *Chuni Lal* v. *Munna Lal* (1930) 11 Lah. 635, 131 I.C. 368, ('31) A.L. 120; *Rama Krishnayya* v. *Venkata* ('34) A.M. 31, 148 I.C. 467; *Jyoti Cold Stores* v. *Punjab Financial Corporation*, (1973) A.P. & H. 38.

[42] *Abbakke Heggadthi* v. *Kinhiamma Shetty* (1906) 29 Mad. 491, 496; *P.C. Pl.* v. *K. A. L. R. Firm* (1923) 1 Rang. 460; *Jyoti Cold Stores* v. *Punjab Financial Corporation*, (1973) A.P. & H. 38.

[43] *Umarkhan* v. *Salekhan* (1892) 17 Bom. 106, 113.

[44] "The Courts do not lean towards compound interest, they do not award it in the absence of stipulation; but where there is a clear agreement for its payment it is, in the absence of disentitling circumstances, allowed"; *Hari Lahu Patil* v. *Ramji Valad Pandu* (1904) 28 Bom. 371, 377.

[45] *Ganga Dayal* v. *Bachhu Lal* (1902) 25 All. 26; *Surya Narain* v. *Jagendra Narain* (1892) 20 Cal. 360; *Malli Chettiar* v. *Veeranna Tevan* (1921) 41 Mad. L.J. 470.

[46] (1906) 34 Cal. 150, at p. 158, L.R. 34 I.A. 9; *Mangat Rai* v. *Babu Singh* (1927) 8 Lah. 721, 103 I.C. 437, ('27) A.L. 445.

III. Stipulations for payment of interest if principal not paid on due date.—These are cases where the bond does not provide for payment of two rates of interest, one lower and the other higher, but for the payment of interest at one specified rate if the principal money or part thereof is not paid within a stipulated period. To such cases s. 2 of Act 28 of 1855 would seem to apply. That Act abolished all usury laws of s. 2 of the Act provides that "in any suit in which interest is recoverable the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties, and if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable." The section refers to a single rate of interest and therefore cases under stipulation I, where there are two rates of interest, the original rate and the enhanced rate, are outside its scope. But stipulation III like s. 2 of the Act of 1855 refers to a single rate of interest and the difficulty is to reconcile sec. 2 of the Act of 1855 with s. 74 in its application to cases under stipulation III. Is the effect of the section to deprive the Court of jurisdiction to give relief in cases where there is a stipulation for an exorbitant rate of interest in default of payment of principal? On this point there were many conflicting decisions, but it is now generally agreed that the words of s. 74 "if the contract contains any other stipulation by way of penalty" introduced in the Contract Act by the Indian Contract (Amendment) Act, 1899, are wide enough to cover cases under this stipulation.

IV. Stipulations for payment of interest at a lower rate, if interest paid regularly on due dates.—Where a bond provides for payment of interest at 24 per cent per annum with a proviso that, if the debtor pays interest punctually at the end of every year, the creditor would accept interest at the rate of 18 per cent per annum, the creditor is entitled on failure of payment of interest on the due date to interest at the higher rate of 24 per cent per annum. Such a clause is not in the nature of a penalty.[47]

V. Stipulations for payment of interest from date of bond, the rate of interest being exorbitant.—The question to be considered under this head is, whether a stipulation for payment of interest can be deemed a "stipulation by way of penalty" within the meaning of this section, if the bond provides for payment of interest at one rate from the date of the bond, and that rate is high and exorbitant. This may be put in the form of an illustration thus:— *A* borrows Rs. 500 from *B* on 15th October 1930, and gives him a bond for that amount promising to pay the principal with interest thereon at the rate of 75 per cent per annum on 15th January 1931. *A* does not repay the loan on 15th January 1931. *B* sues *A* to recover the amount of the loan with interest at 75 per cent per annum. Is *B* entitled to interest at the rate of 75 per cent per annum, or has the Court power under this section to reduce the rate of interest? It has been held by the High Court of Calcutta that whether the stipulation to pay interest at the rate of 75 per cent per annum is a stipulation by way of penalty is a question of fact depending on the circumstances of each case, and if the Court finds that the rate of interest is of a penal character, the Court has power under this section to grant relief.[48] On the other hand, it has been held by the High Court of Madras that the present section does not apply to cases like the above, the

[47] *Kutub-Ud-Din* v. *Bashir-Ud-Din* (1910) 32 All. 448; *Fitz Holmes* v. *Bank of Upper India, Ltd.*, (1923) 4 Lah. 258; *Administrator-General of Burma* v. *Moola* (1927) 5 Rang. 573, 105 I.C. 592, ('28) A.R. 19; *Wallingford* v. *Mutual Society* (1880) 5 App. Cas. 685, 702.

[48] *Krishna Charan* v. *Sanat Kumar Das* (1917) 44 Cal. 162 [rate reduced from 75 per cent to 15 per cent]; *Abdul Majeed* v. *Khirode Chandra Pal* (1914) 42 Cal. 690 [rate reduced from 60 per cent compound interest to 30 per cent simple interest].

reason given being that there cannot be a stipulation by way of penalty unless there is another antecedent promise.[49] The Madras decisions, it is submitted, are correct. The Patna High Court has taken much the same view as the Madras High Court.[50] Cases of the kind now under consideration arising since the enactment of the Usurious Loans Act, 1918, will be dealt with under that Act, sec. 3 of which empowers the Court to relieve against exorbitant interest where (1) the interest is excessive, and (2) the transaction was substantially unfair.

Withdrawal of concessional payments.—An agreement may allow a debtor to discharge his larger debt by payment of a lesser sum by instalments or within a specified time with a stipulation that in default the full amount of the debt shall be payable. Such a stipulation is not in the nature of a penalty and is in the nature of a withdrawal of a concession.[51]

Deposit on agreement for purchase of immovable property.—*Maula Bux* v. *Union of India*[52] supports an important distinction between earnest money and security deposit. When the contract is not regarding purchase of property but a deposit is given for guaranteeing due performance of the contract to deliver goods, such deposit is not an earnest money[53] but security deposit. Earnest money is that which is paid by a purchaser as a stake and when the contract is completed it is treated as part payment of the price.[54] It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.[55] Forfeiture of earnest money under a contract for sale of property-movable or immovable—if the amount is reasonable, does not fall within S. 74.[56] Forfeiture of a reasonable amount paid as earnest money is not a penalty.[57] But if forfeiture is of the nature of penalty, S. 74 applies whether the party in breach has undertaken to pay or he has already paid a sum of money to the party complaining of the breach of the contract.[58] It is not correct to say that S. 74 has no application to cases of deposit for due performance of a contract which is stipulated to be forfeited for breach.[59] In *Fatch Chand* v. *Balkishan Das*,[60] the plaintiff (Respondent) agreed to sell to Defendant

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[49] *Kesavulu* v. *Arithulai* (1913) 36 Mad. 533; *Najaf Ali Khan* v. *Muhammad Fazal Ali Khan* (1927) 26 All. L.J. 210, 107 I.C. 249, ('28) A.A. 225 [rate reduced from 37 to 12 per cent].

[50] *Nathuni Sahu* v. *Baijnath Prasad* (1917) 2 Pat. L.J. 212, pp. 216, 218.

[51] *Burjorji* v. *Madhavlal* (1934) 58 Bom. 610: 36 Bom. L.R. 798: 152 I.C. 575: (1934) A. Bom. 379; *Waman* v. *Yeshwant* (1948) Bom. 654: 50 Bom. L.R. 688: (1949) A. Bom. 97; *Popular Bank of India* v. *Cheranji Lal* (1947) All. 201: (1947) A.A. 136: 231 I.C. 275; *Ko Kyam Swe* v. *U. Ba* (1935) Rang. 341.

[52] A.I.R. 1970 S.C. 1955.

[53] ibid p. 1958, para 4; see also *Union of India* v. *Rampur Distillery & Chemical Co. Ltd.* (1973) 1 S.C.C. 649 = A.I.R. 1973 S.C. 1098.

[54] *Panna Singh* v. *Arjan Singh* (P.C.) (1929) 31 Bom. L.R. 909, 117 I.C. 485, ('29) A.P.C. 179; *Bhalchandra* v. *Mahadeo* (1947) Nag. 60, ('47) A.N. 193; *Vijaya Foundry* v. *Gordon Woodroffe* (1963) 2 M.L.J. 153; *Chiranjit Singh* v. *Harswarup*, A.I.R. 1926 P.C. 1 quoted in *Maula Bux* v. *Union of India* A.I.R. 1970 S.C. 1955, 1958.

[55] *Chiranjit Singh* v. *Har Swarup* A.I.R. 1926 P.C. 1 quoted in *Maula Bux* A.I.R. 1970 S.C. at 1958; *H.C. Mills* v. *Tata Aircraft Ltd.* A.I.R. 1970 S.C. at 1994, Para 24.

[56] *Chiranjit Singh* v. *Har Swarup*, See note on *Maula Bux* v. *Union of India* A. 70 S.C. 1959, Para 7.

[57-58] *Maula Bux* v. *Union of India*, supra.

[59] *Maula Bux* v. *Union of India* A. 70 S.C. 1955.

[60] *Fateh Chand* v. *Balkishan Dass*, (1963) A.S.C. 1405: (1964) 1 S.C.R. 515. *Maula Bux* v. *Union of India*, (1970) 1 S.C.R. 928.

(Appellant) his rights in the land and building at Rs. 1,12,500. At the time of the execution of agreement, purchaser (defendant) paid Rs. 1,000 to seller (plaintiff) and Plaintiff was also paid Rs. 24,000 by the defendant out of the sale price at the time when the purchaser was given actual possession of the property. Under the agreement this entire sum of Rs. 25,000 was subject to forfeiture under the forfeiture clause along with resumption of possession provision if the defendant failed to get the sale deed registered by a specific date. There was also a clause by which further liability was fastened on the purchaser to pay an additional sum of Rs. 25,000 as damages if there was no registration of the sale deed by the specific date. The defendant defaulted, plaintiff claimed to forfeit the entire sum of Rs. 25,000 under the terms of the agreement as earnest money. The defendant did not object to the plaintiff's rights to forfeit Rs. 1,000 paid as earnest money under the agreement but he contended that Rs. 24,000 was expressly paid out of sale price and the stipulation was in the nature of penalty. It was held by the Supreme Court that Rs. 24,000 was not paid as an earnest money and it was expressly referred to in the agreement as paid "out of sale price". Also there was no evidence that Rs. 24,000 was paid as security for due performance of the contract. It cannot be assumed that because there was a stipulation for forfeiture the amount paid must bear the character of a deposit for due performance of the contract. Hence the plaintiff was only entitled to retain Rs. 1,000/- received by him as the earnest money. If there be no forfeiture clause, vendor cannot forfeit earnest money but would be entitled to reasonable compensation.[61]

Deposits other than earnest money.—Moneys are often deposited as security for the performance of a contract, without such moneys being earnest money. In such a case there may be a forfeiture clause or not. Where there is no forfeiture clause, the party committing a breach of the contract is liable only to pay damages and is entitled to the return of the remainder of the moneys deposited.[62] Where however, there is a forfeiture clause, the question in England arises whether the deposit represented a genuine pre-estimate of liquidated damages or was in the nature of penalty.[63] The question in India is whether such a case falls within the terms of sec. 74, so that only reasonable compensation has to be paid whether the amount deposited in by way of liquidated damages or by way of penalty. The words "any other stipulation by way of penalty" are sufficiently ample to cover the case of a deposit with regard to which there is a stipulation for forfeiture.[64]

Cases go to show that if the aggrieved party does not prove the natural loss or damage and asserts the right to forfeit the security deposit only, the Courts are inclined to order the aggrieved party to refund the security deposit,[65] or earnest money.[66]

Consent decree.—Sometimes decree passed on comprise provide that if the defendant pays a particular amount within a specified time, the decree is to be marked as satisfied but if the defendant defaults in so paying he should pay an increased amount. In such cases the question is whether the default clause operates as a penalty. The true

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61 *Mohammad Sultan* v. *Naina Mohammad,* (1973) A. Mad. 233.

62 *Mayson* v. *Clonet* (1924) App. Cas. 980; *Public Works Commissioner* v. *Hill* (1906) App. Cas. 368.

63 (1906) App. Cas. 368. *supra.*

64 *Union of India* v. *Shiam Sunder Lal* (1963) All. L.J. 251; *Fateh Chand* v. *Balkishan Dass,* (1963) A.S.C. 1405: (1964) S.C.R. 515; *Union of India* v. *Rampur Distillery and Chemical Co. Ltd.* (1973) A.S.C. 1098 = (1973) 1 S.C.C. 640.

65 *M/s. Variety Body Builders* v. *Union of India* (1973) A. Guj. 256.

66 *Fateh Chand* v. *Balkishan Das,* (1964) 1 S.C.R. 515 (553) = (1963) A.S.C. 1405.

test[67] is as follows :—

(1) Does the decree holder get more than the amount he claimed in the suit; if so, it is a penalty.

(2) Does the decree holder get in default, or in execution of the decree, only that much of his just claim to which he was entitled in the suit, in that event there is no penalty.

"Reasonable compensation."—The words of the section give a wide discretion to the Court in the assessment of damages. "The only restriction is that the Court cannot decree damages exceeding the amount previously agreed upon by the parties. The discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation, through, of course, the expression 'reasonable compensation' used in the section necessarily implies that the discretion so vested must be exercised with care, caution, and on sound principles."[68] The term 'reasonable' implies having regard to the circumstances of each case. In the exercise of this discretion the Judicial Committee has affirmed a judgment giving, as reasonable in the particular case, compensation at the same rate as the increased interest stipulated for.[69] And generally it is open to the Court under this section to award as compensation a sum equal to the agreed penalty, provided that it does not appear to the Court to exceed what is reasonable.[70] It has been held by a High Court of Bombay that the measure of damages for breach of a contract to borrow moneys at interest for a certain period is not the difference between the agreed rate of interest and that realised by the lender from his bankers for the full period of the loan, but only for such period as might be reasonably required to find another borrower of a similar amount at the agreed rate.[71]

Onus of proof to prove damages whether or not actual damage or loss is proved to have been caused thereby—Onus of proof to prove actual extent of damage is on the aggrieved party.[72] On this aspect of the section, the following observations of the two Supreme Court Cases may be noted. In *Maula Bux* v. *Union of India*, the Supreme Court observed as follows:

"It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of Contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined,

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[67] *Juhari Lal* v. *Mohin Das*, (1972) A. All. 457.

[68] *Nait Ram* v. *Shib Dat* (1882) 5 All. 238, 242; *Fateh Chand* v. *Balkishan Dass* ('63) A.S.C. 1405: (1964) 1 S.C.R. 515.

[69] *Sundar Koer* v. *Sham Krishen* (1906) 34 Cal. 150; L.R. 34 I.A. 9; *Chandi Charan* v. *Jivan Kumar* (1932) 53 Cal.

[70] *Abbake Heggadthi* v. *Kinhiamma Shetty* (1906) 29 Mad. 491, 496.

[71] *Datubhai* v. *Abubaker* (1887) 12 Bom. 242.

[72] *Karamchand Thapar & Bros. Ltd.* v. *H. H. Jethanandani*, 76 C.W.N. 38.

the party claiming compensation must prove the loss suffered by him.''[73]

In *Fateh Chand* v. *Balkishan Das*, the Supreme Court observed thus: ''Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the court duty to award compensation according to settled principles. The Section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of ''actual loss or damage;'' it does not justify the award of compensation when in consequence of the breach not legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose, in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach''.[74]

Not less than: In a managing agency agreement it was provided that in the case of the termination of the managing agency for any reason or cause other than that specified in the agreement the managing agents shall receive as compensation or liquidated amount as damages for the loss of the appointment, a sum equal to the aggregate amount of salary which was not to be less than Rs. 6000 p.m. for the unexpired portion of the agency. The Supreme Court held that the parties having specified the amount of liquidated damages and it excluded the right to claim an unascertained sum as damages. The words ''not less than'' only emphasise that the compensation would not be computable at a sum less than the amount mentioned. The sum was regarded by the parties as reasonable and intended that it should not be reduced by the Court in its discretion.[75]

Exception mentioned in S:74—Scope: A bond given by a person to whom the right of collecting fees from vendors of goods in a market formed by a Local Board under the Madras Local Boards Act, 1884 stipulating that if he exacted fees in excess of the prescribed rates he may be fined not exceeding Rs. 50 imposed by the President of the Board, is a bond ''for the performance of a public duty or an act in which the public are interested,'' but it is not ''given under the provisions of any law,'' as there is no section in the Local Boards Act which authorises or requires the giving of such a bond. Such bond, therefore does not fall within the exception and contractor is not liable to pay the full amount of the penalty on breach of the condition of bond. The Board is only entitled to reasonable compensation.[76]

Party rightfully rescinding contract entitled to compensation.

75. A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.[77]

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[73] A.I.R. 1970 S.C. at 1959, Para 8.

[74] (1964) I.S.C.R. at 527.

[75] *Sir Chunilal Mehta* v. *Century Shipping & Mfg. Co. Ltd.* A.I.R. 1962 S.C. 1314, 1319.

[76] *President of the Taluk Board, Kundapur* v. *Burde Lakshminarayana* (1908) 31 Mad 54 = 17 M.L.J. 537.

[77] This section appears fairly to cover the right of a buyer who has paid a deposit on sale to recover it back if the seller makes Default, if any more specific authority is wanted than his remedy for breach of contract under the general provisions of s. 73. But as rightly observed in *Piari (or Pyare) Lal* v. *Mina Mal* 1928 (50) All, 82, 102 I.C. 766, ('27) A.A. 621, right to recover money paid for a consideration that has failed is not exhausted by statutory specifications.

Illustration

A, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night *A* wilfully absent herself from the theatre, and *B*, in consequence, rescinds the contract. *B* is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

This section is to be read as supplementary to secs. 39, 53, 55, 64 and 65. The facts of the illustration resemble those of illustration (a) to sec. 39. A party who rescinds on the ground of fraud or the like is in a different position; he rescinds the contract not because fulfilment has been refused or prevented, but because the contract, by reason of the fraud, or as the case may be, is altogether to his disadvantage. It is sometimes said that a party who rescinds for fraud cannot also recover damages.[78] This limitation on the remedy must be confined to wholly executory contracts. In the case of partially executed contract, the two remedies should be available.[79]

[78] See Halsbury's Laws of England, 3rd edn., Vol. 26, p. 857.

[79] See Bowen L.J. *Newbigging* v. *Adam* (1886) 34 Ch. D. 582, 592.

Chapter VII

This chapter of the Act is wholly repealed by the Indian Sale of Goods Act, 1930, Sec. 65, but the numbering of the later chapters and sections is not altered.

Chapter VIII

OF INDEMNITY AND GUARANTEE

"Contract" of indemnity defined.

124. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."

Illustration

A contracts to indemnify *B* against the consequences of any proceedings which C may take against *B* in respect of a certain sum of 200 rupees. This is a contract of indemnity.

Indemnity.—English usage of the word "indemnity" is much wider than this definition. It includes promises to save the promisee harmless from loss caused by events or accidents which do not or may not depend on the conduct of any person, or by liability arising from something done by the promisee at the request of the promisor; in the latter case a promise of indemnity may be inferred as a fact from the nature of the transaction.[1] A contract of insurance is kind of contract of indemnity.

The present chapter applies in terms only to express promises; but it should be noted that a duty to indemnify may be annexed by operation of law to various particular kinds of contract (*cf. s.* 69, above).

Commencement and Extent of Indemnifier's liability.—The text of the Act leaves these matters undefined, and in fact the leading English authorities are comparatively recent. It might be supposed that an indemnifier (the person who gives the indemnity) could not be called on till the indemnified (the person for whose protection indemnity is given is called the indemnity holder or indemnified) had incurred actual loss, and this was at one time said to be the rule of English Common Law. But, according to the equitable principles which now prevail, "to indemnify does not merely mean to reimburse in respect of moneys paid, but (in accordance with its derivation) to save from loss in respect of the liability against which the indemnity has been given . . . if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first

[1] *Dugdale* v. *Levering* (1875) L.R. 10 C.P., 196.

instance"[2].

The Bombay High Court has held that an indemnity holder could sue for specific performance of the contract of indemnity even before he incurs the damage provided that it is shown that an absolute liability has been incurred by him and that the contract of indemnity covers the said liability[3]. The reason advanced is that the law of indemnity in this Act is not exhaustive[3]. Similarly in the well known case of *Osman Jamal & Sons Ltd.* v. *Gopal Purshottam*[4] the plaintiff company in liquidation was commission agents for the defendant firm in the purchase and sale of certain goods and was to be indemnified against all losses in such transaction. The plaintiff Company in that capacity bought the goods from a vendor. The defendant firm refused to pay for or to take delivery of the goods and so the vendor resold the goods at a loss. He sought to recover it from the plaintiff Company. Hence the plaintiff company was seeking to recover this sum from the defendant firm before paying over the amount of the loss to the vendor on the basis of indemnity given by a contract. It was held that the Official Liquidator could recover the amount from the defendant even though the Official Liquidator had not actually paid it to the Vendor. Similarly in a later case of the same High Court[5] when *A* had agreed to indemnify *B* against any loss or injury, *B* was entitled to have recourse to this indemnity and to call upon *A* to discharge his liability as soon as the loss or injury became imminent. *B* was not bound to wait until *B* actually suffers loss or injury.

This view of the Court reflects the opinion expressed by Buckley, L.J.[5a] in the case of *In re Richardson* Ex parte the Governors of St. Thomas's Hospital where he observed: "Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called upon to pay....."

Rights of indemnity holder when sued.

125. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any

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[2] Kennedy L.J., *in Liverpool Mortgage Insurance Co's* case (1914) 2 Ch. 617, 638.

[3] *Khetarpal* v. *Madhukar Pictures*, 57 Bom. L.R. 1122 (1126): (1956) A. Bom. 106; *Gajanan Moreshwar* v. *Moreshwar Madan*, 44 Bom. L.R. 703, approving *Kumar Nath Bhuttacharjee* v. *Nobo Kumar* 26 Cal. 241; *Ramadingathudayar* v. *Unnamalai Uchi*, 38 Mad. 791; *Shaim Lal* v. *Abdul Salam* (1931) A.A. 754.

[4] A.I.R. 1929 Cal. 208.

[5] *Profulla Kumar Basu* v. *Gopee* A.I.R. 1946 Cal. 159.

[5a] (1911) 2 K.B. 705 at 715.

contract of indemnity, or if the promisor authorised him to compromise the suit.

Rights of indemnity holders.— The rights conferred upon an indemnity holder by this section are based upon an essential condition that he must be "acting within the scope of his authority." This is clear from the principal part of the section. This aspect is further emphasised by the sub-sections. Sub-sec. (1) requires that the suit must be "in respect of any matter to which the promise to indemnify applies." Sub-sections (2) and (3) also state that in bringing or defending or compromising, such suit, the indemnity holder should have been either (i) authorised by the promisee, or (ii) he did not contravene the orders of the promisor, or (iii) in absence of such authority or orders, his acts should be acts of a prudent man.

It is only when an indemnity holder has complied with the said condition that he would be entitled to recover from the promisor all damages and costs, which he has been compelled to pay in such suit.

Sub-sections contemplate that at each stage, the indemnity holder applied for authority or orders of the promisor. In the absence of such authority or orders from the promisor, the indemnity holder has to act as a prudent man.

The provisions of this section deal with the rights of an indemnity holder in the event of being sued, and it is by no means exhaustive of the rights of an indemnity holder who has other rights besides those mentioned in this section. Even before damage is incurred by an indemnity holder, it would be open to him to sue for specific performance of the contract of indemnity provided it is shown that an absolute liability has been incurred and the liability is covered by the contract of indemnity.[6]

A contract or a bound by a scholar to reimburse the government if he failed to return to India from San Francisco after completing his studies and then serve the government for five years could be a contract of indemnity and the scholar is bound to reimburse the government in the event of his failure to comply with the conditions of the bond.[7]

Sub-sec. 1.—As to sub-sec. 1, "it is obvious that when a person has altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard indeed if when he came to claim the indemnity the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first. Therefore, by reason of that contract of indemnity, the judgment is conclusive," although the promisor was not a party to it.[8] This rule has been followed by the Indian Courts.[9]

Sub-sec. 2.—As to sub-sec. 2, "in the case of contracts of indemnity, the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity, but is the very moving cause of that contract; and in cases of such a nature there is a series of authorities to the effect that costs reasonably incurred in resisting or

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[6] *Khetarpal* v. *Madhukar Pictures*, 57 Bom. L.R. 1122 (1126-27).

[7] *M. Sham Singh* v. *State of Mysore*, (1972) A.S.C. 2440 = (1973) 2 S.C.C. 303.

[8] *Parker* v. *Lewis* (1873) L.R. 8 Ch. 1035, 1059, per Mellish, L.J.

[9] *Nallappa* v. *Virdhachala* (1914) 37 Mad. 270. And the promisee has a cause of action as soon as a decree is passed against him; *Chiranji Lal* v. *Naraini* (1919) 41 All. 395.

reducing or ascertaining the claim may be recovered.''[10] But the costs must be such as would have been incurred by a prudent man.[11]

Sub-sec. 3.—As to sub-sec. 3, ''if a person has [expressly] agreed to indemnify another against a particular claim or a particular demand, and an action is brought on that demand, he [the defendant] may then give notice to the person who has agreed to indemnify him to come in and defend the action, and if he does not come in, and refuses to come in, he may then compromise at once on the best terms he can, and then bring an action on the contract of indemnity.''[12]

Cause of action and period of limitation.—In one case it was held upon a true construction of the contract of indemnity that the plaintiff had two causes of action viz:—

(i) it was permissible for the plaintiff to call upon the defendants to pay the amounts claimed in the order of the Sales Tax Officer directly to the authorities;

(ii) it was also permissible for the plaintiff to wait till he suffers loss i.e when he paid the amount of the claim.[13]

Such a suit will lie within the period of three years under Art. 113 of Limitation Act from the date of payment.[13] In another case the Supreme Court held that the statute runs on the actual damnification.[14]

Rights of promisor.—This section deals with the rights of a promisee in a contract of indemnity. There is no provision in the Act for the rights of a promisor in such a contract. The absence, however, of such a provision does not take away the rights which such a promisor has according to English law, and which are analogous to the rights of surety declared in sec. 141.[15]

"Contract of guarantee," "surety," "Principal debtor," and "creditor."

126. A ''contract of guarantee'' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the ''surety,'' the person in respect of whose default the guarantee is given is called the ''principal debtor'' and the person to whom the guarantee is given is called the ''creditor.'' A guarantee may be either oral or written.

The contract of guarantee presupposes a principal debtor;[16] the surety's obligation must be substantially dependent on a third person's default.[17] A promise to be primarily and independently liable is not a guarantee, though it may be an indemnity.[18] ''Contracts of suretyship . . . require the concurrence of three persons, namely, the principal debtor, the creditor, and the surety. The surety undertakes his obligation at the request express or implied of the principal debtor,'' on the true construction of sec. 141 as well

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[10] *Bepin* v. *Chunder Seekur Mookerjee* (1880) 5 Cal. 811.

[11] *Gopal Singh* v. *Bhawani Prasad* (1888) 10 All. 531.

[12] Mellish, L.J., 8 Ch. at p. 1059, *supra.*

[13] *Abdul Hussain Jambawalla* v. *Bombay Metal Syndicate,* (1972) A. Bom. 252.

[14] *Shanti Swarup* v. *Munshi Singh,* (1967) A.S.C. 1315.

[15] See *Maharana Shri Jasvatsingji Fatesingji* v. *The Secretary of State India* (1889) 14 Bom. 299, 303.

[16] *Mountstephen* v. *Lakeman* (1871) L.R. 7 Q.B. 196, 202, Ex. Ch. affirmed in House of Lords, L.R. 7 H.L. 17.

[17] *Harburg India Rubber Comb Co.* v. *Martin* (1902) 1 K.B. 778 C.A.

[18] *Guild & Co.* v. *Conrod* (1894) 2 Q.B. 885.

as sec. 126.[19] Accordingly, if *A* enters into a contract with *B*, *C*, without any communication with *B*, undertakes for a consideration moving from *A* to indemnify *A* against any damage that may arise from a breach of *B*'s obligation this will not make *C* a surety for *B* or give him a right of action in his own name against *B* in the event of *B*'s default.[19]

A contract of guarantee without consideration is void.[20] A contract of guarantee may be contained in more than one document.[21]

Distinction between guarantee and indemnity

Guarantee	*Indemnity*
(1) Three parties	(1) Two parties
(2) Three contracts: (1) between creditor and debtor; (2) between creditor and surety; (3) between debtor and surety by which principal debtor requests the surety to act as such.[22]	(2) Once contract between indemnifier and indemnified.
(3) As security of creditor for performance and/or for liability or for loss.	(3) It is for reimbursement of loss only.
(4) It is only a consequential contract after the original is entered into. Guarantor's liability is secondary and hence if principal debtor is not liable, guarantor is not liable also.[23]	(4) It is an original and direct contract. It creates primary liability for indemnifier which arises even though the promisee has no enforceable rights under the principal contract.[24]
(5) There can be no contract of guarantee unless there be a principal debtor (i.e. a third person) and the Surety's obligation must be substantially dependent on a third person's default.	(5) A promise to be primarily and independently liable is not a guarantee but it may be an indemnity.[25]
(6) In a contract of guarantee the surety assumes a secondary liability to answer for the debtor who is primarily liable.	(6) In a contract of indemnity the indemnifier assumes a primary liability.
(7) In the case of a guarantee there is an existing debt or duty, the performance of which is guaranteed by the surety.	(7) In indemnity, the possibility or risk of any loss happening is the only contingency against which the indemnifier undertakes to indemnify.[25]

[19] *Periamanna Marakkayar* v. *Banians & Co.* (1925) 49 Mad. 156, 172, 185, 95 I.C. 154, ('26) A.M. 544 at 553; *Ramachandra* v. *Shapurji* (1940) Bom. 552, 42 Bom. L.R. 550. 192 I.C. 375, ('40) A.B. 315; *Jagannath Bakhsh* v. *Chandra Bhukham* (1937) 12 Luck. 484, 165 I.C. 370, ('37) A.O. 19.

[20] *Janaki Paul* v. *Dhokar Mall Kidarbux* (1935) 156 I.C. 200; *Ram Narain* v. *Hari Singh*, A.I.R. (1964) Raj. 76: I.L.R. (1963) Raj, 973.

[21] *S. Chattanatha* v. *Central Bank of India*, (1965) 3 S.C.R. 318 = (1965) A.S.C. 1856.

[22] See *Ramchandra* v. *Shapurji* (1940) 42 Bom. L.R. 550 = A.I.R, 1940 Bom. 315.

[23] *Eldridge & Morris* v. *Taylor* (1931) 2 K.B. 416; *Temperance Loan Fund Ltd.* v. *Rose* (1932) 2 K.B. 522; *Unity Finance Ltd.* v. *Woodcock*, (1963) 1 W.L.R. 455.

In England a guarantee is within the statute of frauds and therefore it is not actionable without a "memorandum or note" as is required by S. 4 of the statute, whereas under S. 126 of the Indian Contract Act a guarantee may be either oral or written. But a contract of indemnity under English Law may be oral.

Law of guarantee

What is a guarantee: Performing promise of principal debtor; or discharging liability of principal debtor (s. 126).

Consideration: Past/future benefit to principal debtor (s. 127).

Invalidated: (1) By misrepresentation by creditor (s. 142). (2) By silence to material circumstances by creditor (s. 143).

Liability of Surety: Surety's liability is co-extensive with that of principal debtor (s.128).

Rights of Surety: (1) Guarantor entitled to be indemnified by principal debtor (s. 145). (2) Guarantor entitled to be subrogated to rights of creditor (Ss. 140, 141).

Discharge of Surety: (1) Release of principal debtor; (2) Act or omission of creditor whereby principal debtor is discharged (Ss. 134, 135, 139).

Revocation of guarantee: (1) By notice to creditor (s. 130). (2) By death of surety (s. 131). (3) By variation of original contract to the prejudice of surety (Ss. 133, 135).

Co-sureties liable to contribute equally *inter se* (Ss. 146, 147).

"Discharge Liability."—By the word "liability" in this section is intended a liability which is enforceable at law, and if such liability does not exist, there cannot be a contract of guarantee. A surety, therefore, is not liable on a guarantee for the payment of a debt which is barred by the law of limitation.[26]

Where the question of performing the promise of the principal debtor, or of discharging the liability of the principal debtor, is not involved, there would not arise any contract of guarantee. For example, in case of auction sales by Excise Department, the auction officer may insist upon the bidder to produce a certificate of his solvency; after the auction bid was closed, a person signed under the column headed 'certificate of solvency' in the auction sale list; it was held that the person so signing did not stand guarantee for the bidder.[27]

Consideration for guarantee.

127. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

Illustrations

(a) *B* requests *A* to sell and deliver to him goods on credit. *A* agrees to do so provided *C* will guarantee the payment of the price of the goods *C* promises to guarantee the payment in consideration of *A*'s promise to deliver the goods. This is a sufficient consideration for *C*'s promise.

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[24] *Yeoman Credit Ltd.* v. *Latter* (1961) 1 W.L.R. 828; *Lakeman* v. *Mountstephen* (1874) L.R. 7 H.L. 17.

[25] *Guild & Co.* v. *Conrad* (1894) 2 Q.B. 885;

[26] *Manju Mahadeo* v. *Shivappa* (1918) 42 Bom. 444.

[27] *Joseph Abraham* v. *Tehsildar Meenachi*, (1971) A. Ker. 334.

(b) *A* sells and delivers goods to *B*. *C* afterwards requests *A* to forbear to sue *B* for the debt for a year, and promises that if he does so, *C* will pay for them in default of payment by *B*. *A* agrees to forbear as requested. This is a sufficient consideration for *C*'s promise.

(c) *A* sells and delivers goods to *B*. *C* afterwards, without consideration agrees to pay for them in default of *B*. The agreement is void.

Consideration for a contract of guarantee.—This is nothing but an application of the wider principle that in all cases of contract the really necessary element of consideration is the legal detriment incurred by the promisee at the promisor's request, and it is immaterial whether there is or is not any apparent benefit to the promisor.[28] The words "anything done" suggest that past consideration is a sufficient consideration for a contract of guarantee.

Like any other contract, a contract of suretyship may be invalidated by total failure of the consideration. A surety gave a written guarantee for payment of the judgment-debts by instalments, in consideration of the decree-holders consenting to postpone the sale under the execution. It turned out that the consent of another person was necessary to prevent the sale. In consequence the sale took place. The surety gave notice that the consideration having failed, the guarantee was at an end. The decree holders represented that when they took the guarantee they had power to stop the sale and that it would be stopped. It was held that the surety was entitled to have the guarantee cancelled,[29] or where the consideration was withdrawal of a criminal prosecution against the debtor, but the Court would not sanction the withdrawal as the offence was not compoundable.[30]

Where *A* advanced money to *B* on a bond hypothecating *B*'s property and mentioning *C* as surety for any balance that might remain due after realisation of *B*'s property, and *C* was no party to the bond, but signed a separate surety bond two days subsequent to the advance of the money, it was held that the subsequent surety bond was void for want of consideration.[31] In Allahabad High Court case[31] the Creditor did not promise to do anything and did not do anything "for the benefit of the principal debtor" and so there was no consideration for the Surety's giving the guarantee. The creditor agreed to do nothing and promised nothing in return for the surety's promise. The surety's separate and subsequent bond was not made for the benefit of the principal debtor as required by s. 127 of the Contract Act since the debtor had already received two days earlier the consideration money. Accordingly, the court found that the act of surety was not on behalf of the principal debtor but as security for the benefit of lender alone and therefore there was no consideration under S. 127 of the Act. So also in Tra. Coch. High Court case[31] there was held to be no consideration for a contract of guarantee because after the debt had been contracted, the surety came forward and promised that he would see that the debtors duly discharged their obligation. The creditor did not suffer any detriment at the instance of the surety. Moreover the surety was not personally liable for the discharge of the debt but would see that the debtors repay the debt. The mere fact that *A* lends money to *B* on the recommendation of *C* is no consideration for a subsequent promise by *C* to

[28] *Sornaling* v. *Pachai Naickan* (1915) 38 Mad. 680; *Pestonji* v. *Bai Meherbai* (1928) 30 Bom. L.R. 1407, 112 I.C. 740, ('28) A.B. 539.

[29] *Cooper* v. *Joel* (1859) 1 D.F. & J. 240. = (1859) 45 E.R. 350.

[30] *Het Ram* v. *Devi Prasad* (1881) 1 All. W.N. 2.

[31] *Nanak Ram* v. *Mehin Lal* (1877) 1 All. 487; *Várghese* v. *Abraham* ('52) A. Tra.-Coch. 202.

pay the money in default of *B*.[32]

Where after a lease is executed a person becomes surety for the payment of the rent due by the lessee, the contract of suretyship is for consideration.[33] In deciding sufficiency of consideration, it is not necessary to look at the events chronologically. If a sale and the guarantee are substantially one transaction (e.g. goods sold are intended to be guaranteed by manufacturers) it does not matter that a guarantee is given at a date later than the sale.[34]

Surety's liability.

128. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration

A guarantees to *B* the payment of a bill of exchange by *C*, the acceptor. The bill is dishonoured by *C*. *A* is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

Additional Illustration

[A guarantees to *C* the payment of rent becoming due from *B* to *C*. *B* fails to pay rent. *A* is liable for the rent, but not for interest on the rent, unless the bond contained some such words as "with interest thereon": *Maharaja of Benares* v. *Har Narain Singh* (1906) 28 All. 25.]

Proof of surety's liability.—The liability must be proved against the surety in the same way as against the principal debtor. A judgment or award against the principal is not admissible as against the surety without a special agreement to that effect. The present section is merely a re-enactment of the Common Law.[35]

Madras Agriculturists' Relief Act.—A full Bench of the Madras High Court[36] has decided that where the principal debt of an agriculturist has been scaled down by the Madras Agriculturist's Relief Act, a non-agriculturist surety will only be liable for the debt as scaled down. Their Lordships distinguished cases in which it was held that discharge of a principal debtor in bankruptcy did not operate as discharge of the sureties.

Liability for whole or part of debt.—A surety may limit his guarantee to a fixed sum. If the debt is an ascertained sum exceeding that sum, the presumption is that the surety guarantees the whole amount but limits his liability to the fixed sum. But if the debt is a floating balance including sums to become due in the future, the presumption is that the surety guarantees not the whole debt but a part of the debt equal to the fixed sum. This is because "it is inequitable in the creditor, who is at liberty to increase the balance or not, to increase it at the expense of the surety."[37] The surety's liability

[32] *Muthukaruppa* v. *Kathappudyan* (1914) 27 Mad. L.J. 249.

[33] *Ghulam Husain* v. *Faiyaz Ali* (1940) 15 Luck. 656, 188 I.C. 175, ('40) A.O. 346; *Kali Charan* v. *Abdul Rahman* (1918) 23 C.W.N. 545, 50 I.C. 651, ('18) A.P.C. 226.

[34] *Thornton* v. *Jenkyns* (1840) 1 Man. & G. 166; *Tanner* v. *Moore* (1846) 9 Q.B. 1.

[35] *Hajarimal* v. *Krishnarav* (1881) 5 Bom. 647, 650; *Sree Meenakshi Mills, Ltd.* v. *Ratilal Tribhovandas* (1941) 43 Bom. L.R. 53, ('41) A.B. 108.

[36] *Subramania* v. *Narayanaswami* (1951) Mad. 305, ('51) A.M. 48 (F.B.). *Narayan Singh* v. *Chhatar Singh*, (1973) A. Raj. 347.

[37] *Ellis* v. *Emanuel* (1876) 1 Ex. Div. 157, 164, *Cur.* per Blackburn, J.

depends upon the terms of the contract.[38] If the guarantee is of the whole debt the surety does not acquire rights of subrogation of contribution (see secs. 140, 141 and 146) until he has paid the whole of the fixed sum to which he has limited his guarantee. If the guarantee is for a part of the debt the surety is entitled to the benefit in rateable proportion of any dividends paid by the estate of the principal debtor.

Co-existence liability.—This section limits the liability of a surety unless the contract provides otherwise. The word 'co-extensive' indicates that a surety is liable to the same extent as the principle debtor; he is jointly and severally liable with the principal debtor.[39] In *Bank of Bihar* v. *Damodar Prasad* the Supreme Court observed that the surety is liable to pay the entire amount and his liability is immediate and cannot be deferred until the creditor exhausts his remedies against the principal debtor. The Court approved Lord Eldon's observations in *Wright* v. *Simpson* (31 E.R. 1272, 1282) that "Surety cannot restrain an action against him by the creditor on the ground that the debtor is solvent or that the creditor may have relief against the debtor in some other proceedings." Likewise when the creditor has obtained a decree against the surety and the debtor, the surety has no right to restrain execution against him until the creditor has exhausted his remedies against the debtor.[40] If the principal debtor is not liable on the principal debt, surety is also not liable. If the principal debt is illegal[41] or is unenforceable under the Moneylenders Act,[42] the principal debtor and guarantor are not liable. If the principal debtor is discharged by the creditor's breach, surety will not be liable.[46]

A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal debtor before suing the surety, and a suit may be maintained against the surety, though the principal debtor has not been sued.[47]

Nor can the surety ask for an injunction against the creditor restraining him from proceeding against surety until his remedies against the principal debtor are exhausted.[48]

But a document which releases the principal debtor without expressly reserving the creditor's rights against the guarantor, the guarantor would be also released from his liability.[49]

If decretal debt is extinguished in whole or in part by substantive statute[50] or by operation of substantive law[50] e.g. Under Agriculturist Debtors Relief Act, or in appeal,[51] the surety's co-extensive liability is *pro-tanto* extinguished, reduced or abates, as the case may be. In *Narayan Singh* v. *Chhatar Singh*[50] the Rajasthan High Court

[38] *Subhankhan* v. *Lalkhan* (1947) Nag. 643, ('48) A.N. 123.

[39] *Suresh Narain* v. *Akhauri* (1957) A. Pat 256; *Madho Sah* v. *Sitaram* (1962) A. Pat. 405.

[40] (1969) 1 S.C.R. 620.

[41] *Swan* v. *Bank of Scotland* (1836) 10 Bli. (N.S.) 627; *A. V. Varadarajulu Naidu* v. *K. V. Thavasi Nadar* (1963) A. Mad. 413.

[42] *Eldridge & Morris* v. *Taylor* (1931) 2 K.B. 416; *Temperance Loan Fund Ltd.* v. *Rose* (1932) 2 K.B. 522.

[46] *Unity Finance Ltd.* v. *Woodcock* (1963) 1 W.L.R. 455.

[47] *Sankara* v. *Virupakshapa* (1883) 7 Bom. 146; *Depak Datt Chaudhari* v. *Secy. of State*, 118 I.C. 443 ('29) A.L. 393; *Badri Baian* v. *Vindhya Pradesh* ('52) A.V.P. 18; *Asharfibi* v. *Prashadilal* ('59) A. Madh. P. 26; *Madho Sah* v. *Sitaram* ('62) A. Pat. 405; *Bank of Bihar* v. *Damodar Prasad*, (1961) A.S.C. 297 = (1961) S.C.J. 380.

[48] *Bank of Bihar* v. *Damodar Prasad, Supra.*

[49] *Cutler* v. *McPhail* (1962) 2 Q.B. 292.

[50] *Narayan Singh* v. *Chhatar Singh*, (1973) A. Raj. 347 (349); *Subramania Chettiar* v. *Moniam P. Narayanswami Gounder*, (1951) A. Mad. 48; *Aypunni Mani* v. *Devassy*, A.I.R. 1966 Ker. 203; *Babu Rao* v. *Babu Manaklal* A.I.R. 1938 Nag. 413;

observed that because the Surety's engagement is one of indemnity it would diminish in like proportion as the liability of the principal debtor diminishes. So if the principal debtor gets any benefit of the provisions of the Act, like Relief of Agricultural Indebtedness Act passed by the State Legislature, those benefits would enure for the benefit of the surety as well because the liability of a surety under a contract could not be more than that of a principal debtor. Moreover the purpose of the beneficial legislation which scales down the debt of the agriculturist with his creditor would be defeated if the surety's liability towards the creditor is not correspondingly reduced because the surety has a right under S. 145 to be reimbursed by the principal debtor for the amount paid by him to the creditor on behalf of the principal debtor. Accordingly, after the judgment creditor gets from the surety the entire decretal amount without being scaled down, then the surety would exercise his right to be reimbursed by the principal debtor for the amount paid under the decree to the creditor. By this, the benefit of the Act to scale down the debt would ultimately be lost to the debtor-agriculturist for whose benefit the Act is passed. However, mere failure to sue within the period of limitation or inability to sue by reason of the provisions of one of the orders under the Civil Procedure Code, would not render the original contract void.[52] In *Mahant Singh* v. *U Ba Yi* the creditor had sued the debtor and surety in one action but on a technical objection by the debtor, had withdrawn the suit against him, without leave of court, and sought to continue the action against the surety. The Privy Council held that the creditor's act amounted to a clear reservation of rights against the surety.[52] As seen earlier a statutory reduction or extinguishment of the principal debtor's liability will operate as a *pro tanto* reduction or extinguishment of the surety debt but its unenforceability against the principal debtor by operation of law of Bankruptcy or Limitation Act is quite different.[53] A discharge of the principal debtor not by act of the party but by operation of law, does not discharge the surety and the remedy of the creditor against the guarantor (surety) should not be restricted to the amount that the debtor may be operation of law be compellable to pay.[54]

So a surety in such a case is liable though the claim against the principal debtor is barred by statute of limitation or by reason of the bankruptcy of the principal debtor.

Surety's liability where original contract is void or voidable.—This section only explains the *quantum* of a surety's obligation when the term of the contract do not limit it, as they often do. It does not follow, conversely, that a surety can never be liable when the principal debtor cannot be held liable. Thus a surety is not discharged from liability by the mere fact that the contract between the principal debtor and creditor was voidable at the option of the former, and was avoided by the former. And when the original agreement is void, as in the case of a minor's contract in India, the surety is liable as a principal debtor; for in such a case the contract of the so-called surety is not a collateral, but a principal, contract.[55]

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but compare *Gopilal* v. *Mts. Trac Industries & Components Ltd.*, A.I.R. 1978 Mad. 134 (D.B.).

[51] *Shek Suleman* v. *Shivram*, (1888) 12 Bom. 71.

[52] *Mahant Singh* v. *U. Ba yi*, 66 I.A. 198 = 41 Bom. L.R. 742 (748).

[53] *Aypunni Mani* v. *Devassy* A.I.R. 1966 Ker. 204, Para 7.

[54] *Bank of India Ltd.* v. *P. F. Cowasjee*, A.I.R. 1955 Bom. 419 para 27.

[55] *Kashiba* v. *Shripat* (1894) 19 Bom. 697; *Indar Singh* v. *Thakur Singh* (1921) 2 Lah. 207; *Jagannath Ganeshram* v. *Shivnarayan* (1940) Bom. 387, 42 Bom. L.R. 451, 190 I.C. 73, ('40) A.B. 247.

Limitation.—The payment of interest by a debtor before the expiration of the period of limitation does not give a fresh starting point for limitation against the surety under sec. 20 of the Limitation Act, 1908* even in the absence of a prohibition by the surety against the payment of interest by the debtor on his account. Payment of interest by the debtor could not be regarded as made by a person liable to pay the debt, nor can the surety be, for the purpose of that section, considered the agent of the principal duly authorised to pay the interest.[56] But where the terms of a contract with the surety imply that he would be bound by the acknowledgements of the principal debtor, as when a surety has agreed to a continuing guarantee with a bank, the surety will be bound by the acknowledgements of the principal debtor.[57]

See also the commentary on sec. 134.

"Continuing guarantee".

129. A guarantee which extends to a series of transactions is called a "continuing guarantee".

Illustrations

(a) *A*, in consideration that *B* will employ *C* in collecting the rents of *B*'s zamindari, promises *B* to be responsible, to the amount of 5,000 rupees, for the due collection and payment by *C* of those rents. This is a continuing guarantee. [See *Durga Priya Chowdhury* v. *Durga Pada Roy* (1928) 55 Cal. 154, 109 I.C. 752, ('28) A.C. 204, where this illustration is relied on.]

(b) *A* guarantees payment to *B*, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to *C*. *B* supplies *C* with tea to the above value of £100 and *C* pays *B* for it. Afterwards *B* supplies *C* with tea to the value of £200. *C* fails to pay. The guarantee given by *A* was a continuing guarantee, and he is accordingly liable to *B* to the extent of £100. [Facts simplified from *Wood* v. *Priestner* (1867) L.R. 2 Ex. 66 and 282.]

(c) *A* guarantees payment to *B* of the price of five sacks of flour, to be delivered by *B* to *C* and to be paid for in a month. *B* delivers five sacks to *C*. *C* pays for them. Afterwards *B* delivers four sacks to *C* which *C* does not pay for. Afterwards *B* delivers four sacks to *C* which *C* does not pay for. The guarantee given by *A* was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks. [*Kay* v. *Groves* (1829) 6 Bing. 276.]

Continuing guarantee.—In a contract of guarantee the consideration may be an entire consideration (and so outside the scope of S. 129 of the Act) or it may be fragmentary consideration supplied from time to time and therefore divisible (and falling within S. 129 of the Act)

In the case of an entire consideration it is indivisible and moves once for all from the person to whom the guarantee is given (i.e. the creditor). The consideration for the contract has flowed once for all and is contained to a single transaction and does not extend to series of transactions. A guarantee given for the performance of a definite engagement which has already come into existence is of this nature. So a guarantee for due

* Corresponding to sec. 19 of the Limitation Act XXXVI of 1963.

[56] *Gopal Daji* v. *Gopal Bin Sonu* (1903) 28 Bom. 248; *Brojendra* v. *Hindustan Co-op. Insurance Society* (1917) 44 Cal. 978.

[57] *Popular Bank Ltd.* v. *United Coir Factories*, I.L.R. (1961) Ker. 493.

performance even of several payments of rent under a lease constitutes a definite engagement of one transaction and it is not a continuing guarantee.[58] The successive payment of rent upon each instalment falling due cannot be treated as successive transactions and it is not a guarantee of the type falling within S. 129 of the Act. Similarly, where a bond was given by a surety for the integrity of a person in consideration of that person's appointment to an office[59] is an example of an indivisible consideration and it is not a continuing guarantee. When the guarantee is not a continuing guarantee, the guarantor cannot end the guarantee at his pleasure nor could it be put to an end by the communication of the death of the guarantor to the creditor.[60] However the position is different when it is not an entire but a fragmentary consideration which is supplied from time to time. In a continuing guarantee a surety may revoke his guarantee after a notice to the creditor and the guarantor is not then responsible with respect to future transactions which may be made by the principal debtor after the surety has revoked the guarantee. Accordingly, a guarantor is liable for all advances made or all the goods supplied upon his guarantee before the notice to determine it is given. Whether in a particular case a guarantee is continuing or not is a question of the intention of the parties, "as expressed by the language they have employed, understanding it fairly in the sense in which it is used; and this intention is best ascertained by looking to the relative position of the parties at the time the instrument is written."[61] A guarantee in this form: "I, *M* will be answerable for £50 sterling that *Y*, butcher, may buy from *H*," was held to be a continuing guarantee to the extent of £50 when it appeared from the circumstances that the parties contemplated a continuing supply of stock to *Y*, in the way of his trade. A guarantee intended to secure advances to be made from time to time in 18 months, the sureties making themselves liable for those advances upto £1000 is a continuing guarantee.[62] *B* became surety under bond to Government for the treasurer of a collectorate. The collector yearly examined the accounts and struck a balance which he certified to be correct. *B* on each occasion executed a new bond, but the old bonds were not cancelled. Subsequently the treasurer was discovered to have embezzled moneys during each year. It was held that it was a continuing guarantee. Further, as the new bond was not in substitution of the old bond, there was no novation and the liability of a surety for the old bond remained.[63] But a guarantee for the due performance of the payment of rent under a lease is not a continuing guarantee as a guarantee has been given for the performance of a definite engagement which has already come into existence. Stipulation for several payments were definite engagements constituting once transaction. Guarantee was given for due fulfilment of these engagements during the lease period.[64] In construing the language of the parties the whole of their expressions must be looked to, and not merely the operative words.

A guarantee of the faithful discharge of his duties by a person appointed to a place of trust in a bank is not a continuing guarantee as there are no series of transaction but it is one transaction,[65] so long as he continues in that place the guarantee remains.

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[58] *Hasan Ali* v. *Waliullah* A.I.R. 1930 All. 730.

[59] *In re Crace* (1902) 1 Ch. 733; See also *Lloyds* v. *Harper* (1880) 16 Ch. D. 290.

[60] *Lloyds* v. *Harper* (1880) 16 Ch. D. 290.

[61] Bobill, C.J., *Coles* v. *Pack* (1869) L.R. 5 C.P. 65, 70.

[62] *Laurie* v. *Scholefield* L.R. 4 C.P. 622.

[63] *Lala Bansidhar* v. *Govt. of Bengal* (1872) 9 B.L.R. 364; 14 M.I.A. 86.

[64] *Hasan Ali* v. *Waliullah* A.I.R. 1930 All. 730; 128 I.C. 821; (1930) A.L.J. 1271.

[65] *Sen* v. *Bank of Bengal* (1920) 47 I.A. 164.

Neither is a guarantee for the payment of a sum certain by instalments within a definite time, a continuing guarantee.[66] The first is a guarantee of an appointment and the second is a guarantee of a loan.

Revocation of continuing guarantee.

130. A continuing guarantee may at any time be revoked by the surety, as to future transaction, by notice to the creditor.

Illustrations

(a) *A*, in consideration of *B*'s discounting, at *A*'s request, bills of exchange for *C*, guarantees to *B*, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. *B* discounts bills for *C* to the extent of 2,000 rupees. Afterwards, at the end of three months, *A* revokes the guarantee. This revocation discharges *A* from all liability to *B* for any subsequent discount. But *A* is liable to *B* for the 2,000 rupees, on default of *C*.

(b) *A* guarantees to *B*, to the extent of 10,000 rupees, that *C* shall pay all the bills that *B* shall draw upon him. *B* draws upon *C*. *C* accepts the bill. *A* gives notice of revocation. *C* dishonours the bill at maturity. *A* is liable upon his guarantee.

Revocation of continuing guarantee.—A continuing guarantee can be revoked under this Act in the following manner:—

(i) by notice to creditor (S. 130)

(ii) by death of surety (S. 131)

(iii) by variance in the terms of the contract between debtor and creditor (S. 133).

Future transactions.—The words "future transaction" must be taken to imply that the operation of this section is confined to cases where a series of distinct and separate transaction is contemplated. It is otherwise in the case of an entire consideration. "Where a continuing relationship is constituted on the faith of a guarantee ... the guarantee cannot be annulled during the continuance of that relationship," and as the surety cannot determine it himself by notice, so his death does not relieve his estate from liability unless the nature of the transaction implies a contract to the contrary under sec. 131. This rule was applied in *Lloyds* v. *Harper*[67] where the father of a person admitted as an underwriting member of Lloyd's gave a guarantee to Lloyd's "for all his engagements in that capacity." Lloyd's was then a voluntary association under which a person once admitted could not be excluded from a membership except for his insolvency. The association as such incurred no liability on the policies underwritten by its members. In 1871, the society was incorporated by Act of Parliament. In 1876 the father (guarantor) died and notice of his death was given to Lloyds. In 1878 son became bankrupt and so ceased to be a member of Lloyds. The question was whether the guarantee terminated with the father's death and notice of it to Lloyds. It was held that guarantee was not determined by the death of the father or by notice of it but the estate of father was liable in respect of engagements contracted by the son.

But a material change in what we may call the guaranteed situation may justify a revocation. Thus, in the common case of a guarantee for a servant's honesty, proved dishonesty on the servant's part entitled the surety to say: "After this you must employ such

[66] *Bhagwandas* v. *Secretary of State* (1926) 28 Bom. L.R. 662, 96 I.C. 248, ('26) A.B. 465.

[67] (1880) 16 Ch.D. 290.

a man, if you will, at your own peril."[68]

This section will not apply to a surety to the receiver appointed by a court of law.[69]

Notice: In a previous suit instituted by the creditor if the surety denied his liability, that may not operate as a notice under his section.[70] This section requires a clear specific notice of revocation.

Revocation of continuing guarantee by surety's death.

131. The death of the surety operates, in the absence of any contract to the contrary, as revocation of a continuing guarantee, so far as regards future transactions.

"Contract to the contrary."—The English rule appears to be that where there is a guarantee subject to revocation by notice, and the surety dies without having revoked it, notice of his death to the creditor operates as a revocation.[71] But this does not govern the construction of the present section.[72] An express provision that a guarantor *or his representatives* may determine the guarantee by notice is an example of such a contract to the contrary as this section contemplates; in such a case mere notice of the death will not be enough.[73]

Liability of two persons, primarily liable, not affected by arrangements between them that one shall be surety on other's default.

132. Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Illustration

A and *B* make a joint and several promissory note to *C*. *A* makes it in fact as surety for *B*, and *C* knows that at the time when the note is made. The fact that *A*, to the knowledge of *C*, made the note as surety for *B*, is no answer to a suit by *C* against *A* upon the note.

Joint debtors and internally one of them a surety for the other.—Where one of two joint debtors is, to the knowledge of the creditor, in fact a surety for the other as between themselves, his immediate liability to the creditor is not qualified, but he is entitled to the rights of a surety under sections 133, 134, 135. "When two or more persons bound as full debtors arrange, either at the time when the debt was contracted or subsequently, that *inter se* one of them shall only be liable as a surety, the creditor after he has notice of the arrangement must do nothing to prejudice the interests of the surety in any

[68] *Phillips* v. *Foxall* (1872) L.R. 7 Q.B. 666, 677, 681.

[69] *Mahomed Ali* v. *Howeson Bros.* (1925) 30 C.W.N. 266; *Bai Somi* v. *Chokshi Ishwardas*, (1894) 19 Bom. 245.

[70] *Bhikabhai* v. *Bai Bhuri*, 27 Bom. 418.

[71] *Coulthart* v. *Clementson* (1879) 5 Q.B.D. 42.

[72] *Durga Priya Chowdhury* v. *Durga Pada Roy* (1928) 55 Cal. 154, 159, 109 I.C. 752, ('28) A.A. 204.

[73] *Re Silvestor* (1895) 1 Ch. 573; *Durga Priya Chowdhury* v. *Durga Pada Roy*, *supra*.

question with his co-debtors. That appears to me to be the law as settled by the judgments of this House in *Oakeley* v. *Pasheller*[74] and *Overend, Gurney & Co.* v. *Oriental Financial Corporation*."[75] This includes the case where one member of a firm retires and another continues the business and agrees to indemnify the outgoing partner.

The provisions of this section do not apply where the liability undertaken is not the same. A party who accepts bills of exchange for the accommodation of another is not precluded by this section from pleading that he was an accommodation acceptor only. See Negotiable Instruments Act, 1881, secs. 37, 38.

Discharge of surety by variance in terms of contract.

133. Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations

(a) A becomes surety to *C* for *B*'s conduct as a manager in *C*'s bank. Afterwards, *B* and *C* contract, without *A*'s consent, that *B*'s salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. *B* allows a customer to overdraw, and the bank loses a sum of money. *A* is discharged from his suretyship by the variance made without his consent and is not liable to make good this loss.

(b) *A* guarantees *C* against the misconduct of *B* in an office to which *B* is appointed by *C*, and of which the duties are defined by an Act of the Legislature. By a subsequent Act the nature of the office is materially altered. Afterwards, *B* misconducts himself. *A* is discharged by the change from future liability under his guarantee, though the misconduct of *B* is in respect of a duty not affected by the later Act.

(c) *C* agrees to appoint *B* as his clerk to sell goods at a yearly salary, upon *A*'s becoming surety to *C* for *B*'s duly accounting for moneys received by him as such clerk. Afterwards, without *A*'s knowledge or consent, *C* and *B* agree that *B* should be paid by a commission on the goods sold by him and not by a fixed salary. *A* is not liable for subsequent misconduct of *B*.

(d) *A* gives to *C* a continuing guarantee to the extent of 3,000 rupees for any oil supplied by *C* to *B* on credit. Afterwards *B* becomes embarrassed, and, without the knowledge of *A*, *B* and *C* contract that *C* shall continue to supply *B* with oil for ready money, and that the payment shall be applied to the then existing debts between *B* and *C*. *A* is not liable on his guarantee for any goods supplied after this new arrangement.

(e) *C* contracts to lend *B* 5,000 rupees on the 1st March. *A* guarantees repayment. *C* pays the 5,000 rupees to *B* on the 1st January. *A* is discharged from his liability, as the contract has been varied inasmuch as *C* might sue *B* for the money before 1st March.

Variation of contract between creditor and principal.—This is a rule of long standing, thus expressed by Lord Cottenham: "Any variance in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such vari-

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[74] (1836) 4 Cl. & F. 207, 42 R.R. 1.

[75] (1874) L.R. 7 H.L. 348; per Lord Watson in *Rouse* v. *Bradford Banking Co.* (1894) A.C. 586, 598.

ance, be substantially performed, will discharge the surety."[76]

Again it was laid down a generation later by a Judicial Committee: "A long series of cases has decided that a surety is discharged by the creditor dealing with the principal or with a co-surety in a manner at variance with the contract, the performance of which the surety has guaranteed."[77] Where a surety handed over a letter of guarantee to the principal debtor for a sum of Rs. 25,000/- but the creditor got the said figure reduced to Rs. 20,000/- and the figure was altered by the debtor, it was held that the guarantor having left the letter with the debtor was estopped from pleading want of authority of the principal debtor to alter and the alteration was unsubstantial and to the benefit of the guarantor and hence the guarantor was not discharged by virtue of such alteration.[78]

In one case[79] a guarantor executed a surety bond for Rs. 25,000/- under sec. 145 C.P. Code and in the suit the defendant submitted to a consent decree for Rs. 22,717.12, costs of the suit and interest, with a stipulation that if Rs. 20,000/- were paid the decree was to be marked satisfied. The plaintiff decree holder took out execution of the decree against the guarantor who pleaded material variation of the guarantee and consequently disclaimed all liability. The Court held that the liability of the surety was reduced by the compromise decree, surety was not prejudiced and the guarantor could not plead variation of the guarantee to his prejudice nor could he disclaim his liability.[79]

Where a guarantee is for the performance of several and distinct contracts or duties, a change in one of those contracts or duties will not affect the surety's liability as to the rest.[80] The intention of a "settlement" contract, for repurchase of goods by the seller from the buyer, is not that the original contract shall be discharged but that the two contracts shall stand together;[81] accordingly, a contract of re-sale to the vendor does not discharge a surety from his original contract.[82] A stipulation in a contract of guarantee whereby the surety purports to waive all his rights, legal, equitable, statutory or otherwise, which may be inconsistent with the guarantee, will not deprive him of his right to discharge under this section because the surety did not thereby consent to a variation of the contract.[83] The general clause in the letter of indemnity under which he waived all rights under the statute cannot be read as implying any consent to the variation within the meaning of S. 133 or as entitling the plaintiffs to enforce the liability against the surety even though, according to law, he (surety) is discharged from such liability. The discharge from liability is an incident of the variation and any such general agreement could not be interpreted as amounting to that specific consent to the variation contemplated by S. 133. Such a consent necessarily implies that the surety has knowledge of the nature of variation.[83]

A becomes surety to *C*, for payment of rent by *B* under a lease. Afterwards *B* and *C* contract, without *A*'s consent, that *B* will pay rent at a higher rate. *A* is discharged

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[76] *Bonar* v. *Macdonald*, (1850) 3 H.L.C. 226 at pp. 238, 239; *Brahmayya & Co.* v. *K. Srinivasan* ('59) A.M. 122.

[77] *Ward* v. *National Bank of New Zealand* (1883) 8 App. Ca. 755, 763.

[78] *M. S. Anirudham* v. *Thomcos Bank Ltd.* ('63) A.S.C. 746.

[79] *Amin Abdul Murtaza* v. *Jivraj Otmal Ratnagiri Bhagidari*, (1972) A. Bom. 88 = 73 Bom. L.R. 715.

[80] *Skillett* v. *Fletcher* (1866-67) L.R. 1 C.P. 217, 1 C.P. 469.

[81] *Uttam Chand Saligram* v. *Jewa Mamooji* (1919) 46 Cal. 534, 542.

[82] *Uderam* v. *Shivbhajan* (1920) 22 Bom. L.R. 711.

[83] *Chitguppi & Co.* v. *Vinayak Kashinath* (1921) 45 Bom. 157: 22 Bom. L.R. 659.

from his suretyship in respect of arrears of rent accruing subsequent to such variance.[84] A surety for a partner was held to be discharged where the partners had extended the business and increased the capital, thus making the partner for whom the surety stood guarantee liable for greater losses than was contemplated at the date of the bond.[85]

An attempted variance which is inoperative, as being against the local law applicable as between the creditor and the principal debtor, will not discharge the surety. A Canadian banker's loan and interest were guaranteed; the bank increased the rate of interest from 7 to 8 per cent, 7 per cent being the highest the bank could legally charge in Canada; the guarantors remained bound for principal and lawful interest.[86] But it is for the promisee (the Creditor) to show performance of the contract before he can hold the promisor (the Surety) to his promise, and therefore, the guarantor will not be held liable if the promisee has failed to perform the original contract.[87] The surety cannot be held bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract, no further question arises. The original contract has gone and unless the surety has assented to the new terms, there is nothing to which he can be bound, for the final obligation of the principal debtor will be something different from the obligation which the surety guaranteed.[88] Presumably he is discharged forthwith on the contract being altered without his consent, for the parties have made it impossible for the guaranteed performance to take place.[88] So in the Privy Council case the guaranteed transaction was an advance of Rs. 1,25,000 on security of four properties. The transaction carried out was an advance of Rs. 1,00,000 on security of three properties. It was held that the sureties cannot he held liable in respect of this performance which was not what they contracted to guarantee.[87]

If there is a substantial variation in a contract without the consent of the surety, the surety will be discharged even though there is no extra perejudice to him.[87] The Court will not go into the question whether there has been any actual prejudice or not.[87] It is for the surety to judge whether he will continue to remain liable on the new contract or not.[87]

If the surety has mortgaged his property as security for his guarantee, any variance in the contract between the creditor and the principal debtor will discharge the surety from liability and release the property mortgaged.[89] The property will be released even if the surety has not made himself personally liable.[90]

Discharge of surety by release or discharge of principal debtor.

134. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

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[84] *Khatun Bibi* v. *Abdullah* (1880) 3 All. 9.

[85] *Jowand Singh* v. *Tirath Ram* (1939) 183 I.C. 740, ('39) A.L. 193.

[86] *Eghert* v. *National Crown Bank* (1918) A.C. 903.

[87] *Pratapsingh* v. *Keshavlal* (1935) 62 I.A. 23, 59 Bom. 180, 37 Bom. L.R. 315, 153 I.C. 700, ('35) A.P.C. 21.

[88] A.I.R. 1935 P.C.24.

[89] *Bolton* v. *Salmon* (1892) 2 Ch. 48.

[90] *Smith* v. *Wood* (1929) 1 Ch. 14; *Jagjiwandas* v. *King Hamilton & Co.* (1931) 55 Bom. 677, 33 Bom. L.R. 709, 134 I.C. 545, ('31) A.B. 337.

Illustrations

(a) *A* gives a guarantee to *C* for goods to be supplied by *C* to *B*. *C* supplies goods to *B*, and afterwards *B* becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here *B* is released from his debt by the contract with *C*, and *A* is discharged from his suretyship.

(b) *A* contracts with *B* to grow a crop of indigo on *A*'s land, and to deliver it to *B* at a fixed rate, and *C* guarantees *A*'s performance of this contract. *B* diverts a stream of water which is necessary for irrigation of *A*'s land, and thereby prevents him from raising the indigo. *C* is no longer liable on his guarantee.

(c) *A* contracts with *B* for a fixed price to build a house for *B* within a stipulated time, *B* supplying the necessary timber. *C* guarantees *A*'s performance of the contract. *B* omits to supply the timber. *C* is discharged from his suretyship.

Creditor's discharge of principal debtor.—"The law upon this subject is clear and well settled. If the creditor, without the consent of the surety, by his own act destroys the debt, or derogate from the power which the law confers upon the surety to recover it against the debtor in case he shall have paid it to the creditor, the surety is discharged."[91]

But it is to be observed, with regard both to this and to the following section, that if the creditor expressly reserves his remedies against the surety, or generally his securities and remedies against persons other than the principal debtor, the surety is not discharged. In section 135, the creditor in order to reserve his remedies has to obtain assent of the surety. In England this is as well settled as the main rule; and it is really quite consistent with the terms of the present section as well as sec. 135. This has been followed in India.[92] The surety's right to indemnity against the principal debtor is a necessary result of such a reservation. If a creditor, without ceasing to hold the principal debtor liable, prefers to sue the more solvent of two sureties for the debt, this does not discharge the other surety.[93]

But where there is a final and full release of the principal debtor by a complete novation or otherwise, "the remedy against the surety is gone because the debt is extinguished, and where such actual release is given no right can be reserved because the debt is satisfied, and no right of recourse remains when the debt is gone." Acceptance of a new debtor instead of the old one puts an end to the liability of a surety for the old debt.[94]

Where a creditor filed a suit against the principal debtor and the surety but the principal debtor could not be traced and served with the writ of summons and consequently the name of the principal debtor was struck off under O IX r. 5 of the Civil Procedure Code. The striking off the name of principal debtor would not amount to an omission on the part of the creditor so as to discharge the surety and hence the creditor was entitled to the decree against the surety alone.[95]

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[91] Kelley, C.B., in *Cragoe* v. *Jones* (1873) L.R. 8 Ex. 81, 82.

[92] *Ram Ranjan* v. *Chief Administrator* ('60) A.C. 416.

[93] *Bhagwandas* v. *Secretary of State* (1926) 28 Bom. L.R. 662, 96 I.C. 240, ('26) A.B. 465.

[94] *Commercial Bank of Tasmania* v. *Jones* (1893) A.C. 313, 316.

[95] *Nathabhai* v. *Ranchhodlal*, 16 Bom. L.R. 696; *Mahant Singh* v. *U Ba yi*, 41 Bom. L.R. 742 (749) = 66 I.A. 198.

"Act or omission of the creditor."—The acts or omissions contemplated by this section may be those referred to in secs. 39, 53, 54, 55, 63 and 67 (*ante*). If the principal debtor is discharged from his obligation by reason of any acts or omissions specified in those sections, the liability of the surety will determine. But the act or omission must be one of which the legal consequence is the discharge of the principal debtor. For further comments read commentary under sec. 139.

Creditor's omission to sue principal within limitation period.—The question whether a surety is discharged when a creditor allows his remedy against the principal debtor to become barred by limitation may be considered at this stage. On this point there are two opposite views taken by the Indian High Courts. On the one hand, it has been held by the High Courts of Bombay,[96] Calcutta,[97] Madras,[98] Lahore,[99] Allahabad[1] and Rangoon[2] that the surety is not under such circumstances discharged from liability to the creditor; the Judicial Commissioner's Court at Peshawar,[3] on the other hand, has held that the surety is discharged. The Madras High Court relies on the well-known distinction between the barring of the remedy by action and the complete extinction of a debt. It is also thought in England that omission of the creditor to sue within the period of limitation does not discharge a surety for another and more substantial reason, that "the surety can himself set the law in operation against the debtor.[4] In a Privy Council case[5] the reasoning of the majority of the High Courts has been preferred by their Lordships and the point, therefore, may be regarded as settled. The Supreme Court has also held that a creditor is entitled to recover the debt from the surety though the suit against the principal debtor is barred.[6]

The provisions of this section are qualified by section 137.[5]

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.

135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor discharges the surety, unless the surety assents to such contract.

Contract to give time to principal debtor.—The general principle was thus stated in the earliest decision on this subject: "It is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact

96 *Sankara* v. *Virupakshapa*, (1883) 7 Bom. 146.

97 *Krishto Kishori Chowdhrain* v. *Radha Romun* (1885) 12 Cal. 330.

98 *Subramania* v. *Gopala* (1909) 33 Mad. 308.

99 *Dil Mahommed* v. *Sain Das* 100 I.C. 922, ('27) A.L. 396; *Bharat National Bank* v. *Thakur Das* (1935) 16 Lah. 757, 156 I.C. 553, ('35) A.L. 729; *Nur Din* v. *Allah Ditta* (1931) 12 Lah. 546, 133 I.C. 628, ('32) A.L. 419.

1 *Aziz Ahmad* v. *Sher Ali*, A.I.R. 1956 All. 8 (F.B.).

2 *U Ba Pe* v. *Ma Lay* (1932) 12 Rang. 398, 139 I.C. 138, ('32) A.R. 88.

3 *Chattar Singh* v. *Makhan Singh* ('36) A. Pesh. 20.

4 Per Lindley, L.J., *Carter* v. *White* (1883) 25 Ch. Div. 666, 672.

5 *Mahanth Singh* v. *U Ba Yi* (1939) 66 I.A. 198, 41 Bom. L.R. 742, 181 I.C. 1, ('39) A.P.C. 110.

6 *Bombay Dyeing & Manufacturing Co. Ltd.* v. *State of Bombay* (1958) S.C.R. 1122, 1134, 1135 = A.I.R. 1958 S.C. 328.

his affairs (for they are as much his as your own) without consulting him.''[7]

A contract to give time to the principal debtor means that the creditor is precluded from suing the principal debtor until that time expires.[8]

A contract whereby the creditor promises to give time to the principal debtor must be distinguished from an unconditional contract not to sue him. In the former case, the remedy of the creditor is merely suspended until the determination of the fixed period; in the latter case the principal debtor is completely released from his obligation so as to entitle the surety to a discharge under sec. 134, apart from the specific provisions of this section. In either case, the mere formation of the contract is sufficient to operate as a discharge of the surety irrespective of any forbearance that may be exercised under it. The reason of this rule appears to be that a surety has a right, immediately on the debt becoming due, to insist upon proceedings being at once taken by the creditor against the principal debtor, and any contract that would prevent the creditor from suing him would be inconsistent with that right (s. 139).[9] In the Supreme Court case an agreement between a creditor Bank and a debtor provided that the debtor should be responsible for the quantity of the goods pledged with the creditor. The goods pledged with the creditor Bank showed shortage of Rs. 35,000 and the Bank immediately asked the debtor to make up the deficit and the debtor promised to make up the deficit within a month but failed to do so. The surety contended that the conduct of the Bank in giving time to the principal debtor to make up the deficit absolved the surety of the liability under the guarantee. It was held that the Bank's act of giving time to the debtor to make up the deficit did not amount to giving of time within the meaning of S. 135 of the Act.[10]

A consent decree, made without the surety's consent for payment by instalments of the sum due from the principal debtor, is a composition such as to discharge the surety.[11]

It is not necessary that the contract should be express; a tacit or implied contract inferred from the acts of the parties is equally binding as an express one. Thus the acceptance of interest in advance by a creditor operates as a general rule as an agreement to give time to the principal debtor and consequently as a discharge to the surety, for the creditor is in that event precluded from suing the principal debtor until the time covered by the payment in advance has expired.[12]

Surety's assent.—The operation of the rules as to giving time to the principal debtor may be excluded by express agreement. If the instrument creating the debt and the suretyship declares that the surety or sureties shall be taken, as between themselves and the creditor, to be principal debtors, and shall not be released by reason of time being given, or of any other forbearance, act or omission of the creditor which, but for this provisions would discharge the sureties, then any defence on these grounds is effectually barred, and it is unnecessary to consider whether the facts would otherwise raise it.[13]

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[7] *Rees* v. *Berrington*, 2 Ves. Jr. 540 (Lord Loghborough).

[8] *Kali Prasanna* v. *Ambica Charan* (1872) 9 B.L.R. 261; *T. N. S. Firm* v. *Mahomed Hussain* (1933) A. Mad. 756: (1934) 57 Mad. 398: 146 I.C. 608.

[9] See *Protab Chunder* v. *Gour Chunder* (1878) 4 Cal. 132, 134.

[10] *Amritlal* v. *State Bank of Travancore* A.I.R. 1968 S.C. 1432, 1435-36.

[11] *National Coal Co.* v. *Kshitish Bose & Co.* (1926) 30 C.W.N. 540, 95 I.C. 409, ('26) A.C. 818; *Mahomedalli Ibrahimji* v. *Lakshmibai Anant Palande* (1930) 54 Bom. 118, 31 Bom. L.R. 1442, 124 I.C. 227, ('30) A.B. 122; *Bondru* v. *Dagadu*, 45 Bom. L.R. 438.

[12] *Kali Prasanna* v. *Ambica Charan* (1872) 9 B.L.R. 261.

[13] *Greenwood* v. *Francis* (1899) 1 Q.B. 312

Assent of the surety to such a contract to give time may be obtained either prior or subsequent to the contract.[14] The reason for obtaining the assent of the surety is to enable the creditor to reserve his remedy against the surety.

Surety not discharged when agreement made with third person to give time to principal debtor.

136. Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration

C, the holder of an overdue bill of exchange drawn by *A* as surety for *B*, and accepted by *B*, contracts with *M* to give time *B*. *A* is not discharged.

In the above illustration *C* is the creditor, *B* is the principal debtor and *A* is surety for *B*. If *C* agrees with *B* to give time to *B*, the contract between *C* and *B* for which *A* stood surety is varied and *A* is no longer liable. But if *C* contracts with a stranger *M* to give *B* time, that is a contract which *B* cannot enforce. *B*'s liability under his contract with *C* is not affected and *A* is not discharged. In an English case the law was stated as follows:

"It is clear that when the creditor enters into a binding contract with the principal debtor to give him time without the assent of the sureties, and without reserving his remedy against the sureties, such giving of time discharges the sureties. . . . But, to produce this result two things are necessary. There must be a binding contract to give time, capable of being enforced by the principal debtor and hence the contract must be with the principal debtor. If merely made with a third party it will not do, as was decided in *Frazer* v. *Jordan*,[15] where in an action by the holder against the drawer of a bill of exchange it was held to be no defence to the drawer that the holder had, without the drawer's consent, made a binding contract with a third party to give time to the acceptor, in consideration of an undertaking by the third party to see the bill paid."[16] If there is no contract with the principal debtor to give time, the mere taking of additional security does not discharge the surety.[17]

Creditors forbearance to sue does not discharge surety.

137. Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Illustration

B owes to *C* a debt guaranteed by *A*. The debt becomes payable. *C* does not sue *B* for a year after the debt has become payable. *A* is not discharged from the suretyship.

"Mere forbearance"—Section 135 enacts that a contract between the creditor and the principal debtor by which the creditor promises not to sue the principal debtor dis-

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C.A. *Krishnaswami* v. *Travancore National Bank* (1940) Mad. 757, ('40) A.M. 437.

[14] *Hari Prasad* v. *Chandrajirao*, A.I.R. (1962) M.P. 69.

[15] 8 E. & B. 303.

[16] *Clarke* v. *Birley* (1889) 41 Ch. D. 422, 433-434, per North, J.

[17] *T. N. Firm* v. *Mahomed Hussain* (1934) 57 Mad. 398, 146 I.C. 608, ('33) A.M. 756.

charges the surety. But there must be a positive agreement not to sue and mere neglect to sue will not discharge the surety.[18] The illustration refers to failure to sue before the period of limitation has expired. The case where the creditor fails to sue until the period of limitation has expired is dealt with in the note to s. 134. Reading both sections together, it is evident that the legislature contemplated that mere forbearance would not have the legal consequence of discharging the principal debtor.

Release of one co-surety does not discharge others.

138. Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

Release of one of several sureties.—This section applies to co-surities whether they are joint and/or several. This section is a necessary consequence of the principle laid down in sec. 44. It is a deliberate extension of a rule which in the Common Law is limited to the case of co-sureties contracting severally and not jointly. Having regard to the language of this section and of section 44, this Act places joint sureties on par with co-sureties.

Discharge of surety by creditor's act or omission impairing surety's eventual remedy.

139. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Illustrations

(a) *B* contracts to build a ship for *C* for a given sum, to be paid by instalments as the work reaches certain stages. *A* becomes surety to *C* for *B*'s due performance of the contract. *C*, without the knowledge of *A*, prepays to *B* the last two instalments. *A* is discharged by this prepayment.

(b) *C* lends money to *B* on the security of a joint and several promissory note made in *C*'s favour by *B*, and by *A* as surety for *B*, together with a bill of sale of *B*'s furniture, which gives power to *C* to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, *C* sells the furniture, but owing to his misconduct and wilful negligence, only a small price is realised. *A* is discharged from liability on the note.

(c) *A* puts *M* as apprentice to *B*, and gives a guarantee to *B* for *M*'s fidelity. *B* promises on his part that he will, at least once a month, see *M* make up the cash. *B* omits to see this done, as promised, and *M* embezzles. *A* is not liable to *B* on his guarantee.

Act or omission of creditor tending to impair surety's remedy.—The injurious quality to be considered is tendency to diminish the surety's remedy or increase his liability. Transactions having an immediate tendency to cause or permit the principal debtor to make default are only one species of those to which the surety may object. "In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficial to the surety—and the answer has always been that

[18] *Oriental Financial Corporation* v. *Overend Gurney & Co.* (1871) L.R. 7 Ch. 142, 150 (Lord Hatherley); *Sankaranarayana* v. *Kottayam Bank* ('50) A. Tra-Coch. 66.

the surety himself was the proper judge of that— and that no arrangement different from that contained in his contract is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is whether what has been done lessens that security.[19]

But mere passive acquiescence by the creditor in irregularities on the part of the principal debtor such as laxity in the time and manner of rendering accounts by a collector of public moneys whose fidelity is guaranteed, will not of itself discharge the surety.[20]

The employer of a servant whose due performance of work is guaranteed does not contract with the surety that he will use the utmost diligence in checking the servant's work.[21] If the employer of a servant whose fidelity has been guaranteed continues to employ him after a proved act of dishonesty, the surety is discharged.[22]

The Mysore High Court held in respect of a surety who had given a fidelity bond for a bank's manager's service that the failure of the directors to carry out scrutiny of cash balances and appointment of a treasurer as required by the bye-laws discharged the surety.[23]

Act or omission impairing surety's eventual remedy.—The case in which a party is discharged by an act or omission of the creditor, of which the legal consequence is the discharge of the principal debtor, has been dealt with in sec. 134 above. Under the present section a surety will be discharged by acts or (subject to the caution above given) omissions of the creditor specified therein which, though not having the legal consequence of discharging the principal, impair the eventual remedy of the surety against him.[24]

Where a creditor failed to execute the decree obtained by him against the debtor within one month thereof as required specifically by the bond and allowed the decree to get time barred, it was held that the creditor had impaired the eventual remedy of the surety and hence the latter was discharged.[25]

As to negotiable instruments, it is specially provided by Act XXVI of 1881, sec. 39, that where the holder of a negotiable instrument without the consent of the indorser destroys or impairs the indorser's remedy against a prior party, the indorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity.

140. Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

Rights of surety on payment or performance.

This section lays down a general principle of which the most important practical application is to be found in sec. 141. It seems that the intention of the Act is to keep

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19 Lord Langdale, *Calvert* v. *London Dock Co.*, 2 Keen 638 at p. 644.

20 *Mayor of Durham* v. *Fowler* (1889) 22 Q.B.D. 394.

21 *Mayor of Kingston-upon-Hull* v. *Harding* (1892) 2 Q.B. 494, C.A.

22 *Phillips* v. *Foxall*, L.R. 7 Q.B. 666; *Co-operative Commission Shop* v. *Udham Singh* (1944) A. Lah. 424; *Radha Kanta* v. *United Bank of India* (1955) A.C. 217.

23 *Chandrasekhara Pai* v. *Town Co-op. Bank*, A.I.R. (1965) Mys. 209.

24 See *Pogose* v. *The Bank of Bengal* (1877) 3 Cal. 174; *Ghuznavi* v. *National Bank of India* (1916) 20 C.W.N. 562.

25 *Hazari* v. *Chunni Lal*, 8 All. 260.

alive for surety's benefit any right of the creditor, under a security or otherwise, which would otherwise have been extinguished at law by the payment of the debt or performance of the duty.

"When a surety is only a surety for a part of the debt, and has paid that part of the debt, he is entitled to receive the dividend which the principal debtor pays in respect of that sum which the surety has discharged."[26] In such a case it may be said that "the right of the surety arises merely by payment of the part, because that part, as between him and the principal creditor, is the whole." Such a surety has a right, having paid part of the debt in that way, to stand *pro tanto* in the shoes of the principal creditor. But a surety who has become surety, though with limited liability in respect of the entire debt, has no rights by way of subrogation or in preference to the creditor until the creditor is fully paid.[27] So a distinction is made as to whether a person is a surety for a part of the debt only i.e. a person is a surety of a limited amount for an ascertained debt, in which event his right comes into existence immediately on payment of that fraction, for that fraction is, so far as he is concerned the whole.[28] On the other hand a person may be a surety though his liability may be limited in respect of the entire debt, i.e. guarantee is given for the whole of the debt with a limitation on the liability of a surety to a specified amount, in which case his position is different as he has no right of subrogation until the creditor is fully paid.

Moreover, the benefit of this principle is intended for persons who, though not actually sureties, are in an analogous position. The indorser of a bill of exchange "is primarily liable as principal on the bill, and is not strictly a surety for the acceptor;" but "he has this in common with a surety for the acceptor, that" after notice of dishonour "he is entitled to the benefit of all payments made by the acceptor, and is entitled, on paying the holder, to be put in a situation to have a right to sue the acceptor."[29]

See as to the right of a payer of a bill of exchange for the honour of any party liable upon it the provision of the Negotiable Instruments Act XXVI of 1881, sec. 114.

Surety's right to benefit of creditor's securities.

141. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Illustrations

(a) *C* advances to *B*, his tenant, 2,000 rupees on the guarantee of *A*. *C* Has also a further security for the 2,000 rupees by a mortgage of *B*'s furniture. *C*. cancels the mortgage. *B* becomes insolvent, and *C* sues *A* on his guarantee. *A* is discharged from liability

[26] *Gray* v. *Seckham* (1872) L.R. 7 Ch. 680, 683, per Mellish, L.J.

[27] *Re Sass* (1896) 2 Q.B. 12, 15; he becomes only a creditor of the principal debtor for what he has paid; *Darbari Lal* v. *Mahbub Ali Mian* (1927) 49 All. 640, 101 I.C. 513, ('27) A.A. 538.

[28] *Bhushayya* v. *Suryanarayana* A.I.R. 1944 Mad. 195, 204.

[29] *Duncan Fox & Co.* v. *North and South Wales Bank* (1880) 6 App. Cas. I, 18.

to the amount of the value of the furniture. [*Cf Pearl* v. *Deacon* (1857) 1 De G. & J. 461, where the creditor, being also the debtor's lessor, destroyed the security on the furniture by distraining for rent (which in English law is a paramount right).]

(b) *C*, a creditor whose advance to *B* is secured by a decree, receives also a guarantee for that advance from *A*. *C* afterwards takes *B*'s goods in execution under the decree, and then, without the knowledge of *A*, withdraws the execution. *A* is discharged.

(c) *A*, as surety for *B*, makes a bond jointly with *B* to *C*, to secure a loan from C to *B*. Afterwards, *C* obtains from *B* a further security for the same debt. Subsequently, *C* gives up the further security. *A* is not discharged.

Surety's right to benefit of securities.—The law in England is different. It has been stated as follows: "As a surety, on payment of the debt, is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship,[30] if the creditor who has, or ought to have had, them in his full possession or power loses them or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged. A surety, moreover, will be released, if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands."[31]

It will be seen that the present section, by limiting the surety's right to securities held by the creditor at the date of his becoming surety, has adopted a view which in England has now been treated as untenable. In *Amritlal* v. *State Bank of Travancore*[32] the Supreme Court clarified the point by saying that S. 141 of the Act has limited the surety's right to securities held by the creditor at the date of his becoming surety, while under English law the surety is entitled to the securities given to the creditor both before and after the contract of surety.

The rule is not confined to securities in any technical sense. A surety is entitled to the benefit of the principal debtor's set-off against the creditor, if it arises out of the same transaction; this follows from the surety's right to be indemnified by his principal, combined with the equitable maxim of avoiding circuity of action.[33]

The High Court of Bombay has cited the reason of the present rule as laid down by Turner, V.C.[34]: "I take it to be, because, as between the principal and surety, the principal is under an obligation to indemnify the surety [see s. 145, below]; and it is, as I conceive from this obligation that the right of the surety to the benefit of securities held by the creditor is derived." If the Creditor loses or parts with such security— In *Amrit Lal* v. *State Bank of Travancore*.[32] the Supreme Court observed that the word security in S. 141 is not used in any technical sense. It includes all rights which the creditor has against the property at the date of the contract. The surety is entitled on payment of the debt or performance of all that he is liable for to the benefit of the rights of the creditor against the debtor. If the creditor has lost or parted with the security, without the consent of the surety, the surety is discharged to the extent of the value of the security lost or

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[30] See judgement of Hall, V.C., in *Forbes* v. *Jackson* (1882) 19 Ch. D. 615, 619.

[31] Notes to *Rees* v. *Berrington* (1795) in 2 Wh. & T.L.C. as approved by Hannen, J., *Wulff* v. *Jay* (1872) L.R. 7 Q.B. 756, 764.

[32] A.I.R. 1968 S.C. 1432, 1437, para 7.

[33] *Bechervaise* v. *Lewis* (1872) L.R. 7 C.P. 372.

[34] *Yonge* v. *Reynell* (1852) 9 Hare, at pp. 818-819; *Goverdhandas* v. *Bank of Bengal* (1890) 15 Bom. 48, 63.

parted with. So where the creditor Bank due to its negligence or some other reason lost the pledged goods with itself, it was held that the surety was discharged to that extent. Loss of security by negligence of the creditor cannot be equated with release of security which implies a volitional act of the creditor.[36] Similarly in *State of M.P.* v. *Kaluram*[35] K. executed a surety bond undertaking to discharge the liability arising out of any act, or omission or negligence or default of a forest contractor who was required to pay the bid sum in four instalments. The Contract rules provided for preventing the contractor from removing the forest goods if there in non-payment of the instalments due. However, the authority responsible for supervising the contract allowed the contractor to remove the felled trees without making the payment. The State of M.P. started proceedings to recover the balance of the amount through surety. It was held that surety was discharged as the State had lost or parted with the security i.e. forest produce.

"To the extent of the value of the security."—Where a creditor sued the principal debtor and the surety on a mortgage bond, and in his plaint formally relinquished his claim against part of the mortgaged property which was worth the amount guaranteed by the surety, it was held that the surety was discharged.[37]

When surety becomes entitled to benefit of creditor's securities.—The Act does not lay down at what point of time the surety is entitled to have the creditor's securities made over to him wholly or in part, whether it is when the debt of the creditor is paid off, or when the surety pays the amount of his guarantee. This point arose in *Goverdhandas* v. *Bank of Bengal*,[38] where it was held that a surety was not entitled to the benefit of a portion of the creditor's securities until the whole of the debt due to the creditor was paid off. In that case a surety who had guaranteed *an aliquot* and defined portion of a past due debt secured by a mortgage, claimed to be entitled, *on payment by him of the portion of the debt* which he had guaranteed, to share in the mortgage in proportion to the amount of the debt which he had guaranteed and paid before the mortgagee had been paid the full amount of his mortgage debt. The Court held that the right of the creditor to hold his securities until the whole debt is discharged is paramount to the surety's claim upon such securities; and that the surety's claim could only arise when the creditor's claim against such securities is satisfied. Farran, J., in rejecting the surety's claim said: "It seems to me to be a strange doctrine that a creditor not fully secured by a mortgage who obtains the benefit of a surety for part of his mortgage debt in order to further secure himself by that very act is deprived of portion of the security the inadequacy of which was a reason for demanding the surety; or that a person advancing say Rs. 10,000 on a mortgage which is valued only at Rs. 5,000 and has Rs. 5,000 of his advance guaranteed by a surety, is only in reality secured to the extent of Rs. 7,500 by reason of the surety's right to claim the benefit of half the mortgage security on paying his half of the debt. To hold so would, I think, defeat the intention of the parties to such a transaction. A principle of equity is seldom adopted which has that effect. If such were the result of sec. 141 of the Contract Act, I should expect to find the wording of sec. 140 repeated in sec. 141. The striking difference in the language of the two sections is a strong argument against the plaintiff's contention."[39]

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[35] A.I.R. 1968 S.C. 1432; See also *State Bank of Saurashtra* v. *Chitranjan* (1980) 4 S.C.C. 516; *State of M.P.* v. *Kaluram* A.I.R. 1967 S.C. 1105 = (1967) 1 S.C.R. 266.

[36] (1980) 4. S.C.C., 523, para 13.

[37] *Narayan* v. *Ganesh* (1870) 7 B.H.C.A.C. 118.

[38] (1890) 15 Bom. 48.

[39] *Goverdhandas* v. *Bank of Bengal* (1890) 15 Bom. 48 at pp. 64, 65.

It is submitted that the answer lies in deciding the question whether the surety has guaranteed a fraction only of the debt or whether a guarantee is given for the whole debt with a limitation on the liability of a surety to a specified amount, a point which we have already discussed earlier on S. 140 of the Act.

Guarantee obtained by misrepresentation invalid.

142. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

The English authorities on the subject matter of this and sec. 143 will be dealt with together under that section.

Guarantee obtained by concealment invalid.

143. Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

Illustrations

(a) *A* engages *B* as clerk to collect money for him. *B* fails to account for some of his receipts, and *A*, in consequence, calls upon him to furnish security for his duly accounting. *C* gives his guarantee for *B*'s duly accounting. *A* does not acquaint *C* with *B*'s previous conduct. *B* afterwards makes default. The guarantee is invalid.

(b) *A* guarantees to *C* payment for iron to be supplied by him to *B* to the amount of 2,000 tons. *B* and *C* have privately agreed that *B* should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from *A*. *A* is not liable as a surety.

Guarantee obtained by misrepresentation or concealment.—English law is settled that, although the contract of suretyship is "one in which there is no universal obligation to make disclosure"—that is, it is not, like a contract of insurance, liable to be avoided by the mere non-disclosure of any material fact whatever—still the surety is entitled to know so much as will tell him what is the transaction for which he is making himself answerable; and he will be discharged if there is either active misrepresentation of the matter by the creditor, or silence amounting in the circumstances to misrepresentation. "Very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid."[40]

Thus where a surety guarantees an agent's existing and future liabilities in account with his employer, and the agent is in fact already indebted to the employer for more than the full amount of the guarantee and the statements made about his position are calculated to mislead, though not false in terms, this is evidence of material misrepresentation on the creditor's part.[41]

To avoid a guarantee under this section it must be proved not only that there was silence as to a material circumstance, but that the guarantee was obtained by means of such silence.[42] The meaning of the words "keeping silence" in this section was consid-

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[40] Fry, J., *Davies* v. *London and Provincial Marine Insurance Co.* (1878) 8 Ch. D. 469, 475.

[41] *Lee* v. *Jones* (1863) 17 C.B. N.S. 482, Ex. Ch.

[42] Per Cur. in *Secretary of State for India* v. *Nilamekan* (1883) 6 Mad. 406, 408.

ered by Sargent, C.J., in a Bombay case.[43] The expression "keeping silence," said the learned Judge, "clearly implies intentional concealment as distinguished from mere non disclosure, which no doubt is of itself a fatal objection in insurance policies, and virtually, we think, expresses what is laid down in *North British Insurance Co.* v. *Lloyd*,[44] that the withholding must be fraudulent, which necessarily must be the case when a meterial circumstance is intentionally concealed."

Misrepresentation or silence by creditor.—The two sections speak of the said acts or omissions on the part of the creditor and not on the part of the debtor. In the latter event, these sections would not apply.[45]

Guarantee on contract that creditor shall not act on it until co-surety joins.

144. Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

A surety who "entered into the obligation upon the understanding and faith that another person would also enter into it . . . has a right in equity to be relieved on the ground that the instrument has not been executed by the intended co-surety.[46]

Implied promise to indemnity surety.

145. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations

(a) *B* is indebted to *C* and *A* is surety for the debt. *C* demands payment from *A* and on his refusal sues him for the amount. *A* defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from *B* the amount paid by him for costs, as well as the principal debt.

(b) *C* lends *B* a sum of money, and *A* at the request of *B* accepts a bill of exchange drawn by *B* upon *A* to secure the amount. *C*, the holder of the bill, demands payment of it from *A*, and, on *A*'s refusal to pay, sues him upon the bill. *A*, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from *B* the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) *A* guarantees to *C*, to the extent of 2,000 rupees, payment for rice to be supplied by *C* to *B*. *C* supplies to *B* rice to a less amount than 2,000 rupees, but obtains from *A* payment of the sum of 2,000 rupees in respect of the rice supplied. *A* cannot recover from *B* more than the price of the rice actually supplied.

Surety's right to indemnity.—The proposition "that as soon as his obligation to

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[43] *Balkrishna* v. *Bank of Bengal* (1891) 15 Bom. 585, 591.

[44] 10 Ex. 523, 532.

[45] *Debendra* v. *Administrator General of Bengal*, 33 Cal. 713.

[46] *Evans* v. *Bremridge* (1856) 8 D.M.G. 100, 109.

pay becomes absolute, [a surety] has a right in equity to be exonerated by his principal,''[47] is treated throughout the English authorities as fundamental, and as furnishing the reason for several of the more specific rules. Further, it has long been settled in England that ''a surety is entitled to come'' to the Court ''to compel the principal debtor to pay what is due from him,'' provided that an ascertained debt is actually due; and this relief is not limited, as at one time supposed, to cases where the creditor has refused to sue the principal debtor.[48]

The surety's only claim is to be fully indemnified and the English rule is followed that the right to indemnity arises as soon as the obligation to pay becomes absolute.[49] He cannot compound the debt for which he is liable, and then proceed as if he stood in the creditor's place for the full amount. ''Where a surety gets rid of and discharges an obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount; but can only claim, as against his principal, what he has actually paid in discharge of the common obligation.[50]

''Whatever sum he has rightfully paid.''—Where sureties to a money bond acknowledged their liability before the claim against the principal debtor became time barred and upon the creditor suing the sureties and obtaining a decree against them and in execution of such decree one of the sureties paid the decretal amount, it was held that the amount must be treated as a sum ''rightfully paid under the guarantee.''[51] As per Madhya Pradesh High Court it was important in the aforesaid Bombay case that ''the surety had kept the liability alive by bonafide payment of interest within time to the creditor and it was because of these payments of interest within time that the Bombay High Court held that the payment made by the surety to the creditor was not wrongful within the meaning of S. 145 of the contract Act''.[52] According to Madhya Pradesh High Court the question whether the payment made by the surety was or was not rightful has to be decided in the context of the circumstances. If the claim of the creditor is barred by time against both the surety and the debtor, then prima facie the surety's payment to the creditor would not be rightful or just. However, the surety may prove that this payment, though it was made after the expiry of the period of limitation, was yet rightful. This expression includes ''not only coin, but also property, of whatever kind, which is parted with in lieu of money, but not the mere incurring of a pecuniary obligation of the creditor in lieu or discharge of the debt owing to him.[53] Therefore if the creditor accepts in discharge of the debt a promissory note executed by the surety and an other person, that is not equivalent to a payment of the debt by the surety.[54] The reason is that, the principal debtor being bound to indemnify the surety, the cause of action cannot be merely the procuring by the surety of the principal debtor's exoneration from liability to

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[47] *Bechervaise* v. *Lewis* (1872) L.R. 7 C.P. 372, 377.

[48] *Ascherson* v. *Tredegar Dry Dock, etc., Co.* (1909) 2 Ch. 401, 406.

[49] *Sripatrao* v. *Shankarrao* (1930) 32 Bom. L.R. 207, 127 I.C. 330, ('30) A.B. 331.

[50] *Reed* v. *Norris* (1837) 2 My. & Cr. 361, 375, (Lord Cottenham). On the point that there is no subrogation, *cf. Periamanna Marakkayar* v. *Banians & Co.* (1925) Mad. 156, 95 I.C. 154, ('26) A.M. 544.

[51] *Raghavendra* v. *Mahipat*, 27 Bom. L.R. 178: 49 Bom. 202 = A.I.R. 1925 Bom. 244.

[52] *Tarachand Lakhmichand Chuhan* v. *Gopal* A.I.R. 1959 M.P. 297, 298, para 4.

[53] Per Bhashyam Ayyangar, J., in *Putti Narayanamurthi* v. *Marimuthu* (1902) 26 Mad. 322, 328.

[54] *Putti Narayanamurthi* v. *Marimuthu* (1902) 26 Mad. 322, 328.

the creditor, but must also include the surety being himself damnified,[55] and the surety cannot be said to be damnified unless the payment is actually made. But a different approach is taken by the Bombay High Court[56] holding that S. 145 does not debar a surety from making a claim against the principal debtor in cases where he has not made the payment under the guarantee but has only become liable "in praesenti" to make the payment and a suit for indemnity at his instance is maintainable.

Guarantee without concurrence of principal debtor.—Where a person becomes a surety without the knowledge and consent of the debtor, the only rights which he acquires are those given by secs. 140 and 141, and not those given by this section.[57]

Co-sureties liable to contribute equally.

146. Where two or more persons are co-sureties for the same debt or duty, either jointly or severally and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt or of that part of it which remains unpaid by the principal debtor.

Illustrations

(a) *A*, *B* and *C* are sureties to *D* for the sum of 3,000 rupees lent to *E*. *E* makes default in payment, *A*, *B* and *C* are liable, as between themselves, to pay 1,000 rupees each.

(b) *A*, *B* and *C* are sureties to *D* for the sum of 1,000 rupees lent to *E*, and there is a contract between *A*, *B* and *C* that *A* is to be responsible to the extent of one-quarter, *B* to the extent of one-quarter, and *C* to the extent of one-half. *E* makes default in payment. As between the sureties, *A* is liable to pay 250 rupees, and *C* 500 rupees.

Contribution by co-sureties.—This has long been elementary. The earliest case usually cited settled that co-sureties need not be bound under the same contract and laid down that the right to contribution is independent of any agreement for that purpose.[58]

It must be observed that a "surety has no claim against his co-sureties until he has paid more than his share of the debt to the principal creditor,"[59] for only then does it become certain that there is ultimately any case for contribution at all. But a judgment against the surety at the suit of the creditor for the full amount of the guarantee (or an equivalent process, such as the allowance of a claim for the sum in the administration of the surety's estate) will have the same effect as payment for this purpose, and entitle the surety or his representatives to a declaration of the right to contribution.[60]

All the co-sureties are entitled to share in the benefit of any security or indemnity which any one of them has obtained from the principal debtor, and this whether they knew of it or not,[61] the surety bringing in, under this rule, what he receives from his

[55] *Ibid.*, 326.

[56] *Sripatrao Sadashiv* v. *Shankarrao* A.I.R. 1930 Bom. 331.

[57] *Muthu Raman* v. *Chinna Vellayan* (1916) 39 Mad. 965.

[58] *Dering* v. *Earl of Winchilsea* (1787) 1 Cox. 318, and see other judgments cited by Wright, J., in *Wolmershausen* v. *Gullick* (1893) 2 Ch. 523 *seq.*

[59] *Ex parte Snowdon* (1881) 17 Ch. Div. 44, 48; *Shirley* v. *Burdett* (1911) 2 Ch. 418.

[60] *Wolmershausen* v. *Gullick* (1893) 2 Ch. 514.

[61] *Steel* v. *Dixon* (1881) 17 Ch. D. 825.

security, may resort again to that security for the liability to which he remains subject, and the co-sureties may again claim the benefit of participation and so on until the co-sureties may again claim the benefit of participation and so on until the co-sureties have been fully reimbursed or the counter security is exhausted.[62]

Liability of co-sureties bound in different sums.

147. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations

(a) *A*, *B* and *C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 30,000 rupees. *A*, *B* and *C* are each liable to pay 10,000 rupees.

(b) *A*, *B* and *C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 40,000 rupees. *A* is liable to pay 10,000 rupees, and *B* and *C* 15,000 rupees each.

(c) *A*, *B* and *C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in a penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 70,000 rupees. *A*, *B* and *C* have to pay each the full penalty of his bond.

The wording of this section and its effect as shown by the illustrations is perfectly clear and the use of the words "equally" and not "rateably," shows an intention to make a deliberate departure from the rule as previously understood.

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[62] *Berridge* v. *Berridge* (1890) 44 Ch. D. 168.

Chapter IX

OF BAILMENT

Bailment

Definition: Delivery of goods by bailor to bailee for a definite purpose on condition of their return or disposal, when purpose is accomplished. (s. 148).

Classification: (i) for hire (s. 150); (ii) for custody (s. 158); (iii) for carriage (s. 158); (iv) to have work, labour and skill done thereon (ss. 158, 170); (v) for loan (s. 159); (vi) Gratuitous (ss. 159, 162); (vii) for security for repayment of debt (s. 172); (viii) for security for performance of promise (s. 172).

Voidable: Bailor may avoid bailment if bailee wrongfully uses or disposes of goods (s. 153).

Determination: When purpose is accomplished or goods are returned (s. 160); Gratuitous bailment by death of bailor/bailee (s. 162).

"Bailment," "bailor," and "bailee" defined.

148. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor." The person to whom they are delivered is called the "bailee."

Explanation.—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods although they may not have been delivered by way of bailment.

Nature of the transaction.—"Bailment" is a technical term of the Common Law, though etymologically it might mean any kind of handing over (Fr. bailler). It involves change of possession. One who has custody without possession, like a servant, or a guest using his host's goods, is not a bailee. But constructive delivery will create the relation of bailor and the bailee as well as actual, as stated in the Explanation.

The bailee's duty to deal with the goods according to the bailor's orders is incidental to the contract of bailment, and arises on the delivery of the goods, although those orders may have already been given and accepted in such a manner as to constitute a prior special contract.[1]

The words "otherwise disposed of" in the present section express the Common Law as now understood. "It seems clear that a bailee is not the less a bailee because he is clothed with authority to sell the thing which is bailed to him," e.g. a factor for sale.[2]

[1] *Streeter* v. *Horlock* (1822) 1 Bing. 34. pp. 161, 162.

[2] See Pollock and Wright on Possession,

BAILOR

Duties	*Liabilities*	*Rights*
(i) to put bailee into possession (s. 149).	(i) to pay expenses of bailment (s. 158).	(i) to claim damages if bailee makes wrongful use (s. 154).
(ii) to disclose material faults (s. 150).	(ii) to pay damages for non-disclosure of material defects (s. 150).	(ii) to claim return of goods or their loss (ss. 159, 160, 161).
	(iii) to pay damages for defect in bailor's title (s. 164).	(iii) to claim proportionate share in mixed goods (s. 155).
	(iv) to indemnify gratuitous bailee (s. 159).	(iv) to claim damages due to mixing up of goods (ss. 156, 157).

BAILEE

Duties	*Liabilities*	*Rights*
(i) to take prudent man's care (s. 151).	(i) to pay damages (a) for failure to take prudent man's care (s. 152). (b) for wrongful use of bailed goods (s. 154). (c) arising due to mixing up of goods (ss. 156, 157). (d) for non-return of goods (s. 161).	(i) to claim possession of goods (s. 149). (ii) to know material faults in goods (s. 150). (iii) to claim proportionate share in mixed goods (s. 155). (iv) to claim damages due to defect in bailor's title or faults in goods (ss. 150, 164). (v) to claim expenses of bailment (s. 158). (vi) to claim indemnity (s. 159). (vii) to claim lien for remuneration (ss. 170, 171).
(ii) Not to make wrongful use of goods (s. 154).		
(iii) Not to mix up bailed goods with his own (ss. 156, 157).		
(iv) to return bailed goods (ss. 159, 160).	(ii) to return bailed goods (ss. 159, 160). (iii) to pay any increase or profit accruing from goods (s. 163).	

On the whole a bailment may be described as a delivery on condition, to which the law usually attaches an obligation to redeliver the goods in identical or altered form, or otherwise deal with them as directed, when the condition is satisfied; but there may be, in particular cases, a bailment without an enforceable obligation.[3] Nor is consent indispensable for the relationship of bailor and bailee in respect of property, e.g. a finder of goods is considered as a bailee in certain circumstances. Bailment is dealt with by the Contract Act only in cases where it arises from a contract but it is not correct to say that there cannot be a bailment without an enforceable contract. So where certain properties including vehicles of the respondent were seized pursuant to the powers under the customs Act it was found that the seizure was unjustifiable. In the meanwhile the State government sold the goods as unclaimed property and could not be returned to the owner. The government was held liable as being in the position of a bailee, either to return the vehicles or the price thereof. The property seized by Customs Officials belongs to its owner till the final order of confiscation is passed. In the meanwhile the State is bound to preserve it and return it to the owner in case the order of confiscation is not made final.[4] Where property is deposited in Court in pursuance of an order of the Court, there is no bailment as there is no contract.[5]

Where a chattel is delivered by mistake, the intention being to deliver another chattel either with or without conditions, the legal result, whatever it may be, is not a bailment; for there is no intention at all to deliver the chattel which is in fact delivered, and no contract with respect to it. Where Government through the police have recovered stolen property, the possession by Government of the property is not that of bailee.[6] The hiring of elephants by mahouts does not amount to a bailment.[7] But it was held as bailment by the High Court of T.C.,[8] where defendant took possession of an elephant with two mahouts from a plaintiff for hire for one year.

No bailment where whole property transferred.—Obviously no transaction can be a bailment within the Act which does not satisfy the terms of this section. Accordingly there is not a bailment if the thing delivered is not to be specifically returned or accounted for[9] : and this is also the Common Law.

A delivery of property on a contract for an equivalent in money or in other commodities (whether like the property delivered or not) is a sale or exchange and not a bailment, as where farmers deliver grain to a miller to be used by him in his trade, and are entitled to claim an equal quantity of corn of like quality or its market price.[10]

An agent authorised to receive payment, and bound to hand over to his principal an equivalent sum, but not necessarily the actual coin, or instruments of credit received by him, is not a bailee.[11]

Similarly, the delivery of Government promissory notes to a treasury for cancellation and consolidation into a single note is not a bailment, for there is no contract in such

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[3] Judgment of Cave, J., *R.* v. *McDonald* (1885) 15 Q.B.D. at p. 328.

[4] *State of Gujarat* v. *Memon Mohammad* A.I.R. 1967 S.C. 1885.

[5] *Mohammed Murad* v. *Govt. of Uttar Pradesh,* A.I.R. 1956 All. 75.

[6] *Ram Gulam* v. *U.P. Government* ('50) A.A. 206.

[7] *Surendra Nath* v. *Kali Kumar,* A.I.R. 1956 Assam 55.

[8] *Annamali Timber Trust Ltd.* v. *Trippunithura* A.I.R. 1954 T.C. 305.

[9] *Gangaram* v. *Crown* A.I.R. (1943) Nag. 436.

[10] *South Australian Insurance Co.* v. *Randell* (1869) L.R. 3 P.C. 101.

[11] See *Bridges* v. *Garrett* (1870) L.R. 5 C.P. 451, in Ex. Ch. judgment of Blackburn, J.

a case that the notes shall be returned or otherwise disposed of according to the directions of the owner.[12]

Compare Secs. 33, 34 of the Sale of Goods Act, 1930.

Delivery to bailee, how made.

149. The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf.

Putting bailee in possession.—The bailor's part need not be very active. Mere assent, for example, of a guest at a place of public entertainment to a servant's officious assumption of custody may be sufficient evidence of delivery to make the proprietor of the house a bailee and responsible for loss.[13] The railway authorities were held as bailees where cotton was stacked on a station platform, with the consent of the station master, as no wagon was available. Subsequently there was a fire due to sparks from a passing train.[14] The mere fact that a loading clerk at a railway station enters the number of the package in the consignor's forwarding note does not amount to registration or delivery of possession to the railway company. This was so held in a case where the consignor neglected to obtain a railway receipt or to leave the goods in the custody of the railway company.[15] A lady employed a goldsmith for the purpose of melting old jewellery and making new jewels. Every evening she used to receive the half-made jewels from the goldsmith and put them into a box which was left in a room in the goldsmith's house of which she retained the key. It was held that there was a redelivery of the jewels to the lady and they were not in the possession of the goldsmith when during one night they were stolen.[16]

Bailor's duty to disclose faults in goods bailed.

150. The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations

(a) *A* lends a horse, which he knows to be vicious, to *B*. He does not disclose the fact that the horse is vicious. The horse runs away. *B* is thrown and injured. A is responsible to *B* for damage sustained.

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[12] *Secretary of State for India in Council* v. *Sheo Singh* (1880) 2 All. 756, 760.

[13] *Ultzen* v. *Nicols* (1894) 1 Q.B. 92.

[14] *Gov. Gen. of India in Council* v. *Jubilee Mills* A.I.R. 1953 Bom. 46.

[15] *Lachmi Narain* v. *Bombay, Baroda & Central India Railway* (1923) 45 All. 235; *Dhanraj* v. *Union of India* ('58) A. Assam 5.

[16] *Kaliaperumal* v. *Visalakshmi* (1938) 175 I.C. 343, ('38) A.M. 32.

(b) *A* hires a carriage of *B*. The carriage is unsafe, though *B* is not aware of it, and *A* is injured. *B* is responsible to *A* for the injury.

Bailor's duty to disclose material faults.—A bailor is under an obligation to disclose to the bailee faults in the goods bailed. Para two of the section refers to bailment for hire. Para one therefore would apply to all other bailments. In respect of a gratuitous bailee, the duty to disclose is confined to the faults known to the bailor and in respect of a non-gratuitous bailee, i.e. bailee who has paid hire, the duty of bailor is not so confined. The faults which are required to be disclosed are (i) those which materially affect the use of the goods bailed, or (ii) which may expose the bailee to extraordinary risks. Failure to disclose such defects entails a liability to pay damages. Such damages must have arisen directly from such faults.

The facts in Illustration (a) to the section were thus referred to by the Court in a case in England: "Would it not be monstrous to hold that if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities and conceals them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible? . . . By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him.[17] It is equally certain that a gratuitous lender is not liable for defects in the things lent of which he is not aware.[18]

A person who delivers to a carrier goods which he knows to be of a dangerous character, such as explosives, and to require extraordinary care in handling, and omits to give warning of it (the nature of the goods not being apparent) is liable for any resulting damage.[19] But this duty seems to be independent of the contract of bailment, and antecedent to the formation of any contract between the parties.

Care to be taken by bailee.

151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

Prudent Man's Care.—The duty to take care laid down in this section is very general. It will depend upon the facts of each case to determine whether the bailee has taken the care required of him by this section.

"Good sense and policy of the law impose some limit upon the amount of care, skill and nerve required of a person in a position of duty who has to encounter a sudden emergency. In a moment of peril and difficulty, the Court should not expect perfect presence of mind, accurate judgment and promptitude. . . . If in sudden emergency a man does something which he might, as he knew the circumstances, reasonably think proper, he is not to be held guilty of negligence, because, upon review of the facts, it can be seen that the course he had adopted was not in fact the best."[20]

This section abolishes the distinctions in the amount of care required of various kinds of bailees which were established, or supposed to be established, by the judgment

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[17] *Blakemore* v. *Bristol and Exeter Ry. Co.* (1858) 8 E. & B. 1035, 1051.

[18] *MacCarthy* v. *Younge* (1861) 6 H. & N. 329.

[19] *Lyell* v. *Ganga Dai* (1875) 1 All. 60.

[20] *Dwarkanath* v. *River Steam Navigation Co. Ltd.*, 20 Bom. L.R. 735: (1917) A.P.C. 173.

of Holt, C.J., in *Coggs* v. *Bernard*.[21] By modern English law a gratuitous bailee is bound to take the same care of the property entrusted to him as a reasonable, prudent and careful man may fairly be expected to take of his own property of the like description;[22] and it does not seem that in practice an ordinary bailee for reward is bound to anything more.[23] Even a gratuitous bailee must use such skill as he actually possesses, or by his profession or condition may reasonably be expected to possess; a man who undertakes to show off a horse is presumed to be a competent rider.[24] Whether the required care has been taken is a question of fact, but the fact that in a fire, the bailee's own goods were also destroyed is not in itself evidence that he had taken the required care.[25]

Read comments under section 152.

Common carriers.—The provisions of secs. 151 and 152 of the Contract Act embody in effect the Common Law rule as to the liability of bailees other than common carriers and innkeepers. The measure of care required of these bailees in respect of goods entrusted to them was the same as a man of ordinary prudence would take of his own goods; in other words, the liability was one for *negligence* only, in the absence of special contract. Common carriers[26] and innkeepers, on the other hand, were liable as insurers of goods; that is, they were responsible for every injury to the goods occasioned by *any means whatever*, except only the act of God and the King's enemies. Therefore the mere proof of delivery of goods and injury thereto, unless caused by the act of God or the King's enemies, was sufficient to entitle the plaintiff to compensation without proof of negligence on the part of the defendant.[27] These principles of the English Common Law applied in India,[28] but they were subsequently modified by legislation as respects common carriers, and the Carriers Act III of 1865 now enables a bailee of this class to limit his liability by special contract in the case of certain goods, but not so as to get rid of liability for negligence.[29] The question about the liability of common carriers arose in a case before the Judicial Committee of the Privy Council in an appeal from the Court of the Recorder of Rangoon, where it was held, that the duties and liabilities of a common carrier in India are governed by the principles of the English Common Law in conjunction with the provisions of the Carriers Act, and that, notwithstanding some general expressions in the chapter on Bailments, the responsibility of a common carrier is not within the Contract Act.[30]

Carriers by railways.—The liability of carriers by railway is now governed by the

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[21] (1703) 2 Ld. Raym. 909, 1 Sm. L.C. 173.

[22] *Giblin* v. *McMullen* (1869) L.R. 2 P.C. 317, 339.

[23] *Searle* v. *Laverick* (1874) L.R. 9 Q.B. 122.

[24] *Wilson* v. *Brett* (1843) 11 M. & W. 113.

[25] *Calcutta Credit Corporation* v. *Prince Peter* ('64) A.C. 374.

[26] "Common carrier" denotes a person other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately: Carriers Act III of 1865, s. 2.

[27] Carriers of passengers are not liable as insurers so as to render them liable under all circumstances for not carrying the passengers safely. Their duty is to exercise reasonable care and diligence, and they cannot, therefore, be held responsible except for neglect of that duty: *East Indian Railway Co.* v. *Kalidas* (1901) 28 Cal. 401, L.R. 28 I.A. 144.

[28] *Irrawaddy Flotilla Co.* v. *Bugwandas* (1891) 18 Cal. 620, 625, L.R. 18 I.A. 121.

[29] Secs. 6 and 8.

[30] *Irrawaddy Flotilla Co.* v. *Bugwandas* (1891) 18 Cal. 620, L.R. 18 I.A. 121; *Orient Ship Supply Co.* v. *Kalamarsand Co.* ('51) A. Tra-Coch. I; *Air Carrying Corporation* v. *Shibendra Nath* ('64) A. Cal. 396, (a case of carriage by air).

Railways Act IX of 1890. Section 72 of that Act provides that the responsibility of a railway administration for injury to goods delivered to it to be carried by railway is, subject to the other provisions of the Act, that of a bailee under secs. 151, 152 and 161 of the Contract Act,[31] and that it shall not be affected by the Common Law of England or the Carriers Act, but that it may be limited by a special agreement between the parties, provided that it is in writing by or on behalf of the person sending the goods and is otherwise in a form approved by the Governor-General-in-Council. Thus where a riotous mob attacked a railway station and destroyed records and goods, the Railway were not held liable for the loss as bailees.[32]

Innkeeper.—It has been held by the High Court of Allahabad that the liability of a *guest* in respect of *goods belonging to a hotel-keeper* and used by the guest is that of a bailee under secs. 151 and 152 of this Act, so that the guest is not responsible for the loss, destruction, or deterioration of the furniture in his use if he has taken as much care of it as a man of ordinary prudence would, under similar circumstances, take of similar furniture of his own.[33] It was held by the Bombay High Court, in a case which arose six years before the date of the Contract Act, that the liability of a *hotel-keeper* in respect of *goods belonging to a guest* was governed by the Common Law of England.[34] To us it appears that the liability of an innkeeper should now be governed by the provisions of secs. 151 and 152. The case of an innkeeper is different from that of a common carrier: there is nothing to show that the Common Law rule as to the liability of an innkeeper has been recognised throughout India, as is the case with common carriers. This opinion is now supported by a decision of the Allahabad High Court.[35]

Carriage by air.—The Indian Airlines Corporation is a common carrier but not a "common carrier" within the meaning of Common Carriers Act, 1865. Air Lines Corporation can therefore exempt itself from liability for negligence by special agreement[36] but this position may be altered if the Union of India issues a notification under section 4 of the Indian Carriage by Air Act, 1934.[37]

Sea Carrier.—It is competent to a shipping company to protect itself by a clause inserted in a bill of lading from liability for negligence of its servants notwithstanding the provisions of this section.[38] Sea carrier is now governed by Carriage of Goods by Sea Act, 1925.

Burden of proof.—In cases governed by the provisions of secs. 151 and 152, the loss of or damage to goods entrusted to a bailee is *prima facie* evidence of negligence and the burden of disproving negligence lies on the bailee.

As regards bailments for hire, the rule has thus been stated by Strachey, C.J.: "If the damage caused were such that in the ordinary course of events it would not happen to goods of the kind in question if used with ordinary prudence, then I think it would be

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[31] *The Secretary of State* v. *Bhagwan Das* (1927) 49 All. 889, 102 I.C. 440, ('27) A.A. 371.

[32] *Jusaf & Ismail Co.* v. *Governor-General in Council* (1947) Nag. 335, 231 I.C. 185, ('48) A.N. 65.

[33] *Rampal Singh* v. *Murray & Co.* (1899) 22 All. 164.

[34] *Whateley* v. *Palanji* (1866) 3 B.H.C.O.C. 137, 146.

[35] *Jan and Son* v. *Cameron* (1922) 44 All. 735.

[36] *Parsram* v. *Air India Ltd.* 56 Bom. L.R. 944.

[37] *National Tobacco Co.* v. *I.A.C.* (1961) A.C. 383; *Rukmanand* v. *Airways India Ltd.* (1961) A. Ass. 71; *I. A. C.* v. *Madhuri Chaudhuri* (1965) A.C. 252.

[38] *Bombay Steam Navigation Co.* v. *Vasudev*, 29 Bom. L.R. 1551.

for the hirer to prove that he had exercised such prudence; otherwise I think the owner must give some evidence of negligence.[39] Thus where a person hires a horse for riding in a sound condition and the horse dies the same day while it is in his custody, it is for the hirer to prove that he had taken such care of the horse as a man of ordinary prudence would, under similar circumstances, have taken of his own.[40] Similarly, where goods delivered for safe custody for reward are lost while in the possession of the bailee, the burden lies on the bailee to prove absence of negligence on his part.[41]

Contract by bailee exempting himself from liability for negligence.—A bailee's liability cannot be reduced by contract below the limit prescribed by this section; a contract by a bailee purporting to exempt him wholly from liability for negligence is not valid.[42]

Bailee's liability for negligence of servants.—A bailee's liability extends to damage caused by the negligence of his servants acting in the course of their employment about the use or custody of the thing bailed; but it does not extend to damage caused by the acts or defaults of third persons which he could not by ordinary diligence have foreseen and prevented, nor to unauthorised acts of his servants outside the scope of their employment.[43]

Bailee when not liable for loss, etc., of thing bailed.

152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

No liability for loss if Care taken by bailee.—Since the standard of diligence required of a bailee is that of the average prudent man, a bailee of goods is not liable for loss of the goods by theft in his shop, if it is shown that he took as much care of the articles bailed as an ordinary prudent man would, under similar circumstances, take of his own goods of the same quality and value. For the same reason if *A* sends jewels to *B* for repairs, asking *B* to return them after repair as a value-payable parcel, and *B* does so, *B* is not liable for the loss of the jewels merely because he failed to insure the parcel. Failure to insure the jewels is not evidence of want of such care as a man of ordinary prudence would, under similar circumstances, take of his own goods, specially when the owner himself does not insure them when sending them out for repair.[44] But it is negligence on the part of a carrier of goods to send jute in a boat with twenty or thirty leaks on its side, one or one and a half inches in length, and keep the goods in the hold of the boat for thirty hours;[45] similarly, where a commission agent purchases silver bars on instructions and places them against the wall of a shop which is unattended and some of

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[39] *Rampal Singh* v. *Murray & Co.* (1899) 22 All. 164, 167.

[40] *Shields* v. *Wilkinson* (1887) 9 All. 398, 406. See Evidence Act, s. 106.

[41] *Trustee of the Harbour, Madras* v. *Best & Co.* (1899) 22 Mad. 524.

[42] *Sheikh Mahamed* v. *The British Indian Steam Navigation Co. Ltd.* (1908) 32 Mad. 95, at p. 120; *Bombay Steam Navigation Co.* v. *Vasudev Baburao* (1928) 52 Bom. 37, 29 Bom. L.R. 1551, 106 I.C. 470, (1928) A.B. 5; *Raipur Transport Co.* v. *Ghanshyam*, (1956) A. Nag. 145.

[43] *Sanderson* v. *Collins* (1904) 1 K.B. 628 C.A.; *Bilaspur Central Co-operative Bank Ltd.* v. *The State of Madhya Pradesh* ('59) A. Madh. p. 77.

[44] *Boseck & Co.* v. *Maudlestan* (1906) Punj. Rec. no. 70.

[45] *Lakshmi Narain* v. *The Secretary of State for India* (1923) 27 C.W.N. 1017.

the bars are lost.[46]

The bailee's duty does not necessarily come to an end when the goods are lost or stolen. In England a bailee for reward ought to take such steps, if any, as are reasonable and usual with a view to recovering the goods. If he fails to do so, the burden of proof is on him to show that reasonable efforts would not have been successful.[47]

Termination of bailment by bailee's act inconsistent with conditions.

153. A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustration

A lets to *B* for hire a horse for his own riding. *B* drives the horse in his carriage. This is, at the option of *A*, a termination of the bailment.

Termination of bailment.—It is well settled law that a wrongful use or disposal of the goods by the bailee determines the bailment and remits the bailor to the rights and remedies of a person entitled to possession; a wrongful act means, for this purpose, a dealing wholly inconsistent with the terms of the bailment. Merely irregular exercise of a right, such as a sub-pledge to a third person by a pledgee, or a premature sale by a pledgee with power of sale, has not the same effect.[48]

Liability of bailee making unauthorised use of goods bailed.

154. If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Illustrations

(a) *A* lends a horse to *B* for his own riding only. *B* allows *C*, a member of his family, to ride the horse. *C* rides with care, but the horse accidentally falls and is injured. *B* is liable to make compensation to *A* for the injury done to the horse.

(b) *A* hires a horse in Calcutta from *B* expressly to march to Banares. *A* rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. *A* is liable to make compensation to *B* for the injury to the horse.

Illustration (b) is apparently suggested by the case put in old English books of a man borrowing a horse to ride to York and riding to Carlisle. See 1 C.B. 681.

Bailee's liability for unauthorised use.—This section provides for a positive duty on the part of a bailee. A bailee is liable to make use of the goods bailed according to the conditions of bailment. If he commits a breach of this duty and if the bailor suffers any damage to the goods from or during such use he can call upon the bailee to pay the loss.

As regards the observance of the conditions of bailment, read the provisions of sections 158 and 159.

Bailor's remedy.—Nothing is said here about the extent of the bailor's remedies if the goods are not forthcoming. he can have an action for damages against the bailee, and

[46] *Lakhaji Dollaji & Co.* v. *Boorugu* (1939) 41 Bom. L.R. 6, 181 I.C. 334, ('39) A.B. 101.

[47] *Coldman* v. *Hill* (1919) 1 K.B. 443.

[48] *Holiday* v. *Holgate* (1868) Ex. Ch. L. R. 3 Ex. 299, 302.

he has also further equitable rights. "If the bailee sells the goods bailed, the bailor can in equity follow the proceeds and can follow the proceeds wherever they can be distinguished, either being actually kept separate, or being mixed up with other moneys."[49]

Effect of mixture, with bailor's consent, of his goods with bailee's.

155. If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

This and two following sections are clear enough.

Effect of mixture, without bailor's consent, when the goods can be separated.

156. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustration

A bails 100 bales of cotton marked with a particular mark to *B*. *B*, without *A*'s consent, mixes the 100 bales with other bales of his own, bearing a different mark. *A* is entitled to have his 100 bales returned, and *B* is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

Effect of mixture, without bailor's consent, when the goods cannot be separated.

157. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Illustration

A bails a barrel of Cape flour worth Rs. 45 to *B*. *B*, without *A*'s consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. *B* must compensate *A* for the loss of his flour.

Mixture of goods by bailee.—These three sections lay down the liability of a bailee when he mixes up the goods bailed with those of his own.

Mixture may be either with the consent of the bailor or without the consent of the bailor. If the goods are mixed without the bailor's consent, the two further contingencies are provided for viz. (i) where goods are separable and (ii) where goods are impossible of separation.

Any other contingency will be covered by the general provisions of sec. 154 viz. use of the goods contrary to the conditions of bailment.

Repayment by bailor of necessary expenses.

158. Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no

[49] Jessel, M. R., *Re. Hallett's Estate* (1879) 13 Ch. Div. 696, 710.

remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

Bailor to pay expenses to gratuitous bailee.—This section is intended to lay down the duty of a bailor in respect of a gratuitous bailee. In so doing, the legislature had to specify the classes of bailment such as for (i) custody, storage, warehousing, (ii) for transport by person, railway, air, sea, motor car etc. and (iii) for work and labour to be done such as repair work, laundering, ironing, decorating, watching, checking. The next section relates to a gratuitous loan of the article to the bailee. The legislature has described the classes of bailment or purposes thereof by words " the conditions of bailment". It stands to reason that when bailee is to render service free, he should not be put to further loss of expenses and that is why this section provides for payment of necessary expenses to the bailee.

Restoration of goods lent gratuitously.

159. The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But, if, on the face of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

Gratuitous bailor.—This section lays down the rights and duties of a gratuitous bailor. Just as the bailee may be gratuitous similarly bailor may also be gratuitous. The gratuitous bailor or lender of the article should generally abide by the terms and conditions of bailment or gratuitous loan but if he needs the article back he need not wait and can ask for its return. In doing so if he puts the bailee to any loss caused by earlier demand, he must indemnify the bailee. This is quite a reasonable and sensible rule.

Return of goods bailed on expiration of time or accomplishment of purpose.

160. It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

Duty to return.—This section lays down the most important duty of the bailee. Bailor can exercise his right to receive back the goods either directly or can give directions to be returned e.g. if the bailor had deposited the goods with the warehouseman and secured a warehouse receipt and if he endorses over such receipt to a bank for obtaining the loan, the bank would be entitled to claim back the goods as a transferee of the receipt.[50] This will be covered by the words "according to bailor's directions."[50]

Where an article is hired for use or for a purpose but such article is unfit for such use or purpose, this is treated as a breach of warranty and the bailee is not bound to return

50 *Central Warehousing Corporation* v. *Central Bank of India*, A.I.R. (1974) A.P. 8.

it to the bailor because the purpose cannot be accomplished. In such a case, the bailee may give notice to the bailor who is then bound to take it back.[51]

Bailee's responsibility when goods are not duly returned.

161. If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

Bailee's liability for loss, if goods not returned.—Unexplained failure to return the thing bailed is presumed to be by the bailee's default.[52] Where there is a breach of warranty in respect of the goods bailed i.e. they are not fit for the purpose for which they are bailed, the bailee is not bound to return and hence there can be no question of his default.[51]

If the goods in possession or custody of bailee are seized by Government by authority of law, the bailee cannot comply with the provisions of sections 160 and 161 and is excused from returning the goods to the bailor.[53]

Termination of gratuitous bailment by death.

162. A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

Termination of gratuitous bailment.—The executors of persons who have borrowed things, especially books, do not always remember this, as is shown by common experience. On the other hand, the executors of a lender may tacitly and discreetly, in many cases, treat the loan as a gift without fear of being called to account for a *devastavit*.

Bailor entitled to increase or profit from goods bailed.

163. In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Illustration

A leaves a cow in the custody at *B* to be taken care of. The cow has a calf. *B* is bound to deliver the calf as well as the cow to *A*.

Good sense and therefore good law, seemingly without any previous reported authority. New shares allotted in respect of shares that have been pledged are an increase claimable by the pledgor.[54]

Bailor's responsibility to bailee.

164. The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.

If a bailor or consignee omits or refuses to take his goods at the proper time from

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[51] *Isufalli* v. *Ibrahim*, 23 Bom. L.R. 403: 45 Bom. 1017.

[52] *Kush Kanta Burkakati* v. *Chandra Kanta Kakati* (1923) 28 C.W.N. 1041.

[53] *M/s. Juggilal Kamalapat Oil Mills* v. *Union of India*, (1976) 1 S.C.C. 893.

[54] *Motilal Hirabhai* v. *Bai Mani* (1924) 52 I.A. 137, 49 Bom. 233, 27 Bom. L.R. 455, 86 I.C. 368, ('25) A.P.C. 86.

a carrier (or, it would seem, any other kind of bailee) who is ready and willing to deliver them, he may be liable to compensate the bailee for any necessary expenses of and incidental to their safe custody.[55]

Bailment by several joint owners.

165. If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

Bailment by joint owners.—The section is permissive; it says "may", not "must".[56] Even if there is an agreement to the contrary, one of several joint owners cannot, after having accepted redelivery from the bailee, sue him jointly with the other owners; for "one party to a contract cannot maintain an action for a breach occasioned by his own act, and neither can three parties maintain an action unless each party separately could."[57]

Bailee not responsible on redelivery to bailor without title.

166. If the bailor has no title to the goods, and the bailee in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

Return of goods to or to the order of the bailor.—A bailee who in good faith returns the goods bailed to the bailor or to his order is not liable to the true owner of the goods. *N* entrusted certain bales of cotton to *L* a *muccadam* (warehouseman). *L* pledged the cotton with *B* (with whom he had dealings for several years) to secure advances made by *B* to *L*. Subsequently *L* redeemed the pledge, and the cotton was returned by *B* to or to the order of *L*. *N* sued *B* and *L* claiming delivery of the goods or their value. The judicial Committee held that whether the pledge by *L* to *B* was or was not valid under sec. 178, the return of the goods by *B* in good faith to *L* was a complete defence to the suit against *B*.[58]

Estoppel of bailee.—*Cf.* the Evidence Act I of 1872, sec. 117.—The rule of the Common Law is that generally a bailee is estopped from denying his bailor's title. He is not only justified in delivering to the bailor or according to his directions, but he is estopped from setting up the title of a third person against the bailor, unless he is under the effective pressure of an adverse claim, and defends upon the right and title and by the authority of the third person so claiming.[59]

Right of third person claiming goods bailed.

167. If a person, other than the bailor, claims goods apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

Third party's right—The bailee's protection against conflicting claims appears to

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[55] *G. N. R. Co* v. *Swaffield* (1874) L.R. 9 Ex. 132.

[56] *May* v. *Harvey* (1811) 13 East. 197.

[57] *Brandon* v. *Scott* (1857) 7 E. & B. 334.

[58] *Bank of Bombay* v. *Nandlal Thackerseydass* (1912) L.R. 40 I.A. 1, 37 Bom. 122.

[59] *Thorene* v. *Tilbury*, 3 H. & N. 534 (537) followed in *Biddle* v. *Bond* (1865) 6 B. & S. 225, approved by C.A. in *Rogers, Sons & Co.* v. *Lambert & Co.* (1891) 1 Q.B. 318, 325.

be left to the general directions of the Code of Civil Procedure. In England the bailee can take refuge with the Court by interpleading.[60] In India such an interpleader suit can be filed.

Right of finder of goods; may sue for specific reward offered.

168. The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

Finder of goods, rights to sue and to retain.—By the Common Law a person who finds lost goods and holds them with the intention of saving them for the true owner is certainly not a trespasser, and has no higher duties than a bailee[61] but, the service being rendered without request from the owner, he does not seem entitled to any remuneration[62] unless a specific reward has been offered for the return of the goods, and the offer has come to his knowledge; and if he cannot claim compensation there is no ground on which he can retain the goods.

The rule of the present section appears to be intended to satisfy natural justice. Presumably the compensation, if no specific reward has been offered and the parties cannot agree, is to be what the Court considers reasonable. If the parties do agree, the owner's promise of reward may be binding under sec. 25, sub-sec. 2.

When finder of thing commonly on sale may sell it.

169. When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

(1) when the thing is in danger of perishing or of losing the greater part of its value, or,

(2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

Finder's right to sell.—In order not to place a finder of goods in an embarassing position, it was essential to give power of sale to the finder. In case the goods are perishable or excisable or insurable or risky, power of sale should be given even if the finder had not incurred any charges.

But for this power of sale, if the finder were to sell the goods, he would be guilty of conversion.

Bailee's particular lien.

170. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until

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[60] *Rogers, Sons & Co.* v. *Lambert & Co.* (1891) 1 Q.B. 318, 327.

[61] *Isaack* v. *Clark* (1615) 2 Bulstr. 306, 312.

[62] *Binstead* v. *Buck* (1777) 2 W. Bl. 1117.

he receives due remuneration for the services he has rendered in respect of them.

Illustrations

(a) *A* delivers a rough diamond to *B*, a jeweller, to be cut and polished, which is accordingly done. *B* is entitled to retain the stone till he is paid for the services he has rendered.

(b) *A* gives cloth to *B*, a tailor, to make into a coat. *B* promises *A* to deliver the coat as soon as it is finished, and to give *A* three months' credit for the price. *B* is not entitled to retain the coat until he is paid.

Principle of bailee's lien.—This section expresses the "Common Law principle that if a man has an article delivered to him, on the improvement of which he has to bestow trouble and expense, he has a right to detain it until his demand is paid."[63]

"Where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus the artificer to whom the goods are delivered for the purpose of being worked up into form, or the farrier by whose skill the animal is cured of a disease, or the horsebreaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges."[64]

Particular lien.—This section deals with a lien of a bailee in respect of the goods bailed only. The lien can be exercised provided the service involving labour and skill has been rendered in respect thereof and such service has been rendered in accordance with the contract i.e. in accordance with the purpose of bailment. If service is not rendered in accordance with the terms of the contract, the bailee cannot exercise his right of particular lien.[65]

The right of lien being possessory in nature, it can be exercised so long as the bailee is in possession thereof. Once a bailee has parted with possession of the goods bailed, he loses his right of lien.

Further, where a person does work on goods delivered to him under one entire contract, the fact that the deliveries are at different times does not affect his right to a lien on all goods dealt with under that contract.[66] Accordingly, where jute was delivered to a pressing company from time to time to be baled, but all under one contract, the lien was held to attach to all such goods.[67]

No Transfer of lien.—A bailee for reward cannot transfer his lien to a sub-contractor without the bailor's authority.[68]

Contract to the contrary.—Where there is an express contract to do certain work for a specified sum of money, there is no room for a *quantum meruit* claim.

Particular lines.—In India, various statutes have provided for particular liens as follows:—

(1) Lien of a finder of goods (s. 168).

(2) Bailee's lien (s. 170).

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[63] Best, C.J., in *Bevan* v. *Waters* (1828) 3 Car. & P. 520. See *Judah* v. *Emperor* (1925) 53 Cal. 174, 90 I.C. 289, ('26) A.C. 464.

[64] Parke, B., in *Scarfe* v. *Morgan* (1838) 4 M. & W. 270, 283.

[65] *Skinner* v. *Jager*, (1883) 6 All. 1894.

[66] *Chase* v. *Westmore* (1816) 15 M. & S. 180.

[67] *Miller* v. *Nasmyth's Patent Press Co. Ltd.*, (1882) 8 Cal. 312.

[68] *Pennington* v. *Reliance Motor Works* (1923) 1 K.B. 127.

(3) Pledgee's or Pawnee's lien (s. 173).
(4) Agent's lien (s. 221).
(5) Unpaid vendor's lien (s. 47, Sale of Goods Act).
(6) A partner's lien on surplus or assets of a firm if partnership is rescinded on the ground of fraud (s. 52 of Partnership Act).

General lien of bankers, factors, wharfingers, attorneys and policy-brokers.

171. Bankers, factors, wharfingers, attorneys of a High Court, and policy-brokers may, in the absence of a contract to the contrary, retain, as security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

General as distinct from particular lien.—A general lien is a right to retain any property of another for a general balance of accounts due to the persons specified; a particular lien is a right to retain it only for a charge on account of labour or skill employed or expenses bestowed upon the identical property detained.[69] Since a general lien can be exercised in respect of a property of another, it cannot be exercised in respect of one's own property.[70] This "general lien," as it is called by way of distinction from the "particular lien" of an artificer for work done by him on the particular goods in question,[69] was originally established in England, as regards bankers and others, as a proved usage of trade; but once being so established, it became part of the law merchant, and as much to be judicially noticed as any other part of the law.[71]

Lien of bankers.—The right does not extend to securities or other valuable property deposited with a banker merely for safe custody or for a special purpose,[72] and this on the ground that the limited and special purpose must be deemed to imply a contract to the contrary. Nor does the right extend to a trust account not the property of the customer.[73] Where a member of a firm deposited a lease to secure a particular advance to the firm, it was held that the banker had no lien for the general balance due from the firm.[74] Nor does the lien of a banker extend to title deeds casually left at the bank after a refusal by him to advance money on them.[75]

But, in order that the general lien may be excluded by a special agreement, whether express or implied from the circumstances, the agreement must be clearly inconsistent with the existence of such a lien.[76] Accordingly, a deposit of valuables with a banker to secure debts and advance to a customer is subject to the banker's lien for the customer's general balance of accounts, unless the customer can prove an agreement to give up his general lien.[77]

A banker's lien, when it is not excluded by special contract, express or implied, extends to all bills, cheques, and money entrusted or paid to him, and all securities depos-

[69] Kent, Comm. ii, 634.
[70] *Brahmaya* v. *Thangavelu* (1956) A. Mad. 570.
[71] *Brandao* v. *Barnett* (1864) 12 Cl. & F. 787.
[72] See *Cuthbert* v. *Robarts, Lubbock & Co.* (1909) 2 Ch. 226, C.A.
[73] *Ex parte Kingston and Gross* (1871) 6 Ch. App. 632; *Lloyds Bank Ltd.* v. *Administrator General of Burma* (1934) 12 Rang. 25, 151 I.C. 1018, ('34) A.R. 66.
[74] *Wolstenholm* v. *Sheffield Bank* (1886) 54 L.T. 746.
[75] *Lucas* v. *Dorrein* (1817) 7 Taunt 278.
[76] *Agra Bank's Claim* (1872) L.R. 8 H.L. 41.
[77] *Official Assignee of Madras* v. *Ramaswami Chetti* (1920) 43 Mad. 747.

ited with him, in his character as a banker.[78] In the case of money and negotiable securities, the lien is not prejudiced by any defect in the title of the customer, nor by equities of third persons, provided the banker acts honestly and without notice of any defect of title.[79] But there is no lien for advances made after notice of a defect in the customer's title,[80] or after notice of an assignment of the moneys or securities in the banker's hands.[81]

Factor.—A factor "is an agent entrusted with the possession of goods for the purpose of sale."[82] He may buy and sell either in his own name or in that of the principal, though "he usually sells in his own name, without disclosing that of his principal." The factor is said to have a "special property" in the goods consigned to him.[83] Private instructions to sell only in the principal's name or within fixed limits of price will not make him the less a factor or deprive him of his claim to lien.[84] But a *banian* in Calcutta is not a factor and has no lien for a general balance of account in the absence of an express contract to that effect.[85] Though advances made by a factor for sale confer a lien on him, they do not confer upon him the right to sell, *invito domino*. To claim such a right there must be an agreement either express or to be inferred from the general course of business or from the circumstances attending the particular consignment.[86]

Conformably to the principle governing all general liens, a factor's lien, where it exists, applies only to debts due to the factor in that character; it does not extend to "debts which arise prior to the time at which his character of factor commences."[87] But it extends to all his lawful claims against the principal as a factor, whether for advances, or remuneration, or for the losses or liabilities incurred in the course of his employment is respect of which he is entitled to be indemnified.[88]

In order that the lien may attach, the goods must come into the possession, actual or constructive,[89] of the factor. If, for instance, a factor accepts bills on the faith of a consignment of goods which, by reason of the bankruptcy of the principal, are never received by him he has no lien on the goods as against the principal's trustee in bankruptcy.[90] Nor does the lien extend to goods acquired otherwise than in his character of a factor,[91] or entrusted to him with express directions or for a special purpose inconsistent with the existence of a general lien.[92]

Wharfingers.—The dictionary meaning of the word is that he is a person in charge of handling of freight, loading, unloading, storage, removal of goods at the port or wharf on behalf of importers and exporters of goods. The lien of a wharfinger is, generally speaking, only effective as regards claims against the owner of the goods. He has no lien against a buyer for charges becoming due from the seller after he has had notice of the

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[78] *Misa* v. *Currie* (1876) 1 App. Cas. 554; *London Chartered Bank* v. *White* (1879) 4 App. Cas. 413.

[79] *Bank of New South Wales* v. *Goulburn Butter Factory* (1902) A.C. 543.

[80] *Locke* v. *Prescott* (1863) 32 Beav. 261.

[81] *Jeffreys* v. *Agra Bank* (1866) L.R. 2 Eq. 674.

[82] Cotton, L. J., in *Stevens* v. *Biller* (1883) 25 Ch. Div. 31, 37; *Emperor* v. *Parakh* (1925) 1 Luck. 133, 92 I.C. 744, ('26) A.O. 202.

[83] *Baring* v. *Cowie* (1818) 2 B. & All. 137, 143, 148.

[84] *Stevens* v. *Biller* (1883) 25 Ch. Div. 31, 37.

[85] *Peacock* v. *Baijnath* (1891) 18 Cal. 573; L.R. 18 I.A. 78.

[86] *Jafferbhoy* v. *Charlesworth* (1893) 17 Bom. 520, 542.

[87] *Houghton* v. *Mathews* (1803) 3 B. & P. 485, 488.

[88] *Hammonds* v. *Barclay* (1802) 2 East. 227.

[89] *Bryans* v. *Nix* (1839) 5 M. & W. 775.

[90] *Kinloch* v. *Craig* (1790) 3 T.R. 119, 783.

[91] *Dixon* v. *Stansfeld* (1850) 10 C.B. 398.

[92] *Spalding* v. *Ruding* (1843) 6 Beav. 376.

sale;[93] and where it was agreed between a buyer and seller, before the goods sold came to the hands of the wharfinger, contract of sale should be rescinded, it was held that the latter had no lien as against the seller for a general balance due to him from the buyer.[94]

Attorneys.—In England a solicitor has a lien on his client's documents (not only deeds and law papers)[95] entrusted to him as solicitor[96] "for all taxable costs, charges, and expenses incurred by him as solicitor for client; but he has no lien for ordinary advances or loans. His taxable costs, charges, and expenses would include money payments which he makes for his client in the course of his business, such as counsel's fee."[97] A solicitor has also a lien for his costs on any fund or sum of money recovered for his client. A solicitor in India has the same lien.[98] As long as the Court has control of the funds, the lien is not liable to be defeated by a third party such as an assignee of a decree or an attaching creditor, even though the third party has no express notice of the lien.[99]

A solicitor who is discharged by his client holds the papers entrusted to him subject to his lien for costs. If, however, a solicitor discharges himself, he is not, according to English law, entitled to a lien, and the same law applies in India.[1] Section 1 (of the Contract Act) saves usages and customs of trade not inconsistent with the provisions of this Act, and the usage of trade of attorneys sanctioned by English law is not inconsistent with this section. Applying this reasoning, it was held by the Calcutta High Court that a dissolution of a firm of solicitors operates as a discharge of the client who employs them, and the attorneys are not entitled to retain the papers until their costs are paid.[2]

The kinds of lien dealt with in this Act are as follows:-

(1) Lien of finder of goods (s. 168 above);
(2) Particular lien of bailees (s. 170 above);
(3) General lien of bankers, factors, wharfingers, High Court attorneys and policy-brokers (s. 171 above);
(4) Lien of pawnees (ss. 173, 174 below); and
(5) Lien of agents (s. 221 below).

Some further comments with regard to liens, general and particular, of agents and sub-agents, and to the modes in which such liens may be extinguished or lost, will be found in the commentary on sec. 221 below.

Bailment of Pledges

"Pledge" "pawnor" and "pawnee" defined.

172. The bailment of goods as security for payment of a debt or performance of a promise is called "pledge." The bailor is in this case called the "pawnor." The bailee is

[93] *Barry* v. *Longmore* (1840) 12 A. & E. 639.
[94] *Richardson* v. *Goss* (1802) 3 B. & P. 119.
[95] *E.g.*, cheques: *General Share Trust Co.* v. *Chapman* (1876) 1 C.P.D. 771.
[96] *Sheffield* v. *Eden* (1878) 10 Ch. Div. 291.
[97] *Re Taylor Stileman and Underwood* (1891) 1 Ch. 590, 596.
[98] *Devkabai* v. *Jefferson, Bhaishankar and Dinsha* (1886) 10 Bom. 248; *Mangal Chand* v. *Purna Chandra* (1945) 1 Cal. 430, ('49) A.C. 505.
[99] *Ved and Sopher* v. *R. P. Wagle & Co.* (1925) 49 Bom. 505, 27 Bom. L.R. 556, 88 I.C. 81, ('25) A.B. 351; *Tyabji Dayabhai & Co.* v. *Jetha Devji & Co.* (1927) 51 Bom. 855, 29 Bom. L.R. 1196, 105 I.C. 383, ('27) A.B. 542; *Ghulam Moideen* v. *Mahomed Oomer* (1931) 60 Mad. L.J. 133, 131 I.C. 158, ('31) A.M. 183.
[1] *Atool Chandra Mukerjee* v. *Shoshee Bhusan* (1904) 6 C.W.N. 215.
[2] *Re McCorkindale* (1880) 6 Cal. 1, following *Re Moss* (1866) L.R. 2 Eq. 345.

called the "pawnee."

Ingredients of a pledge.—A bailment of goods *as a security* for payment of a debt or for performance of a promise is called a pledge. A mere licence to take possession or an agreement to give possession will not constitute a pledge. Unless there is actual delivery of the goods there is no bailment and there is, therefore, no pledge.

Delivery of possession may be actual or constructive. In a constructive delivery, the pledgee retains dominion over the pledged article. Goods in custody of railway can be pledged by constructive delivery i.e. by endorsing the railway receipt in favour of the pledgee. It is sufficient if the thing pledged is delivered under the contract within a reasonable time of the lender's advance being made.[3] Government promissory notes may be pledged, but this must be done as required by statute by endorsement and delivery.[4] The rules of delivery and the like which are generally applicable to bailments are applicable here.

Subject matter of a pledge.—Any kind of goods, documents or valuable things of a personal nature may be pledged.[5] Shares,[6] and Government promissory notes may also be the subject matter of a pledge. There cannot be a pledge of that which cannot be the subject matter of a sale, therefore money cannot be pledged.

Pledge and hypothecation distinguished.—It is clear from the definition of "bailment" (s. 148 above) that there can be no pledge of goods unless there is an actual delivery of the goods. A loan, however, may be secured by a hypothecation of goods. Such a transaction does not require delivery of goods for its validity; nor can it be said to be prohibited by the Contract Act because the Act contains provisions for bailments of pledges and none for hypothecation of goods.[7]

Lien and pledge distinguished.—On goods deposited a banker has a general lien under sec 171 as security for a general balance of account. This general lien is a mere right of retainer. But if goods are deposited with a bank to secure drafts drawn on the bank for the price of the goods the transaction is a pledge and the bank has a right of sale under sec. 176.[8]

Pledge and mortgage.—In a pledge, the general property or ownership continues in pledgor; a pledgee has a special right to retain, file a suit and to sell (s. 176)(1). In case of a mortgage, the legal title passes to the mortgagee subject to the right of redemption which vests in the mortgagor;[10] mortgagee has a right of foreclosure while a pledgee has no such right of foreclosure.[9]

A pledge cannot be effected except by delivery of possession while a mortgage can be effected without possession.[10]

As the right to property vests with the pledgee a pawn or a pledge is intermediate

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[3] *Hilton* v. *Tucker* (1888) 39 Ch. D. 669; *Jyoti Prakash* v. *Mukti Prakash* (1917) 22 C.W.N. 297.

[4] *Jyoti Prakash* v. *Mukti Prakash* (1917) 22 C.W.N. 297. See also *Neckram* v. *Bank of Bengal* (1891) 19 Cal. 322, L.R. 19 I.A. 60.

[5] 10 Enc. Laws of England, 2nd ed., 642, citing Story.

[6] *Arjun Prasad* v. *Central Bank of India* (1956) A. Pat. 32; *Official Assignee, Bombay* v. *Madholal*, 48 Bom. L.R. 828.

[7] *Haripada* v. *Anath Nath De* (1918) 22 C.W.N. 758.

[8] *Alliance Bank of Simla* *Jaini Lal* (1927) 8 Lah. ('25) A.L. 408.

[9] *Raghunathaiya* v. *Sabi* A. Mad. 946; *Carter* D. 605.

[10] *Damodar* v. *Atmar* *Tehilram* v. *D'Mel*

between a simple lien and a mortgage which wholly passes the property in the thing conveyed.[11]

Rights and liabilities of pledgee.—Pawnee has a right to claim payment of debt or performance of promise at stipulated time, interest on debt, expenses (necessary and extraordinary) to preserve the goods (secs. 173, 175). He could detain the goods till payment of debt or performance of promise, payment of interest and necessary expenses (s. 173). He could bring a suit upon the debt or promise and retain goods by way of collateral security or sell the goods after reasonable notice (s. 176). He cannot detain the goods for any other debt or promise (s. 174) or for extraordinary expenses (s. 175); out of sale proceeds if there be excess, he has to pay to the pawnor (s. 176). The supreme Court has held that where a bank has advanced a loan and the borrower has executed a promissory note in favour of the bank in respect of the loan, and endorsed in favour of the bank a railway receipt which is a document of title in respect of the goods, the transaction taken as a whole is a pledge of the goods. The bank has all the remedies of a pledgee against the railway authorities.[12] A pawnee's liability for loss of goods is that of a bailee, and if the goods are lost without his fault, he is not liable for the loss and is entitled to sue for the debt.[13]

Pawnee's right of retainer.

173. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

Right of retention.—As discussed in foregoing paras, the pledgor continues to be the general owner, this section declares the 'special property or right' of the pawnee viz. the limited right of retention. This right of retention is further elaborated in sections 174 and 176.[14] It is because the pawnor is the general owner he can redeem the pledge before the sale as per section 177.[14]

The special right or property of the pawnee is determined if proper tender of the moneys due to the pawnee, as stated in sections 173, 175 and 177, is made.[14] If the pawnee refuses the proper tender he becomes the wrongdoer and the pawnor can exercise his right of return of the goods and compensation as per sections 160 and 161.[14]

Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances.

174. The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

Retention not for any other debt.—This section may be read into two parts viz.

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[11] *Lallan Parshad* v. *Rehmat Ali* A.I.R. 1967 S.C. 1322 = (1967) 2 S.C.R. 233.

[12] *Morvi Mercantile Bank Ltd.* v. *Union of India* ('65) A.S.C. 1954.

[13] *Rampal* v. *Gourishankar* ('52) A.N. 8.

[14] *Bank of New South Wales* v. *O'Connor* (1880) 14 App. Cas. 273, 282.

(1919) 4 Ch. 344; L.R. 587.

that the pawnee cannot, in the absence of a contract to that effect, retain the goods pledged for a debt for which the goods are not pledged. Thus pledge is specific.

The second part of the section refers to the presumption in respect of subsequent advances. This part is not clear. The words 'subsequent advances' and the presumption have been explained as "if the writing said that subsequent advances were to be secured on article X, it cannot be said that they were to be secured on article A the subject matter of prior pledge. Similarly if the parties specifically in writing A provide that X articles are to be a security for a particular sum under writing A and state in writing B that the articles Y are to be pledged for another sum, it would be dangerous to hold that both the lots i.e. articles X and Y were to be a security both the debts."[15]

Pawnee's right as to extraordinary expenses incurred.

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

"Entitled to receive."—Note that the word is not "retain," as in the two preceding sections, but "receive." A pawnee has, therefore, no right of lien for "extraordinary" expenses, as he has in the case of "necessary" expenses (s.173), but has only a right of action to recover them.

Pawnee's right where pawnor makes default.

176. If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

Pawnee's rights.—The substance of this section is familiar and well settled English law.

This section confers upon the pawnee two rights in the event of the default on the part of the pawnor. The one right is to file a suit for recovery of the debt or for performance of the promise. In such a case he is entitled to retain the pledged article as and by way of collateral security. If the pawnee does not file the suit, he is given the right to sell the pledged article but before selling it, he must give to the pawnor a reasonable notice of sale.

The right to file suit as aforesaid would also entitle the pledgee to have the collateral security sold through the Court under the Civil Procedure Code.[16]

Where no time is originally stipulated for payment, it seems that the debtor is not in default until notice is given by the creditor that he requires payment on a certain day,

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[15] *Cowasji* v. *Official Assignee* (1928) 30 Bom. L.R. 1310, 115 I.C. 389, ('28) A.B. 507.

[16] *Haridas Mundra* v. *National and Grindlays Bank* (1963) A. Cal. 132.

and that day is past. The debtor is then in default, and is in the same position as if a day for repayment had been fixed in the original contract.[17]

"May sell the thing pledged."—A pawnee, not being the legal owner, is not entitled to foreclose, but has only power to sell;[18] and authorities on mortgage transactions are to be applied to cases of pledge, if at all, only with great caution.

The power conferred on the pledgee under this section to sell the property without reference to the Court does not take away his right to sue the pawnor on the debt or bring a suit for the sale of the property pledged to him.[19]

Cannot sell to himself.—There is nothing in the Act to forbid the pawnee from buying the thing pledged at the sale, though he cannot sell to himself. But it has been held by the Judicial Committee that a sale by the pawnee to himself, though unauthorised, does not put an end to the contract of pledge so as to entitle the pawnor to have the thing pledged without payment of the debt secured by it.[20]

Reasonable notice of sale, requirement of.—It is not necessary that the notice under this section should state the date, time or place of the intended sale. A notice by the pledgee to the pawnor that unless the latter redeems the articles pledged within a fortnight, the pledgee will sell them is good notice, though the pledgee may not sell the goods until some days after the expiration of the fortnight.[21] In this case the Allahabad and Calcutta High Courts held that notice of an intention to sell is sufficient and it was not necessary to state that the exact date and time and place of sale. The Madras High Court has held that if notice is given of the sale, the pawnee is not obliged to sell within a reasonable time of the expiry of the period prescribed in the notice.[22] Where the pledgee before selling had consulted the pledgor, who had consented to the transfer of the shares, it was held that the provisions of the section with regard to notice did not arise and as the pledgor after notice of sale had acquiesced in transfer, he was deemed to have ratified the transfer.[23]

If goods are sold by the pawnee without notice of sale, the sale is bad and void.[24] Unqualified right of sale without notice is bad as it would be contrary to this section.[24]

Notice to surety.—If due notice of sale has been given to the pledgor, there is nothing in the section that requires notice of sale to be given to the pledgor's guarantor.[25] However, in order to afford an opportunity to the surety to make payment or to perform the promise (under sec. 140) or in order not to impair the eventual remedy of the surety (under sec. 139), it will be advisable to give notice to the surety as well.

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17 *Motilal* v. *Lakhmichand* (1943) A. Nag. 234.

18 *Carter* v. *Wake* (1877) 4 Ch. D. 605.

19 *Mahalinga* v. *Ganapathi* (1902) 27 Mad. 528; *Nim Chand* v. *Jogabundhu* (1894) 22 Cal. 21; *Jyoti Prakash* v. *Mukti Prakash* (1917) 22 C.W.N. 297.

20 *Neckram* v. *Bank of Bengal* (1891) 19 Cal. 322, 333; L.R. 19 I.A. 60.

21 *Kunj Behari Lal* v. *Bhargava Commercial bank* (1918) 40 All. 522, 45 I.C. 462; *Kesarimal* v. *Gundabathula Suryanarayanamurty* 114 I.C. 820, ('28) A.M. 1022; *Haridas Mundra* v. *National & Grindlays Bank* (1963) A. Cal. 132

22 *Kesarimal* v. *Gundabathula Suryanarayanamurty* (1928) 114 I.C. 820, ('28) A.M. 1022.

23 *Madholal* v. *Official Assignee of Bombay* (1949) F.C.R. 441, 51 Bom. L.R. 906, ('50) A.F.C. 21.

24 *O. A.* v. *Madholal*, 48 Bom. L. R. 830.

25 *Sankaranarayana* v. *Kottayam Bank*, (1950) A.T.C. 66.

Defaulting pawnor's right to redeem.

177. If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

Pawnor's right to redeem.—This is supplemental to the foregoing section, and requires no further explanation. The word 'sale' means 'lawful sale'.[24] Until lawful sale, right to redeem subsists.[24]

Limitation.—The period for a suit against a pawnee to recover the thing pledged is thirty years from the date of the pawn. See Limitation Act, XXXVI of 1963 Sch. I, art. 70.

Pledge by mercantile agent.

178. Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

Explanation.—In this section the expressions "mercantile agent" and "documents of title" shall have the meanings assigned to them in the Indian* Sale of Goods Act, 1930.

The section is the counterpart of the second paragraph of sec. 27 of the Sale of Goods Act, 1930, which relates to sales.

The present sec. 178 and sec. 178-A were inserted by the Indian Contract (Amendment) Act, 1930, which came into force on the 1st July 1930.

Pledge by mercantile agent.—By sec. 2 of the Sale of Goods Act, sub-sec. (9), "mercantile agent" means a mercantile agent having in the customary course of business as such agent authority either to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of goods. This definition has been taken from the English Factors Act, 1889, sec. 1.

The old section 178 was as follows: "A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents: Provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly:

Provided also that such goods or documents have not been obtained from the lawful owner or from any person in lawful custody of them, by means of an offence or fraud."

The language of the old sec. 178 was very wide and it appeared capable of giving

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* The word "Indian" has been omitted by the Indian Sale of Goods (Amendment) Act, 1963 (Act 33 of 1963), s. 2.

effect to pledges made by persons who were in temporary possession of goods or documents of title without having either the real or apparent authority of mercantile agents, and indeed without being agents of any kind. The Courts endeavoured to keep the results within tolerable bounds by putting a strict construction on the word "possession," but this was only a partial remedy.

The old section allowed an owner of goods though not in physical possession of the goods to obtain a loan on the security of a pledge of the goods by a pledge of the documents of title, as decided by the Privy Council in *Official Assignee of Madras* v. *Mercantile Bank*.[26] Under the English law an owner cannot do this unless constructive delivery has been completed by the person in physical possession attorning to the pledgee. In 1930 the Indian Legislature brought the section into conformity with the English law and the privilege of pledging goods by pledging documents of title was restricted to mercantile agents as in the Factors Acts. This establishes, as the Privy Council in the case last cited observed, the curious and anomalous position that the mercantile agent can do what the owner cannot do, i.e. make a pledge of goods by a pledge of the documents of title without the attornment of the warehouseman or other custodian.

Other cases in which a person other than the owner of the goods may make a valid pledge are dealt with in sec. 178-A below and in sec. 30 of the Sale of Goods Act considered below. The result is that a valid pledge can now only be made by a mercantile agent as provided in sec. 178, or by a person who has obtained possession of the goods under a contract voidable under sec. 19 or sec. 19-A of the Act as provided in sec. 178-A, or by a seller or by a buyer in possession of goods after sale as provided in sec. 30 of the Indian Sale of Goods Act.

The changes caused by the amendment of the section may be illustrated by the following examples:-

(1) A commission agent or broker may make a valid pledge of the goods under the old as well as the present section.

(2) A seller left in possession of goods may make a valid pledge under the old section as well as under sec. 30 of the Sale of Goods Act.

(3) A person in bare custody of goods may not make a valid pledge either under the old or the present section.

(4) A hirer under a hire-purchase agreement who has entered into a binding agreement to buy goods may make a valid pledge under the old as well as the present section. See notes below, "Seller or buyer in possession after sale."

(5) A person entrusted with goods for a specific purpose may not make a valid pledge either under the old or the present section.

(6) Under the old and present law, both the owner and the mercantile agent could create a pledge by delivering documents of title.[27]

Antecedent debt.—The present section seems to protect a pledge for an antecedent debt as well as a pledge for an advance made specifically upon it. See English Factors Act, 1889. sec. 4.

Possession with Owner's consent.—As the Supreme Court in *Morvi Mercantile Bank* v. *Union of India* observed, if a mercantile agent is with the consent of the owner in possession of the goods or document of title to the goods, the pledge made by him will

[26] (1934) 61 I.A. 416, 427, 68 M.L.J. 26, 37 Bom. L.R. 130, 152 I.C. 730, ('34) A.P.C. 246.

[27] *Morvi Mercantile Bank* v. *Union of India* (1965) A.S.C. 1954.

be deemed to have been expressly authorized by the owner of the goods and the fiction of authorisation indicate that he is doing what the owner could have done.[28] Regarding the nature of consent under S. 178 of the Contract Act the Supreme Court decision of *Central National Bank* v. *United Industrial Bank*[29] may be referred to, though the said decision was on S. 30 (2) of the Sale of Goods Act, 1930 and not on S. 178 of the Contract Act. It is submitted that the nature of consent under S. 178 of the Contract Act will not receive a different interpretation from that given by the Supreme Court under S. 30 (2) of the Sale of Goods Act, 1930. Accordingly, the Supreme Court in the above mentioned case observed that a consent secured by false representation may not be free consent but it is a real consent as the effect of fraud or misrepresentation is to make a transaction voidable and not void. So a pledgee obtaining goods from a person in possession whose possessory right is defeasible on the ground of fraud but has not actually been defeated at the time when the transaction took place, is protected. So, if a mercantile agent induces the owner to pass the property to him by some false pretence, the owner cannot claim it back from an innocent pledgee until the pledgee's rights are satisfied. However, the position is different where the fraud committed is of such a character as would prevent there being consent at all on the part of the owner to give possession of the goods to a particular person, e.g. fraud induced by an error regarding the identity of the person to whom the property was to be given, the whole thing is void and there is no consent of two persons on the same thing in the same sense under S. 13 of the Indian Contract Act.[29] In the aforesaid Supreme Court case, Defendant 2 (Radhika Bhaiya) agreed to sell shares to *M*. for Rs. 38,000. For this, Defendant 2 sent the shares with the transfer deeds to the Defendant bank with the instruction to deliver over the share certificate with the transfer deeds to *M* only against full payment of its price. The Defendant bank directed its official, Paul, with the aforesaid instruction to see *M*. at *M*'s Office. Paul saw *M*. at his office. *M*. asked for the shares but Paul refused to make over the share certificate to him unless pay order was given. Then *M*. desired to have a look at the share and transfer deed to ascertain that they were all right. So Paul placed them on the table and *M*. examined them and then went out of his chamber with these documents, inspite of Paul's objection, as the pay order was not given by *M*. *M*. told Paul that he was going out to get the pay order and asked Paul to sit in the Chamber. However, *M*. bolted and pledged the share with the plaintiff Bank who, acting innocently, advanced Rs. 29,000 to *M*. On these facts the Supreme Court found that when Paul placed the shares on the table for *M*'s scrutiny, Paul did not part with possession or control over the shares, as while scrutinising the papers, Paul was present there. When *M* went out of the office with the shares, he got possession of them but *M*. had no possession with the consent of Paul (an agent of the owner of the Shares) as Paul had objected to his going away with the shares without making payment. It was against Paul's desire that *M*. took the shares and left the Office. Accordingly the plaintiff Bank had no right of a pledgee to sell the shares in enforcement of the pledge against the interest of the defendant Bank.

Good faith.—To validate a pledge by a mercantile agent the pledgee must have acted in good faith and must not have at the time of the pledge notice that the pawnor has no authority to pledge the goods. The onus of proving both these facts upon the person disputing the validity of the pledge.[30] Under sec. 3, cl. 20, of the General Clau-

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[28] A.I.R. 1965 S.C. 1954, 1959, Para 7.

[29] A.I.R. 1954 S.C. 181, 184, Para 10, 11.

[30] *Stadium Finance* v. *Robbins* (1962) 2 Q.B. 664 (673).

ses Act, 1897, a thing is to be deemed done in good faith where it is in fact done honestly whether it is done negligently or not. Gross negligence may be evidence of bad faith, but it is not the same thing and does not entail the same consequence.[31]

Instances of this are (1) a pledge by a jewellery broker, the pawnee acting in good faith,[32] (2) a pledge by a sharebroker of the shares, the pledgee being unaware of the authority of the sharebroker.[33]

Acting in the ordinary course of business.—The requirement is that the mercantile agent must act in the ordinary course of his business. If he therefore does the business outside his business premises or out of business hours, such a transaction would fall outside this section.[34] A sale of a motor car without a registration book may not be in the ordinary course of his business.[35]

Notice.—The term "notice" in this section includes both express and constructive notice.

Seller or buyer in possession after sale.—Besides the cases mentioned above, there are two other cases in which a person who is not the owner of goods may make a valid pledge thereof, namely, a seller left in possession after sale, and a buyer to whom possession has been delivered before payment of the price. These cases have been provided for in sec. 30 of the Sale of Goods Act, 1930, which is a reproduction of sec. 25 of the English Sale of Goods Act, 1893.

That section provides not only for a sale by a buyer or seller in possession, but also for a pledge, mortgage or other disposition of goods.

Pledge by seller remaining in possession.—The following is an illustration of a pledge by a seller left in possession of the goods sold:—

A sells 100 cases of cutlery to *B* under an agreement made in July 1927, that payment should be made within five months from the date of the agreement and delivery should be taken within that time, the goods remaining in the meanwhile in *A*'s godown free of rent. In August 1927, *A* pledges the goods with *C* who has no notice of the sale to *B*. The pledge to *C* is valid.[36]

Pledge by buyer obtaining possession.—Section 30(2) of the Sale of Goods Act validates a pledge not only by a person who has bought goods but also by one who has agreed to buy them. The hirer under a hire-purchase agreement is not a person who has agreed to buy goods within the meaning of this section unless he is under a binding agreement to buy them. An option to buy will not suffice.[37]

Competition between prior mortgagee and subsequent pledgee.—A mortgages certain goods to B, the mortgage not being accompanied with possession.[38] Afterwards

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[31] See *Jones* v. *Gordon* (1877) 2 App. Cas 616, at p. 629. Cases Under the Indian Factors Act, 1842; *Gobind Chunder Sein* v. *Rayan* (1861) 9 M.I.A. 140; 1 W.R. 43, P.C.; *Jonmenjoy* v. *Watson* (1884) 10 Cal. 901; L.R. 11 I.A. 94.

[32] *Sesappier* v. *Subramania* (1917) 40 Mad. 678.

[33] *Fuller* v. *Glyn* (1914) 2 K.B. 168.

[34] *Coppenheimer* v. *Attenborough & Son* (1908) 1 K.B. 221.

[35] *Pearson* v. *Rose & Young* (1951) 1 K.B. 275.

[36] *Haji Rahimbux* v. *Central Bank of India. Ltd.* (1928) 56 Cal. 367, 119 I.C. 23, ('29) A.C. 447; a case under the old s. 178.

[37] *Belsize Motor Supply Co.* v. *Cox* (1914) 1 K.B. 244.

[38] a mortgage of movable property, although not accompanied by possession, is valid in India: *Shrish Chandra Roy* v. *Mungri Bewa* (1904) 9 C.W.N. 14; *Damodar* v. *Atmaram* (1906) 8 Bom. L.R. 344.

A pledges the goods with *C*, who has not notice of the mortgage. The pledge to *C* is not valid, and *C* has a priority over *B*.[39]

Documents of title to goods.—As to what this term means see sec. 2, sub-sec. (4), of the Sale of Goods Act, 1930, below. Share certificates are not document of title to goods within the meaning of that section,[40] nor cash receipts given in place of delivery orders.[41]

Revocation of authority of mercantile agent.—A pledge by a mercantile agent, though made after the revocation of his authority, is valid, provided the pledgee has not at the time of the pledge notice of such revocation.[42]

Pledge by person in possession under voidable contract.

178-A. When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or section 19-A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

This section is the counterpart of sec. 29 of the Sale of Goods Act, 1930. That section is based on sec. 23 of the English Sale of goods Act, 1893.

Pledge by person in possession under voidable contract.—A person may obtain possession of goods under a contract which is voidable at the option of the lawful owner on the ground of fraud, misrepresentation or coercion (s. 19), or on the ground of undue influence (s. 19-A). Possession so obtained is not by free consent as defined in sec. 14 of the Act. It is nevertheless possession by consent, and the person in possession may make a valid pledge of the goods, provided the contract has not been rescinded at the time of the pledge. There is in such case a *de facto* contract, though voidable on the ground of fraud and the like. It is, however, different if there is no real consent, as where goods have been obtained by means of theft as defined in sec. 378 of the Indian Penal Code. A thief has no title and can give none.

Where goods have been obtained by fraud the person who has so obtained may either have no title at all, or a voidable title, according to the nature of the transaction. If the nature of the fraud is such that there never was a contract between the parties, the person who so obtains the goods has no title and can give none. Thus if *A* represents to *B* that he is acting as agent for *C*, and *B* relying on that representation delivers goods to *A* as buyer, there is not a voidable contract between *A* and *B*, but no contract at all. No property passes to *A*, and he can neither make a valid sale[43] nor a valid pledge. This is really a case of fundamental error as to the person with whom one is contracting. There is no real consent and no contract; there is only an offer on *B*'s part to the person with whom alone he means to deal and thinks he is dealing: See note under sec. 13 above, "Error as to person of the other party." But if a person buys goods with the intention of not paying for them, there is consent, though not free, and a contract, though void-

[39] *Chummun Khan* v. *Mody* (1874) Punj. Rec. no 70; *Abdul Habib* v. *Maung Tur Kyaing* (1921) 9 Rang. 182, 131 I.C. 723, ('31) A.R. 201.

[40] *Lalit Mohan* v. *Haridas* (1916) 24 Cal. L.J. 335.

[41] *Kemp* v. *Falk* (1882) 7 App. Cas. 573, at p. 585.

[42] See English Factors Act, 1889, s. 2(2), and *Moody* v. *Pallmall* (1917) 22 Times L.R. 306.

[43] *Hardman* v. *Booth* (1863) 32 L.J. Ex. 105.

able,[44] and he may make a valid pledge or sale of the goods while the contract is still subsisting,[45] though the fraud may amount to the offence of cheating, as defined in sec. 415 of the Indian Penal Code.

Pledge by co-owner in possession.—One of several joint owners of goods in sole possession thereof with the consent of the rest may make a valid pledge of the goods.[46] Compare Sale of Goods Act, sec. 28.

Good faith.—See note under sec. 178.

Notice.—See note under sec. 178.

Pledge where pawnor has only a limited interest.

179. Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

This must be taken as subject to the operation of the foregoing section. In those cases where a pledge which otherwise would not be valid is made valid by secs. 178 and 178-A, it does not matter whether the pawnor has any interest of his own or not. The present section applies to other cases where the pawnor has possession and some interest, but not the whole interest, in the goods; and where it applies, it is immaterial that the pawnee had no notice of pawnor's limited interest.[47] The pawnor on satisfying his debt to the pawnee is entitled to the return of his goods even if the sub-pledge is for a larger amount.[48] The true scope of the section has been thus defined by Scott, C. J.: "Section 179 does not limit the scope of [the old] section 178, but saves a pledge to the extent of the pledgor's own interest notwithstanding the presence of invalidating conditions falling under one of the provisions to [the old] sec. 178. In other words, whenever he has interest, the person in possession of the goods or documents has unconditional authority to charge at least that interest."[49]

Suits by Bailees or Bailors against Wrong-doers

Suit by bailor or bailee against wrong-doer.

180. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against third person for such deprivation or injury.

In *Morvi Mercantile Bank Ltd* v. *Union of India*[50] appellant bank advanced Rs. 20,000 to a firm which had endorsed in favour of the appellant bank some railway receipts issued by the railway for carriage of consignments from Thana to Okhla (near Delhi). The said consignments sent by the firm to the railway for carriage did not arrive

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[44] *Clough* v. *Lond. & N. W. Ry. Co.* (1871) L.R. 7 Ex. 26.

[45] *Croft* v. *Lumley* (1858) 6 H.L.C. 672, 705.

[46] *Shadi Ram* v. *Mahtab Chand* (1895) Punj. Rec. No. 1.

[47] *Hoare* v. *Parker* (1788) 2 T.R. 376.

[48] *Firm Thakur Das* v. *Mathura Prasad* ('58) A.A. 66; *Belgaum Pioneer Urban Co-op. Credit Bank* v. *Satyapromoda* (1962) A. Mays. 48.

[49] *Lakhamsey Ladha & Co.* v. *Lakmichand* (1918) 42 Bom. 205, doubted in *Haji Rahim Bux* v. *Central Bank of India, Ltd.* (1928) 56 Cal. 367, 387-388, 119 I.C. 23, ('29) A.C. 497.

[50] A.I.R. 1965 S.C. 1954.

at their destination. The Bank as endorsee of the railway receipts sued the Union of India to recover as damages Rs. 35,000 being the value of the lost consignments. The Division Bench of the Bombay High Court held that the bank as endorsee of the railway receipts was entitled to sue for compensation for loss suffered by it by reason of the loss of consignments, but as pledgee of the goods it suffered the loss only to the extent of the amount secured under the pledge and so decree was limited to Rs. 20,000. Reversing this part of the judgment of the High Court, the Supreme Court held that S. 180 of the Contract Act was applicable and that a pledge being a bailment of goods as security for debt, the pledgee will have the same remedies as the owner of the goods would have against third person (i.e. here the Railway) for deprivation of the said goods. Accordingly, the Bank being a pledgee can maintain a suit for recovery of the full value of the consignments.

This section recognizes concurrent rights of an owner and of a bailee. The right given to a bailee is by virtue of his possession so that his possessory right should be an efficacious one.

Apportionment of relief or compensation obtained by such suits.

181. Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

In other words, it does not matter which of them recovers first, or whether one sues or both. Of course the defendant cannot be liable in all for more than the value of the goods, and special damages, if any.