and cannot pledge his credit even for necessaries. The husband is not bound to maintain her under such circumstances.

3. Agency by ratification

A person may act on behalf of another without his knowledge or consent. For example, *A* may act as *P*'s agent though he has no prior authority from *P*. In such a case *P* may subsequently either accept the act of *A* or reject it. If he accepts the act of *A*, done without his consent, he is said to have ratified that act and it places the parties in exactly the same position in which they would have been if *A* had *P*'s authority at the time he made the contract. Likewise, when an agent exceeds the authority bestowed upon him by the principal, the principal may ratify the unauthorised act.

Examples. (*a*) *A* insures *P*'s goods without his authority. If *P* ratifies *A*'s act, the policy will be as valid as if *A* had been authorised to insure the goods [*Williams* v. *North China Insurance Co.*, (1876) 1 C.P.D. 757].

(*b*) *A*, acting for and on behalf of *P*, effected an assurance which he had no authority to do. *P* without demur (hesitation, objection, protest) accepted the money received under the policy. *Held*, this was ratification of the contract by *P* [*Hukumchand Insurance Co.* v. *Bank of Baroda*, A.I.R. (1977) Kant. 204].

Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done (Sec. 197).

Examples. (*a*) *A*, without authority, buys goods for *P*. Afterwards *P* sells them to *T* on his own account. *P*'s conduct implies a ratification of the purchase made for him by *A*.

(*b*) *A*, without *P*'s authority, lends *P*'s money to *T*. Afterwards *P* accepts interest from *T*. *P*'s conduct implies a ratification of the loan.

(*c*) *A* let *P*'s property without the latter's consent. *A* received rent for many years and *P* sued him for an account of the rents. *Held*, *P*'s action constituted ratification of such receipts [*Lyell* v. *Kennedy*, (1889) 14 App. Cas. 437].

(*d*) *A* bought some goods on behalf of *P* in excess of the price authorised by *P*. *P* objected to the purchase but sold some of the goods. *Held*, he had ratified the purchase by selling goods [*Cornwal* v. *Wilson*, (1750) 1 Ves. Sen 509].

Effect of ratification. The effect of ratification is to render the acts done by one person (agent) on behalf of another (principal), without his (principal's) knowledge or authority, as binding on the other person (principal) as if they had been performed by his authority (Sec. 196).

Ratification is tantamount to prior authority. It relates back to the date when the act was done by the agent. This means the agency comes into existence from the moment the agent first acted and not from the time when the principal ratified the act.

Example. *A*, the managing director of a company, purporting to act as agent on company's behalf, but without its authority, accepted an offer by *T*. *T* subsequently withdrew the offer, but the company ratified *A*'s acceptance. *Held*, *T* was bound. The ratification related back to the time of *A*'s acceptance and so prevented the subsequent revocation by *T* [*Bolton Partners* v. *Lambert*, (1888) 41 Ch. D. 295].

Requisites of valid ratification

1. *The agent must purport to act as agent for a principal who is in contemplation* and is identifiable at the time of contract.

Example. *R* was authorised by *K* to buy wheat at a certain price. Acting in excess of his authority, *R* purchased wheat from *D* at a higher price in his own name. He did not profess to buy wheat on behalf of *K*. Subsequently *K* ratified the act of *R* but later refused to take delivery of the wheat. *D* brought an action against *K*. *Held*, the contract could not be ratified because *R* did not purport to act as an agent for *K* [*Keighley, Maxsted & Co.* v. *Durant*, (1901) A.C. 240].

2. *The principal must be in existence at the time of contract.* A company, for example, cannot ratify the contracts entered into by the promoters on its behalf before its incorporation.

Example. *B* entered into a contract with *K* on behalf of a hotel company intended to be formed. The company, when duly formed, ratified the contract. After some time it went into liquidation. *K* sued *B* upon the contract. *B* pleaded that the liability had passed to the company by ratification. *Held*, the company was not liable by a mere ratification. "Ratification can only be by a person ascertained at the time of the act done and by a person in existence either actually or in contemplation of law...." As such *B* was held to be personally liable [*Kelner* v. *Baxter*, (1866) L.R. 2 C.P. 174].

3. *The principal must have contractual capacity both at the time of the contract and at the time of ratification.* If the principal was not competent to enter into contract at the time when the contract was entered into, he cannot validate it by subsequently ratifying it at the time when he is competent to contract.

4. *Ratification must be with full knowledge of facts.* No valid ratification can be made by a person whose knowledge of facts of the case is materially defective (Sec. 198).

Example. *A* has an authority from *P* to buy certain goods at the market rate. He buys at a higher rate but *P* accepts the purchase. Afterwards *P* comes to know that the goods purchased by *A* for *P* belonged to *A* himself. The ratification is not binding on *P*.

If however the alleged principal is prepared to take the risk of what the purported agent has done, he can choose to ratify without full knowledge of facts.

Example. *A*, an agent, entered into an unauthorised contract for the purchase of a property from *T* for *P*. *P* wrote to *T* assuring him that he would stand by the acts of *A* whatever they were, even if he did not know what they were. *Held*, *P* was liable as he had agreed to bear the risk of being bound by the unauthorised acts of *A* [*Fitzmaurice* v. *Bayley*, (1856) 6 E. & B. 868]

5. *Ratification must be done within a reasonable time of the act purported to be ratified.* If it is made after the expiry of the reasonable time, it will not be valid.

6. *The act to be ratified must be lawful and not void or illegal or ultra vires* in case of a company. An agreement which is void *ab initio* cannot be ratified [*Mulamchand* v. *State of M.P.*, A.I.R. (1968) S.C. 1218].

7. *The whole transaction can be ratified* (Sec. 199). There can be ratification of an act *in toto* (entirely, wholly) or its rejection *in toto*. The

principal cannot ratify a part of the transaction which is beneficial to him and reject the rest.

8. *Ratification must be communicated* to the party who is sought to be bound by the act done by the agent.

9. *Ratification can be of the acts which the principal had the power to do.* The acts which the principal is incapable of doing cannot be ratified. A company, for example, cannot ratify the acts of the directors which are *ultra vires* the powers of the company.

10. *Ratification should not put a third party to damages.* Ratification, which has the effect of subjecting a third person to damages or of terminating any right or interest of a third person, cannot be made (Sec. 200).

Examples. (*a*) *A*, not being authorised thereto by *P*, demands on behalf of *P* the delivery of a chattel, the property of *P*, from *T* who is in possession of it. The demand cannot be ratified by *P*, so as to make *T* liable for damages for his refusal to deliver.

(*b*) *T* holds a lease from *P*, terminable on three months' notice. *A*, an unauthorised person, gives notice of termination to *T*. The notice cannot be ratified by *P*, so as to be binding on *T*.

11. *Ratification relates back to the date of the act of the agent.*

Example. A who purports to act as agent on behalf of *P* but without *P*'s authority accepts an offer by *T*. *T* withdraws the offer before *P* comes to know of it. *P* subsequently ratifies *A*'s acceptance. The ratification results in a contract and as such *T* is bound by the contract.

Limitations to the doctrine of ratification. There can be no ratification —

(1) Where an agent purports to act as agent for a principal not in contemplation or existence.

(2) Where the principal is incapable of contracting.

(3) Where the principal does not have full knowledge of facts.

(4) Where the act to be ratified is void or illegal.

(5) Where the whole of the transaction is not ratified.

(6) Where the ratification is not communicated to the person sought to be bound by the act done by the agent.

(7) Where the ratification is of the acts which the principal has no power to do.

(8) Where the ratification puts a third party to damages.

4. Agency by operation of law

Sometimes an agency arises by operation of law. When a company is formed, its promoters are its agents by operation of law. A partner is the agent of the firm for the purposes of the business of the firm, and the act of a partner, which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm (Secs. 18 and 19 of the Indian Partnership Act, 1932). In all these cases, agency is implied by operation of law.

CLASSIFICATION OF AGENTS

A general classification of agents from the point of view of the *extent of their authority* is as follows :

1. *Special agent.* A special agent is one who is appointed to perform a particular act or to represent his principal in some particular transaction as, for example, an agent employed to sell a house or an agent employed to bid at an auction. Such an agent has a limited authority and as soon as the act is performed, his authority comes to an end. He cannot bind his principal in any matter other than that for which he is employed. The persons who deal with him are bound to ascertain the extent of his authority.

2. *General agent.* A general agent is one who has authority to do all acts connected with a particular trade, business or employment. For example, the manager (general agent) of a firm has an implied authority to bind his principal by doing anything necessary for carrying on the business of the firm or which falls within the ordinary scope of the business. Such authority of the agent is continuous until it is put to an end. If the principal, by secret instructions, limits the authority of the general agent, and the agent exceeds the authority, the principal is bound by the agent's acts done within the scope of his authority, *unless* the third parties dealing with the agent have a notice of the curtailment of the authority of the agent.

3. *Universal agent.* A universal agent is one whose authority to act for the principal is unlimited. He has authority to bind his principal by any act which he does, provided that act (*i*) is legal, and (*ii*) is agreeable to the law of the land.

Another classification of agents from the point of view of *the nature of work performed* by them is as follows :

1. **Commercial or mercantile agents.** A 'mercantile agent', according to Sec. 2 (9) of the Sale of Goods Act, 1930, means "a mercantile agent having in the customary coure of business as such agent, authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods." This definition does not cover all kinds of mercantile agents which are as follows :

(1) *Factor.* A factor is a mercantile agent entrusted with the *possession* of goods for the purpose of selling them. He has ostensible authority to do such things as are usual in the conduct of business [*Pickering* v. *Busk*, (1812) 15 East 38). He sells the goods in *his own* name as an apparent owner upon such terms as he thinks fit. He can sell them on credit as well. He has also the authority to receive the price and give a good discharge to the purchaser.

A factor has a general lien on the goods of his principal for a general balance of account between him and the principal (Sec. 171). If he is in possession of goods, or of the documents of title to goods, *with the consent of the owner*, any sale, pledge or other disposition of them made by him, in the ordinary course of business, is binding on the owner, whether or not the owner authorised it.

Example. P owned a motor car and delivered it to *A*, a mercantile agent, for sale at not less than £ 575. *A* sold the car for £ 340 to *T*, who bought it in good faith and without notice of any fraud. *A* misappropriated the £ 340 and *P* sued to recover the car from *T*. *Held*, as *A* was in possession of the car with *P*'s consent for the purposes of sale, *T* got a good title [*Folkes* v. *King*, (1923) 1 K.B. 282].

(2) *Auctioneer.* An acutioneer is an agent appointed by a seller to sell his goods by public auction for a reward generally in the form o:

commission. He is primarily the agent of the seller, but after the sale has taken place, he becomes the agent of the purchaser also. He resembles a factor in all respects except that he has only a particular lien on the goods for his charges. He has authority to receive the price of the goods sold. He can also sue for the price in his own name. The principal is liable to the third parties for the acts of the auctioneer if the auctioneer acts within the scope of his apparent authority even though he disobeys instructions privately given to him.

Example. *P* instructed *A* to sell a pony by auction, subject to a reserve price of £ 25. *A* at the time of sale inadvertently stated that there was no reserve price and knocked the pony down to *T* at £ 16. *Held*, the sale was binding on *P* [*Rainbow* v. *Hawkins*, (1904) 2 K.B. 322].

If the auctioneer states that the sale is subject to a reserve price, but by mistake knocks the article down at a price below the reserve price, the sale is not binding on the owner. In such a case, the buyer knows that there is a limitation on the auctioneer's authority, and therefore bids can only be accepted provided the reserve price is reached [*McManus* v. *Fortescue*, (1907) 2 K.B. 1].

(3) *Broker.* A broker is an agent who is employed to buy or sell goods on behalf of another. He is employed primarily to bring about a contractual relation between the principal and the third parties. He is not entrusted with the possession of the goods in which he deals. He cannot act or sue in his own name. And as he has no possession, he has no right of lien.

The usual mode of dealing by a broker is to put the terms of the contract in writing in a book, sign it and then send the particulars of the contract to both the parties. The document sent to the buyer is called the "bought note", and that sent to the seller the "sold note". If these documents agree, the terms of the contract are defined. If they do not agree, there is no binding contract. A reference is then made to signed entry in the broker's book.

(4) *Commission agent.* A commission agent belongs to a somewhat indefinite class of agents. He is employed to buy and sell goods, or transact business generally for other persons receiving for his labour and trouble a money payment, called commission.

(5) *Del credere agent.* *A del credere* agent is one who, in consideration of an extra commission, guarantees his principal that the persons with whom he enters into contract on behalf of the principal, shall perform their obligations. He occupies the position of both a guarantor and an agent.

(*b*) *Banker.* The relationship between a banker and his customer is really that of debtor and creditor. But there is a super-added obligation on the part of the banker to pay when called upon to do so by the draft or order (in the form of a cheque) of the customer. To this extent, a banker is the agent of his customer.

2. **Non-mercantile agents.** These include attorneys, solicitors, insurance agents, clearing and forwarding agents and wife, etc.

RELATIONS OF PRINCIPAL AND AGENT

Duties and rights of agent

Duties of agent. An agent owes a number of duties to his principal

which vary in degree according to the nature of agency. These duties are as follows :

1. *To carry out the work undertaken according to the directions given by the principal.* In the absence of any such directions, he must act according to the custom which prevails in doing business of the same kind at the place where he conducts such business. When he acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it (Sec. 211). If the agent's disobedience is material, the principal may even terminate the agency.

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

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

(*c*) *A*, an agent, was instructed to warehouse some drapery goods for *P*, at a particular place. He warehoused a portion of them at another place where they were destroyed by fire, without any negligence on the part of *A*. *Held*, *A* was liable to *P* for the value of the goods destroyed [*Lilley* v. *Doubleday*, (1881) 1 Q.B.D. 510].

(*d*) An agent, instructed to insure goods, neglects to do so. He is liable to the principal for their value in the event of their loss [*Pannalal Jankidas* v. *Mohanlal*, A.I.R. (1951) S.C. 144].

An agent may disobey his principal's directions where his authority is coupled with interest, *i.e.*, where he is privileged to protect his interest.

Example. *A*, a factor, has a lien on *P*'s goods in his possession to the extent of moneys advanced by *A* to *P*. *P* directs *A* to return the goods or sell them on credit. *A* is not bound to comply with *P*'s orders until *P* has repaid all advances made by *A*.

2. *To carry out the work with reasonable care, skill and diligence.* 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. He is always bound to act with reasonable diligence, to use skill as he possesses, and to make compensation to his principal in respect of the direct consequence of his neglect, want of skill or misconduct. But he is not liable to his principal in respect of loss or damage which is indirectly or remotely caused by such neglect, want of skill or misconduct (Sec. 212).

Examples. (*a*) *P*, a merchant in Calcutta, has an agent, *A*, in London to whom a sum of money is paid on *P*'s account with orders to remit. *A* retains the money for a considerable time. *P*, in consequence of not receving the money, becomes insolvent. *A* is liable to *P* for the money and interest from the day on which it ought to have been paid according to the usual rate and for any further direct loss as, *e.g.*, by variation of rate of exchange but not further.

(*b*) *A*, an agent for the sale of goods, having authority to sell on credit, sells to *T*, on credit, without making the proper and usual inquiries as to the solvency of *T*. *T*, 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 *P* 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 *P*.

3. *To render proper accounts to his principal.* An agent is bound to render proper accounts to his principal on demand (Sec. 213).

4. *To communicate with the principal in case of difficulty.* 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 (Sec. 214).

5. *Not to deal on his own account.* An agent must not deal on his own account in the business of the agency without first obtaining the consent of the principal and acquainting him with all the material circumstances which have come to his knowledge.

If an agent, without the knowledge of his principal, deals in the business of the agency on his own account, the principal may—

(1) repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent or that the dealings of the agent have been disadvantageous to him (Sec. 215), and

Examples. (*a*) *P* directs *A* to sells his (*P*'s) estate. *A* buys the estate for himself in the name of *T*. *P*, on discovering that *A* has bought the estate for himself, may repudiate the sale, if he can show that *A* has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

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

(2) claim from the agent any benefit which may have resulted to him from the transaction (Sec. 216).

Example. P directs *A*, his agent, to buy a certain house for him. *A* tells *P* it cannot be bought, and buys the house for himself. *P* may, on discovering that *A* has bought the house, compel him to sell it to him (*P*) at the price he (*A*) gave for it.

6. *To pay sums received for the principal.* An agent is bound to pay to his principal all sums received on his account (Sec. 218). He may deduct therefrom all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business and also such remuneration as may be payable to him for acting as agent (Sec. 217).

7. *To protect and preserve the interests of the principal in case of his death or insolvency.* When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf

of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him (Sec. 209).

8. *Not to use information obtained in the course of the agency against the principal.* It is the duty of the agent to pass on any information which he receives in the course of the agency to his principal. Where he uses any such information against the interest of principal and the principal suffers a loss, he is bound to compensate the principal. The principal may also restrain the agent from using such information by an injunction.

9. *Not to make sercet profit from agency.* An agent occupies fiduciary position. He must not, except with the knowledge and assent of the principal, make any profit beyond the agreed commission or remuneration.

Examples. (*a*) An auctioneer received from the buyer commission in addition to what his principal paid him as commission. *Held*, he was bound to hand over the total commission to the principal [*Andrews* v. *Ramsay & Co.*, (1903) 2 K.B. 635].

(*b*) An agent sold his own stock to his principal without disclosing this fact at the prevailing market price. *Held*, he was bound to account for any profit he made in the transaction [*Kimber* v. *Barber*, (1873) L.R. 8 Ch. 5].

(*c*) *P* employed *A* to buy a house for him. *A* bought a house for £ 2,000 in the name of a nominee. He then entered into a contract with the nominee to purchase the house for £ 4,500 which he resold to *P* for £ 5,000. *Held*, *A* was liable to account to *P* not only for the immediate profit of £ 500 but also for 2,500 profit on the previous transaction [*Regier* v. *Campbell Stuart*, (1939) Ch. 766].

If the agent makes a secret profit or takes a bribe from the other party with whom he contracts on behalf of his principal, the principal may—

(*a*) recover the amount of the secret profit from the agent ;

(*b*) refuse to pay the agent his commission or remuneration ;

(*c*) dismiss the agent without notice ;

(*d*) repudiate the contract with the other party.

10. *Not to set up an adverse title.* An agent must not set up his own title or the title of a third person (unless he proves a better title in that person) to the goods which he receives from the principal as an agent. If he does so, he will be liable for conversion (any act in relation to goods of another person which constitutes an unjustifiable denial of his title to them).

11. *Not to put himself in a position where interest and duty conflict.* An agent is under a duty, in all cases, to act in the interest of the principal. He must not put himself in a position where his duty to the principal and his personal interest conflict unless he has made full disclosure of his interest to his principal, specifying its exact nature and obtained his assent.

Example. P employed *A*, a stockbroker, to buy some shares for him. *A* sold his own shares to *P* without disclosing that the shares belonged to him. *Held*, *P* could rescind the contract [*Armstrong* v. *Jackson*, (1977) K.B. 822].

12. *Not to delegate authority.* An agent must not, as a general rule, depute another person to do what he has himself undertaken to do. This is, however, subject to certain exceptions (Sec. 190).

Rights of agent. An agent has the following rights against the principal :

1. *Right of retainer.* The agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of his remuneration and advances made or expenses properly incurred by him in conducting such business (Sec. 217).

2. *Right to receive remuneration.* The agent is entitled to his agreed remuneration, or if there is no agreement, to a reasonable remuneration. But in the absence of any special contract, payment for the performance of any act is not due to the agent until the *completion* of such act (Sec. 219). Now the question is : when is the act complete ? This depends on the terms of the contract.

Examples. (*a*) *A* was appointed an agent to secure orders for advertisements in a newspaper. The commission was agreed to be paid when an advertisement was published. After *A* had obtained orders for certain advertisements, the agency was terminated. *Held*, he was entitled to commission on orders obtained by him although the advertisements were not published [*Sellers* v. *London County Newspapers*, (1951) 1 All E.R. 544].

(*b*) *A* was employed an agent to sell a property on the terms that he would be paid commission on the *completion* of sale. He produced a person ready and willing to buy but the owners refused to sell. *Held*, the agent was not entitled to commission as sale had not been completed [*Luxor (Eastbourne) Ltd.* v. *Cooper*, (1941) A.C. 108].

(*c*) An agent was appointed to introduce a customer to purchase the principal's property. He did introduce one cutomer : the sale was settled and earnest money paid. The sale fell through because of the customer's inability to find money. *Held*, the agent was entitled to his agreed commission [*Sheikh Farid Baksh* v. *Hargulal Singh*, A.I.R. (1937) All. 46].

If a transaction for which the agent claims remuneration is the direct or indirect result of his services or efforts, he is entitled to remuneration.

Example. An agent was appointed to sell a house. He held an auction but could not find a purchaser. One of the persons attending the auction obtained from him the address of the principal and finalised with him the purchase without the agent's intervention. *Held*, the agent was entitled to his commission as the transaction was the result of his efforts [*Green* v. *Barlett*, (1863) 14 C.B. N.S. 681].

An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted (Sec. 220).

Examples. (*a*) *P* employs *A* to recover Rs. 1,00,000 from *T*, and to lay it out on good security. *A* recovers Rs. 1,00,000 and lays out Rs. 90,000 on good security, but lays out Rs. 10,000 on security which he ought to have known to be bad whereby *P* loses Rs. 2,000. *A* is entitled to remuneration for recovering Rs. 1,00,000 and investing Rs. 90,000. He is not entitled to any remuneration for investing Rs. 10,000 and he must make good Rs. 2,000 to *P*.

(*b*) *P* employs *A* to recover Rs. 1,000 from *T*. Through *A*'s misconduct the money is not recovered. *A* is entitled to no remuneration for his services, but must make good the loss to *P*.

(*c*) *P* engaged *A*, an auctioneer, to sell some property on the terms that he should receive £ 50 as commission. *A* sold the property and received in addition £ 20 as commission from the purchaser. *P*, upon discovering this fact, sued to recover this £ 20 and also £ 50 he had paid to *A*. *Held*, he was entitled to recover both sums [*Andrews* v. *Ramsay & Co.*, (1903) 2 K.B. 635].

3. *Right of lien.* In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or immovable, 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 (Sec. 221). This lien of the agent is a *particular lien.* It is confined to claims arising in connection with the goods or property in respect of which the right is claimed. But by a special contract, an agent may have a general lien extending to all claims arising out of the agency.

4. *Right of indemnification.* The agent has a right to be indemnified against the consequences of all lawful acts done by him in exercise of the authority conferred upon him (Sec. 222).

Examples. (*a*) *A*, at Singapore, under instructions from *P* of Calcutta, contracts with *T* to deliver certain goods to him. *P* does not send the goods to *A* and *T* sues *A* for breach of contract. *A* defends the suit and is compelled to pay damages and costs, and incurs expenses. *P* is liable to *A* for such damages, costs and expenses.

(*b*) *A*, an agent, seized goods of *T*, a third party, at the command of *P*, the principal. Although the goods had been seized improperly, it was shown that *A* had acted *bona fide*. *Held*, *A* was entitled to be indemnified [*Toplis* v. *Crane*, (1938) 5 Bing. N.C. 636].

The right of agent to be indemnified does not extend to acts which are known to the agent to be unlawful. Sec. 224 provides in this regard that where, any 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.

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

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

But, where one person employs another to do an act, and the agent does the act in good faith, the agent has a right to be indemnified against the consequences of that act, even though it causes an injury to the rights of a third person (Sec. 223).

Examples. (*a*) *P*, a decree-holder, entitled to execution (carrying into effect the judgment of the Court for recovery of debt) of *T*'s goods requires the officer of the Court to seize certain goods, representing them to be the goods of *T*. The officer seizes the goods and is sued by *O*, the true owner of the goods. *P* is liable to indemnify the officer for the sum which he is compelled to pay to *O* in consequence of obeying *P*'s instructions.

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

5. *Right of compensation.* The agent has a right to be compensated for injuries sustained by him by neglect or want of skill on the part of the principal (Sec. 225).

Example. *P* employs *A* as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up and *A* is in consequence injured. *P* must make compensation to *A*.

6. *Right of stoppage in transit.* This right is available to the agent in the following two cases :

(1) Where he has bought goods for his principal by incurring a personal liability, he has a right of stoppage in transit against the principal, in respect of the money which he has paid or is liable to pay. This right of the agent is similar to that of the unpaid seller.

(2) Where he is personally liable to the principal for the price of the goods sold, he stands in the position of an unpaid seller towards the buyer and can stop the goods in transit on the insolvency of the buyer.

Duties and rights of principal

Duties of principal. The duties of a principal towards his agent are the rights of the agent against the principal. The rights of an agent have already been discussed.

The principal owes the following duties to an agent :

1. *To indemnify the agent against the consequences of all lawful acts.* The principal is bound to indemnify the agent against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him (Sec. 222).

2. *To indemnify the agent against the consequences of acts done in good faith.* 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 causes an injury to the rights of a third person (Sec. 223). Where, however, any 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 (Sec. 224).

3. *To indemnify agent for injury caused by principal's neglect.* The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill (Sec. 225).

4. *To pay the agent the commission or other remuneration agreed.*

Rights of principal. The principal can enforce all the duties of the agent which are indirectly the rights of the principal. When an agent fails in his duty towards the principal, the principal has the following remedies against the agent :

1. *To recover damages.* If the principal suffers any loss due to disregard by the agent of the directions by the principal, or by not following the custom of trade in the absence of directions by the principal, or where the principal suffers due to lack of requisite skill,

care, or diligence on the part of the agent, he can recover damages accruing as a result from the agent.

2. *To obtain an account of secret profits and recover them and resist a claim for remuneration.* If the agent, without the knowledge and assent of the principal, makes any secret profits out of the agency, the principal has the right to recover them from the agent. Not only this, the agent also forfeits his right to any commission in respect of the transaction. Where the agent makes a secret profit, the contract with the third party is not rendered void.

3. *To resist agent's claim for indemnity against liability incurred.* Where the principal can show that the agent has acted as principal himself and not merely as agent, he can resist the agent's claim for indemnity against liability incurred by him in such a transaction.

DELEGATION OF AUTHORITY

The general rule is that an agent is not entitled to delegate his authority to another person without the consent of his principal. '*Delegatus non potest delegare*' is the maxim which means that a person to whom authority has been given, cannot delegate that authority to another. Sec. 190 also prohibits delegation of such authority. This is because when the principal appoints a particular agent to act on his behalf, he relies upon the agent's skill, integrity and competence.

Sub-agent

A 'sub-agent' is a person employed by, and acting under the control of, the original agent in the business of the agency (Sec. 191). This means he is the agent of the original agent. The relation of the sub-agent to the original agent is, as between themselves, that of the agent and principal.

Exceptions. Sec. 190 provides that an agent may appoint a sub-agent and delegate the work to him if—

(*a*) there is a custom of trade to that effect, or

(*b*) the nature of work is such that a sub-agent is necessary.

Examples. (*a*) A banker authorised to let out a house and collect rent may entrust the work to an estate agent [*Mahinder* v. *Mohan* A.I.R. (1939) All. 188].

(*b*) A banker instructed to make payment to a particular person at a particular place may appoint a banker who has an office at that place [*Summan Singh* v. *National City Bank*, A.I.R. (1952) Punj. 172].

There are some more exceptions recognised by the English Law. These exceptions are also recognised in India and are as follows :

(*c*) Where the principal is aware of the intention of the agent to appoint a sub-agent but does not object to it.

(*d*) Where unforeseen emergencies arise rendering appointment of a sub-agent necessary.

(*e*) Where the act to be done is purely ministerial not involving confidence or use of discretion.

(*f*) Where power of the agent to delegate can be inferred from the conduct of both the principal and the agent.

(*g*) Where the principal permits appointment of a sub-agent.

Relationship between principal and sub-agent. As a general rule, an agent cannot delegate his authority to a sub-agent. But in certain exceptional cases, he is permitted to do so. In such cases, the delegation o

authority to a sub-agent is proper. In all other cases, the appointment of a sub-agent is improper. The legal relation between the principal and the sub-agent depends upon the crucial question, as to whether the appointment of the sub-agent is proper or improper.

1. *Where a sub-agent is properly appointed.* (*a*) The principal is bound by the acts of the sub-agent as if the sub-agent were an agent originally appointed by the principal (Sec. 192, para 1).

(*b*) The agent is responsible to the principal for the acts of the sub-agent (Sec. 192, para 2).

Example. *A*, a carrier, agreed to carry 70 bags of cotton waste from Morvi to Bhavnagar by a truck. *A* asked A_1, another carrier, to carry the goods. The goods were damaged in transit. *Held*, *A* was liable even though it was proved that A_1 was the carrier [*Jugaldas* v. *Harilal*, A.I.R. (1956) Guj. 88].

(*c*) The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong (Sec. 192, para 3).

2. *Where a sub-agent is not properly appointed.* Where an agent, without having authority to do so, has appointed a sub-agent, the agent is responsible for the acts of the sub-agent to the principal and to the third parties. The principal, in such a case, is not represented by or responsible for the acts of the sub-agent, nor is the sub-agent responsible to the principal (Sec. 193).

Co-agent or substituted agent

A co-agent or a substituted agent is a person who is named by the agent, on an express or implied authority from the principal, to act for the principal. He 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. He is the agent of the principal, though he is named, at the request of the principal, by the agent (Sec. 194).

Examples. (*a*) *P* directs *A*, his solicitor, to sell his estate by auction and to employ an auctioneer for the purpose. *A* names A_1, an auctioneer, to conduct the sale. A_1 is not a sub-agent, but is *P*'s agent for the conduct of the sale.

(*b*) *P* authorises *A*, a merchant in Calcutta, to recover moneys due to *P* from *T*. *A* instructs A_1, a solicitor, to take legal proceedings against *T* for the recovery of the money. A_1 is not a sub-agent, but is a solicitor for *P*.

In selecting a co-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 is not responsible to the principal for the acts or negligence of the co-agent (Sec. 195).

Difference between sub-agent and substituted agent

1. A sub-agent does his work under the control of the agent whereas a substituted agent works under the instructions of the principal.

2. There is no privity of contract between a sub-agent and the principal. The principal cannot sue the sub-agent directly for any amounts or money. Similarly, a sub-gent cannot sue the principal for his remuneration. He is also not directly answerable to the principal. Both the principal and the sub-agent can sue the agent. In the case of a substituted agent, there is a privity of contract between him and the principal and both can sue each other.

3. The agent is responsible to the principal for the acts of the sub-agent. But he is not responsible to the principal for any act or negligence of the substituted agent.

RELATIONS OF PRINCIPAL WITH THIRD PARTIES

Extent of agent's authority

The authority of an agent means his *right* or *capacity* to bind the principal. According to Sec. 226, the acts of an agent within the scope of his authority bind the principal. The authority of the agent to bind the principal may be—

1. Actual or real authority, or
2. Ostensible or apparent authority.

1. *Actual authority.* Actual authority of an agent is the authority conferred on him by the principal. It may be expressed or implied (Sec. 186).

Express authority. An authority is said to be *express* when it is given by words spoken or written (Sec. 187).

Implied authority. 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 (Sec. 187). An agent, having an authority to do an act, has authority to do every lawful thing which is necessary in order to do such act (Sec. 188, para 1). An agent, having an authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducing such business (Sec. 188, para 2).

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

(*b*) *P* appoints *A* as his agent to carry on his business of a shipbuilder. *A* may purchase timber and other materials and hire workmen for the purpose of carrying on the business.

(*c*) A solicitor was authorised to conduct legal preceedings. He however presented an insolvency petition against a debtor of his principal. *Held*, this was within his authority {*Wallace, Re, ex parte Wallace*, (1884) 14 Q.B.D. 22].

2. *Ostensible authority.* When an agent is employed for a particular business, persons dealing with him can presume that he has authority to do all such acts as are necessary or incidental to such business. Such authority of the agent is called *ostensible* or *apparent* authority as distinguished from *actual* or *real* authority. The scope of an agent's authority is determined by his ostensible authority. If the act of an agent is in excess of his actual authority, but is within the scope of his ostensible authority, the principal will be bound by the act of the agent.

Examples. (*a*) *P* writes to *T* that *A* is authorised to sell his car. *P* privately instructs *A* not to sell the car but merely to obtain *T*'s best offer. *A* sells the car to *T* for Rs. 50,000. The sale is binding on *T*.

(*b*) An estate agent was instructed by owners to find a purchaser for a property. He did so and accepted from the prospective purchaser a deposit *as agent* of the owners. *Held*, although the estate agent was not given authority to accept deposit, he had acted within the scope

the scope of his ostensible authority [*Ryan* v. *Pilkington*, (1959) 1 W.L.R. 403].

(*c*) *P* employed *A* as a manager of his business, and it was incidental to the business that the bills should be drawn and accepted from time to time by the manager, *P*, however, forbade *A* to draw and accept bills. *A* accepted some bills in breach of this prohibition, and *P* was sued upon them. *Held*, *P* was liable [*Edmunds* v. *Bushell & Jones*, (1965) 2 L.R. 1 Q.B. 97].

It is a well-established principle that if a person employs another as an agent in a character which involves a particular authority, he cannot by secret reservation divest him of that authority. But if the third party knows of the limitation of the agent's ostensible authority, the principal will not be liable for such act of the agent.

Examples. (*a*) *P* leaves certain articles with *A*, an auctioneer, asking him not to sell them below a stated price. *A* sells the articles to *T* below the stated price. *T* knows of *P*'s instructions to *A*. *P* can set aside the contract with *T*. But if *T* is ignorant of *P*'s instructions to *A*, *P* cannot set aside the contract with *T*.

(*b*) *O*, the owner of a restaurant, sold the restaurant to *P*. *P* employed *P* as manager. *T*, who knew nothing of this transaction of *P*, sold cigars to *A* for use of the restaurant. *A* had been expressly told by *P* not to purchase cigars on credit. Being unable to obtain payment from *A*, *T* sued *P*. *Held*, (1) as the cigars were such as would usually be dealt in at such a restaurant, *A* was acting within the scope of his implied authority as manager in ordering them ; (2) *P* could not, as against *T*, set up any secret limitation of that authority [*Watteau* v. *Fenwick*, (1893) 1 Q.B. 146].

Agent's authority in an emergency. 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 (Sec. 189).

Position of principal and agent in relation to third parties

The position of a principal and his agent as regards contracts made by the agent with third parties may be discussed under the following three heads :

1. Where the principal's existence and name are disclosed by the agent, *i.e.*, where the principal is named.

2. Where the principal's existence is disclosed but not his name, *i.e.* where the principal is unnamed.

3. Where both the existence and the name of the principal are not disclosed, *i.e.*, where the principal is undisclosed.

1. **Named principal.** The position of the named principal for the acts of his agent is as follows :

(1) *Acts of the agent are the acts of the principal.* The principal is liable for the acts of the agent with third persons provided his acts are done (*a*) within the *scope of his authority*, and (*b*) in the *course of his employment* as an agent. He is also liable for such acts of the agent which are necessary for the proper execution of his (agent's) authority. Sec. 226 further provides that 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.

Example. *A* is *P*'s agent with authority to receive money on his behalf. He receives from *T* a sum of money due to *P*. *T* is discharged of his obligation to pay the sum in question to *P*.

(2) *When the agent exceeds his authority.* When an agent exceeds his authority to do work of the principal, the principal is bound by that part of the work which is within his authority and which can be separated from the part which is beyond his authority (Sec. 227).

Example. *P*, being owner of a ship and cargo, authorised *A* to procure an insurance on the ship. *A* procured a policy on the ship, and another for the like sum on the cargo. *P* is bound to pay the premium for the policy on the ship, but not the premium for the policy on the Cargo [*Bains* v. *Ewing*, (1866) 1 Ex. 343]. If *A* had taken only one policy on the ship and the cargo, *P* would not be bound.

Where an agent exceeds his authority, the principal may repudiate the whole of the transaction if what he (the agent) does beyond the scope of his authority cannot be separated from the rest (Sec. 228).

Example. *P* authorises *A* to buy 10 sheep for him. *A* buys 10 sheep and 20 lambs for one sum of Rs. 6,000. *P* may repudiate the whole transaction.

(3) *Notice given to agent as notice to principal.* The principal is bound by the notice given to or information obtained by the agent in course of the business of the principal (Sec. 229). The principal is also bound by the admissions made by the agent.

Example. *T* took out a policy with *P*, an insurance company, against accidental injury. The proposal form contained a declaration that the proposer did not suffer from any physical infirmity. *T* was blind in one eye. This fact was known to the agent. *T* was illiterate and the agent filled in the form without disclosing *T*'s infirmity. *Held*, the policy was good, as *P* was bound by the knowledge of the agent [*Bawden* v. *The London etc. Insurance Co.* (1892) 2 Q.B. 534].

But where the agent has committed a fraud on his principal, any information obtained by him or notice given to him is not regarded as having been obtained by the principal. In such cases the knowledge of the agent is not imputed to the principal because of the extreme improbability of the agent communicating his fraud to the principal [*Cave* v. *Cave*, (1880) 15 Ch. D. 630].

(4) *Principal inducing belief that agent's unauthorised acts were authorised.* Refer to Sec. 237 discussed under the heading "Agency by Estoppel".

(5) *Misrepresentation or fraud of agent.* The principal is liable for the misrepresentations made or frauds committed by the agent in the course of his business for the principal. Such misrepresentations or frauds have the same effect on agreements made by such agent as if these had been made or committed by the principal. However, misrepresentations made or frauds committed by the agent in matters, which do not fall within his authority, do not affect his principal (Sec. 238).

Examples. (*a*) *A*, being *P*'s agent for the sale of goods, induces *T* to buy them by a misrepresentation, which he was not authorised by *P*

to make. The contract is voidable, between *P* and *T*, at the option of *T*.

(*b*) *A*, the captain of *P*'s ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between *P* and the pretended consignor.

(*c*) *P* instructed his agent, *A*, to reinsure an overdue ship at a certain port. *A* heard that the ship had actually been lost. He did not disclose this fact to the insurer. *Held*, *P* could not recover upon the policy [*Blackburn, Louve Co.* v. *Haslam*, (1888) 21 Q.B.D. 144].

2. **Unnamed principal.** When an agent contracts as an agent for a principal but does not disclose his name, the principal is liable for the contract of the agent, unless there is a trade custom or a term, express or implied, to the effect which makes the agent personally liable. If the third party contracts knowing that there is a principal although his identity is not disclosed, he cannot sue the agent. If, however, the agent declines to disclose the identity of the principal, he will become personally liable on the contract.

3. **Undisclosed principal.** Sometimes, an agent not only conceals the name of the principal but also the fact that he is an agent. This gives rise to the *doctrine of undisclosed principal*. The agent in such a case gives an impression to the third party as if he is contracting in an independent capacity.

Sec. 231 deals with rights of parties to a conract made by an agent for the undisclosed principle. The position of parties to such a contract may be discussed under the following heads :

(*a*) *The position of principal.* When an undisclosed principal is subsequently discovered or he himself intervenes, the other contracting party (if he has not already obtained judgment against the agent) may sue either the principal or the agent or both. The principal may also if he likes require the performance of the contract from the other contracting party (Sec. 231, para 1). But in such a case he must allow to the third party the benefit of all payments made by the third party to the agent.

(*b*) *The position of agent.* As between the principal and the agent, the agent has all the rights of an agent as against the principal ; but as regards the third party, he is personally liable on the contract. He may be sued on the contract and he has the right to sue the third party.

(*c*) *The position of third parties.* (*i*) In a contract with an agent for an undisclosed principal, the third party may elect to sue either the principal or the agent or both.

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

(*ii*) If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who the principal was or that the agent was not the principal, he would not have entered into the contract (Sec. 231, para 2).

(*iii*) The third party can also claim a right of set-off against the agent. Where the principal requires the performance of the contract, he can only obtain such performance as is subject to the rights and obligations subsisting between the agent and the other party to the contract (Sec. 232).

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

(*b*) *A* sold to *T* goods of *P*, an undisclosed principal. When *P* sued *T*, *T* claimed to set off a debt by *A* to *T*. The set-off was allowed [*Rabone* v. *Williams*, (1875) 7 I.T.R. 360]. The set-off will not be allowed if *T* was aware that *A* was an agent although he was not aware of the identity of the principal.

Liability of pretended agent

A person may sometimes untruly represent himself to be the authorised agent of another, and thereby induce a third person to deal with him as such agent. He is, in such a case, liable, if his alleged employer does not ratify his acts, to make compensation to the third person in respect of any loss or damage which he has incurred by so dealing (Sec. 235).

While the third person has the right to claim compensation from the pretended agent, the agent has no right to proceed against that person for the contract. Thus, 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 (Sec. 236).

PERSONAL LIABILITY OF AGENT

The general rule is that only the principal can enforce, and can be held liable on, a contract entered into by the agent *except when there is a contract to the contrary*. Sec. 230 of the Contract Act clearly lays down this rule : "In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them."

An agent is, however, personally liable in the following cases :

1. *When the contract expressly provides.* A person while entering into a contract with an agent may expressly stipulate that he would hold the agent personally liable in case of breach of contract, and if the agent agrees to it, he is personally liable.

2. *When the agent acts for a foreign principal* (Sec. 230, para 2). When the contract is made by an agent for the sale or purchase of goods for a merchant residing abroad, the agent is personally liable. He can exclude his personal liability by express provision to this effect in the contract. If he does so, he cannot be sued on the contract.

3. *When he acts for an undisclosed principal* (Sec. 230, para 2). Where an agent acts for an undisclosed principal, he is personally liable though the principal, on being discovered by the third party, is also liable.

4. *When he acts for a principal who cannot be sued* (Sec. 230, para 2). Where the principal is incompetent to enter into a contract, *e.g.*, where he is a minor or an idiot, the agent is personally liable as the credit is presumed to have been given to the agent and not to the principal.

5. *Where he signs a contract in his own name.* An agent who signs a contract in his own name without qualification (*i.e.*, without disclosing that he is acting as an agent), though known to be an agent, is understood to have contracted personally, unless a contrary intention appears from the body of the instrument.

Example. *A* executed a *hundi* in favour of *T* for a loan taken by him from *T*. The *hundi* purported to be drawn by a firm. *A* did not sign the *hundi* as agent of the firm and did not disclose to *T* the name of the principal who was the proprietor of the firm. *Held*, *A* was personally liable [*Trilok Chand* v. *Rameshwar Lal*, A.I.R. (1975) Pat. 196].

6. *Where he acts for a principal not in existence.* This is a rather peculiar case. The promoters of a company, yet to be incorporated, sometimes enter into contracts on behalf of the company, though in such a case the alleged principal (*i.e.*, the company) has no legal existence till the time of incorporation. In such a case the promoters are held to have contracted on their own account and are personally liable.

7. *Where he is liable for breach of warranty of authority.* Where a person professes to act as an agent but has no authority from the alleged principal or exceeds his authority, he is personally liable for breach of warranty of authority in a suit by the third party with whom he professed to make the contract [*Collen* v. *Wright*, (1857) 7 E. & B. 301].

8. *Where he receives or pays money by mistake or fraud.* Where an agent receives money from a third party by mistake or fraud, he is personally liable to the third party. Likewise, he has the right to sue the third party for the recovery of the money where he has paid it by mistake or under fraud of the third party.

9. *Where his authority is coupled with interest.* When an agent has an interest in the subject-matter of the contract entered into by him with a third party, his authority is coupled with interest. He has, in such a case, the right to sue, or be sued, but only to the extent of his interest in the subject-matter.

10. *Where the trade usage or custom makes him personally liable.* Where there is a trade usage or a custom making the agent personally liable, he is liable unless there is a contract to the contrary.

Right of person dealing with agent personally liable. 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 (Sec. 233).

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

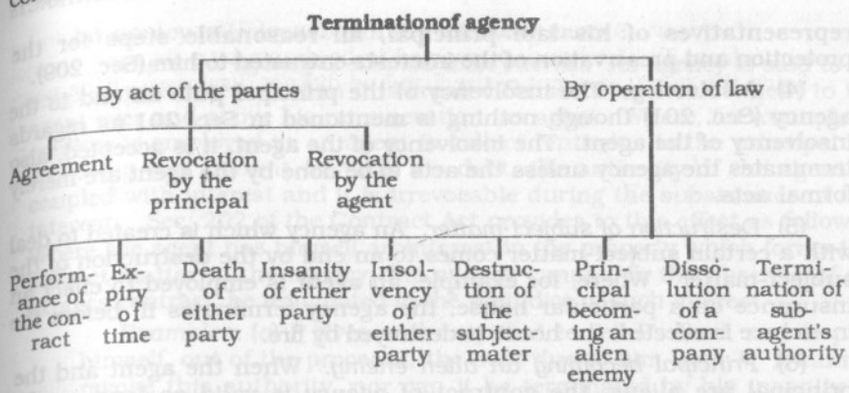
But when a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, he cannot afterwards hold the agent liable. Likewise if he induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold the principal liable (Sec. 234).

TERMINATION OF AGENCY

Sec. 201 describes the modes of termination of agency. The Section is not comprehensive. The various modes of termination of agency as mentioned in Sec. 201 and other modes are indicated in the chart on the next page. In certain cases, the agency is irrevocable.

1. Termination of agency by act of the parties

(1) *Agreement.* The relation of principal and agent like any other agreement may be terminated at any time and at any stage by the mutual agreement between the principal and the agent.



(2) *Revocation by the principal.* The principal may revoke the authority of the agent (Sec. 201) at any time before the agent has exercised his authority so as to bind the principal unless the agency is irrevocable (Sec. 203). But if the act is begun, the authority can only be revoked subject to any claim which the agent may have for breach of contract (Sec. 204). Where the agency is a continuous one, notice of its termination to the agent and also to the third parties is essential.

(3) *Revocation by the agent.* An agency may also be terminated by an express renunciation by the agent after giving a reasonable notice to the principal (Sec. 201).

Where there is an express or implied contract that the agency should be continued for a 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 (Sec. 205). Reasonable notice must be given of such revocation or renunciation, otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other (Sec. 206). Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively (Sec. 207).

Examples. (*a*) *P* employs *A* to let *P* his house. Afterwards *P* lets it himself. This is an implied revocation of *A*'s authority.

(*b*) *A* was appointed agent to do all acts and carry on business on behalf of *P*, the principal, in his absence from India. *Held*, applying Sec. 207, the power should be treated as impliedly revoked when *P* returned to India [*Azam Khan* v. *S. Sattar*, A.I.R. (1978) A.P. 422].

2. Termination of agency by operation of law

(1) *Performance of the contract.* The most obvious mode of putting an end to the agency is to do what the agent has undertaken to do (Sec. 201). Where the agency is for a particular object, it is terminated when the object is accomplished or when the accomplishment of the object becomes impossible.

(2) *Expiry of time.* When the agent is appointed for a fixed period of time, the agency comes to an end after the expiry of that time even if the work is not completed.

(3) *Death and insanity.* When the agent or the principal dies or becomes of unsound mind, the agency is terminated (Sec. 201). When the termination thus takes places the agent must take, on behalf of the

representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him (Sec. 209).

(4) *Insolvency.* The insolvency of the principal puts an end to the agency (Sec. 201) though nothing is mentioned in Sec. 201 as regards insolvency of the agent. The insolvency of the agent, it is accepted, also terminates the agency unless the acts to be done by the agent are merely formal acts.

(5) *Destruction of subject-matter.* An agency which is created to deal with a certain subject-matter comes to an end by the destruction of the subject-matter. Where, for example, an agent is employed to effect an insurance on a particular house, the agency terminates if, before the insurance is effected, the house is destroyed by fire.

(6) *Principal becoming an alien enemy.* When the agent and the principal are aliens, the contract of agency is valid so long as the countries of the principal and the agent are at peace. If war breaks out between the two countries, the contract of agency is terminated.

(7) *Dissolution of a company.* When a company, whether principal or agent, is dissolved, the contract of agency with or by the company automatically comes to and end.

(8) *Termination of sub-agent's authority.* The termination of an agent's authority puts an end to the sub-agent's authority (Sec. 210).

When termination of agent's authority takes effect. The termination of the authority of an agent takes effect, so far as regards the agent, when it becomes known to the agent, and so far as regards the third persons, when it becomes known to them (Sec. 208).

Examples. (*a*) *P* directs *A* to sell goods for him, and agrees to give *A* 5 per cent commission on the price fetched by the goods. *P* afterwards, by a letter, revokes *A*'s authority. After the letter is sent but before *A* receives it, he sells the goods for Rs. 1,000. The sale is binding on *P*, and *A* is entitled to Rs. 50 as his commission.

(*b*) *P*, at Madras, by a letter, directs *A* to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by a letter revokes his authority to sell, and directs *A* to send the cotton to Madras. *A*, after receiving the second letter, enters into a contract with *T* who knows of the first letter , but not of the second, for the sale to him of the cotton. *T* pays *A* the money, with which *A* absconds. *T*'s payment is good as against *P*.

The revocation of agency as regards the agent and as regards the third parties may take effect at different points of time.

If an agent knowingly enters into a contract with a third party after termination of his agency and if the third party deals with him *bona fide*, *i.e.*, without knowing that his authority as agent has been terminated, the agent will bind the principal by his act.

Termination of sub-agency. The sub-agency will be terminated as soon as the main agency is terminated.

Termination of substituted agency. The authority of the substituted agent will not automatically be terminated if the authority of the agent is terminated.

Irrevocable agency

When an agency cannot be terminated or put an end to, it is said to be an irrevocable agency.

An agency is irrevocable in the following cases :

1. *Where the agency is coupled with interest.* An agency is said to be coupled with interest when it is created for securing some benefit to the agent over and above his remuneration as agent. Where, for example, a creditor is employed as an agent to collect rents due to the principal for adjusting the amount towards his debt, the authority of the agent is coupled with interest and it is irrevocable during the subsistence of the interest. Sec. 202 of the Contract Act provides to this effect as follows : Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

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

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

The above rule applies only if the agency is created for the protection of the interest of the agent. It does not apply where the interest arises after the creation of the agency. It is important that the agency is created with the object of securing a benefit to the agent, and it is not sufficent that the agency secures a benefit to the agent incidentally.

Example. *A* was entrusted by *P* with certain wheat to be sold on his (*P*'s) behalf. Subsequently *A* advanced a certain sum of money to *P* which *P* failed to pay. *P* gave orders that the wheat was not to be sold. *A* nevertheless sold it to secure his advance. In an action against *A*, *A* pleaded that the agency, being coupled with interest, was irrevocable. The Court, however held that this was an improper application of the rule, and *A* could not sell the wheat. This is because the agency is not coupled with interest [*Smart* v. *Sandars*, (1848) 5 C.B.895]

2. *Where the agent has incurred a personal liability.* Where an agent incurs a personal liability, the agency becomes irrevocable. The principal cannot, in such a case, revoke the agency leaving the agent exposed to the risk or liability he has already incurred.

3. *Where the agent has partly exercised the authority.* 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 (Sec. 204)

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

SUMMARY

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 such act is done, or who is so represented, is called the '*principal*' (Sec. 182).

Rules of agency. (*a*) Whatever a person competent to contract may do himself, he may do through an agent. (*b*) He, who does through another, does by himself.

The acts of an agent, therefore, are the acts of the principal. This is of course subject to certain conditions.

Who can employ an agent ? 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 (Sec. 183).

CREATION OF AGENCY

The relationship of principal and agent may be created by—

1. *Express agreement, i.e.,* by word of mouth or by an agreement in writing.

2. *Implied agreement i.e.,* by inference from the circumstances of the case. Implied agency includes :

(1) *Agency by estoppel or holding out, i.e.,* when a person, by his conduct or by statement, leads wilfully another person to believe that a certain person is his agent, he is estopped from denying subsequently that that person is not his agent.

(2) *Agency by necessity, i.e.,* when a person acts in some emergency as agent for another without requiring the consent of that other person.

3. *Ratification, i.e.,* when a person subsequently accepts the act of the agent done without his consent. *Ratification is tantamount to prior authority.* It relates back to the date when the act was done by the agent.

RIGHTS AND DUTIES OF AGENT

Rights of agents. 1. Right of retainer. 2. Right to receive remuneration. 3. Right of lien. 4. Right of indemnification. 5. Right of compensation. 6. Right of stoppage in transit.

Duties of agent. 1. To carry out work undertaken according to instructions. 2. To carry out the work with reasonable care, skill and diligence. 3. To render accounts to the principal. 4. To communicate with the principal in case of difficulty 5. Not to deal on his own account. 6. To pay sums received for the principal. 7. To protect and preserve the interests of the principal in case of his death or insolvency. 8. Not to use information obtained in the course of agency against the principal. 9. Not to make secret profit from agency. 10. Not to set up an adverse title. 1. Not to put himself in a position where his interest and duty conflict. 12. Not to delegate authority.

RELATION OF PRINCIPAL WITH THIRD PARTIES

Agent's authority. The authority of an agent means his capacity to bind the principal. This authority may be actual authority or ostensible authority.

Actual authority is the authority conferred on an agent by the principal. It may be expressed or implied (Sec. 186) An agent having authority to do an act has authority to do every lawful thing which is necessary in order to do such act (Sec. 188).

Ostensible or apparent authority is the authority of an agent as it appears to others.

Delegation of authority. The general rule is that an agent cannot delegate his authority to another, *i.e.,* he cannot appoint a sub-agent.

Sub-agent. A 'sub-agent' is a person employed by, and acting under the control of, the original agent in the business of the agency (Sec. 191). A sub-agent, therefore, is the agent of the original agent. The relation of the sub-agent to the original agent is, as between themselves, that of agent and principal.

Substituted agent. A substituted agent is a person who is named by the agent, holding an express or implied authority from the principal, to act for the principal. He is the agent of the principal, though he is named at the request of the principal, by the agent (Sec. 194).

POSITION OF PRINCIPAL AND AGENT IN RELATION TO THIRD PARTIES

1. *Named principal.* Where the agent contracts as agent for a named principal, the principal is (*a*) liable for the acts of the agent with third persons provided the acts are done within the *scope of his authority and in the course of his employment* as an agent, (*b*) liable for the misrepresentations made or frauds committed by the agent in the course of employment, (*c*) bound by the notice given to or information obtained by the agent in the course of the business of the principal and for admissions made by the agent.

2. *Unnamed principal.* The principal is liable for the contracts of the agent, unless there is a trade custom, or a term, express or implied, to the effect which makes the agent personally liable. The legal position is the same as where the principal is named.

3. *Undisclosed principal.* The agent is bound by the contract. He may be sued on it and he has the right to sue the third party. The principal too has the right to intervene and assert his position as an undisclosed party to the contract.

Personal liability of agent. An agent is personally liable where (1) the contract expressly provides ; (2) he acts for a foreign principal ; (3) he acts for a concealed principal ; (4) he acts for a principal who cannot be sued ; (5) he signs a contract in his own name ; (6) he acts for a principal not in existence ; (7) there is breach of warranty ; (8) he receives or pays money by mistake or fraud ; (9) his authority is coupled with interest ; (10) the trade usage or custom makes him personally liable.

TERMINATION OF AGENCY

An agency is terminated (*i*) by the principal revoking agent's authority ; or (*ii*) by the agent renouncing the business of the agency ; or (*iii*) by the business of the agency being completed ; or (*iv*) by either the principal or agent dying or becoming of unsound mind ; or (*v*) when the principal is adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors (Sec. 201).

Irrevocable agency. When an agency cannot be put an end to, it is said to be an irrevocable agency. An agency is irrevocable where (1) it is coupled with interest, (2) the agent has incurred a personal liiability, (3) the agent has partly exercised the authority.

TEST QUESTIONS

1. Define 'agent' and 'principal'. Is consideration needed in a contract of agency ?

2. What is a contract of agency ? What are the essentials of relationship of agency ?

3. What are the various ways in which the relation of agency arises ?

4. What are the different kinds of agents ?

5. Write notes on (*i*) Agency by estoppel, (*ii*) Agency by holding out, and (*iii*) Agency by necessity.

6. On what principle and to what extent can a wife pledge her husband's credit (*i*) while she lives with him, and (*ii*) while she lives apart from him ?

7. What is meant by agency by ratification ? State the conditions that must be fulfilled before the doctrine of ratification can apply to an act of an agent ?

8. State briefly the duties of an agent to the principal. What are his rights against the principal ? What is the degree of skill required of an agent ?

9. What remedies are available to the principal against the agent in the event of the agent failing to carry out the directions of the principal ?

10. What is the extent of the liability of the principal when his agent exceeds authority ?

11. What are the principal's remedies against (*i*) his agent, and (*ii*) against a third party, where the agent is found to have taken a bribe offered to him by the third party ?

12. Explain the effect of a contract made by an agent with a third party—(*a*) where the agent discloses the existence but not the name of the principal ; and (*b*) where the existence of the principal is not disclosed.

13. Define a sub-agent. When can an agent appoint a sub-agent ?

14. When is an agent personally bound by contracts entered into by him on behalf of his principal ?

15. (*a*) Discuss the different modes in which the authority of an agent may terminate.

(*a*) State the effect of death, insanity and insolvency of the principal or agent on a contract of agency.

(*b*) When is an agency irrecovable ?

16. Comment briefly on the following statements :

(*a*) An agent is a superior servant.

(*b*) He who acts through an agent is himself acting.

(*c*) No one can become the agent of another person except by the will of that person.

(*d*) The effect of a contract made by an agent varies according to the circumstances under which the agent contracted.

(e) Ratification is tantamount to prior authority.
(f) Agency is not irrevocable.
(g) A delegate cannot further delegate.

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. *A* enters into a contract with *B* for buying *B*'s car as agent for *C* without *B*'s authority. *B* repudiates the contract before *C* comes to know of it. *C* subsequently ratifies the contract and sues to enforce it. Advise *B*.

[*Hint* : *B* is bound by the contract (*Bolton Partners* v. *Lambert*, Sec. 196)].

2. *A*, a merchant, entrusts *B*, his agent, with a bill of lading relating to certain goods and instructs *B* not to sell the goods for less than a certain price, and not to give credit to *D*. *B* sells the goods to *D* for less than that price and gives *D* three months' credit. Advise *A*.

[*Hint* : *A* is bound by the sale (Sec. 226). He can, however, recover damages from *B* for any loss he may sustain (Sec. 211)].

3. *A* engaged *B*, an auctioneer, to sell some property on the terms that he should receive his due commission of Rs. 500. *B*, however, received secretly Rs. 200 as commission from the purchaser. Discuss the rights of *A* and *B*.

[*Hint* : *A* is entitled to recover from *B* both the sums, *i.e.*, Rs. 500 and Rs. 200 (*Andrews* v. *Ramsay & Co.*)].

4. *X*, who owes *Y* Rs. 500, sells Rs. 1,000 worth of rice to *Y*. *X* is acting as agent for *Z* in the transaction but *Y* has no knowledge nor reasonable ground of suspicion that such is the case. *Z*, the principal, sues *Y* for the price of the rice. *Y* claims to set off *X*'s debt. Examine the nature of *Z*'s claim.

[*Hint* : *Z* cannot compel *Y* to take the rice without allowing him to set off *X*'s debt (Sec. 232)].

5. A power of attorney was given by *A* to *B*, his agent, to present a document for registration. *A* died before the document was presented for registration. The Registrar was aware of the death of *A* and registered the document. Examine the position.

[*Hint* : The document is not validity registered as the Registar knew of the death of *A* (Sec. 209)].

6. *A*, who owes *B* Rs. 20,000, appoints *B* as his agent to sell his landed property at Meerut and after paying himself (*B*) what is due to him, to hand over the balance to *A*. *B* invites offers. (*a*) Can *A* revoke this authority delegated to *B* ? (*b*) Is *B*'s authority terminated if *A* dies or becomes insane ?

[*Hint* : (*a*) No. (*b*) No (Sec. 202)].

7. A policeman, thinking that the driver of a bus was drunk, ordered him to leave the bus. The conductor asked a man in the street to drive the bus to its destination, a kilometre away. He drove the bus negligently and a passenger received injuries. Is the proprietor liable ?

[*Hint* : No, as the conductor cannot delegate authority (Sec. 190)].

8. *A* entrusted to *B* for investment some money which *B*, without the knowledge of *A*, used in his own business. *B* continued to pay *A* interest on the said money at the bank rate but earned profits in his business at a much higher rate. What rights, if any, has *A* against *B* ?

[*Hint* : *A* can recover from *B* the profit which *A* has earned by using the money in his own business (Sec. 211)].

9. *A*, at Bombay, directs *B*, by a letter, to sell for him his furniture lying with a friend in Delhi. Afterwards *A* revokes by a letter his authority to *B* to sell, and instructs him to send furniture to Bombay. *B*, after receiving the second letter, sells the furniture to *C*, who knew of the first letter but not of the second. *C* pays *B* the price with which *B* absconds. Is *C*'s payment good against *A* ?

[*Hint* : Yes (Sec. 208].

10. *A* agreed to act as the agent of *B* for the purchase of a house. He bought the house for Rs. 10,000 in the name of his nominee, *C*. Subsequently he purported to purchase it from *C* for Rs. 20,000. He then offered the house to *P* for Rs. 20,000 telling *B* that he himself had paid Rs. 20,000 for it to *C*. *B* paid Rs. 20,000 to *A*. State briefly the rights, if any, of *B* against *A*.

[*Hint* : *B* can recover Rs. 10,000 from *A* (Sec. 216)].

11. *P* Ltd. invited tenders for the supply of cotton. *A* agreed with *P*, the manager of *P* Ltd., that he would pay him Rs. 100 per bale of cotton if his tender was accepted. *A* accordingly quoted a price higher by Rs. 100 per bale than he would otherwise have done. *A*'s tender was accepted. Discuss the rights of *P* Ltd. when it discovers the fact about *A*'s tender.

[*Hint* : *P* Ltd. can recover Rs. 100 per bale received by *A* as damages (*Salford Corpn.* v. *Lever*, (1981) 1 Q. B. 168 ; Sec. 216)].

12. *A*, professing to act for a joint stock company about to be incorporated, enters into a contract with *B* on its behalf as agent. After incorporation the company passes a resolution adopting *A*'s transaction. (*a*) Is the company liable on the contract ? (*b*) If not, is *A* liable to *B* ?

[*Hint* : (*a*) No. (*b*) Yes (*Kelner* v. *Baxter*)].

13. *P*, a solicitor, entrusted all his work to his clerk and rarely attended to it himself. The clerk induced a client to sign a conveyance of his property under the impression that it was merely a power of attorney. Later he sold the property and absconded with the money. The client sues *P*. Is *P* liable ?

[*Hint* : Yes (Sec. 288 : *Lloyd* v. *Grace Smith* & Co., (1912) A.C. 716)].

14. *D*, a carrier, discovers that a consignment of tomatoes owned by *E* has deteriorated badly before the destination was reached. He, therefore, sells the consignment for what he can get; this is about a third of the market price for good tomatoes. *E* sues *D* for damages. *D* claims he was an agent of necessity. Advise him.

[*Hint* : *D*, as an agent of necessity, is not liable (Sec. 189)].

15. A picture dealer in Mumbai sends pictures to an agent in Delhi, some being for sale and some for exhibition only. The dealer shortly afterwards revokes the agent's authority either to sell or to exhibit the pictures and directs him to return them. In defiance of these instructions, the agent pledges the pictures with a pawnbroker. Is the pledge valid ?

[*Hint* : Yes, provided the pawnbroker was acting *bona fide* (Sec. 178)].

16. Sandars, who was a corn factor, was entrusted by Smart with a certain quantity of wheat to sell on his behalf. Sandars subsequently advanced the sum of £ 3,000 to Smart, which Smart failed to repay, Smart gave orders that the wheat was not to be sold. Notwithstanding this. Sandars sold it to secure his advance. In an action against him. Sandars pleaded that the agency was irrevocable. Decide.

[*Hint* : The plea of Sandars is wrong for the money was advanced subsequent to the agency agreement (Sec. 202 : *Smart* v. *Sandars*]

17. *P* appoints *A*, a minor, to sell his bicycle for cash for a price not below Rs. 400. *A* sells it to *T* for Rs. 280. Explain the position of *A* and *T*.

[*Hint* : *T* gets a good title to the bicycle. *A* is not liable to *P* for his negligence in the performance of his duties (Sec. 184)].

18. At a sale by auction without reserve the auctioneer is instructed not to sell for less than a certain price. The auctioneer accepts the highest *bona fide* bid which is lower than that price. (*a*) Is the auction valid ? (*b*) Is the auctioneer liable to the principal for the loss ?

[*Hint* : (*a*) Yes. (*b*) Yes (Sec. 211)].

19. *A*, without *B*'s authority, lends *B*'s money to *C*. Afterwards *B* accepts interest on the money from *C*. Discuss the rights of *A*, *B* and *C*.

[*Hint* : The acceptance of interest by *B* amounts to implied ratification by *B* of *A*'s act of lending money to *C* (Sec. 197)].

20. A who had appointed *B* as agent to sell his house, revokes *B*'s authority and informs *B* about it. Notwithstanding the revocation, *B* enters into a contract to sell the house to *C* and takes an advance of Rs. 10,000 from *C* and absconds with the money. Examine the rights of *A*, *B* and *C*.

[*Hint* : If *C* deals with *B bona fide*, *A* will be bound (Sec. 208)].

21. *A* instructs *B*, a merchant, to buy a ship for him. *B* employes a ship surveyor to choose a ship for *A*. The surveyor makes the choice negligently, and the ship turns out to be unseaworthy and is lost. *A* sues *B* for damages. Give your decision.

[*Hint* : *B* is not liable for the loss to *A* (Sec. 195). The surveyor however is].

22. *P* employs *A* as his agent in selling his (*Ps*) gold watch. *A* is instructed to sell the watch for not less than Rs. 400. *A buys* the watch himself and hands over Rs. 400 to *P*, who is quite satisfied with the price and does not ask for the name of

buyer. *P* discovers the identity of the buyer a few weeks later after *A* has resold the watch for Rs. 600. Can *P* claim Rs. 200 from *A*?

[*Hint* : Yes, as *A* is in a fiduciary relation with *P*].

23. *A* being *B*'s agent for the sale of goods induces *C* to buy them by a misrepresentation which he was not authorised to make. Explain the effect of the contract between *B* and *C*.

[*Hint* : The agreement between *B* and *C* is voidable at the option of *C*, provided *A* acts within the scope of his ostensible authority (Sec. 238)].

24. *P* instructed his agent *A* to sell a picture at a named price. *P* died. Afterwards, before the fact of his death became known to *A*, *A* sold and delivered the picture. Was this sale binding on *P*s executors?

[*Hint* : Yes, as the revocation of *A*'s authority on the death of *P* takes effect from the time the death of *P* becomes known to *A* (Sec. 209)].

25. *A* consigns goods to *B* for sale and gives him instructions not to sell under a fixed price. *C* enters into a contract with *B* to buy the goods at a price lower than the reserve price. Is *A* bound by the contract?

[*Hint* : Yes. *A* is bound by the contract as *B* is acting within the scope of his ostensible authority. He can however claim damages from *A*].

26. *B* rents out his house to *A* and the contract is terminable on three months' notice. *C*, without *B*'s authority, gives notice of termination to *A*. *B* ratifies the notice and files a suit for ejectment. Is *B* entitled to get decree?

[*Hint* : No. The notice cannot be ratified by *B* so as to be binding on *A* (Sec. 200)].

27. *A* enters into a contract with *B* to sell him 100 bales of cotton and afterwards discovers that *B* was acting as agent of *C*. Advise *A* as to the person against whom he should bring a suit for the price of the cotton.

[*Hint* : *A* may sue either *B* or *C* or both for the price of the cotton (Sec. 231)].

28. *A*, not being authorised thereto by *P*, demands on behalf of *P* the delivery of a chattel, the property of *P*, from *T* who is in possession of it. *T* refuses to deliver. Can *P* ratify the demand and render *T* liable for non-delivery?

[*Hint* : No, as the ratification would subject *T* to damages for his refusal to deliver the chattel to *A* (Sec. 200)].

29. *N* gave his wife authority to buy goods from *D*. *N* became insane, but the wife continued to buy from *D*, who did not know of *N*'s insanity. Is *N* liable to *D*?

[*Hint* : Yes. *N* continues to be liable unless the termination of the authority of the wife by the insanity of *N* becomes known to *D* (Sec. 209)].

30. *Z*, a wholesale cloth dealer, appoints *Y* as his agent for the sale of cloth on the basis of 5 per cent commission on the sale made by him. *Y* had an agreement with his principal *Z* that he (*Y*) could retain part of the sale amount of goods to adjust the commission due to him. *Z* terminates the agency of *Y*. *Y* refuses to hand over the cloth in his possession to *Z* and claims that he is vested with authority coupled with interest, and that agency cannot be terminated. How would you decide?

[*Hint* : The agency can be terminated by *Z* and *Y*'s plea is wrong].

31. *P* sends his agent *A* to buy certain goods on credit for him. Later, he pays for the goods. On another occasion, he again sends *A* to buy goods but pays suficient amount to *A* for the purpose. *A*, however, buys goods on credit from the old merchant. After some time, *A* runs away. Is *P* bound to pay the merchant?

[*Hint* : Yes. *P* is bound to pay on the ground of holding out].

32. *B*, a broker at Calcutta, by the order of *A*, a merchant of Singapore, 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 is unsuccessful and has to pay damages and costs and incurs expenses. Examine the liability of *A* to *B* for such damages, costs and expenses.

[*Hint* : *A* is liable to *B* for damages, costs and expenses (Sec. 222)].

33. *Z* instructs his lawyer in another town to engage an estate agent to sell his house in that town. Accordingly, the lawyer selects *B*, the leading estate agent of the town, for the purpose. *B* is able to sell the house for a good price. But he delays to remit the purchase amount to *Z* and meanwhile becomes insolvent. *Z* holds his lawyer responsible for the loss. How would you decide? State your reasons.

[*Hint* : *Z* cannot hold his lawyer responsible for the loss as *B* is the substituted agent of *Z* (Sec. 194)].

4-1

Sale of Goods

The sale of goods is the most common of all commercial contracts. A knowledge of its main principles is of the utmost importance to all classes of the community. The law relating to it is contained in the Sale of Goods Act, 1930. Prior to this Act, the law of sale of goods was contained in Chapter VII of the Indian Contract Act, 1872.

Contracts for the sale of goods are subject to the general legal principles applicable to all contracts, such as offer and its acceptance, the capacity of the parties, free and real consent, consideration, and legality of the object. The general provisions of the Indian Contract Act continue to apply to contracts for the sale of goods in so far as they are not inconsistent with the express provisions of the Sale of Goods Act (Sec. 3). Thus, for example, if there is a breach of contract of sale, the measure of damages is that prescribed in Secs. 73 and 74 of the Contract Act. A contract of sale, however, has some special features which are not common to all contracts. Thus, what conditions or warranties are implied in the contract, when does the ownership of the goods sold pass to the buyer, in what circumstances does a buyer acquire a good title, what are the special duties of the seller and the buyer in respect of the goods and of the price, what are the rights of a seller who has not received the price, what are the remedies of the buyer if the goods are not delivered to him : all these are matters with which the general law of contract is not concerned.

The expressions used but not defined in the Sale of Goods Act, 1930 and defined in the Contract Act, 1872 have the meanings assigned to them in the Contract Act [Sec. 2 (15)].

Sections referred to in Chapters 4-1 to 4-5, unless otherwise indicated, are the Sections of the Sale of Goods Act, 1930.

FORMATION OF CONTRACT OF SALE

Contract of sale of goods

A contract of sale of goods is a contract whereby the seller *transfers* or *agrees to transfer* the *property in goods* to the buyer for a *price*. There may be a contract of sale between one part-owner and another [Sec. 4 (1)]. A contract of sale may be absolute or conditional [Sec. 4 (2)].

The term 'contract of sale' is a generic term and includes both a *sale* and an *agreement to sell*.

Sale and agreement to sell. Where under a contract of sale, the *property* in the goods is *transferred* from the seller to the buyer, the contract is called a '*sale*', but where the *transfer* of the property in the goods is *to take place* at a *future time* or subject to some *conditions* thereafter *to be fulfilled*, the contract is called an '*agreement to sell*' [Sec. 4 (3)]. An agreement to sell becomes a sale when the time elapses or the conditions, subject to which the property in the goods is to be transferred are fulfilled [Sec. 4 (4)].

Transfer of property in goods for a price is the linchpin of the definition of contract of sale [*Union of India* v. *Central India Machinery*

Mfg. Co., A.I.R. (1977) S.C., 1537]. 'Property' means the general property in goods, and not merely a special property [Sec. 2 (11)]. In other words, it means 'the right of ownership'. When we say that the property in goods has passed from the seller to the buyer. it means that the seller ceases to be, and the buyer becomes, the owner of the goods.

Essentials of a contract of sale. The following essential elements are necessary for a contract of sale :

1. *Two parties.* There must be *two distinct parties. i. e.,* a buyer and a seller, to effect a contract of sale and they must be competent to contract. '*Buyer*' means a person who buys or agrees to buy goods [Sec. 2 (1)]. 'Seller' means a person who sells or agrees to sell goods [Sec. 2 (13)]. These two terms are complimentary.

Example. A partnership firm was dissolved and the surplus assets. including the stock-in-trade, were divided among the partners, *in specie* (in the same form). *Held*, it was not a sale as the partners themselves were the joint owners of the goods and they could not be both sellers and buyers [*State of Gujarat* v *Raman Lal & Co.*, A.I.R. (1965) Guj. 60].

2. *Goods.* There must be some *goods* the property in which is or is to be transferred from the seller to the buyer. The goods which form the subject-matter of the contract of sale must be *movable*. Transfer of immovable property is not regulated by the Sale of Goods Act.

Example. A hotel company provided residence and food making a consolidated charged for both the services. No rebate was allowed if food was not taken by the customers. *Held*, supply of food was not sale of goods but simply a service as the transaction was an indivisible contract of multiple services and did not involve any sale of food [*Associated Hotels of India* v. *Excise & Taxation Officer*, A.I.R. (1996) Punj. 449]. It was observed in this case that the "Position is akin to that of a steamship or airline company which serves food to passengers".

3. *Price.* The consideration for the contract of sale, called price, must be *money*. When goods are exchanged for goods, it is not a sale but a barter. There is, however, nothing to prevent the consideration from being partly in money and partly in goods [*Sheldon* v. *Cox*, (1824) 3 B. & C. 420].

Example . *A* agreed to exchange with *B* 100 quarters of barley at £ 2 per quarter for 52 bullocks valued at £ 6 per bullock and pay the difference in cash. *Held*, the contract was a contract of sale [*Aldridge* v. *Johnson*, (1857) 7 E. & B. 385].

4. *Transfer of general property.* There must be a *transfer of general property* as distinguished from *special property* in goods from the seller to the buyer. If *A* owns certain goods, he has general property in the goods. If he pledges them with *B*, *B* has special property in the goods.

5. *Essential elements of a valid contract.* All the *essential elements of a valid contract* must be present in the contract of sale.

Contract of sale how made. No particular form is necessary to constitute a contract of sale. It is, like any other contract, made by the ordinary method of offer (to buy or sell goods) by one party and its acceptance (to sell or buy goods respectively) by the other party. It may be made in writing or by word of mouth, or partly in writing and partly by word of mouth. It may also be implied from the conduct of the parties [Sec. 5 (2)]. or from the course of dealing between the parties.

The contract of sale may provide for the immediate delivery of the goods, or immediate payment of the price or both, or for the delivery or payment by instalments or that the delivery or payment or both shall be postponed [Sec. 5 (1)].

Sale and agreement to sell—distinction

1. *Transfer of property.* In a sale, the property in the goods passes from the seller to the buyer immediately so that the seller is no more the owner of the goods sold. In an agreement to sell, the transfer of property in the goods is to take place at a future time or subject to certain conditions to be fulfilled. In this sense, a sale is an *executed contract* and an agreement to sell is an *executory* contract.

2. *Type of goods.* A sale can only be in case of existing and specific goods only. An agreement to sell is mostly in case of future and contingent goods although in some cases it may refer to unascertained existing goods.

3. *Risk of loss.* In a sale, if the goods are destroyed, the loss falls on the buyer even though the goods are in the possession of the seller. In an agreement to sell, if the goods are destroyed, the loss falls on the seller, even though the goods are in the possession of the buyer.

4. *Consequences of breach.* In a sale, if the buyer fails to pay the price of the goods or if there is a breach of contract by the buyer, the seller can sue for the price even though the goods are still in his possession. In an agreement to sell if there is a breach of contract by the buyer, the seller can only sue for damages and not for the price even though the goods are in the possession of the buyer.

5. *Right to re-sell.* In a sale, the seller cannot re-sell the goods (except in certain cases, as for example, a sale by a seller in possession after sale under Sec. 30, or a sale by an unpaid seller under Sec. 54). If he does so the subsequent buyer does not acquire title to the goods. In an agreement to sell, in case of re-sale, the buyer, who takes the goods for consideration and without notice of the prior agreement, gets a good title. In such a case, the original buyer can only sue the seller for damages.

6. *General and particular property.* A sale is a contract plus conveyance, and creates *jus in rem* , *i.e.*, gives right to the buyer to enjoy the goods as against the world at large including the seller. An agreement to sell is merely a contract, pure and simple, and creates *jus in personam*, *i.e.*, gives a right to the buyer against the seller to sue for damages.

7. *Insolvency of buyer.* In a sale, if the buyer becomes insolvent before he pays for the goods, the seller, in the absence of a lien over the goods, must return them to the Official Receiver or Assignee. He can only claim a rateable dividend for the price of the goods. In an agreement to sell, if the buyer becomes insolvent and has not yet paid the price, the seller is not bound to part with the goods until he is paid for.

8. *Insolvency of seller.* In a sale, if the seller becomes insolvent, the buyer, being the owner, is entitled to recover the goods from the Official Receiver or Assignee. In an agreement to sell, if the buyer, who has paid the price, finds that the seller has become insolvent, he can only claim a rateable dividend and not the goods because property in them has not yet passed to him.

Sale and hire-purchase agreement. A hire-purchase agreement is a contract whereby the owner of the goods lets them on hire to another person called hirer or hire purchaser on payment of rent to be paid in instalments and upon an agreement that when a certain number of such instalments is paid, the property in the goods will pass to the hirer. The hirer may return the goods at any time without any obligation to pay the balance rent. A hire-purchase agreement is not a contract of sale but only a bailment and the property in the goods remains in the owner during the continuance of the bailment. In other words, it is a *bailment plus an agreement to sell.*

Whether an agreement is a hire-purchase agreement or a contract of sale, the test would be whether or not any option has been given to the hirer to terminate the contract. If the answer is in the affirmative, it would be a hire-purchase agreement and if the answer is in the negative it would be a contract of sale. The hirer must not, however, be compelled to exercise the option. But where a buyer has no right to terminate the agreement and is bound to pay the price, the agreement is a contract of sale.

Example. *B* hires a piano from *H* on an agreement that *B* should pay £ 20 a month as rent. The stipulation is that if he regularly pays the rent for 36 months the piano becomes his property at the end of 36 months. Further it is provided that *B* can return the piano at any time and he need not pay any more. This is a hire-purchase agreement proper. If, however, it is agreed that 36 months' rent must be paid and that he cannot return the piano, the agreement is a contract of sale and not a hire-purchase agreement [*Helby* v. *Mathews*, (1895) A.C. 471].

Distinction between a sale and a hire-purchase agreement

Sale	*Hire-purchase agreement*
1. Ownership is transferred from the seller to the buyer as soon as the contract is entered into.	1. Ownership is transferred from the seller to the hire-purchaser only when a certain agreed number of instalments is paid.
2. The position of the buyer is that of the owner.	2. The position of the hire-purchaser is that of the bailee.
3. The buyer cannot terminate the contract and as such is bound to pay the price of the goods.	3. The hire-purchaser has an option to terminate the contract at any stage, and cannot be forced to pay the further instalments.
4. If the payment is made by the buyer in instalments, the amount payable by the buyer to the seller is reduced, for the payment made by the buyer is towards the price of the goods.	4. The instalments paid by the hire-purchaser are regarded as hire charges and not as payment towards the price of the goods till option to purchase the goods is exercised.

The hire-purchase agreements are governed by the Hire-Purchase Act, 1972.

Sale and barter or exchange. Where the property in goods is transferred from the seller to the buyer for a price, it is called a sale. Where goods are exchanged for goods, the transaction is called a barter and not sale. Where money is exchanged for money, it is a transaction of exchange and not of sale. But if the consideration for transfer of property

in goods consists partly of goods and partly of money, the contract is a sale.

Sale and bailment. In a sale, the property in goods is transferred from the seller to the buyer. In a bailment, there is only transfer of possession from the bailor to the bailee. This may be for any one of the objects, namely, safe custody, use, carriage from one place to another, etc. In a sale, the buyer can deal with the goods in any way he likes. The bailee can deal with the goods according to the directions of the bailor.

Sale and contract for work and materials. The Sale of Goods Act applies to a contract of sale and not to a contract for work and materials. A contract of sale contemplates the delivery of goods whereas a contract for work and material involves exercise of skill and labour by one party in respect of materials supplied by another, the delivery of goods being only subsidiary or incidental [*State of Gujarat* v. *Variety Body Builders*, A.I.R. (1976) S.C. 2109].

Examples (*a*) A dentist agreed to supply a set of artificial teeth to a patient. The material was wholly found by the dentist. *Held*, the contract was for the sale of goods [*Lee* v. *Griffin*, (1861) 3 L.J.Q.B. 252].

(*b*) A contract involved the repair of a car and the supply of parts for that purpose. *Held*, it was a contract for work and materials [*Myers & Co.* v. *Brent Cross Services Co.*, (1934) 1 K.B. 46].

(*c*) *G* commissioned *R*, an artist, to paint a portrait of *A* for 250 guineas. *R* supplied the canvas and other materials. *Held*, the contract was one for work and materials and not for sale of goods because the substance of the contract was the artist's skill and it was only ancillary to that there would pass to the customer some materials, namely, the paint and canvas [*Robinson* v. *Graves*, (1935) 1 K.B. 579]. In contrast, however, note the following case :

(*d*) *F* contracted for the sale of a fur coat of a special design and colour to a customer's requirements. *Held*, it was a sale of goods notwithstanding the degree of skilled work and labour involved in its production [*Marcel* v. *Furriers Tapper*, (1953) All E.R. 15].

SUBJECT-MATTER OF CONTRACT OF SALE

Goods form the subject-matter of a contract of sale. According to Sec. 2 (7), '*goods*' means *every kind of movable property* other than actionable claims and money ; and includes stocks and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Trade marks, copyrights, patent rights, goodwil, electricity, water, gas are all goods.

Actionable claims and money are not goods. An actionable claim means a claim to any debt or any beneficial interest in movable property not in possession (Sec. 3 of the Transfer of Property Act, 1882). It is something which can only be enforced by action in a Court of law. A debt due from one person to another is an actionable claim and cannot be bought or sold as goods. It can only be assigned. Money here means current money and not old rare coins.

The definition of the term 'goods' also suggests that it includes stocks and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed from the land before sale. Growing crops and grass are included in the definition of the term goods because they are to be severed from land. Trees which are agreed to be

severed before sale or under the contract of sale are goods [*Badri Prasad* v. *State of M.P.*, A.I.R. (1970) S.C. 706].

Classification of goods. The goods which form the subject of a contract of sale may be either existing goods, or future goods [Sec. 6 (1)], or contingent goods [Sec. 6 (2)].

1. *Existing goods.* These are the goods which are *owned* or *possessed* by the seller at the time of sale. Only existing goods can be the subject of a sale. The existing goods may be—

(1) *Specific goods.* These are goods which are *identified* and *agreed upon* at the time a contract of sale is made [Sec. 2 (14)] as, for example, a specified watch, dog or horse. Goods are, however, not specific merely because the source of supply is identified, *e.g.*, "500 quintals from 1,000 quintals on board".

(2) *Ascertained goods.* Though commonly used as similar in meaning to specific goods, these are the goods which become ascertained subsequent to the formation of a contract of sale.

(3) *Unascertained or generic goods.* These are the goods which are not *identified* and *agreed upon* at the time of the contract of sale. They are defined only by description and may from part of a lot.

Example. A who wants to buy a television set goes to a showroom where four sets of Janta model of Oscar television are displayed. He sees the performance of a particular set, which he agrees to buy. The set so agreed to be bought is a *specific* set. If after having bought one set he marks a particular set, the set so marked becomes *ascertained.* Till this is done, all sets are *unascertained.*

2. *Future goods.* These are the goods which a seller *does not possess* at the time of the contract but which will be manufactured or produced or acquired by him after the making of the contract of sale [Sec. 2 (6)]. A contract of present sale of future goods, though expressed as an actual sale, purports to operate as an agreement to sell the goods and not a sale [Sec. 6 (3)]. This is because the ownership of a thing cannot be transferred before that thing comes into existence.

Example. A railway administration entered into a contract for sale of coal-ash that might accumulate during the period of contract. *Held*, the contract amounted to an agreement to sell [*Union of India* v. *Tara Chand*, A.I.R. (1976) M.P. 101].

3. *Contingent goods.* Though a type of future goods, these are the goods the *acquisition* of which by the seller *depends upon a contingency* which may or may not happen [Sec. 6 (2)].

Example. A agrees to sell specific goods in a particular ship to *B* to be delivered on the arrival of the ship. If the ship arrives but with no such goods on board, the seller is not liable, for the contract is to deliver the goods should they arrive.

Contingent and future goods. The procurement of contingent goods depends upon a contingency whereas it is not so in case of future goods. On non-acquisition of contingent goods, the parties are discharged whereas on non-acquisition or non-production of future goods the parties are not discharged.

Effect of destruction of goods

1. *Goods perishing before making of contract* (Sec. 7). A contract for the sale of *specific goods* is void if at the time when the contract was made,

the goods have, without the knowledge of the seller, perished. The same would be the case where the goods become so damaged as no longer to answer to their description in the contract. This rule is based on the ground of mutual mistake or impossibility of performance [*Couturier* v. *Hastie*, (1856) 5 H.L.C. 673].

Examples. (*a*) *A* agrees to sell a horse to *B* who tells *A* that he (*B*) needs the horse for riding to Mumbai immediately. The horse is ill at the time of the agreement. Both *A* and *B* are ignorant of this fact. The agreement is void.

(*b*) A cargo of dates was sold. The dates were contaminated with sea water so as to be unsaleable as dates, though they could be used for making spirits. *Held*, the contract was void as the dates no longer answered their decription in the contract [*Asfar & Co.* v. *Blundell*, (1896) 1 Q.B. 123].

The contract is also void in the case of an indivisible lot of specific goods if only a part of the goods has perished at the time when the contract is made.

Example. A sold to *B* 700 bags of Chinese groundnuts identified by marks and lying in a named warehouse. Unknown to *A*. 109 bags had been stolen at the time of the sale. *A* tendered delivery of 591 bags. *Held*, the sale was void and *B* could not be compelled to take the remainder [*Barrow, Lane & Ballard Ltd.* v. *Philips & Co.*, (1929) I K.B. 574].

The same result obtains where the seller has been irretrievably (that cannot be recovered) deprived of the goods as, for example, when the goods have been stolen or lawfully requisitioned by the Government or seized by enemy during war.

2. *Goods perishing after the agreement to sell but before the sale is effected* (Sec. 8). An agreement to sell *specific goods* becomes void if subsequently the goods, without any fault on the part of the seller or buyer, perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer. 'Fault' means wrongful act or default [Sec. 2 5)]. This rule is based on the ground of impossibility of performance [*Howell* v. *Coupland*, (1876) Q.B.D. 258].

Secs. 7 and 8 apply *only* to specific goods and *not* to unascertained goods. If the agreement is to sell a certain quantity of unascertained goods, the perishing of even the whole quantity of such goods in the possession of the seller will not relieve him of his obligation to deliver the goods.

Example. A agrees to sell to *B* 10 bales of Egyptian cotton out of 100 bales lying in his godown. The godown had been destroyed by fire at the time of the contract. Both *A* and *B* are unaware of this fact. The contract is not void as the sale here is not of specific goods, but of a certain quantity of unascertained goods. A must supply 10 bales of cotton or pay damages for the breach.

Document of title to goods

A document of title to goods is one which enables its possessor to deal with the goods described in it as if he were the owner. It is used in the ordinary course of business as proof of the possession or control of goods. It authorises, either by endorsement or by delivery, its possessor to transfer or receive goods represented by it [Sec. 2 (4)]. It symbolises the goods and confers a right on the purchaser to receive the goods or to

further transfer such right to another person. This may be done by mere delivery or by proper endorsement and delivery.

Conditions to be fulfilled by a document of title to goods. (1) It must be used in the ordinary course of business.

(2) The undertaking to deliver the goods to the possessor of the document must be unconditional.

(3). The possessor of the document, by virtue of holding such document, must be entitled to receive the goods unconditionally.

Some instances of documents of title to goods are given below :

1. *Bill of lading.* It is a document which acknowledges receipt of goods on board a ship and is signed by the captain of the ship or his duly authorised representative.

2. *Dock warrant.* It is a document issued by a dock owner, giving details of the goods and certifying that the goods are held to the order of the person named in it or endorsee. It authorises the person holding it to receive possession of the goods.

3. *Warehouse-keeper's or wharfinger's certificate.* It is a document issued by a warehouse-keeper or a wharfinger stating that the goods specified in the document are in his warehouse or in his wharf.

4. *Railway receipt.* It is a document issued by a railway company acknowledging receipt of goods. It is to be presented by the holder or consignee at the destination to take delivery of the goods.

5. *Delivery order.* It is a document containing an order by the owner of the goods to the holder of the goods on his behalf, asking him to deliver the goods to the person named in the document.

THE PRICE (Secs. 9 and 10)

The "price" in a contract of sale means the money consideration for sale of goods [Sec. 2 (10)]. It forms an essential part of the contract. It must be expressed in money. It is the consideration for the transfer or agreement to transfer the property in goods from the seller to the buyer. It is not essential that the price should be fixed at the time of sale. It must, however, be payable, though it may not have been fixed.

Ascertainment of price. Price in a contract of sale may be (*a*) fixed by the contract itself, or (*b*) left to be fixed in an agreed manner, or (*c*) determined by the course of dealing between the parties [Sec. 9 (1)]. In the absence of this, the buyer must pay to the seller a *reasonable price.* What is a reasonable price is a question of fact dependent on the circumstances of each particular case [Sec. 9 (2)]. It is not necessarily the market price.

Agreement to sell at valuation. The parties may agree to sell and buy goods on the terms that price is to be fixed by the valuation of a third party. if such third party cannot or does not make such valuation, the agreement becomes void. But if the goods or any part thereof have been delivered to, and appropriated by the buyer, he shall pay a reasonable price therefor [Sec. 10 (1)]. If the third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault [Sec. 10 (2)].

Example. A agrees to sell certain goods to *B* at a price to be fixed by *C*. If *C* refuses to value the goods and fix the price, the agreement is avoided. If, however, *C* is willing to value the goods, but is prevented from making the valuation by the wrongful act or fault of *A* or *B*, the party in fault is liable in damages to the party not in fault.

Earnest. Quite often in a contract of sale the buyer may give some tangible thing as a token of good faith as a guarantee or security for the due performance of the contract [*Howe* v. *Smith*, (1884) 27 Ch. D. 89]. This is known as *earnest.* If the contract is duly performed, the earnest is returned or if it is in the form of money it is adjusted against the purchase price. If the contract is not, or cannot be, performed through the default of the buyer, the buyer forfeits the earnest, unless otherwise agreed.

An 'earnest' must be distinguished from part payment. It is forfeited if through the buyer's default, the contract goes off. But if there has been a part payment, and the contract goes off through the buyer's default, the buyer may recover the part payment ; but he remains liable to the seller for such damages as the seller has sustained by reason of the breach.

STIPULATIONS AS TO TIME (Sec. 11)

Stipulations as to time in a contract of sale may be—

1. *Stipulations relating to time of payment.* These are not of the essence of a contract of sale, unless a different intention appears from the contract.

2. *Stipulations not relating to time of payment, e.g.,* delivery of goods, etc. As regards these stipulations, time may be of the essence of the contract but this essentially depends on the terms of the contract. In a contract of sale, stipulations other than those relating to the time of payment are regarded as of the essence of the contract. Thus, if a time is fixed for the delivery of goods, the delivery must be made at the fixed time, otherwise the other party is entitled to put an end to the contract.

SUMMARY

Contract of sale. A contract of sale of goods is a contract whereby the seller *transfers* or *agrees to transfer* the property in goods to the buyer for a price (Sec. 4).

Sale and agreement to sell. Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition therafter to be fulfilled the contract is called an agreement to sell. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Contract of sale how made. A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. It may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments or that the delivery or payment or both shall be postponed. It may be made in writing or by word of mouth or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties (Sec. 5).

Subject-matter of sale. 'Goods' form the subject of a contract of sale. They mean *every kind of movable property* other than actionable claims and money, and include stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale [Sec. 2(7)]. Goods may be : (1) *Existing goods, i.e.,* goods which are owned and possessed by the seller at the time of sale. These goods may be specific ascertained or unascertained. (2) *Future goods, i.e.,* goods which the seller does not possess at the time of the contract and which will be acquired, manufactured or produced by him at some future date. (3) *Contingent goods i.e.,* goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

Price. The price in a contract of sale must be expressed in money. It (1) may be fixed by the contract itself, or (2) may be left to be fixed in an agreed manner, or (3) may be determined from the course of dealing between the parties. Where the price is not determined in accordance with these provisions, the buyer must pay the seller a reasonable price (Sec. 9).

TEST QUESTIONS

1. Explain the nature of a contract of sale of goods and bring out clearly the distinction between a sale and an agreement to sell.

2. How is a contract of sale made ? State briefly the necessary formalities of such a contract with illustrations.

3. Define the term 'goods'. What are the different types of goods ?

4. Distinguish between a sale and a hire-purchase agreement.

5. What is the effect of destruction of specific goods on a contract of sale ?

6. State the rules as to the ascertainment of price in a contract of sale. Are stipulations as to time of payment the essence of a contract of sale ?

7. How is price fixed in a contract of sale ? If a price is not determined by the parties, what price, if any, is the buyer liable to pay ?

8. Write short notes on : (*a*) Goods, (*b*) Document of title to goods, (c) Earnest, (*d*) Stipulations as to time.

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. State the nature of the transaction in each of the following cases :

(*i*) A dentist makes a set of false teeth for his patient with materials wholly found by the dentist and the buyer agrees to pay Rs. 2,000 when they are properly fitted into his mouth. (*ii*) A customer gives his tailor a length of suiting and requires him to make a suit for him, the lining materials and the buttons to be supplied by the tailor. (*iii*) A member of a recreation club takes home a supply of certain provisions from the club store, the payment to be made along with the subscription for the month. (*iv*) A dealer in bicycles gives a 'Hercules' bicycle to a customer on the terms that Rs. 100 should be paid by him then and there and balance Rs. 375 in five equal monthly instalments.

[*Hint* : (*i*) The contract is one for the sale of goods (*Lee* v. *Griffin*). (*ii*) The contract is one for work and material and not for sale of goods. (*iii*) The contract is one for the sale of goods. (*iv*) The contract is a sale if the customer cannot terminate the agreement at his will, and is bound to pay the price. It is a hire-purchase agreement if he can terminate the agreement at his will and is not bound to pay the balance instalments].

2. *A* agrees to sell to *B* his two second-hand cars on the terms that the price was to be fixed by *C*. *B* takes delivery of one car immediately. *C*, however, refuses to fix the price. *A* asks for the return of the car already delivered whereas *B* insists on the delivery of the second car to him for a reasonable price of both the cars. Decide.

[*Hint* : *B* shall have to pay for the car already delivered a reasonable price. *A* cannot ask for its return. As regards the second car, *B* cannot insist on its delivery to him since the contract has become void (Sec. 10)].

3. *A* sold 100 quintals of groundnut oil to *B*. Before it could be delivered to *B*, the Government of India requisitioned the whole quantity lying with *A* in public interest. *B* wants to sue *A* for breach of contract. Advise *B*.

[*Hint* : The contract becomes void (Sec. 8). It also becomes void because of supervening impossibility (Sec. 56 of the Indian Contract Act)].

4. A hirer, who obtains possession of a refrigerator from its owner under a hire-purchase agreement, sells the refrigerator to a buyer who buys in good faith and without notice of the right of the owner. Does this buyer get a good title to the refrigerator ? State reasons for your answer.

[*Hint* : No, as the hire-purchaser has no title to the refrigerator].

5. *A* agrees to sell a horse to *B* who tells *A* that he (*B*) needs the horse for riding to Bombay immediately. The horse is ill at the time of agreement. What are the rights of *A* and *B* ?

[*Hint* : The agreement is void (Sec. 8)].

6. *B* agrees to buy *A*'s furniture at a price to be fixed by *C*, a furniture dealer. *C* refuses to oblige *A* and *B* and fixes no price. On *A*'s refusal to sell, can *B* legally compel him to sell the furniture for any price ?

[*Hint* : No (Sec. 10)].

4-2

Conditions and Warranties

Before a contract of sale is entered into, a seller frequently makes representations or statements with reference to the goods which influence the buyer to clinch the bargain. Such representations or statements differ in character and importance. Whether any statement or representation made by the seller with reference to the goods is a stipulation forming part of the contract or is a mere representation (such as expression of an opinion) forming no part of the contract, depends on the construction of the contract. If there are no such representations, the ordinary rule of law—'*caveat emptor*', *i.e.*, "let the buyer beware" — applies. This means the buyer gets the goods as they come and it is no part of the seller's duty to point out the defects in the goods to the buyer.

CONDITIONS AND WARRANTIES

A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty [Sec. 12 (1)].

Condition [Sec. 12 (2)]. A *condition* is a stipulation which is *essential to the main purpose of the contract.* It goes to the root of the contract. Its non-fulfilment upsets the very basis of the contract. It is defined by Fletcher Moulton L.J. in *Wallis* v. *Pratt*, (1910) 2 K.B. 1012 as an "obligation which goes so directly to the substance of the contract, or in other words, is so essential to its very nature, that its non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all." If there is a breach of a condition, the aggrieved party can treat the contract as repudiated .

Example. By a charter party (a contract by which a ship is hired for the carriage of goods), it was agreed that ship *M* of 420 tons "now in the port of Amsterdam" should proceed direct to Newport to load a cargo. In fact at the time of the contract the ship was not in the port of Amsterdam and when the ship reached Newport, the charterer refused to load. *Held*, the words "now in the port of Amsterdam" amounted to a condition, the breach of which entitled the charterer to repudiate the contract [*Behn* v. *Burness*, (1863) 3 B. & S. 751].

Warranty [Sec. 12 (3)]. A *warranty* is a stipulation which is *collateral to the main purpose of the contract.* It is not of such vital importance as a condition is. It is defined in *Wallis* v. *Pratt* as an "obligation which, though it must be performed, is not so vital that a failure to perform it goes to the substance of the contract." If there is a breach of a warranty, the aggrieved party can only claim damages and it has no right to treat the contract as repudiated .

Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract as a whole. The Court is not to be guided by the terminology used by the parties to the contract. A stipulation may be a condition though called a warranty in the contract [Sec. 12 (4)].

Distinction between a condition and warranty

1. *Difference as to value.* A condition is a stipulation which is

essential to the main purpose of the contract. A warranty is a stipulation which is collateral to the main purpose of the contract.

2. *Difference as to breach.* If there is a breach of a condition, the aggrieved party can repudiate the contract of sale ; in case of a breach of a warranty, the aggrieved party can claim damages only.

3. *Difference as to treatment.* A breach of a condition may be treated as a breach of a warranty. This would happen where the aggrieved party is contented with damages only. A breach of a warranty, however, cannot be treated as a breach of a condition.

When condition to be treated as warranty (Sec. 13)

1. *Voluntary waiver of condition.* Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may (*a*) waive the condition, or (*b*) elect to treat the breach of the condition as a breach of warranty [Sec. 13 (1)]. If the buyer once decides to waive the condition, he cannot afterwards insist on its fulfilment.

2. *Acceptance of goods by buyer.* Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, unless there is a term of the contract, express or implied, to the contrary [Sec. 13 (2)].

The provisions of Sec. 13 do not affect the cases where the fulfilment of any condition or warranty is excused by law by reason of impossibility or otherwise [Sec. 13 (3)].

EXPRESS AND IMPLIED CONDITIONS AND WARRANTIES

In a contract of sale of goods conditions and warranties may be express or implied. Express conditions and warranties are those which are expressly provided in the contract. Implied conditions and warranties (contained in Secs. 14 to 17) are those which the law implies into the contract unless the parties stipulate to the contrary. Sec. 16 (4) further provides that an express warranty or condition does not negative an implied warranty or condition unless the express warranty or condition is inconsistent with the implied warranty or condition.

Implied conditions

1. **Condition as to title** [Sec. 14 (*a*)]. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is an implied condition on the part of the seller that—

(*a*) *in the case of a sale*, he has a *right to sell* the goods, and

(*b*) *in the case of an agreement to sell*, he will have a *right to sell* the goods at the time when the property is to pass.

Example. R bought a car from *D* and used it for four months. *D* had no title to the car and consequently *R* had to hand it over to the true owner. *Held*, *R* could recover the price paid [*Rowland* v. *Divall*, (1923) 2 K.B. 500].

If the goods delivered can only be sold by infringing a trade mark, the seller has broken the condition that he has a right to sell the goods. The expression "right to sell" is wider than the "right to property".

Example. A bought 3,000 tins of condensed milk from the U.S.A. The tins were labelled in such a way as to infringe the Nestle's trade mark. As a result, they were detained by the custom authorities. To get the clearance certificate from the custom authorities, *A* had to remove the labels and sell the tins at a loss. *Held*, the seller had broken the condition that he had the right to sell [*Niblett Ltd.* v. *Confectioners' Materials Co.*, (1921) 3 K.B. 387].

Where a seller having no title to the goods at the time of the sale, subsequently acquires a title, that title feeds the defective titles of both the original buyer and the subsequent buyer [*Butterworth* v. *Kingsway Motors*, (1954) 1 W.L.R. 1286].

2. **Sale by description** (Sec. 15). Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description. The rule of law contained in Sec. 15 is summarised in the following maxim : "If you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect, it is not the article bargained for and the other party is not bound to take it." [*Bowes* v. *Shand*, (1877) App. Cas. 455].

Goods are sold by description when they are described in the contract, as Farm wheat or Dehra Dun Basmati, and the buyer contracts in reliance on that description.

Example. A ship was contracted to be sold as a "copper-fastened vessel" to be taken with all faults, without any allowance for any defects whatsoever. The ship turned out to be "partially copper-fastened". *Held*, the buyer was entitled to reject [*Shepherd* v. *Kain*, (1821) 5 B. & Ald. 240].

"Sale of goods by description" may include the following situations :

(1) Where the buyer has not seen the goods and relies on their description given by the seller.

Example. W bought a reaping machine which he had never seen and which, *V*, the seller, described "to have been new the previous year and used to cut only 50 or 60 acres". *W* found the machine to be extremely old. *Held*, *W* could return the machine as it did not correspond with the description [*Varley* v. *Whipp*, (1900) Q.B. 513].

(2) Where the buyer has seen the goods but he relies not on what he has seen but what was stated to him and the deviation of the goods from the description is not apparent.

Examples. (*a*) In an auction sale of a set of napkins and table cloths, these were described as "dating from the seventh century". The buyer bought the set after seeing it. Subsequently he found the set to be an eighteenth century set. *Held*, he could reject the set [*Nicholson & Venn* v. *Smith Marriott*, (1947) 177 L.T. 189].

(*b*) A car was advertised for sale as a "Herald Convertible, 1961 model". The buyer saw the car before buying it. After buying the car, he discovered that while the rear part of the car was part of a 1961 model, the front half was part of an earlier model. *Held*, he could return the car [*Beale* v. *Taylor*, (1967) 3 All E.R. 253].

(3) Packing of goods may sometimes be a part of the description.

Example. M sold to *L* 300 tins of Australian fruits packed in cases each containing 30 tins. *M* tendered a substantial portion in cases containing 24 tins. *Held*, *L* could reject all the tins as the goods were not packed according to the description given in the contract as the method in which the fruit was packed was an essential part of the description [*Moore & Co.* v. *Landauer & Co.*, (1921) 2 K.B. 519].

Sale by description as well as by sample. Sec. 15 further provides that if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. This means the goods must correspond both with the sample and with the description.

Examples. (*a*) In a contract for the sale of a quantity of seed described as "Common English Sainfoin" the seed supplied was of a different kind, though the difference was not discoverable except by sowing. The defect also existed in the sample. *Held*, the buyer was entitled to recover damages for the breach of condition [*Wallis* v. *Pratt*, (1911) A.C. 394].

(*b*) *N* agreed to sell to *G* some oil described as "foreign refined rape oil, warranted only equal to sample". The goods tendered were equal to sample, but contained an admixture of hemp oil. *Held*, *G* could reject the goods [*Nichol* v. *Godts*, (1854) 10 Ex. 191].

3. **Condition as to quality or fitness** [Sec. 16 (1)]. Normally, in a contract of sale there is no implied condition as to quality or fitness of the goods for a particular purpose. The buyer must examine the goods thoroughly before he buys them in order to satisfy himself that the goods will be suitable for the purpose for which he is buying them. The following points should however be noted in this regard :

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which he needs the goods and depends upon the skill and judgment of the seller whose business it is to supply goods of that description, there is an implied condition that the goods shall be reasonably fit for that purpose [Sec. 16 (1)].

Example. An order was placed for some lorries to be used "for heavy traffic in a hilly area". The lorries supplied were unfit and broke down. There is breach of condition as to fitness.

(2) If the buyer purchasing an article for a particular use is suffering from an abnormality and it is not made known to the seller at the time of sale, implied condition of fitness does not apply.

Example. *G* purchased a tweed coat which caused her dermatitis (inflammation of the skin) due to her unusually sensitive skin. *Held*, the seller was not liable, the cloth being fit for any one with a normal skin [*Griffiths* v. *Peter Conway Ltd.*, (1939) 1 All E.R. 685].

(3) If the buyer purchases an article under its patent or other trade name, the implied condition that articles are fit for a particular purpose shall not apply, unless the buyer relies on the seller's skill and judgment and makes known to the seller that he so relies on him.

Example. *B* told *M*, a motor car dealer, that he wanted a comfortable car suitable for touring purposes. *M* recommended a 'Bugatti car' and *B* thereupon bought one. The car was uncomfortable and unsuitable for touring purposes. *Held*, *B* could reject the car and recover the price, and the mere fact that *B* bought the car under its trade name did not necessarily exclude the condition of fitness [*Baldry* v. *Marshall*, (1925) 1 K.B. 260].

(4) In case the goods can be used for a number of purposes, the buyer must tell the seller the particular purpose for which he requires the goods. If he does not, he cannot hold the seller liable if the goods do not suit the particular purpose for which he buys the goods.

Example. *A*, a woollen merchant who was also a tailor, bought, by a sample, indigo cloth for the purpose of making liveries. This fact was not brought to the notice of the seller. *Held*, the seller was not liable when, on account of a latent defect in the cloth, the cloth was unfit for making liveries, but was fit for other usual purposes [*Jones* v. *Padgett*, (1890) 24 Q.B.D. 650].

6. **Condition as to merchantability** [Sec. 16 (2)]. Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods are of merchantable quality. This means goods should be such as are commercially saleable under the description by which they are known in the market at their full value.

The term 'merchantable' quality is not defined in the Sale of Goods Act. But according to 62 (1-A) of the English Sale of Goods Act, 1893, "Goods of any kind are of merchantable quality if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances."

Example. A firm of Liverpool merchants contracted to buy from a London merchant a number of bales of Manilla hemp to arrive from Singapore. The hemp was damaged by sea water in such a way that it would not pass in the market as Manilla hemp. *Held*, the goods were not of merchantable quality [*Jones* v. *Just*, (1868) L.R. 3 Q.B. 197].

If goods are of such a quality and in such a condition that a reasonable person acting reasonably would accept them after having examined them thoroughly, they are of merchantable quality. Thus a watch that will not keep time, a pen that will not write, and tobacco that will not smoke, cannot be regarded as merchantable under such names.

Examples. (*a*) A manufacturer supplied 600 horns under a contract. The horns were found to be dented, scratched and otherwise of faulty manufacture. *Held*, they were not of merchantable quality and therefore the seller's suit for price was dismissed [*Jackson* v. *Rotax Motor & Cycle Co.*, (1910) 2 K.B. 397].

(*b*) There was a sale by a grocer of tinned salmon which was poisonous. It resulted in the death of the wife of the buyer. *Held*, the buyer could recover damages including a sum to compensate him for being compelled to hire services which were rendered by his wife [*Jackson* v. *Watson & Sons*, (1909) 9 K.B. 193 C.A.].

(*c*) *P* sold a plastic catapult to *G*, a boy of six. While *G* was using it in the proper manner, the catapult broke due to the fact that the material used in its manufacture was unsuitable. As a result, the boy was blinded in one eye. *Held*, *P* was liable as the catapult was not of merchantable quality [*Godley* v. *Perry*, (1960) 1 All E.R. 36].

(*d*) A radio set was sold to a layman. The set was defective. It did not work in spite of repairs. *Held*, the buyer could return the set and claim refund [*R.S. Thakur* v. *H.G.E. Corpn.*, A.I.R. (1971) Bom. 97].

Even if the defect can be easily cured, *e.g.*, by washing an irritant out of a woollen or nylon garment by making some trifling repair, the buyer can avoid the contract. If he has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed. If, while professing to examine the goods, he makes a perfunctory examination with the result that he overlooks a defect which a proper examination would have revealed, he

has nevertheless examined the goods, and there will be no implied condition of merchantable quality.

Example. *B* went to *V*'s warehouse to buy some glue. The glue was stored in barrels and every facility was given to *B* for its inspection. *B* did not have any of the barrels opened, but only looked at the outside. He then purchased the glue. *Held*, as an examination of the inside of the barrels would have revealed the nature of the glue, and as *B* had an opportunity of making the examination, there was no condition as to merchantable quality [*Thornett & Fehr* v. *Beers & Sons*, (1919) 1 K.B. 486].

Packing of the goods is an equally important consideration in judging their "merchantability".

Example. *M* asked for a bottle of Stone's ginger wine at *F*'s shop, which was licensed for the sale of wines. While *M* was drawing the cork, the bottle broke and *M* was injured. *Held*, the sale was by description and *M* was entitled to recover damages as the bottle was not of merchantable quality [*Morelli* v. *Fitch & Gibbons*, (1928) 2 K.B. 636].

Where the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed [Proviso to Sec. 16 (2)].

5. **Condition implied by custom.** An implied condition as to quality or fitness for a particular purpose may be annexed by the usage of trade [Sec. 16 (3)].

In some cases, the purpose for which the goods are required may be ascertained from the acts and conduct of the parties to the sale, or from the nature of description of the article purchased. For instance, if a perambulator or a bottle of milk is purchased, the purpose for which it is purchased is implied in the thing itself. In such a case the buyer need not tell the seller the purpose for which he buys the goods.

Examples. (*a*) *P* asked for a hot water bottle of *L*, a retail chemist. He was supplied one which burst after a few days use and injured *P*'s wife. *Held*, *L* was liable for breach of implied condition because *P* had sufficiently made known the use for which he required the bottle [*Priest* v. *Last*, (1903) 2 K.B. 148].

(*b*) *G* purchased a woollen underwear from *M*, a retailer, whose business it was to sell goods of that description. After wearing the underwear, *G* developed an acute skin disease. *Held*, the goods were not fit for their only proper use and *G* was entitled to avoid the contract and claim damages [*Grant* v. *Australian Knitting Mills Ltd.*, (1936) A.C. 5].

(*c*) *A* bought a set of false teeth from a dentist. The set did not fit into *A*'s mouth. *Held*, he could reject the set as the purpose for which anybody would buy it was implicitly known to the seller, *i.e.*, the dentist [*Dr. Baretto* v. *T.R. Price*, A.I.R. (1939) Nag. 19].

6. **Sale by sample** (Sec. 17). A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect [Sec. 17 (1)]. In the case of a contract for sale by sample, there is an implied condition—

(*a*) that the bulk shall correspond with the sample in quality ;

(*b*) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.

(*c*) that the goods shall be free from any defect, rendering them unmerchantable. The defect should not however be apparent on a reasonable examination of the sample [Sec. 17 (2)]. This implied condition applies only to *latent* defects, *i.e.*, defects which are not discoverable on a reasonable examination of the sample. The seller is not responsible for the defects which are *patent*, *i.e.*, visible or discoverable by examination of the goods. In case of patent defects, there is no breach of implied condition as to merchantability.

Examples. (*a*) There was a sale by sample of mixed worsted coatings to be in quality and weight equal to the samples. It was found that the goods owing to a latent defect would not stand ordinary wear when made up into coats. The same defect was there in the sample but could not be detected on a reasonable examination of the sample. *Held*, the buyer could reject the goods [*Drummond* v. *Van Ingen*, (1887) 12 App. Cas. 284]. "The office of the sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself." (*Lord Macnaghten*).

(*b*) In a contract for the sale of brandy by sample, brandy coloured with a dye was supplied. *Held*, the buyer was not bound to the contract even though the goods supplied were equal to sample, as the defects were not apparent on reasonable examination of sample [*Mody* v. *Gregson*, (1868) L.R. 4 Ex. 49].

(*c*) *D* sold sulphuric acid to *P* as commercially free from arsenic. *P used* it for making glucose which he sold to brewers who used it in brewing beer. The persons who drank the beer were poisoned. *D* was not aware of the purpose for which *P* had bought the acid. *Held*, *P* was entitled to repudiate the contract and since this was not possible in the instant case (as *P* had already used the goods), he could treat breach of condition as breach of warranty and claim damages [*Bostock & Co. Ltd.* v. *Nicholson & Sons Ltd.*, (1904) 1 K.B. 725].

7. **Condition as to wholesomeness.** In the case of eatables and provisions, in addition to the implied condition as to merchantability, there is another implied condition that the goods shall be wholesome.

Examples. (*a*) *F* bought milk from *A*. The milk contained germs of typhoid fever. *F*'s wife took the milk and got infection as a result of which she died. *Held*, *F* could recover damages [*Frost* v. *Aylesbury Dairy Co.* Ltd., (1905) 1 K.B. 608].

(*b*) *C* bought a bun containing a stone which broke one of *C*'s teeth. *Held*, he could recover damages [*Chaproniere* v. *Mason*, (1905) 21 T.L.R. 633].

Implied warranties

The implied warranties in a contract of sale are as follows :

1. *Warranty of quiet possession* [Sec. 14 (*b*)]. In a contract of sale, unless there is a contrary intention, there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. If the buyer is in any way disturbed in the enjoyment of the goods in consequence of the seller's defective title to sell, he can claim damages from the seller.

2. *Warranty of freedom from encumbrances* [Sec. 14 (*c*)]. In addition to the previous warranty, the buyer is entitled to a further warranty that the goods are not subject to any charge or right in favour of a third party. If his possession is in any way disturbed by reason of the existence of any charge or encumbrance on the goods in favour of any third party, he shall have a right to claim damages for breach of this warranty.

3. *Warranty as to quality or fitness by usage of trade* [Sec. 16 (4)[. An implied warranty as to quality or fitness for a particular purpose may be annexed by the usage of trade.

4. *Warranty to disclose dangerous nature of goods.* Where a person sells goods, knowing that the goods are inherently dangerous or they are likely to be dangerous to the buyer and that the buyer is ignorant of the danger, he must warn the buyer of the probable danger, otherwise he will be liable in damages.

Example A sold a tin of disinfectant powder to *C*. He knew that it was likely to be dangerous to *C* if it was opened without special care being taken. *C* opened the tin whereupon the disinfectant powder flew into her eyes, causing injury. *Held*, *A* was liable in damages to *C*, as he should have warned *C* of the probable danger [*Clarke* v. *Army & Navy Co-operative Society Ltd.*, (1963) 1 K.B. 155].

Exclusion of implied conditions and warranties. Implied conditions and warranties in a contract of sale may be negative or varied by (*a*) express agreement between the parties ; or (*b*) the course of dealing between them ; or (*c*) the custom or usage of trade.

CAVEAT EMPTOR

This means "let the buyer beware", *i.e.*, in a contract of sale of goods the seller is under no duty to reveal unflattering truths about the goods sold. Therefore, when a person buys some goods, he must examine them thoroughly. If the goods turn out to be defective or do not suit his purpose or if he depends upon his own skill or judgment and makes a bad selection, he cannot blame anybody excepting himself.

Examples. (*a*) *H* bought oats from *S* a sample of which had been shown to *H*. *H* erroneously thought that the oats were old. The oats were, however, new. *Held*, *H* could not avoid the contract [*Smith* v. *Hughes*, (1871) L.R. 6 Q.B. 597].

(*b*) *H* sent to market 32 pigs to be sold by auction. The pigs were sold to *W* "with all faults and errors of description". *H* knew that the pigs were suffering from swine-fever, but he never disclosed this to *W*. *Held*, there was no implied warranty by *H* and the sale was good and *H* was not liable in damages [*Ward* v. *Hobbs*, (1878) 4 App. Cas 13].

The rule of *caveat emptor* is enunciated in the opening words of Sec. 16 which runs thus : "*Subject to the provisions of this Act and of any other* law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale ..."

Exceptions. The doctrine of *caveat emptor* has certain important exceptions. The case law on these exceptions has already been discussed.

The exceptions are however briefly referred to—

1. *Fitness for buyer's purpose.* Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which he requires the goods and relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply, the seller must supply the goods which shall be fit for the buyer's purpose [Sec. 16 (1)].

2. *Sale under a patent or trade name.* In the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition that the goods shall be reasonably fit for any particular purpose [Proviso to Sec. 16 (1)].

3. *Merchantable quality.* Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality. But if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed [Sec. 16 (2)].

4. *Usage of trade.* An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade [Sec. 16 (3)].

5. *Consent by fraud.* Where the consent of the buyer, in a contract of sale, is obtained by the seller by fraud or where the seller knowingly conceals a defect which could not be discovered on a reasonable examination (*i.e.*, where there is a latent defect in the goods), the doctrine of *caveat emptor* does not apply.

SUMMARY

A stipulation in a contract of sale with reference to goods which are the subject thereof may be a *condition* or a *warranty* [Sec. 12 (1)]. A condition is a stipulation *essential to the main purpose* of the contract. Its breach gives a right to the buyer to treat the contract as repudiated [Sec. 12 (2)]. A warranty is a stipulation *collateral* to the main purpose of the contract. Its breach gives rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated [Sec. 12 (3)].

Express and implied conditions and warranties

In a contract of sale, conditions and warranties may be *express* or *implied*. Express conditions and warranties are those which are agreed upon between the parties at the time of the contract. Implied conditions and warranties are those which are implied by law unless the parties stipulate to the contrary.

Implied conditions. 1. *Condition as to title.* In a contract of sale there is an implied condition on the part of the seller that (*a*) in the case of a sale, he has a right to sell the goods, and (*b*) in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass [Sec. 14 (1)].

2. *Sale by description.* Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description. If the sale is by sample as well as by description, the goods shall correspond both with the sample and the description (Sec. 15).

3. *Condition as to quality or fitness.* The condition as to quality or fitness is implied where (*a*) the goods sold are such as the seller deals in the ordinary course of his business ; (*b*) the buyer relies on the seller's skill or judgment as to the fitness of the goods for any particular purpose ; and (*c*) the buyer expressly or impliedly makes known to the seller that he wants the goods for that particular purpose [Sec. 16 (1)].

4. *Condition as to merchantability.* Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality [Sec. 16 (2)].

5. *Condition implied by custom.* An implied condition as to quality or fitness for a particular purpose may be annexed by the usage of trade [Sec. 16 (3)].

6. *Sale by sample.* In the case of a contract for sale by sample there is an implied condition (*a*) that the bulk shall correspond with the sample in quality ; (*b*) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample ; and (*c*) that the goods shall be free from any defect, rendering them

unmerchantable, which would not be apparent on a reasonable examination of the sample (Sec. 17).

7. *Condition as to wholesomeness.* In case of eatables and provisions, there is an implied condition that the goods shall be wholesome and fit for human consumption.

Implied warranties. In a contract of sale, unless there is a contrary intention, there is an implied warranty that (1) the buyer shall have and enjoy *quiet possession* of the goods [Sec. 14 (*b*)], and (2) the goods are free from any charge or encumbrance in favour of any third party [Sec. 14 (*c*)]

Caveat emptor. This means "let the buyer beware". The doctrine of *caveat emptor* does not apply—(1) In case of implied conditions and warranties ; (2) When the buyer intimates the purpose to the seller and depends upon his skill or judgment ; (3) When there is a usage of trade ; (4) When there is a fraud by the seller.

TEST QUESTIONS

1. Briefly explain the conditions and warranties implied by law in a contract for the sale of goods.

2. Distinguish between a 'condition' and a 'warrantly'. When does a condition descend to the level of a warranty ? Explain the rule of *caveat emptor* and state how far it is modified by implied conditions.

3. " In a contract for the sale of goods there is no implied condition or warranty as to the quality of the goods or their fitness for any particular purpose." Comment.

4. "If a person sells an article, he thereby warrants that it is fit for some purpose, but he does not warrant that it is fit for any particular purpose." State the various qualifications subject to which this proposition should be received.

5. State the conditions implied in a contract for the sale of goods (1) by description, (2) by sample, and (3) required for a particular purpose.

6. What is implied 'warranty' in case of a sale by sample ? Can a contract be avoided if such warranty is breached?

7. State the doctrine of *caveat emptor* and exceptions to it.

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. *A* purchases a car from *B* and uses it for some time. It turns out that the car sold by *B* to *A* was a stolen one and had to be returned to the rightful owner. *A* brings action against *B* for the return of the price. Will he succeed ?

[*Hint* : Yes (Sec. 14 (*a*), *Rowland* v. *Divall*)].

2. *A*, a farmer, simply exhibits oats in his farm. *B* buys the oats in the belief that they are old oats. In fact they are new oats. *B* wants to return the oats and refuses to pay the price. Decide.

[*Hint* : *B* cannot return the oats as the doctrine of *caveat emptor will apply*].

3. *A* purchased a hot-water bottle from a retail chemist. The bottle could stand hot water but not boiling water. When it was filled by *A* with boiling water, it burst and injured his wife. *A* sues for damages. Decide.

[*Hint* : There is a breach of implied condition as to fitness and hence *A* can recover damages (*Priest* v. *Last*)].

4. *A* purchases some chocolates from a shop. One of the chocolates contains a poisonous matter and as a result *A*'s wife who has eaten it falls seriously ill. What remedy is available to *A* against the shopkeeper ?

[*Hint* : The chocolates are not of merchantable quality and hence *A* can repudiate the contract and recover damages (Sec. 16 (2)].

5. Worsted cotton cloth of quality equal to sample was sold to tailors who could not stich it into coats owing to some defect in its texture. The buyers had examined the cloth before effecting the purchase. Are they entitled to damages ?

[*Hint* : Yes, as there is a latent defect in cloth (Sec. 17; *Drummond* v. *Van Ingen*)]

6. *M* asked for a bottle of Stone's Ginger Wine at *F*'s shop which was licensed for the sale of wines. While *M* was drawing the cork, the bottle broke because of defect in the glass and *M* was injured. Can *M* claim damages for the injury ?

[*Hint* : Yes, as the bottle is not of merchantable quality and there is a sale of goods by description [Secs. 15 and 16 (2) ; *Morelli* v. *Fitch and Gibbons*)].

7. A seller agrees to supply to the buyer timber of 1/2" thickness for being made into cement barrels. The timber actually supplied varies in thickness from 1/2" to 5/8". The timber is merchantable and commercially fit for the purpose for

which it was ordered. The buyer rejects the timber. Is his action justified ?

[*Hint* : Yes (Sec. 15)].

8. The sale of pure ghee was warranted only equal to sample. The ghee tendered corresponded to the sample, but was adulterated with 25 % groundnut oil. Are the buyers bound to accept ?

[*Hint* : No (Sec. 17)].

9. A lady buys synthetic pearls for a high price thinking that they are natural pearls. The seller does not correct her mistake. Has she any remedies against the seller ? Would your decision be different if the lady had told the seller : "I think they are natural pearls and, therefore, agree to buy them at your price," and the seller was silent ?

[*Hint* : The lady has no remedy against the seller as the doctrine of *caveat emptor* applies in this case. In the latter case, she can avoid the contract as there is a breach of condition as to quality (Sec. 16 (1)].

10. A wholesale dealer in soaps agrees to sell and deliver two cases of '*Luxury* toilet soap to a sub dealer but delivers that quantity of '*Luxury*' washing soap. What are the rights of the sub-dealer ?

[*Hint* : The sub-dealer can repudiate the contract on the ground of breach of condition as to description (Sec. 15)].

11. A lady who knew that she was allergic to a particular hair dye developed dermatitis as a result of having her hair dyed with that substance. She did not disclose her allergy to the hair dresser. Is the hair dresser liable for breach of implied condition ?

[*Hint* : No. The hair dresser is not liable for the breach of implied condition as to the fitness of the hair dye since that condition extends to the dyeing of the hair of a normal person (Sec. 16 (1) ;*Ingham* v. *Emes* (1955) 2 Q.B. 366 ; *Griffiths* v. *Peter Conway, Ltd.*, (1939) 1 All E.R. 683].

12. A sold to *B* a tin of disinfectant powder. He knew that it would be dangerous to open the tin without special care but he did not warn *B*. *B* without knowledge of the danger, opened the tin whereupon the powder flew into his eyes and injured him. *B* filed a suit for damages for the injury. Will he succeed ?

[*Hint* : Yes (Sec. 16 (2)].

13. A contracts to sell *B* a piece of silk. *B* thinks that it is Indian silk. A knows that *B* thinks so, but knows that it is not Indian silk. *A* does not correct *B*'s impression. *B* afterwards discovers that it is not Indian silk. Can he repudiate the contract ?

[*Hint* : Yes, as the rule of *caveat emptor* will apply in this case].

14. *A* agreed to sell a second-hand reaping machine which *B*, the buyer, had not seen. The seller stated the machine was new the previous year and had been used to cut 50 acres only. *B*, however, found that the machine, when it was delivered, was old and had even been repaired. Can *B* repudiate the contract ?

[*Hint* : Yes, as there is a breach of the implied condition that the goods shall correspond with the description (Sec. 15 ; *Varley* v. *Whipp*)].

15. *A* sells a horse to *B*. When *B* goes with the horse he is arrested by the police on the charge of keeping stolen property as the horse belongs to *C*. Can *B* sue *A*, and if so, on what basis, and what damages can he recover ?

[*Hint* : Yes, *B* sue *A* can also recover the loss suffered by him which is the direct and natural consequence of the breach of condition (Sec. 14 (*a*) ;*Rowland* v. *Divall*)].

16. *H*, a housewife, ordered from *C*, a coal merchant, 'a ton of coalite' and it was duly delivered to her. When part of the consignment was put on fire in an open grate in *H*'s house, an explosion occurred which caused damage. *H* claims damages. Is she entitled to sue ?

[*Hint* : Yes, as the goods are not of merchantable quality (Sec. 16 (2)].

17. In a contract for the purchase of 3,000 tins of canned fruits to be packed in cases each containing 30 tins, a substantial part was tendered in cases containing 24 tins instead of 30. Can the buyer reject the cases ?

[*Hint* : Yes, as the goods do not correspond with the description of the goods ordered (Sec. 15 ; *Moore & Co.* v. *Landaur & Co.*)].

18. *X* contracted to sell by sample two parcels of wheat one containing 200 bushels and the other 400, and he allowed inspection of the smaller parcel but refused inspection of the larger parcel. Is the buyer entitled to refuse any of the above-mentioned two parcels ? State reasons for your answer.

[*Hint* : Yes (Sec. 17)].

4-3

Transfer of Property

PROPERTY, POSSESSION AND RISK

There are three stages in the performance of a contract of sale of goods by a seller, *viz.*,

(1) the transfer of property in the goods ;

(2) the transfer of possession of the goods (*i.e.*, delivery) ; and

(3) the passing of the risk.

Transfer of property in goods from the seller to the buyer is the main object of a contract of sale. The term *'property in goods'* must be distinguished from *'possession of goods'* 'Property in goods' means the ownership of goods whereas 'possession of goods' refers to the custody or control of goods. An article may belong to *A* although it may not be in his possession. *B* may be in possession of that article although he is not its owner.

It is important to know the precise moment of time at which the property in goods passes from the seller to the buyer for the following reasons :

1. *Risk follows ownership.* Unless otherwise agreed, risk follows ownership whether delivery has been made or not and whether price has been paid or not. Thus the risk of loss as a rule lies on the owner. Sec. 26 provides in this regard that, unless otherwise agreed, the goods remain at the seller's until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk risk whether delivery has been made or not. But if delivery has been delayed through the fault of either the buyer or the seller, the goods are at the risk of the party at fault. Thus 'risk' and 'property' go together.

Example. *B* contracts to purchase 30 tons of apple juice from *S*. *S* crushes the apples, puts juice in casks and keeps them ready for delivery. *B*, however, delays to take the delivery and the juice goes putrid and has to be thrown away. *B* is liable to pay the price [*Demby Hamilton & Co. Ltd.* v. *Barden*, (1949) All E R. 435].

2. *Action against third parties.* When the goods are in any way damaged or destroyed by the action of third parties, it is only the owner of the goods who can take action against them.

3. *Insolvency of the seller or the buyer.* In the event of insolvency of either the seller or the buyer, the question whether the Official Receiver or Assignee can take over the goods or not depends on whether the property in the goods has passed from the seller to the buyer.

4. *Suit for price.* The seller can sue for the price, unless otherwise agreed, only if the goods have become the property of the buyer.

PASSING OF PROPERTY

The primary rules for ascertaining when the property in goods passes to the buyer are as follows :

1. *Goods must be ascertained.* Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained (Sec. 18).

Example. Under a contract of sale, *B* was entitled to cut teak trees of more than 12 inches girth. The stumps of trees after cutting had to be 3 inches high. *Held*, in these circumstances property in the timber that was cut could pass to *B* when the trees were felled. Till the trees were felled, they were not ascertained [*Badri Prasad* v. *State of M.P.*, A.I.R. (1970) S.C. 706].

2. *Intention of the parties.* Where there is a contract for the sale of specific or ascertained goods, the property in them passes to the buyer at the time when the parties *intend* it to pass [Sec. 19 (1)]. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case [Sec. 19 (2)].

Examples. (*a*) *S* offered to sell to *B* a certain machine for Rs. 5,000. *B* refused to buy it unless certain work was done on it to put it into proper running condition. *S* replied that *B* could get it done himself, and when the cost of the repairs was known, *B* might pay *S* Rs. 5,000 less the cost of repairs. To this *B* agreed and took the machine to a repair shop. While being repaired, the machine was destroyed without any fault of the repairman. *Held*, the property in the machine had not passed from *S* to *B* [*Appleby* v. *Myers*, (1867) L R. 2 C.P. 651].

(*b*) In a mixed contract for storage of paddy and the sale of same thereafter the paddy was delivered by *S* to *B* for storage. *B* had the option to name a particular day on which he was to buy the paddy. *Held*, the property in the paddy did not pass to *B* until *B* named the particular day on which he was to buy the paddy [*Chidambaram Chettiar* v. *Steel Bros.*, A.I.R. (1946) Rang. 419].

Where the intention of the parties cannot be ascertained. Where the intention of the parties as to the time when the property in the goods is to pass to the buyer cannot be ascertained from the contract, the rules contained in Secs. 20 to 24 apply [Sec. 19 (3)]. These rules are as follows :

1. Specific goods (Secs. 20 to 22)

The rules relating to transfer of property in specific goods are as follows :

(1) *Passing of property at the time of contract.* Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made. The fact that the time of payment of the price or the time of delivery of goods, or both, is postponed does not prevent the property in goods passing at once (Sec. 20).

'Deliverable state' means such a state that the buyer would under the contract be bound to take delivery of the goods [Sec. 2 (3)].

Examples. (*a*) *B* selects certain books in a book shop. The price is settled. He arranges to take delivery of the books the next day through his servant and agrees to pay for the books on the first of the next month. The books are destroyed by fire the same evening. The property in the books has passed to the buyer and he is bound to pay the price.

(*b*) *S* sells to *B* a horse which is to be delivered to *B* the next week. *B* is to pay the price on delivery. *B* asks his servant to keep the horse separate from the other horses. The horse dies before it is delivered and paid for. The property in the horse has passed to *B* and he must bear the loss.

(2) *Passing of property delayed beyond the date of the contract :*

(*i*) *Goods not in a deliverable state.* Where there is a contract for the sale of specific goods not in a deliverable state, *i.e.*, the seller has to do something to the goods to put them into a deliverable state, the property does not pass until such thing is done and the buyer has notice of it (Sec. 21).

Examples. (*a*) There was a contract for the sale of timber from oak trees. The buyer marked out the selected parts of the trees. According to the usage of the trade, the seller had to remove the rejected portions from the trees. But before he could do this he became bankrupt. *Held*, the buyer could not take away the selected portion as the property in the goods had not passed to him. Until the seller had severed the rejected portions, the goods could not be said to be in a deliverable state [*Acraman* v. *Morrice*, (1849) 137 E.R. 584].

(*b*) There was a contracrt for the sale of a machine, weighing 30 tons and embedded in a concrete floor. A part of the machine was destroyed while being removed. *Held*, the buyer was entitled to refuse to take the machine as it was not in a deliverable state [*Underwood* v. *B.C. Cement Syndicate*, (1922) 1 K.B. 343].

(*ii*) *When the price of goods is to be ascertained by weighing, etc.* Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof (Sec. 22).

2. Unascertained goods (Sec. 23)

Where there is a contract for the sale of unascertained goods, the property in the goods does not pass to the buyer until the good are *ascertained* (Sec. 18). Until goods are ascertained there is merely an agreement to sell. Sec. 23 (1) further provides that where is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally *appropriated* to the contract, the property in the goods thereupon passes to the buyer.

The "ascertainment of goods" and their unconditional "appropriation to the contract" are the two pre-conditions for the transfer of property from the seller to buyer in case of unascertained goods.

'Ascertainment' is the process by which the goods answering the description are indentified and set apart. Further the goods must also be appropriated to the contract. Whereas 'ascertainment' can be a unilateral act of the seller, *i.e.*, he alone may set apart the goods, 'appropriation' involves selection of goods with the intention of using them in performance of the contract and with the mutual consent of the seller and the buyer.

Example. In a sale of 20 hogheads of sugar out of a larger quantity, 4 were filled and taken away by the buyer. The remaining 16 hogheads were subsequantly filled and the buyer was informed of the same. The buyer promised to take them away, but before he could do so, the goods were lost. *Held*, the property had passed to the buyer at the time of the loss [*Rhode* v. *Thwaites*, (1827) 6 B. & C. 388].

The appropriation must be unconditional. It is unconditional when the seller does not reserve to himself the right of disposal of the goods. The appropriation may be done either by the seller with the assent of the buyer or by the buyer with the assent of the seller. Such assent may be express or implied, and may be given either before or after the appropriation is made.

If the contract is silent as to the party who is to appropriate the goods, the party who under the contract is first to act is the one who appropriates. For instance, *A* sells by description ten sheep to *B*. If *A* is to send the sheep to *B*, it is *A* who appropriates the sheep. If *B* is to collect the sheep, it is *B* who appropriates the sheep. If the buyer tells the seller to send the goods by rail or some other mode of carriage, he is deemed to have given his assent in advance to the subsequent appropriation by the seller of the goods.

Delivery to carrier. A seller is deemed to have unconditionally appropriated the goods to the contract where he delivers them to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal [Sec. 23 (2)].

The delivery to the carrier may be :

(1) *Absolutely for the buyer.* Where the bill of lading or railway receipt is made out in the name of the buyer and is sent to him, the presumption is that no right of disposal has been reserved by the seller in respect of those goods. The ownership in such a case passes from the seller to the buyer.

(2) *Absolutely for the seller.* Where the bill of lading or railway receipt is taken in the seller's or his agent's name and is sent to the agent of the seller to be delivered to the buyer on the fulfilment of certain conditions, the seller is deemed to have reserved the right of disposal of the goods. In such a case the ownership does not pass to the buyer until the necessary conditions are fulfilled and the documents of title are delivered to the buyer.

3. Goods sent on approval or 'on sale or return' (Sec. 24)

When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms, the property therein passes to the buyer :

(1) when he *signifies his approval* or *acceptance* to the seller ;

(2) when he *does any other act adopting the transaction* ;

Examples. (*a*) *K* delivered some jewellery to *W* on 'sale or return'. *W* pledged it with *A*. *Held*, the pledge was an act by *W* adopting the transaction. As such the property in the jewellery had passed to *W* so that *K* could not recover it from *A* [*Kirkham* v. *Attenborough*, (1897) 1 Q.B. 210].

(*b*) A horse was delivered to *B* on the condition of sale or return within 8 days. The horse died within 8 days. *Held*, the loss would fall on the seller as the property in horse had not yet passed to *B* [*Elphick* v. *Barnes*, (1880) 5 C.P.D. 321].

(*c*) Goods are delivered by *A* to *B* on 'sale or return'. They are further delivered by *B* to *C* and then by *C* to *D* on similar terms. The goods are stolen while in the custody of *D*. As between *A* and *B*

there is a complete sale. But as between *C* and *D*, the property in the goods has not passed to *D*. As such *C* cannot recover the loss from *D*, but is bound to pay the price to *B* and *B* is bound to pay the price to *A* [*Genn* v. *Winkel*, (1911) All E.R. 910].

If the seller delivers the goods to the buyer 'on sale or return' on the terms that the goods were to remain his property until settled or paid for, the property would not pass to the buyer until these terms are complied with.

Example. *A* delivered some jewellery to *B* "on sale for cash only or return...the goods to remain the property of *A* until paid for." Before *B* paid the price, he pledged the jewellery with *C*. *Held*, the pledge was not valid and *A* could recover the jewellery from *C* [*Weiner* v. *Smith*, (1906) 2 K.B. 574].

(3) if he *does not signify his approval or acceptance* to the seller but *retains the goods* without giving notice of rejection, beyond the time fixed for the return of the goods, or if no time has been fixed, beyond a reasonable time. The question as to what is a 'reasonable time is a question of fact (Sec. 63).

Example. S Ltd. agreed to sell a tractor to H.C. Municipality on the condition that if the latter was not satisfied, it could reject the tractor. The Municipality used the tractor for a month and a half and then wanted to reject. *Held*, a reasonable time to reject having elapsed, the property in the tractor had passed to the Municipality and therefore it could not reject [*Hooghly Chinsurah Municipality* v. *Spence Ltd.*, A.I.R. (1978) Cal. 49].

Reservation of right of disposal (Sec. 25)

The property in goods, whether specific or subsequently approrpriated to the contract, *does not pass* to the buyer if the seller reserves the right of disposal of the goods until certain conditions are fulfilled. If, for example, it is a term of the contract that the buyer is to pay for the goods *before* delivery, the seller reserves the right of disposal. In such a case the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. It makes no difference even if the goods have been delivered to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer [Sec. 25 (1)].

Apart from an express reservation of the right of disposal, the seller is deemed to reserve the right of disposal—

(1) Where goods are shipped or delivered to a railway for carriage, and by the bill of lading or railway receipt they are deliverable to the order of the seller or his agent [Sec. 25 (2)].

Example. *B* placed an order with *S* requesting him to send the goods by sea. *S* took a bill of lading in the name of *B* and sent it to his own agent. The goods were destroyed in the course of voyage. *S* had to suffer the loss as the ownership had not passed to *B*.

(2) Where the seller sends a bill of exchange for the price of the goods to the buyer for his acceptance, together with the bill of lading or railway receipt. The property in the goods does not pass to the buyer until he accepts the bill of exchange. The buyer must return the bill of lading or railway receipt, if he does not honour the bill of exchange ; and if he wrongfully retains the bill of lading or railway receipt, the property in the goods does not pass to him [Sec. 25 (3)].

CONTRACTS INVOLVING SEA ROUTES

In contracts of sale which involve sea routes, certain special clauses and conditions are to be found. The meaning of these clauses has been standarised to an extent in accordance with the international customs and practices of merchants. Some of these clauses which are quite often found in such contracts and their legal effects are discussed below :

F.A.S. contracts. F.A.S. stands for "free alongside ship". The property in goods sold under an F.A.S. contract passes from the seller to the buyer when the goods are delivered alongside the ship named by the buyer under a contract of carriage.

Seller's duties. 1. To deliver the the goods alongside the ship.

2. To notify the buyer immediately that the goods have been delivered alongside the ship.

Buyer's duties. 1. To arrange for the contract of affreightment

2. To give the seller sufficient notice of the name of the ship and time for delivery alongside the ship.

3, To pay all charges and to bear all risks from the time the goods are delivered alongside the ship.

F.O.B. contracts—(*Named port of shipment*). F.O.B. stands for "free on board". If *A* of Delhi agrees to sell 100 tons of sugar, F.O.B. Bombay, to *B* of Manchester, this would mean that *A* must put the goods on board a ship at Bombay at his own expense under a contract of carriage by sea, to be made by or on behalf of the buyer, for the purpose of transmission to the buyer.

Seller's duties. 1. To deliver the goods on board the ship named by the buyer. When once the goods are put on board the ship, they are at the risk of the buyer. The duty of the seller ends when he delivers the goods at his own expense to the ship at the port of shipment [*Colley* v. *Overseas Exporters*, (1921) 3 K.B. 302]. Such delivery transfers the possession, property and risk to the buyer.

2. To give notice of the shipment to the buyer so as to enable him to protect himself by insurance against loss during the sea transit ; if the seller fails to do this, the goods will be at his risk.

Buyer's duties. 1. To arrange for the contract of affreightment.

2. To name the ship to which the goods are to be delivered or to authorise the seller to select the ship.

3. To pay all charges and bear all risks subsequent to delivery of the goods on board the ship.

The property in the goods does not pass to the buyer until the goods are delivered on board the ship. If the seller is prevented from putting the goods on board the ship by the failure of the buyer to name a ship, the seller can sue for damages for non-acceptance and not for the price.

C.I.F. contracts—(*Named port of destination*). C.I.F. stands for "cost, insurance and freight". If *A* of Delhi agrees to sell 100 bags of rice at Rs. 2,450 per bag, C.I.F. Manchester, the sum of Rs. 2,45,000 (100 × 2,450) includes (1) the price of goods, (2) the cost of insurance, and (3) the freight up to Manchester.

A C.I.F. contract is performed by the delivery of documents (bill of lading, insurance policy, invoice, certificate of origin, etc.) representing the goods to the buyer, through a bank. The documents are usually delivered by the bank against payment of the price, or against acceptance

of a draft (bill of exchange). This protects both the seller and the buyer. The seller continues to be the owner of the goods until the buyer pays for the goods and gets the documents. If, in the meantime, the goods are lost at sea, the buyer or the seller, whoever is the owner at the time of the loss, can recover the amount from the insurer. If, on receiving the goods, the buyer finds that they are not according to the contract, he may reject them and recover the price paid by him.

Seller's duties. 1. To make out an invoice of the goods sold.

2. To ship at the port of shipment goods of the description contained in the contract.

3. To procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract.

4. To arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. If the seller does not effect insurance, the buyer is not bound to accept and pay for the goods even if the goods arrive safely at the destination.

5. To tender, within a reasonable time after shipment, the bill of lading, the policy of insurance and the invoice and other documents to the buyer, so that he may obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage.

The bill of lading tendered must correctly state the date of shipment of the goods, otherwise the buyer can reject the goods.

Buyer's duties. 1. To accept the documents if they are complete and regular, and pay the price less the freight, on delivery of the documents. The buyer is bound to do so even if the goods have been destroyed, for he has a remedy against the insurer of the goods.

2. To pay the unloading, wharfage charges, etc., at the port of destination.

3. To pay all customs and import duties.

In the case of a C.I.F. contract, the buyer has the right to reject (1) the documents if they are not in order, and (2) the goods if they do not conform to the contract of sale.

C.I.F. contract — Is it a contract for the sale of documents? In a C.I.F. contract, as already observed, the buyer has got to accept the documents, and pay the price even if the goods are destroyed, for he has a remedy against the insurer for the recovery of the loss. It is for this reason that a C.I.F. contract is described as a contract for the sale of documents rather than for the sale of goods. Scrutton J. observed, in this regard, in *Arnhold Karberg & Co.* v. *Blythe, etc.*, (1916) 1 K.B. 495 : A C.I.F. sale is not a sale of goods, but a sale of documents relating to goods. This view is however not correct. A C.I.F. contract may better be described as a contract for the sale of goods to be performed by the delivery of documents, or a contract for the sale of goods through documents. Chalmers has observed that a C.I.F. contract is not a contract for the sale of documents but a contract for the sale of insured goods, to be implemented by the delivery of proper documents.

Chakravarti, C.J. has also rightly observed in *Joseph Pyke & Son* v. *Kedarnath* , A.I.R. (1959) Cal. 328, that "a person who purchases goods under a C.I.F. contract does not intend to purchase mere paper and does not expect to get merely some documents but he intends to purchase and get goods...It is a total misconception to think that C.I.F contracts are

altogether divorced from delivery of the goods." The learned judge further observed, "It cannot be said that a C.I.F. contract is not a contract for the delivery of any article. Even after the shipping documents have been presented to the buyer and even after he has paid out the invoice price, he still retains the right to examine the goods shipped to him and to reject them, if he finds any deficiency in regard to either quantity or quality. It is thus impossible to see how it can be said that under a C.I.F. contract delivery of the goods to the buyer is not material or is not contemplated."

To conclude, we may say that a C.I.F. contract is a contract for the sale of insured goods, lost or not lost, to be implemented by transfer of proper documents.

Transfer of property. In a C.I.F. contract, the property in the goods passes from the seller to the buyer when the goods are shipped unless, as usually happens, the seller reserves the right of disposal. If the seller parts with control over the disposal of the goods, the property in the goods passes to the buyer. The seller may do this by indorsing the bill of lading to the buyer. But if the seller indorses the bill of lading in blank and sends it to his agent to be delivered to the buyer only against payment of the price, or acceptance of the draft, he retains the disposal of the goods under his control. And till the price is paid or the draft is accepted, the property in the goods does not pass to the buyer.

Ex-ship contracts—(*Named ship and named port of delivery*). These are contracts under which the seller causes the delivery of the goods to be made to the buyer from a ship which has arrived at the port of destination at his (seller's) expense. In such contracts, the property in the goods does not pass to the buyer until the goods are actually delivered to him.

Seller's duties. 1. To deliver the goods to the buyer from a ship which has arrived at the port of destination at a place from which it is usual for goods of that kind to be delivered.

2. To pay the freight or otherwise release the shipowner's lien.

3. To furnish the buyer with a delivery order, or some other effectual direction to the shipowner to deliver.

In the case of an ex-shipcontract, the property and risk in the goods do not pass to the buyer until they are delivered at the port of destination. The goods are at the seller's risk during the voyage and there is no obligation on him to effect an insurance on behalf of the buyer.

SALE BY NON-OWNERS

The general rule of law is that "no one can give that which one has not got". This is expressed in Latin maxim *"nemo dat qui non habet"*. For example, if *A* steals an article and sells it to *B*, *B* does not become the owner of the article. It is only the owner of the goods, or a person authorised by him, who can sell the goods. If the seller has no title to the goods, the buyer does not acquire any although he may have acted honestly and may have paid value for the goods. This protects the owner of the goods. Sec. 27 also provides that where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had. This is, however, subject to certain exceptions.

Exceptions

1. *Sale by a person not the owner or title by estoppel* (Sec. 27). Where

the owner by his conduct, or by an act or omission, leads the buyer to believe that the seller has the authority to sell and induces the buyer to buy the goods, he shall be estopped from denying the fact of want of authority of the seller. The buyer in such a case gets a better title than that of the seller.

Example. *A* tells *B* within the hearing of *C* that he (*A*) is the owner of certain goods which in fact belong to *C*. *C* does not contradict *A*'s statement. After some time *B* buys those goods from *A*. The title of *B* will be better than that of *A*, and *C* will be precluded from disputing *B*'s title to the goods.

2. *Sale by a mercantile agent* (Proviso to Sec. 27). A mercantile agent is one who, in the customary course of his business, has, as such agent, authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods [Sec. 2 (9)]. The buyer of goods from a mercantile agent, who has no authority from the principal to sell, gets a good title to the goods if—

(*a*) the agent is in possession of the goods or documents of title to the goods with the consent of the owner ;

(*b*) the agent sells the goods while acting in the ordinary course of business of a mercantile agent ;

(*c*) the buyer acts in good faith ; and

(*d*) the buyer has not at the time of the contract of sale notice that the agent has no authority to sell.

Example. *F*, the owner of a car, delivered it to *H*, a mercantile agent for sale at not less than £ 575. *H* sold the car for £140 to *K*, who bought it in good faith and without notice of any fraud. *H* misappropriated the money. *F* sued to recover the car from *K*. *Held*, as *H* was in possession of the car with *F*'s consent for the purpose of sale, *K* obtained a good title to the car [*Folkes* v. *King*, (1923) 1 K.B. 282].

3. *Sale by one of several joint owners* (Sec. 28). If one of the several joint owners, who is in sole possession of the goods by permission of the other co-owners, sells the goods, a buyer in good faith of those goods gets a good title to the goods.

4. *Sale by a person in possession under a voidable contract* (Sec. 29). When the seller of goods has obtained their possession under a voidable contract, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Example. *A* purchases a piano from *B* by fraud. *A* has a voidable title to the goods. Before *B* rescinds the contract, *A* sells the piano to *C*, who buys in good faith and in ignorance of the fraud. *C* gets a good title.

If a contract under which the seller obtains goods is void, even an innocent buyer of the goods from such a seller does not acquire title to the goods [*Cundy* v. *Lindsay*, (1878) 3 A.C. 459].

5. *Sale by seller in possession after sale* [Sec. 30 (1)]. Where a seller, having sold goods, continues to be in possession of the goods or of the documents of title to the goods and sells them either himself or through a mercantile agent to a person who buys them in good faith and without notice of the previous sale, the buyer gets a good title.

Example. *A* sells certain goods to *B* and promises to deliver the goods the next day. Before delivery *A* sells and delivers the goods to *C* who buys them in good faith and without notice of the prior sale to *B*. *C* gets a good title to the goods notwithstanding that the property had, before he purchased, passed to *B*. *B*'s only remedy in this case is against *A*.

6. *Sale by buyer in possession after having bought or agreed to buy goods* [Sec. 30 (2)]. Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or documents of title to the goods and sells them either himself or through an agent, the buyer who acts in good faith and without notice of any lien or other right of the original seller in respect of the goods, gets a good title.

Example. *A* bought some furniture on hire-purchase, the ownership to pass to him on the payment of the last instalment. *A* sold the furniture to *B* before paying the last instalment. *B* purchased the furniture *bona fide*. *Held*, *B*, having bought in good faith, had obtained a good title to the furniture [*Lee* v. *Butler*, (1853) 2 Q.B. 318].

A person who obtains goods under a hire-purchase agreement is not necessarily a person who has bought or agreed to buy the goods. If he has merely an *option* to buy, he cannot sell the goods so as to give a good title to the transferee, but if he is under an obligation to buy he can give a good title.

Example. *B* let on hire to *M* a car at an agreed monthly rental for 24 months. According to one of the terms of the agreement, *M* could at any time within 24 months purchase the car by making the amount of the hire paid equal to a certain amount. During the term of the hire, without complying with this condition, *M* pledged the car with *C*. *B* filed a suit for the recovery of the car. *Held*, *B* could recover the car as *M* had only an option to purchase and as such could not give a good title to *C* [*Belsize Motor Supply Co.* v. *Cox*, (1914) 1 K.B. 224].

7. *Sale by an unpaid seller* [Sec. 54 (3)]. Where an unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title to the goods as against the original buyer.

8. *Exceptions in other Acts :*

(*a*) *Sale by a finder of lost goods* under certain circumstances (Sec. 169 of the Indian Contract Act, 1872).

(*b*) *Sale by a pawnee or pledgee* under certain circumstances (Sec. 176 of the Indian Contract Act, 1872).

(*c*) *Sale by an Official Receiver* or *Official Assignee* or *Liquidator* of a company.

In all the above cases, if the seller, even though he is not the owner of the goods, sells the goods, the buyer gets a good title.

Sale in market overt. In England, a person, who buys goods in market overt, obtains a good title to the goods. "Market overt" means an "open, public and legally constituted market". Where goods are sold in market overt, the buyer acquires a good title to them irrespective of the seller's title provided

(*a*) the goods are sold in accordance with the usage of the market ; and

(*b*) the buy bought the goods in good faith and without notice of any defect or want of title on the part of the seller.

SUMMARY

It is important to know the precise moment of time at which the property in goods passes from the seller to the buyer for the following reasons :

1. *Risk follows ownership* whether delivery has been made or not and whether price has been paid or not. This is, however, subject to agreement between the parties.

2. When the goods are damaged or destroyed by the action of the third parties, it is the owner of the goods who can take action against them.

3. In the event of insolvency of either the seller or the buyer, the question whether the Official Receiver or Assignee can take over the goods or not depends on whether the property in the goods has passed from the seller to the buyer.

4. The seller can sue for the price, unless otherwise agreed, only if the goods have become the property of the buyer.

TRANSFER OF PROPERTY

The primary rules for ascertaining when the property in goods passes to the buyer are as follows :

(1) Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained (Sec. 18).

(2) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract *intend* it to be transferred. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case (Sec. 19). Where the intention of the parties cannot be ascertained, the following rules shall apply :

1. *Specific goods.* In case of a contract for the sale of specific goods (*a*) in a deliverable state, if the contract is unconditional, property passes as soon as the contract is entered into (Sec. 20), (*b*) if the seller has to do something to put them in a deliverable state, property passes only when such thing is done and notice thereof is given to the buyer (Sec. 21), (*c*) in a deliverable state if the seller has to do something for the purpose of ascertaining the price, property will pass only when such act is done and notice thereof is given to the buyer (Sec. 22).

2. *Unascertained goods.* In case of unascertained or future goods sold by description, property passes only when goods according to the description are unconditionally appropriated to the contract and the buyer is given a notice thereof. Delivery to a carrier (the seller not reserving right of disposal, Sec. 25) amounts to an unconditional appropriation (Sec. 23).

3. *Goods sent on approval.* In case of goods delivered to a buyer on approval or 'on sale or return' property passes when he signifies his approval or acceptance or when he does some act adopting the transaction. If he retains the goods without giving notice of rejection, property passes when the time agreed for returning the goods expires or after a reasonable time has expired (Sec. 24).

SALE BY NON-OWNERS

The general rule of law is that only the owner of the goods or any person specifically authorised by him can sell the goods. If any other person sells them, the title of the buyer will not be better than that of the seller.

Exceptions. The following are the exceptions to the above rule : (1) Sale by a mercantile agent. (2) Sale under the implied authority of owner or title by estoppel. (3) Sale by one of several joint owners. (4) Sale by a person in possession of goods under a voidable contract. (5) Sale by a seller in possession after sale. (6) Sale by a buyer in possession after having bought or agreed to buy. (6) Sale by an unpaid seller

In all these cases, the person selling the goods must be in possession of the goods with the consent of the seller and the buyer must act *bona fide.*

TEST QUESTIONS

1. State briefly the rules as to the passing of property from the seller to the buyer in a contract for the sale of goods.

2. In a contract for the sale of goods, state when (*a*) the property, (*b*) the risk, in the goods sold passes from the seller to the buyer.

3. Summarise the provisions of the Sale of Goods Act in regard to the passing of property in (*a*) ascertained goods, (*b*) unascertained goods, (*c*) goods sold on approval or on sale or return.

4. What are the rules for ascertaining the intention of the parties as to the time when the property in specific goods is to pass to the buyer ?

5. Explain what is meant by reservation of the right of disposal in a contract for the sale of goods.

6. Explain the general rule that no one can give a better title than he himself has. Discuss and illustrate the exceptions under this rule.

7. "A seller cannot convey a better title to the buyer than he himself has." Discuss this rule of law and point out the exceptions.

8. State the exceptions to the rule "*Nemo dat qui non habet.*"

9. (*a*) State briefly the incidents of C.I.F. and F.O.B. contracts.

(*b*) Is it correct to say that a C.I.F. contract is only a contract for the sale of documents ?

10. Comment :

(*a*) Risk *prima facie* passes with ownership.

(*b*) The passing of property from the seller to the buyer is the most important incident in a contract for the sale of goods.

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. Has the property in the goods passed in the following cases ?

(a) *B* offers for a specific horse Rs. 20,000, the horse to be delivered on 5th January, and the price to be paid on the 1st February following.

(b) *B* orders *A*, a boat-builder, to make him a boat. While the boat is being built,B pays to *A* money from time to time on account of price.

(c) *A*, having a quantity of sugar which is more than twenty quintals, contracts to sell to *B* ten quintals out of it. Afterwards *A* puts ten quintals of sugar in sacks and gives notice to *B* that the sugar is ready and requires him to take it away. *B* says he will take it as soon as he can.

[*Hint* : (*a*) The property in the horse would pass to *B* as soon as the seller accepts the offer. The fact that the time of delivery and of payment of price is postponed does not prevent the property from passing at once.
(*b*) No. The property in the boat would pass to *B* when the boat is ready and *A* gives a notice to *B* to this effect (Sec. 21).
(*c*) Yes. The property in sugar passes to *B* when *A* gives notice to *B* (Sec. 21)]

2. *A*, a jeweller, was entrusted with a diamond by *P* with the instructions that *A* should obtain offers for it, and if any such offer was approved by *P*, *A* should sell it to the offerer. Acting contrary to *P*'s instructions *A* sold the diamond to *S* who bought it in good faith. Thereafter, *A* absconded with the price money. Can *P* recover the diamond from *S* ?

[*Hint* : No. *P* cannot recover the diamond from *S* who bought it in good faith from *A* who is a mercantile agent (Sec. 27)].

3. *B* buys from *A*, a furniture-maker, a cabinet for Rs. 5,000, pays the whole amount of price and informs *A* that he will take the cabinet away in a fortnight. *A* thereafter sells the cabinet to *C* and receives payment in cash. Examine the nature of *C*'s title to the cabinet.

[*Hint* : *C* gets a good title to the cabinet provided he buys in good faith and without notice of the previous sale (Sec. 30 (1)].

4. *A* delivers a gold necklace to *B* on "sale or return" basis. It is agreed between *A* and *B* that property is not to pass to *B* till he has paid price of the necklace. Without paying the price, *B* sells the necklace to *C*. Does *C* get a good title to the necklace ?

[*Hint* : No. *C* does not get a good title to the necklace as *B* himself has no title to the necklace till he pays its price (*Weiner* v. *Smith*)].

5. *A* offered to sell to *B* a certain machine for Rs. 50,000. *B* refused to buy unless certain work was done on it to put it into a running condition. *A* replied that *B* might take it to a repair shop and have work done, and when the cost of repairs was known might pay *A* Rs. 50,000 less the cost of repair. To this *B* agreed and took the machine to a repair shop. While being repaired, the machine was destroyed without any fault of the repairman. Can *A* recover the price from *B* ?

[*Hint* : No. (Sec. 19; *Appleby* v. *Myers*)].

6. In a mixed contract for storage of paddy and the sale of the same thereafter, the paddy was delivered by *A* to *B* for storage. *B* had the option to name a particular day on which he was to buy the paddy at the current prevailing rate. Shall *B* be liable if the goods are destroyed before he exercises this option ?

[*Hint* : No (Sec. 19 : *Chidambaram Chettiar* v. *Steel Bros.*)].

7. *B* offers and *A* accepts Rs. 100 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. Who must bear the loss ?

[*Hint* : B (Sec. 20 ; *Tarling* v. *Baxter*, (1827) 6 B .& C. 360)].

8. *A* sells to *B* a horse which is to be delivered to *B* the next week. *B* is to pay the price on delivery. *A* asks his servant to keep the horse separate from the other horses. The horse, however, dies before it is delivered and paid for. Who shall suffer the loss ?

[*Hint* : *B*. (Sec. 20)].

9. Goods are delivered by *A* to *B* on "sale or return". They are further delivered by *B* to *C* and then by *C* to *D* on similar terms. The goods are stolen while in the custody of *D*. Is *B* liable to *A* for the loss ? If not, who shall suffer the loss ?

[*Hint* : Yes, *B*, is liable to *A* for the loss. *B* can recover the loss from *C*. But *C cannot recover the* loss from *D* as between *C* and *D*, there is not a sale but an agreement to sell (Sec. 24 : *Genn* v. *Winkel*)].

10. Jewellery was sent by *A* to *B* 'on sale or return'. *B* pledged the jewellery with *C*. Discuss the rights and liabilities of the parties.

[*Hint* : *A* can recover the price of jewellery from *B*. He cannot recover the jewellery from *C* [Sec. 24 ; *Kirkham* v. *Attenborough*)].

11. *A* finds a costly ring and after making reasonable efforts to discover the owner, sells it to *B*, who buys without knowledge that *A* was merely a finder. Can the true owner recover the ring from *B* ?

[*Hint* : Yes, the true owner can recover the ring from *B* as it is not a valid sale and it also does not come under the exceptions when the finder has the right to sell (Sec. 169 of the Indian Contract Act, 1872)].

12. In a contract of sale of goods, 200 specified bales of goat-skins containing 60 pieces in each bale were sold. It was necessary for the seller to count them before delivery. Before counting was completed, the bales were destroyed by fire. Who should bear the loss, the buyer or the seller ?

[*Hint* : The seller (Sec. 22)].

13. There was a contract for the sale of goods to be of a stated specification. The contract provided that the property in the goods was to be deemed to have passed to the buyer when the goods were put on board, and if any disputes arose the buyer was not to reject the goods but the dispute was to be referred to arbitration. The goods were not according to specification. The buyer rejected the goods and the seller sued him of damages for breach of contract. Decide.

[*Hint* : The buyer is entitled to reject the goods as the seller has delivered a substance quite distinct from that contracted by the buyer].

14. *A* orders 140 bags of rice from *B*, pays for them and asks for delivery. *B* sends him a delivery order for 125 bags and writes saying that the remaining 15 bags are ready for delivery at his place of business. *A* waits for a month before sending for the 15 bags and in the meantime they are stolen. On whom will the loss fall ?

[*Hint*: The loss will fall on *A* because *B* had appropriated the 15 bags to the contract and *A*'s assent to the appropriation was to be inferred from his conduct in not objecting. The property in the 15 bags had therefore passed to *A* [Secs. 18 and 23 (1) ; *Pignataro* v. *Gilroy*, (1919) 1 K.B. 459].

15. *A* agreed to buy from *B* a car and pay Rs. 80,000 for it if his solicitor approved. *A* took possession of the car and sold it to *C*. The solicitor subsequently disapproved the transaction. *B* sued *C* for the recovery of the car. Will he succeed ?

[*Hint*: No, *B* will not succeed . His only remedy is that he can proceed against *A* for the recovery of the price of the car (Sec. 30 (2)].

16. *H* entered into a hire-purchase agreement with *B* in relation to a piano on the condition that on paying 12 instalments of Rs. 1,000 each the piano would be his property. After paying 6 instalments, *B* pawned the piano with *M*, who took it

in good faith. Can *H* take back the piano from *M* ?

[*Hint* : Yes, *H* can recover the piano as *B* had only an option to purchase and as such could not give title to *M* (Sec. 30 (2) ; *Belsize Motor Supply Co.* v. *Cox*)].

17. *A* placed an order with *B* & Co. requesting them to send the goods by sea. *B* & Co. took a bill of lading in the name of *A* and sent it to their own agent. The goods were, however, destroyed in the course of the voyage. Examine the position of the buyer and the seller.

[*Hint* : *B* & Co. does not intend the property in the goods to pass to *A* as it sends the bill of lading to its agent. The property in the goods, therefore, does not pass to *A* and as such *B* & Co. must bear the loss (Sec. 25)].

18. *A* delivers his horse to *B* on 'sale or return within a week'. The horse dies three days after it had been delivered while in the possession of *B*. Can *A* recover the price ? If so, under what circumstances ?

[*Hint* : No, *A* cannot recover the price (Sec. 24; *Elphick* v. *Barnes*). He can recover it if *B* had expressly or by conduct signified his approval or acceptance to *A* within those three days].

19. There is a contract for the sale of a machine, weighting 30 tons. The machine is embedded in a concrete floor. A part of the machine is damaged while being removed. The buyer refuses to take the machine. Advise the parties.

[*Hint* : The buyer is entitled to refuse to take the machine as it is not in a deliverable state (Sec. 21 ; *Underwood* v. *B.C. Cement Syndicate*)].

20. *X* delivers some jewellery to *Y* on 'sale or return' without specifying any time for its return in case of non-acceptance. *Y* allows the jewellery to remain with himself without signifying his approval or refusal. After a month a burglary, takes place in *Y*'s house and the jewellery is stolen. Can *X* sue *Y* for the price of the jewellery ?

[*Hint* : Yes. *X* can sue *Y* for the price of the jewellery as *X* retains the jewellery without giving notice of rejection within a reasonable time. As such, the property in the jewellery had passed to *Y* (Sec. 24)].

21. *A* entrusted a motor car to a mercantile agent for sale, stipulating that the car should not be sold below a certain price. To this the agent professed to agree but intended from the outset to sell the car at such price as he could obtain and misappropriate the proceeds. He sold it to *B* who bought it in good faith for less than the stipulated price and absconded. Subsequently *B* sold the car to *C*. *A* sues *C* to recover the car from him. Decide the case.

[*Hint* : *A* cannot recover the car from *C* (Sec. 27; *Folkes* v. *King*)].

22. *A* goes into a shop and selects certain hats. He arranges with the shopkeeper the supply of the hats to him next morning by a servant of the shop and a month's credit for payment. The hats are destroyed in a fire on the same night. Who should bear this loss ?

[*Hint* : *A* (Secs. 20 and 26)].

23. *A* ordered goods from an English company and paid for them in advance. The goods were to be sent F.O.B. destination Mumbai. The English company packed the goods into cases marked with the buyer's name, registered them for consignment and ordered shipping space in a named ship. Before the goods were sent to the port, a Receiver was appointed by the debenture-holders of the English company and he refused to deliver the goods. A claims the goods. Decide.

[*Hint* : The property in the goods has not passed to *A* and as such his claim for goods will be dismissed. He can only claim a reteable dividend from the estate of the company (*Colley* v. *Overseas Exporters*)].

24. *A* agrees to sell 100 quintals of rice to *B* out of a larger quantity lying in his godown. According to agreement *B* sends gunny bags for the rice and *A* puts 100 quintals of rice in them and informs *B* of the same. But before *B* could take delivery the godown catches fire and the bags are damaged. Who is to suffer the loss ?

[*Hint* : *B* has to bear the loss as risk follows ownership (Sec. 26)][.

25. *A* agreed to purchase 200 tons of wheat from *B* out of a larger stock. *A* sent his men with sacks and 150 tons of wheat were put into the sacks. Then there was a sudden fire and the entire stock was gutted. Who will bear the loss and why ?

[*Hint* : *B* (Sec. 18)]

4-4

Performance of Contract

Performance of a contract of sale means *as regards the seller*, delivery of the goods to the buyer, and *as regards the buyer*, acceptance of the delivery of the goods and payment for them, in accordance with the terms of the contract of sale (Sec. 31).

A contract of sale always involves reciprocal promises, the seller promising to deliver the goods and the buyer promising to accept and pay for them. In the absence of a contract to the contrary they are to be performed simultaneously and each party should be ready and willing to perform his promise before he can call upon the other to perform his promise [*Sujanmal* v. *Radhey Shyam*, A.I.R. (1976) Raj. 98].

If the contract contains any special terms as to delivery and acceptance, these must be complied with. If there are no terms in the contract to this effect, delivery of the goods and payment of the price are concurrent conditions, that is, both these must take place at the same time as in, for instance, a cash sale over a shop counter (Sec. 32)

DELIVERY OF GOODS

Delivery means *voluntary transfer of possession of* goods from one person to another [Sec. 2 (2)]. Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or his agent (Sec. 33).

Delivery of goods may be actual, symbolic, or constructive.

1. *Actual delivery.* Where the goods are handed over by the seller to the buyer or his duly authorised agent, the delivery is said to be actual. Delivery of goods may also be made by doing anything which has the effect of putting the goods in the possession of the buyer (Sec. 33).

2. *Symbolic delivery.* Where goods are ponderous or bulky and incapable of actual delivery, *e.g.*, haystack in a meadow, the delivery may be symbolic. Handing over of the key of a warehouse to the buyer is symbolic delivery of the goods to the buyer and is as effective as actual delivery, even though there is no change in the possession of the goods.

3. *Constructive delivery or delivery by attornment.* Where a third person (*e.g.*, a bailee) who is in possession of the goods of the seller at the time of the sale acknowledges to the buyer that he holds the goods on his behalf, there takes place a delivery by attornment or constructive delivery [Sec. 36 (3)]. This may happen in the following cases :

(*a*) Where the seller in possession of the goods agrees to hold them on behalf of the buyer.

(*b*) Where the buyer is in possession of the goods and the seller agrees to the buyer's holding the goods as owner.

(*c*) Where a third person in possession of the goods acknowledges to the buyer that he holds them on his behalf.

Example. *A* sells to *B* 10 bags of wheat lying in *C*'s godown. *A* gives an order to *C*, asking him to transfer the goods to *B*. *C* assents to such order and transfers the goods in his books to *B*. This is a delivery by attornment.

Rules as to delivery of goods

1. *Mode of delivery* (Sec. 33). Delivery should have the effect of putting the goods in the possession of the buyer or his duly authorised agent. Delivery of goods may be (1) actual, (2) constructive, or (3) symbolic.

2. *Delivery and payment—concurrent conditions.* Delivery of the goods and payment of the price must be according to the terms of the contract. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer shall be ready and willing to pay the price in exchange for possession of the goods (Sec. 32).

3. *Effect of part delivery.* A delivery of part of the goods in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole. But a delivery of the goods, with an intention of severing it from the whole, does not operate as delivery of the remainder (Sec. 34).

Examples. (*a*) *S* directed the wharfinger to deliver his goods lying at the wharf to *B* to whom these goods had been sold. *B* weighed the goods and took away a part of them. *Held*, the delivery of a part of the goods had the same effect as a delivery of the whole [*Hammond* v. *Anderson*, (1803) R. R 763].

(*b*) *S* sold five bales of certain goods to *B*. *B* received one bale, paid for it and refused to accept the other four. *Held*, this amounted to part delivery [*Mitchell Reid Co.* v. *Baldev Dass*, (1888) 15 Cal. 1].

4. *Buyer to apply for delivery.* Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery (Sec. 35). Where the goods are subsequently acquired by the seller, he should intimate this to the buyer and the buyer should then apply for delivery. Unless otherwise agreed, the buyer has no cause of action against the seller if he does not apply for delivery.

5. *Place of delivery.* Where the place at which delivery of the goods is to take place is specified in the contract, the goods must be delivered at that place during business hours on a working day. Where there is no specific agreement as to place, the goods sold are to be delivered at the place at which they are at the time of sale. As regards the goods agreed to be sold, they are to be delivered at the place at which they are at the time of agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced [Sec. 36 (1)].

6. *Time of delivery.* Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time [Sec. 36 (2)]. But where the contract uses words like "directly", "without loss of time", or "forthwith", quick and immediate delivery is contemplated. Demand or tender of delivery should be made at a reasonable hour. What is a reasonable hour is a question of fact [Sec. 36 (4)].

7. *Goods in possession of a third party.* When at the time of the sale the goods are with a third party, there is no delivery by the seller to the buyer until such third party acknowledges to the buyer that he holds them on his behalf. But where the goods have been sold by the issue or

transfer of any document of title to goods, *e.g.*, a railway receipt or a bill of lading, such third party's consent is not required [Sec. 36 (3)].

8. *Cost of delivery.* Unless otherwise agreed, all expenses of and incidental to making of delivery are borne by the seller, but all expenses of and incidental to obtaining of delivery are borne by the buyer [Sec. 36 (5)].

9. **Delivery of wrong quantity** (Sec. 37). The delivery of the quantity of goods contracted for should be strictly according to the terms of the contract. A defective delivery entitles the buyer to reject the goods. The three different contingencies which may arise in case of a defective delivery, *i.e.*, delivery of a *wrong quantity*, are:

(1) *Delivery of goods less than contracted for.* Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject the goods. If he accepts them, he shall pay for them at the contract rate [Sec. 37 (1)].

Example. A sells to *B* 2,000 gross of 200 yards reels of swing cotton. After taking delivery *B* finds that the length of the cotton per reel is less than 200 yards, the average being shortage of about 6 per cent. *B* may reject the goods. If he waives the right of rejection, he is liable to pay the price of the goods at the contract rate [*Beck etc.* v. *Synzmanoski*, (1924)A.C. 43].

If the goods have been rejected for short delivery, the seller can make, within the time limit, another delivery in accordance with the terms of the contract.

(2) *Delivery of goods in excess of the quantity contracted for.* Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may (*i*) accept the whole : or (*ii*) reject the whole ; or (*iii*) accept the quantity he ordered and reject the rest. If the buyer accepts the whole of the goods so delivered, he must pay for them at the contract rate [Sec. 37 (2)].

Examples. (*a*) *A* places an order with *B* to supply 25 bottles of orange syrup. *B* sends 30. *A* is entitled to reject the whole, or he may accept 25 and reject the rest. If he accepts all the 30, he must pay for them at the contract rate.

(*b*) *A* ordered for 10 hogsheads of claret and the seller supplied 15. *Held*, the buyer was entitled to reject the whole [*Cunliffe* v. *Harrison*, (1851) 6 Ex. 903]. It was observed in this case : " The delivery of fifteen hogsheads under a contract to deliver ten is no performance of that contract for the person to whom they are sent cannot tell which are the ten that are to be his ; and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him."

Where a contract is for the sale of "about" so much quantity or so much quantity "more or less", the seller is allowed a reasonable margin. If this margin exceeds, the buyer cannot be compelled to accept the goods. If however, the deficiency or excess is so small as to be negligible, the Court applies the maxim *de minimis non curat lex* (Law does not take account of trifles). Thus where there was a shortage of 522 kgs. of rice out of the agreed quantity of 16,000 kgs., it was held to be a slight deficiency which came within "*de minimis*" rule . The buyer could not therefore refuse to take delivery of the goods [*Suresh Kumar Rajendra Kumar* v. *K. Assan Koya & Sons*, A.I.R. (1990) A.P. 20].

The right to reject the goods is not equivalent to the right to cancel the contract. If the buyer rejects the goods (either because they are less than or in excess of the quantity contracted for), the seller has a right to tender again the contract quantity and the buyer is bound to accept the same [*Vilas Udyog ltd.* v. *Prag Vanaspati Products*, A.I.R. (1975) Guj. 112].

(3) *Delivery of goods contracted for mixed with other goods.* Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole [Sec. 37. (3)].

Examples. (*s*) *A* contracts with *B* to buy 100 tons of cane sugar. *A* delivers to *B* 75 tons of cane sugar and 25 tons of beet sugar. *A* may either (*i*) accept 75 tons of cane sugar which is in accordance with the contract, and reject 25 tons of beet sugar which is of a different description, or (*ii*) reject the whole sugar.

(*b*) A buyer inspected certain timber and branded by hammer-marks those which he accepted. When the timber arrived, it contained a large quantity of unbranded timber. *Held*, the buyer could reject the whole consignment [*London Plywood Ltd.* v. *Nasik Oak Ltd.*, (1939) 2 K.B. 343].

The provisions of Sec. 37 are subject to any usage of trade, special agreement, or course of dealing between the parties [Sec. 37 (4)].

10. *Instalment deliveries* (Sec. 38). Unless otherwise agreed, the seller is not entitled to deliver the goods by instalments and if he does so, the buyer is not bound to accept the goods [Sec. 38 (1)]. The parties may, however, agree that the goods are to be or may be delivered by instalments.

Example. X bought from *Y* 25 tons of pepper October-November shipment. *Y* shipped 20 tons in November and 5 tons in December. *Held*, the case was governed by Sec. 38 under which the buyer of goods is not bound to accept delivery thereof by instalments, unless otherwise agreed. *X* could, therefore, reject the entire lot [*Renter* v. *Sala*, (1879) 48 L.J. 492].

When there is a contract for the sale of goods to be delivered by instalments, the delivery should be in instalments as stipulated in the contract. Such a contract may be express or may be inferred from the circumstances of the case, or from the nature of the contract. In a contract for delivery by instalments which are to be separately paid for, the seller may sometimes make no delivery or make defective delivery in respect of one or more instalments, or the buyer may neglect or refuse to take delivery of, or pay for, one or more instalments. In such a case, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or a severable breach giving rise to a claim for compensation [Sec. 38 (2)]. In deciding whether the breach in respect of one or more instalments of a contract justifies a party in repudiating the whole contract, regard must be had to :

(1) the *quantitative ratio* which the breach bears to the contract as a whole, and

(2) the *degree of probability* that such a breach will be repeated [*Chunilal* v. *Sheoprasad*. A.I.R. (1943) All. 752].

Where the repudiation is on the part of the seller, the buyer is relieved of his obligation to accept the residue of the goods. Where the repudiation is on the part of the buyer, the seller is not bound to tender the residue of the goods. The seller need not make an offer of the goods which he knows the buyer will refuse.

11. *Delivery to a carrier or wharfinger* (Sec. 39). Where, in pursuance of a contract of sale, goods are delivered to a carrier for the purpose of transmission to the buyer or to a wharfinger for safe custody, delivery of goods to them is *prima facie* deemed to be a delivery of the goods to the buyer [Sec. 39 (1)]. In such a case, the seller must enter into a reasonable contract with the carrier or wharfinger on behalf of the buyer for the safe transmission or custody of the goods. If the seller omits so to do and if the goods are destroyed, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages [Sec. 39 (2)]. Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, the seller must inform the buyer in time to get the goods insured otherwise the goods will be at the seller's risk during such sea transit [Sec. 39 (3)].

Acceptance of delivery (Sec. 42)

Receipt of goods by the buyer does not necessarily result in acceptance of goods by him under, and in performance of, the contract of sale. Acceptance is something more than mere receipt or taking possession of the goods by the buyer. It means the final assent by the buyer that he has received the goods under, and in performance of, the contract of sale. If he wrongfully refuses to accept the goods under the contract, he is liable for damages.

The buyer is deemed to have accepted the goods—

1. When he intimates to the seller that he has accepted the goods.

2. When the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller as, for instance, where he (*a*) re-sells the goods, or (*b*) uses the goods in a manner proper only for the owner, or (*c*) makes some alteration in the goods (Sec. 42).

Example. *P* sold barley to *B* by sample. *B* resold the barley to *X*. When the barley was delivered to *B*, he inspected a sample of it and sent it on to *X*. *X* rejected it as not being according to the sample. *B* also claimed to be entitled to reject the barley. *Held*, *B*'s act in inspecting the sample and then sending barley to *X* was an acceptance, and he could not afterwards reject it [*Perkins* v. *Bell*, (1893) 1 Q.B. 193].

3. When, after the lapse of a reasonable time, he retains the goods without intimation to the seller that he has rejected them.

Buyer's liability for rejecting, neglecting or refusing delivery

Buyer's liability in case of rejection of goods (Sec. 43). Unless otherwise agreed, where goods are delivered to the buyer and he rejects them, he is not bound to return them to the seller. It is sufficient if he intimates to the seller that he has rejected the goods. If the seller refuses to take away the goods, the buyer becomes the bailee of the goods, and may charge for keeping them.

Buyer's liability for neglecting or refusing delivery of goods (Sec. 44). When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not, within a reasonable time after such request, take delivery of the goods, he is liable to the seller for—

(*a*) any loss occasioned by his neglect or refusal to take delivery, and

(*b*) a reasonable charge for the care and custody of the goods.

Where the neglect or refusal of the buyer to take delivery amounts to repudiation of the contract, the seller may sue for price and for damages.

RIGHTS AND DUTIES OF THE BUYER

Rights of the buyer

1. *Right to have delivery as per contract* (Secs. 31 and 32). The first right of the buyer is to have delivery of the goods as per contract.

2. *Right to reject the goods* (Sec. 37). If the seller sends to the buyer a larger or smaller quantity of goods than he ordered, the buyer may (*a*) reject the whole, (*b*) accept the whole or (*c*) accept the quantity he ordered and reject the rest.

3. *Right to repudiate* [Sec. 38 (1)]. Unless otherwise agreed, the buyer of goods has a right not to accept delivery thereof by instalments. This has already been explained in detail.

4. *Right to notice of insurance* [Sec. 39 (3)]. Unless otherwise agreed, where goods are sent by the seller to the buyer by a sea route, the buyer has a right to be informed by the seller so that he may get the goods insured.

5. *Right to examine* (Sec. 41). The buyer has a right to examine the goods which he has not previously examined before he accepts them [Sec. 41 (1)]. The seller is bound to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract [Sec. 41 (2)]. Place of delivery is, *prima face*, the place of examination [*Perkins* v. *Bell*, (1893) 1 Q.B. 193]. Where the seller affords an opportunity to the buyer to examine the goods but the buyer refuses to do so, the buyer cannot say that the goods are of an inferior quality and, therefore, cannot repudiate the contract. If the buyer repudiates the contract, the seller is entitled to damages from the buyer [*Dharampal* v. *Ram Chander Rao*, A.I.R. (1980) All. 316].

6. *Rights against the seller for breach of contract.*

(1) *Suit for damages* (Sec. 57). Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery. The measure of damages is, *prima facie*, the difference between the contract price and the market price at the time when they ought to have been delivered, or if no time was fixed at the time of refusal to deliver.

Example. *S* agreed to sell to *B* a quantity of coal at £ 160 per ton. *S* refused to deliver the coal to *B* as its price had risen to £ 230. *Held*, *B* was entitled to recover damages at the rate of £ 70 per ton [*William Brothers* v. *E.T. Aegius*, (1914) A.C. 510].

(2) *Suit for price.* If the buyer has paid the price and the goods are not delivered, he can recover the amount paid.

(3) *Suit for specific performance* (Sec. 58). The buyer may sue the seller for specific performance of the contract to sell. If the goods are specific or ascertained, the Court may, if it thinks fit, order for the specific performance of the contract.

(4) *Suit for breach of warranty* (Sec. 59). Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods. But he may (*a*) set up against the seller the breach of warranty in diminution or extinction of the price ; or (*b*) sue the seller for damages for breach of warranty [Sec. 59 (1)].

The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage [Sec. 59 (2)].

The measure of damages for breach of warranty is the estimated loss arising directly and naturally from the breach which is *prima facie* the difference between the value of the goods as delivered and the value they would have had if the goods were according to the warranty.

(5) *Repudiation of contract before due date* (Sec. 60). When the seller repudiates the contract before the date of delivery, the buyer may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach. This rule is known as the 'rule of anticipatory breach of contract'.

(6) *Suit for interest* [Sec. 61 (2) (*b*)]. Where there is a breach of contract on the part of the seller and as a result the price has to be refunded to the buyer, the buyer has a right to claim interest on the amount of the price refunded to him from the date on which the payment was made. The Court may award the interest at such rate as it thinks fit.

Duties of the buyer

1. *Duty to accept the goods and pay for them in exchange for possession* (Sec. 31 and 32). It is the duty of the buyer to accept the goods and pay for them, in accordance with the terms of the contract of sale (Sec. 31). Further, the buyer must be ready and willing to pay the price in exchange for possession of the goods (Sec. 32).

2. *Duty to apply for delivery* (Sec. 35). Apart from any express contract, it is the duty of the buyer to apply for delivery.

3. *Duty to demand delivery at a reasonable hour* [Sec. 36 (4)]. It is the duty of the buyer to demand delivery at a reasonable hour.

4. *Duty to accept instalment delivery and pay for it* [Sec. 38 (2)]. Refer to point 10 of "Rules as to delivery".

5. *Duty to take risk of deterioration in the course of transit* (Sec. 40). Where the seller of goods agrees to deliver them at his own risk at a place other than where they are sold, the buyer shall take any risk of deterioration in the goods necessarily incident to the course of transit. The buyer and seller may, however, agree to the contrary in this regard.

Example. *P* sold to *D* a certain quantity of hoop iron. It was sent by canal at the request of the buyer. It was rusted before it reached destination. The rusting, however, was no more than what was necessarily incident to the course of transit. *Held*, the buyer was bound to accept the goods [*Bull* v. *Robinson*, (1854) 10 Ex. 342].

6. *Duty to intimate the seller where he rejects the goods* (Sec. 43). Unless otherwise agreed, it is the duty of the buyer to inform the seller in case he refuses to accept the goods.

7. *Duty to take delivery* (Sec. 44). It is the duty of the buyer to take delivery of the goods within a reasonable time after the tender of delivery.

He becomes liable to the seller for any loss occasioned by his neglect or refusal to take delivery.

8. *Duty to pay price* (Sec. 55). Where property in goods has passed to the buyer, it is his duty to pay the price according to the terms of the contract.

9. *Duty to pay damages for non-acceptance* (Sec. 56). Where the buyer wrongfully neglects or refuses to accept and pay for the goods, he will have to compensate the seller, in a suit by him, for damages for non-acceptance.

SUMMARY

It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

Delivery of goods. Delivery means voluntary transfer of possession of goods from the seller to the buyer. It may be (*i*) actual, (*ii*) symbolic, or (*iii*) constructive. But it must be according to the rules as given below :

Rules as to delivery. 1. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. (2) A delivery of part of the goods, in progress, of the delivery of whole, amounts to, for the purpose of passing the property in such goods, as a delivery of the whole. (3) Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery. (4) The place of delivery is the place at which they are at the time of the sale. (5) If the goods are in possession of a third party, there is no delivery until such third party acknowledges to the buyer that he holds the goods on his behalf. (6) Where the seller is bound to send the goods to the buyer but no time for sending them is fixed, they must be sent within a reasonable time. (7) Expenses of making delivery are borne by the seller and expenses of obtaining delivery by the buyer. (8) If the seller sends to the buyer a larger or a smaller quantity of goods than he ordered, the buyer may (*a*) reject the whole, or (*b*) accept the whole, or (*c*) accept the quantity he ordered and reject the rest. (9) If the seller delivers, with the goods ordered, goods of a wrong description, the buyer may accept the goods ordered and reject the rest or reject the whole. (10) Unless otherwise agreed, the goods are not to be delivered by instalments.

TEST QUESTIONS

1. Does the Sale of Goods Act provide for any rules as to delivery of goods ? If so, what are they ?

2. What rights and liabilities flow in cases of part delivery and wrong delivery of goods ?

3. What course is open to the buyer if the seller makes (*a*) a short delivery, or (*b*) a delivery in excess of contract quantity, or (*c*) a delivery of contract goods mixed with other goods ?

4. "Delivery does not amount to acceptance of goods." Discuss, when a buyer can be said to have accepted the goods.

5. Comment : "The fact that the buyer of the goods has received the goods does not mean that he has accepted them."

6. What remedies are open to a buyer for breach of a contract by the seller ? What are his liabilities for rejecting or refusing delivery of goods ?

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. *X*, a dealer in cattle feed, sold to *Y*, another such dealer, 15,000 tons of meat and bone-meal of specified quality to be shipped, 1,250 tons monthly in equal instalments. After about half the meat was delivered and paid for, it was found that it was not of the contract quality, and *Y* refused to take further delivery. Advise *X*.

[*Hint* : *Y* is entitled to refuse to take further delivery as he is not bound to take the risk of having put upon him further deliveries of goods which do not conform to the contract (Sec. 38 ; *Robert A. Munro & Co.* v. *Meyer*, (1930) 2 K.B. 312)].

2. *A* agrees to sell to *B* five tons of oil at Rs. 20,000 per ton to be paid for at the time of delivery. *A* gives to *C*, a wharfinger, at whose wharf he had twenty tons of oil, an order to transfer five of them into the name of *B*. *C* marks the transfer in his books and gives *A*'s clerk a notice of the transfer to *B*. *A*'s clerk takes the transfer