- ***If the restraint is intended only to protect an employer against an employee making use of trade secrets learned y him in the course of employment:*** Such agreemens do not amount to restraint of trade and hence are enforceable by law.

- ***If a restraint is intended to serve any other purpose (say, to avoid competition):*** Such agreements amounts to restraint of trade and hence, are not enforceable by law.

AGREEMENT IN RESTRAINT OF LEGAL PROCEEDINGS [SEC. 28]

An agreement by which any party is restricted absolutely from enforcing his legal rights under any contract is void. According to Sec. 28, the following two agreements amount to restraint of legal proceedings and are thus, void to that extent-

a) ***Agreement restraining enforcement of rights:*** An agreement by which a party is restricted absolutely from enforcing his legal rights under or in respect of any contract is void to that extent. There are two exceptions to this rule-
   - ✓ ***An agreement between two or more persons to referto arbitration any dispute which may arise between them, is not illegal.***
   - ✓ ***An agreement in writing between two or more persons to refer to arbitration any dispute which has already arisen is not illegal.***

   NOTE: Where two courts have jurisdiction to try a suit, an agreement between the parties that a suit should be filed in one of those courts alone and not in the other is not invalid. ***[C. Milton & Co. v. Ojha Automobile Co.]***

   However, an agreement not to go in appeal to a higher court against the judgment of a lower court, does not amount to restraint of legal proceedings.

b) ***Agreements limiting period of limitation:*** An agreement which limits the time within which an action may be brought so as to make it shorter than that prescribed by the Law of Limitation, is void because its object is to defeat the provisions of law. A partial restrain is not void.

AN AGREEMENT THE MEANING OF WHICH IS NOT CERTAIN, VOID [SEC 29]

An agreement is called an uncertain agreement when the meaning of that agreement is not certain or capable of being made certain. Such agreements are declared void under Section 29. Uncertainty may relate to –

- Subject matter of contract; or
- Terms of contract.

Example: A agrees to sell to B "a hundred ton of oil." There is whatever to show what kind of oil was intended. The agreement is void for uncertainty.

WAGERING AGREEMENT [Sec. 30]

An agreement between two persons under which money or money's worth is payable by one person to another on the happen or non happening of a future uncertain event is called a wagering agreement.

Essential elements of wagering agreements-

a) ***The must be a promise to pay money or money's worth***

b) ***Performance of a promise must depend upon determination of an uncertain event.*** An event is said to be uncertain when it is yet to take place or it might have already happened but the parties are not aware of its result.

c) ***Mutual chances of gains or loss:*** Each party must stand to win or lose upon the determination of an uncertain event. If either of the parties may win but cannot loose, or may lose but cannot win, it is not a wagering agreement.

d) ***Neither party to have control over the events***

e) ***Neither party should have any other interest in the happening or non-happening of the event other than the sum or stake he will win or lose.***

f) ***One party is to win and one party is to lose***

EXAMPLES OF WAGERING AGREEMENTS:

- Agreement to settle the difference between the contract price and market price of certain goods or shares on a particular day.
- A lottery is wagering agreement. Therefore, an agreement to buy and sell lottery tickets is a wagering agreement. (***Section 294A of the Indian Penal Code declares that drawing of lottery is an offence***. However, the government may authorize lotteries. The persons authorized to conduct lotteries are exempted from the punishment. But, the lotteries still remain a wagering transaction.
- An agreement to buy a lottery ticket.
- A crossword puzzle in which prizes depend upon correcpondence of the competitor's solution with a previously prepared solution kept with the Editor of newspapers is a lottery and hence a wagering transaction. [***State of Bombay v. R.M.D. Chamaurbaugwala***]. ***But, a crossword puzzle is generally a game of skill and intelligence and hence not a wager.***

EXAMPLES OF TRANSACTIONS NOT HELD AS WAGERING AGREEMENTS:

- A commercial transaction should always be distinguished from a pure speculative transaction. A commercial transaction is done with an intention of delivery of goods (commodity or security) and payment of price. Therefore, it is not wagering agreement.
- Contract of insurance are contracts of utmost good faith and it is just a contingent contract and not a wagering agreement.
- Prize competitions which are games of skill, e.g., picture puzzles.
- According to the Prize Competition Act, 1955, prize competitions in games of skill are not wagers provided the prize money does not exceed Rs. 1,000.
- An agreement to contribute to a plate or prize of the value of above Rs. 500 to be awarded to the winner of a horse race. (Sec.30)

Effects of wagering agreements-

- Agreements by way of wager are void in India.
- No suit can be filed to recovery the amount won on any wager.
- Agreements by way of wager have been declared illegal in the states of Maharashtra and Gujarat.
- Any transaction or agreement collateral to wagering agreement are not void in India except in the States of Maharashtra and Gujarat because such transactions and agreements as collateral to wagering agreements are illegal in the states of Maharashtra and Gujarat.

CONTINGENT CONTRACTS (Sec. 31 to 36)

As per ***Sec. 31***, "***A contingent contract is a contract, to do or not to do something if some event, collateral to such contract does or does not happen.***"

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***Essential features of a contingent contract*-**

- ***a)*** It is a contract to do or not to do something
- ***b)*** Dependent on happening or non happening of an uncertain future event
- ***c)*** Such an event is a collateral event (i.e. it is collateral to the contract) i.e. the event must not depend upon the mere will of party.
- ***d)*** The event is uncertain

Sec. 32: Contracts contingent upon the happening of an event

Such contracts cannot be enforced by law unless and until that event has happened.
Becomes enforceable: only if such event has happened
Becomes void: if such event because impossible i.e. happening becomes impossible.

Sec. 33: Contracts contingent upon non-happening of a future event

Becomes enforceable: When the happening of such event becomes impossible.
Becomes void: If such event happens.

Sec. 34: Contract contingent upon the future conduct of a living person

Becomes enforceable: When such person acts in the manner as desired in the contract.
Becomes void: When such person does anything which makes the desired future conduct of such person impossible.

***Sec. 35*-**

Contracts contingent upon happening of an uncertain specified event within a specified/fixed time

Becomes enforceable: When such event has happened within the specific time.
Becomes void: When the happening of such event because impossible before the expiry of specified time or when such event has not happened within specified time.

Contracts contingent upon non-happening of an uncertain specified event within a fixed time

Becomes enforceable: When the happening of such event because impossible before the expiry of specified time or when such event has not happened within the specified time.
Becomes void: When such event has happened within the specified period.

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DISTINCTION BETWEEN CONTINGENT CONTRACT AND WAGERING AGREEMENT

BASIS OF DISTINCTION	CONTINGENT CONTRACT	WAGERING AGREEMENT
1) MEANING	A contingent contract is contract in which the promisor undertakes to perform the contract upon the happening or non-happening of an event, which is collateral to the contract.	A wagering agreement is one in which one person agrees to pay certain amount of money to the other on happening or non-happening of a specific event.
2) NATURE OF EVENT	The event is collateral to the contract, i.e. not a part of promise or consideration of the contract.	Even is the sole determining factor.
3) RECIPROCAL PROMISE	There is no reciprocal promise is a contingent contract.	The wagering agreement consists of reciprocal promise.
4) INTEREST IN THE SUBJECT MATTER	The parties are interested in the subject-matter of such contracts. Therefore, the happening or non-happening of the event is material for them.	The parties to wagering agreement have no other interest in the subject matter of the agreement except the winning or losing the money at stake.
5) VALIDITY	A contingent contract is valid contract.	A wagering agreement is void agreement. In the State of Maharastra and Gujarat it is illegal.
6) NATURE OF CONTRACT	All contingent contracts are not wagering agreements because all contingent contracts are not void.	All wagering agreements are contingent agreements because their performance is dependent upon uncertain future events.

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PERFORMANCE OF CONTRACT

Performance of the contract is one of the various modes of discharge of the contract. A contract is said to have been performed when the parties to a contract either perform or offer to perform their respective promises. Sec.37 of the Indian Contract Act lays down the obligation of the parties regarding performance.

Sec 37*: *The parties to a contract must either perform or offer to perform, their respective promises unless such performance is dispensed with or excused under the provisions of Contract Act, or of any other law.

TYPES OF PERFORMANCE

- ***Actual performance*:** When a promisor has made an offer of performance to the promisee and the offer has been accepted by the promisee, it is called an actual promisee. The contractual obligations are actually performed whereby the liability of a party under the contract comes to an end.

- ***Attempted performance or tender of performance:*** Where the promisor has made an offer of performance to the promisee, and the offer has not been accepted by the promisee, it is called an attempted performance [Sec.38]. Such refusal to accept offer of performance by promisee discharges the party from its liability and from its performance.

***Tender or offer of performance to be valid must satisfy the following conditions*-**

- It must be unconditional
- It must be made at a proper time and place i.e. must be made in stipulated time that too during the business hours and also at the stipulated place i.e. promisee's business place or at promisee's residence if there is no business place.
- Reasonable opportunity to the promisee to examine and ascertain that the goods offered are the same as the promisor is bound to deliver.
- It must be for the whole obligation and not for a part of it.
- It must be made to the promisee or his duly authorized agent.
- In case of payment of money, tender must be of the exact amount due and it must be a legal tender.

EFFECT OF REFUSAL OF PARTY TP PERFORM PROMISE WHOLLY: When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

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WHO CAN DEMAND PERFORMANCE?

a) ***Promisee***– Stranger can't demand performance of the contract.

b) ***Legal Representative***– In case of death of the promisee, the legal representative can demand performance unless a contrary intention appears from the contract or the contract is of personal nature.

c) ***Third party***– A third party can also demand performance of the contract in some exceptional cases like beneficiary in case of trust, the person for whose benefir the provision is made in a family arrangement. This is an exception to the doctrine that a stranger to a contract cannot enforce a contract.

d) ***Joint Promisees***- In case of several promisees, unless a contrary intention appears from the contract, the following persons must perform the promise-
   - ✓ ***In case all the promisees are alive***- All the promisees jointly can demand performance.
   - ✓ ***In case of death of any of the joint promisees***- Representatives of deceased promisee jointly with the surviving promisee(s) can demand performance of promise.
   - ✓ ***In case of death of all joint promisees***- Representatives of all of them jointly can demand performance of the promise.

BY WHOM PROMISE IS TO BE PERFORMED / WHO WILL PERFORM THE CONTRACT (SEC 40)

a) ***Promisor himself***- If it appears from nature of the case that it was the intention of the parties to a contract that any promise contained in it should be performed by the promisor himself, such as the ones which includes personal skill, volition or art, such promise must be performed by the promisor himself.
Example- A promises to paint a picture for B as this promise involves personal skill of A. It must be performed by A.

b) ***Promisor or agent***– If it was not the intention of the parties to a contract that the promise should be performed by the promisor himself, as does not involves personal skill of the promisor, such contracts can be performed by the promisor himself or any competent person employed by him.

c) ***Legal Representative***– In case of death of the promisor, his legal representatives can perform the contract unless a contrary intention appears or the contract does not involve personal skill.

d) ***Third person [Sec.41]***- A contract can be performed by a third party if the promisee accepts arrangement i.e. performance by a third party. According to Sec.41, when a promisee accepts the performance by a third party, he cannott afterwards enforce the performance against the promisor although the promisor might not have authorized or ratified the act of the third party. In other meaning once the promisee accepts the performance from a third person, he cannot compel the promisor to perform the contract again.

e) ***Joint Promisors***- In case of several promisors, unless a contrary intention appears from the contract, the following persons must perform the promise-
   - ✓ ***In case all the promisors are alive***- All the promisors jointly must perform.

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- ✓ ***In case of death of any of the joint promisors***- Representatives of deceased promisor jointly with the surviving promisor(s) must perform the promises.
- ✓ ***In case of death of all joint promisors***- Representatives of all of them jointly must perform the promises.

DEVOLUTION OF JOINT LIABILITIES AND JOINT RIGHTS

"Devolution" means passing over from one person to another.

Sec.42 provides for the devolution of joint liabilities: The liabilities of joint promisors pass to their legal representatives (in case of death).

RULES REGARDING THE PERFORMANCE OF JOINT PROMISE [SEC. 43 & 44]:

a) ***Joint and several liability of joint promisors:*** When two or more persons make a joint promise, the promisee may, in the express contract to the contrary, compel anyone or more of such joint promisors to perform the whole of the promise.

b) ***Right to claim contribution:*** Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

c) ***Sharing of loss by default in contribution:*** If anyone of two or more joint promisors makes a default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

d) ***Effect of release of one joint promisor:*** Where two or more persons made a joint promise, a release of one of such joint promisors by the promisee, does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors. ***(Sec 44)***
NOTE: In English law if one joint promisor is discharge then all the joint promisors gets discharged.

MEANING OF DEVOLUTION OF JOINT RIGHTS [SECTION 45]

When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly, with the survivor or survivors and after the death of the last survivor, with the representative of all jointly.

RULES REGARDING THE TIME AND PLACE OF PERFORMANCE [SECTIONS 46 TO 50]

✓ ***Where no time is specified for performance [Sec. 46]***

- ➪ Time of performance is not specified **+** promisor agreed to perform without a demand by the promisee, the contract must be performed within a reasonable time.
- ➪ What is reasonable time is a question of fact and will depend on facts of the case.

✓ ***Where time is specified but hour not mentioned [Sec.47]***.

- ➪ Time of performance specified **+** promisor agreed to perform without application by the promisee then contract must be performed on the day fixed in the contract during the usual business hours and at the place at which the promise ought to be performed.

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- ***Where time is fixed and promisor has not undertaken to perform without an application by the promisee [Sec. 48]***
  - The promisee must apply for performance at a proper place and within the usual hour of business.
- ***Where no place for performance is specified and no application is to be made by the promisee [Sec. 49]***
  - It is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance and perform it at such appointed place.
- ***Where the promisee prescribes the manner or time for performance [Sec. 50]***
  - The promise must be performed in the manner and at the time prescribed by the promisee.

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TIME AS THE ESSENCE OF THE CONTRACT (SEC. 55)

"Time is essence of a contract" means that it is essential for the parties to a contract to perform their respective promises within the specified time. Where time is essence, the concerned parties must perform and are under actual obligation to fulfil their respective promises within the specified time.

Time is pleaded as a fact that is to say that if time is specified for the performance of the contract, this is not by itself sufficient to prove that time is essence of the contract. Intention of the parties has to be observed in order to ascertain whether the parties had the intention to treat time as an essential fact in that particular contract.

Cases where time is considered to be essence of contract:

- Where the parties have expressly agreed to treat as the essence of the contract.
- Where the non-performance at the specified time or delay operates as an injury to the party.
- Where the nature and necessity of the contract requires it to be performed within the specified time.

In commercial or mercantile contracts, the time fixed for the delivery of goods is considered to be the essence of a contract but the time fixed for the payment of the price is not considered to be the essence of a contract.

In non-commercial and non-mercantile contracts, usually the presumption is that time is not the essence of such contracts.

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CONSEQUENCES OF NON-PERFORMANCE OF CONTRACT WITHIN SPECIFIED TIME [SEC. 55]

The consequence of non-performance of a contract within the specified time depends upon whether the time is essence of the contract or not:

- ***When time is essence of a contract***-
  - ***a)*** The contract becomes voidable at the option of the promisee.
  - ***b)*** If performance beyond the specific time is accepted, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the agreed time unless at the time of such acceptance, he gives notice to the promisor of his intention to do so.

- ***When time is not the essence of the contract***-
  - ***a)*** The contract does not become voidable at the option of the promisee.
  - ***b)*** The promisee is entitled to claim compensation for any loss occasioned by the non-performance of the promise at the agreed time.

PERFORMANCE OF RECIPROCAL PROMISES

Meaning of Reciprocal Promise: As per ***Sec. 2 (f)***, "***Promises which form the consideration or part of consideration for each other as called reciprocal promises***."

TYPES OF RECIPROCAL PROMISES:

a) Mutual and Independent- Such promises all to be performed by each party independently without waiting for the other party to perform his promise and therefore he can't excuse himself on the ground of non-performance by the default party.

b) ***Mutual and Dependent***- Where the performance of promise by one party depend on the prior performance of the promise by other party. The party at fault becomes liable to pay compensation to the other party may sustain by the non performance of the contract [***Sec. 54***]

c) ***Mutual and concurrent***- When the promises are to be performed simultaneously a promisor need not perform his part unless the promisee is ready and willing to perform his reciprocal promise. [***Sec. 51***]

Order of performance of reciprocal promises [Sec. 52]: Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they must be performed in that order. And if the order is not expressly fixed by the contract, then it must be performed in the order in which the nature of the transaction requires.

Effects of preventing the performance [Sec. 53]: When the contracts contain reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is not entitles to sompensation from the other party for any loss which ma sustain in consequence of the non-performance of the contract.

APPROPRIATION OF PAYMENTS [SEC. 59–61]
{ALSO KNOWN AS RULE IN CLAYTON'S CASE}

"***Appropriation***" means application of payments or adjustment of payment towards the debts. The question of appropriation of payments arises when a debtor owes several debts to the same creditor and makes a payment that is not sufficient to discharge the whole indebtness.

Appropriation of Payments- Sometimes, a debtor owes several distinct debts to the same creditor and he makes a payment which is insufficient to satisfy all the debts. In such a case, a question arises as to which particular debt the payment is to be appropriated. ***Section 59 to 61*** of the Act which actually incorporates the four rules laid down in Clayton's case provides for the following rules as to appropriation of payments which provide an answer to this question.

1) ***Appropriation as per express instructions by the debtor to the creditor [Sec. 59]:*** Every debtor who owes several debts to a creditor has a right to instruct his creditor to which particular debt, the payment is to be appropriated or adjusted. Therefore, where the debtor expressly states that the payment is to be applied to the discharge of a particular debt, the payment must be applied accordingly.
Example: A owes B three distinct debts of Rs. 2,000, 3,000 and 5,000. A sends Rs. 5,000 and instructs B that the payment should be appropriated against the third debt. He is bound to appropriate the payment against the third debt only.

2) ***Application of payment where debt to be discharge is not indicated [Sec. 60]:*** Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor shall have the discretion to apply such payment for any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.
Example: A owes to B, among other debts, the sum of Rs. 5,000. B writes to A and demands payment of this sum. A sends to B Rs. 5,000 accordingly. This payment is to be applied to the discharge of the debt of which B had demanded payment.

3) ***Application of payment where neither party appropriates [Sec. 61]:*** Where neither party appropriates, the payment shall be applied to discharge the debts including time barred ones in a cronoloical order i.e. in order of time. If the debts are of equal standing, the payment shall be