EAST INDIA (CONTRACT LAW).

RETURN to an Address of the Honourable The House of Commons, dated 26 March 1868;—for,

"COPIES of Papers showing the present position of the Question of a Contract Law for India:"

"And, of all Reports of the Indian Law Commissioners on the Subject of Contracts."

India Office, 29 April 1868.

H. L. ANDERSON, Secretary, Judicial and Legislative Department.

(Mr. Kinnaird.)

Ordered, by The House of Commons, to be Printed, 30 April 1868.
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COPIES of PAPERS showing the present position of the Question of a CONTRACT LAW for India; and, of all REPORTS of the INDIAN LAW COMMISSIONERS on the subject of CONTRACTS.

— No. 1.—

Indian Law Commissioners to the Under Secretary of State for India.

Indian Law Commission, 20, Abingdon Street,
31 July 1866.

I am directed by the Indian Law Commissioners to transmit their Second Report on the Substantive Law of India.

I have, &c.

The Under Secretary of State
for India.

W. Macpherson.

SECOND REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

We, Your Majesty's Commissioners appointed to prepare a body of substantive law for India, have, since we made our First Report, applied ourselves principally to the subject of contract, which affords the most frequent occasion for litigation in all parts of that country, and on which we are satisfied that a law can be framed applicable to the whole population. The need of such law is manifest on a view of the existing state of things; which, in general terms, may be described by saying that, within the limits of the Presidency towns, the decision of suits of this nature is practically governed by the law of England, and that everywhere else the judge is to a great extent without the guidance of any positive law beyond the rule that his decision shall be such as he deems to be in accordance with "justice, equity, and good conscience."

It is essential that this large subject should be so treated that the rules of the several branches into which it divides itself shall form a consistent system. But we do not think it necessary or expedient to refrain on this account from following, with respect to those branches, the course recommended to us by Your Majesty's Secretary of State for India on our appointment, of submitting, as the progress of our labours might enable us to frame them, successive reports on the several departments of law. Accordingly we now humbly submit to Your Majesty rules of law which we have prepared on the subject of Contracts in general, of the Sale of Moveable Property, of Indemnity and Guarantee, of Bailment, of Agency, and of Partnership. The early enactment of these rules appears to us to be very advisable.

In framing them we have deemed it expedient to depart, more or less, from the English law in several particulars; of which we proceed to specify the most important.

In accordance with the principles upon which we prepared the rules of succession, we have not thought it necessary to place married women under any disability to contract.

We have not adopted, in framing these rules, the provisions of the English Statute of Frauds, which require certain contracts to be in writing. Those provisions are not of unquestionable expediency even in England; and we think...
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that they are not suited to the habits and present condition of the people of India.

We have considered whether it would be expedient to render binding in law promises made without consideration. By the English law, such promises are held to be binding only when expressed in writings under seal. We have not recognised any distinction between writings under seal and writings not under seal, but we think that in order to give validity to promises made without consideration, it ought to appear that they were made with due deliberation. In order to attain this object, we propose that such promises shall be binding only when they are given in writing, and are registered with the permission of the promisor, according to the provisions of the law for the time being in force for the registration of assurances.

By the English law, a promise by a creditor to give time for the payment of an existing debt, or the acceptance by him, in full satisfaction of his demand, of a smaller sum than that which is due to him, is not binding on him unless there has been some new consideration given for it, such as an undertaking to give an additional or different security, or to pay the debt in a manner or at a time more advantageous to the creditor than that originally agreed upon; or unless the creditor's engagement to take less than his due, or to give time, be contained in a composition deed or agreement entered into by the debtor with his creditors generally; but a slight variation of the terms of the contract will satisfy these conditions.

We have provided that a person who is entitled to claim performance of an engagement may dispense with or remit such performance wholly or in part, or may accept instead of it any satisfaction which he thinks fit.

We propose that the extraordinary remedy of an order for Specific Performance should be restricted to the case of engagements for the creation or transfer of any interest in immovable property, or for the delivery of any specific article of moveable property. We have not, however, thought it right to include in the former category agreements to cultivate land in a particular manner or to grow particular crops; and we have provided that Injunctions shall not be granted to restrain the breach of engagements relating to the cultivation of land or the growing of particular crops.

With regard to goods sold by a person who has no right to sell them, the general rule of English law is, that the owner of the goods retains the ownership notwithstanding his having lost the possession of them, and their having been sold to a third person. But from this rule there is an exception in the case of goods sold in open market, an expression which, by the custom of London, applies to every shop within the city.

It cannot be denied that the subject is difficult. We have to consider, on one hand, the hardship suffered by an innocent person who loses in this way his undoubted property. But, on the other hand, still greater weight appears to us to be due to the hardship which a bond fide purchaser would suffer were he to be deprived of what he bought. The former is very often justly chargeable with remissness or negligence in the custody of the property. The conduct of the latter has been blameless. The balance of equitable consideration is therefore on the side of a rule favourable to the purchaser: and we think that sound policy with respect to the interests of commerce point to the same conclusion.

We have therefore provided that the ownership of goods may be acquired by buying them from any person who is in possession of them, if the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession has no right to sell them.

Similar provisions have been inserted—in accordance, we may observe, with the spirit of the Factors' Act—to meet the cases of those who have purchased goods or taken them by way of pledge from persons in possession of any documentary title to the goods, where the circumstances are not such as to raise a reasonable presumption that the person in possession of the document has no right to sell or to pledge the goods.

It would seem that by the English law if a buyer, or any person claiming under him, is by reason of the invalidity of the seller's title deprived of the thing sold, he cannot claim compensation from the seller for loss thereby caused. We propose that in such cases the seller shall be responsible, unless a contrary intention appears by the agreement.

In order to avoid the litigation which arises under the English law on the subject
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subject of the distinction between penalty and liquidated damages, where the contract contains a stipulation that a specified sum shall be paid in case of its breach, we propose that the rule of law shall have no regard to that distinction, but simply require payment of the specified sum.

In dealing with the law of Suretyship, we have not thought it right to recognise a transaction so complicated, and tending so much to the unfair devolution of liability on the surety, as that by which a creditor who makes a composition with, or agrees to give time to, or not to sue, the principal, may yet reserve his rights and remedies against the surety. By the rule which we propose, an agreement between the creditor and the principal, by which the creditor makes a composition with, or agrees to give time to, the principal, or not to sue him, will discharge the surety; no exception being made in favour of the creditor in the case where he has endeavoured to reserve his rights and remedies against the surety. From a wish to avoid subtleties, and the attaching of unforeseen consequences to men’s actions, we have provided that where there are co-sureties, a release of one of them by the creditor shall not discharge the others, nor free that one from responsibility to them.

Adopting a provision of the French and Italian codes, we propose that the surety shall be discharged by any act or omission of the creditor, only in case the eventual remedy of the surety against the principal is thereby impaired. We also propose to enact that where upon the face of an agreement two persons are primarily liable to a third person, that liability shall not be affected so far as regards the third person by an arrangement between the two, that one of them shall be liable only upon the default of the other, even although such arrangement may have been known to the third person, unless he was a party to the arrangement. In this we adhere to the old and simple doctrine of the common law, rejecting the qualifications introduced by Courts of Equity.

In our rules on the subject of Bailment we have discarded the complicated system of gradation which the English law applies to the amount of care which a bailee is to be expected to exercise, and the responsibility which is to attach to him; and we have framed our proposed law on the principle, that 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 take of his own goods, and that more should not be required of him in any case.

We have endeavoured to improve the law applicable to the case where the bailor’s goods have, without the consent of the bailor, been mixed up with the goods of the bailee, so that they cannot be separated. The remedy which our rule provides is, that the bailor shall be entitled to receive compensation for the loss of his goods, which seems more expedient than the provision of the English law, that the whole shall go indiscriminately to the person whose goods have been mixed without his consent.

We have provided that a continuing guarantee given by, to, or for a firm, shall not be rendered invalid by a change in the firm.

In regulating the devolution of rights and liabilities, we propose, in accordance with the rule of English Courts of Equity and of the Indian Code of Civil Procedure, that joint liabilities and rights shall, after the death of one of the persons liable or entitled, go to his representative jointly with the survivor, and after the death of the survivor to the representatives of both jointly.

We propose to lay it down that a person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it, if he was in reality acting, not as agent, but on his own account.

In defining the responsibility of a master for the misconduct of his servant, we have stopped a little short of the limits assigned to it by the English law. We think that the responsibility ought to cease as soon as the misconduct assumes the character of intentional wrong-doing.

According to the English law, when there is any partnership property, the separate property of any partner must be employed first in the payment of his separate debts, and the surplus, if any, in the payment of the partnership debts; but when there is no partnership property, the separate property of any partner must be applied equally to the payment of all the partnership and separate debts for which such partner is liable. It thus depends upon the existence or non-existence of partnership property, no matter how small in amount, which of the two rules is to govern the division of the separate property of the partners. We have
have thought it right so to frame the law that the rule first stated, which is more equitable, shall prevail, whether there is any partnership property or not. The principle on which we proceed is that of having regard to the views of the creditor in giving the credit. In contracts with a firm, partnership property is primarily looked to; in dealings with a partner with which the firm has nothing to do, all that is looked to is his own sufficiency.

Adopting a rule which is to be found in the German and the Italian commercial codes, we propose that every person introduced as a partner into a pre-existing firm shall be subject to all the obligations incurred by the firm before he was introduced.

We have adopted, with such verbal alterations as were necessary to bring them into harmony with the language of our rules, the provisions of a law lately passed by the Indian Legislature, Act XV. of 1866, for relieving those who participate in the profits of a partnership without being really partners, from becoming liable for the engagements of the firm.

The Indian Legislature has recently passed an Act (X. of 1866) for regulating joint-stock companies, which appears to be an extension to India of the English code as embodied in the Joint Companies Act of 1862. We have abstained for the present from entering upon the consideration of this subject.

We have to repeat the expression of our hope, conveyed in our last Report, that if the rules submitted by us to Your Majesty shall be enacted as law, those whose duty it may be to administer justice under them, will not resort to any other system of law for an authoritative solution of an ambiguity or supply of an omission, but will in such cases be entirely guided by regard to justice, equity, and good conscience.

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**Contract.**

1. A contract is an agreement between parties whereby a party engages to do a thing or engages not to do a thing.

A contract may contain several engagements; and they may be either by the same party or by different parties.

A contract may be expressed or implied, or partly expressed and partly implied.

A contract or part of a contract may be expressed either orally or by writing.

A contract or part of a contract is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

**Illustrations.**

(a.) A. orally agrees with B. to buy of him at a certain price 500 maunds of rice. This is a contract expressed orally.

(b.) A. orders of B., by writing, 500 maunds of rice at a certain price. B. by writing accepts the order. This is a contract expressed by writing.

(c.) A. orally agrees with B. to buy of him 600 maunds of rice at a price to be fixed afterwards. The price is afterwards fixed by correspondence between A. and B. This is a contract expressed in part orally and in part by writing.

(d.) A. orally orders B., a tailor, to make him a coat. B. accepts the order. The contract thus made contains an implied engagement by B. that the coat to be made for A. shall be of suitable materials, and shall fit A.; and an implied engagement by A. that he will accept the coat, and will pay for it, if within a reasonable time it shall be so made.

(e.) A., by writing, orders of B. 500 maunds of the best rice, lying in his godowns. B. accepts the order. There is an implied engagement on A.'s part to pay a reasonable price for the rice.

2. Every person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may enter into a contract.

**Explanation 1.**—Persons who are deaf, or dumb, or blind, are not thereby incapacitated for entering into a contract if they are able to know what they do by it.

**Explanation 2.**—One who is ordinarily insane may make a contract during an interval in which he is of sound mind.

**Explanation**
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Explanation 3.— No person can enter into a contract while he is in such a state of mind, whether arising from drunkenness, or from illness, or from any other cause, that he does not know what he is doing.

3. A proposal to enter into a contract may be retracted, or the terms of it altered by the party making it, at any time before it is accepted.

Explanation.—A proposal is said to be accepted when an expressed acceptance of it has been communicated to the proposer; or when a letter of acceptance is posted or a telegraphic message of acceptance is delivered at a proper office, and the acceptance by letter or telegram is not cancelled by some communication which reaches the proposer before or at the same time with the letter or telegram of acceptance; or when acceptance is to be inferred from the circumstances of the case.

Illustration.

A. sends goods to B. for sale or return. B. sells the goods to C. B. has accepted the goods.

4. A proposal does not bind the party making it, unless it be accepted within the time prescribed for its acceptance, or, if no time is prescribed, within a reasonable time.

5. Any engagement which a contracting party has been induced to form by deceit or coercion, or by such influence as impedes or interferes with the freedom of his agency, renders the contract voidable at the option of that party.

Explanation 1.— Deceit may be practised on a person, not only by intentionally inducing him to believe what is not true, but by intentionally concealing truth from him.

Explanation 2.— In order to enable a party to annul a contract by reason of deceit, it must appear, where a false representation has been made, that he relied on the representation; and where the truth has been concealed, that he had not the means with ordinary diligence of discovering the truth.

Illustrations.

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

(b.) A., in order to deceive B., falsely informs him that 500 maunds of indigo are made annually at A.'s factory. B., not relying on this statement, examines the accounts of the factory, which show that only 400 maunds of indigo have been made. After this B. buys the factory. The contract is not voidable on account of A.'s mis-statement.

(c.) B. having discovered a vein of coal on A.'s estate, does not communicate that circumstance to A., and buys the estate at a price fixed by A., in ignorance of the existence of the coal. The sale is not voidable on account of B.'s conduct.

(d.) B. having discovered a vein of ore on the estate of A., adopts means to conceal and does conceal from A. the existence of the ore, so that A. cannot with ordinary diligence discern its existence. Through A.'s ignorance B. is enabled to buy the estate at an under-value. The sale is voidable.

(e.) B., by deceit, induces A. to enter into an engagement with B. for the benefit of C., who is not privy to the deceit. The engagement is voidable.

(f.) B., by deceit, induces A. to enter into an engagement with B. for the benefit of C., who is not privy to the deceit. The engagement is voidable.

(g.) A., a young female who has resided during her minority in the family of B., her guardian, continues to reside with him after attaining majority, and is induced, by means of his influence, to enter into a contract with him which is disadvantageous to herself. The contract is voidable.

6. A person who, either knowingly or ignorantly, makes a false representation whereby he induces another to enter into a contract with him, is bound to place the other in the same position as if the representation had been true, and in default of his doing so the contract is voidable at the option of the person who has been misled.

Explanation.—Where a party's consent to an engagement by contract has been given through a mistake as to the substance of the thing which is the subject
ject of the engagement, and the mistake was occasioned, however innocently, by
the other party, this has the same effect as a false representation.

Illustrations.

(a.) A. informs B. that A.'s estate is exempt from the payment of revenue to Govern-
ment; B. thereupon buys the estate. It turns out that the estate is not exempt from
the payment of revenue, and that such exemption cannot be obtained. The sale is voidable.
(b.) A. informs B. that A.'s estate is within a mile of the town of Ramnuggur; B. there-
upon buys the estate. The estate is found to be two miles from the town. The sale is
voidable.
(c.) A. informs B. that A.'s estate is free from incumbrance; B. thereupon buys the
estate. It turns out that the estate is subject to a mortgage. A. must redeem the mort-
gage; or if he cannot do so the contract is voidable.
(d.) A. and B. are partners in a mercantile business. A. is the managing partner, B. is
ignorant of the state of the business. A. and B., in order to induce C. to become a partner
with them, show him a statement of the affairs of the partnership, which is wrong by a
large amount. C., relying upon the statement, joins the firm, and for several years does not
discover the falsity of the statement. The contract of partnership is voidable at the option
of C.

7. Where both the parties to an engagement by contract are under a mistake
as to a matter of fact essential to the engagement, the engagement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms
the subject-matter of the contract, is not to be considered a mistake as to a matter
of fact.

Illustrations.

(a.) A. agrees to sell to B. a cargo of goods, supposed to be on its way from England to
Bombay. It turns out that before the day of the bargain the ship conveying the cargo had
been cast away and the goods lost. Neither party was aware of these facts. The contract
is void.
(b.) A. buys of B. a certain horse. It turns out that the horse was dead at the time of
the bargain, though neither party was aware of the fact. The sale is void.
(c.) A., being entitled to an estate for the life of B., agrees to sell it to C. B. was dead
at the time of the contract, but both parties were ignorant of the fact. The contract is
void.

8. The validity of a contract is not affected by the circumstance that a party
was at the time of making it under a mistake of law.

Explanation.—A mistake in respect of a law not in force in India has the
legal consequences of a mistake, not of law, but of fact.

Illustration.

A. owes to B. a debt, the payment of which at a fixed time is guaranteed by C. B.
contracts with A. to give time to A., C. not assenting to the arrangement. B. is not aware
at the time of entering into this contract, that its legal effect will be to discharge C. from
liability under his guarantee. B. is nevertheless bound by his contract to give time to A.

9. The subject of every contract must be certain, or capable of being made
certain.

Illustrations.

(a.) A. agrees to sell to B. “100 tons of oil,” the kind of oil not being specified or in
any way indicated. The contract is void for uncertainty.
(b.) A. agrees to sell to B. 100 tons of oil of a specified description, known as an article
of commerce. There is no uncertainty here to prevent the contract from being valid.
(c.) A., who is a dealer in cocoa-nut oil only, agrees to sell to B. “100 tons of oil.” The
nature of A.'s trade affords an indication of the meaning of the words, and A. has entered
into a contract for the sale of 100 tons of cocoa-nut oil.
(d.) A. agrees to sell to B. “all the grain in his granary at Ramnuggur.” There is no
uncertainty here to prevent the contract from being valid.
(e.) A. agrees to sell to B. 1,000 maunds of rice at a price to be fixed by C. The subject
of the contract is capable of being made certain, and there is no uncertainty here to
prevent the contract from being valid.

10. In order to the validity of an engagement by contract, there must be a
lawful object and a good consideration.

First
**First Exception.**—A person who makes a promise, whether upon good consideration or not, is bound to perform it if the promise be expressed in writing and duly registered according to the provisions of the law for the time being in force for the registration of assurances, unless the promise is unlawful or is based on an unlawful consideration.

**Second Exception.**—A person who makes an express promise without good consideration is bound to perform it, if it be a promise to compensate wholly or in part a person who has already voluntarily done something which the person who makes the promise was legally compellable to do; or if it be a promise to pay wholly or in part a debt which the creditor is legally entitled to receive from the person who makes the promise, but of which by reason of the law for the limitation of suits he cannot enforce payment.

**Explanation 1.**—A good consideration must be lawful.

**Explanation 2.**—An object, a consideration, or a promise is said to be lawful when it is not contrary to law or to morality.

**Explanation 3.**—A good consideration must be something which at the desire of the person entering into the engagement another person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing.

**Illustrations.**

(a.) A. engages by contract with B. to sell his house to B. for 10,000 rupees. Here there is an engagement by A. to B., and an engagement by B. to A., and these engagements are valid, there being in each case a lawful object, and a good consideration.

(b.) A. agrees to sell his house at Ramnugger to B. for 10,000 rupees. Here the promise to pay the sum of 10,000 rupees is the consideration for A.’s entering into the contract; and the promise to convey the house is the consideration for B.’s entering into the contract. These are good considerations.

(c.) A. engages to pay B. 1,000 rupees at the end of six months if C., who owes that sum to B., fails to pay it. B. engages to grant time to C. accordingly. Here the engagement of each party is the consideration for the engagement of the other party; and they are good considerations.

(d.) A. engages, for a certain sum paid to him by B., to make good to B. the value of his ship, if it shall perish by shipwreck on a certain voyage. Here A.’s promise is the consideration for B.’s payment, and B.’s payment is the consideration for A.’s promise; and these are good considerations.

(e.) A. engages to maintain B.’s child, and B. engages to pay A. 1,000 rupees yearly for the purpose. Here the engagement of each party is the consideration for the engagement of the other party. They are good considerations.

(f.) A., B., and C. enter into a contract for the division among them of gains acquired or to be acquired by them by fraud. The contract is void.

(g.) A. undertakes to obtain for B. an employment in the public service, and B. agrees to pay 1,000 rupees to A. The contract is void, as the consideration for it is illegal.

(h.) A., being agent for a landed proprietor, agrees, for money, without the knowledge of his principal, to obtain for B. a lease of land belonging to his principal. The contract between A. and B. is void, being contrary to A.’s duty as agent.

(i.) A. engages with B. to drop a prosecution which he has instituted against B. for robbery, and B. engages to restore the value of the things taken. The contract is void.

(j.) A. voluntarily pays B. a sum of money which is due to B. from C. Afterwards C. is bound to perform the promise.
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deliver them to him on receiving payment of the first instalment. A.'s engagement to
deliver the goods does not become absolute until B. pays or tenders to him the first
instalment.

(c.) A. enters into an engagement by contract with B. to buy B.'s house for 10,000
rupees if A. shall survive C. A.'s engagement does not become absolute until C. dies,
leaving A. surviving him.

(d.) A. enters into an engagement by contract with B. to sell a horse to B. at a specified
price in case C., to whom the horse has been offered, shall refuse to buy it. A.'s engage-
ment does not become absolute until C. refuses to buy the horse.

12. An engagement by contract which is intended to take effect only in case a
specified uncertain event shall not happen, does not become absolute until the
happening of that event becomes impossible.

13. Where an engagement by contract is intended to take effect only in case a
specified uncertain event shall happen within a fixed time, and the time expires
without the event having occurred, the engagement becomes void. Where no
time has been fixed for the happening of the event the engagement becomes
void as soon as it is ascertained that the event will not happen.

Illustrations.

(a.) A. enters into an engagement by contract to buy B. a sum of money if a certain
ship shall return within a year from the time of the contract. The year elapses without
the ship having returned. The engagement becomes void.

(b.) A. enters into an engagement by contract to sell B. a certain sum of money if C.
shall leave a son surviving him. C. dies, not leaving a son surviving him. The engage-
ment becomes void.

14. Where an engagement by contract is intended to take effect in case a
specified event shall not happen within a fixed time, the engagement does not
become absolute until the time has expired without the event having occurred,
or until before the time fixed, it is ascertained that the event will not occur.
Where no time has been fixed for the happening of the event the engagement becomes
void as soon as it is ascertained that the event will not happen.

Illustrations.

(a.) A. enters into an engagement by contract to pay B. a sum of money if a certain
ship shall not return within a year. At the end of six months it is ascertained that the ship
has been lost. The engagement has become absolute.

(b.) A. enters into an engagement by contract to pay B. a sum of money if a certain ship
shall not return. It is ascertained that the ship has been lost. The engagement has
become absolute.

15. Where the order in which different engagements are to be performed is
not expressly fixed by the contract, it shall be that order which the nature of
the transaction requires.

Illustrations.

(a.) A. enters into an engagement by contract to build a house for B. at a fixed price.
B. engages to pay the price. B.'s engagement does not become absolute until A. finishes
the house.

(b.) A., a tradesman, enters into an engagement by contract to make over his stock in
trade to B. at a fixed price, and B. engages to give security for the payment of the money.
A.'s engagement does not become absolute until the security is given; for the essence of
the engagement is, that A. should have security before he delivers up his stock.

16. Where one of two engagements by contract has been entered into in con-
sideration of the other, and a time is appointed for the performance of one of
them, which time is to arrive before the reciprocal engagement can be performed,
the latter does not become absolute until the former has been performed.

Illustrations.

(a.) A. contracts with B. to sell to him at a specified price certain merchandise on board
a ship which cannot arrive for a month, and B. engages to pay for the merchandise within
a week from the date of the contract. A.'s engagement does not become absolute until B.'s
engagement has been fulfilled.

(b.) A. contracts with B. to sell him 100 bales of merchandise to be delivered next day,
and B. engages to pay for them within a month. B.'s engagement does not become abso-
lute until the merchandise has been delivered to him.

17. The
17. The parties to a contract are bound to afford to each other all reasonable facilities for performing their engagements.

18. Where an engagement by contract is intended to take effect on the happening of an event, and the party who has entered into the engagement prevents the happening of the event, he becomes liable to perform the engagement, or to make compensation to the other party, for any loss which he may have sustained in consequence of its non-performance.

Illustration.

A. engages to pay 1,000 rupees to B., provided that B. shall execute certain work for him; and B. engages to execute the work. B. is ready and willing to execute the work accordingly, but A. prevents him from doing so. A.'s engagement has become absolute.

19. When a person having entered into an engagement by contract with another fails to do an act which he is bound by law to do, and which is necessary to enable the other to perform his part of the contract, the party who has failed to do such act is liable to make compensation to the other party for any loss or damage which he may have sustained in consequence of the non-performance of it.

Illustrations.

(a.) A. hires B.'s ship to take in and convey from Calcutta to the Mauritius a cargo to be provided by A., B. receiving a certain freight for its conveyance. A. does not provide any cargo for the ship. A. must make compensation to B. for his failure.

(b.) A. enters into an engagement by contract with B. to execute certain builders' work, for a fixed price, B. supplying the scaffolding and timber necessary for the work. B. refuses to furnish any scaffolding or timber, and the work cannot be executed. B. is bound to make compensation to A. for any loss.

20. When there are mutual engagements by contract, and one of them is an entire and indivisible engagement by contract for the doing of a particular thing by a fixed time, time is of the essence of the contract, and unless the thing be done at the stipulated time the reciprocal engagement, if any, does not become absolute.

21. Where there are mutual engagements by contract, and one of them is an engagement for the doing of several things at different times, and the things stipulated are done, but not at the times specified, this irregularity does not prevent the reciprocal engagement from becoming absolute, but the person who entered into the latter engagement is entitled to compensation for any loss which he may have sustained in consequence of the irregularity.

22. When an engagement by contract is conditional, and the condition fails to be fulfilled, the engagement becomes void.

Illustration.

A. engages to pay 10,000 rupees to B. if he will marry A.'s daughter. A.'s daughter was dead at the date of the engagement. The condition cannot be fulfilled, and the engagement is void.

23. An engagement by contract may be made with the condition superadded, that it shall be terminated or varied in case a specified uncertain event shall happen; or that it shall be terminated or varied in case a specified uncertain event shall not happen.

24. A condition of the kind described in the last preceding section is invalid, and does not affect the engagement to which it is superadded, if at the time of the contract the event is impossible, or if it is repugnant to law or morality, or inconsistent with the main purpose of the contract.

25. An engagement to which is superadded a condition of the kind described in Section 23 becomes void if the fulfilment of the condition is, subsequently to the contract, rendered unlawful, or is made impossible by some unforeseen event which the person who entered into the engagement could not prevent.

Illustrations.

(a.) A. engages to pay B. 5,000 rupees, provided that the engagement shall be void if A. takes in cargo for B. at a certain port. The Government afterwards declares war against 239.

(b.)
the country in which the port is situated, so that A. cannot trade there. The engagement becomes void.

(B.) A., a singer, who has undertaken to sing at B.'s theatre, engages to pay B. 20,000 rupees, provided that the engagement shall be void if A. sings at B.'s theatre on a certain number of nights in the month of June. A., before June loses his voice through illness. The engagement to pay 20,000 rupees becomes void.

26. Where an engagement by contract is made with a condition super-added, that it shall be terminated or varied unless a certain person shall perform a specified act, but no time is specified for the performance of the Act; if such person takes any step which renders impossible or indefinitely postpones the performance of the act required, the engagement shall be terminated or varied as if such person had died without performing the Act.

27. If a condition of the kind described in Section 23 consists in doing one or the other of two things, and one of them is unlawful or impossible, the condition can only be fulfilled by doing the other.

Illustration.

A. engages by contract to pay B. a fixed sum, provided that if A. delivers to B. on a certain future day either 20 maunds of the finest rice, or a certain quantity of opium to be obtained contrary to law, the engagement shall be void. The condition cannot be fulfilled otherwise than by the delivery of 20 maunds of the finest rice.

28. A person who fails to do an act which he has engaged by contract to do, shall make compensation to the person in whose favour the act was to be done.

Exception.—A man incurs no liability through the non-performance of an act which he has engaged by contract to do, where, since the date of the contract, the performance of the act has been rendered unlawful, or has been made impossible by some event of which he did not, expressly or by implication, take upon himself the risk.

Illustrations

(a.) A. engages to deliver to B. at a certain price, at a specified time and place, a cargo of merchandise then at sea in his ship. The ship is afterwards lost at sea, with all its cargo. A. is liable to make compensation to B. for the non-performance of his engagement.

(b.) A. freights B.'s ship to proceed to the Island of Ichaboe, and there to take in a cargo of guano, to be supplied by A., and to convey it to a certain port. The guano at Ichaboe was entirely exhausted before the ship arrived, and it was impossible for A. to supply a cargo. A. must make compensation to B. for the non-performance of his engagement.

(c.) A., the owner of a music hall, agrees to let B. have the use of it for four days in June for the purpose of giving concerts in it; B. to pay 1,000 rupees a day. On the 30th of May the hall is accidentally destroyed by fire without the fault of either party. Neither party is bound to make compensation for the non-performance of the act which he engaged by the contract to do.

(d.) A., a painter, enters into an engagement to paint a picture for B. A. becomes blind. A. is not liable to make compensation to B. for not painting the picture.

(e.) A. engages to take in cargo at a certain port. The Government afterwards declares war against the country in which the port is situated, so that A. cannot trade there. He is not bound to make compensation for failure to take in cargo at the specified port.

29. For the purpose of determining questions as to the meaning of a contract, a court must inquire into every material fact relating to the situation of the parties to, or the subject matter of such contract, and into every fact a knowledge of which may conduce to the right application of the words which the contracting parties have used.

30. An engagement by contract must be performed by the person who has entered into it, unless its nature be such that it can be properly performed by another, in which case he may employ a competent person to perform it; or if he dies before performance, his representatives may perform it, or employ a competent person to do so.

Illustrations.

(a.) A. engages to pay B. a sum of money. He may perform this engagement, either by personally paying the money to B., or by causing it to be paid to B. by another; and if A. dies...
A. dies before the time appointed for payment, his representatives may perform the engagement.

(b.) A engages to paint a picture for B. This engagement cannot be performed except by A's painting the picture himself.

31. Where a person who is entitled to claim from another the performance of an engagement accepts such performance from a third person, he cannot afterwards enforce it against the person who entered into the engagement.

32. A person who is entitled to claim performance of an engagement may dispense with or remit such performance, wholly or in part, or may accept instead of it any satisfaction which he thinks fit.

Illustrations.

(a.) A. engages to paint a picture for B. B. afterwards expressly forbids him to do so. A. is no longer bound to perform the engagement.

(b.) A. owes B. 5,000 rupees. By agreement A. pays to B. and B. accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c.) A. owes B. 5,000 rupees. C. pays to B. 1,000 rupees, and B. accepts them in satisfaction of his claim on A. This payment is a discharge of the whole claim.

33. If a person who is entitled to claim the performance of an engagement by contract accepts a new and distinct contract by way of substitution for the existing one, the original engagement is no longer in force.

Illustrations.

(a.) A. owes money to B. under a contract. It is agreed between A., B., and C. that B. shall thenceforth accept C. as his debtor instead of A. The old debt of A. to B. is at an end, and a new debt from C. to B. has been contracted.

(b.) A. owes B. 10,000 rupees. A. enters into an arrangement with B. and gives him a mortgage of A.'s estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract.

(c.) A. and B. have mercantile transactions with each other, and A. thereby becomes indebted to B. in the sum of 10,000 rupees, for which B. holds no security. Afterwards A. executes a bond in favour of B. to secure the payment of the sum due to him. The execution of this bond does not constitute a new and distinct contract.

(d.) A. owes B. 1,000 rupees under a contract; B. owes C. 1,000 rupees. B. orders A. to pay 1,000 rupees to C. C. does not assent to the arrangement. B. still owes C. 1,000 rupees, and no new contract has been entered into.

34. Where by the contract a person is to perform his engagement without application by the person with whom he made the engagement, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question what is a reasonable time is in each particular case a question of fact.

Illustrations.

(a.) A. sells fresh provisions to B., to be delivered by A. to B. No time for delivery is specified. After the lapse of a week A. tenders the provisions to B. B. need not accept them, as the offer was not made within a reasonable time.

(b.) B. orders A., a tailor, to make and to send him a coat. A. sends home the coat after the lapse of two months. B. need not accept it, as the delivery was not made within a reasonable time.

(c.) A., a bookseller in Calcutta, sells to B. a book, to be delivered to B. at his residence in Calcutta. A. afterwards casually hears a false report, that B. is absent from Calcutta, and without taking any means to inform himself as to the correctness of the report, neglects for three months to deliver the book, and at the end of that time sends it to B.'s residence. B. need not accept the book, as delivery was not made within a reasonable time.
35. When an engagement is to be performed on a certain day, and the person entering into the engagement has undertaken to perform it without application, he has the whole of that day to perform the engagement in; subject to this qualification, that the person who is to receive performance is not bound to receive it before or after the usual hours of business, or at any other place than that at which the engagement ought to be performed.

Illustration.

A. engages to deliver goods at B.'s warehouse on the 1st January. On that day A. brings the goods to B.'s warehouse, but after the usual hour for closing it, and they are not received. A. has not performed his engagement.

36. When the engagement is to be performed on a certain day, and the person entering into the engagement has not undertaken to perform it without application, it is the duty of the person in whose favour the engagement is made, to apply for performance at a proper time and place.

Explanation.—The question what is a proper time and place is in each particular case a question of fact.

37. Where an engagement is to be performed without application, and no place is fixed for the performance of it, the person bound by the engagement must perform it at any reasonable place which the person with whom the engagement was made may appoint.

Illustration.

A. undertakes to pay B. 1,000 rupees on a fixed day. A. must apply to B. to appoint a reasonable place for the purpose of receiving it, and B. must pay it to him at such place.

38. The performance is valid if made in any manner or at any time which the person entitled to claim performance may have prescribed, or may have subsequently sanctioned.

Illustrations.

(a.) B. owes A. 2,000 rupees. A. desires B. to pay the amount to A.'s account with C., a banker. B., who also banks with C., orders the amount to be transferred from his account to A.'s credit, and this is done by C. Afterwards, and before A. knows of this, C. fails. This is a good payment by B.

(b.) A. and B. are mutually indebted. A. and B. settle an account by setting off one item against another, and B. pays A. the balance found to be due from him upon such settlement. This amounts to a payment by A. and B. respectively of the sums which they owed to each other.

(c.) A. owes B. 2,000 rupees. A. and B. agree that B. shall receive some of A.'s goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d.) A. owes B. 5,000 rupees. A. gives to B., and B. accepts, a cheque for that amount drawn by A. This operates as payment, provided the cheque be duly paid.

(e.) A. desires B., who owes him a sum of money, to remit the amount of his debt by post. The debt is discharged as soon as B. puts into the post a letter containing the money, duly addressed to A.

39. Where a man owing several distinct debts to one person makes a payment to him, either with express intimation, or under circumstances, implying that the payment is to be applied to some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations.

(a.) A. owes B. (among other debts) 1,000 rupees upon a promissory note, which falls due on the 1st June. He owes B. no other debt of that amount. On the 1st June A. pays to B. 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b.) A. owes to B. (among other debts) the sum of 567 rupees. B. writes to A. and demands payment of this sum. A. sends to B. 567 rupees. This payment is to be applied to the discharge of the debt of which B. had demanded payment.

40. Where the debtor has omitted to intimate to which debt the payment is to be applied, the creditor is at liberty to apply it at his discretion to any lawful debt actually due and payable to him from the payer, on giving notice thereof to the payer within a reasonable time.

41. Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time. If they are of equal standing, the payment shall be applied in discharge of each proportionately.

42. Were
42. Where a person who has come under an engagement to another has made him an offer of performance, and the offer has not been accepted, the person who has made such offer is not responsible for non-performance so caused, nor does he thereby lose his title to claim performance of any reciprocal engagement.

43. In order to constitute a valid offer of performance, the following rules must be observed:

First. The offer must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining whether the thing tendered really is what it purports to be.

Second. The offer must be a tender of the whole thing which the other party to the engagement is entitled to demand.

Third. It must be unconditional.

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

Explanation. — Where the performance of an engagement would involve the production of a certain thing, it is not necessary to the validity of a tender that the thing should actually be produced, if the person entitled to claim performance does not require that it should be produced.

44. When two persons have jointly come under an engagement by contract to a third person, then, unless a contrary intention appears by the contract, the liability to perform the engagement rests, as between them and him, on those two persons during their joint lives, and after the death of either, on his representative jointly with the survivor, and after the death of the survivor, on the representatives of both jointly.

45. As between themselves, persons who have jointly come under an engagement are bound (unless a contrary intention appears by the contract) to bear the burden of its performance equally; and if one of them is unable to bear his share of the burden, the others must make up the deficiency by equal contributions.

Explanation. — This rule is not to prevent a surety from recovering his disbursements from the principal, or to entitle the principal to recover anything from the surety.

Illustrations.

(a.) A., B., and C. are under a joint engagement to pay D. the sum of 3,000 rupees. A. is insolvent, but his assets are sufficient to pay one-half of his debts. A.'s estate pays 500 rupees. B. and C. must pay 1,250 rupees each.

(b.) A., B., and C. are under a joint engagement to pay D. 3,000 rupees. A. and B. being in fact only sureties for C. C. is unable to pay anything, and A. pays the whole. A. is entitled to receive 1,500 rupees from B.

(c.) A., B., and C. are under a joint engagement to pay D. 3,000 rupees. A. and B. being in fact only sureties for C. C. is unable to pay; A. and B. are compelled to pay the whole sum. They are entitled to recover it from C.

46. Where two persons have jointly come under an engagement by contract to a third person, a release by the creditor of one of them does not discharge the other; neither does it free that one from responsibility to the other.

47. When a person has come under an engagement by contract to two other persons jointly, then, unless a contrary intention appears by the contract, the right to claim performance rests (as between him and them) with them during their joint lives, and after the death of either, with his representative jointly with the survivor, and after the death of the survivor, with the representatives of both jointly.

Illustration.

A., in consideration of 5,000 rupees lent to him by B. and C., enters into an engagement by contract with B. and C. to repay them that sum with interest on a day specified. B. dies. The right to claim performance rests with B.'s representative jointly with C., during C.'s life, and after the death of C. with the representatives of B. and C. jointly.

48. When a party to a contract has refused to perform, or disabled himself from performing, his engagement in its entirety, the party who has entered into the reciprocal engagement may put an end to the contract, provided he has not signified, expressly or impliedly, that he acquiesced in its continuance.

239.
Illustrations.

(a.) A., a singer, enters into an engagement with B., the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B. engages to pay her 100 rupees for each night's performance. On the sixth night the signer wilfully absents herself from the theatre. B. is at liberty to put an end to the contract.

(b.) A., a singer, enters into an engagement with B., the manager of a theatre, to sing at his theatre two nights in every week during the next two months; and B. engages to pay her at the rate of 100 rupees for each night. On the sixth night the signer wilfully absents herself. With the assent of B. she sings on the seventh night. B. has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through her failure.

49. A person who rightfully puts an end to an engagement is entitled to compensation for any damage he has sustained.

50. When a contract has been broken, if a sum is named in the contract itself as the amount to be paid in case of such breach, the amount so named shall be paid accordingly; but if no sum has been named in the contract itself, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for loss or damage caused to him thereby, provided that it has naturally arisen in the usual course of things from such breach, or that it was in the knowledge of the parties at the time they made the contract, that such loss or damage would probably 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.

Explanation.—In estimating the loss, the means which existed of remedying the inconvenience caused by the non-performance of the engagement must be taken into account.

Illustrations.

(a.) A enters into an engagement by contract, that in case he fails to pay B. 500 rupees on a certain day, he shall immediately become liable to pay him 1,000 rupees. A fails to pay B. 500 rupees on the day named. A. has become liable to pay B. 1,000 rupees.

(b.) A. enters into an engagement by contract, that if he practises as a surgeon in the town of Z., he shall pay B. 6,000 rupees. A. commits a breach of the engagement. The sum of 5,000 rupees is actually payable by A. to B.

(c.) A. agrees to sell and deliver 50 maunds of saltpetre to B. at a certain price, to be paid on delivery. A. breaks his engagement. 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.

(d.) A. hires B.'s ship to go to Bombay, and there take on board on the 1st 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.

(e.) A. agrees to sell and deliver to B. on the 1st of January, at a stated price, a certain quantity of cotton, to be paid for on delivery. Afterwards, on the 1st of December, A. announces to B. that he does not intend to perform his engagement, and on the 1st of January he delivers no cotton to B. B. is entitled to receive from A., by way of compensation, the excess, if any, of price of the like quantity of cotton on the 1st of January over the contract price.

(f.) A. agrees to sell and deliver to B. on the 1st of January a certain quantity of sugar, for which B. pays him in advance. Afterwards, on the 1st of December, A. informs B. that he does not intend to deliver the sugar, and on the 1st of January he does not deliver it. B. is entitled to receive from A. the money paid, together with current mercantile interest, and also by way of compensation, the excess, if any, of the sum for which the sugar could have been procured by him on the 1st of January, over the sum paid in advance.

(g.) A. agrees to buy of B., at a stated price, 50 maunds of rice, no time being fixed for delivery. A. afterwards intimates to 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. could have obtained for the rice at the time of the refusal.

(h.) A. agrees to buy B.'s ship for 60,000 rupees, but breaks his engagement. 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 engagement.

(i.) A. agrees to buy of B., at a stated price, 100 bales of jute, to be delivered on the 1st of January. Afterwards, on the 15th of December, A. gives notice to B. that he will not accept the jute; on the 1st January the jute is tendered to A., who refuses to accept it. A. must
A. must pay to B., by way of compensation, the excess, if any, of the contract price over the sum which B. could obtain for the jute on the 1st of January.

(j.) A., the owner of a boat, enters into an engagement by contract with B. to take a cargo of jute to Mirzapore, for sale at that place, starting on a specified day. The boat does not start on the appointed day, because of the arrival of the cargo at Mirzapore was delayed, but not to the loss sustained by not obtaining the Government. A. is entitled to receive from B., by way of compensation, the difference between the contract price of the jute and the sum which B. could obtain for the jute at Mirzapore at 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 Mirzapore at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(k.) A. agrees to repair B.'s house in a certain manner, and receive 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 engagement.

(l.) A. agrees to let his ship to B. for a year, from the 1st of January next, for a certain price. Freights rise, and on the 1st of January the hire obtainable for the ship is higher than the contract price. A. breaks his engagement. He must pay to B., by way of compensation, a sum equal to the difference between the contract price and the hire, which could be obtained for the use of the ship on the 1st of January.

(m.) A. engaged 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 refused 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.

(n.) 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 use of such machine during the time that delivery of it was delayed, but not to the loss sustained by not obtaining the Government contract.

(o.) A. having entered into an engagement with B. to supply B. with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, enters into an agreement with C. for the purchase of a certain quantity of iron at 80 rupees a ton, telling C. that he does so for the purpose of performing his engagement with B. C. fails to fulfill his engagement with A., who cannot procure other iron, and, in consequence, fails to fulfill his engagement with B. C. must pay to A. 20,000 rupees, being the profit which A. would have made by the performance of his engagement.

(p.) A. entered into an engagement with B. to make and deliver to B. by a fixed day, for a specified price, a certain piece of machinery. A. did not deliver the piece of machinery at the time specified, and in consequence of this B. was obliged to procure another, at a higher price than that which he was to have paid to A., and was prevented from fulfilling an engagement under which he lay to a third person at the time of his contract with A. (but which had not been then communicated to A.), and was compelled to make compensation for breach of his engagement. 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 A. to the third person by way of compensation.

(q.) A. undertakes to erect and finish a house by the 1st of January, in order that B. may give possession of it at that time to C., to whom B. has agreed to let it. A. is informed of the agreement between B. and C. A. builds the house so badly that before the 1st 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. for the breach of his engagement. A. must make compensation to B. for the cost of rebuilding the house, for the rent lost, and for the compensation made.

(r.) 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 warranties are broken, 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.

(s.) A. engages to supply B. with a thrashing machine on the 15th of August; he is aware at the time of entering into the engagement that B. is in the habit of thrashing out his wheat in the field, and sending it off at once to market. A. did not supply the machine on the 15th of August, but assured B. from day to day that it would be delivered shortly. He delivered the machine on the 11th of September. In consequence of the non-delivery of the machine, it became necessary for A. to carry the wheat home and stack it; it was injured by exposure to the weather, and had to be dried at a great expense; its quality was much deteriorated, and before it could be sold the market price of wheat had fallen. B. in consequence of these events is unable to pay a judgment debt to C., who seizes and sells his property in execution. A. must make compensation to B. in respect of the expenses of carrying, stacking, and drying the wheat, and in respect of its deterioration in quality; but not in respect of the loss sustained by B. through the fall in the market price of wheat, nor in respect of the seizure of his property.

(t.) A. has entered into an engagement by contract to pay a sum of money to B. on a day specified. A. does not pay the money on the day appointed. B., in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A. is entitled to the compensation payable to B. by A. is the difference between the price which B. could have obtained for the machine at Mirzapore at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived. 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 Mirzapore at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived. 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 Mirzapore at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived. 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 Mirzapore at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.
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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.

(a.) A. engaged to deliver 40 mounds of saltpetre to B. on the 1st of January, at a certain price. B. afterwards, before the 1st of January, agreed to sell the saltpetre to C. at a price higher than the market price of the 1st of January. A. broke his engagement. In estimating the compensation payable by A. to B., the market price of the 1st of January, and not the profit which would have arisen to B. from the sale to C., is to be taken into account.

(c.) A. engaged to sell and deliver 600 bales of cotton to B. on a fixed day. A. broke his engagement, and B. having no cotton, was obliged to close his mill. A. is not responsible to B. for the loss caused to B. by the closing of his mill.

(to.) A. agreed to sell and deliver to B. on the 1st of January certain cloth which B. intended to manufacture into caps of a particular kind, for which there was no demand except at that season. The cloth was not delivered till long after the appointed time, and too late to be used that year in making caps. A. is entitled to receive from B., by way of compensation, the difference between the contract price of the cloth and its market price at the 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 preparation for the manufacture.

(3.) A., a shipowner, agreed with B. to convey him from Calcutta to Sydney in A.'s ship, sailing on the 1st of January; and B. paid to A., by way of deposit, one-half of his passage money. The ship did not sail on the 1st of January, and B., after being in consequence detained in Calcutta for some time, and thereby put to some expense, proceeded to Sydney in another vessel, and in consequence, arriving too late in Sydney, lost a sum of money. A. is liable to repay to B. his deposit with interest, and the expense to which he was put by his detention in Calcutta, but not the sum of money which he lost by arriving in Sydney too late.

51. Specific performance of a contract is the doing or the delivery of the thing contracted for, as the case may be, according to the terms of the contract.

52. Where an engagement by contract, has been made between any persons for the creation or transfer of any interest in immovable property, or for the delivery of any specific article of moveable property, and the party who has entered into such engagement fail to perform it, the Court may, at the suit of any other party to the contract, order specific performance of the engagement, with or without compensation in respect of loss or damage caused by his default.

Explanation.—An agreement to cultivate land in a particular manner, or to grow particular crops, does not create such an interest in immovable property as is contemplated by this section.

Illustration.

(a.) A. agrees with B. to sell him a house for 1,000 rupees. B. is entitled to a decree directing A. to convey the house to him, he paying the purchase money.

(b.) A. agrees with B. to give him a bill of lading of a certain cargo. B. is entitled to have the bill of lading signed by A.

(c.) A. agrees with B. to prepare and sow, and cultivate a field with indigo, and to deliver him the crop; when the crop is cut and ready for delivery, B. is entitled to have the crop delivered to him in specie; but he is not entitled to a decree directing A. to prepare, or sow, or cultivate.

(d.) A. agrees with B. that he will paint a picture for him, and the picture is painted. B. is entitled to have it delivered to him, but B. is not entitled to a decree ordering A. to paint or to complete the painting of the picture.

(e.) A. agrees with B. to edit a periodical work for the remuneration of 1,000 rupees per month. B. cannot enforce against A. the specific performance of this contract; and, as the rights and obligations are mutual, A. cannot enforce against B. the specific performance of this contract.

[N.B.—In this case either party can obtain compensation for the loss sustained by him by the failure of A. to perform his engagement.]

(f.) A. agrees with B. to deliver to him 40 chests of indigo at 1,000 rupees per chest. A. fails to perform his engagement. B. cannot obtain specific performance of the contract, but can obtain compensation for the loss sustained by him by reason of A.'s failure to complete the contract.

(g.) A. agrees with B. to sell him a house for 10,000 rupees, the price to be paid and possession given on the 1st of January 1866. A. fails to perform his engagement. B. brings his suit for specific performance, which is decided in his favour on the 1st of January 1866. The decree ought, besides ordering specific performance, to award to B. compensation for any loss or damage which he has sustained by A.'s refusal.

53. Where a party to a contract is unable to perform the whole of the engagement which he has entered into with another party, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of
of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the engagement as can be performed, and award compensation in money for the deficiency. In such case neither party shall be entitled to compensation for loss or damage caused by the neglect or default of the other party to perform the engagement.

Illustration.

A. agrees to sell B. a piece of land consisting of 100 biggahs. It turns out that 98 biggahs of the land belong to A. and the two remaining biggahs to a stranger, who refuses to part with them. A. may be directed at the suit of B. to convey to B. the 98 biggahs, and to make compensation to him for not conveying the two remaining biggahs; or B. may be directed, at the suit of A., to pay to A., on receiving the conveyance and possession of the land, the stipulated purchase-money, less a sum awarded as compensation for the deficiency.

54. Where a party to a contract is unable to perform the whole of the engagement which he has entered into with another party, and the part which must be left unperformed forms a considerable portion of the whole, the party in default is not entitled to obtain a decree for specific performance; but the Court may, at the suit of the other party, direct the party in default to perform specifically so much of the engagement as he can perform, provided that the party seeking specific performance relinquishes all claim to further performance and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the other party.

Illustrations.

(a.) A. agrees to sell to B. a piece of land consisting of 100 biggahs. It turns out that 50 biggahs of the land belong to A., and the other 50 biggahs to a stranger, who refuses to part with them. A. cannot obtain a decree against B. for the specific performance of the contract; but if B. is willing to pay the price agreed upon, and to take the 50 biggahs which belong to A., waiving all right to compensation either for the deficiency or for loss sustained by him through A.'s neglect or default, B. is entitled to a decree directing A. to convey those 50 biggahs to him on payment of the purchase-money.

(b.) A. agrees to sell to B. an estate with a house and garden for 100,000 rupees. It turns out that A. is unable to convey the garden. A. cannot obtain a decree against B. for the specific performance of the contract: but, if B. is willing to pay the price agreed upon, and to take the estate and house without the garden, waiving all right to compensation either for the deficiency or for loss sustained by him through A.'s neglect or default, B. is entitled to a decree, directing A. to convey the house to him on payment of the purchase money.

55. Except in cases coming under one or other of the two last preceding sections, it is not competent for the Court to direct the specific performance of a part of an engagement by contract.

56. It shall be competent to the Court to award compensation in cases where specific performance is sued for and the Court does not think fit to order it.

57. In every case the Court shall have power to give compensation in money in lieu of the specific performance of the contract, where it shall appear to the Court that specific performance would inflict damage or injury on one party to the contract without any corresponding benefit to the party seeking specific performance.

58. Where the specific performance of an engagement is ordered, and it appears to the Court that such specific performance ought to be made by a party by executing a conveyance, or by endorsing a negotiable instrument, and the party ordered to execute or endorse such conveyance or negotiable instrument shall neglect or refuse so to do, any party interested in having the same executed or endorsed may prepare a conveyance or endorsement of the instrument in accordance with the terms of the decree, and tender the same to the Court for execution upon the proper stamp (if any is required by law) and the signature thereof by the judge, shall have the same effect as the execution or endorsement thereof by the party ordered to execute.

59. Where a contract contains an engagement express or implied, by one party, that he will abstain from doing any act, the Court may, at the suit of another party, issue an injunction to restrain the breach of such engagement, provided such other party has not failed to perform his own engagement.

Exception.—This section shall not apply to engagements relating to the cultivation of land or the growing particular crops.
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Illustrations.

(a.) A. agrees with B. that he will sing at B.'s theatre for a twelvemonth. B. cannot have an order directing A. to sing, but he is entitled to have an order restraining A. from singing at any other place of entertainment.

(b.) B. agrees with A. that he will serve him faithfully for twelve months as a clerk. A. is not entitled to an order directing B. to serve, but he is entitled to an order restraining B. from serving a rival house, or doing any other act to the injury of A. in his business.

(c.) A. agrees with B. that in consideration of a sum of money to be paid to him by B. on a day fixed, he will not set up a certain business within a specified distance. B. makes default in payment of the money. A. cannot be restrained from carrying on business within the specified distance.

ON CERTAIN OBLIGATIONS RESEMBLING THOSE CREATED BY CONTRACT.

60. Where a person has, either by words spoken or written, or by his conduct, led another to believe that a certain state of things exists which does not really exist, with the intention that the other shall act upon such belief in a transaction between them, and the other accordingly acts upon such belief, the person who has caused such belief is bound to place the other in the same position as if such a state of things had existed, or, in default, to make compensation to the other in respect of any loss or damage which he has incurred by acting upon such belief.

61. A person who, by a false representation, induces another to enter into a contract with a third party, is bound to make good the representation if he knew it to be false, or if in the due discharge of his duty he ought to have known it to be so.

Illustrations.

(a.) A. is trustee for B. of certain property. B. creates a charge upon the trust property, of which notice is given to A. B. afterwards enters into treaty with C. for the sale of the property. C. asks A. whether the property is incumbered or not. A. not remembering the notice, replies in the negative, and C. thereupon buys the property. A. as well as B. is responsible for the discharge of the incumbrance.

(b.) A. conveys his property to B., and permits him to appear as the owner of it, upon a secret trust for A.'s benefit. B. alienates the property to a person who is not aware of the trust. A. cannot dispute the alienation.

(c.) A. being applied to by B. formerchandise upon credit, asks C. whether B. is in good circumstances. C., knowing B. to be deeply in debt, with the intention of inducing A. to comply with B.'s wishes, replies that B. is in good circumstances. In consequence of this reply, A. lets B. have the merchandise on credit. B. becomes insolvent before the time for payment arrives. C. is liable to make good to A. the value of the merchandise.

(d.) C. without any particular knowledge of B.'s means, speaks of him in the presence of A. as a person in good circumstances. A. in consequence lets B. have merchandise on credit. B. becomes insolvent. C. is not liable to make good to A. the value of the merchandise.

62. If one person makes a deliberate statement as to his own future conduct to another, with the intent that it should be acted upon, and the other acts upon the faith of such assurance, the person who made the statement must make it good.

Illustration.

A. holding a decree against B., and knowing that B. is desirous to be married to C., assures the father of C. that he will never enforce the execution of the decree against B. C.'s father, relying on this assurance, permits the marriage to take place. A. is not entitled to enforce the execution of the decree.

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

Illustrations.

(a.) A. supplies B., a minor, with necessaries suitable to his condition in life. A. is entitled to be reimbursed from B.'s property.

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

64. A person
64. 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.

A. holds some land in Bengal as zemindar. B. holds the land on a lease granted by A. 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 Government the sum due from A. A. is bound to make good to B. the amount so paid.

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

This rule shall apply, notwithstanding that there shall have been a larger contract between the parties, which has been put an end to by reason of a breach thereof.

Illustrations.

(a.) 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. contracts with B. to deliver to him 250 maunds of rice before the 1st of May. A. delivers 130 maunds only before that day and none after. B. retains the 130 maunds after the 1st of May. He is bound to pay A. for them.
(c.) A., a singer, enters into an engagement 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 the singer wilfully absents herself from the theatre, and B. in consequence puts an end to the engagement. B. must pay A. for the five nights on which she had sung.

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

67. A person to whom money has been paid by mistake or under coercion is liable to repay it.

Illustration.

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.

SALE OF GOODS.

68. In the following chapter the word "goods" is used to denote every kind of moveable property.

69. Sale is the exchange of anything which is property for a price. It involves the transference of the ownership of the thing sold from the seller to the buyer.

70. Sale is effected by offer and acceptance of ascertained goods for a price, or of a price for ascertained goods, together with payment of the price or delivery of the goods, or with tender, part payment, earnest, or part delivery, or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed.

Illustrations.

(a.) B. offers to buy A.'s horse for 600 rupees. A. accepts the offer, and tells B. to take away the horse. The horse has been sold to B.
(b.) A. sends goods to B., with the request that he will buy them at a stated price if he approves of them, or return them if he does not approve of them. B. retains the goods, and informs A. that he approves of them. The goods have been sold to B.
(c.) B. offers A. for his horse 1,000 rupees, the horse to be delivered to B. on a stated day, and the price to be paid on another stated day. A. accepts the offer. The horse has been sold to B. by offer and acceptance with an agreement to postpone delivery and payment.
(d.) B. offers A. for his horse 1,000 rupees, on a month's credit. A. accepts the offer.
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The horse has been sold to B. by offer and acceptance with an agreement to postpone the payment.

(c.) B., on the 1st January 1863, offers to A. for a quantity of rice 2,000 rupees, to be paid on the 1st March following, the rice not to be taken away till paid for. A. accepts the offer. The rice has been sold to B.

71. By an agreement for the sale of a thing which has yet to be ascertained, made, or finished, no ownership of any portion of that thing passes to the buyer until it is ascertained, made, or finished.

Illustration.

B. orders A., a barge-builder, to make him a barge. The price is not made payable by instalments. While the barge is building, B. pays to A. money from time to time on account of the price. The ownership of the barge does not pass to B. until it is finished.

72. Where by an agreement for the sale of goods the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done.

Illustrations.

(a) A., a shipbuilder, agrees to sell to B., for a stated price, a vessel which is lying in A.'s yard; the vessel to be rigged and fitted for a voyage, and the price to be paid on delivery. Under the agreement a sale is not effected until the vessel has been rigged, fitted up, and delivered.

(b) A. contracts to build a ship for B. for a price, payable by instalments dependent on the progress of the building of the ship, and the ship is to be built under B.'s superintendence. The ownership of the materials incorporated with the ship passes to B. at the time of incorporation, as this was intended by the parties, but the materials lying in A.'s yard, though suited and intended for the ship, do not pass to B. until they are actually incorporated with the ship.

73. Where anything remains to be done to the goods by the seller for the purpose of ascertaining the amount of the price, the sale is not complete until this has been done.

Illustrations.

(a) A., owner of a stack of bark, agrees to sell it to B. at 100 rupees per ton; B. agrees to take and pay for it on a certain day. Part is weighed and delivered to B.; the ownership of the residue is not transferred to B. until it has been weighed pursuant to the contract.

(b) A. agrees to sell a heap of clay to B. at a certain price per ton; B. is by the agreement to load the clay in his own carts, and to weigh each load at a certain weighing machine which his carts must pass over on their way from A.'s ground to B.'s place of deposit. Here nothing more remains to be done by the seller, the sale is complete, and the ownership of the heap of clay is transferred at once.

74. Where the goods are not ascertained at the time of making the agreement for sale, it is necessary to the completion of the sale that the goods shall be ascertained.

Illustration.

A. agrees to sell to B. 20 tuns of oil in A.'s cisterns. A's cisterns contain more than 20 tuns of oil. B. has not acquired the ownership of any portion of the oil.

75. Where the goods are not ascertained at the time of making the agreement for sale, but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete.

Illustration.

A. having a quantity of sugar in bulk, more than sufficient to fill 20 hogsheads, agrees to sell B. 20 hogsheads of it. After the agreement, A. fills 20 hogsheads with the sugar, and gives notice to B. that the hogsheads are ready, and requires him to take them away. B. says he will take them as soon as he can. By this appropriation by A. and assent by B., the ownership passes to B.

76. Where the goods are not ascertained at the time of making the agreement for sale, and by the terms of the agreement the seller is to do an act with reference to the goods which cannot be done until they are appropriated to the buyer, the seller has a right to select any goods answering to the agreement, and by his doing so the goods are ascertained.

Illustration.

B. agrees with A. to purchase of him at a stated price, to be paid on a fixed day, 50 maunds of rice, out of a larger quantity in A.'s granary. It is agreed that B. shall send sacks for the rice, and that A. shall put the rice into them. B. does so, and A. puts 50 maunds of rice into the sacks. The goods have been ascertained.

77. Where
77. Where an agreement is made for the sale of immoveable and moveable property combined, the ownership of the moveable property does not pass before the transference of the immoveable property.

Illustration.

A. agrees with B. for the sale of a house and furniture. The ownership of the furniture does not pass to B. until the house is conveyed to B.

78. Where goods are sold by auction, there is a distinct and separate sale of the goods in each lot, by which the ownership thereof is transferred as each lot is knocked down.

79. A buyer to whom the ownership of the goods sold has passed, is liable to bear any loss arising from the destruction or injury of the goods.

Illustration.

B. offers and A. accepts 100 rupees for a stack of firewood standing on A.'s premises, the firewood to be allowed to remain on A.'s premises till a certain day, and not to be taken away till paid for. Before payment, and while the firewood is on A.'s premises, it is accidentally destroyed by fire. B. must bear the loss.

80. A valid agreement for the sale of goods may be made either by word of mouth or by writing.

81. The ownership of goods may be acquired by buying them from any person who is in possession of them, provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession has no right to sell them.

Illustrations.

(a.) A. steals a cow from B., and sells it at a cattle market to C., a purchaser in good faith. A. is afterwards convicted of the theft. B. cannot recover the cow from C.

(b.) A., a person whose rank and occupation are not such as to account for his having plate in his possession, sells a piece of plate to B., without giving a satisfactory explanation of the manner in which he had become possessed of it. The plate had in fact been stolen from C. C., on proof of the theft, can recover the plate from B.

(c.) A., a commercial agent, to whom goods have been consigned with instructions not to sell them without reference to the consignor, sells them to B., who has no ground for a reasonable presumption that A. has no right to sell them. The consignor cannot disturb the sale.

(d.) A., a commercial agent, to whom goods have been consigned with instructions not to sell them without reference to the consignor, sells them, without such reference, to B., who is acquainted with the instructions given to A. The sale is void as against the consignor.

82. The ownership of goods may be acquired by buying them from any person who is in possession of a bill of lading, dock warrant, warehouse keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other documentary title to the goods, provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the document has no right to sell the goods.

Illustration.

A. sells to B. goods of which he has the bill of lading, but the bill of lading is made out for delivery of the goods to C., and it has not been indorsed by C. The sale is not valid.

83. Under an agreement for the sale of goods not yet in existence, the ownership of the goods may be transferred by acts which, after the goods are produced, are done in pursuance of the agreement by the seller, or by the buyer with the seller's assent.

Illustrations.

(a.) A. agrees to sell to B., for a stated price, all the indigo which shall be produced at A.'s factory during the ensuing year. A., when the indigo has been manufactured, gives to B. an acknowledgment that he holds the indigo at his disposal. The ownership of the indigo vests in B. from the date of the acknowledgment.

(b.) A., for a stated price, agrees that B. may take and sell any crops that shall be grown on his land in succession to the crops then standing. Under this agreement, B., with the assent of A., takes possession of some crops grown in succession to the crops standing at the time of the agreement. The ownership of the crops when taken vests in B.

(c.) A., for a stated price, agrees that B. may take and sell any crops that shall be grown on his land in succession to the crops then standing. Under this agreement B. applies to A. for possession.
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possession of some crops grown in succession to the crops which were standing at the time of the agreement. A. refuses to give possession. The ownership of the crops does not pass to B.

84. An agreement for the sale of goods to be delivered at a future day is binding, though the goods are not in the possession of the seller at the time of making the agreement, and though at that time he has no reasonable expectation of acquiring them otherwise than by purchase.

Illustration.

A. agrees, on the 1st January, to sell B. 50 shares in the East Indian Railway Company, to be delivered and paid for on the 1st March of the same year. A., at the time of making the agreement, is not in possession of any shares. The agreement is valid.

85. Where there has been a sale or an agreement to sell, and the amount of the price has not been fixed, it shall be determined by the consideration of what is just and reasonable.

Illustration.

A. agrees, on the 1st January, to sell B. 50 shares in the East Indian Railway Company, to be delivered and paid for on the 1st March of the same year. A., at the time of making the agreement, is not in possession of any shares. The agreement is valid.

86. Delivery of goods sold may be made by doing anything which has the effect of putting them in the possession of the buyer, or of any person authorised to hold them on his behalf.

Illustrations.

(a.) A. sells to B. a horse, and causes or permits it to be removed from A.'s stables to B.'s. This is a delivery.

(b.) B. in England, orders 100 bales of cotton from A., a merchant of Bombay, and sends his own ship to Bombay for the cotton. The putting the cotton on board the ship is a delivery to B.

(c.) A. sells to B. certain specific goods which are locked up in a godown. A. gives B. the key of the godown in order that he may get the goods. This is a delivery.

(d.) A. sells to B. five specific casks of oil. The oil is in the warehouse of A. B. sells the five casks to C. A. receives warehouse rent for them from C. This amounts to a delivery of the oil to C., as it shows an assent on the part of A. to hold the goods as warehouseman of C.

(e.) A. sells to B. 50 maunds of rice in the possession of C., a warehouseman. A. gives B. an order to C. to transfer the rice to B., and C. assents to such order, and transfers the rice in his books to B. This is a delivery.

(f.) A. agrees to sell B. five tunns of oil at 1,000 rupees per tun, to be paid for at the time of delivery. A. gives C., a wharfinger, at whose wharf he had 20 tuns of the oil, an order to transfer five of them into the name of B. C. makes the transfer in his books, and gives A.'s clerk a notice of the transfer for B. A.'s clerk takes the transfer notice to B., and offers to give it him on payment of the bill. B. refuses to pay. There has been no delivery to B., as B. never assented to make C. his agent to hold for him the five tuns selected by A.

87. A delivery to a wharfinger or carrier of the goods sold, which do not reach the buyer, does not render the buyer liable for the price, unless the delivery is so made, as to enable him to hold the wharfinger or carrier responsible for the safe delivery of the goods.

Illustration.

B. at Agra, orders of A., who lives at Calcutta, three casks of oil, to be sent to him by railway. A. takes three casks of oil directed to B. to the railway station, and leaves them there without conforming to the rules, which must be complied with in order to render the railway company responsible for their safety. This is not a sufficient delivery to charge B. in a suit for the price, if the goods are not delivered to the buyer.

88. A delivery of part of the goods in progress of the delivery of the whole, has the same legal effect as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

Illustrations.

(a.) A ship arrives in a harbour laden with a cargo consigned to A., the buyer of the cargo. The captain begins to discharge it, and delivers over part of the goods to A. in progress of the delivery of the whole. This is a delivery of the cargo to A.

(b.) A sells
(6.) A sells to B. a stack of firewood, to be paid for by bill on delivery. After the sale, B. applies for and obtains from A. leave to take away some of the firewood. This has not the legal effect of delivery of the whole.

(c.) A sells 50 maunds of rice to B. The rice remains in A.'s warehouse. After the sale, B. sells to C. 10 maunds of the rice, and A. at B.'s desire, sends the 10 maunds to C. This has not the legal effect of a delivery of the whole.

89. In the absence of any special agreement, the seller of goods is not bound to deliver them until the buyer applies for possession.

90. In the absence of any agreement as to delivery, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement for sale, or if not then in existence, at the place at which they are produced.

91. Unless a contrary intention appears by the agreement, a seller has a lien on sold goods as long as they remain in his possession, and the price or any part of it remains unpaid.

92. Where by the agreement the payment is to be made at a future day, but no time is fixed for the delivery of the goods, the seller has no lien, and the buyer is entitled to a present delivery of the goods without payment. But if the buyer becomes insolvent before delivery of the goods, the seller may retain the goods for the price.

Explanation.—A person is insolvent who has ceased to pay his debts in the usual course of business, or who is incapable of paying them.

Illustration.

A sells to B. a quantity of sugar in A.'s warehouse. Payment is agreed to be made by a bill of exchange at three months. B. gives A. the bill of exchange, but allows the sugar to remain in A.'s warehouse. Before the bill falls due B. stops payment. A. may retain the goods for the price.

93. Where by the agreement, the payment is to be made at a future day, and the buyer allows the goods to remain in the possession of the seller until that day, and does not then pay for them, the seller may retain the goods for the price.

Illustration.

A. sells to B. a quantity of sugar in A.'s warehouse. Payment is agreed to be made by a bill of exchange at three months. B. gives the bill of exchange, but allows the sugar to remain in the warehouse. The bill is dishonoured. A. may retain the goods for the price.

94. A seller in possession of goods sold may retain them for the price against any subsequent buyer, unless the seller has recognised the title of the subsequent buyer.

Illustrations.

(a.) A. sells to B. at three months' credit, a chest of tea, then in the custody of X., a wharfinger. A. gives B. a delivery order for the tea, and before the expiration for the credit, B. resells the tea to C. for cash, and transfers to him the delivery order. B. stops payment before C. obtains possession under the order. A. may countermand the order to X., and retain the goods against C.

(b.) A. sells to B. a cargo of sugar, then in the warehouse of A. B., according to the terms of the sale, gives A. his acceptance at three months for the price of sugar. B. sells the sugar to C. for cash, and gives C. an order addressed to A., requesting him to deliver the sugar to C. A. asents to the delivery order, and agrees to hold for C. Afterwards B. becomes insolvent, and his acceptance is dishonoured. A. cannot retain the goods against C.

95. A seller who has parted with the possession of the goods, and has not received the whole price, may, in the event of the buyer becoming insolvent, stop the goods while they are in transit to the buyer.

96. Goods are to be deemed in transit while they are in the possession of the carrier, or lodged at any place in the course of transmission to the buyer, and are not yet come into the possession of the buyer, or any person on his behalf, otherwise than as being in possession of the carrier, or as being so lodged.

239. D
Illustrations.

(a.) B. living at Madras, orders goods of A. at Patna, and directs that they shall be sent to Madras. The goods are sent to Calcutta, and there delivered to C. a wharfinger, to be forwarded to Madras. The goods, while they are in the possession of C., are in transit.

(b.) B., at Delhi, orders goods of A., at Calcutta. A. consigns and forwards the goods to B., at Delhi. On arrival there, they are taken to the warehouse of B., and left there. B. refuses to receive them, and immediately afterwards stops payment. The goods are in transit.

(c.) B., who lives at Poona, orders goods of A., at Bombay. A. consigns them to Poona by C., a carrier, appointed by B. The goods arrive at Poona, and are placed by C., at B.'s request, in C.'s warehouse for B. The goods are no longer in transit.

(d.) B., a merchant of London, orders 100 bales of cotton of A., a merchant at Bombay. B. sends his own ship to Bombay for the cotton. The transit is at an end when the cotton is delivered on board the ship.

97. The right of stoppage does not cease on the buyer's re-selling the goods while in transit, and receiving the price; but continues until the goods have been delivered to the second buyer, or to some person on his behalf.

98. The right of stoppage ceases, if the buyer, while the goods are in transit, assigns a bill of lading in respect of them to a second buyer in good faith for valuable consideration.

Illustrations.

(a.) A. sells and consigns certain goods to B. A. being still unpaid, B. becomes insolvent, and while the goods are in transit, assigns the bill of lading for cash to C., who is not aware of his insolvency. A. cannot stop the goods in transit.

(b.) A. sells and consigns certain goods to B. A., being still unpaid, B. becomes insolvent, and while the goods are still in transit, assigns the bill of lading for cash to C., who knows that B. is insolvent. The assignment not being in good faith, A. may still stop the goods in transit.

99. Where a bill of lading is not negotiable until a certain condition has been fulfilled, the right of stoppage does not cease until such condition has been fulfilled.

Illustration.

A. sells and despatches goods to B., and sends him a letter enclosing the bill of lading and directing him not to part with it until he has accepted certain bills of exchange which A. has drawn against the consignment. B. without accepting the bills of exchange, assigns the bill of lading to a buyer in good faith, for a valuable consideration. A.'s right of stoppage does not cease upon such assignment.

100. Where a bill of lading is assigned by the buyer by way of pledge, to secure an advance which has been made upon it in good faith, the seller may, on payment or tender to the pledgee of the amount of his claim, stop the goods in transit.

Illustrations.

(a.) A. sells and consigns goods to B. of the value of 12,000 rupees. B. assigns the bill of lading for those goods to C. to secure a specific advance of 5,000 rupees made to him upon the bill of lading by C. B. becomes insolvent, being indebted to C. to the amount of 9,000 rupees. A. is entitled to stop the goods on payment or tender to C. of 5,000 rupees.

(b.) A. sells and consigns goods to B. of the value of 12,000 rupees. B. assigns the bill of lading for those goods to C. to secure the sum of 5,000 rupees due from him to C. upon a general balance of accounts. B. becomes insolvent. A. is entitled to stop the goods in transit for the whole sum due to him.

101. Stoppage in transit may be effected by the seller, either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other depositary in whose possession they are.

102. The notice may be given either to the person who has the immediate possession of the goods, or to the principal whose servant has the possession. In the latter case, it must be given at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent a delivery to the buyer.

103. Stoppage
103. Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods sold is paid.

Illustration.

A. sells to B. 100 bales of cotton; 60 bales having come into B.'s possession, and 40 being still in transit, B. becomes insolvent, and A. being still unpaid, stops the 40 bales in transit. A. is entitled to hold the 40 bales until the price of the 100 bales is paid.

104. Where the buyer fails to perform his part of the agreement, either by not taking the goods sold to him, or by not paying for them, the seller may re-sell them within a reasonable time after giving notice to the buyer of his intention to do so; and the buyer must bear any loss; but is not entitled to any profit which may occur on the re-sale.

105. If the buyer, or any person claiming under him, is by reason of the invalidity of the seller's title deprived of the thing sold, the seller is responsible to the buyer for loss thereby caused, unless a contrary intention appears by the agreement.

106. An implied warranty of goodness or quality may be established by the custom of any particular trade.

107. On the sale of provisions there is an implied warranty that they are sound.

108. On the sale of goods by sample, there is an implied warranty that the bulk is equal in quality to the sample.

109. Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample or after inspection of the bulk.

Illustrations.

(a.) A., at Calcutta, sells to B. 12 bags of "waste silk" then on its way from Moorsabad to Calcutta. There is an implied warranty by A. that the silk shall be such as is known in the market under the denomination of "waste silk."

(b.) A. sells parcels of "linseed oil," by sample, to B. [warranted only equal to sample.] There is an implied warranty by A. that the article sold is such as is known in the market as "linseed oil;" and if he delivers an article which, though equal to sample, is not such as is known in the market as linseed oil, there is a breach of the implied warranty.

(c.) A. sells to B. 40 casks of "oxalic acid," B. having before the sale seen the bulk of the acid, and inspected samples of it. The acid proves to be so adulterated as not to be the article known in commerce as "oxalic acid." There is here a breach of an implied warranty.

(d.) A., in London, where inland bills of exchange do, and foreign bills of exchange do not by law require a stamp, sells to B. a bill of exchange, unstamped, and purporting to be a foreign bill. There is an implied warranty by A. that the bill is a foreign bill, and if it turns out that the bill is not a foreign but an inland bill, there is a breach of that implied warranty.

110. Where goods have been ordered for a specified purpose, for which goods of the denomination employed in the order are usually sold, there is an implied warranty by the seller, that the goods supplied are fit for that purpose.

Illustration.

B. orders of A., a copper manufacturer, copper for sheathing a vessel. A. on this order supplies copper. There is an implied warranty that the copper is fit for sheathing a vessel.

111. Upon the sale of an article of a well-known ascertained kind, there is no implied warranty of its fitness for any particular purpose.

Illustration.

B. writes to A., the owner of a patent invention for cleaning cotton, "Send me your patent cotton-cleaning machine, to clean the cotton at my factory." A. sends the machine according to order. There is an implied warranty by A. that it is the article known as A.'s patent cotton-cleaning machine; but none that it is fit for the particular purpose of cleaning the cotton at B.'s factory.
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112. In the absence of fraud and of any express warranty of quality the seller of an article which answers the description under which it was sold is not responsible for a latent defect in it.

Illustration.
A. in good faith sells and delivers to B. scrip certificates of shares in a certain railway company. Afterwards the scrip is repudiated, on the ground that it had been issued without authority. A. is not responsible for loss sustained by B. in consequence.

113. Where a specific article has been sold with a warranty and the warranty is broken, the sale is not thereby rendered voidable; but the buyer is entitled to compensation from the seller for loss caused by the breach of warranty.

Illustration.
A. sells to B. a horse, warranted sound. The horse proves to have been unsound at the time of sale. B. is entitled to compensation from A. for loss caused by the unsoundness.

114. Where there has been an agreement for the sale of goods with a warranty, and the warranty is broken, the buyer may reject the goods on their being tendered to him, or may return them after the lapse of not more than a reasonable time for ascertaining the breach of warranty; provided that, beyond keeping them such time and examining or trying them, he does not exercise any act of ownership over them; or he may retain them. And, whichever course he follows, he is entitled to compensation from the seller for loss caused by the breach of warranty.

Illustrations.
(a.) A. agrees to sell to B. 200 bales of cotton by sample. Cotton not in accordance with sample is delivered to B. He may return it if he has not kept it longer than a reasonable time for the purpose of examination.
(b.) B. agrees to buy of A. 25 sacks of flour, by sample. The flour is delivered to B., who pays the price. B., upon examination, finds it not equal to sample, and complains of this to A. A. afterwards uses two sacks, and sells one. He cannot now repudiate the contract and recover the price; but he is entitled to compensation from A. for any loss caused by the breach of warranty.

115. When the seller sends goods not ordered with goods ordered, the buyer may refuse to accept any of the goods so sent, if there is risk or trouble in separating the goods ordered from the goods not ordered.

Illustration.
A. orders of B. specific articles of china. B. sends these articles to A. in a hamper, with other articles of china, which had not been ordered. A. may refuse to accept any of the goods sent.

116. If a buyer wrongfully refuses to accept the goods sold to him, this amounts to a breach of the contract of sale.

117. The seller of goods is not entitled to rescind the agreement on the buyer's failing to pay the price at the time fixed, unless it was stipulated by the agreement that he should be so entitled.

118. If, at a sale by auction, the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer.

Indemnity and Guarantee.

119. A person can bind himself to save another person from eventual loss.

The security thus afforded is called indemnity when the loss guarded against is that which may be consequent upon the conduct of some person.

Illustrations.
(a.) A. gives B. a letter of indemnity against the consequences of any proceedings which C may take against B. in respect of a certain sum of 200 rupees. Here A. binds himself
CONTRACT LAW (EAST INDIA).

himself by an express engagement to save B. from consequent loss if C. shall act as contemplated.

(b) B. accepts a bill of exchange, at A.'s request, for the accommodation of A. A. does not provide for the bill at maturity, and B. is compelled to pay it. A. is liable to B. for the amount of the bill. Here A. binds himself by an implied engagement to indemnify B. against loss consequent on a failure on A.'s part to provide for payment of the bill when due.

120. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by him in exercise of the authority conferred upon him.

Illustrations.

(a.) B., a stockbroker at London, and member of the Stock Exchange, at the request of A. buys for him 20 shares in the bank, " to be paid for on settlement day." Before the settlement day arrives, the bank stops payment, and A. repudiates the transaction, and tells B. not to pay the price. By the rules of the Stock Exchange, however, B. is compelled to pay the price on the settlement day. A. is liable to B. for the price on an implied agreement to indemnify.

(b) B., at Singapore, under instructions from A. of Calcutta, contracts with C. to deliver certain goods to him. A. does not send the goods to B., and C. sues B. for breach of contract. B. informs A. of the suit, and A. authorizes him to defend the suit. B. defends the suit, and is compelled to pay damages and costs, and incurs expenses. A. is liable to B. for such damages, costs, and expenses.

(c) B., a broker at Calcutta, by the orders of A., a merchant there, contracts with C. for the purchase of 10 casks of oil for A. Afterwards A. refuses to receive the oil, and C. sues B. B. informs A., who repudiates the contract altogether. B. defends, but unsuccessfully, and has to pay damages and costs, and incurs expenses. A. is liable to B. for such damages, costs, and expenses.

121. Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Illustrations.

(a.) A., a decree holder, and entitled to execution of B.'s goods, requires the nazir to seize certain goods, representing them to be the goods of B. The nazir seizes the goods, and is sued by C., the true owner of the goods. A. is liable to indemnify the nazir for the sum he is compelled to pay to C., in consequence of obeying A.'s directions.

(b) B., an auctioneer, at request of A., sells goods in the possession of A., but which A. had no right to dispose of. B. does not know this, and hands over the proceeds of the sale to A. Afterwards C., the true owner of the goods, sues B. and recovers the value of the goods and costs. A. is liable to indemnify B. for what he has been compelled to pay to C., and for B.'s own expenses.

(c) A. employs B. to make a quantity of fire-bricks with a trade mark, which A. knows, but B. does not, to be the trade mark of C. B. makes and marks the bricks as ordered. C. obtains an injunction against B. A. is liable to pay B. the amount of his expenses.

122. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise to indemnify him against the consequences of that act.

Illustrations.

(a.) A. employs B. to beat C., and agrees to indemnify him against all consequences of the act. B. thereupon beats C., and has to pay damages to C. for so doing. A. is not liable to indemnify B. for those damages.

(b) B., the proprietor of a newspaper, publishes, at A.'s request, a libel upon C. in the paper, and A. agrees to indemnify B. against the consequences of the publication, and all costs and damages of any action in respect thereof. B. is sued by C. and has to pay damages, and also incurs expenses. A. is not liable to B. upon the indemnity.

123. Where a person holds an indemnity and an action is brought against him in respect of matters comprised in the indemnity, it is his duty to give notice to the person who is bound to indemnify him; and if that person does not authorise him to defend the action, he is at liberty to compromise it. Whether he defends the action under such authority as aforesaid, or in the absence of such authority compromises it, he is entitled to receive from the person bound to indemnify him the damages and costs which he has been compelled to pay.

If he defends the action without such authority, he is entitled to receive from the person bound to indemnify him the amount he has been compelled to pay, exclusive.
exclusive of any expenses caused by his having defended the action; unless in defending it he has acted as a prudent man holding no indemnity would have acted in his own case.

Illustrations.

(a.) B., at the request of A., accepts a bill of exchange for the accommodation of A. C., the holder of the bill, sues B. upon it. B. has clearly no defence, but without the authority of A. he defends the suit, and has to pay costs as well as the amount of the bill. B. can only recover from A. the amount of the bill, upon A.'s implied promise to indemnify.

(b.) C., who holds a lease from W. of certain houses, assigns the lease to B., who agrees to indemnify and save harmless C. from all damages and expenses in respect of the breach of any of the covenants therein. B. re-assigns the lease to A., who gives a like indemnity to B. A. commits a breach of a covenant to repair. W. sues C. and recovers 2,000 rupees, and C. has to pay, in addition, 800 rupees as costs and expenses. C. sues B., who defends the suit unsuccessfully, and has to pay to C. the 2,800 rupees, and also incurs costs and expenses in the defence. A. is only liable to B. for 2,800 rupees, and not for the costs and expenses, as the amount of liability was ascertained by the suit of W. against C., and B. ought to have paid that amount at once to C. on demand.

124. An engagement to fulfil the liability of a third person in case of his default is called a guarantee when founded on sufficient consideration. The person who gives the guarantee is called the surety, the person primarily liable is called the principal, and the person to whom the guarantee is given is called the creditor. A guarantee may be either oral or written.

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. agrees to guarantee the payment of the goods to be supplied. This is a good guarantee.

(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. There is here a sufficient consideration to sustain C.'s guarantee.

(c.) A. sells and delivers goods to B. C. afterwards promises A. to pay for them in default of B. This is not a guarantee, as there is no consideration to support it.

126. An offer to guarantee does not constitute a guarantee until it is accepted by the person to whom it is made, and the acceptance is notified to the offerer.

127. The liability of the surety is co-extensive with that of the principal.

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 which may have become due on it.

128. A guarantee may extend to a series of transactions, in which case it is called a continuing guarantee.

Illustrations.

(a.) A., in consideration that B. will employ C. in collecting the rents of B.'s zemindary, 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.

(b. A. promises B., a tea dealer, to be responsible to the amount of 100 L. for any tea he may supply to C. B. supplies C. with tea to above the value of 100 L, and C. pays B. for the same. Afterwards B. supplies C. with tea to the value of 200 L. 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 L.

(c.) A. agrees with B. to be answerable to him for the price of five sacks of flour to be delivered by B. to C. payable in one month. B. delivers five sacks to C. A. pays for them. 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.

See Act V. of 1866.

129. A continuing guarantee may be at any time revoked by the surety as to future transactions, by notice to the creditor.
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Illustrations.

(a.) A., in consideration of B.'s discounting, at A.'s request, bills of exchange for C., guarantees to B. for 12 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.

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

131. Where, upon the face of the agreement, two persons are primarily liable to a third person, that liability is not affected so far as regards the third person by an arrangement between the two, that one of them shall be liable only upon the default of the other, even although such arrangement may have been known to the third person, unless he was a party to the arrangement.

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 this at the time when the note is made. In a suit by C. against A. upon the note, the fact that A. made it as surety for B. and that C. knew it, is no answer to the action.

132. Any variance made without the surety's consent, in the terms of the original agreement, discharges the surety as to future transactions.

Illustrations.

(a.) A. becomes surety to C. for B.'s conduct as a manager in C.'s bank. Afterwards, B. and C. agree, without A.'s consent, that B.'s salary shall be raised, and that he shall become liable to one-fourth of the losses on discounts. 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 he 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 from future liability under his guarantee by the change, 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 coals at a yearly salary of 100 l., upon A.'s becoming surety to C. for B.'s duty accounting for monies 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 of 6 d. per ton on the coal sold by him instead of by the 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 to C. B. on credit. Afterwards B. becomes embarrassed, and, without the knowledge of A., B. and C. agree that B. should continue to supply B. with oil for ready money, and that the payments should 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.) A. as surety for B., gives to C. a promissory note for 5,000 rupees upon an agreement that the 5,000 rupees should be paid by C. to B. "by draft at three months' date." C. without A.'s knowledge, pays the 5,000 rupees to B. at once, instead of giving a draft. A. is discharged from liability, as the agreement has been varied, and C. might sue B. for the money before the expiration of three months.

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

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 agrees 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 agreement with C., and A. is discharged from his suretyship.

(b.) A. agrees 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.

(c.) A. agrees
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c. A agrees 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 agreement. B. diverts a stream of water which is necessary for the irrigation of A.'s land, and thereby prevents him from raising the indigo. C. is no longer liable on his guarantee.

134. An agreement between the creditor and the principal, by which the creditor makes a composition with, or agrees to give time to, or not to sue, the principal, discharges the surety.

Illustrations.

(a.) C., the holder of an overdue bill of exchange drawn by A. as surety for B., and accepted by B., binds himself by a valid agreement with B., to give time to B., A. not assenting to the agreement. A. is discharged from liability on the bill.

(b.) C., to whom B. owes a debt guaranteed by A., binds himself by agreement with B., not to sue B., and to accept 5 s. in the pound in respect of B.'s debts. A. assents to the arrangement. A. is not discharged, and is liable to C. for the whole debt.

135. Where an agreement to give time to the principal is made by the creditor with a third person, and not with the principal, 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., binds himself by a valid agreement with M. to give time to B. A. has no knowledge of this agreement. A. is not discharged.

136. Mere forbearance on the part of the creditor to sue the principal, or to enforce any other remedy, 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 his suretyship.

137. Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free that one from any responsibility to the others.

138. 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 is thereby impaired, the surety is discharged.

Illustrations.

(a.) B. agrees 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 agreement. C., without the knowledge of A., preparess to B. the last two instalments. A. is discharged by this payment.

(b.) B. agrees with C. to complete certain fittings in C.'s warehouse for 8,000 rupees, stipulating to insure, from time to time, the fittings from fire, and to deduct the costs of the insurance from the 8,000 rupees. A. knowing of this agreement, guarantees B.'s due performance of the work. C. never insures, and fittings to the value of 7,000 rupees are destroyed by fire at B.'s shop. B. becomes insolvent, and it costs C. 9,000 rupees to complete the work. A. is discharged by C.'s omission to insure, not merely to the extent of the benefit he would have derived from the insurance if it had been effected, but altogether.

(c.) 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 satisfaction of the monies due on the note. Subsequently, C. sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized. A. is discharged from liability on the note.

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

139. Where a guaranteed debt has become due, or default of the principal 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.

140. A surety
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140. A surety is entitled to the benefit of every security which the creditor has against the principal at the time the contract is entered into, whether the surety knows or does not know of the existence of such security; 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 to the amount of the value of the furniture.

(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. After the date of this transaction, C. obtains from B. a further security for the same debt. Subsequently C. gives up the further security. A. is not discharged.

141. 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.

Illustrations.

(a.) B. owes C. 800 l. C. agrees to advance B. 2,000 l. on his obtaining a surety for that amount. It is also agreed between B. and C. that the 800 l. should be deducted from that sum. The agreement, which is in writing, states that C. had agreed to advance B. 2,000 l., and that the 800 l. had been repaid: this agreement is read to A. in C.'s presence, but nothing more is said, when A. gives a promissory note for 2,000 l. as surety for B. A. is discharged from liability on the note, as there is a false representation to A. that the 800 l. had been repaid, and that the whole sum of 2,000 l. was to be advanced to B.

(b.) C. represents to A. that he is liable to D. for 3,000 rupees, as surety for A. and B. A. thereupon consents as surety in a mortgage security given by B. in order to indemnify C. C., in fact, was not liable to D. as alleged. A. is not bound by the security.

142. Any guarantee which the creditor has obtained by means of the concealment of a material circumstance, 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. afterward 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.

143. Where a person gives a guarantee upon an agreement that the 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.

144. In every contract of guarantee there is an implied agreement by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal whatever sum he has rightly paid under the guarantee.

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, at the request of B., having reasonable grounds for doing so, but he 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 A. upon the bill. A. 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 of 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. E payment.
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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.

145. 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 agreements, and whether with or without the knowledge of each other, the co-sureties, in the absence of any agreement 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.

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 it is arranged between A., B., C., and E. that A. is to be responsible to the extent of 1, B. to the extent of 1, and C. to the extent of 1. E. makes default in payment. A. between the sureties, A. is liable to pay 250 rupees, B. 250 rupees, and C. 500 rupees.

146. 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, viz., 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 each.

(b.) A., B., and C., as sureties for D., enter into three several bonds, each in a different penalty, viz., 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, viz., 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 70,000 rupees. Each has to pay the full penalty of his bond.

LAW OF BAILMENT.

147. The delivery of goods by one person to another for some purpose, upon an agreement, that it shall be delivered by the latter back to or according to the directions of the former when the purpose shall have been accomplished, is called a bailment. The person delivering the goods is called the bailor. The person to whom they are delivered is called the bailee.

148. 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.

149. The bailor is bound to disclose to the bailee faults in the goods bailed 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.

Illustration.

A. lends a horse to B. which he knows to be vicious. 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.

150. 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 take of his own goods.

151. The bailee, in the absence of any agreement to the contrary, is not responsible for the loss, destruction, or deterioration of the thing bailed, if not caused by his fault.
152. If the bailee does any act with regard to the goods bailed which
is inconsistent with the conditions of the bailment, such act is, at the option of
the bailor, a termination 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.

153. 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. lent a horse to B. for his own riding only. B. allowed C., a member of his
family, to ride the horse. C. rode with care, but the horse accidentally fell and was injured.
B. is liable to make compensation to A. for the injury done to the horse.
(b.) A. hired a horse in Calcutta from B. to ride to Benares. A. rode with due care, but
rode to Cuttack instead. The horse accidentally fell and was injured. A. is liable to make
compensation to B. for the injury to the horse.

154. 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.

155. 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, the property in the
goods remains in the parties respectively, but the bailee is bound to bear the
expense of separation, and any damage arising from the mixture.

156. If the bailee, without the consent of the bailor, mixes the goods of the
bailor with his own goods, so that it is impossible to separate the goods bailed
from the other goods and deliver them back, the bailor is entitled to be com-
penated by the bailee for the loss of the goods.

157. 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 remuneration, the bailor shall repay to the bailee the
necessary expenses incurred by him for the purpose of the bailment.

158. Where the bailment is gratuitous, the bailor is entitled at any time upon
reasonable notice to the restoration of the goods bailed.

159. The bailee must return 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.

160. If, by the fault of the bailee, the goods are not delivered or tendered at
the proper time, he is responsible to the bailor for any loss, destruction, or deter-
rioration of the goods from that time.

161. The bailment, where gratuitous, is terminated by the death either of the
bailor or of the bailee.

162. In the absence of any agreement 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 of B., who takes care of it gratuitously. The cow has a
calf. B. is bound to deliver the calf as well as the cow to A.

163. The bailor is responsible to the bailee for any loss which he 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.

164. 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.

165. If the bailor has no title to the goods, and the bailee delivers them back

239.
to or according to the directions of the bailor, the bailee is not responsible to the owner in respect of such delivery.

166. If a third person claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

167. 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 has a right to retain the goods against the owner until he receives such compensation; and where the owner offers a specific reward for the return of goods lost, the finder has a right to retain them until he receives the reward.

168. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill on the goods bailed, he has, in the absence of any agreement to the contrary, a right to retain the goods until he receives 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. gave some cloth to B., a tailor, to make into a coat. A. agreed with B. that the coat should be delivered as soon as it was finished, and that three months' credit should be given for the price. B. is not entitled to retain the coat until he is paid.

169. In the absence of any agreement to the contrary, bankers, factors, and wharfingers have no right to retain any goods bailed to them as a security for a general balance of account.

170. The bailment of goods as security for payment of a debt or performance of an engagement is called pledge. The bailor is in this case called the pawnor. The bailee is called the pawnee.

171. The pawnee may retain the goods pledged not only for payment of the debt or the performance of engagement, 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.

172. The pawnee shall not retain the goods pledged for any other debt or engagement than the debt or engagement for which they are delivered, except by agreement between the parties; but such agreement in the absence of anything to the contrary will be presumed in regard to subsequent advances made by the pawnee.

173. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

174. If the pawnor makes default in payment of the debt or performance of the engagement at the stipulated time, the pawnee may bring a suit against the pawnor upon the debt or engagement, and retain the goods pledged as a collateral security, or may sell the thing pledged on giving the pawnor reasonable notice of the sale. If the proceeds of the sale are less than the amount due in respect of the debt or engagement, 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.

175. If a time is stipulated for the payment of the debt or performance of the engagement for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the engagement at the stipulated time, he may redeem the goods pledged at any time before the actual sale of them.

176. A person who is in possession of goods, or of any bill of lading, dock warrant, warehouse keepers' certificate, 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.

177. Where
177. Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

178. 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 use in the like case if no bailment had been made, and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

179. 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.

Agency.

180. An agent is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom the act is done, or who is so represented, is called the principal.

181. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

182. As between the principal and third persons, any person may become an agent; but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

183. No consideration is necessary to create an agency.

184. The authority of an agent may be expressed or implied.

185. An authority is said to be expressed when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration.

A. owns a shop in Serampore, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B., and he is in the habit of ordering goods from C. in the name of A. for the purposes of the shop, and of paying for them out of A.'s funds with A.'s knowledge. B. has an implied authority from A. to order goods from C. in the name of A. for the purposes of the shop.

186. An agent having an authority to do any act, has authority to do every lawful thing which is necessary in order to do such act; and an agent having an authority to carry on any business, has authority to do every lawful thing necessary for the purpose of or usually done in the course of conducting such business.

Illustrations.

(a.) A. is employed by B., residing in London, to recover at Bombay a debt due to B. A. may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

(b.) A. constitutes B. his agent to carry on his business of a shipbuilder. B. may purchase timber and other materials, and hire workmen for the purpose of carrying on the business.

187. An agent has authority in an emergency to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence in his own case under similar circumstances.

Illustrations.

(a.) A ship is driven on shore. The master has authority to hire men and boats to get her off, and to incur all necessary expenses for re-fitting her.

(b.) A consigns provisions to B. at Calcutta, with directions to send them immediately to C. at Cuttack. B. may sell the provisions at Calcutta if they will not bear the journey without spoiling.

188. Contracts
188. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

Illustrations.

(a.) A. buys goods from B., knowing that he is an agent for their sale, but not knowing who is the principal. B.'s principal is the person entitled to claim from A. the price of the goods, and A. cannot set off against that claim a debt due to himself from B.

(b.) A. being B.'s agent with authority to receive money on his behalf, receives from C. a sum of money due to B. C. is discharged of his obligation to pay the sum in question to B.

189. Where an agent does more than he is authorized to do, what he does within the scope of his authority, if it can be separated from what is beyond that scope, is binding as between the principal and the agent; the rest not.

Illustration.

A., being owner of a ship and cargo, authorizes B. to procure an insurance for 4,000 rupees on the ship. B. procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A. is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

190. Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the whole is void as against the principal.

Illustration.

A. authorizes B. to buy 500 sheep for him. B. buys 500 sheep and 200 lambs for one sum of 6,000 rupees. The whole transaction is void as against A.

191. A sub-agent is a person employed by and acting under the control of the original agent in the business of the agency.

192. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally.

193. Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

The agent is responsible to the principal for the acts of the sub-agent.

The sub-agent is responsible for his acts to the agent but not to the principal, except in cases of fraud or wilful wrong.

194. Where an agent has appointed a person to act as a sub-agent without having authority to do so, the agent stands towards that person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons, and the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

195. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly; such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations.

(a.) A. directs B., his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B. names C., an auctioneer, to conduct the sale. C. is not a sub-agent, but is A.'s agent for the conduct of the sale.

(b.) A., a merchant in Calcutta, consigns goods to B., a merchant in London, and directs him to sell the goods. B. appoints C., a broker, to sell the goods for A. C. is not a sub-agent, but is agent for A.

(c.) A. appoints B., a merchant in Calcutta, his attorney, for the purpose of recovering the monies due to A. from C. & Co. B. instructs D., a solicitor, to take legal proceedings against C. & Co. for the recovery of the money. D. is not a sub-agent, but is solicitor for A.
196. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case, and if he does this he will not be responsible to the principal for the acts or negligence of the agent so selected.

Illustrations.

(a.) A directs B. to buy and ship a cargo of indigo for him, and to have the cargo properly insured. B. employs an insurance broker of good reputation, who effects an insurance on the cargo. The ship, having the cargo on board, is lost; but owing to the omission of some usual stipulations in the policy of assurance the underwriters refuse to pay the sum insured. B. is not responsible to A. for the loss, but the insurance broker is.

(b.) B., the agent of A, employs an auctioneer in good credit to sell goods of A., and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B. is not responsible to A. for the proceeds.

197. An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind. When the agent adopts a different course, if any loss be sustained he must make it good to his principal, and if any profit accrues he must account for it.

Illustrations.

(a.) A., an agent engaged in carrying on for B. a business in which it is the custom to invest from time to time at interest the monies which may be in hand, omits to make such investment. A. must make good to the principal the interest usually obtained by such investments.

(b.) B., a broker, in whose business it is not the custom to sell on credit, sells goods of A. on credit to C., whose credit at the time was very high. C., before payment, becomes insolvent. B. must make good the loss to A.

198. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business; unless the principal has notice of his want of skill. The agent is always bound to act with diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.

Illustrations.

(a.) A., a merchant in Calcutta, has an agent B. in London, to whom a large sum of money is paid on A.'s account. B. improperly retains the money for a considerable time. A., in consequence of not receiving the money, becomes bankrupt. B. is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, but not further.

(b.) A., an agent for the sale of goods, having authority to sell on credit, sells to B. on credit, without making the proper and usual inquiries as to the solvency of B. B., at the time of such sale, is insolvent. A. must make compensation to his principal in respect of any loss thereby sustained.

(c.) A., an insurance broker employed by B. to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A. is bound to make good the loss to B.

(d.) A., a merchant in England, directs B., his agent at Bombay, to send him 100 bales of cotton by a certain ship. B., having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B. is bound to make good to A. the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

199. An agent is bound to render proper accounts to his principal on demand.

200. It is the duty of an agent in cases of difficulty to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

201. If a person who is an agent deals on his own account in the business of the agency without first obtaining the consent of the principal, and acquainting him with all matters which have come to his own knowledge on the subject, the principal
principal is at liberty, on discovering such circumstances, either to adopt or to repudiate the transaction.

Illustrations.

(a.) A. directs B. to sell A.'s estate. B. buys the estate for himself, in the name of C. A., on discovering that B. has bought the estate for himself, may either repudiate or adopt the sale at his option.

(b.) A. directs B. to sell A.'s estate. B. on looking at the estate before selling it, finds a mine on the estate which is unknown to A. B. informs A. that he wishes to buy the estate for himself, but conceals the discovery of the mine. A. allows B. to buy, in ignorance of the existence of the mine. A., on discovering that B. knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

202. An agent dealing on his own account with his principal in the business of the agency is not entitled to any remuneration as agent notwithstanding that the principal adopts the transaction.

Illustration.

A. agrees that if B. will find a purchaser for his land in Bombay at 2 rupees a yard, A. will give B. 5 per cent. commission. B. afterwards buys on his own account, and A. adopts the contract. B. is not entitled to any commission.

203. If an agent without the knowledge of his principal deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration.

A. directs B. to buy a certain house for him. B. tells A. it cannot be bought, and buys the house for himself. A. may, on discovering that B. has bought the house, compel him to sell it to A. at the price he gave for it.

204. An agent may retain out of any sums received on account of the principal in the business of the agency all monies due to himself in respect of advances made or expenses incurred by him in conducting such business, and also such compensation as may be payable to him for acting as agent.

205. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

206. In the absence of any agreement to the contrary, remuneration in respect of the performance of any act is not due to the agent until the completion of such act.

207. An agent who is guilty of gross misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which has been so misconducted.

Illustrations.

(a.) A. employs B. to recover 100,000 rupees from C., and lay it out on good security. B. recovers the 100,000 rupees, and lays out 90,000 rupees on good security, but lays out 10,000 rupees on insufficient security, whereby A. loses 2,000 rupees. B. is entitled to remuneration for recovering the 100,000 rupees, and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to B.

(b.) A. employs B. to recover 1,000 rupees from C. Through B.'s misconduct the money is not received. B. is entitled to no remuneration for his services, and must make good the loss.

208. In the absence of any agreement to the contrary, an agent is entitled to retain goods, papers, and other property of the principal committed to his charge, until the amount due to himself for commission, disbursements, and services in respect of the same has been paid or accounted for to him.

209. Where acts are done by one person on behalf of another, but without his knowledge, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.

210. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.
Illustration.
A., without authority, buys goods for B.; afterwards sells them to C. on his own account. B.'s conduct implies a ratification of the purchase made for him by A.

211. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

212. A person ratifying any unauthorised act done on his behalf ratifies the whole of the transaction of which such act formed a part.

213. An act done without authority, which if done with authority would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot by ratification be made to have such effect.

Illustration.
(a.) A., an unauthorised person, requires on account of B., the owner of a chattel, the delivery of the chattel to B. This demand cannot be ratified by B. so as to make the holder liable for damages for default.
(b.) A. holds a lease from B. terminable on three months' notice. C., an unauthorised person, gives notice of termination to A. The notice cannot be ratified so as to be binding on A.

214. Any notice given to, or information obtained by, the agent, provided it be given or obtained in the course of the business transacted by him for the principal, will, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

Illustration.
(a.) A. is employed by B. to buy certain goods from C., and buys them accordingly. In the course of the treaty for the sale A. learns that the goods really belonged to D., but B. is ignorant of that fact. B. is not entitled to set off a debt owing to him from C. against the price of the goods.
(b.) A. is employed by B. to buy goods from C. A. was, before he was so employed, a servant of C., and then learnt that the goods really belonged to D., but B. is ignorant of that fact. In spite of the knowledge of his agent, B. may set off against the price of the goods a debt owing to him from C.

215. In the absence of any agreement to the contrary, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Explanation.—Such an agreement may be implied in the following cases:

1. Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad.
2. Where the agent does not disclose the name of his principal.
3. Where the principal, though disclosed, cannot be sued.

216. Where one man enters into an engagement by contract with another, having no knowledge or reasonable ground of suspicion that the other is an agent, the principal, if he requires the performance of the engagement, can only obtain it subject to the rights and obligations subsisting between the agent and the other party to the contract.

Illustration.
A., who owes 500 rupees to B., sells 1,000 rupees' worth of rice to B. A. is acting as agent for C. in the transaction, but B. has no knowledge nor reasonable ground of suspicion that such is the case. C. cannot compel B. to take the rice without allowing him to set off A.'s debt.

217. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Illustration.
A. enters into a contract with B. to sell him 100 bales of cotton, and afterwards discovers that B. was acting as agent for C. A. may sue either B. or C., or both, for the price of the cotton.

239. F 218. A person
218. A person who enters into a contract with an agent, if he afterwards induces the agent to do any act in the belief that the principal will be held exclusively liable on the contract, cannot hold the agent liable; and in like manner if he induces the principal to do any act in the belief that the agent will be held exclusively liable, he cannot hold the principal liable.

Illustration.
A., in Bombay, agrees as agent for B., a merchant in London, to buy 100 bales of cotton from C. C. intimates to B. that he intends to hold A. exclusively liable for the price of the cotton, and B., relying upon this intimation, settles his account with A., giving A. credit for the price of the cotton. A. afterwards becomes bankrupt without having paid the price of the cotton to C. C. cannot hold B. liable for the price of the cotton.

219. A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his supposed employer does not ratify his acts, to make compensation to the other, according to the rules laid down in the chapter on contracts, sect. 63, in respect of any loss or damage which he has incurred by so dealing.

220. A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

221. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he had by his words or conduct induced such persons to believe that such acts and obligations were within the scope of the agent's authority.

Illustrations.
(a.) A. consigns goods to B. for sale, and gives him verbal instructions not to sell under a fixed price. C., being ignorant of B.'s instructions, enters into an agreement with B. to buy the goods at a price lower than the reserved price. A. is bound by the agreement.
(b.) A. knows that B. is an agent of C., and acting under written instructions from C., makes an agreement with B. as C.'s agent without asking to see the instructions. The terms of the agreement are contrary to the instructions. C. is not bound by the agreement.

222. The master of a ship has not as such any authority to sign bills of lading without receiving the goods to which they refer.

223. A master is bound to make compensation to third persons for injuries caused by the negligence or unskilfulness of his servant acting as such; but not for his wilful misconduct.

Illustrations.
(a.) A.'s coachman, driving A.'s carriage on A.'s business, strikes B.'s horses, not wantonly, but in order to extricate himself from a difficulty, and causes the horses to run away, in consequence of which B.'s carriage is overturned and broken. A. is liable to make compensation to B. in respect of the loss or damage caused to him by the breaking of the carriage.
(b.) A.'s coachman, driving A.'s coach on A.'s business, wantonly strikes B.'s horses, which run away, in consequence of which B.'s carriage is overturned and broken. A. is not, but his coachman is, liable to make compensation to B. in respect of the loss or damage caused to him by the breaking of the carriage.
(c.) The commander of A.'s ship, navigating the ship on A.'s business, through negligence runs over B.'s boat. A. is liable to make compensation to B. in respect of loss or damage caused to him thereby.
(d.) The commander of A.'s ship, navigating the ship on A.'s business, intentionally runs over B.'s boat. A. is not, but the commander is, liable to make compensation to B. in respect of loss or damage caused to him thereby.
(e.) A.'s coachman, driving A.'s coach, but not on A.'s business, through negligence runs over B., who thereby sustains severe bodily injury. A. is not, but the coachman is, liable to make compensation to B. in respect of such injury.
(f.) A. employs B. to act as conductor of his omnibus. C. enters the omnibus, and, having behaved improperly there, is removed by B. with unnecessary violence. In consequence of B.'s violence, C. is seriously injured. A. is not, but B. is, liable to make compensation to C. in respect of the effects of such injury.
(g.) A. was in the habit of buying corn, and directing the vendor to deliver it at B.'s wharf, and of paying for the corn on the production of the receipt of B. or his servant. B.'s servant, whose duty it was to receive the corn, and give receipts for it on behalf of B., gave C. a receipt for corn that had never been delivered, and thus enabled C. to obtain money from A. B. is not liable to make compensation to A. in respect of the loss caused to him by the conduct of B.'s servant.
224. A person who employs another to do a lawful act, otherwise than as a servant, is not responsible for injuries caused to third persons in the doing of that act by the negligence or unskilfulness of the person employed, except in any case where the injuries may have been caused by conduct which the employer had authorised or adopted.

Illustrations.

(a.) A. employs B., a builder, to pull down and rebuild A.'s house. In consequence of the negligence of B.'s workmen in pulling down the house, the front of C.'s house, which adjoins A.'s, falls down. A. is not liable to make good the loss to C., but B. is.

(b.) A. employs B., a builder, to execute certain alterations in a house, including the preparation and fixing of gas fittings. B. makes a sub-contract with C., a gas fitter, to execute part of the work. D. is injured by an explosion of gas, caused by C.'s negligence. C. is, but A. and B. are not, liable to make compensation to D. in respect of such injury.

225. A person who is bound to do any act is responsible for all injuries arising from the non-performance of such act, although he may have employed another to do it.

Illustrations.

(a.) A. is bound to repair the wall of his house, which is in a dangerous state. He employs B. to repair it. B. omits to do so. The wall falls down; and in doing so draws with it a part of an adjoining house belonging to C. A. is liable to make good the loss to C.

(b.) A. is bound to cover in a drain in front of his house, and employs B. to do so. B. neglects to cover in the drain; in consequence of B.'s negligence, C. falls into the drain, and is hurt. A. must make compensation to C.

226. A person employing another to do any act is bound to make compensation to third persons in respect of injuries caused directly by such act.

Exception.—Where two persons are engaged as agents or servants to the same master for a common object, the master is not bound to make compensation to one servant in respect of loss or damage arising from the misconduct, negligence, or want of skill of the other, unless he neglected to use ordinary care in the selection of the servant who has caused the injuries.

Illustrations.

(a.) A. employs B. to build a house according to a particular plan. The house cannot be built without obscuring the lights of a neighbour's house. The house is built accordingly. A. is liable to make good the loss or damage thereby sustained by the neighbour.

(b.) The guard of a train is injured through the neglect of the platelayers to keep the line in proper order. Ordinary care had been used in the selection of the platelayers. The railway company is not liable to indemnify the guard.

227. The master must make compensation to his agent or servant in respect of injury caused to such agent or servant by the master's neglect or want of skill.

Illustration.

A. employs B. as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B. is in consequence hurt. A. must make compensation to B.

228. The principal cannot retain any profit resulting from the fraud of his agent, although such fraud has been unauthorised by or unknown to the principal.

229. An agent is not responsible to third persons for injuries to them arising from his neglect of duty, but he is bound to make compensation to his employer against all sums paid by him on account of such injuries.

Illustration.

A. is bound to cover in a drain in front of his house, and employs B. to do so. B. neglects to cover in the drain; in consequence of B.'s negligence, C. falls into the drain, and is hurt. B. is not liable to make compensation to C.; but B. must make compensation to A. in respect of any compensation which A. has been compelled to make to C.

230. An agent is in all cases responsible to third persons for wrongful acts done by him, though such acts may have been previously commanded or subsequently ratified by his employer.

231. An
231. An agency is terminated by the principal revoking his authority, or by the agent renouncing the business of the agency, or by the business of the agency being completed, or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

232. Where the agent has himself an interest in the property which forms the subject matter of the agency, the agency cannot be terminated to the prejudice of such interest.

Illustrations.

(a.) A. gives authority to B. to sell A.'s land, and to pay himself out of the proceeds the debts due to him from A. A. cannot revoke this authority, nor can it be terminated by his insanity or death.

(b.) A. consigns 1,000 bales of cotton to B., who has made advances to him on such cotton, and desires B. to sell the cotton, and to repay out of the price the amount of his own advances. A. cannot revoke this authority, nor is it terminated by his insanity or death.

233. The principal may (save as is otherwise provided by the last preceding section) revoke the authority given to his agent, at any time before the authority has been exercised so as to bind the principal.

234. The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

Illustrations.

(a.) A. authorises B. to buy 1,000 bales of cotton on account of A., and to pay for it out of A.'s monies remaining in his hands. B. buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A. cannot revoke his authority so far as regards payment for the cotton.

(b.) A. authorises B. to buy 1,000 bales of cotton on account of A., and to pay for it out of A.'s monies remaining in B.'s hands. B. buys 1,000 bales of cotton in A.'s name, and so as not to render himself personally liable for the price. A. can revoke B.'s authority to pay for the cotton.

235. If it has been agreed expressly or by implication that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

236. Reasonable notice must be given of such revocation or renunciation, or the damage thereby resulting to the principal or the agent, as the case may be, must be made good to him by the other.

237. Revocation and renunciation may be expressed, or may be implied in the conduct of the principal or agent respectively.

Illustration.

A. empowers B. to let A.'s house. Afterwards A. lets it himself. This is an implied revocation of B.'s authority.

238. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Illustrations.

(a.) A. directs B. to sell goods for him, and agrees to give B. 2 per cent. commission on the price fetched by the goods. A. afterwards by letter revokes his authority. B. after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A., and B. is entitled to two rupees as his commission.

(b.) A., at Madras, by letter directs B. to sell some cotton lying in a warehouse in Bombay for him, and afterwards by letter revokes his authority to sell, and directs B. to send the cotton to Madras. B. after receiving the second letter enters into a contract with C., who knows of the first letter but not of the second, for the sale to him of the cotton. C. pays B. the money, with which B. absconds. The contract is binding on A.
239. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take all reasonable steps for the protection and preservation of the property entrusted to him.

Illustrations.

(a.) A. in London consigns to his agent B. at Calcutta for sale a cargo of porcelain. A. dies. B.'s duty, under ordinary circumstances, is to warehouse and retain the porcelain.

(b.) A. in New York consigns to B. in Calcutta for sale a cargo of ice. A. dies. It is B.'s duty to sell the ice as soon as possible.

240. The termination of the authority of an agent causes the termination of the authority of all sub-agents appointed by him, subject to the rules herein contained regarding the termination of an agent's authority.

PARTNERSHIP.

241. Partnership is the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits thereof between them.

Persons who have entered into partnership with one another are called collectively a firm.

Illustrations.

(a.) A. and B. buy 100 bales of cotton, which they agree to sell for their joint profit; A. and B. are partners in respect of such cotton.

(b.) A. and B. buy 100 bales of cotton, agreeing to share it between them. A. and B. are not partners.

(c.) A. agrees with B., a goldsmith, to buy and furnish gold to B., to be worked up by him, and sold, and that they shall share in the profits. A. and B. are partners.

(d.) A. and B. agree to work together as carpenters, but that A. shall receive all profits, and shall pay wages to B. A. and B. are not partners.

(e.) A. and B. are joint owners of a ship. This circumstance does not make them partners.

242. A loan to a person engaged or about to engage in any trade or undertaking upon a contract with such person that the lender shall receive interest at a rate varying with the profits, or that he shall receive a share of the profits, does not, of itself, constitute the lender a partner, or render him responsible as such.

243. In the absence of any agreement to the contrary, property left by a retiring partner or the representative of a deceased partner to be used in the business, is to be considered a loan.

244. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein nor give him the rights of a partner.

245. No person being a widow or child of a deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of such trader, or be subject to any liabilities incurred by him.

246. No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of the person carrying on such business, or be subject to his liabilities.

247. A person who has, by words spoken or written, or by his conduct, led another to believe that he is a partner in a particular firm is responsible to him as a partner.

248. Any one permitting himself to be represented as a partner is liable as such to third persons, who on the faith thereof, give credit to the partnership.

249. A person who is under the age of majority, according to the laws to which he is subject, may be admitted to the benefits of partnership, but cannot be
be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm.

250. A person who has been admitted to the benefits of partnership under the age of majority, becomes on attaining that age liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice within a reasonable time of his repudiation of the partnership.

251. Every partner is liable for all debts and obligations incurred by or on behalf of the partnership.

252. Every partner is liable to make compensation to third persons in respect of loss or damage arising from the neglect or fraud of any partner in the management of the business of the firm.

253. Each partner who does any act necessary for or usually done in carrying on the business of such a partnership as that of which he is a member, binds his copartners to the same extent as if he were their agent duly appointed for that purpose.

Exception.—If it has been agreed between the partners that any restriction shall be placed upon the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement.

Illustrations.

(a.) A. and B. trade in partnership, A. residing in England and B. in India. A. draws a bill of exchange in the name of the firm. B. has no notice of the bill, nor is he at all interested in the transaction. The firm is liable on the bill, provided the holder did not know of the fraud.

(b.) A., being one of a firm of solicitors and attorneys, draws a bill of exchange in the name of the firm without authority. The other partners are not liable on the bills.

(c.) A. and B. carry on business in partnership as bankers; a sum of money is received by A. on behalf of the firm. A. does not inform B. of such payment, and afterwards A. appropriates the money to his own use. The partnership is liable to make good the money.

(d.) A., a partner, takes upon him to agree that his firm shall submit to an arbitration. His undertaking is void.

(e.) A. and B. are partners. A., with the intention of cheating B., goes to a shop and purchases articles such as might be used in the partnership business, which he converts to his own separate use, there being no collusion between him and the seller. The firm is liable for the price of the goods.

254. Where partners have by agreement regulated and defined as between themselves their rights and obligations, such agreement can be annulled or altered only by consent of all of them, which consent must either be expressed or be implied from a uniform course of dealing.

Illustration.

A., B., and C., intending to enter into partnership, execute written articles of agreement, by which it is stipulated that the net profits arising from the partnership business shall be equally divided between them. Afterwards they carry on the partnership business for many years, A. receiving one-half of the net profits, and the other half being divided equally between B. and C. without any remonstrance on their part. This course of dealing supersedes the provision in the articles as to the division of profits.

255. In the absence of any agreement to the contrary, the relations of the partners to each other are determined by the following rules:

(1.) All partners are joint owners of all property originally brought into the partnership stock, or bought with money belonging to the partnership, or acquired for the purposes of the partnership business. All such property is called partnership property. The share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss.

(2.) All partners are entitled to share equally in the profits of the partnership business, and must contribute equally towards the losses sustained by the partnership.

(3.) Each
(3.) Each partner has a right to take part in the management of the partnership business.

(4.) Each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business.

(5.) All ordinary matters of partnership business may be done with the consent of the majority of the partners; but no change in the nature of the business of the partnership can be made except with the consent of all the partners.

(6.) No person can introduce a new partner into a firm without the consent of all the partners.

(7.) If from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members.

(8.) Unless the partnership has been entered into for a fixed term, any partner may retire from it at any time.

(9.) Where a partnership has been entered into for a fixed term, no partner can during such term retire, except with the consent of all the partners, nor can he be expelled by his partners for any cause whatever.

(10.) Partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner.

256. At the suit of a partner the court may dissolve the partnership in the following cases:

(1.) When a partner becomes of unsound mind.

(2.) When a partner other than the person suing has been adjudicated an insolvent under any law relating to insolvent debtors.

(3.) When a partner other than the person suing has done any act by which the whole interest of such partner is legally transferred to a third person.

(4.) When any partner becomes incapable of performing his part of the partnership contract.

(5.) When a partner other than the person suing is guilty of gross misconduct in the affairs of the partnership or towards his partners.

(6.) When the business can only be carried on at a loss.

257. A partnership is in all cases dissolved by its business being prohibited by law.

258. If a partnership entered into for a fixed term be continued after such term has expired, the right and obligations of the partners will, in the absence of any agreement to the contrary, remain the same as they were at the expiration of the term, so far as such rights and obligations can be applied to a partnership dissolvable at the will of any partner.

259. Partners are bound to carry on the business of the partnership for the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

260. A partner must account to the firm for any benefit derived from a transaction affecting the partnership.

Illustrations.

(a.) A. and B. are partners for the sale of a mineral of a certain description. A. keeps a shop near a mine where this mineral is found, and buys it from the miners, giving them goods in which he deals in exchange. A. must account to B. for the profit which he obtains by selling his own goods as well as for that which he derives from the sale of the mineral.

(b.) A. B. and C. are partners in trade. C., without the knowledge of A. and B., obtains for his own sole benefit a lease of the house in which the partnership business is carried on. A. and B. are entitled to participate, if they please, in the benefit of the lease.

(c.) A. B. and C. carry on business together in partnership as merchants, trading between Bombay and London. D., a merchant in London, to whom they make their consignments, secretly allows C. a share of the commission which he receives upon such consignments, in consideration of C.'s using his influence to obtain the consignments for him. C. is liable to account to the firm for the money so received by him.
261. If a partner, without the knowledge and consent of the other partners, carries on any business competing or interfering with that of the firm, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby.

262. Every person introduced as a partner into a pre-existing firm is subject to all the obligations incurred by the firm before he was introduced.

263. A continuing guarantee, given either to a firm or to a third person in respect of the transactions of a firm, is not revoked as to future transactions by any change in the firm to which, or in respect of the transactions of which, such guarantee was given.

264. The estate of a partner who has died is not liable in respect of any obligation incurred by the firm after his death.

265. Where there are joint debts due from the partnership, and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of the debts of the firm, and if there is any surplus, then the share of each partner must be paid to him, or applied in payment of his separate debts. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

266. After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership.

267. Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they had themselves notice of such dissolution.

268. In the absence of any agreement to the contrary, after the termination of a partnership, each partner, or his representative, may apply to the court to wind up the business of the firm, to provide for the payment of its debts, and to distribute the surplus according to the shares of the partners respectively.

269. Extraordinary partnerships, such as partnerships with limited liability, incorporated partnerships, and joint stock companies, shall be regulated by the law now in force in India relating thereto, until further provision shall be made in that behalf.

We humbly submit this our Second Report to your Majesty's Royal consideration.

Romilly.  (L.S.)
Edward Ryan. (L.S.)
Robert Lowe. (L.S.)
John M. Macleod. (L.S.)
W. M. James. (L.S.)
J. Henderson. (L.S.)

Dated this 28th day of July 1866.
To His Excellency the Right Honourable the Governor General of India in Council.


I herewith transmit 12 copies of the Second Report of Her Majesty's Commissioners appointed to prepare a body of substantive law for India, which I desire may be taken into early consideration by your Excellency in Council, in order that a measure founded on its provisions may be introduced into the Council for making Laws and Regulations.

2. Copies of the Report will be forwarded to the Governments of Madras and Bombay, with directions to forward any observations which a consideration of the Report may suggest to your Excellency in Council.

3. I regard the accomplishment by the Commission of a second and most important portion of the great duty entrusted to it as a subject of congratulation to all India.

4. A supply of copies of the Report will be sent by an early opportunity.

(signed) Cranborne.

—— No. 3. ———

Assistant Under Secretary of State for India to the Indian Law Commissioners.

Sir, India Office, 28 November 1867.

I am directed by Sir Stafford Northcote to transmit to you, for the purpose of being placed before Her Majesty's Commissioners appointed to prepare a body of Substantive Law for India, the accompanying copy of a Despatch from the Government of India, dated 16th August (4) 1867, with a copy of a Draft Bill on the subject of contracts.

2. The draft Bill, it will be observed, is identical with the measure prepared by Her Majesty's Commissioners, with the exception that the claims relating to the specific performance contained in Sections 51 to 59 are omitted.

3. The grounds on which this omission is founded are set forth in the statement of objects and reasons, and in the notes recorded by the Governor General and the Members of his Council on the subject. I am directed by Sir Stafford Northcote to state that he would be glad to receive any observations which Her Majesty's Commissioners may desire to make on the subject, but he requests that the papers may be regarded as strictly confidential.

Wm. Macpherson, Esq., &c. &c.

(signed) J. C. Melville.
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PAPERS RELATING TO

— No. 4. —

(Home Department.—Legislative.—No. 4 of 1867.)

To the Right Honourable Sir Stafford Northcote, Bart., Secretary of State for India.

Sir,

Simla, 16 August 1867.

Lord Cranborne's Despatch in the Judicial Department, No. 42, dated 14th September 1866, transmitted to us the Second Report of Her Majesty's Commissioners appointed to prepare a body of Substantive Law for India, which his Lordship desired us to take into early consideration, in order that a measure founded upon its provisions might be introduced into the Council for making Laws and Regulations.

2. The Second Report of Her Majesty's Commissioners is devoted entirely to the question of contracts, and contains a draft legislative measure on the subject, which our honourable colleague, Mr. Maine, has proposed to adopt, with the omission of the clauses relating to specific performance contained in Sections 51 to 59. A copy of the Draft Bill which our honourable colleague has prepared with this view is herewith forwarded.

3. You will perceive from the statement of objects and reasons appended to the Bill, and from the notes which we have recorded on the subject, that Mr. Maine's proposal has been carefully discussed by us; and after a further consideration of the matter in Council, we have resolved to omit the clauses relating to specific performance, as not properly belonging to a Bill which enacts a general law of contract. Moreover, we think that the difficult questions raised by a law of specific performance for India will be more conveniently discussed upon a Bill which deals exclusively with the law of procedure.

We have, &c.

(signed) John Lawrence.

W. Mansfield.

H. S. Maine.

G. W. Taylor.

W. N. Massey.

H. M. Durand.

G. N. Yule.
The following Bill and statement of objects and reasons accompanying it, are published for general information by order of his Excellency the Governor General, under the 19th of the rules for the conduct of business at meetings of the Council of the Governor General of India for the purposes of making Laws and Regulations:

THE INDIAN CONTRACT LAW, 1867.

ARRANGEMENT OF SECTIONS.

PART I.—PRELIMINARY.

Sec. 1. Short Title.
2. Interpretation Clause.

PART II.—OF CONTRACT.

5. Who may contract.
6. Retraction or alteration of proposal.
7. Acceptance or proposal.
8. Effect of deceit, coercion and undue influence.
9. Effect of false representation inducing a contract.
10. Mistake of fact.
11. Mistake of law.
12. Certainty of subject.
13. Object and consideration. Promise when binding.
15. Avoidance of engagement intended to take effect only in case specified uncertain event shall happen.
16. When an engagement intended to take effect in case a specified event shall not happen, becomes absolute.
17. Order of performance of different engagements.
19. Where one reciprocal engagement does not become absolute till performance of other.
20. Parties mutually bound to facilitate performance.
21. Liability of party preventing event on which contract is to take effect.
22. Liability of one party failing to do act which he is bound to do, and which is necessary to enable the other to perform.
23. When time is essential.
24. Effect of doing several things, but not at the times specified.

PART III.—OF CERTAIN OBLIGATIONS RESEMBLING THOSE CREATED BY CONTRACT.

25. Effect of one person intentionally leading another to believe in a non-existent state of things, when the other acts on such belief.
26. Effect of one person, by a false representation, inducing another to contract with a third party.
27. Supply of necessaries to persons incapable of contracting.
28. Reimbursement of person paying what another is bound to pay.
29. Effect of non-gratuitous act of which a person enjoys the benefit.
31. Liability of person to whom money is paid by mistake or coercion.

PART IV.—SALE OF GOODS.

32. "Goods" defined.
33. "Sale" defined.
34. Sale by order.
35. Depositories with, or remittances of, or acceptances of satisfaction in lieu of, performance.
36. Acceptance of new contract in substitution.

Time and Place for Performance.

37. Time for performance of engagement where no time is specified, and no application to be made.
38. Time for performance of engagement where time is specified, and no application to be made.
Sect. 69. Ascertainment of goods by subsequent appropriation.
Sect. 70. Ascertainment of goods by seller's selection.
Sect. 71. Agreement for sale of immovable and moveable property combined.
Sect. 72. Sale of several lots by auction.
Sect. 73. Buyer's risk.
Sect. 74. Agreement for sale may be oral or written.
Sect. 75. Acquisition of ownership of goods by purchase from their possessor.
Sect. 76. Acquisition by purchase from possessor of documentary title.
Sect. 77. Transfer of ownership of goods agreed to be sold while non-existent.
Sect. 78. Contract to sell and deliver at a future day goods not in seller's possession at date of contract.
Sect. 79. Determination of unfixed price.

Delivery.
Sect. 80. Delivery how made.
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PAPERS RELATING TO

THE INDIAN CONTRACT LAW, 1867.

PART I.—PRELIMINARY.

1. This Act may be called the "Indian Contract Law, 1867."

2. In this Act—unless there be something repugnant in the subject or context:—

   "Person" includes any Company or Association, or body of persons, whether incorporated or not;

   "Child," in the case of anyone whose personal law permits adoption, includes an adopted child;

   "Immoveable property" includes land, any benefit to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;

   "Moveable property" means property of every description, except immoveable property;

   "British India" means the territories which are, or may become, vested in Her Majesty or her successors by the Statute 21 & 22 Vict. c. 106 (an Act for the better government of India).

3. The enactments specified in the first Schedule hereto are repealed, but nothing herein contained shall be deemed to affect the enactments specified in the second Schedule hereto, nor any enactment of the Governor General of India in Council, the Lieutenant-Governor of Bengal in Council, the Governor of Fort St. George in Council, or the Governor of Bombay in Council, relating to the emigration, or transport, or contracts of native labourers, or saving the members of municipal committees from personal liability.

PART II.—OF CONTRACT IN GENERAL.

4. A contract is an agreement between parties whereby a party engages to do a thing or engages not to do a thing.

   A contract may contain several engagements, and they may be either by the same party or by different parties.

   A contract may be expressed or implied, or partly expressed and partly implied.

   A contract, or part of a contract, may be expressed either orally or by writing.

   A contract, or part of a contract, is said to be implied when it is to be inferred from the circumstances of the case, and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

   Illustrations.

   (a.) A. orally agrees with B. to buy of him, at a certain price, 500 maunds of rice. This is a contract expressed orally.

   (b.) A. orders B., by writing, 500 maunds of rice at a certain price. B., by writing, accepts the order. This is a contract expressed by writing.

   (c.) A. orally agrees with B. to buy of him 500 maunds of rice at a price to be fixed afterwards. The price is afterwards fixed by correspondence between A. and B. This is a contract expressed in part orally and in part by writing.

   (d.) A. orally orders B., a tailor, to make him a coat. B. accepts the order. The contract thus made contains an implied engagement by B. that the coat to be made for A. shall be of suitable materials, and shall fit A.; and an implied engagement by A. that he will accept the coat, and will pay for it, if within a reasonable time it shall be so made.

   (e.) A., by writing, orders of B. 500 maunds of the best rice lying in his godowns. B. accepts the order. There is an implied engagement on A.'s part to pay a reasonable price for the rice.

5. Every person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may enter into a contract.

   Explanation 1.—Persons who are deaf, or dumb, or blind, are not thereby incapacitated for entering into a contract if they are able to know what they do by it.

   Explanation 2.—One who is ordinarily insane may make a contract during an interval in which he is of sound mind.

   Explanation 3.—No person can enter into a contract while he is in such a state of mind, whether arising from drunkenness, or from illness, or from any other cause, that he does not know what he is doing.

6. A proposal to enter into a contract may be retracted, or the terms of it altered by the party making it, at any time before it is accepted.

   Explanation.—A proposal is said to be accepted when an expressed acceptance of it has been communicated to the proposer; or when a letter of acceptance is posted, or a telegraphic message of acceptance is delivered at a proper office, and the acceptance by letter or telegram is not cancelled by some communication which reaches the proposer before or at the same time with the letter or telegram of acceptance, or when acceptance is to be inferred from the circumstances of the case.
Illustration.

A. sends goods to B. for sale or return.  B. sells the goods to C.  B. has accepted the goods.

7. A proposal does not bind the party making it, unless it be accepted within the time prescribed for its acceptance, or, if no time is prescribed, within a reasonable time.

8. Any engagement which a contracting party has been induced to form by deceit or coercion, or by such influence as impedes or interferes with the freedom of his agency, renders the contract voidable at the option of that party.

Explanation 1.—Deceit may be practiced on a person, not only by intentionally inducing him to believe what is not true, but by intentionally concealing truth from him.

Explanation 2.—In order to enable a party to annul a contract by reason of deceit, it must appear, where a false representation has been made, that he relied on the representation; and where the truth has been concealed, that he had not the means with ordinary diligence of discovering the truth.

Illustrations.

(a.) A., intending to deceive B., falsely represents that 600 maunds of indigo are made annually at A.'s factory, and thereby induces B. to buy the factory.  The contract is voidable.

(b.) A., in order to deceive B., falsely informs him that 600 maunds of indigo are made annually at A.'s factory.  B., not relying on this statement, examines the accounts of the factory, which show that only 400 maunds of indigo have been made.  After this B. buys the factory.  The contract is not voidable on account of A.'s mis-statement.

(c.) A., having discovered a seam of coal on A.'s estate, does not communicate that circumstance to A., and buys the estate at a price fixed by A. in ignorance of the existence of the coal.  The sale is not voidable on account of A.'s mis-statement.

(d.) A. informs B. that A.'s estate is exempt from the payment of revenue to the Government; B., thereupon buys the estate.  It turns out that the estate is not exempt from the payment of revenue, and that such exemption cannot be obtained.  The sale is voidable.

(e.) A. informs B. that A.'s estate is within a mile of the town of Kamnagar; B. thereupon buys the estate.  The estate is found to be two miles from the town.  The sale is voidable.

(f.) A. informs B. that A.'s estate is free from encumbrance.  B. thereupon buys the estate.  It turns out that the estate is subject to a mortgage.  A. must redeem the mortgage; or, if he cannot do so, the contract is voidable.

(g.) A. and B. are partners in a mercantile business.  A. is the managing partner, B is ignorant of the state of the business.  A. and B., in order to induce C. to become a partner with him, show him a statement of the affairs of the partnership, which is wrong by a large amount.  C., relying upon the statement, joins the firm, and for several years does not discover the falsity of the statement.  The contract of partnership is voidable at the option of C.

9. A person who, either knowingly or ignorantly, makes a false representation whereby he induces another to enter into a contract with him, is bound to place the other in the same position, as if the representation had been true, and in default of his doing so, the contract is voidable at the option of the person who has been misled.

Explanation.—Where a party's consent to an engagement by contract has been given through a mistake as to the substance of the thing which is the subject of the engagement, and the mistake was occasioned, however innocently, by the other party, this has the same effect as a false representation.

Illustrations.

(a.) A. agrees to sell to B. a cargo of goods, supposed to be on its way from England to Bombay.  It turns out that before the day of the bargain the ship conveying the cargo had been cast away and the goods lost.  Neither party was aware of these facts.  The contract is void.

(b.) A. buys of B. a certain horse.  It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact.  The sale is void.

(c.) A., being entitled to an estate for the life of B., agrees to sell it to C.  B. was dead at the time of the contract, but both parties were ignorant of the fact.  The contract is void.

10. Where both the parties to an engagement by contract are under a mistake as to a matter of fact essential to the engagement, the engagement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the contract, is not to be considered a mistake as to a matter of fact.

Illustrations.

(a.) A. agrees to sell to B. a cargo of goods, supposed to be on its way from England to Bombay.  It turns out that before the day of the bargain the ship conveying the cargo had been cast away and the goods lost.  Neither party was aware of these facts.  The contract is void.

(b.) A. agrees to sell to B. a cargo of goods, supposed to be on its way from England to Bombay.  It turns out that before the day of the bargain the ship conveying the cargo had been cast away and the goods lost.  Neither party was aware of these facts.  The contract is void.

(c.) A., being entitled to an estate for the life of B., agrees to sell it to C.  B. was dead at the time of the contract, but both parties were ignorant of the fact.  The contract is void.
11. The validity of a contract is not affected by the circumstance that a party was at the time of making it under a mistake of law.

Explanation.—A mistake in respect of a law not in force in British India, has the legal consequences of mistake not of law but of fact.

Illustrations.
A. owes to B a debt, the payment of which at a fixed time is guaranteed by C. B. contracts with A. to give time to A., C. not consenting to the arrangement. B. is not aware, at the time of entering into this contract, that its legal effect will be to discharge C. from liability under his guarantee. B. is nevertheless bound by his contract to give time to A.

12. The subject of every contract must be certain, or capable of being made certain.

Illustrations.
(a.) A. agrees to sell to B. 100 tons of oil, the kind of oil not being specified or in any way indicated. The contract is void for uncertainty.
(b.) A. agrees to sell to B. 100 tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to prevent the contract from being valid.
(c.) A. who is a dealer in coconuts oil only, agrees to sell to B. "100 tons of oil." The nature of A.'s trade affords an indication of the meaning of the words, and A. has entered into a contract for the sale of 100 tons of coconuts oil.
(d.) A. agrees to sell to B. "all the grain in his granary at Ramnagar." There is no uncertainty here to prevent the contract from being valid.
(e.) A. agrees to sell to B. 1,000 maunds of rice, at a price to be fixed by C. The subject of the contract is capable of being made certain, and there is no uncertainty here to prevent the contract from being valid.

13. In order to the validity of an engagement by contract there must be a lawful object and a good consideration.

First Exception.—A person who makes a promise, whether upon good consideration or not, is bound to perform it if the promise be expressed in writing, and duly registered, according to the provisions of the law, for the time being in force, for the registration of assurances, unless the promise is unlawful, or is based on an unlawful consideration.

Second Exception.—A person who makes an express promise, without good consideration, is bound to perform it, if it be a promise to compensate wholly or in part, a person who has already voluntarily done something which the person who makes the promise was legally compellable to do; or if it be a promise to pay wholly or in part a debt which the creditor is legally entitled to receive from the person who makes the promise, but of which, by reason of the law for the limitation of suits, he cannot enforce payment.

Explanation 1.—A good consideration must be something which, at the desire of the person entering into the engagement, another person has done or abstained from doing, or does or abstains from doing, or promises to do, or to abstain from doing.

Explanation 2.—A good consideration must be lawful.

Explanation 3.—An object, a consideration, or a promise, is said to be lawful when it is not contrary to law or to morality.

Illustrations.
(a.) A. engages by contract with B. to sell his house to B. for 10,000 rupees. Here there is an engagement by A. to B., and an engagement by B. to A., and these engagements are valid, there being in each case a lawful object and a good consideration.
(b.) A. agrees to sell his house at Ramnagar to B. for 10,000 rupees. Here the promise to pay the sum of 10,000 rupees is the consideration for A.'s entering into the contract; and the promise to convey the house is the consideration for B.'s entering into the contract. These are good considerations.
(c.) A. agrees to pay B. 1,000 rupees at the end of six months, if C., who owes that sum to B., fails to pay it. B. engages to grant time to C. accordingly. Here the engagement of each party is the consideration for the engagement of the other party; and they are good considerations.
(d.) A. engages, for a certain sum paid to him by B., to make a house which shall not perish by shipwreck on a certain voyage. Here A.'s promise is the consideration for B.'s payment, and B.'s promise is the consideration for A.'s promise; and these are good considerations.
(e.) A. engages to maintain B.'s child, and B. engages to pay A. 1,000 rupees yearly for the purpose. Here the engagement of each party is the consideration for the engagement of the other party. They are good considerations.
(f.) A. B., and C. enter into a contract for the division among them of gains acquired, or to be acquired, by them by fraud. The contract is void.
(g.) A. undertakes to obtain for B. an employment in the public service, and B. agrees to pay 1,000 rupees to A. The contract is void, as the consideration for it is illegal.
(h.) A., being a servant for a landed proprietor, agrees, for money, without the knowledge of his principal, to obtain for B. a lease of land belonging to his principal. The contract between A. and B. is void, being contrary to A.'s duty as agent.
(i.) A. engages with B. to drop a prosecution which he has instituted against B. for robbery, and B. engages to restore the value of the things taken. The contract is void.
(j.) A.'s estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B. upon an understanding with A., becomes the purchaser, and agrees to convey the estate to A., upon receiving from him the price which B. has paid. B.'s engagement is void, as it renders the transaction in effect a purchase by the defaulter.
(k.) A. agrees to superintend on behalf of B. a legal manufacture of indigo and to suppress all illegal traffic in such article. B. enters into an engagement to pay to A. a salary of 10,000 rupees a year. B.'s engagement is void—the consideration being in part unlawful.
(l.) A. voluntarily pays B. a sum of money which is due to B. from C. Afterwards C. promises to reimburse A. C. is bound to perform the promise.

14. An engagement by contract may be made to take effect only in case a specified uncertain event shall happen. The event may be the performance of something that constitutes the consideration, or part of the consideration for the engagement, or it may be an event distinct from such performance.

Illustration.
CONTRACT LAW (EAST INDIA).

Illustrations.

(a.) A. sells goods to B. for a fixed price, and engages to deliver them to him on receiving payment in full. A.'s engagement to deliver the goods does not become absolute until B. pays, or tenders to him the price.
(b.) A. sells goods to B. for a fixed price, to be paid by instalments, and engages to deliver them to him only on the payment of the first instalment. A.'s engagement to deliver the goods does not become absolute until B. pays, or tenders to him the first instalment.
(c.) A. enters into an engagement by contract with B. to buy B.'s house for 10,000 rupees, if A. shall survive. A.'s engagement does not become absolute until C. dies, leaving A. surviving him.
(d.) A. enters into an engagement by contract with B. to sell a horse to B. at a specified price, in case C. survives him, B. is ready and willing to take the horse.

15. An engagement by contract, which is intended to take effect only in case a specified uncertain event shall not happen, does not become absolute until the happening of that event becomes impossible.

16. Where an engagement by contract is intended to take effect only in case a specified uncertain event shall happen within a fixed time, and the time expires without the event having occurred, the engagement becomes void. Where no time has been fixed for the happening of the event, the engagement becomes void as soon as it is ascertained that the event will not happen.

Illustrations.

(a.) A. enters into an engagement by contract to pay B. a sum of money if a certain ship shall return within a year from the time of the contract. The year elapses without the ship having returned. The engagement becomes void.
(b.) A. enters into an engagement by contract to pay B. a certain sum of money, if C. shall leave a son surviving him. C. dies, not leaving a son surviving him. The engagement becomes void.

17. Where an engagement by contract is intended to take effect in case a specified event shall not happen within a fixed time, the engagement does not become absolute until the time has expired without the event having occurred, or until, before the time fixed, it is ascertained that the event will not occur. Where no time has been fixed the engagement becomes absolute as soon as it is ascertained that the event will not happen.

Illustrations.

(a.) A. enters into an engagement by contract to pay B. a sum of money if a certain ship shall not return within a year. At the end of six months it is ascertained that the ship has been lost. The engagement becomes absolute.
(b.) A. enters into an engagement by contract to pay B. a sum of money if a certain ship shall not return. It is ascertained that the ship has been lost. The engagement becomes absolute.

18. Where the order in which different engagements are to be performed is not expressly fixed by the contract, it shall be that order which the nature of the transaction requires.

Illustrations.

(a.) A. enters into an engagement by contract to build a house for B. at a fixed price. B. engages to pay the price. B.'s engagement does not become absolute until A. finishes the house.
(b.) A., a tradesman, enters into an engagement by contract to make over his stock in trade to B. at a fixed price, and B. engages to give security for the payment of the money. A.'s engagement does not become absolute until the security is given; for the essence of the engagement is, that A. should have security before he delivers up his stock.

19. Where one of two engagements by contract has been entered into in consideration of the other, and a time is appointed for the performance of one of them, which time is to arrive before the reciprocal engagement can be performed, the latter does not become absolute until the former has been performed.

Illustrations.

(a.) A. contracts with B. to sell to him at a specified price certain merchandise on board a ship which cannot arrive for a month, and B. engages to pay for the merchandise within a week from the date of the contract. A.'s engagement does not become absolute until B.'s engagement has been fulfilled.
(b.) A. contracts with B. to sell him 100 bales of merchandise to be delivered next day, and B. engages to pay for them within a month. B.'s engagement does not become absolute until the merchandise has been delivered to him.

20. The parties to a contract are bound to afford to each other all reasonable facilities for performing their engagements.

21. Where an engagement by contract is intended to take effect on the happening of an event, and the party who has entered into the engagement prevents the happening of the event, he becomes liable to perform the engagement, or to make compensation to the other party for any loss which he may have sustained in consequence of its non-performance.

Illustration.

A. engages to pay 1,000 rupees to B., provided that B. shall execute certain work for him; and B. engages to execute the work. B. is ready and willing to execute the work accordingly, but A. prevents him from doing so. A.'s engagement has become absolute.

22. When a person having entered into an engagement by contract with another fails to do an act which he is bound by law to do, and which is necessary to enable the other to perform his part of the contract, the party who has failed to do such act is liable to make compensation to the other party for any loss or damage which he may have sustained in consequence of the non-performance of it.

Illustrations.

Contract taking effect only when specified uncertain event does not happen.
Avoidance of engagement intended to take effect only in case specified uncertain event shall happen.

When an engagement intended to take effect in case a specified event shall not happen, becomes absolute.

When one reciprocal engagement does not become absolute till performance of other.

Order of performance of different engagements.

When one engagement intended to take effect in case a specified event shall happen, becomes absolute.

Illustrations.

Order of performance of different engagements.

Parties mutually bound to facilitate performance.
Liability of party preventing event on which contract is to take effect.

Illustration.

A. engages to pay 1,000 rupees to B., provided that B. shall execute certain work for him; and B. engages to execute the work. B. is ready and willing to execute the work accordingly, but A. prevents him from doing so. A.'s engagement has become absolute.

Liability of one party failing to do act which he is bound to do, and which is necessary to enable the other to perform.

Illustrations.
23. When there are mutual engagements by contract, and one of them is an entire and indivisible engagement by contract for the doing of a particular thing by a fixed time, time is of the essence of the contract, and unless the thing be done at the stipulated time the reciprocal engagement, if any, does not become absolute.

24. Where there are mutual engagements by contract, and one of them is an engagement for the doing of several things at different times, and the things stipulated are done, but not at the times specified, this irregularity does not prevent the reciprocal engagement from becoming absolute, but the person who entered into the latter engagement is entitled to compensation for any loss which he may have sustained in consequence of the irregularity.

Conditional Contract.

25. When an engagement by contract is conditional, and the condition fails to be fulfilled, the engagement becomes void.

Illustration

A. engages to pay 10,000 rupees to B. if he will marry A.'s daughter. A.'s daughter was dead at the date of the engagement. The condition cannot be fulfilled, and the engagement is void.

26. An engagement by contract may be made with the condition superadded, that it shall be terminated or varied in case a specified uncertain event shall happen, or that it shall be terminated or varied in case a specified uncertain event shall not happen.

Illustrations.

(a) A. engages to pay B. 6,000 rupees, provided that the engagement shall be void if A. takes in cargo for B. at a certain port. The Government afterwards declares war against the country in which the port is situated, so that A. cannot trade there. The engagement becomes void.

(b) A., a singer, who has undertaken to sing at B.'s theatre, engages to pay B. 20,000 rupees, provided that his engagement shall be void if A. sings at B.'s theatre on a certain number of nights in the month of June. A. before June loses his voice through illness. The engagement to pay 20,000 rupees becomes void.

27. A condition of the kind described in the last preceding section is invalid and does not affect the engagement to which it is superadded, if at the time of the contract the event is impossible, or if it is repugnant to law or morality, or inconsistent with the main purpose of the contract.

28. An engagement to which is superadded a condition of the kind described in Section 26 becomes void if the fulfilment of the condition is, subsequently to the contract, rendered unlawful, or is made impossible by some unforeseen event which the person who entered into the engagement could not prevent.

Illustrations.

(a) A. engages by contract to pay B. a fixed sum, provided that if A. delivers to B. on a certain future day either 20 maunds of the finest rice, or a certain quantity of opium to be obtained contrary to law, the engagement shall be void. The condition cannot be fulfilled otherwise than by the delivery of 30 maunds of the finest rice.

(b) A. engages by contract to pay B. a fixed sum, provided that if A. delivers to B. on a certain future day either 20 maunds of the finest rice, or a certain quantity of opium to be obtained contrary to law, the engagement shall be void. The condition cannot be fulfilled otherwise than by the delivery of 30 maunds of the finest rice.

Termination or variation of contract made with condition subsequent that it shall be terminated or varied unless a certain person performs a specified act.

29. Where an engagement by contract is made with a condition superadded, that it shall be terminated or varied unless a certain person shall perform a specified act, but no time is specified for the performance of the act; if such person takes any step which renders impossible or indefinitely postpones the performance of the act required, the engagement shall be terminated or varied as if such person had died without performing the act.

Discharge of alternative obligation where one of the two things is unlawful or impossible.

30. If a condition of the kind described in Section 26 consists in doing one or the other of two things, and one of them is unlawful or impossible, the condition can only be fulfilled by doing the other.

Illustration.

A. engages by contract to pay B. a fixed sum, provided that if A. delivers to B. on a certain future day either 20 maunds of the finest rice, or a certain quantity of opium to be obtained contrary to law, the engagement shall be void. The condition cannot be fulfilled otherwise than by the delivery of 30 maunds of the finest rice.

31. A person who fails to do an act which he has engaged by contract to do, shall make compensation to the person in whose favour the act was to be done.

Exception.—A man incurs no liability through the non-performance of an act which he has engaged by contract to do, where, since the date of the contract, the performance of the act has been rendered unlawful, or has been made impossible by some event, of which he did not, expressly, or by implication, take upon himself the risk.

Illustrations.

(a) A. engages so deliver to B. at a certain price, at a specified time and place, a cargo of merchandise on a vessel in his ship. The ship is afterwards lost at sea, with all its cargo. A. is liable to make compensation to B. for the non-performance of his engagement.

(b) A. freighted B.'s ship to proceed to the Island of Ichaboe, and there to take in a cargo of guano, to be supplied by A., and to convey it to a certain port. The guano at Ichaboe was entirely exhausted before the ship arrived, and it was impossible for A. to supply a cargo. A. must make compensation to B. for the non-performance of his engagement.

(c)
Rule of Construction.

32. For the purpose of determining questions as to the meaning of a contract, a Court must inquire into every material fact relating to the situation of the parties to, or the subject-matter of such contract, and into every fact a knowledge of which may conduce to the right application of the words which the contracting parties have used.

Performance of Contract.

33. An engagement by contract must be performed by the person who has entered into it, unless its nature be such that it can be properly performed by another, in which case he may employ a competent person to perform it; or if he dies before performance, his representatives may perform it, or employ a competent person to do so.

Illustrations.

(a.) A engages to pay B a sum of money. He may perform this engagement, either by personally paying the money to B, or by causing it to be paid to B by another; and if A. dies before performance, his representatives may perform the engagement.

(b.) A. engages to paint a picture for B. This engagement cannot be performed except by A.'s painting the picture himself.

34. Where a person who is entitled to claim from another the performance of an engagement accepts such performance from a third person, he cannot afterwards enforce it against the person who entered into the engagement.

35. A person who is entitled to claim performance of an engagement may dispense with or remit such performance wholly or in part, or may extend the time for it, or may accept instead of it any satisfaction which he thinks fit.

Illustrations.

(a.) A. engages to paint a picture for B. B. afterward expressly forbids him to do so. A is no longer bound to perform the engagement.

(b.) A. owes B. 5,000 rupees. By agreement A. pays to B. and B. accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c.) A. owes B. 5,000 rupees. C. pays to B. 1,000 rupees, and B. accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.

(d.) A. owes B. under a contract, a sum of money, the amount of which has not been ascertained. A. without ascertaining the amount, gives to B., and B., in satisfaction thereof, accepts the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e.) A. owes B. 2,000 rupees, and is also indebted to other creditors. A. makes an arrangement with his creditors, including B., to pay them a composition of 8 annas in the rupee upon their respective demands. Payment to B. of 1,000 rupees is a discharge of B.'s demand.

36. If a person who is entitled to claim the performance of an engagement by contract accepts a new and distinct contract by way of substitution for the existing one, the original engagement is no longer in force.

Illustrations.

(a.) A. owes money to B. under a contract. It is agreed between A., B., and C. that B. shall thenceforth accept C. as his debtor instead of A. The old debt of A. to B. is at an end, and a new debt from C. to B. has been contracted.

(b.) A. owes B. 10,000 rupees. A. enters into an arrangement with B. and gives him a mortgage of A.'s estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract.

(c.) A. and B. have mercantile transactions with each other, and A. thereby becomes indebted to B. in the sum of 10,000 rupees, for which B. holds no security. Afterwards A. executes a bond in favour of B. to secure the payment of the sum due to him. The execution of this bond does not constitute a new and distinct contract.

(d.) A. owes B. 1,000 rupees under a contract; B. owes C. 1,000 rupees. B. orders A. to pay 1,000 rupees to C. C. does not assent to the arrangement. B. still owes C. 1,000 rupees, and no new contract has been entered into.

Time and Place for Performance.

37. Where by the contract a person is to perform his engagement without application by the person with whom he made the engagement, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question what is a reasonable time is in each particular case a question of fact.

38. When an engagement is to be performed on a certain day, and the person entering into the engagement has undertaken to perform it without application, he has the whole of that day to perform the engagement in; subject to this qualification, that the person who is to receive performance is not bound to receive it before or after the usual hours of business, or at any other place than that at which the engagement ought to be performed.

Illustration.
PAPERS RELATING TO

Illustration.

A. engages to deliver goods at B.'s warehouse on the 1st January. On that day A. brings the goods to B.'s warehouse, but after the usual hour for closing it, and they are not received. A. has not performed his engagement.

39 When the engagement is to be performed on a certain day, and the person entering into the engagement has not undertaken to perform it without application, it is the duty of the person, in whose favour the engagement is made to apply for performance at a proper time and place.

Explanation.—The question what is a proper time and place is in each particular case a question of fact.

40. Where an engagement is to be performed without application, and no place is fixed for the performance of it, the person bound by the engagement must perform it at any reasonable place which the person with whom the engagement was made may appoint.

Illustration.

A. undertakes to pay B. 1,000 rupees on a fixed day. A. must apply to B. to appoint a proper place for the purpose of receiving it, and must pay it to him at such place.

Performance in manner or at time prescribed or sanctioned by person entitled to claim performance.

41. The performance is valid if made in any manner or at any time which the person entitled to claim performance may have prescribed, or may have subsequently sanctioned.

Illustrations.

(a.) B. owes A. 2,000 rupees. A. desires B. to pay the amount to B.'s account with C., a banker. B., who also banks with C., orders the amount to be transferred from his account to A.'s credit, and this is done by C. Afterwards, and before A. knew of this, C. fails. This is a good payment by B.

(b.) A. and B. are mutually indebted. A. and B. settle an account by setting off one item against another, and B. pays A. the balance found to be due from him upon such settlement. This amount is paid by A. and B. respectively of the sums which they owed to each other.

(c.) A. owes B. 2,000 rupees. A. and B. agree that B. shall receive some of A.'s goods in reduction of the debt. The delivery of the goods operates as a part payment.

Performance in manner or at time prescribed or sanctioned by person entitled to claim it.

42. Where a man owing several distinct debts to one person, makes a payment to him either with express intimation, or under circumstances implying that the payment is to be applied to some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations.

(a.) B. owes A. among other debts 1,000 rupees upon a promissory note, which falls due on the 1st June. He owes B. no other debt of that amount. On the 1st June A. pays to B. 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b.) A. owes B. (among other debts) 1,000 rupees upon a promissory note, which falls due on the 1st June. He owes B. no other debt of that amount. On the 1st June A. pays to B. 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

Where there are several distinct debts, and the debt to which payment is to be applied is indicated.

(c.) A. owes B. 1,000 rupees upon a promissory note, which falls due on the 1st June. He owes B. no other debt of that amount. On the 1st June A. pays to B. 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

Where there are several distinct debts, but the debt to which payment is to be applied is not indicated.

43. Where the debtor has omitted to intimate, and there are no other circumstances indicating, to which debt the payment is to be applied, the creditor is at liberty to apply it at his discretion to any lawful debt actually due and payable to him from the payer, or giving notice thereof to the payer within a reasonable time.

Where neither party makes any appropriation.

44. Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time. If they are of equal standing, the payment shall be applied in discharge of each proportionately.

Offer of Performance.

45. Where a person who has come under an engagement to another has made him an offer of performance, and the offer has not been accepted, the person who has made such offer is not responsible for non-performance so caused, nor does he thereby lose his title to claim performance of any reciprocal engagement.

46. In order to constitute a valid offer of performance, the following rules must be observed:—

1.—The offer must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining whether the thing tendered really is what it purports to be.

2.—The offer must be a tender of the whole thing which the other party to the engagement is entitled to demand.

3.—It must be unconditional.

4.—An offer to one of several joint creditors has the same legal consequences as an offer to all of them.

Explanation.
Explanation.—Where the performance of an engagement would involve the production of a certain thing, it is not necessary to the validity of a tender that the thing should actually be produced, if the person entitled to claim performance does not require that it should be produced.

Joint Liabilities and Rights.

47. When two persons have jointly come under an engagement by contract to a third person, then, unless a contrary intention appears by the contract, the liability to perform the engagement rests, as between them and him, on those two persons during their joint lives, and after the death of either, on his representative jointly with the survivor, and after the death of the survivor, on the representatives of both jointly.

48. As between themselves, persons who have jointly come under an engagement are bound, unless a contrary intention appears by the contract, to bear the burden of its performance equally; and if one of them is unable to bear his share of the burden, the others must make up the deficiency by equal contributions.

Explanation.—This rule is not to prevent a surety from recovering his disbursements from the principal, or to entitle the principal to recover anything from the surety.

Illustrations.

(a.) A., B., and C. are under a joint engagement to pay D. the sum of 3,000 rupees. A. is insolvent, but his assets are sufficient to pay one-half of his debts. A.'s estate pays 500 rupees. B. and C. must pay 1,500 rupees each.

(b.) A., B., and C. are under a joint engagement to pay D. 3,000 rupees. A. being in fact only sureties for C. C. is unable to pay anything, and A. pays the whole. A. is entitled to receive 1,500 rupees from B.

(c.) A., B., and C. are under a joint engagement to pay D. 3,000 rupees. A. and B. being in fact only sureties for C. C. is unable to pay; A. and B. are compelled to pay the whole sum. They are entitled to recover it from C.

49. Where two persons have jointly come under an engagement by contract to a third person, a release of one of them by such third person does not discharge the other; neither does it free that one from responsibility to the other.

50. When a person has come under an engagement by contract to two other persons jointly, then, unless a contrary intention appears by the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of either, with his representative jointly with the survivor, and after the death of the survivor, with the representatives of both jointly.

Illustrations.

A., in consideration of 5,000 rupees lent to him by B. and C., enters into an engagement by contract with B. and C. to repay them that sum with interest on a day specified. B. dies. The right to claim performance rests with B.'s representative jointly with C. during C.'s life, and after the death of C. with the representatives of B. and C. jointly.

Power to terminate Contract.

51. When a party to a contract has refused to perform, or disabled himself from performing, his engagement in its entirety, the party who has entered into the reciprocal contract, provided he has not signified, expressly or impliedly, that he acquiesced in its continuance, may put an end to the contract, and recover any damages sustained by the违约方.

Illustrations.

(a.) A., a singer, enters into an engagement with B., the manager of a theatre, to sing at his theatre two nights in every week during the next two months; and B. engages to pay her 100 rupees for each night's performance. On the sixth night the singer willfully absents herself from the theatre. B. is at liberty to put an end to the contract.

(b.) A., a singer, enters into an engagement with B., the manager of a theatre, to sing at his theatre two nights in every week during the next two months; and B. engages to pay her at the rate of 100 rupees for each night. On the sixth night the singer willfully absents herself. With the assent of B. she sings on the seventh night. B. has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through her failure.

Compensation.

52. A person who rightfully puts an end to an engagement is entitled to compensation for any damage he has sustained.

53. When a contract has been broken, if a sum is named in the contract itself as the amount to be paid in case of such breach, the amount so named shall be paid accordingly; but if no sum has been named in the contract itself, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for loss or damage caused to him thereby. Provided that it has naturally arisen in the usual course of things from such breach, or that it was in the knowledge of the parties at the time they made the contract, that such loss or damage would probably 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.

Explanations.

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Illustrations.

Explanation.—In estimating the loss, the means which existed of remedying the inconvenience caused by the non-performance of the engagement, must be taken into account.

(a.) A enters into an engagement by contract, that in case he fails to pay B. 500 rupees on a certain day, he shall immediately become liable to pay him 1,000 rupees. A. fails to pay 500 rupees on the day named. A. has become liable to pay B. 1,000 rupees.

(b.) A. enters into an engagement by contract, that if he practises as a surgeon in the town of Z, he shall pay B. 5,000 rupees. A. commits a breach of the engagement. The sum of 5,000 rupees is actually payable by A. to B.

(c.) A. agrees to sell and deliver 500 mounds of saltpetre to B. at a certain price, to be paid on delivery. A. breaks his engagement. B. is entitled to receive from A. by way of compensation, the sum paid by B. for another, but not the sum paid by A. to the third person by way of compensation.

(d.) A. hires B.'s ship to go to Bombay, and there take on board on the 1st 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.

(e.) A. agrees to sell and deliver to B. on the 1st of January, at a stated price, a certain quantity of cotton, to be paid on delivery. Afterwards, on the 1st December, A. announces to B. that he does not intend to perform his engagement, and on the 1st of January he delivers no cotton to B. B. is entitled to receive from A. by way of compensation, the excess, if any, of price of the like quantity of cotton on the 1st of January over the contract price.

(f.) A. agrees to sell and deliver to B. on the 1st of January a certain quantity of sugar for which B. pays him in advance. Afterwards, on the 1st of December, A. informs B. that he does not intend to deliver the sugar, and on the 1st of January he does not deliver it. B. is entitled to receive from A. by way of compensation, the excess, if any, of the sum for which the sugar could have been procured by him on the 1st of January, over the sum paid in advance.

(g.) A. agrees to buy of B., at a stated price, 50 mounds of rice, no time being fixed for delivery. Afterwards intimates to B. that he will not accept the rice if tendered to him. B. is entitled to receive from A. by way of compensation, the excess, if any, of the contract price over the price which B. can obtain for the rice at the time of the refusal.

(h.) A. agrees to buy B.'s ship for 60,000 rupees, but breaks his engagement. 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 engagement.

(i.) A. agrees to buy of B., at a stated price, 100 bales of jute, to be delivered on the 1st of January. Afterwards, on the 15th of December, A. gives notice to B. that he will not accept the jute; on the 1st of January the jute is tendered to A., who refuses to accept it. A. must pay to B., by way of compensation, the excess, if any, of the contract price over the sum which B. could obtain for the jute on the 1st of January.

(j.) A. agrees to engage store 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 engagement.

(k.) A. agrees to let his ship to B. for a year from the 1st of January next for a certain price. Freight rise, and on the 1st of January the hire obtainable for the ship is higher than the contract price. A. breaks his engagement. He must pay to B. the difference between the price which B. could have obtained for the ship at the time when it was actually arrived and its market price at the time when it would have arrived if forward in due course, and its market price at the time when it actually arrived.

(l.) A. engages 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 engagement.

(m.) A. agrees to let his ship to B. for a year from the 1st of January next for a certain price. Freight rise, and on the 1st of January the hire obtainable for the ship is higher than the contract price. A. breaks his engagement. He must pay to B. the difference between the price which B. could have obtained for the ship at the time when it would have arrived if forward in due course, and its market price at the time when it actually arrived.

(n.) A. agrees to buy of B., at a stated price, 100 bales of jute, to be delivered on the 1st of January. Afterwards, on the 15th of December, A. gives notice to B. that he will not accept the jute; on the 1st of January the jute is tendered to A., who refuses to accept it. A. must pay to B., by way of compensation, the excess, if any, of the contract price over the sum which B. could obtain for the jute on the 1st of January.

(o.) A. agrees to engage store 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 engagement.

(p.) A. agrees to let his ship to B. for a year from the 1st of January next for a certain price. Freight rise, and on the 1st of January the hire obtainable for the ship is higher than the contract price. A. breaks his engagement. He must pay to B. the difference between the price which B. could have obtained for the ship at the time when it would have arrived if forward in due course, and its market price at the time when it actually arrived.

(q.) A. agrees to buy of B., at a stated price, 100 bales of jute, to be delivered on the 1st of January. Afterwards, on the 15th of December, A. gives notice to B. that he will not accept the jute; on the 1st of January the jute is tendered to A., who refuses to accept it. A. must pay to B., by way of compensation, the excess, if any, of the contract price over the sum which B. could obtain for the jute on the 1st of January.

(r.) A. agrees to engage store 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 engagement.

(s.) A. agrees to let his ship to B. for a year from the 1st of January next for a certain price. Freight rise, and on the 1st of January the hire obtainable for the ship is higher than the contract price. A. breaks his engagement. He must pay to B. the difference between the price which B. could have obtained for the ship at the time when it would have arrived if forward in due course, and its market price at the time when it actually arrived.

(t.) A. agrees to buy of B., at a stated price, 100 bales of jute, to be delivered on the 1st of January. Afterwards, on the 15th of December, A. gives notice to B. that he will not accept the jute; on the 1st of January the jute is tendered to A., who refuses to accept it. A. must pay to B., by way of compensation, the excess, if any, of the contract price over the sum which B. could obtain for the jute on the 1st of January.

(u.) A. agrees to engage store 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 engagement.

(v.) A. agrees to let his ship to B. for a year from the 1st of January next for a certain price. Freight rise, and on the 1st of January the hire obtainable for the ship is higher than the contract price. A. breaks his engagement. He must pay to B. the difference between the price which B. could have obtained for the ship at the time when it would have arrived if forward in due course, and its market price at the time when it actually arrived.

(w.) A. agrees to buy of B., at a stated price, 100 bales of jute, to be delivered on the 1st of January. Afterwards, on the 15th of December, A. gives notice to B. that he will not accept the jute; on the 1st of January the jute is tendered to A., who refuses to accept it. A. must pay to B., by way of compensation, the excess, if any, of the contract price over the sum which B. could obtain for the jute on the 1st of January.

(x.) A. agrees to engage store 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 engagement.

(y.) A. agrees to let his ship to B. for a year from the 1st of January next for a certain price. Freight rise, and on the 1st of January the hire obtainable for the ship is higher than the contract price. A. breaks his engagement. He must pay to B. the difference between the price which B. could have obtained for the ship at the time when it would have arrived if forward in due course, and its market price at the time when it actually arrived.

(z.) A. agrees to buy of B., at a stated price, 100 bales of jute, to be delivered on the 1st of January. Afterwards, on the 15th of December, A. gives notice to B. that he will not accept the jute; on the 1st of January the jute is tendered to A., who refuses to accept it. A. must pay to B., by way of compensation, the excess, if any, of the contract price over the sum which B. could obtain for the jute on the 1st of January.

1. The measure of the compensation payable to B. by A., is the difference between the price which B. could have obtained for the ship at the time when it actually arrived, and the market price at the time when it would have arrived if forward in due course.

2. The measure of the compensation payable to B. by A., is the difference between the price which B. could have obtained for the ship at the time when it would have arrived if forward in due course, and its market price at the time when it actually arrived.

3. A. agrees to let his ship to B. for a year from the 1st of January next for a certain price. Freight rise, and on the 1st of January the hire obtainable for the ship is higher than the contract price. A. breaks his engagement. He must pay to B. the difference between the price which B. could have obtained for the ship at the time when it would have arrived if forward in due course, and its market price at the time when it actually arrived.

4. A. agrees to buy of B., at a stated price, 100 bales of jute, to be delivered on the 1st of January. Afterwards, on the 15th of December, A. gives notice to B. that he will not accept the jute; on the 1st of January the jute is tendered to A., who refuses to accept it. A. must pay to B., by way of compensation, the excess, if any, of the contract price over the sum which B. could obtain for the jute on the 1st of January.
liable to pay C. a sum of money by way of compensation. B. is entitled to be reimbursed this sum by A.

(c.) A. engages to supply B. with a threshing machine on the 15th of August; he is aware at the time of entering into the engagement that B. is in the habit of threshing out his wheat in the field, and sending it off at once to market. A. did not supply the machine on the 15th of August, but assured B. from day to day that it would be delivered shortly. He delivered the machine on the 11th of September. In consequence of the non-delivery of the machine, it became necessary for A. to carry the wheat home and dry it, and the weather, and had to be dried at a great expense; its quality was much deteriorated, and before it could be sold the market price of wheat had fallen. B., in consequence of these events, is unable to pay a judgment debt to C., who seizes and sells his property in execution. A. must make compensation to B. in respect of the expenses of carrying, stacking, and drying the wheat, and in respect of its deterioration in quality; but not in respect of the loss sustained by B. through the fall in the market price of wheat, nor in respect of the seizure of his property.

(b.) A. has entered into an engagement by contract to pay to B. a sum of money on a day specified. A. does not pay the money on the day appointed. 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.

(a.) A. engaged to deliver 50 mounds of saltpetre to B. on the 1st of January at a certain price. B. afterwards, before the 1st of January, agreed to sell the saltpetre to C. at a price higher than the market price of the 1st of January. A. broke his engagement. In estimating the compensation payable by A. to B. the market price of the 1st of January, and not the profit which would have arisen to B. from the sale to C., is to be taken into account.

(d.) A. engaged to sell and deliver 500 bales of cotton to B. on a fixed day. A. broke his engagement, and B. having no cotton, was obliged to close his mill. A. is not responsible to B. for the loss caused to B. by the closing of his mill.

(c.) A. agreed to sell and deliver to B. on the 1st of January certain cloth which B. intended to manufacture into caps of a particular kind, for which there was no demand except at that season. The cloth was not delivered till long after the appointed time, and too late to be used that year in making caps. A. is entitled to receive from B. by way of compensation, the difference between the contract price of the cloth and its market price of delivery, but not the profits which he has to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(x.) A., a ship-owner, agreed with B. to convey him from Calcutta to Sydney in A.'s ship, sailing on the 1st of January; and B. paid to A. by way of deposit one-half of his passage-money. The ship did not sail on the 1st of January, and B., after being in consequence detained in Calcutta for some time, and thereby put to some expense, proceeded to Sydney in another vessel, and in consequence, arriving too late in Sydney, lost to B. his deposit with interest, and the expense to which he was put by his detention in Calcutta, but not the sum of money which he lost by arriving in Sydney too late.

PART III.—ON CERTAIN OBLIGATIONS RESEMBLING THOSE CREATED BY CONTRACT.

54. Where a person has, either by words spoken or written, or by his conduct, led another to believe that a certain state of things exists which does not really exist, with the intention that the other shall act upon such belief in a transaction between them, and the other accordingly acts upon such belief; the person who has caused such belief is bound to place the other in the same position as if such a state of things had existed, or, act on such belief.

Effect of one person intentionally leading another to believe in a non-existent state of things, when the other acts on such belief.

55. A person who, by a false representation, induces another to enter into a contract with a third party, is bound to make good the representation if he knew it to be false, or, if, in the due discharge of his duty, he ought to have known it to be so.

Effect of one person, by a false representation, inducing another to contract with a third party.

Illustrations.

(a.) A. is trustee for B. of certain property. B. creates a charge upon the trust property, of which notice is given to C. who enters into a contract with C. for the sale of the property. C. asks A. whether the property is incumbered or not. A. not remembering the notice, replies in the negative, and C. thereupon buys the property. A. as well as B. is responsible for the discharge of the incumbrance.

(b.) A. engages to execute an order to B. by a secret trustor A.'s benefit and permits B. to appear as the owner of it. B. alienates the property to a person who is not aware of the trust. A. cannot dispute the alienation.

(c.) A. being applied to by B. for merchandise upon credit, asks C. whether B. is in good circumstances, C. knowing B. to be deeply in debt, with the intention of inducing A. to comply with B.'s wishes, replies that B. is in good circumstances. In consequence of this reply, A. sells B. merchandise on credit. B. becomes insolvent before the time for payment arrives. C. is liable to make good to A. the value of the merchandise.

(d.) C., without any particular knowledge of B.'s means, speaks of him in the presence of A. as a person in good circumstances. A. in consequence lets B. have merchandise on credit. B. becomes insolvent. C. is not liable to make good to A. the value of the merchandise.

56. If one person makes a deliberate statement as to his own future conduct to another, with the intent that it should be acted upon, and the other acts upon the faith of such assurance, the person who made the statement must make it good.

Representation as to future conduct.

Illustration.

A. holding a decree against B., and knowing that B. is desirous to be married to C., assures the father of C. that he will never enforce the execution of the decree against B. C.'s father, relying on this assurance, permits the marriage to take place. A. is not entitled to enforce the execution of the decree.

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

Supply of necessaries to person incapable of contracting.

Illustrations.

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Illustrations.

(a.) A supplies B, a minor, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

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

58. 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.

A holds some land in Bengal as zamindar. B. holds the land on a lease granted by A. 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 Government the sum due from A. A. is bound to make good to B. the amount so paid.

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

This rule shall apply, notwithstanding that there shall have been a larger contract between the parties, which has been put an end to by reason of a breach thereof.

Illustrations.

(a.) 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. contracts with B. to deliver to him 250 maunds of rice before the 1st of May. A. delivers 100 maunds only before that day and none after. B. retains the 130 maunds after the 1st of May. A. is bound to pay A. for them.

(c.) A., a singer, enters into an engagement 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 the singer wilfully absents herself from the theatre, and B. in consequence puts an end to the engagement. B. must pay A. for the five nights on which she had sung.

Illustrations.

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.


"Goods" defined.

"Sale" defined.

Sale how effected.

(b.) A. sends goods to B., with the request that he will buy them at a stated price if he approves of them, or return them if he does not approve of them. B. retains the goods, and informs A. that he approves of them. The goods have been sold to B.

(c) B. offers A. for his horse 1,000 rupees, the horse to be delivered to B. on a stated day, and the price to be paid on another stated day. A. accepts the offer. The horse has been sold to B. by offer and acceptance with an agreement to postpone delivery and payment.

(d) B. offers A. for his horse 1,000 rupees, on a month's credit. A. accepts the offer. The horse has been sold to B. by offer and acceptance with an agreement to postpone the payment.

(e) B., on the 1st January 1863, offers to A. for a quantity of rice 2,000 rupees, to be paid on the 1st March following, the rice not to be taken away till paid for. A. accepts the offer. The rice has been sold to B.

65. By an agreement for the sale of a thing which has yet to be ascertained, made, or finished, no ownership of any portion of that thing passes to the buyer until it is ascertained, made, or finished.

Illustration.

B. orders A., a barge-builder, to make him a barge. The price is not made payable by instalments. While the barge is building, B. pays to A. money from time to time on account of the price. The ownership of the barge does not pass to B. until it is finished.

66. Where by an agreement for the sale of goods the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done.

Illustrations.
(a.) A., a ship-builder, agrees to sell to B. for a stated price, a vessel which is lying in A.'s yard; the vessel to be rigged and fitted for a voyage, and the price to be paid on delivery. Under the agreement a sale is not effected until the vessel has been rigged, fitted up, and delivered.

(b.) A. contracts to build a ship for B. for a price, payable by instalments dependent on the progress of the building of the ship, and the ship to be built under B.'s superintendence. The ownership of the materials incorporated with the ship passes to B. at the time of incorporation, as this was intended by the parties, but the materials lying in A.'s yard, though suited and intended for the ship, do not pass to B. until they are actually incorporated with the ship.

67. Where anything remains to be done to the goods by the seller for the purpose of ascertaining the amount of the price, the sale is not complete until this has been done.

Illustrations.

(a.) A., owner of a stack of bark, agrees to sell it to B. at 100 rupees per ton; B. agrees to take and pay for it on a certain day. Part is weighed and delivered to B.; the ownership of the residue is not transferred to B. until it has been weighed pursuant to the contract.

(b.) A. agrees to sell a heap of clay to B. at a certain price per ton; B. by the agreement to load the clay in his own carts, and to weigh each load at a certain weighing machine which his carts must pass over on their way from A.'s ground to B.'s place of deposit. Here nothing more remains to be done by the seller, the sale is complete, and the ownership of the heap of clay is transferred at once.

68. Where the goods are not ascertained at the time of making the agreement for sale it is necessary to the completion of the sale that the goods shall be ascertained.

Illustration.

A. agrees to sell to B. 20 tons of oil in A.'s cisterns. A.'s cisterns contain more than 20 tons of oil. B. has not acquired the ownership of any portion of the oil.

69. Where the goods are not ascertained at the time of making the agreement for sale, but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete.

Illustration.

A. having a quantity of sugar in bulk, more than sufficient to fill 20 hogsheds, agrees to sell B. 20 hogsheds of it. After the agreement, A. fills 20 hogsheds with the sugar, and gives notice to B. that the hogsheds are ready, and requires him to take them away. B. says he will take them as soon as he can. By this appropriation by A. and assent by B., the ownership passes to B.

70. Where the goods are not ascertained at the time of making the agreement for sale, and by the terms of the agreement the seller is to do an act with reference to the goods which cannot be done until they are appropriated to the buyer, the seller has a right to select any goods answering to the agreement, and by his doing so the goods are ascertained.

Illustration.

B. agrees with A. to purchase of him at a stated price, to be paid on a fixed day, 50 maunds of rice out of a larger quantity in A.'s granary. It is agreed that B. shall send sacks for the rice, and that A. shall put the rice into them. B. does so, and A. puts 50 maunds of rice into the sacks. The goods have been ascertained.

71. Where an agreement is made for the sale of immoveable and moveable property combined, the ownership of the moveable property does not pass before the transference of the immoveable property.

Illustration.

A. agrees with B. for the sale of a house and furniture. The ownership of the furniture does not pass to B. until the house is conveyed to B.

72. Where goods are sold by auction, there is a distinct and separate sale of the goods in each lot, by which the ownership thereof is transferred as each lot is knocked down.

Illustration.

B. offers and A. accepts 100 rupees for a stack of fire-wood standing on A.'s premises, the fire-wood to be allowed to remain on A.'s premises till a certain day, and not to be taken away till paid for. Before payment, and while the fire-wood is on A.'s premises, it is accidentally destroyed by fire. B. must bear the loss.

74. A. steals a cow from B. and sells it at a cattle-market to C., a purchaser, in good faith. A. is afterwards convicted of the theft. B. cannot recover the cow from C.

75. The ownership of goods may be acquired by buying them from any person who is in possession of them: provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession has no right to sell them.

Illustrations.

(a.) A. steals a cow from B. and sells it at a cattle-market to C., a purchaser, in good faith. A. is afterwards convicted of the theft. B. cannot recover the cow from C.

(b.) A., a person whose rank and occupation are not such as to account for his having plate in his possession, sells a plate of plate to B. without giving a satisfactory explanation of the manner in which he had become possessed of it. The plate had, in fact, been stolen from C.; C., on proof of the theft, can recover the plate from B.

(c.) A. commercial agent, to whom goods have been consigned, with instructions not to sell them without permission.
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Reference to the consignor, sells them to B., who has no ground for a reasonable presumption that A. has no right to sell them. The consignor cannot disturb the sale.

A. is a commercial agent, to whom goods have been consigned with instructions not to sell them without reference to the consignor, sells them, without such reference, to B. who is acquainted with the instructions given to A. The sale is void as against the consignor.

76. The ownership of goods may be acquired by buying them from any person who is in possession of a bill of lading, dock-warrant, warehouse keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other documentary title to the goods  provided that the buyer acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the document has no right to sell the goods.

Illustration.

A. sells to B. goods of which he has the bill of lading, but the bill of lading is made out for delivery of the goods to C., and it has not been endorsed by C. The sale is not valid.

77. Under an agreement for the sale of goods not yet in existence, the ownership of the goods may be transferred by acts which, after the goods are produced, are done in pursuance of the agreement by the seller, or by the buyer with the seller's consent.

Illustrations.

(a.) A. agrees to sell to B. for a stated price all the indigo which shall be produced at A.'s factory during the ensuing year. A., when the indigo has been manufactured, gives B. an acknowledgment that he holds the indigo at his disposal. The ownership of the indigo vests in B. from the date of the acknowledgment.

(b.) A. agrees to sell to B. for a stated price all the indigo which shall be produced at A.'s factory during the ensuing year. A., when the indigo has been manufactured, gives B. an acknowledgment that he holds the indigo at his disposal. The ownership of the indigo vests in B. from the date of the acknowledgment.

78. An agreement for the sale of goods to be delivered at a future day is binding, though the goods are not in the possession of the seller at the time of making the agreement, and though at that time he has no reasonable expectation of acquiring them otherwise than by purchase.

Illustration.

A. agrees on the 1st January to sell B. 50 shares in the East Indian Railway Company, to be delivered and paid for on the 1st March of the same year. A., at the time of making the agreement, is not in possession of any share. The agreement is valid.

79. Where there has been a sale, or an agreement to sell, and the amount of the price has not been fixed, it shall be determined by the consideration of what is just and reasonable.

Illustration.

B., living at Patna, orders of A., a coach-builder at Calcutta, a carriage of a particular description. Nothing is said by either as to the price. The order having been executed, and the price being in dispute between the buyer and the seller, the amount of it must be determined by the consideration of what is just and reasonable.

Delivery.

80. Delivery of goods sold may be made by doing anything which has the effect of putting them in the possession of the buyer, or of any person authorized to hold them on his behalf.

Illustrations.

(a.) A. sells to B. a horse, and cautions or permits it to be removed from A.'s stables to B.'s. This is a delivery.

(b.) A. delivers cotton to B. A. sends his own ship to Bombay for the cotton. The putting the cotton on board the ship is a delivery to B.

(c.) A. sells to B. certain specific goods which are locked up in a godown. A. gives B. the key of the godown, in order that he may get the goods. This is a delivery.

(d.) A. sells to B. five specific casks of oil. The oil is in the warehouse of A. B. sells the five casks to C. A. receives warehouse rent for them from C. This amount is delivered to B. C. from B. A. gives B. the key of the godown, in order that he may get the goods. This is a delivery.

(e.) A. sells to B. 50 maunds of rice in the possession of C., a warehouseman. A. gives B. an order to C. to transfer the rice to B., and C. assents to such order, and transfers the rice in his books to B. This is a delivery.

(f.) A. agrees to sell B. five tons of oil at 1,000 rupees per ton, to be paid for at the time of delivery. A. gives to C., a wharfinger, at whose wharf he has 20 tons of the oil, an order to transfer five of them into the name of B. C. makes the transfer in his books, and gives A.'s clerk a notice of the transfer for B. A.'s clerk takes the transfer notice to B., and offers to give it him on payment of the bill. B. refuses to pay. There has been no delivery to B., as B. never assented to make C. his agent to hold for him the five tons selected by A.

81. A delivery to a wharfinger or carrier of the goods sold, which do not reach the buyer, does not render the buyer liable for the price, unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe delivery of the goods.

Illustration.

B., at Agra, orders of A., who lives at Calcutta, three casks of oil to be sent to him by railway. A. takes three casks of oil directed to B. to the railway station, and leaves them there without conforming to the rules which
which must be complied with in order to render the railway company responsible for their safety. This is not a sufficient delivery to charge B. in a suit for the price, if the goods are not delivered to the buyer.

82. A delivery of part of the goods in progress of the delivery of the whole has the same legal effect as a delivery of the whole; but a delivery of part of the goods with an intention of severing it from the whole, does not operate as a delivery of the remainder.

Illustrations.

(a.) A ship arrives in a harbour laden with a cargo consigned to A., the buyer of the cargo. The captain begins to discharge it, and delivers over part of the goods to A. in progress of the delivery of the whole. This is a delivery of the cargo to A.

(b) A sells to B. a stack of fire-wood, be paid for by bill on delivery. After the sale, B. applies for and obtains from A. leave to take away some of the fire-wood. This has not the legal effect of delivery of the whole.

(c.) A. sells 50 maunds of rice to B. The rice remains in A.'s warehouse. After the sale, B. sells to C. 10 maunds of the rice, and A., at B.'s desire, sends the 10 maunds to C. This has not the legal effect of a delivery of the whole.

83. In the absence of any special agreement, the seller of goods is not bound to deliver them until the buyer applies for possession.

84. In the absence of any agreement as to delivery, goods sold are to be delivered at the place at which they are at the time of the sale; and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement for sale, or, if not then in existence, at the place at which they are produced.

Seller's Lien.

85. Unless a contrary intention appears by the agreement, a seller has a lien on sold goods as long as they remain in his possession, and the price or any part of it remains unpaid.

86. Where by the agreement the payment is to be made at a future day, but no time is fixed for the delivery of the goods, the seller has no lien, and the buyer is entitled to a present delivery of the goods without payment. But if the buyer becomes insolvent before delivery of the goods, the seller may retain the goods for the price.

Explanation.—A person is insolvent who has ceased to pay his debts in the usual course of business, or who is incapable of paying them.

Illustration.

A. sells to B. a quantity of sugar in A.'s warehouse. Payment is agreed to be made by a bill of exchange at three months. B. gives A. the bill of exchange, but allows the sugar to remain in A.'s warehouse. Before the bill falls due B. stops payment. A. may retain the goods for the price.

87. Where by the agreement the payment is to be made at a future day, and the buyer allows the goods to remain in the possession of the seller until that day, and does not then pay for them, the seller may retain the goods for the price.

Illustration.

A. sells to B. a quantity of sugar in A.'s warehouse. Payment is agreed to be made by a bill of exchange at three months. B. gives the bill of exchange, but allows the sugar to remain in the warehouse. The bill is dishonoured. A. may retain the goods for the price.

88. A seller in possession of goods sold may retain them for the price against any subsequent buyer, unless the seller has recognised the title of the subsequent buyer.

Illustrations.

(a.) A. sells to B. at three months' credit a chest of tea then in the custody of X., a wharfinger. A. gives B. a delivery order for the tea, and before the expiration for the credit, B. re-sells the tea to C. for cash, and transfers to him the delivery order. B. stops payment before C. obtains possession under the order. A. may countermand the order to X., and retain the goods against C.

(b) A. sells to B. a cargo of sugar then in the warehouse of A.; B. according to the terms of the sale, gives A. his acceptance at three months for the price of the sugar. B. sells the sugar to C. for cash, and gives C. an order addressed to A., requesting him to deliver the sugar to C. A. assigns to the delivery order, and agrees to hold for C. Afterwards B. becomes insolvent, and his acceptance is dishonoured. A. cannot retain the goods against C.

Stoppage in Transit.

89. A seller who has parted with the possession of the goods, and has not received the whole price, may, in the event of the buyer becoming insolvent, stop the goods while they are in transit to the buyer.

90. Goods are to be deemed in transit while they are in the possession of the carrier, or lodged at any place in the course of transmission to the buyer, and are not yet come into the possession of the buyer, or any person on his behalf, otherwise than as being in possession of the carrier, or as being so lodged.

Illustrations.

(a.) B., living at Madras, orders goods of A. at Patna, and directs that they shall be sent to Madras. The goods are sent to Calcutta, and there delivered to C., a wharfinger, to be forwarded to Madras. The goods, while they are in the possession of C. are in transit.

(b) B. at
(b.) B. at Delhi orders goods of A. at Calcutta. A. consigns and forwards the goods to B. at Delhi. On arrival there, they are taken to the warehouse of B. and left there. B. refuses to receive them, and immediately afterwards stops payment. The goods are in transit.

(c.) B., who lives at Puna, orders goods of A. at Bombay. A. sends them to Puna by C., a carrier appointed by B. The goods arrive at Puna, and are placed by C., at B.'s request, in C.'s warehouse for B. The goods are no longer in transit.

(d.) B., a merchant of London, orders 100 bales of cotton of A., a merchant at Bombay. B. sends his own ship to Bombay for the cotton. The transit is at an end when the cotton is delivered on board the ship.

91. The right of stoppage does not cease on the buyer's re-selling the goods while in transit, and receiving the price; but continues until the goods have been delivered to the second buyer, or to some person on his behalf.

92. The right of stoppage ceases if the buyer, while the goods are in transit, assigns a bill of lading in respect of them to a second buyer in good faith for valuable consideration.

Illustrations.

(a.) A. sells and consigns certain goods to B. A. being still unpaid, B. becomes insolvent, and while the goods are in transit assigns the bill of lading for cash to C., who is not aware of his insolvency. A. cannot stop the goods in transit.

(b.) A. sells and consigns certain goods to B. A. being still unpaid, B. becomes insolvent, and while the goods are still in transit assigns the bill of lading for cash to C., who knows that B. is insolvent. The assignment not being in good faith, A. may still stop the goods in transit.

93. Where a bill of lading is negotiable until a certain condition has been fulfilled, the right of stoppage does not cease until such condition has been fulfilled.

Illustration.

A. sells and dispatches goods to B. and sends him a letter enclosing the bill of lading, and directing him not to pay with it until he has accepted certain bills of exchange which A. has drawn against the consignment. B., without accepting the bills of exchange, assigns the bill of lading to a buyer in good faith for valuable consideration. A.'s right of stoppage does not cease upon such assignment.

95. Stoppage in transit may be effected by the seller, either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other depositary in whose possession they are.

96. The notice may be given either to the person who has the immediate possession of the goods, or to the principal whose servant has the possession. In the latter case, it must be given at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent a delivery to the buyer.

97. Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods sold is paid.

Illustration.

A. sells to B. 100 bales of cotton; 60 bales having come into B.'s possession, and 40 being still in transit, B. becomes insolvent, and A., being still unpaid, stops the 40 bales in transit. A. is entitled to hold the 40 bales until the price of the 100 bales is paid.

Re-sale on buyer's failure to perform.

98. Where the buyer fails to perform his part of the agreement, either by not taking the goods sold to him or by not paying for them, the seller may re-sell them within a reasonable time after giving notice to the buyer of his intention to do so; and the buyer must bear any loss, but is not entitled to any profit which may occur on the re-sale.

Warranty of Title.

99. If the buyer, or any person claiming under him, is, by reason of the invalidity of the seller's title, deprived of the thing sold, the seller is responsible to the buyer for the loss thereby caused, unless a contrary intention appears by the agreement.

100. An implied warranty of goodness or quality may be established by the custom of any particular trade.

101. On the sale of provisions there is an implied warranty that they are sound.
102. On the sale of goods by sample there is an implied warranty that the bulk is equal in quality to the sample.

103. Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample or after inspection of the bulk.

Illustrations.

(a.) A., at Calcutta, sells to B. 12 bags of "waste silk," then on its way from Moorshedabad to Calcutta. There is an implied warranty by A. that the silk shall be such as is known in the market under the denomination of "waste silk."

(b.) A. sells parcels of "linseed oil" by sample to B. There is an implied warranty by A. that the article sold is such as is known in the market as "linseed oil"; and if he delivers an article which, though equal to sample, is not such as is known in the market as linseed oil, there is a breach of the implied warranty.

(c.) A. sells to B. 40 cases of "oxalic acid." B. having before the sale seen the bulk of the acid, and inspected samples of it. The acid proves to be so adulterated as not to be the article known in commerce as "oxalic acid." There is here a breach of an implied warranty.

(d.) A. in London, where inland bills of exchange do, and foreign bills of exchange do not, by law require a stamp, sells to B. a bill of exchange unstamped and purporting to be a foreign bill. There is an implied warranty by A. that the bill is a foreign bill; and if it turns out that the bill is not a foreign but an inland bill, there is a breach of that implied warranty.

104. Where goods have been ordered for a specified purpose, for which goods of the denomination employed in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose.

Illustration.

B. orders of A., a copper manufacturer, copper for sheathing a vessel. A. on this order supplies copper. There is an implied warranty that the copper is fit for sheathing a vessel.

105. Upon the sale of an article of a well-known ascertained kind there is no implied warranty of its fitness for any particular purpose.

Illustration.

B. writes to A., the owner of a patent invention for cleaning cotton, "Send me your patent cotton-cleaning machine to clean the cotton at my factory." A. sends the machine according to order. There is an implied warranty by A. that it is the article known as A.'s patent cotton-cleaning machine, but none that it is fit for the particular purpose of cleaning the cotton at B.'s factory.

106. In the absence of fraud and of any express warranty of quality, the seller of an article which answers the description under which it was sold, is not responsible for a latent defect in it.

Illustration.

A., in good faith, sells and delivers to B. scrip certificates of shares in a certain railway company. Afterwards the scrip is repudiated on the ground that it had been issued without authority. A. is not responsible for loss sustained by B. in consequence.

107. Where a specific article has been sold with a warranty and the warranty is broken, the buyer's right on breach of warranty.

Illustration.

A. sells to B. a horse, warranted sound. The horse proves to have been unsound at the time of sale. B. is entitled to compensation from A. for loss caused by the unsoundness.

108. Where there has been an agreement for the sale of goods with a warranty, and the warranty is broken, the buyer may reject the goods on their being tendered to him, or may return them after the lapse of not more than a reasonable time for ascertaining the breach of warranty: provided that beyond keeping them such time, and examining or trying them, he does not exercise any act of ownership over them; and whichever course he follows, he is entitled to compensation from the seller for loss caused by the breach of warranty.

Illustrations.

(a.) A. agrees to sell to B. 200 bales of cotton by sample. Cotton not in accordance with sample is delivered to B. He may reject it if he has not kept it longer than a reasonable time for the purpose of examination.

(b.) B. agrees to buy of A. 25 sacks of flour by sample. The flour is delivered to B. who pays the price. B., upon examination, finds it not equal to sample, and complains of this to A. B. afterwards uses two sacks, and sells one. He cannot now repudiate the contract and recover the price, but he is entitled to compensation from A. for any loss caused by the breach of warranty.

Refusal to accept.

109. When the seller sends goods not ordered with goods ordered, the buyer may refuse to accept any of the goods so sent, if there is risk or trouble in separating the goods ordered from the goods not ordered.

Illustration.

A. orders of B. specific articles of china. B. sends these articles to A. in a hamper with other articles of china, which had not been ordered. A. may refuse to accept any of the goods sent.

110. If a buyer wrongfully refuses to accept the goods sold to him, this amounts to a breach of the contract of sale.

Effect of wrongful refusal to accept.
111. The seller of goods is not entitled to rescind the agreement on the buyer's failing to pay the price at the time fixed, unless it was stipulated by the agreement that he should be so entitled.

Auction.

112. If at a sale by auction the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer.

Part V.—Of Indemnity and Guarantee.

113. A person can bind himself to save another person from eventual loss. The security thus afforded is called indemnity when the loss guarded against is that which may be consequent upon the conduct of some person.

Illustrations.

(a.) A gives B. a letter of indemnity against the consequences of any proceedings which C. may take against B. in respect of a certain sum of 200 rupees. Here A. binds himself by an express engagement to save B. from consequent loss if C. shall act as contemplated.

(b.) B. accepts a bill of exchange, at A.'s request, for the accommodation of A. A. does not provide for the bill at maturity, and B. is compelled to pay it. A. is liable to B. for the amount of the bill. Here A. binds himself by an implied engagement to indemnify B. against loss consequent on a failure on A.'s part to provide for payment of the bill when due.

114. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by him in exercise of the authority conferred upon him.

Illustrations.

(a.) B., a stockbroker at London, and member of the Stock Exchange, at the request of A., buys for him 20 shares in a bank, "to be paid for on settlement day." Before the settlement day arrives, the bank stops payment, and A. repudiates the transaction, and tells B. not to pay the price. By the rules of the Stock Exchange, however, B. is compelled to pay the price on the settlement day. A. is liable to B. for the price on an implied agreement to indemnify.

(b.) B., an auctioneer, at request of A., sellsgoods in the possession of A., but which A. had no right to dispose of. B. does not know this, and hands over the proceeds of the sale to A. Afterwards, C. is found to be the true owner of the goods, and sues B. for breach of contract. B. informs A. of the suit, and A. authorises him to defend the suit. C. defends the suit, and is compelled to pay damages and costs, and incurs expenses. A. is liable to B. for such damages, costs, and expenses.

(c.) B., a broker at Calcutta, by the orders of A., a merchant there, contracts with C. to deliver certain bricks to him B. does not send the goods to B., and C. sues B. for breach of contract. B. informs A. of the suit, and A. authorises him to defend the suit. C. defends the suit, and is compelled to pay damages and costs, and incurs expenses. A. is liable to B. for such damages, costs, and expenses.

115. Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cost an injury to the rights of third persons.

Illustrations.

(a.) A., a decree-holder and entitled to execution of B.'s goods, requires the nazir to seize certain goods representing them to be the goods of B. The nazir seizes the goods, and is sued by C., the true owner of the goods. A. is liable to indemnify the nazir for the sum he is compelled to pay to C., in consequence of obeying A.'s directions.

(b.) B., an auctioneer, at request of A., sells goods in the possession of A., but which A. had no right to dispose of. B. does not know this, and hands over the proceeds of the sale to A. Afterwards, C. is found to be the true owner of the goods, and sues B. for breach of contract. B. informs A. of the suit, and A. authorises him to defend the suit. C. defends the suit, and is compelled to pay damages and costs, and incurs expenses. A. is liable to indemnify B. for what he has been compelled to pay to C., and for B.'s own expenses.

(c.) B., a broker at Calcutta, by the orders of A., a merchant there, contracts with C. for the purchase of 10 casks of oil for A. Afterwards A. refuses to receive the oil, and C. sues B. B. informs A., who repudiates the contract altogether. B. defends, but unsuccessfully, and has to pay damages and costs, and incurs expenses. A. is liable to B. for such damages, costs, and expenses.

116. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Illustrations.

(a.) A. employs B. to cheat C., and agrees to indemnify him against all consequences of the act. B. then proceeds to C., and has to pay damages to C. for so doing. A. is not liable to indemnify B. for those damages.

(b.) B., the proprietor of a newspaper, publishes, at A.'s request, a libel upon C. in the paper, and A. agrees to indemnify B. against the consequences of the publication, and all cost and damages of any action in respect thereof. B. is sued by C. and has to pay damages, and also incurs expenses. A. is not liable to B. upon the indemnity.

117. Where a person holds an indemnity and a suit is brought against him in respect of matters comprised in the indemnity, it is his duty to give notice to the person who is bound to indemnify him; and if that person does not authorise him to defend the suit, he is at liberty to compromise it. Whether he defends the suit under such authority as aforesaid, or in the absence of such authority compromises it, he is entitled to receive from the person bound to indemnify him the damages and costs which he has been compelled to pay.

If he defends the suit without such authority, he is entitled to receive from the person bound to indemnify him the amount he has been compelled to pay, exclusive of any expenses caused by his having defended the suit; unless in defending it he has acted as a prudent man holding no indemnity would have acted in his own case.
118. An engagement to fulfil the liability of a third person in case of his default is called a guarantee when founded on sufficient consideration. The person who gives the guarantee is called the surety, the person primarily liable 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.

119. Anything which is done or agreed to be done for the benefit of the principal debtor, and which is an inducement to the surety to give the guarantee, may be a sufficient consideration.

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 agrees to guarantee the payment of the goods to be supplied. This is a good guarantee.

(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 to sue B. There is here a sufficient consideration to sustain C's guarantee.

(c) A sells and delivers goods to B. C afterwards promises A to pay for them in default of B. This is not a guarantee, as there is no consideration to support it.

120. An offer to guarantee does not constitute a guarantee until it is accepted by the person to whom it is made, and the acceptance is notified to the offerer.

121. The liability of the surety is co-extensive with that of the principal debtor.

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 which may have become due on it.

122. A guarantee may extend to a series of transactions, in which case it is called a continuing guarantee.

Illustrations.

(a) A, in consideration that B will employ C in collecting the rents of B's zamindars 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.

(b) A promises B, a tea-dealer, to be responsible to the amount of 100L for any tea he may supply to C. B supplies C with tea to the value of 100L, C pays B for the same. Afterwards B supplies C with tea to the value of 200L. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of 100L.

(c) A agrees with B to be answerable to him for the price of five sacks of flour, to be delivered by B to C, payable in one month. B delivers five sacks to C. A pays for them. 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.

123. A continuing guarantee may be at any time revoked by the surety as to future transactions, 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 12 months the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 5,000 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.

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

125. Where, upon the face of the agreement, two persons are primarily liable to a third person, that liability is not affected, so far as regards the third person, by an arrangement between the two, that one of them shall be liable only upon the default of the other, even although such arrangement may have been known to the third person, unless he was a party to the arrangement.

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 this at the time when the note is made. In a suit by C against A upon the note, the fact that A made it as surety for B, and that C knew it, is no answer to the suit.

129. 14

126. Any
126. Any variance made without the surety's consent, in the terms of the original agreement, discharges the surety as to future transactions.

Illustrations.

(a.) A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C renew, without A's consent, that B's salary shall be raised, and that he shall become liable to one-fourth of the losses on discounts. 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 he is appointed by C, and under 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 from future liability under his guarantee by the change, 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 coals at a yearly salary of 100/, upon A's becoming surety to C for B's duty accounting for monies received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid a commission of 6d. per ton on the coal sold by him instead of by the fixed salary. A is not liable for subsequent misconduct of B.

(d.) A gives to C a continuing guarantee to the extent of 5,000 rupees for any oil supplied by C to B on credit. Afterwards, B becomes embarrassed, and, without the knowledge of A, C and B agree that C should continue to supply B with oil for ready money, and that the payments should 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.) A, as surety for B, gives to C a promissory note for 5,000 rupees upon an agreement that the 5,000 rupees should be paid by C to B "by draft at three months' date." C, without A's knowledge, pays the 5,000 rupees to B at once, instead of giving a draft. A is discharged from liability, as the agreement has been varied, and C might sue B for the money before the expiration of three months.

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

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 agrees with his creditors (including C) to re-sell the goods at the expense of C. A is discharged from his suretyship.

(b.) A agrees 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 agreement. B diverts a stream of water which is necessary for the irrigation of A's land, and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

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

128. An agreement between the creditor and the principal debtor, by which the creditor makes a composition with, or agrees to give time to, or not to sue, the principal debtor, discharges the surety.

Illustrations.

(a.) C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, hides himself by a valid agreement with B, to give time to B, A not assenting to the agreement. A is discharged from liability on the bill.

(b.) C, to whom B owes a debt guaranteed by A, hides himself by agreement with B, not to see B, and to accept four annas in the rupee in respect of B's debts. A assents to the arrangement. A is not discharged, and is liable to C for the whole debt.

129. Where an agreement to give time to the principal debtor is made with a third person, and not with the principal debtor, the surety is not discharged.

Illustration.

A., the holder of an overdue bill of exchange, drawn by A. as surety for B., and accepted by B, hides himself by a valid agreement with M. to give time to B. A. has no knowledge of this agreement. A is not discharged.

130. 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 his suretyship.

131. Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free that one from any responsibility to the others.

132. 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 agrees 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 agreement. C. without the knowledge of A., prepay to B. the last two instalments. A. is discharged by this payment.

(b.) A. agrees with C. to complete certain fittings in C.'s warehouse for 8,000 rupees. C. stipulates to insure from time to time, the fittings from fire, and to deduct the costs of the insurance from the 8,000 rupees. A. knowing of this agreement, guarantees B.'s due performance of the work. C. never insures, and fittings to the value of 7,000 rupees are destroyed by the fire at B.'s shop. B. becomes insolvent, and it seems...
costs C. 9,000 rupees to complete the work. A. is discharged by C.'s omission to insure, not merely to the extent of the benefit he would have derived from the insurance if it had been effected, but altogether.

(c) A. 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 satisfaction of the monies due on 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.

(d) A. puts M. as apprentice to B., and gives a guarantee to B. for M.'s fidelity. C. sues A. and by A. assures B. together with a bill of sale of B.'s furniture, which gives power to C. to sell the part that he will, at least once a month, see M. make up the cash. B. omits to see this done as agreed, and M. embezzles. A. is not liable to B. on his guarantee.

133. 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.

134. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time the contract is entered into, whether the surety knows or does not know of the existence of such security; 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 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, and C. is discharged from liability to the amount of the value of the furniture.

(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. After the date of this transaction, C. obtains from B. a further security for the same debt. Subsequently C. gives up the further security. A. is not discharged.

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

Illustrations.

(a) B. owes C. 800 l. C. agrees to advance B. 2,000 l. on his obtaining a surety for that amount. It is also agreed between B. and C. that the 800 l. should be deducted from that sum. The agreement, which is in writing, states that C. had agreed to advance 2,000 l., and that the 800 l. had been repaid. This agreement is read to A. in C.'s presence, but nothing more is said, when A. gives a promissory note for 2,000 l. as surety for B. A. is discharged from liability on the note, as there is a false representation to A. that the 800 l. had been paid, and that the whole sum of 2,000 l. was to be advanced to B.

(b) C. for 2,000 rupees as surety for A. and B. thereupon concurs as surety in a mortgage security given by B. in order to indemnify C. C. in fact, was not liable to D. as alleged. A. is not bound by the security.

136. Any guarantee which the creditor has obtained by means of the concealment of a material circumstance, 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 cannot satisfy him to furnish security for his duly accounting. C. gave 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. for payment to 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 5 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.

137. Where a person gives a guarantee upon an agreement that the 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.

138. In every contract of guarantee there is an implied agreement 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.

Illustrations.

(a) B. is indebted to C., and A. is surety for his debt. C. demands payment from A., and on his refusal sues him for the amount. A. defends the suit, at the request of B., having reasonable grounds for doing so, but he 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) B. 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 A. upon the bill. A. 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 of 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.

139. Where two or more persons or co-sureties for the same debt or duty either jointly or severally, and whether under the same or different agreements, and whether with or without the knowledge of each other, the co-sureties, in the absence of any agreement 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.

239.
PAPERS RELATING TO

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 it is arranged between A., B., C., and E. 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, B. 250 rupees, and C. 500 rupees.

140. 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, viz., 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, viz., 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, viz., 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 70,000 rupees. Each has to pay the full penalty of his bond.

PART VI.—Of Bailment.

141. The delivery of goods by one person to another for some purpose, upon an agreement that they shall be delivered by the latter back to or according to the directions of the former when the purpose shall have been accomplished, is called a bailment. The person delivering the goods is called the bailor. The person to whom they are delivered is called the bailee.

142. 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 authorized to hold them on his behalf.

143. 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.

Illustration.

A. lends a horse to B. which he knows to be vicious. 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.

144. 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 of the goods bailed.

145. The bailee, in the absence of any agreement to the contrary, is not responsible for the loss, destruction, or deterioration of the thing bailed if not caused by his fault.

146. If the bailee does any act with regard to the goods bailed which is inconsistent with the conditions of the bailment, such act is, at the option of the bailor, a termination of the bailment.

Illustration.

A. lends 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.

147. 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. lent a horse to B. for his own riding only. B. allowed C., a member of his family, to ride the horse. C. rode with care, but the horse accidentally fell and was injured. B. is liable to make compensation to A. for the injury done to the horse.

(b.) A. hired a horse in Calcutta from B. to ride to Benares. A. rode with due care, but rode to Cuttack instead. The horse accidentally fell and was injured. A. is liable to make compensation to B. for the injury to the horse.

Mixture of Goods bailed.

148. 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.

149. 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, the property in the goods remains in the
parties respectively, but the bailee is bound to bear the expense of separation, and any damage arising from the mixture.

150. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods so 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.

151. 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 remuneration, the bailor shall re-pay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

152. Where the bailment is gratuitous, the bailor is entitled at any time, upon reasonable notice, to the restoration of the goods bailed.

153. The bailee must return 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.

154. If by the fault of the bailee the goods are not 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.

155. The bailment, where gratuitous, is terminated by the death either of the bailor or of the bailee.

156. In the absence of any agreement 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 of B., who takes care of it gratuitously. The cow has a calf. B. is bound to deliver the calf as well as the cow to A.

157. The bailor is responsible to the bailee for any loss which he 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.

158. 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.

159. If the bailor has no title to the goods, and the bailee 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.

160. If a third person claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

161. 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 has a right to retain the goods against the owner until he receives such compensation; and where the owner offers a specific reward for the return of goods lost, the finder has a right to retain them until he receives the reward.

162. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill on the goods bailed, he has, in the absence of any agreement to the contrary, a right to retain the goods until he receives 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. gave some cloth to B., a tailor, to make into a coat. A. agreed with B. that the coat should be delivered as soon as it was finished, and that three months' credit should be given for the price. B. is not entitled to retain the coat until he is paid.

163. In the absence of any agreement to the contrary, bankers, factors, and wharfingers have no right to retain the goods bailed to them as a security for a general balance of account.

Pledge.

164. The bailment of goods as security for payment of a debt or performance of an engagement is called pledge. The bailor is in this case called the pawnor. The bailee is called the pawnee.

165. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of engagement, 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.

K 2 166. The...
In case of subsequent advances.

166. The pawnee shall not retain the goods pledged for any other debt or engagement than the debt or engagement for which they are delivered, except by agreement between the parties; but such agreement, in the absence of anything to the contrary, will be presumed in regard to subsequent advances made by the pawnee.

Extraordinary expenses incurred by pawnee.

167. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

Pawnee's right where pawnor makes default.

168. If the pawnor makes default in payment of the debt or performance of the engagement at the stipulated time, the pawnee may bring a suit against the pawnor upon the debt or engagement, and retain the goods pledged as a collateral security, or may sell the thing pledged on giving the pawnor reasonable notice of the sale. If the proceeds of the sale are less than the amount due in respect of the debt or engagement, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount due, the pawnee shall pay over the surplus to the pawnor.

Defaulting pawnor's right to redeem.

169. If a time is stipulated for the payment of the debt or performance of the engagement for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the engagement at the stipulated time, he may redeem the goods pledged at any time before the actual sale of them.

Pledge by possessor of documentary title to goods.

170. A person who is in possession of goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, 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 pawnor acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly.

Pledge where pledgee has only a limited interest.

171. Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Suits against wrong-doers.

172. 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 use in the like case if no bailment had been made, and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Apparitionment of proceeds of such suits.

173. 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.

PART VII.—OF AGENCY.

174. An agent is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom the act is done, or who is so represented, is called the principal.

175. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

176. As between the principal and third persons, any person may become an agent; but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal, according to the provisions in that behalf herein contained.

177. No consideration is necessary to create an agency.

178. The authority of an agent may be expressed or implied.

179. An authority is said to be expressed when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing may be accounted circumstances of the case.

Agent's authority in an emergency.

180. An agent having an authority to do any act, has authority to do every lawful thing which is necessary in order to do such act; and an agent having an authority to carry on any business, has authority to do every lawful thing necessary for the purpose of or usually done in the course of conducting such business.

Agent and principal defined.

181. An agent is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom the act is done, or who is so represented, is called the principal.

Who may be a principal.

175. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

Who may be an agent.

176. As between the principal and third persons, any person may become an agent; but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal, according to the provisions in that behalf herein contained.

Agency created without consideration.

177. No consideration is necessary to create an agency.

178. The authority of an agent may be expressed or implied.

179. An authority is said to be expressed when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing may be accounted circumstances of the case.

Extent of agent's authority.

180. An agent having an authority to do any act, has authority to do every lawful thing which is necessary in order to do such act; and an agent having an authority to carry on any business, has authority to do every lawful thing necessary for the purpose of or usually done in the course of conducting such business.

Agent's authority in an emergency.

181. An agent has authority in an emergency to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence in his own case under similar circumstances.
Illustrations.

(a.) A. ship is driven on shore. The master has authority to hire men and boats to get her off, and to incur all necessary expenses for re-fitting her.

(b.) A. consigns provisions to B at Calcutta, with directions to send them immediately to C at Cuttack. B. may sell the provisions at Calcutta, if they will not bear the journey without spoiling.

182. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

Illustrations.

(a.) A. buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B.'s principal is the person entitled to claim from A. the price of the goods, and A. cannot set off against that claim a debt due to himself from B.

(b.) A. being B.'s agent, with authority to receive money on his behalf, receives from C. a sum of money due to B. C. is discharged of his obligation to pay the sum in question to B.

183. Where an agent does more than he is authorised to do, what he does within the scope of his authority, if it can be separated from what is beyond that scope, is binding as between the principal and the agent; the rest not.

Illustration.

A., being owner of a ship and cargo, authorises B. to procure an insurance for 4,000 rupees on the ship. B. procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A. is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

184. Where an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the whole is void as against the principal.

Illustration.

A. authorises B. to buy 500 sheep for him. B. buys 600 sheep and 200 lambs for one sum of 6,000 rupees. The whole transaction is void as against A.

185. A sub-agent is a person employed by and acting under the control of the original agent in the business of the agency.

186. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally.

187. Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal. The agent is responsible to the principal for the acts of the sub-agent, the sub-agent is responsible for his acts to the agent but not to the principal, except in cases of fraud or wilful wrong.

188. Where an agent has appointed a person to act as a sub-agent without having authority to do so, the agent stands towards that person in relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons, and the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

189. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly; such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations.

(a.) A. directs B., his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B. names C., an auctioneer, to conduct the sale. C. is not a sub-agent, but is A.'s agent for the conduct of the sale.

(b.) A., a merchant in Calcutta, consigns goods to B., a merchant in London, and directs him to sell the goods. B. appoints C., a broker, to sell the goods for A. C. is not a sub-agent, but is agent for A.

(c.) A. appoints B., a merchant in Calcutta, his attorney, for the purpose of recovering the monies due to A. from C. and Co. B. instructs D., a solicitor, to take legal proceedings against C. and Co. for the recovery of the money. D. is not a sub-agent, but is solicitor for A.

190. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case, and if he does this he will not be responsible to the principal for the acts or negligence of the agent so selected.

Illustrations.

(a.) A. directs B. to buy and ship a cargo of indigo for him, and to have the cargo properly insured. B. employs an insurance broker of good reputation, who effects an insurance on the cargo. The ship, having the cargo on board, is lost, but owing to the omission of some usual stipulations in the policy of insurance, the underwriters refuse to pay the sum insured. B. is not responsible to A. for the loss; but the insurance broker is.

(b.) B., the agent of A., employs an auctioneer in good credit to sell goods of A., and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent, without having accounted for the proceeds. B. is not responsible to A. for the proceeds.

191. An agent is bound to conduct the business of his principal according to the directions given by the principal, or in the absence of any such directions, according to the custom.
custom which prevails in doing business of the same kind. When the agent adopts a different course, if any loss be sustained, he must make it good to his principal, and if any profit accrues he must account for it.

Illustrations.

(a.) A, an agent engaged in carrying on for B, a business in which it is the custom to invest from time to time at interest the monies which may be in hand, omits to make such investment. A. must make good to the principal the interest usually obtained by such investments.

(b.) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A. on credit to C, whose credit at the time was very high. C., before payment, becomes insolvent. B. must make good the loss to A.

102. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.

Illustrations.

(a.) A., a merchant in Calcutta, has an agent B. in London, to whom a large sum of money is paid as A.'s account. B. improperly retains the money for a considerable time. A., in consequence of not receiving the money, becomes insolvent. B. is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, but not further.

(b.) A., an agent for the sale of goods, having authority to sell on credit, sells to B., in credit, without making the proper and usual inquiries as to the solvency of B. At the time of such sale, is insolvent. A. must make compensation to his principal in respect of any loss thereby sustained.

(c.) A., an insurance broker employed by B. to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A. is bound to make good the loss to B.

(d.) A., a merchant in England, directs B., his agent at Bombay, to send him 100 bales of cotton by a certain ship. B., having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B. is bound to make good to A. the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit which might have been made by the subsequent rise.

Agent's accounts.

193. An agent is bound to render proper accounts to his principal on demand.

Agent's duty to communicate with principal.

194. It is the duty of an agent in cases of difficulty to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

Agent dealing on his own account. 195. If a person who is an agent deals on his own account in the business of the agency without first obtaining the consent of the principal, and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal is at liberty, on discovering such circumstances, either to adopt or to repudiate the transaction.

Illustrations.

(a.) A. directs B. to sell A.'s estate. B. buys the estate for himself in the name of C. A., on discovering that B. has bought the estate for himself, may either repudiate or adopt the sale at his option.

(b.) A. directs B. to sell A.'s estate. B. on looking at the estate before selling it, finds a mine on the estate which is unknown to A. B. informs A. that he wishes to buy the estate for himself, but conceals the discovery of the mine. A. allows B. to buy, in ignorance of the existence of the mine. A., on discovering that B. knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

196. An agent dealing on his own account with his principal in the business of the agency is not entitled to any remuneration as agent, notwithstanding that the principal adopts the transaction.

Illustration.

A. agrees that if B. will find a purchaser for his land in Bombay at two rupees a yard, A. will give B five per cent. commission. B. afterwards buys on his own account, and A. adopts the contract. B. is not entitled to any commission.

Principal's right to benefit gained by agent dealing on his own account in business of agency.

197. If an agent without the knowledge of his principal deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration.

A. directs B. to buy a certain house for him. B. tells A. it cannot be bought, and buys the house for himself. A. may, on discovering that B. has bought the house, compel him to sell it to A. at the price he gave for it.

Agent's duty to pay sums received for principal.

198. An agent may retain, out of any sums received on account of the principal in the business of the agency, all monies due to himself in respect of advances made or expenses incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

199. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

200. In
200. In the absence of any agreement to the contrary, remuneration in respect of the performance of any act is not due to the agent until the completion of such act.

201. An agent who is guilty of gross misconduct in the business of the agency, is not entitled to any remuneration in respect of that part of the business which has been so misconducted.

Illustrations.

(a.) A employs B to recover 1,00,000 rupees from C and lay it out on good security. B recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on insufficient security. A is entitled to remuneration for recovering the 1,00,000 rupees, and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to B.

(b.) A employs B to recover 1,00,000 rupees from C. Though B's misconduct the money is not received. B is entitled to no remuneration for his services, and must make good the loss.

202. In the absence of any agreement to the contrary, an agent is entitled to retain goods, papers, and other property of the principal received by him, until the amount due to himself for commission, disbursements, and services in respect of the same has been paid or accounted for to him.

Ratification.

203. Where acts are done by one person on behalf of another, but without his knowledge, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

204. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Illustration.

A, without authority buys goods for B. Afterwards B sells them to C on his own account. B's conduct implies a ratification of the purchase made for him by A.

205. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

206. A person ratifying any unauthorised act done on his behalf ratifies the whole of the transaction of which such act formed a part.

207. An act done without authority, which, if done with authority, would have the effect of subjecting a third person to damage or of terminating any right or interest of a third person, cannot by ratification be made to have such effect.

Illustrations.

(a.) A, an unauthorized person, requires on account of B, the owner of a chattel, the delivery of the chattel to B. This demand cannot be ratified by B so as to make the holder liable for damages for default.

(b.) A holds a lease from B terminable on three months’ notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified so as to be binding on A.

208. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

Illustrations.

(a.) A is employed by B to buy certain goods from C, and buys them accordingly. In the course of the treaty for the sale A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods.

(b.) A is employed by B to buy goods from C. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

209. In the absence of any agreement to the contrary, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Explanation.—Such an agreement may be implied in the following cases:

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

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

(3.) Where the principal, though disclosing, cannot be sued.

210. Where one man enters into an engagement by contract with another, having no knowledge or reasonable ground of suspicion that the other is an agent, the principal, if he requires the performance of the engagement, can only obtain it, subject to the rights and obligations subsisting between the agent and the other party to the contract.
211. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Illustration.

A. enters into a contract with B. to sell him 100 bales of cotton, and afterwards discovers that B. is acting as agent for C. A. may sue either B. or C., or both, for the price of the cotton.

212. A person who enters into a contract with an agent, if he afterwards induces the agent to do any act in the belief that the principal will be held exclusively liable on the contract, cannot hold the agent liable; and in like manner if he induces the principal to do any act in the belief that the agent will be held exclusively liable, he cannot hold the principal liable.

Illustration.

A., in Bombay, agrees as agent for B., a merchant in London, to buy 100 bales of cotton from C. C. intimates to B. that he intends to hold A. exclusively liable for the price of the cotton, and B. relying upon this intimation settles his account with A., giving A. credit for the price of the cotton. A. afterwards becomes bankrupt without having paid the price of the cotton to C. C. cannot hold B. liable for the price of the cotton.

213. A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his supposed employer does not ratify his acts, to make compensation to the other, according to the rules laid down in the chapter on contracts, section 50, in respect of any loss or damage which he has incurred by so dealing.

214. A person with whom a contract has been entered into in the character of an agent is not entitled to require the performance of it, if he was in reality acting not as agent, but on his own account.

215. When an agent has without authority done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he had by his words or conduct induced such persons to believe that such acts and obligations were within the scope of the agent's authority.

Illustrations.

(a.) A. consigns goods to B. for sale, and gives him verbal instructions not to sell under a fixed price. C. being ignorant of B.'s instructions enters into an agreement with B. to buy the goods at price lower than the reserved price. A. is bound by the agreement.

(b.) A. knows that B. is an agent of C., and acting under written instructions from C., makes an agreement with B., as C.'s agent, without asking to see the instructions. The terms of the agreement are contrary to the instructions. C. is not bound by the agreement.

216. The master of a ship has not, as such, any authority to sign bills of lading without receiving the goods to which they refer.

217. A master is bound to make compensation to third persons for injuries caused by the negligence or unskilfulness of his servant acting as such, but not for his willful misconduct.

Illustrations.

(a.) A.'s coachman, driving A.'s carriage on A.'s business, strikes B.'s horses, not wantonly, but in order to extricate himself from a difficulty, and causes the horses to run away, in consequence of which B.'s carriage is overturned and broken. A. is liable to make compensation to B. in respect of the loss or damage caused to him by the breaking of the carriage.

(b.) A.'s coachman, driving A.'s coach on A.'s business, wantonly strikes B.'s horses, which run away, in consequence of which B.'s carriage is overturned and broken. A. is not, but his coachman is, liable to make compensation to B. in respect of the loss or damage caused to him by the breaking of the carriage.

(c.) The commander of A.'s ship, navigating the ship on A.'s business, through negligence runs over B.'s boat. A. is liable to make compensation to B. in respect of loss or damage caused to him thereby.

(d.) The commander of A.'s ship, navigating the ship on A.'s business, intentionally runs over B.'s boat. A. is not, but the commander is, liable to make compensation to B. in respect of loss or damage caused to him thereby.

(e.) A.'s coachman driving A.'s coach, but not on A.'s business, through negligence runs over B. who thereby sustains severe bodily injury. A. is not, but the coachman is, liable to make compensation to B. in respect of such injury.

(f.) A. employs B. to act as conductor of his omnibus. C. enters the omnibus, and having behaved improperly there, is removed by B. with unnecessary violence. In consequence of B.'s violence C. is seriously injured. A. is not, but B. is, liable to make compensation to C. in respect of the effects of such injury.

(g.) A. was in the habit of buying corn and directing the vendor to deliver it at a B.'s wharf, and of paying for the corn on the production of the receipt of B. or his servant. B.'s servant, whose duty it was to receive the corn, and give receipts for it on behalf of B., gave C. a receipt for corn that had never been delivered, and thus enabled C. to obtain money from A. B. is not liable to make compensation to A. in respect of the loss caused to him by the conduct of B.'s servant.

218. A person who employs another to do a lawful act, otherwise than as a servant, is not responsible for injuries caused to third persons in the doing of that act by the negligence or unskilfulness of the person employed, except in any case where the injuries may have been caused by conduct which the employer had authorised or adopted.
Responsibility for injuries arising from non-performance of act which a person is bound to do.

Illustrations.
(a.) A. employs B., a builder, to pull down and rebuild A.'s house. In consequence of the negligence of B.'s workmen in pulling down the house, the front of C.'s house, which adjoins A.'s, falls down. A. is not liable to make good the loss to C., but B. is.
(b.) A. employs B., a builder, to execute certain alterations in a house, including the preparation and fixing of gas fittings. B. makes a sub-contract with C., a gas-fitter, to execute this part of the work. D. is injured by an explosion of gas, caused by C.'s negligence. C. is, but A. and B. are not, liable to make compensation to D. in respect of such injury.

219. A person who is bound to do any act is responsible for all injuries arising from the non-performance of such act, although he may have employed another to do it.

Illustrations.
(a.) A. is bound to repair the wall of his house, which is in a dangerous state. He employs B. to repair it. B. omits to do so. The wall falls down; and in doing so draws with it a part of an adjoining house belonging to C. A. is liable to make good the loss to C.
(b.) A. is bound to cover in a drain in front of his house, and employs B. to do so. B. neglects to cover in the drain; in consequence of B.'s negligence C. falls into the drain, and is hurt. A. must make compensation to C.

220. A person employing another to do any act is bound to make compensation to third persons in respect of injuries caused directly by such act.

Exception.—Where two persons are engaged as agents or servants to the same master for a common object, the master is not bound to make compensation to one servant in respect of loss or damage arising from the misconduct, negligence, or want of skill of the other, unless he neglected to use ordinary care in the selection of the servant who has caused the injuries.

Illustrations.
(a.) A. employs B. to build a house according to a particular plan. The house cannot be built without obscuring the lights of a neighbour's house. The house is built accordingly. A. is liable to make good the loss to C.
(b.) A. is bound to cover in a drain in front of his house, and employs B. to do so. B. neglects to cover in the drain; in consequence of B.'s negligence C. falls into the drain, and is hurt. A. must make compensation to C.

221. The master must make compensation to his agent or servant in respect of injury caused to such agent or servant by the master’s neglect or want of skill.

Illustration.
A. employs B. as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B. is in consequence hurt. A. must make compensation to B.

222. The principal cannot retain any profit resulting from the fraud of his agent, although such fraud have been unauthorised by or unknown to the principal.

Illustration.
A. gives authority to B. to sell A.'s land, and to pay himself out of the proceeds the debts due to him from A. A. cannot revoke this authority, nor can it be terminated by his insanity or death.

223. An agent is not responsible to third persons for injuries to them arising from his neglect of duty, but he is bound to make compensation to his employer in respect of all sums properly paid by him on account of such injuries.

Illustration.
A. is bound to cover in a drain in front of his house, and employs B. to do so. B. neglects to cover in the drain; in consequence of B.'s negligence C. falls into the drain, and is hurt. B. is not liable to make compensation to C.; but B. must make compensation to A. in respect of any compensation which A. has been compelled to make to C.

224. An agent is in all cases responsible to third persons for wrongful acts done by him, though such acts may have been previously commanded or subsequently ratified by his employer.

225. An agency is terminated by the principal revoking his authority or by the agent renouncing the business of the agency, or by the business of the agency being completed, or by either the principal or agent dying or becoming of unsound mind : or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

226. Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot be terminated to the prejudice of such interest.

Illustration.
A. gives authority to B. to sell A.'s land, and to pay himself out of the proceeds the debts due to him from A. A. cannot revoke this authority, nor can it be terminated by his insanity or death.

227. The principal may (save as is otherwise provided by the last preceding section) revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

239. The
228. The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

Illustrations.

(a.) A. authorizes B. to buy 1,000 bales of cotton on account of A., and to pay for it out of A.'s money remaining in his hands. B. buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A. cannot revoke his authority so far as regards payment for the cotton.

(b.) A. authorizes B. to buy 1,000 bales of cotton on account of A., and to pay for it out of A.'s money remaining in B.'s hands. B. buys 1,000 bales of cotton in A.'s name, and so as not to render himself personally liable for the price. A. can revoke B.'s authority to pay for the cotton.

229. If it has been agreed expressly or by implication that the agency should continue for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Notice of revocation or renunciation.

230. Reasonable notice must be given of such revocation or renunciation, or the damage thereby resulting to the principal or the agent, as the case may be, must be made good to him by the other.

Revocation and renunciation may be expressed or implied.

231. Revocation and renunciation may be expressed, or may be implied in the conduct of the principal or agent respectively.

Illustration.

A. authorizes B. to let A.'s house. Afterwards A. lets it himself. This is an implied revocation of B.'s authority.

232. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Illustrations.

(a.) A. directs B. to sell goods for him, and agrees to give B. 2 per cent. commission on the price fetched by the goods. A. afterwards by letter revokes his authority B., after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A., and B. is entitled to 2 rupees as his commission.

(b.) A., at Madras, by letter directs B. to sell some cotton lying in a warehouse in Bombay for him, and afterwards by letter revokes his authority to sell, and directs B. to send the cotton to Madras. B. after receiving the second letter enters into a contract with C., who knows of the first letter, but not of the second, for the sale to him of the cotton. C. pays B. the money, with which B. abandons. The contract is binding on A.

233. When an agency is terminated by the principal dying or becoming of unsound mind the agent is bound to take all reasonable steps for the protection and preservation of the interest intrusted to him.

Illustrations.

(a.) A., in London, consigns to his agent B., at Calcutta, for sale, a cargo of porcelain. A. dies. B.'s duty, under ordinary circumstances, is to warehouse and retain the porcelain.

(b.) A., in New York, consigns to B., in Calcutta, for sale, a cargo of ice. A. dies. It is B.'s duty to sell the ice as soon as possible.

234. The termination of the authority of an agent causes the termination of the authority of all sub-agents appointed by him, subject to the rules herein contained regarding the termination of an agent's authority.

PART VIII.— Of Partnership.

235. Partnership is the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits therefrom between them.

Persons who have entered into partnership with one another are called collectively a firm.

Illustrations.

(a.) A. and B. buy 100 bales of cotton, which they agree to sell for their joint profit; A. and B. are partners in respect of such cotton.

(b.) A. and B. buy 100 bales of cotton, agreeing to share it between them. A. and B. are not partners.

(c.) A. agrees with B., a goldsmith, to buy and furnish gold to B., to be worked up by him and sold, and that they shall share in the profits. A. and B. are partners.

(d.) A. and B. agree to work together as carpenters, but that A. shall receive all profits, and shall pay wages to B. A. and B. are not partners.

(e.) A. and B. are joint owners of a ship. This circumstance does not make them partners.
236. A loan to a person engaged or about to engage in any trade or undertaking upon a contract with such person, that the lender shall receive interest at a rate varying with the profits, or that he shall receive a share of the profits, does not, of itself, constitute the lender a partner, or render him responsible as such.

237. In the absence of any agreement to the contrary, property left by a retiring partner or the representative of a deceased partner to be used in the business, is to be considered a loan within the meaning of the last preceding section.

238. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

239. No person being a widow or child of a deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of such trader, or be subject to any liabilities incurred by him.

240. No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the good-will of such business, shall, by reason only of such receipt, be deemed to be a partner of the person carrying on such business, or be subject to his liabilities.

241. A person who has, by words spoken or written, or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such firm.

242. Any one permitting himself to be represented as a partner is liable as such to third persons who, on the faith thereof, give credit to the partnership. permitting himself to be represented as a partner.

243. A person who is under the age of majority, according to the laws to which he is subject, may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm.

244. A person who has been admitted to the benefits of partnership under the age of majority, becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice within a reasonable time of his repudiation of the partnership.

245. Every partner is liable for all debts and obligations incurred by or on behalf of the partnership.

246. Every partner is liable to make compensation to third persons in respect of loss or damage arising from the neglect or fraud of any partner in the management of the business of the firm.

247. Each partner who does any act necessary for or usually done in carrying on the business of such a partnership as that of which he is a member, binds his co-partners, to the same extent as if he were their agent duly appointed for that purpose.

Exception.—If it has been agreed between the partners that any restriction shall be placed upon the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement.

Illustrations.

(a.) A. and B. trade in partnership; A. residing in England, and B. in India. A. draws a bill of exchange in the name of the firm. B. has no notice of the bill, nor is he at all interested in the transaction. The bill is liable on the bill, provided the holder did not know of the fraud.

(b.) A., being one of a firm of solicitors and attorneys, draws a bill of exchange in the name of the firm without authority. The other partners are not liable on the bills.

(c.) A. and B. carry on business in partnership as bankers: a sum of money is received by A. on behalf of the firm. A. does not, in form, pay B. of such payment, and afterwards A. appropriates the money to his own use. The partnership is liable to make good the money.

(d.) A., a partner, takes upon him to agree that his firm shall submit to arbitration. His undertaking is void.

(e.) A. and B. are partners. A. with the intention of cheating B., goes to a shop and purchases articles such as might be used in the partnership business, which he converts to his own separate use, there being no collusion between him and the seller. The firm is liable for the price of the goods.

248. Where partners have by agreement regulated and defined as between themselves their rights and obligations, such agreement can be annulled or altered only by consent of all of them, which consent must either be expressed or be implied from a uniform course of dealing.

Illustration.

A., B., and C., intending to enter into partnership, execute written articles of agreement, by which it is stipulated that the net profits arising from the partnership business shall be equally divided between them. Afterwards, they carry on the partnership business for many years, A. receiving one-half of the net profits, and the other half being divided equally between B. and C. without any remonstrance on their part. This course of dealing supersedes the provision in the articles as to the division of profits.

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249. In
249. In the absence of any agreement to the contrary, the relations of the partners to each other are determined by the following rules:—

(1.) All partners are joint owners of all property originally brought into the partnership stock, or bought with money belonging to the partnership, or acquired for purposes of the partnership business. All such property is called partnership property. The share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss.

(2.) All partners are entitled to share equally in the profits of the partnership business, and must contribute equally towards the losses sustained by the partnership.

(3.) Each partner has a right to take part in the management of the partnership business.

(4.) Each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business.

(5.) All ordinary matters of partnership business may be decided by the majority of the partners; but no change in the nature of the business of the partnership can be made, except with the consent of all the partners.

(6.) No person can introduce a new partner into a firm without the consent of all the partners.

(7.) If, from any cause whatever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members.

(8.) Unless the partnership has been entered into for a fixed term, any partner may retire from it at any time.

(9.) Where a partnership has been entered into for a fixed term, no partner can during such term retire, except with the consent of all the partners, nor can he be expelled by his partners for any cause whatever.

(10.) Partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner.

250. At the suit of a partner the court may dissolve the partnership in the following cases:—

(1.) When a partner becomes of unsound mind.

(2.) When a partner other than the person suing has been adjudicated an insolvent under any law relating to insolvent debtors.

(3.) When a partner other than the person suing has done any act by which the whole interest of such partner is legally transferred to a third person.

(4.) When any partner becomes incapable of performing his part of the partnership contract.

(5.) When a partner other than the person suing is guilty of gross misconduct in the affairs of the partnership or towards his partners.

(6.) When the business can only be carried on at a loss.

251. A partnership is in all cases dissolved by its business being prohibited by law.

252. If a partnership entered into for a fixed term be continued after such term has expired, the rights and obligations of the partners will, in the absence of any agreement to the contrary, remain the same as they were at the expiration of the term, so far as such rights and obligations can be applied to a partnership dissoluble at the will of any partner.

253. Partners are bound to carry on the business of the partnership for the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the partnership to any partner, or his legal representatives.

254. A partner must account to the firm for any benefit derived from a transaction affecting the partnership.

Illustrations.

(a.) A. and B. are partners for the sale of a mineral of a certain description. A. keeps a shop near a mine where this mineral is found, and buys it from the miners, giving them goods in which he deals in exchange. A. must account to B. for the profit which he obtains by selling his own goods, as well as for that which he derives from the sale of the mineral.

(b.) A., B., and C. are partners in trade. C., without the knowledge of A. and B., obtains for his own sole benefit a lease of the house in which the partnership business is carried on. A. and B. are entitled to participate, if they please, in the benefit of the lease.

(c.) A., B., and C. carry on business together in partnership as merchants, trading between Bombay and London. D., a merchant in London, to whom they make their consignments, secretly allows C. a share of the commission which he receives upon such consignments, in consideration of C.'s using his influence to obtain the consignments for him. C. is liable to account to the firm for the money so received by him.
255. If a partner, without the knowledge and consent of the other partners, carries on any business competing or interfering with that of the firm, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby.

256. Every person introduced as a partner into a pre-existing firm, is subject to all the obligations incurred by the firm before he was introduced.

257. A continuing guarantee given either to a firm or to a third person in respect of the transactions of a firm, is not revoked as to future transactions by any change in the firm to which, or in respect of the transactions of which, such guarantee was given.

258. The estate of a partner who has died is not liable in respect of any obligation incurred by the firm after his death.

259. Where there are joint debts due from the partnership, and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of the debts of the firm, and if there is any surplus, then the share of each partner must be paid to him or applied in payment of his separate debts. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

260. After a dissolution of partnership the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership.

261. Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they had themselves notice of such dissolution.

262. In the absence of any agreement to the contrary, after the termination of a partnership, each partner, or his representatives, may apply to the Court to wind up the business of the firm, to provide for the payment of its debts, and to distribute the surplus according to the shares of the partners respectively.

263. Extraordinary partnerships, such as partnerships with limited liability, incorporated partnerships, and joint stock companies, shall be regulated by the law now in force in India relating thereto, until further provision shall be made in that behalf.

### FIRST SCHEDULE

<table>
<thead>
<tr>
<th>Number of Statute or Act</th>
<th>Title of Act</th>
<th>Extent of Repeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stat. 29 Car. 2, c. 3</td>
<td>An Act for prevention of Frauds and Perjuries</td>
<td>Sections 1, 2, 3, 4, and 17.</td>
</tr>
<tr>
<td>Stat. 11 &amp; 12 Vict. c. 21</td>
<td>To consolidate and amend the law relating to insolvent debtors in India.</td>
<td>Section 42.</td>
</tr>
<tr>
<td>Act XIII. of 1840</td>
<td>An Act for the amendment of the law regarding factors, by extending to the territories of the East India Company, in cases governed by the English law, the provisions of the statute 4 Geo. 4, c. 83, as altered and amended by the statute 6 Geo. 4, c. 94.</td>
<td>The whole.</td>
</tr>
<tr>
<td>Act. XIV. of 1840</td>
<td>An Act for rendering a written memorandum necessary to the validity of certain promises and engagements by extending to the territories of the East India Company, in cases governed by English law, the provisions of statute 9 Geo. 4, c. 14.</td>
<td>The whole, except Section 4.</td>
</tr>
<tr>
<td>Act V. of 1866</td>
<td>To provide a summary procedure on bills of exchange, and to amend in certain respects the commercial law of British India.</td>
<td>Section 10.</td>
</tr>
<tr>
<td>Act XV. of 1866</td>
<td>To amend the law of Partnership in India</td>
<td>The whole.</td>
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### SECOND SCHEDULE.

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<thead>
<tr>
<th>Number of Statute or Act</th>
<th>Title of Act</th>
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<tbody>
<tr>
<td>Act XI. of 1841</td>
<td>Military Courts of Request Act</td>
<td>Section 9.</td>
</tr>
<tr>
<td>Act XXI. of 1848</td>
<td>For avoiding wages</td>
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<tr>
<td>Act VI. of 1849</td>
<td>For securing Military and Naval pensions and superannuation allowances</td>
<td>Section 8.</td>
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<tr>
<td>Act XIX. of 1850</td>
<td>Concerning the binding of apprentices</td>
<td>Sections 8, 9, 10, 11, 12, and 13.</td>
</tr>
<tr>
<td>Act XVIII. of 1853</td>
<td>For regulating the sale of spirituous liquors, &amp;c., in cantonments</td>
<td>So much as is not repealed.</td>
</tr>
<tr>
<td>Act XVIII. of 1854</td>
<td>An act relating to railways in India</td>
<td>Sections 9, 10, and 11.</td>
</tr>
<tr>
<td>Stat. 17 &amp; 18 Vict. c. 104</td>
<td>The Merchant Shipping Act, 1854</td>
<td>Section 544.</td>
</tr>
<tr>
<td>Act I. of 1859</td>
<td>For the amendment of the law relating to Merchant Seamen</td>
<td>So much as relates to agreements with seamen.</td>
</tr>
<tr>
<td>Act XIII. of 1859</td>
<td>To provide for the punishment of breaches of contract by artificers, workmen, and labourers in certain cases</td>
<td>The whole.</td>
</tr>
<tr>
<td>Act XV. of 1863</td>
<td>To amend Act I. of 1839</td>
<td>Section 3.</td>
</tr>
<tr>
<td>Act III. of 1865</td>
<td>The Carriers' Act, 1865</td>
<td>The whole.</td>
</tr>
<tr>
<td>Act XIV. of 1866</td>
<td>The Indian Post Office Act, 1866</td>
<td>Section 66.</td>
</tr>
<tr>
<td>Act VIII. of 1867</td>
<td>To amend the law relating to Horse-racing in India</td>
<td>The whole.</td>
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### STATEMENT OF OBJECTS AND REASONS.

The Bill now submitted to the Council of the Governor General for making laws and regulations embodies the draft Law of Contract prepared under the superintendence of the Indian Law Commissioners. A series of sections, having reference to one particular subject, has been omitted for reasons which will be afterwards assigned; but, with this exception, no change has been made in the draft of the Commissioners other than the correction of some minor errors, of which a few appear to be either clerical or typographical.

"The Indian Contract Law"—which is the designation proposed for the measure—constitutes the second chapter transmitted to India of the intended Code of Substantive Civil Law. If it becomes law, it will differ in one important particular from the chapter which has already received legislative sanction. The "Indian Succession Act," so far at least as regards intestate succession, was never intended to include Hindus and Mahometans, and the Indian Legislation further exempted Buddhists from its operation. But the Commissioners recommend, and the present Bill proposes, that the new Indian Contract Law shall be of universal application in India.

The recommendation of the Commissioners appears to be justified, not only by the abstract consideration that contract is the branch of law on which men of all times and races are agreed to have come most nearly to identical conclusions, but also by the actual condition of the Law of Contract in India. The state of that law is thus described in general terms by the Commissioners:

"Within the limits of the Presidency towns, the decision of suits of the nature is practically governed by the law of England, and everywhere else the judge is, to a great extent, without the guidance of any positive law beyond the rule that his decision shall be such as he deems to be in accordance with 'justice, equity, and good conscience.'"

This description needs only to be qualified by the remark that the decisions assumed to be dictated by "justice, equity, and good conscience," have of late years been much affected, as a fact, by the English Law of Contract, as gathered from the ordinary text books in use among English practitioners.

The largeness of the sphere practically occupied in India by the English Law of Contract, is in truth the justification of the course which has been followed by the Commissioners. Their draft will be found to consist of the English Law of Contract, much simplified, and
altered in some particulars so as to accommodate it to the circumstances of this country. As the sections relating to sale do not apply to the sale of immovable property, and as the law regarding negotiable instruments forms no part of the present measure, the amount of native law which it will displace will be extremely minute.

The principal changes which it is proposed to introduce into the English Law of Contract, considered as the basis of the present measure, are thus indicated by the Commissioners:

"We have not adopted from these rules, the provisions of the English Statute of Frauds which require certain contracts to be in writing. Those provisions are not of unquestionable expediency even in England; and we think that they are not suited to the habits and present condition of the people of India.

"We have considered whether it would be expedient to render binding in law promises made without consideration. By the English law such promises are held to be binding only when expressed in writing under seal. We have not recognized any distinction between writings under seal and writings not under seal; but we think that, in order to give validity to promises made without consideration, it ought to appear that they were made with due deliberation. In order to attain this object, we propose that such promises shall be binding only when they are given in writing, and are registered with the permission of the promisor, according to the provisions of the law for the time being in force for the registration of assurances.

"By the English law a promise by a creditor to give time for the payment of an existing debt, or the acceptance by him, in full satisfaction of his demand, of a smaller sum than that which is due to him, is not binding on him unless there has been some new consideration given for it, such as an undertaking to give an additional or different security, or to pay the debt in a manner or at a time more advantageous to the creditor than that originally agreed upon; or unless the creditor's engagement to take less than his due, or to give time, be contained in a composition deed or agreement entered into by the debtor with his creditors generally; but a slight variation of the terms of the contract will satisfy these conditions. We have provided, that a person who is entitled to claim performance of an engagement, may dispense with or remit such performance wholly or in part, or may accept instead of it any satisfaction which he thinks fit.

"With regard to goods sold by a person who has no right to sell them, the general rule of English law is that the owner of the goods retains the ownership notwithstanding his having lost the possession of them and their having been sold to a third person. But from this rule there is an exception in the case of goods sold in open market, an expression which, by the custom of London, applies to every shop within the city.

"It cannot be denied that the subject is difficult. We have to consider, on one hand, the hardship suffered by an innocent person who loses in this way his right to recover what was his undoubted property. But, on the other hand, still greater weight appears to us to be due to the hardship which a bona fide purchaser would suffer were he to be deprived of what he bought. The former is very often justly chargeable with remissness or negligence in the custody of the property. The conduct of the latter has been blameless. The balance of equitable consideration is therefore on the side of a rule, favourable to the purchaser; and we think that sound policy, with respect to the interests of commerce, points to the same conclusion.

"We have, therefore, provided that the ownership of goods may be acquired by buying them from any person who is in possession of them, if the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession has no right to sell them.

"Similar provisions have been inserted, in accordance, we may observe, with the spirit of the Factors' Act, to meet the cases of those who have purchased goods or taken them by way of pledge from persons in possession of any documentary title to the goods, where the circumstances are not such as to raise a reasonable presumption that the person in possession of the document has no right to sell or to pledge the goods.

"It would seem that by the English law, if a buyer or any person claiming under him, is by reason of the invalidity of the seller's title deprived of the thing sold, he cannot claim compensation from the seller for loss thereby caused. We propose that in such cases the seller shall be responsible, unless a contrary intention appears by the agreement.

"In order to avoid the litigation which arises under the English law on the subject of the distinction between penalty and liquidated damages, where the contract contains a stipulation that a specified sum shall be paid in case of its breach, we propose that the rule of law shall have no regard to that distinction, but simply require payment of the specified sum.

"In dealing with the law of suretyship, we have not thought it right to recognise a transaction so complicated, and tending so much to the unfair devolution of liability on the surety, as that by which a creditor who makes a composition with, or agrees to give time to, or not to sue the principal, may yet reserve his rights and remedies against the surety. By the rule we propose, an agreement between the creditor and the principal, by which the creditor makes a composition with, or agrees to give time to the principal, or not to sue him, will discharge the surety; no exception being made in favour of the creditor in the case where he has endeavoured to reserve his rights and remedies against the surety. From a wish to avoid subtleties, and the attaching of unforeseen consequences to men's actions, we have provided that where there are co-sureties, a release of one

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of them by the creditor shall not discharge the others, nor free that one from responsibility to them.

"Adopting a provision of the French and Italian Codes, we propose that the surety shall be discharged by any act or omission of the creditor, only in case the eventual remedy of the surety against the principal is thereby impaired. We also propose to enact that where upon the face of an agreement two persons are primarily liable to a third person, that liability shall not be effected, so far as regards the third person, by an arrangement between the two, that one of them shall be liable only upon the default of the other, even although such arrangement may have been known to the third person, unless he was a party to the arrangement. In this we adhere to the old and simple doctrine of the common law, and not to the qualifications introduced by courts of equity.

"In our rules on the subject of bailment we have discarded the complicated system of gradation which the English law applies to the amount of care which a bailee is to be expected to exercise, and the responsibility which is to attach to him; and we have framed our proposed law on the principle that 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 take of his own goods, and that more should not be required of him in any case.

"We have endeavored to improve the law applicable to the case where the bailor's goods have, without the consent of the bailor, been mixed up with the goods of the bailee, so that they cannot be separated. The remedy which our rule provides is, that the bailor shall be entitled to receive compensation for the loss of his goods, which seems more expeditious than the provision of the English law, that the whole shall go indiscriminately to the person whose goods have been mixed without his consent.

"We have provided that a continuing guaranty given by, to, or for a firm, shall not be rendered invalid by a change in the firm.

"In regulating the devolution of rights and liabilities, we propose, in accordance with the rule of English courts of equity, and of the Indian Code of Civil Procedure, that joint liabilities and rights shall, after the death of one of the persons liable or entitled, go to his representative jointly with the survivor, and, after the death of the survivor, to the representatives of both jointly.

"We propose to lay it down, that a person with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it if he was in reality acting not as agent but on his own account.

"In defining the responsibility of a master for the misconduct of his servant, we have stopped a little short of the limits assigned to it by the English law. We think that the responsibility ought to cease as soon as the misconduct assumes the character of intentional wrong-doing.

"According to the English law, when there is any partnership property, the separate property of any partner must be employed first in the payment of his separate debts, and the surplus, if any, in the payment of the partnership debts; but when there is no partnership property the separate property of any partner must be applied equally to the payment of all the partnership and separate debts for which such partner is liable. It thus depends upon the existence or non-existence of partnership property, no matter how small in amount, which of the two rules is to govern the division of the separate property of the partners. We have thought it right so to frame the law that the rule first stated, which is more equitable, shall prevail whether there is any partnership property or not. The principle on which we proceeded is that of having regard to the views of the creditors in giving the credit in contracts with a firm, partnership property is primarily looked to; in dealings with a partner with which the firm has nothing to do, all that is looked to is his own sufficiency.

"Adopting a rule which is to be found in the German and the Italian commercial codes, we propose that every person introduced as a partner into a pre-existing firm, shall be subject to all the obligations incurred by the firm before he was introduced.

"We have adopted, with such verbal alterations as were necessary to bring them into harmony with the language of our rules, the provisions of a law lately passed by the Indian Legislature, Act XV. of 1866, for relieving those who participate in the profits of a partnership without being really partners, from becoming liable for the engagements of the firm."

It may be said of these proposed modifications of English law, that while all, or nearly all of them, have commended themselves to the approval of enlightened lawyers, not a few are being gradually carried out in England without the aid of the Legislature, through the direction given of late years to the current of judicial decision.

It has been stated that a certain number of sections contained in the Commissioners' draft, have been omitted from the present Bill. These sections, numbered from 51 to 59, will be found in the Appendix, together with the paragraph in the Commissioners' Report which describes their character. They relate to the specific performance of contracts and to injunctions against breach of contract; and they would in effect necessitate the repeal of certain portions of the Code of Civil Procedure.

The existing law of India, on the subject of the specific performance of contracts, is given by section 192 of the Code of Civil Procedure. The law on the subject of injunctions against breach of contract, which to a very great extent discharge the office of decrees for specific performance, is contained in section 23 of the Code. The language of both sections is so wide as to embrace contracts of every description.
It cannot be said that the latitude thus given to specific performance and analogous remedies is without precedent. It is not known that in continental European countries there is any limit to the power of decreeing the specific performance of contracts, except the discretion of the Court. But the law of India on the subject is considerably wider than the Scottish law, which, again, is wider than the law of England. The law of specific performance in England is, in fact, the narrowest in the world, less probably owing to deliberate intention than to the reluctance of equity judges to put freely in motion the once cumbersome and costly machinery of the Court of Chancery.

There is no doubt that, from an English point of view, the Indian law of specific performance is too little restricted. But, on the other hand, owing to difficulties of procedure, and especially to those arising out of the system of appeal, there are large numbers of contracts to which this class of remedies cannot be effectually applied, and it is believed accordingly that decrees for specific performance and injunctions against breach of contract are comparatively rare in India.

Under these circumstances, when the time for the first revision of the Code of Civil Procedure approached, a number of sections were prepared and (with amendments and additions) were inserted in a draft revised code, having for their object to place the extraordinary civil remedies on what appeared to be a more satisfactory footing. On the one hand, the classes of contracts to which they were applicable were more strictly defined, and various provisions were inserted to prevent the remedies themselves from operating with undue harshness against the defendants. On the other hand, the procedure was so simplified as to make the remedies, thus altered and limited, of considerably easier application.

The sections in question, together with the draft of a revised code of procedure, were submitted by the Secretary of State to the Indian Law Commissioners. The Commissioners, in dissenting from them, expressed an opinion that no law of specific performance of the kind proposed, however carefully guarded, would be safe from abuse in India.

The question thus raised by the Law Commissioners is doubtless one of much difficulty, as well of great importance. It may be argued, on the one hand, that there is no country in which damages afford practically so imperfect a redress for breach of contract as they do in India, and none in which the prospect of having to pay damages operates so slightly to compel the performance of agreements. It may be contended on the other side that, under the circumstances of the country and people, all facilities for applying any unusual compulsion are peculiarly liable to be abused.

The sections omitted from the present Bill were doubtless framed by the Commissioners, under the influence of the feeling just indicated. They, in effect, propose for India a law of specific performance of contract and of injunction against mediated breach of contract, which would be narrower than that of England, which again is narrower, as has been stated, than that of any known community.

It is now proposed to omit these sections on two grounds. The first is, that in the opinion of the Member of Council charged with this Bill there is no law which apparently coincides with that entertained by the framers of the Code of Civil Procedure; the proper place for defining the extraordinary, as well as the ordinary, civil remedies applicable in suits on contract is a code of procedure, not a code of substantive law. Owing to the historical connection between law and procedure, there is often a close association in men's minds between the two, and sometimes there is practical difficulty in disentangling them.

If, however, we could suppose a code of substantive civil law and a code of civil procedure were being framed simultaneously, and that the framers of the codes had the power of placing the law of specific performance in either code, there cannot be much doubt that he would consider it as cognate to procedure rather than to substantive law.

The second reason for omission is of a less technical character. It appears very desirable to leave the new Substantive Law of Contract to its operation for some little time, before that question of remedies in cases of breach of contract which has been so long and so hotly disputed in India, is brought forward for discussion. It may be reasonably suspected that much of the disinclination which has been felt, to investing the plaintiff in suits on contract with more than a bare claim to pecuniary damages, has arisen from the feeling that the civil courts of the Mofussil, in the absence of definite and accessible rules for their guidance, have scarcely been in a position to determine with accuracy the proper legal relations of contracting parties, or to apply to contracts the proper tests of validity and invalidity. If, however, the Legislature adopts the present Bill, India will be in possession of a body of contract law which leaves nothing to be desired, in point of simplicity and comprehensiveness, in respect of the essential equity of its provisions, and in respect of the perspicuity with which those provisions are set forth. It is probable, and indeed certain, that the effect of the new law will be, after a while, to place all questions of contract, and of procedure in suits on contract, in a far clearer light. A distinct advantage will thus be gained by postponing the subject of specific performance, and other cognate remedies, until the Legislature again addresses itself to the revision of the Code of Civil Procedure; a revision which, after it had been proceeded with some way, has been deferred for the present under the instructions of Her Majesty's Government.

Simla, 9 July 1867.

H. S. Maine.
We propose that the extraordinary remedy of an order for specific performance should be restricted to the case of engagements for the creation or transfer of any interest in immovable property, or for the delivery of any specific article of moveable property. We have not, however, thought it right to include in the former category agreements to cultivate land in a particular manner or to grow particular crops; and we have provided that injunctions shall not be granted to restrain the breach of engagements relating to the cultivating of land or the growing of particular crops.

51. Specific performance of a contract is the doing or the delivery of the thing contract for, as the case may be, according to the terms of the contract.

52. Where an engagement by contract has been made between any persons for the creation or transfer of any interest in immovable property, or for the delivery of any specific article of moveable property, and the party who has entered into such engagement fails to perform it, the Court may, at the suit of any other party to the contract, order specific performance of the engagement, with or without compensation in respect of loss or damage caused by his default.

Explanation.—An agreement to cultivate land in a particular manner, or to grow particular crops, does not create such an interest in immovable property as is contemplated by this section.

Illustrations.

(a.) A. agrees with B. to sell him a house for 1,000 rupees. B. is entitled to a decree directing A. to convey the house to him, he paying the purchase money.

(b.) A. agrees with B. to give him a bill of lading of a certain cargo. B. is entitled to have the bill of lading signed by A.

(c.) A. agrees with B. to prepare and sow, and cultivate a field with indigo, and to deliver him the crop when the crop is cut and ready for delivery. B. is entitled to have the crop delivered to him in specie, he is not entitled to a decree directing A. to prepare, or sow, or cultivate.

(d.) A. agrees with B. that he will paint a picture for him, and the picture is painted. B. is entitled to have it delivered to him, but B. is not entitled to a decree ordering A. to paint or to complete the painting of the picture.

(e.) A. agrees with B. to edit a periodical work for the remuneration of 1,000 rupees per month. B. cannot enforce against A. the specific performance of this contract; and as the rights and obligations are mutual, A. cannot enforce against B. the specific performance of this contract.

53. Where a party to a contract is unable to perform the whole of the engagement which he has entered into with another party, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the engagement as can be performed, and award compensation in money for the deficient. In such case neither party shall be entitled to compensation for loss or damage caused by the neglect or default of the other party to perform the engagement.

Illustration.

A. agrees to sell B. a piece of land consisting of 100 biggahs. It turns out that 98 biggahs of the land belong to A., and the two remaining biggahs to a stranger, who refuses to part with them. A. may be directed at the suit of B. to convey to B. the 98 biggahs, and to make compensation to him for not conveying the two remaining biggahs; or B. may be directed at the suit of A. to pay to A. on receiving the conveyance and possession of the land, the stipulated purchase-money, less a sum awarded as compensation for the deficiency.

54. Where a party to a contract is unable to perform the whole of the engagement which he has entered into with another party, and the part which must be left unperformed forms a considerable portion of the whole, the party in default is not entitled to obtain a decree for specific performance, but the Court may, at the suit of the other party, direct the party in default to perform specifically so much of the engagement as he can perform, provided that the party seeking specific performance relinquishes all claim to further performance, and all right to compensation, either for the efficiency or for the loss or damage sustained by him through the default of the other party.

Illustration.

A. agrees to sell to B. a piece of land consisting of 100 biggahs. It turns out that 90 biggahs of the

land...
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land belongs to A., and the other 60 biggahs to a stranger, who refuses to part with them. A. cannot obtain a degree against B. for the specific performance of the contract; but if B. is willing to pay the price agreed upon, and to take the 60 biggahs which belong to A., waiving all right to compensation, either for the deficiency or for loss sustained by him through A.'s neglect or default, B. is entitled to a degree directing A. to convey those 60 biggahs to him on payment of the purchase money.

(5.) A. agrees to sell to B. an estate with a house and garden for 1,00,000 rupees. It turns out that A. is unable to convey the garden. A. cannot obtain a decree against B. for the specific performance of the contract; but if B. is willing to pay the price agreed upon, and to take the estate and house without the garden, waiving all right to compensation either for the deficiency or for loss sustained by him through A.'s neglect or default, B. is entitled to a degree directing A. to convey the 60 biggahs to him on payment of the purchase money.

“55. Except in cases coming under one or other of the two last preceding sections, it is not competent for the Court to direct the specific performance of a part of an engagement by contract.

“56. It shall be competent to the Court to award compensation in cases where specific performance is sued for, and the Court does not think fit to order it.

“57. In every case the Court shall have power to give compensation in money in lieu of the specific performance of the contract, where it shall appear to the Court that specific performance would inflict damage or injury on one party to the contract without any corresponding benefit to the party seeking specific performance.

“58. Where the specific performance of an engagement is ordered, and it appears to the Court that such specific performance ought to be made by a party by executing a conveyance, or by endorsing a negotiable instrument, and the party ordered to execute or endorse such conveyance or negotiable instrument shall neglect or refuse so to do, any party interested in having the same executed or endorsed, may prepare a conveyance or endorsement of the instrument in accordance with the terms of the decree, and tender the same to the Court for execution upon the proper stamp (if any is required by law), and the signature thereof by the judge, shall have the same effect as the execution or endorsement thereof by the party ordered to execute.

“59. Where a contract contains an engagement, express or implied, by one party, that he will abstain from doing any act, the Court may at the suit of another party issue an injunction to restrain the breach of such engagement, provided such other party has not failed to perform his own engagement.

“Exception.—This section shall not apply to engagements relating to the cultivation of land or the growing particular crops.

Illustrations.

(a.) A. agrees with B. that he will sing at B.'s theatre for a twelvemonth. B. cannot have an order directing A. to sing, but he is entitled to have an order restraining A. from singing at any other place of entertainment.

(b.) B. agrees with A. that he will serve him faithfully for twelvemonths as a clerk. A. is not entitled to an order directing B. to serve, but he is entitled to an order restraining B. from serving a rival house, or doing any other act to the injury of A. in his business.

(c.) A. agrees with B. that in consideration of a sum of money to be paid to him by B. on a day fixed, he will not set up a certain business within a specified distance. B. makes default in payment of the money. A. cannot be restrained from carrying on business within the specified distance.

Whitley Stokes,
Assistant Secretary to the Government of India,
Home Department (Legislative).

NOTE by the Honourable Mr. Maine; dated 15th July 1867.

This is the second chapter of the proposed Civil Code. Under ordinary circumstances, I should have asked the Governor General to direct its publication under the rule of the Legislative Council which permits Bills to be published before their submission to the Legislature. But this rule is so framed as not to apply when the Council is holding weekly sittings, however formal they may be, and accordingly, early publication being a matter of urgent moment, I am reduced to proposing that the Bill be introduced and referred to a Select Committee merely as a form, it being explained at the time that the object is only to get the Bill before the public, and that no Committee will actually sit until we reach Calcutta.

I have assigned in the statement of objects and reasons the grounds on which I have omitted certain sections of the Commissioners' draft. I venture to predict with some confidence that the Council will allow this to be done. Having committed myself, in conjunction with Sir H. Iarlington, and with the concurrence, and indeed at the instance of the last Governor General, to a very different view of the law of specific performance, I could not with honour propose such an enactment on the subject as appears to commend itself to the Commissioner. The submission of such an enactment, if at any time it receives the express approval of the Home Government or of the Government of India, may well be reserved for my successor, and the proper time for submitting it will be the period at which
the revision of the code of civil procedure is again taken up, the Secretary of State being postponed it for the present.

It is perhaps necessary to add, that nobody but the writer is responsible for the statement of objects and reasons. It is in the nature of a speech, and, in fact, is generally framed from the remarks made by the mover on obtaining leave to introduce a Bill.

It cannot, I think, be honestly denied that the omitted sections (which are printed in the Appendix) are, in truth, directed against indigo planting. I would call attention to the "Explanation" appended to section 52, and to "Illustration" (c), also to the "Explanation" added to section 59.

These exceptions, explanations, and illustrations (which, in fact, constitute rules) are only, in my judgment, be defended on the ground that there is some special practical object which may be attained through the exceptional provisions.

Now, there is no such special practical object to be attained. Whatever be the evils of indigo planting, they no longer arise from a complicated system of contracts. The planting which did depend on such contracts is virtually extinct, and its place has been taken a Thriloo and elsewhere by a system which depends for its stringency on zemindari influence, direct or indirect. This is a result, and far from a satisfactory result, which I from the first predicted when I saw that the course likely to be followed would consist in preventing the indigo planters from enforcing their contracts, without, at the same time, taking steps to sift the equitable from the inequitable contracts, and to give facilities for enforcing the former.

Again, it is not a case of limiting or amending a procedure which is found to work oppressively. The rules of the code of civil procedure on the subject of specific performance of contract (that is, the actual performance of contract, as opposed to the payment of damages), and of injunctions against intended breach of contract, cannot easily be worked by anybody, and by an indigo planter not at all. The planter, when he sees the ryot preparing for another crop the ground which he has contracted to sow with indigo, must file a regular suit in the civil court before he can obtain a decree for specific performance, or an injunction. Both are appealable; and before the ultimate decision can be given, the crop has long since been reaped and sold, or consumed.

The effect, therefore, of attempting to make these sections law, would be to put a perfect needless and useless affront on the European community. It is true that the section of even the indigo planters which is directly interested in the question is but a small one; still the old quarrels have left traces behind them, and the whole unofficial community would consider itself attacked, and the contest would be entered into without any sort of object.

I have thought it right to publish the sections in question, that the proposed law may have whatever advantage is given to it by the Commissioners' authority. But I am compelled to dissent from their proposal, and I do not disguise my own opinion that, when the rest of the new law (which has my highest admiration) has been sometime in operation, and when the improvement which has begun in our judicial service has proceeded some way, the civil courts of India ought to be empowered to decree more speedily and easily the actual performance of contracts (whether through the agency of specific performance properly so called, or through that of injunctions) instead of leaving the plaintiff to the barbarous and illusory remedy of pecuniary damages. In this way, and in this way only, will the Government of India be relieved from the perpetually recurring cry for a penal contract law.

H. S. M.

Note by His Excellency the Governor General; dated 19th July 1867.

It would afford me much pleasure could I concur in the Honourable Mr. Maine's views, and agree to omit certain sections of the Chapter on Contracts drawn up by the Commissioners in England, with the object of being introduced into the Council of India as the future law of contracts for this country.

I can quite understand and appreciate the circumstances under which Mr. Maine is unwilling to support these sections. But, with every deference to my honourable colleague's judgment, it strikes me that the proper course will be to introduce the Bill as it has been directed by the Commissioners, and on its introduction into the Council, for Mr. Maine to state his objections to the particular clauses which he proposes to omit. Even did I object to these clauses on their merits, I should equally consider that I was bound to adopt this course.

I presume that the Legislative Council of India will consider and discuss on its merits each and all of the clauses of the Bill, and that every member will then be free to give them his support, as his judgment may direct; those sections of a law so drafted, and which have received the support of the Secretary of State for India in Council, it will be desirable.
desirable, if possible, that they should receive the support of the different members of the Government of India.

I have always been opposed in principle to the specific performance clauses as drafted in the code of procedure, to which Mr. Maine refers, and when that code was originally drawn up, I explained my objections both to that gentleman and to Sir Henry Harrington. It is true that the said clauses were then so fenced round by very stringent conditions, that they would probably in practice have been rendered null or nearly so. But the objection which I then saw to them, even in their modified form, was that, if they were once passed into law, and were subsequently found, as they assuredly would have been found, to be practically ineffectual, the indigo planter could, and would probably, come forward and have said, "the Legislature has admitted the principle that contracts for the supply of indigo plant are necessary and reasonable; it has admitted further, the necessity for specific performance of such contracts; now that the conditions which surround the provisions of the law for their enforcement have been found impracticable, modify these conditions and carry out the principle of law."

My belief is that any such law, if applied to contracts for the supply of indigo produce, from the very nature of the circumstances which pertain to such cultivation, must be liable to great abuse, which it would not be possible effectually to guard against; and therefore I am strongly opposed to any course of procedure which may indirectly lead to the enunciation of such a principle. When, therefore, a law of contracts is brought into the Legislative Council, I am glad to see clauses guarding against the application of specific performance to contracts for the delivery of indigo. Without this precaution, the clauses on specific performance, which remained in the law of contracts, might be construed to cover contracts also for the delivery of indigo.

I am not aware that such contracts are really extinct. They have doubtless become less common than formerly, as indigo cultivation has been largely reduced in parts of Bengal. In those districts in the neighbourhood of Calcutta, where the dispute between the planter and the ryot arose, and where the strife was most intense, viz., the districts of Bashabazar, Jessore, Furreedpore, and Buraset, such contracts may have become virtually extinct. But there are large portions of Lower Bengal to which the strife of those days did not, for one cause or other, in such intensity extend, yet where indigo was largely cultivated, and where the justly deprecated contract system equally prevailed, viz., the eastern portion of Bengal, Dacca, Tipperah, and Mymensingh, and the districts bordering on the Ganges, Maldah, Rajshaye, and Mooshtabad. I believe it will be found on inquiry that the contract system which formerly prevailed does still in those parts generally prevail.

Nor am I satisfied that the system of indigo planting which prevails in Tirhoot is free from the taint of inequitable contract. The Tirhoot system has been long in force in Behar, but it has not, I believe, been introduced generally into Bengal. Moreover, the two systems, the Bengal and the Behar, are not practically very dissimilar. In Behar (i.e., in Tirhoot, Chumparan, Sarun, &c), as in Bengal, the first essential for the planter was to buy the influence of the zamindar. But in the former Province it has been the settled policy of the planter really to conciliate and carry along with him the native landlord, and so to have less difficulty with the ryot; in Bengal, the price once paid to the native landlord, the planter cared not further to conciliate him; and the result frequently was secret hostility towards the planter and secret assistance to the ryot in resisting him.

Add to this a feature favourable to the ryot in Behar, by which, in a season of adversity, the land was paid for by the planter, and not, as in Bengal, borne entirely by the ryot, and the fact that the ryot in Behar was less worried by unscrupulous subordinates of the planter, and the main differences have been stated. In the one system, as in the other, the planter was all powerful—the ryot all in his power. In the one case, as in the other, the ryot was not a free agent, and did not cultivate indigo from choice. The contract under such circumstances, whether it were to deliver produce or to sow a certain quantity of land, was not voluntary, and could not be equitable. In neither case is it easy to conceive that a contract between persons so situated and with interests so opposed can be purely voluntary and equitable, such as to justify a law enforcing specific performance. The remedy for such a state of things is to be found not, I think, in exceptional legislation, but in the simple process on the part of the employer of providing proper remuneration to the employed.

If the planter will pay adequately for the cultivation of indigo, he will get the ryots to grow and deliver it. It is the circumstance that he is unwilling to do so that necessitates his driving the ryot into contracts, which the latter uses all his cunning to evade.

I cannot admit that it can fairly be considered that the retention of the clauses which have been drafted by the Commissioners, and which Mr. Maine proposes now to omit, would be to put an affront on the European community. What we do in this case, we do because it has been proved by experience that such precautions are necessary to protect a particular class from oppression to which they are from circumstances especially exposed.

Nor can I apprehend any danger to artisans or labourers under Section 59 and its "Illustrations." No one, I should say, would think of applying them to such persons. But if there really is any danger of such a misapplication, I would suggest that an additional "Illustration" be added to the section.
Note by the Honourable Major General Sir H. M. Durand, C.B., K.C.S.I.;— dated 22nd July 1867.

This is a question I cannot summarily dispose of with an off-hand opinion. It involves the consideration of some difficult points, and even of a conflict of legal principles.

I should suggest that the Bill be printed without casting out the clauses to which Mr. Maine objects into an Appendix. I would print the Bill without omissions, but the clauses to which Mr. Maine raises exceptions might be printed in a different type, so as to indicate clearly and at a glance, but in connection with what precedes and what follows, the parts of the Bill to which Mr. Maine's Statement of Reasons refers. It would not weaken Mr. Maine's position, for it would, supposing his view be correct, show the contrast between the clauses alleged to be drawn in adverse intention to the indigo planters, and those not exceptional, but based on the general principles to which Mr. Maine gives his support.

Both Mr. Maine's note and that of the Governor General might, with advantage, be circulated in print.

H. M. D.

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Note by the Honourable Sir George Yule, C.B., K.C.S.I.; dated 23rd July 1867.

I think Sir H. Durand's proposal preferable to putting the Specific Performance Sections into an appendix; preferable even, it seems to me, from Mr. Maine's point of view in regard to the sections in question; but still, under the peculiar circumstances of the case, I would leave the decision on the procedure to be adopted entirely to Mr. Maine himself. We are not required to express an opinion on any other point at present.

G. U. Y.

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Note by the Honourable Mr. Maine; dated 23rd July 1867.

These papers have again come to me, possibly through accident, but I think that a few more words from me may save from some misapprehension those Members of Council who have not yet seen them.

His Excellency the Viceroy appears to me to be under the impression that there is some law of Specific Performance in India which may be used to enforce an indigo contract. There is no such law. The provision in the Code of Civil Procedure that the forms of a regular suit must be gone through before a decree for specific performance or an injunction can be obtained, is an absolute bar to its being employed in indigo matters.

If the Commissioners' sections become law, they will in no respect alter the existing procedure. They will only throw it into a form singularly obnoxious to the European community, through the special exception of indigo contracts from the operation of principles elsewhere recognised.

My contention is that the sections are in their wrong place. A civil code of contract embodies the answer to the question, "What is a contract?" A code of procedure in contract containsthe reply to the question, "In what mode shall a contract be enforced?" My opinion is clear as to the code in which the rules of specific performance ought to be set forth.

I have accordingly proposed to postpone the question of specific performance until the proper moment for discussing it arrives; the period, namely, when the Secretary of State gives leave to the Legislature to undertake the revision of the code of civil procedure. I do not wish to discuss either the sections of the Commissioners or those prepared by Sir H. Harington and myself; first, because it is the wrong time for such a discussion; and, next, because, if either one or the other set of rules were carried now, they would assuredly have to be repealed when the code of procedure was revised.

I submit, at the same time, that I have paid all due deference to the authority of the Commissioners. I have printed their sections in an Appendix, and they will have as much publicity, and will be as widely circulated, as the Bill itself. If any Member of the Select Committee or Council thinks fit to move them by way of amendment, they are ready to his hand. This course seems to me infinitely preferable to placing me in the not very creditable position of having to oppose my own Bill.

I frankly admit that I hope the good sense of each and every member of the Legislature will lead him to refrain from moving such an amendment. In the discussion which will come, things will almost infallibly be said which will be offensive to the European community on one side, and to the Law Commissioners on the other. Attention will be diverted from the important parts of the Bill to its least important provisions. A prejudice will be created against what is really a most beneficial measure. And, when all is done, it will come practically to the same thing, whether the sections are carried, or whether they are not carried.

I am sorry that some remarks of mine have given occasion to His Excellency to enter on the question of substance. Whether indigo contracts are or are not extinct, whether they
ar always fair or always unfair, may be matters on which there is room for legitimate
doubt, but which there is not the smallest practical use in discussing now.

Let me add that his Excellency is mistaken in supposing that the Secretary of State has
especially approved of these sections. He has merely requested that a "measure founded
on the Commissioners' draft" may be submitted to the Legislature. As Lord Cranborne,
in replying to a question about my own sections (intended, be it remembered, for a code of
procedure), stated in Parliament that the planters had grievances which ought to be re-
medied, he can scarcely approve of sections which would practically have the effect of
excluding the planters from civil remedies.

H. S. M.

Note by the Right Honourable Mr. Massey; dated 23rd July 1867.

The simple question at present is, whether Mr. Maine shall be allowed to print the Bill
in the form in which he proposes to introduce it?

I have no hesitation in saying he is entitled to do so, and that the Council could not
attempt to subject him to any coercion in the matter.

I give no opinion at present as to the clauses which he proposes to omit. The whole
policy of the measure will be discussed before the Bill is debated in the Legislative Council,
and if we cannot agree in the Executive Council, Mr. Maine will probably not object to its
being an open question.

W. N. M.

Note by the Honourable Mr. Maine; dated 25th July 1867.

After reconsidering the subject discussed in Council yesterday, I have to say that I am
willing to change the form of the Bill which embodies the "Indian Contract Law." I do
this, partly out of deference to the strong feeling which appears to be entertained by his
Excellency the Viceroy, partly because I do not wish to deprive the country any longer of
the great boon which will be conferred on it by the mere publication of those parts of the
Bill which define and describe contracts; and partly because, while I feel strongly the
futility of the position involved in moving the reference to a Select Committee of a Bill of
which I in some measure disapprove, yet I think that almost any anomaly, confined to
India, is better than that this Government should formally refer to the Secretary of State
the question whether the legal member of Council is bound to move the adoption of certain
provisions, from which not only does he dissent, but his dissent from which is so notorious
that questions respecting his views have been asked in Parliament.

I am willing, therefore, to transfer the specific performance sections from their present
position in the Appendix to the end of the Bill, in which they will be included; and I pro-
pose, after the discussion of these sections in the Statement of Objects and Reasons, to add
some such passage as the following:—

These sections are retained in the Bill out of deference to Her Majesty's Commissioners'
but it is the intention of the Member of Council charged with the Bill to move their omis-
ion in the Select Committee, or, if necessary, in the Council, principally for the following
reasons:—

Then will follow the last two paragraphs of the statement in their present form.

But while I state my willingness to take this course, I must again take the liberty of
expressing my doubts whether it is expedient, and not only whether it is expedient, but
whether it is not especially inexpedient from the point of view of the Viceroy and of those
who agree with him.

1. It renders an irritating discussion inevitable. If the omitted sections are replaced in
the Bill, it is due, not simply to myself and my opinions, but to the character of Sir
H. Harington, that I should attempt to get them out. On the other hand, if they are left
in the Appendix, the chances seem to me to be that the good sense of all will prevent their
being moved by way of amendment. The consequence will be that, though there may be
a little discussion by the Press when the Bill is first published, the whole subject of specific
performance will be postponed, as his Excellency would apparently wish, till long after
the Viceroy and I have left the country, and will probably be re-discussed amid a totally new set
of ideas on the subject of contract produced by the present Bill, and possibly in a totally
different set of relations between planter and ryot. Meantime, so long as the code of civil
procedure is unrevised, the law does not admit of the specific performance of a contract to
cultivate a particular crop, or in a particular manner.

2. The result which I understood the Viceroy to deprecate strongly in Council, namely,
that his Excellency himself or somebody who agrees with him, should have to move these
sections by way of amendment, is very likely to occur, even though they are placed at first
in the body of the Bill. It follows, of course, from what I have said, that I consent to
move the reference of the Bill to a Select Committee, although, strictly speaking, such a
motion, according to our procedure, implies approval of all important parts of the measure.
But in Committee I must move the omission of the sections, and I may possibly succeed,
In that case, the Bill submitted to Council at what may be called the third reading will not be the Bill in its original form, but the Bill as amended by the Select Committee. Consequently, anybody who, contrary to the recommendation of the Select Committee, wishes to replace the omitted sections, will have to move them by way of amendment.

3. I submit that, in insisting on the inclusion of these sections, the Viceroy, or anybody who agrees with him, abandons a strong position for a weak one. The Report of the Indigo Commission is now seven years old, and whether or not its Excellency is right in denying that the old indigo contracts are extinct, there can be no reasonable doubt that they have been widely and considerably modified. Still I freely admit that when anybody attempts to amend the present code of civil procedure, which does not admit of the specific performance of any kind of cultivating contract, the conclusions of the Indigo Report present a formidable and perhaps insuperable obstacle to his success, if the effect of the amendment will be to give an advantage, however slight and incidental, to the planter. But on the other hand, I submit that there is not sufficient evidence to go upon, if the offensive is taken, and if one places oneself under the obligation of showing that indigo contracts should be excepted ex nomine (as is virtually done by the Commissioners) from a class of enforceable contracts to which they would otherwise belong, and to which they would belong even under the narrow English law. Direct, distinct, affirmative evidence, bearing on the state of things now existing, is required in such a case, not inferences from the Indigo Report or suspicions derived from the relative characters of European and Native. I only state the results of my own experience when I say that, so long as the planter is denied the help of the civil law in enforcing his contracts through a general provision of the procedure code, evidently not framed with any special reference to his position, it is all but impossible to make any change which assists him, however incidentally, in the face of the doubts suggested by the Indigo Report. But it becomes a very different matter when the positions are reversed, and when the opponent of the planter proposes a new law of specific performance, and denies the benefit of it to his contracts with the ryot, not on the score of proved want of equity in particular contracts, but on the a priori assumption that all such contracts are from the nature of the case unjust.

As I have said, however, rather than make a reference to the Home Government, I will adopt the course which I think not the best.

H. S. M.

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Notes by His Excellency the Governor General; dated 25th July 1867.

(With remarks by the Honourable Mr. Maine, dated 26th July 1867.)

On again looking over the printed copy of the amended draft for the Contract Law, I find that all the Specific Performance Clauses have been omitted, as stated yesterday by Mr. Maine in Council. One of my objections, therefore, to comply with his wishes, of course falls to the ground. But I am myself still in favour of retaining all these clauses in the proposed Contract Law, as prepared by the Commissioners. The objection advanced by Mr. Maine to their forming part of the substantive law, appears to me to be quite a technical one, which ought not to have much weight with us. And if his authority on such a subject is justly entitled to much consideration, so is that of the Commissioners also.

The real objection of my honourable friend is to the exceptions of the Commissioners to the rules laid down in these clauses. Now it certainly appears to me that the weight of authority is in favour of these exceptions. The Report of the Commission on the question of indigo cultivation in Bengal, in Lord Canning’s time, proved, in my mind, most completely, what was long before that period pretty notorious, that contracts for the delivery of indigo produce were not really voluntary ones, but forced on the ryot as a rule by the planters. While I see no objection to Specific Performance Clauses in a Contract Law for India as a general rule, I consider that exceptions, such as the Commissioners have made, are just and reasonable, and such as circumstances demand in India.

If Mr. Maine cannot bring himself to introduce the law in the complete form in which it has been received from England, it becomes a question whether some other Member of Council would not undertake the duty.

J. L.

On this Note of his Excellency I have to remark that my objections to the Commissioners’ sections are threefold. I consider,

1. That the sections are out of place;

2. That they needlessly raise an irritating political question;

3. That both the rules and the exceptions are thoroughly unsuited to India.

This last is an objection of substance, which I have kept back, trusting to the first two.

H. S. M.
CONTRACT LAW (EAST INDIA).

Note by the Honourable Mr. Maine, dated 27th July 1867.

I am extremely sorry to have to ask the Viceroy and my honourable colleagues to read anything more from me on the subject of the "Indian Contract Law;" but I perceive from a second Note by his Excellency, which has been in circulation, that the discussion next Wednesday will be incomplete, unless I touch on a side of the question before us, which I have hitherto scrupulously avoided—its merits. I have hitherto confined myself to reasons for omitting the Commissioners' sections which are not reasons of substance. These are—

1. That the sections will embark us in an irritating controversy;
2. That they will do so needlessly, since they will effect no practical change in the existing law;
3. That they will do so prematurely, since the revision of the Code of Civil Procedure will furnish a much better occasion for discussing the subject of Specific Performance;
4. That they are out of place.

On my former Notes, however, the Viceroy has made the remark that apparently I do not object to the Commissioners' rules of Specific Performance and Injunction, but only to the exceptions. It is thus evident to me that, by trusting to the objections just enumerated, I have placed myself at a disadvantage. The truth is, I object to the rules as much as, or even more than, I do to the exceptions.

The grounds on which I quarrél with the rules are much wider than those on which I quarrél with the exceptions. My opinion is that the greatest evil connected with the civil procedure of India, is one quite apart from indigo contracts. It is the system of unexecuted decrees. Or money or pecuniary damages. Until my own proposals fell into abeyance, I was collecting evidence on the point, and had collected a great deal. It was all one way. It showed that such decrees are rarely, indeed almost never, executed in India against small debtors in the way required by the theory of the law. This is, perhaps, inevitable in a country in which the debtor has so little "visible" moveable property, and in which his land depends so much for its value upon his labour, and, indeed, if it consist in a right of occupancy, cannot be taken in execution. The result is that these decrees are hoarded. They are divided, bequeathed, inherited, and sold in open market. Probably there is nothing which more astonishes an English judge fresh from home. Finally, these decrees get into the hands of some neighbour of the debtor, richer than himself, probably the village money-lender. By him they are so used as to become an instrument of monstrous oppression. They are enforced by a little at a time, or bonds, bearing enormous interest, are taken for forbearance, or they are retained as means of exercising power. Meanwhile there is no insolvent law in the Muffussil by which the debtor can release himself.

The rules of specific performance and injunction framed by me with Sir H. Harington's assistance would have tended to cure this great evil, which probably affects thousands, where the indigo contracts affect scores. Under these rules, the civil courts would have ordered the defendant to perform his engagements or restrained him from breaking them, instead of waiting till he had committed a breach of contract, and then handing him over to the plaintiff. It appears to me that in this way only can Indian Courts discharge the duty imposed on them by the theory of the law. At present they seem to me to act pretty much after the fashion of certain tribunals which have no very savoury historical reputation. They condemn the defendant, and then turn him over to somebody else to be tortured.

The sections in question proceed on the assumption (which is made by every civilized body of law in the world, except the English), that a wide and liberal law of specific performance is to be preferred to a narrow law. But they are fenced round with restrictions which would effectually prevent their being applied in any case in which the extraordinary civil remedies of specific performance and injunction would cause injustice or hardship, as compared with the ordinary civil remedy of damages.

The draft revised Code of Civil Procedure is put up. The specific performance sections are 24, 25, 133, 134, Sections 314 to 317 (both inclusive), and Section 328. The rules concerning injunctions correspond.

I would further call attention to Section 62 of the Code of Criminal Procedure (also put up). It is, I believe, the provision of the code on which magistrates most rely for good administration and the prevention of crime and disorder, and it embodies a true criminal law of specific performance and injunction, now in force in India.

I also take the liberty of appealing to certain remarks of mine made in the Legislative Council when I transferred the charge of my sections to Sir H. Harington. They are contained in the volume of Legislative Proceedings put up. My argument is much weaker than it would be if the present Bill became law, for almost any court will now be able to apply the proper tests of validity and invalidity to contracts.

I fully admit that my sections would have applied to indigo contracts, unless such contracts were excluded by the limitations embodied in the law. I also admit that, but for the planters' agitation, it is very likely that the grave defects in Indian civil procedure to which I have adverted, might have escaped notice; but this is only an illustration of a phenomenon many times seen. The European community has rarely been disinterested in its agitations; but
but its grievances have constantly opened its eyes, and ultimately those of the Government to many real and grave defects in our laws and administration.

I assert, however, that if an indigo contract satisfied the conditions of those sections, and if, further, it satisfied the tests of valid contract set forth in the new Bill, and known for centuries to lawyers, on every principle of justice it ought to be enforced by the civil courts.

My own opinion is that, if my sections had become law, they would have revolutionised the relations of planter and ryot. The practice of hoarding money-decrees and holding them over the ryot in terror, was one of the greatest evils of the indigo system. That would have come to an end. My sections further denied the benefit of their procedure to contracts for more than five years, a provision which would have put an end to those long contracts under which the ryot was almost enslaved, and I would have consented to shorten the duration of the contracts, if necessary. Further, a contract, in order to come under the new law, had to be registered under the Registration Act, so that the personation imputed justly or unjustly to the planters would have been rendered impossible, and the actual assent of the ryot would have been established.

Under such a system it is all but certain that the whole of the existing indigo contracts would have been abandoned, and all contracts would have assumed a new form. And, after all the securities required by my sections had been provided in the initiation of the contract, the planter, if the present Bill became law, would be compelled to satisfy the Court of the inherent equity of his contract before he obtained his remedy—a remedy which, I may observe, would, in the great majority of cases, have been, not a decree for specific performance in the strict sense of the words, but an injunction against meditated breach of contract, since a complicated contract to cultivate in a particular way is not "certain" within the meaning of my sections.

This attempt, not, I venture to think, quite worthy of the importance and difficulty of the subject, has now miscarried. The Secretary of State has vetoed it, and the Law Commissioners now propose that the planters shall be outlawed so far as the civil law is concerned. The expedients by which a Native enforces a money-decrees against a small debtor are, of course, impracticable to a European. The Viceroy anticipates that, in the absence of legal power of constraint, the planters will make fair contracts. If I know anything of human nature, I predict the exactly opposite result. I think they will become careless of the equity of their contracts, and will trust to zemindaree influence, and to other less legal, though not less oppressive, methods to enforce them.

The Viceroy has observed in the same note, that my objection to the misplacement of the sections in a Civil Code is only "technical." If the observation is made in disparagement, I do not accept it. Scientific faults are of great importance in our codes, which are destined, I am sure, to exercise great influence on English jurisprudence, an influence which the proposed arrangement would be likely to impair.

I do not wish by this note to provoke a paper controversy, but merely to ensure the completeness of our next discussion, and to guard myself against being supposed to make a concession which I never intended to make. Nor do I desire to recall the offer which I made to include the omitted sections in the Bill, provided I may expressly reserve to myself power to oppose them afterwards.

H. S. M.

Norm by His Excellency the Commander in Chief, dated 27 July 1867.

[With a Remark by Sir H. Durand, dated 29 July 1867.]

It appears to me that the important questions which are involved in the matter of the discussion between his Excellency the Viceroy and the Honourable Mr. Maine should be specified, and votes taken separately on them.

1st. Is it competent for even a majority of the Council to dictate to a Member how he is to frame a Bill, provided that he generally adheres to the spirit of the instructions the Government has received from the Secretary of State?

2nd. The principle of our future discussions having been affirmed by a vote on Question 1, does the course proposed by Mr. Maine sufficiently meet the views of the Secretary of State in a matter of such moment as the framing of a chapter of a code of substantive law; this question being viewed according to the precedents with which the Council is acquainted?

3rd. Is the reasoning of Mr. Maine sufficient for the support of his views, on what has been called the technical ground, though much more than technicality is involved in it, viz., that it is a solecism to include rules of procedure in a code of substantive law?

4th. Is Mr. Maine right or wrong in his proposition that the course proposed by the Viceroy will not alter the law as apparently wished by his Excellency, while it will suggest class-agitation and irritate the indigo planters?

5th. Is it politic to introduce into the Indian Contract Law of 1867 the contested clauses, if Mr. Maine's proposition as contained in Question 4 be correct?

I venture to suggest that it will facilitate our deliberations if the Council come to a distinct understanding on the foregoing points, it being, I believe, impossible for us to extricate ourselves from the dilemma in which we are involved without defining the issues in some such manner as is here proposed.
CONTRACT LAW (EAST INDIA).

It seems to me that the Council has been sufficiently informed for this purpose by the several notes of the Viceroy and Mr. Maine, and the discussion of last Wednesday.

I would beg that this note may be circulated before the next meeting of Council.

W. R. M.

In a Note circulated before this paper reached me, I have stated what appears to me the main point to be considered and discussed before entering on the question, whether the principle involved should be in contract law or the civil procedure.

H. M. D.


I do not fully appreciate the technical objection raised by Mr. Maine to the insertion of the sections having reference to specific performance; they seem to follow naturally enough as a branch of performance of contract; and considering that independently of indigo contracts, there are many other kinds of agreements in which specific performance may have to be adjudicated, the Law Commissioners might have exposed themselves to criticism had they passed over this peculiar form of performance of contract without laying down any guiding principles in the Indian Contract Law. We are told that "in some cases where " compensation in damages is manifestly insufficient, the Court of Equity, and in some " cases, the Common Law Courts also, will compel specific performance, as for example in " case of agreements for the formation of a partnership, or for the sale of the good-will of a " trade, and of contracts to insure against loss of fire." Having to combine the principles which in England govern the Common Law Courts and Chancery, the Law Commissioners could hardly with propriety avoid touching distinctly on a branch of contract law which had a special bearing on a large and not unimportant class of cases that may and do occur at our centres of commerce. But more especially was this necessary when they had to lay down so vital a principle as that one large class of cases, which might otherwise be comprised by the general principles affecting specific performance, were to be excluded from this remedy. As a principle, it touches to the quick the interests of the ryots employed in the cultivation of indigo, opium, cotton, sugar, &c.; and at the same time it nervously affects the interests of capitalists, European or Native, who trade with the agricultural community for these valuable products, in a way more or less serious, according to the nature of agreements which it is the custom to make in particular districts. From this point of view, I can hardly conceive a more momentous legal principle than the exclusion of agreements to cultivate land in a particular manner, or to grow particular crops, and it is one that, if deliberately adopted, merits a distinct section for its prominent and formal enunciation. It is scarcely done credit by insertion as an explanation to section 52.

The main point at issue really is, whether the Government of India is prepared deliberately to accept the exclusion of this class of engagements from the judicial remedy of decrees for specific performance or of injunction against meditated breach of contract. This lies at the root of the difference of opinion between his Excellency the Governor General and the Honourable Mr. Maine; and whether the contract law code or the revised civil procedure code be the proper place for the sections on specific performance, seems a point of minor moment easily enough disposed of when once the main question at issue is faced and decided. It is a question which should be first formally considered and discussed before embodying a vital principle in either code.

H. M. D.

Note by the Honourable H. S. Maine; dated 14th August 1867.

His Excellency the Governor General, while expressing himself sensible of my offer to defer to his views by including the omitted sections in the Bill, subject to a right reserved on my part to move their omission at a later stage, has intimated in Council that he does not consider such a course would be expedient. It has therefore been decided that the discussion on the sections shall be communicated to the Secretary of State.

The misfortune of differing from the Indian Law Commissioners on a point of law and from the Governor General on a point of policy, does not often happen to me. But as my opinion is strong, and as my position, owing to passages in the past history of the question, is somewhat peculiar, I have thought it right to maintain my position.

The question as to the proper place of the sections is, I may observe, raised in a singularly distinct form. The case is not like that of those rules of procedure which were sent to us by the Commissioners with their chapter on succession. At that time there was not in India any procedure to regulate probate and administration, and consequently, if the new
rules of succession were to be worked at all, it was necessary to supply a new procedure. But now we have a law of specific performance in India and of injunction against breach of contract, and this law is contained in the existing code. I therefore distinctly raised whether this law shall or shall not be removed from the code of civil procedure, and transferred to the code of substantive civil law.

I do not for a moment deny that something is to be said for including specific performance and cognate topics in the province of procedure. I have admitted in the statement of objects and reasons appended to my Bill (which I beg may be considered as incorporated with these notes) that there is between law and procedure a debatable land. Nor do I doubt that many more reasons for the course taken in the Commissioners' draft have suggested themselves to the Commissioners than have occurred to me. At the same time, I hesitate to place among the reasons which have determined the Commissioners, those which appear to be urged in the last note of Sir H. Durand, which, by some accident, I have only just seen. If I rightly understand my honourable and gallant colleague, his argument is, that the Commissioners were justified in including specific performance and injunction in their draft because those subjects have great importance in connection with contract. The fact is undeniable; and unquestionably this very impression, that whatever is incidentally important in connection with a particular branch of law may legitimately be dealt with as part of it, is one which is shared by large numbers of English writers on law. These writers almost systematically confound the boundaries between law and procedure, and hence it is that the most comprehensive treatise on the English common law is nominally a work on "Nisi Prius," that books on the "principles of equity" run off into discussions on the practice of the Court of Chancery, and that exhaustive discussions of these principles are found in treatises on "Equity Pleading" and on "Decrees." But nobody who has bestowed much thought on the matter can doubt that the impression I have referred to, is, in fact, the great cause of the confused arrangement of all English law-books, and, if not most carefully guarded against, it will introduce confusion wholesale into our codes.

If there were no question at issue except that of arrangement, it would be easy to give practical effect to the Commissioners' conclusions. When the various Acts which have been found on their drafts are finally embodied in a code consisting of numbered chapters, there will have to be a revision of the provisions of those Acts with a view to the severance of law from procedure; and my own impression is, that not a few rules and sets of rules, besides those under discussion, will have to be removed to the procedure code. It would have been possible therefore to include the sections before us in the code, subject to an express understanding that the question of place should be re-considered at the final revision. Or again, since the Secretary of State, in postponing the revision of the procedure code, has permitted that urgent amendments of it be embodied in separate measures, the sections before us might have been submitted to the legislature in a separate Bill, as an avowed anticipation of a revised code of civil procedure.

But, unfortunately, I differ further from the Commissioners in the question of substance, whether their sections constitute a good and fitting law for India on the subjects to which they refer. The grounds of my opinion, which are set forth fully in the preceding note, need not be repeated.

My difference from the Governor General is on a point of immediate policy. His Excellency, as far at least as regards the exceptions to the Commissioners' rules, has frankly accepted the view which nine men out of every ten in India would take—that those exceptions are directed against indigo contracts as a class. I do not myself doubt that the general opinion would go even beyond this, and would hold that the rules were framed with the same object as the exceptions, and were, in truth, narrowed and pared down in order to suit their measure. His Excellency is not afraid of such a construction, and would attach a special value to the exceptions, if not to rules, as a permanent protest against the indigo system, seconded by the authority of the Law Commissioners. I will not repeat the reasons I have before urged against the expediency of such a protest, but I may be permitted to express my doubts of its permanence. The present code of civil procedure is commonly cited as Act VIII. of 1859, that is, it was passed eight years ago. But that code, also founded on the drafts of the Commissioners, contains a law of specific performance and injunction quite different in principle from that now proposed. What ground is there for supposing that the new law would last longer than the old? The very attacks to which it would from the first be exposed, surely promise it a much smaller longevity.

It is desirable that I should repeat my conviction that no direction to submit these sections to the legislature has been given by the Secretary of State. Theoretically, I admit that such a direction might be given, but it would be a strong measure to dictate the detail of a Bill, and an extreme measure to impose it, in effect, on a member of Council committed to a different mode of legislation. I have seen during my term of office, many requests from the Secretary of State for legislation in a particular sense, but these have always been couched in the most general language. I remember that the direction to submit to the legislature a most important measure, the abolition of the grand jury, was conveyed in a few lines.

I will only add my hope, that nothing I have written may be interpreted as implying that I do not think that the indigo system should be carefully watched. Indeed, one of my principal reasons for objecting to the Commissioners' proposal is, that its tendency is to leave that system entirely to itself.
Note by His Excellency the Governor General; dated 16th August 1867.

I have no wish to add to the notes which have already passed on this subject.

It has been fully discussed in Council, and it seems to me that the feeling of my colleagues is, that the present is not an opportune occasion for discussing the question of indigo contracts.

I have therefore consented to the course originally proposed by the Honourable Mr. Maine, viz., that the clauses as to specific performance proposed by the Law Commissioners, and by which the question as to indigo contracts would have been raised, should be omitted from the Bill.

I think it right, however, before the discussion finally closes, to disclaim all attempt to desire to dictate to my honourable colleague, Mr. Maine, any course to which he is conscientiously opposed. Nothing has ever been further from my intention than to do so.

But I considered it right to bring the question before the Council, because I think the indigo system in Bengal calls for examination, and, if necessary, for interference, and I thought that the Bill, as drafted by the Commissioners, distinctly directed attention to it.

Without discussing the legal points raised by the Honourable Mr. Maine, I still think that the opinion of the Law Commissioners is also entitled to deference, and justified me in wishing to use the opportunity thus afforded.

Moreover, beyond doubt, indigo cultivation is founded on a peculiar system of contracts, the discussion of which seemed to me naturally to be raised by the preparation of a new general law of contract.

However, as I have already said, I think it due to the feeling expressed by my colleagues, to defer to their wishes, and to await another opportunity of considering this question, and I do this the rather that I believe that it is likely to be more satisfactorily examined, if its merits are not complicated with any accidental circumstances, such as those which have arisen on the present occasion.

At the same time, I think it my duty to say that I fear that the day is not far distant when we shall be compelled to examine the entire indigo system, and I feel assured that the difficulties attending such examination will not grow less, but rather greater, by delay.

J. L.

--- No. 5. ---

Indian Law Commissioners to the Assistant Under Secretary of State for India.

Sir,

20, Abingdon-street, 18 December 1867.

In reply to your letter of the 28th ultimo, transmitting, by direction of Sir Stafford Northcote, for the purpose of being placed before Her Majesty's Commissioners appointed to prepare a body of substantive law for India, a copy of a Despatch from the Government of India, with a draft Bill on the subject of contract, and other papers, and stating that Sir S. Northcote would be glad to receive any observations which the Commissioners might desire to make on the subject, I am directed by the Commissioners to transmit to you their 4th Report, in which are contained their observations on the subject referred to them.

J. C. Melvill, Esq., (signed) W. Macpherson.

India Office.

FOURTH REPORT.

To the Queen's Most Excellent Majesty.

We, Your Majesty's Commissioners, appointed for the purpose of preparing for India a body of substantive law, and of considering and reporting on such other matters in relation to the reform of the laws of India as might be referred to us by Your Majesty's Secretary of State for India, have received from Your Majesty's Secretary of State for India a communication dated the 28th November last, referring to us a Despatch from the Government of India, with a copy of a draft Bill on the subject of contract, identical with the measure prepared by us, and submitted in our Second Report, except that Sections 51 to 59, relating to the specific performance of contracts, are omitted; and also, as setting forth the

239. N 3 grounds
grounds on which this omission is founded, the statement of "Objects and Reasons," and the "Notes" recorded by the Governor General and the members of his Council on the subject.

We find that in the papers referred to us two questions are discussed with respect to the omitted sections:

First, whether the subject of them, namely, the enforcement of the specific performance of contracts, properly belongs to Substantive Law or to the Law of Procedure.

Secondly, whether the law proposed in those sections is fit to be enacted.

Upon the first question, we entertain no doubt that the proper place for the clauses relating to the specific performance of contracts is in the Code of Substantive Law and not in the Code of Procedure.

To enforce the specific performance of some contracts is impossible; of others, is inexpedient. It is the province of the Code of Substantive Law to define the rights and liabilities of parties arising out of their contracts, and in so doing to specify what contracts may and what shall not be specifically enforced. This is no part of procedure. The proper province of procedure is to point out the mode by which effect is to be given to rights already defined, and not itself to define those rights.

In like manner the Penal Code, which is Substantive Law, defines and classifies offences and assigns the appropriate punishments, but leaves the rest to the Code of Criminal Procedure.

The defining and classifying the contracts to which the enforcement of specific performance is an incident, is a branch of Substantive Law, exactly as the defining and classifying of offences to which capital punishment applies is also a branch of it.

Accordingly the New York Code puts specific performance in the Code of Substantive Law and not in the Code of Procedure. So also in Mr. Austin's work, and in Mr. Justice Story's Treatise on Jurisprudence, specific performance is treated as a part of Substantive Law, not of Procedure.

To proceed to the second question. We see no reason to think that the omitted sections are either wrong in principle or inexpedient, or that there is anything in them which ought to be struck out or to be altered.

What is alleged against them as a fault is in effect that under them specific performance cannot, in cases of contracts for cultivation, be enforced by the imprisonment of the contracting cultivator.

In framing our rules we considered, first, the principle of the English law, and then how far it was applicable to India, and how far, if at all, it ought to be modified.

The general principle of the English law of specific performance is that the Court decrees specific performance where there is a single simple act to be done by the defendant, and the Court can at the same time give him that which he contracted for; or where there is some act about to be done by the defendant which he has contracted not to do, and which he may be ordered to abstain from doing. In the exercise of this jurisdiction the Courts in England have refused to deal with any matter which required a succession of acts or the exercise of skill, or the application of personal labour.

The Commissioners adopted this principle, and endeavoured by the rules they framed to make it free from the ambiguity with which, in some particular cases usually treated as exceptions, the English Court of Chancery has encumbered it.

Experience has taught the English courts to be very cautious in the exercise of this extraordinary jurisdiction, and we see nothing in the circumstances of India to make it expedient that the courts of that country should be entrusted with powers larger than those exercised by our own judges, and not given, so far as we are informed, to the courts of other countries. To this opinion we have given effect in framing the omitted sections. The rules of law which they embody are founded on principles of jurisprudence which we believe to be of universal application, and which, in our judgment, will be found the most equitable and beneficial for all classes of the inhabitants of India, and they are recommended by us for that reason alone.
We humbly submit this our Fourth Report to Your Majesty's Royal consideration.

Romilly. (l.s.)
Edward Ryan. (l.s.)
Robert Lowe. (l.s.)
Robert Lush. (l.s.)
John M. Macleod. (l.s.)
W. M. James. (l.s.)

Dated this 18th day of December 1867.

(No. 6, of 1868.)

India Office, London,
8 February 1868.
Legislative Department.

Sir,
The Despatch of your Excellency in Council, dated 16th August (4) 1867, forwarding a draft of the Indian Contract Law which it is proposed to enact, together with minutes by your Excellency, the honourable Mr. Maine, and other members of your Council, has been considered by me in Council.

2. I now forward, for the consideration of your Excellency in Council, copy of a letter transmitting the Fourth Report of the Indian Law Commission, which contains the observations of Her Majesty’s Commissioners on the Despatch under reply, and on the draft Act.

I have, &c.
(signed) Stafford H. Northcote.

To his Excellency
The Right Hon. the Governor General of India
in Council.