## LECTURE III.

PRINCIPLES OF THE LAW OF PERSONS (RIGHTS ARISING OUT OF DEALINGS BETWEEN PARTY AND PARTY, AND FROM EVENTS).

HAVING now finished our remarks on the meaning of terms, and on the general conception of "right," of "law," as well as of the nature of "persons" and "things," we proceed to the subjects noted in the *Conspectus*, Part II. We pass over the class (I.), rights and obligations arising out of birth, *status* in society, and out of natural or family relations, and come at once to that large and important class (II.) which concerns the rights of persons, when those persons are brought into connection with other persons, by means of some *voluntary dealing* between them, or by some (involuntary) *event* which affects them both. On this class our observations will be confined to broad principles and general features; a glance at the *Conspectus* (II.) (page 15) shows the natural divisions of the subject and the points which must successively receive attention. The first subject is:—

### (A) The parties concerned.

As a right on one side implies an obligation on the other, in all cases of right or obligation arising from any dealing between man and man, there must be at least one person on each side.

The Roman lawyers used the term *creditor* to express the person who had the primary right, and *debitor* to express the person who had the corresponding primary obligation. We have adopted these terms in English, but confine their use to one class of dealings, where one party owes or has to pay, and the other is entitled to receive, *money*.

In many, if not in most, cases where there is a dealing between two parties, it is (as I have already mentioned) a *reciprocal* right and obligation that arises. In other words the person who has the primary right has also an obligation, and the person who has the primary obligation has also a corresponding right. For example, A. agrees with B. to paint a picture for £100: A. has the right to the picture and to B.'s services in

painting it; and B. has the obligation to paint the picture and hand it over: but reciprocally, B. has the right to the £100, and A. the obligation to pay it. But here we have the case of a dealing with one person on each side.

Sometimes there may be more than one person. Several persons (*not* being an "artificial person" or corporation) may jointly undertake to supply 1,000 tons of coal to A., or to A. with D. and E. jointly; and *vice versâ*, the recipient or recipients agree to pay at a certain rate per ton. Here it is a question to be settled by law (if not by terms of the agreement) how performance is to be had. Under the Indian Contract Act, the promisee may make any one of the joint promisors supply the whole of the coal; and they in turn could ask any one of the joint purchasers to pay the whole of the price. If this is not intended, there must be an express condition in the contract or agreement; otherwise the parties are "jointly and severally" liable as the phrase is; which means that the promisors may be come down on for the whole performance—either as a body or individually—at the option of the other side.[1] This matter is of great practical importance, as it enters into many provisions of the law of partnership.

Then, again, there may be persons only *conditionally* concerned in the dealing. A. says to B., if you (B.) lend C. £100, I (A.) will be answerable that C. repays you by a certain date; here A. has no obligation except in the event of C. not paying as agreed. (Law of Principal and Surety.) Here again it is a matter regulated by law (if not by the terms of the agreement) whether B. can at once proceed optionally against either A. or C., when failure to pay occurs; or whether he must exhaust his means of getting payment from C. (the actual debtor) before calling on A. the surety. Sect. 128 (I. C. Act) agrees with the English common law that the former is the rule, not the latter.

One person may become responsible for another, as in *guarantee* and *security*, either by express or implied agreement. But there are also cases where a person, without any express contract,

[1] And whenever one person (whether "severally" liable or not) has actually paid more than his share, he is allowed a claim at law against his fellows to "contribute," *i.e.*, to make up to him the excess (beyond his own proper share) which he has paid on their behalf. The English law is not quite the same as the Indian on the subject of joint or several liability under a contract.

becomes liable for wrong or injury caused by another; for example, the employer may be liable for injury caused by his servant in the course of his employment as such servant, and so also there is a certain responsibility of the employer for injury done *to* his servant in the course of his duty.

Unless expressly otherwise provided, the employer (and the Government or State as employer no less than private persons) may be liable for damage done by the servant in the course of his employment: (whatever remedy the employer may, in his turn, have against the servant if he has been negligent).

In Calcutta, I remember a case where some "coolies" were employed by the Secretary of State (for the Indian Department of Public Works ultimately represents the Secretary of State for India, who has control). They were carrying a hollow iron boiler on a public road, doing it so carelessly that they dropped it with a loud crash, frightening the plaintiff's horses so as to cause them to bolt, whereby the carriage was smashed and the horses so injured that they had to be killed. The Secretary of State was held liable (Calcutta High Court on reference from the Court of Small Causes).

Where a servant has a claim for injury occasioned to him *in the course of his service*, it must appear that there was want of skill, or neglect, on the master's part—*e.g.*, neglect to fence dangerous machinery in a factory; otherwise he will not be liable.

Before the dealing between two persons or more is concluded, it may be that one or other party *changes;* this may be by the act of one of them, or by some event, as the death of one of them.

By the 'act of one of the parties' we mean the *assignment* of a right (*cessio*). It may be voluntary, or by effect of law—*e.g.*, A. owes B. £10; B. voluntarily assigns this debt to C., and gives A. notice to pay to C.; B.'s right is thereat an end and cannot be revived at his pleasure.[1] Supposing, on the other hand, that A. is security for B., who owes C. £10, and A. has to pay up. Here C.'s right is satisfied; but at once, and of itself, it passes over to A., so that he can compel B. to pay or recompense him for what he paid on his behalf.

[1] There are special rules about *assignment*, of which a brief and clear account is given by Dr. W. Stokes (A. I. Code, Vol. I., p. 498); no restriction exists in

Some kinds of contracts are not terminated by the death of the parties; the right of the one and the obligation of the other may pass on to their heirs. This is however not the case where the contract was a "personal" one, in the sense that the thing required *could* only be done by the particular person—*e.g.*, a contract with a particular painter to paint a portrait, or an author to write a story or a play.

### (B) Substance of the right and obligation.

This may vary, of course, according to the nature of the dealing, the act, or the event, which puts one party to such a relation to the other that a right and a corresponding duty come into existence in consequence. If there is an agreement between the parties, the "substance" (or "content"—*Inhalt*, as Dr. Olshausen calls it) of the right, is what they agree about; something to be done, or submitted to, some money to be paid, something to be delivered or supplied. If it is a matter of some wrong act of the person, or some event, giving rise to a relation between them, it is most frequently the case that the obligation consists in the *abstinence* of the other party from any act infringing the right; consequently when the right and duty are called into *active* existence, it is because some infringement has taken place, and an obligation to supply a remedy has arisen.

In some cases, as we have seen, the law will be able to enforce a positive right, by making the party obliged do the very thing itself (specific performance, in some form or shape); but in many cases of unfulfilled agreements, and in all cases of wrong, or of breach of an obligation resembling an agreement or a wrong, the form taken by obligation is, that the defaulter has *to make reparation*. The law in fact finds a *substitute* for the agreed act, or a remedy for the wrong done; in either case in the shape of money *damages*.[1] When a money debt is due and not paid

India (as in some cases it does under the English Common Law). But it should be remembered that no transfer of a claim or debt has effect on the debtor, unless he is a party to or is otherwise aware of the transfer. If A. owes C. money and C. wishes him to pay to X. instead of to himself, he must give A. notice in writing, and then A. will be liable to pay as directed.

[1] What has to be said about damages will be found at pp. 30, 31. I will only add in this place, that when a right is broken or not observed, an injury arises in one of two ways: either there is a positive injury or loss (*damnum emergens*)—something is taken away, or there is a negative loss (*lucrum cessans*)—that is, the

*interest* may be allowed by the Courts (when they have found out what the exact sum overdue is). This additional payment of *interest* on the sum overdue (*i.e.* not paid when it ought to have been) is in fact, a form of compensation to the creditor for the breach of the right to have payment at a certain date, or (if you like to put it so) a price paid to him for the use which the other has had of the money when he was no longer entitled to keep it.

**(C) How the right and obligation arise.**

Such being the characteristics and legal features of every right and corresponding obligation dependent on some relation arising (by acts or events) between one man and another: how does it come to pass, that such a relation practically arises between the parties? The two chief ways are—by voluntary agreement called (I.) Contract; or by a wrongful act called (II.) Tort.[1]

## I. OF CONTRACT OBLIGATIONS.

An agreement *enforceable by law* is called a "Contract." The following elements will be found in every such contract:—

1. Two or more persons or parties capable of contracting.
2. A bilateral act, *i.e.*, an act on either side expressing the agreement, *i.e.*, what each undertakes. In exceptional cases there may be what is called an "unilateral" contract, where only one party engages to do something.
3. The subject of the promise is a matter which is (*a*) possible, (*b*) lawful (*i.e.*, not opposed to positive law or good morals) and (*c*) of a nature to produce a result legally binding and affecting the relations of the parties to each other.
4. The promise on one side constitutes a "consideration" or that which induces and compensates the promise on the other side. In general, one promise must constitute a valid consideration for the other: but in exceptional cases

injured person is prevented from obtaining a profit or benefit he would have had if no breach had occurred.

[1] Wrongful acts or torts, as already remarked, are sometimes offences as well; *e.g.*, it is a tort to slander a man, but (in some laws at any rate) it may also be a criminal offence. Adultery is a tort in English law (money damages only, however heavy); in India it is also a crime (chargeable against the man alone, under the I. P. Code, but against the woman also by some local laws).

the promise may be binding without any corresponding promise or tangible consideration.[1]

5. There *may* be a necessity for putting the agreement into some special form.

(1) There must be at least two parties: a promise to pay to one's self is not a contract.[2] There is always a *promisor* and a *promisee*. Each must be able to act: here come in those general considerations already stated, regarding "legal acts" (p. 28 ff.) about being *of age*, of sound mind (conscious), and not being expressly disqualified by law from contracting.[3]

The contract is started by one party making a *proposal*, and the other giving his *acceptance*. When "accepted," the proposal becomes a "promise." In "acceptance" there must be an unqualified, definite, assent.[4] Of course you may say, "I agree to your proposal provided you do so and so, or allow such and such a thing;" but then that requires further correspondence, and the assent of the other party. In fact, very generally, there is a *set of promises* together; but in the end there must be definite unqualified assent on either side. And it may be that if, in "accepting" with a certain condition, the other side, after a reasonable time, does not object to the condition, he will be held to have agreed to it, and so the acceptance as a whole is perfected. When a person has once made a proposal, he may be bound to adhere to it, even though he has not yet heard of its formal acceptance. But if he dispatches a revocation before he has heard of its acceptance—even though an acceptance has been put in the Post Office—he is free. There are however some

[1] Dr. Whitley Stokes refers to "consideration" as "some fact which affords a motive for the agreement," and thus includes the cases where natural affection, &c., is the motive; in such cases, however, a "solemn form" of agreement is requisite.

[2] *I.e.*, an agreement enforceable by law; the student will always bear in mind this meaning. In a case where a company had two "departments," one for insurance and one for annuities, it was held that one department could not contract with the other.

[3] As where a person of full age, but unable to manage his affairs, is put under the Court of Wards. In Calcutta a special Act was passed to make the (then) King of Oudh incapable of contracting debts, &c.

[4] The proposal is most frequently *special*, *i.e.*, addressed to a particular person or firm; but sometimes there is a *general* proposal addressed to the public—as when a man offers (by public advertisement) a reward for finding a lost article and bringing it to a certain place; here *any* one may signify acceptance by fulfilling the conditions. It is often the case that an acceptance is not unqualified, *e.g.*, A. writes to B. offering to sell a horse for £50, B. replies that he will buy it for £40. This is not an acceptance, but in reality a counter proposal, requiring a new acceptance on A.'s part.

differences in law about this matter, which I do not go into.[1] Besides formal notice of revocation, a proposal is revoked by the *lapse of time* prescribed in the proposal for its acceptance, or (if none such is prescribed) by the *lapse of a reasonable time* without any answer being sent. And it comes to an end, if the person replying to the proposal has added a condition of acceptance which the proposer refuses: and so by the death or insanity of the proposer, if this comes to the other party's knowledge before acceptance. Assent must (of course) not be the result of fraud, coercion, undue influence, or misrepresentation; for these things go against the conscious freedom of act which is requisite. There are some special conditions and consequences in law, attaching to *fraud* and *misrepresentation*, to which I do not extend my remarks.[2]

There are also several rules in detail about the *method* by which either party should make known the conditions or terms of the agreement: such rules are illustrated by the case of a person taking a ticket for carriage of himself or of goods by a railway, and there being printed conditions on the ticket or receipt-form. In general he is held to accept these conditions by taking the ticket or form; unless it appears that the conditions were so indicated that he could not have notice of them.

The parties "proposing" and "accepting," may act themselves or by an *agent*. That agent may be appointed *generally* to carry on the principal's business, or *specially*, to do a particular act or set of acts. Agency may be *implied* in some cases, but ordinarily it is express; no particular *form* being needed (unless the law requires a particular form, as it does in some cases).

The general powers of an agent and his power to act in an *emergency* beyond his specified powers (as stated in the power of attorney) are matters of the special law of the particular relation (itself a contract-relation) of "Principal and Agent." So the further question of the agent delegating his duty to a *sub-agent*. But an agent may act where the power is *implied*, as where a wife buying goods for household purposes, has

[1] See Whitley Stokes' introduction to the Indian Contract Act (A. I. Codes), Vol. I., p. 493.

[2] As when a person discovering the *misrepresentation* may insist on the other performing his part *as if* the matter had been as he (falsely) represented it to be.

*implied* authority to act for (and so bind) her husband. Where a proposal or acceptance is made by agent, there are matters for the other party to consider, such as whether the agency is still existing at the time. The agent (acting properly) is not personally liable, nor can he sue on the contract made for his principal, except in certain cases (three in number), for which see I. Cont. Act, sec. 230 ff.

(*a*) In India a promise to do an impossible thing (*i.e.*, thing impossible in itself) is void. In England there are special distinctions.[1] It should be remembered that the impossibility of keeping a promise may not always be *in the thing itself*, but may arise in consequence of some "event;" and impossibility of performing one side (*i.e.*, one part of the whole contract) does not always affect the other side, or make the *whole* contract void. Under the Indian Specific Relief Act, 1877, A. finally agrees with B. to buy a house for a *lakh* (100,000) of rupees; before B. takes possession, the house is totally destroyed by a cyclone; here it becomes impossible for A. to hand over the house, but B. may have to pay nevertheless.[2]

Quite recently an English case was reported in the papers, where a contractor had agreed with a town corporation to lay down a great extent of water piping: he tendered at a ridiculously low figure and omitted to examine the soil. He found that the work was impossible on his terms, and he had to give up after spending a good deal of money. The corporation thereon took over the work under the agreement, and he was held entitled to nothing: he chose to go into the contract with his eyes open.

(*b*) The matter must also be lawful and not contrary to morality and public policy. Thus a promise to marry a woman

[1] In England it is held that the impossibility does not necessarily take effect on the obligation of the other party, unless it is such that the Court could take it that each party meant to *imply* the possibility, and the cessation of the transaction if the thing proved impossible.

[2] Observe that it is not a matter of a completed sale, where the property has actually passed into B.'s hand, but a *contract to sell*, which is, however, in practice very similar, because B. could specifically enforce his right if A. refused; B. is, therefore, in a very strong position. The cyclone being a calamity of nature, the loss must fall on *some one*, and it must fall on the person who, so to speak, is *most* owner of the two, which under the agreement is B., though he has not yet handed over the money. It is not more hard than if the cyclone had fallen a day after B. had signed the actual sale deed. The hardship of such a case would in practice, usually be mitigated by the fact that the house was insured, and B. paying the price, would get the insurance money.

when the promisor had already a wife and the law prohibited bigamy, would be void, *i.e.*, no contract.[1] So an agreement by A. to pay B. £5 if B. gives evidence in his case. For either the evidence is to be true—in which case (under the next following head) there is no binding matter of agreement, for every one is obliged, without any agreement, to give evidence truly, when called on; or else the evidence is to be "favourable," in which case it is against the law and public morality.

And (*c*) The agreement must be such as produces a binding result on the parties: *i.e.*, must be some matter such as marriage, sale, hiring, paying money, etc., of which the law takes cognizance. A promise to dine with a man, or accompany him on a shooting excursion, is not one creating any legal relation. Nor must it be to do something that every one is bound to do without any agreement.

(4) But it was further noted that the promise of either party (*i.e.*, the lawful, possible, and legally binding promise) was the *consideration* for the contract. Thus, if A. promises to deliver goods to B., and B. promises to pay A. £500 for them, the one promise is the consideration for the other; and this forms an important element in the contract. Indeed this is the most common form of contract. In general, a contract in which there is absolutely no consideration, is void. There are, however, some exceptions, chiefly those in which the party promising, with nothing in return, is actuated by motives of affection, or family feeling; and even then a special formality is required, as will be noticed in the next paragraph. It is not, however, necessary that the "consideration" should be on any defined scale of value, because that would be impracticable. Mere forbearance, for example, may be good consideration; in itself this may appear of no value, but in fact, the granting of time may be of the utmost importance to the other party. Generally speaking, where the consideration clearly appears grossly *inadequate*, it will be considered by the Court whether it does not afford an indication of some fraud, wrong influence, or other circumstance which may entitle it to regard the contract as invalid.

Laws vary as to this. In England there are distinctions

[1] But if one party was not aware of the obstacle there might be a claim for compensation.

between agreements (or contracts) *under seal* and those *not under seal*; and there used to be some distinction as to an agreement of the kind called an *indenture*, but this does not now exist.[1] It is often provided by law that certain agreements and acts connected with them must be in writing, or in writing and registered under the law for registration of assurances. And there may be requirements about *witnesses* signing, and the final "delivery."[2]

Thus in India, an agreement in which affection, &c., is the sole consideration, is only valid if in writing and registered; and we have noted the case of a transfer of immoveable property worth Rs. 100 and more, under the I. T. Act of 1882 (p. 26). So a promise to pay a debt which is time-barred (*i.e.*, cannot be recovered by suit owing to the law of limitation) must be registered. But unless there is some express provision of the kind, no particular form is required for any contract, though it may be customary (and wise) to have a formal written document; and even if the parties *intend* to have a formal document, that will not prevent the contract being binding, if otherwise the proposal, acceptance, &c., have been fully made and assented to.

If we were now going to become regular students of law, we should have to go on to the rules which are applicable to each of the separate kinds of contract-relation known to the law; and a whole book would be required for the study of the various kinds of contract, which have their own peculiarities. I will here only give you a general idea of the scope of contract law, by showing a table of the subject matter which it contains.

There are two main divisions: "principal" contracts, which stand by themselves, as it were; and "accessory," which hang on to some other contract.

(A) "Principal" contracts—

1. Absolute alienation.
   - Gift—exchange.
   - Sale—assignment of rights.
2. Temporary alienation or permissive use.
   - Loan for consumption (*i.e., where a similar quantity and kind of goods is to be returned in kind*).
   - Loan for use.
   - Letting for hire or rent.

[1] The term "indenture" is still used, but no special character attaches to the document by reason of its being so called.

[2] As putting the finger on the seal and saying, "I acknowledge this as my act and deed" (in English law—unknown in India).

3. Marriage.

4. Trusts.

5. For work and service.
   - To keep goods in deposit.
   - To do work on materials or on land, &c.
   - Carriage of goods.
   - For professional, domestic, or trade-service.
   - Agency.
   - Partnership.

6. "Negative service," *i.e.*, agreements not to do something (as, *e.g.*, to refrain from working as a doctor in certain limits of another man's practice).

7. "Aleatory" contracts.[1]
   - Wagers (not enforceable at law).
   - Annuities.
   - Insurance.
   - Marine bonds, "*respondentia*," &c.

(B) "Accessory" contracts[2]—

Contracts of guarantee, indemnity, security (by mortgage, pawn), warranty, &c.

[1] So called from *alea*, a die, because there is an element of chance. The insurance is only payable *if* the accident occurs or the house is burnt down.

[2] So called because they always presuppose some other (principal) contract which is secured, guaranteed, &c.