CHAPTER XI

THE KINDS OF LEGAL RIGHT

79. Perfect and Imperfect Rights

Rights as well as duties are of two kinds, distinguishable as perfect and imperfect.

A perfect right is one which corresponds to a perfect duty, and is not only recognised by law but also enforced by it. Enforceability is the general test of such a right. A legal proceeding will lie for the breach of such a right. The Courts of law not only recognise perfect right but also enforce it, if necessary, with the help of the physical force of the State. The right of a creditor to recover his dues from the debtor within time is a perfect right.

On the other hand, an imperfect right is one which, though recognised by the law, is not enforced by it, and as such falls short of a perfect right. No legal proceeding will lie with regard to such a right. Examples of such legal rights are time-barred debt or claims barred by lapse of time, claims unenforceable by legal action on account of the absence of some strict legal requirement, such as the non-registration of a document where registration is compulsory and so on. In a time-barred debt the creditor cannot recover his dues not because his right has been destroyed but because the law of limitation bars the remedy. The relationship of the creditor and the debtor still subsists and if the debtor pays the creditor after the lapse of time, no action will lie for the recovery of such payment from the debtor. These are rights which receive recognition by the Courts but they are imperfect because no action will lie for the enforcement of such rights. Thus, the Statute of Limitation (i. e. the Limitation Act) does not provide that after a certain time the debt shall become extinct, but merely states that no action can be brought for its recovery after the period of limitation as prescribed by the Act.

The imperfect rights are exception to the maxim "ubijus ibi remedium" which means—where there is a right there is a remedy i. e. there is no right without any remedy.

The law will recognise imperfect rights for the following purposes which are of greatest importance and of most general application :

(1) An imperfect right may be good as a ground of defence, though not as a ground of action. I cannot sue on an informal contract, i.e. on an unregistered instrument required by law to be registered, but if money is paid to

me or property delivered to me in pursuance of it. I can successfully defend any claim for its recovery.

(2) An imperfect right is sufficient to support any security that has been given for it. A mortgage or pledge remains valid, although the debt secured by it has ceased to be recoverable by action. But if the debt is discharged, instead of becoming merely imperfect, the security will disappear along with it.

(3) An imperfect right may possess the capacity of becoming perfect. The right of action may not be non-existent but may be merely dormant. An informal verbal contract may become enforceable by action, by reason of the fact that written evidence of it has since come into existence. In like manner, part payment or acknowledgment will raise, once more to the level of a perfect right, a debt that has been barred by the lapse of time. Thus, a promise to pay a time-barred debt will be enforced by the Courts.

80. The legal nature of Rights against the State

Just as private individuals may have claims against each other, a subject may also have claims against the State itself. Salmond says that such rights against the State must necessarily be imperfect, because the State cannot exercise force against itself. The absence of the element of enforcement in the case of rights against the State has led many writers to deny that they are legal rights at all. Austin and Markby hold that a sovereign cannot be bound by a legal duty. The State cannot be said to issue commands against itself. But Salmond considers that it is not correct to give such a narrow definition to the term "legal right' as strictly those claims that are legally enforced only, but also to include within the term all those claims which are legally recognised by the State in the administration of justice. All rights against the State are not legal, any more than that all rights against private persons are not legal, but some of them are, namely, those which can be sued for in the Courts of justice. A contract with State is as much a source of legal rights and obligations as is a contract between two private persons. It is not to the point to say that rights against the State are held at the State's good pleasure, and are, therefore, not legal rights at all, for, all other legal rights are in the same position. They are legal rights not because the State is bound to recognise them, but because it does so.

81. Positive and Negative Rights

In respect of their contents, rights are of two kinds, being either positive or negative.

A positive right corresponds to a positive duty. It is a right that he, on whom the duty lies, shall do some positive act on behalf of the person entitled. It is an advantage conferred by the law on the owner of the right by virtue of which he can compel others to do something in his favour e. g. the right to recover debt from a debtor is a positive right vested in the creditor.

A negative right, on the other hand, corresponds to a negative duty, and is a right that the person bound shall refrain from doing some act which would operate to the prejudice of the person entitled. It is an advantage conferred by the law on the owner of the right by virtue of which he can compel others not to do less some act towards him e. g. every man has a right not to be killed or injured in any way whatsoever. This is his negative right.

82. Rights in rem and Rights in personam (Jus in rem and Jus in personam) or Real and personal rights

A right is rem, sometimes called a real right, corresponds to a duty imposed upon the people in general. A right in personam, sometimes called a personal right, corresponds to a duty imposed upon a particular or determinate individual. The term jus in rem and jus in personam are derived from the Roman terms actio in rem and actio in personam. An actio in rem was an action for the recovery of dominium in which the plaintiff claimed that certain thing belonged to him and ought to be restored to him. An actio in personam was one for enforcement of an obligation in which the plaintiff claimed the payment of money, the performance of a contract or the protection of some other personal rights vested in him as against the defendant. Naturally enough, the right protected by an actio in rem came to be called jus in rem and a right protected by an actio in personam, jus in personam. The typical modern example of a right in rem is that of the owner of land against persons generally that they shall not interfere with his right of ownership. A typical example of a right in personam, is that arising between the parties to a contract. A right is rem, since it relates to a greater number of persons, is somewhat arrogantly defined as a right availing against the whole world at large, although the usual definition is now more limited which describes it as availing against persons generally. On the other hand, a right in personam binds only a particular person or persons.

The distinctions between the two is one of great importance and prominence in the law and the following illustrations may be taken of it. My right to the peaceful possession of my farm or use of money in my purse, is a real right or right in rem, for all the world at large is under a duty towards me not to interfere with it, but my right to receive money from one who owes it to me is personal, because my right is available only against that particular person who owes the money to me. Similarly, if I grant a lease of the farm to a tenant, my right to receive the rent from him is a right in personam, for it avails exclusively against the tenant himself. I have a real right (right in rem) against every one not to be deprived of my liberty or reputation. I have a personal right to receive compensation from any individual person who has injured or defamed me. In this respect, the right in rem and in personam may be distinguished as primary right and secondary right respectively.

When I say that I have a real right to liberty and reputation it necessarily means that no one should try to imprison me or defame me except at his own peril. That is why, it is said that all real rights (i. e. right in rem) are negative. Generally a personal right is positive e. g. my right to receive money from my debtor. But although all real rights are negative, that is not equally true that all personal rights are positive. For example, many acts though harmful are not considered by law to be wrongful and do not give right of action to the sufferer e. g. trade competition. Thus, I have the fullest liberty to compete with my fellow trader although it may mean ruin to him. But in selling to him the goodwill of my business, I may lawfully deprive myself of this liberty by an express agreement to that effect. He thereby acquires against me a right of exemption from competition and this 'right is personal as well as negative'. Although right in rem and in personam are sometimes called real and personal rights, the former expression right in rem and in personam, is more appropriate, because the term 'personal rights' can also be used with another meaning, namely, as being opposed to a proprietary right.

The distinctions between rights in rem and in personam applies not only to right in the strict sense but also to liberties, powers and immunities. Thus, freedom of speech is, within its limits, a liberty in rem, while a licence to walk over the land of a particular landowner is a liberty in personam. The power to make a contractual offer is a power in rem, while the power to accept an offer made, and thus to create a contract, is a power in personam availing against the person who has made the offer.

83. Proprietary and Personal Rights

'Property' is an extraordinarily ambiguous term and the adjective 'proprietary' conveys the same confusion. Salmond, however, makes the following distinction between proprietary and personal right. The aggregate of a man's proprietary rights constitute his estate, his assets and his property in one of the many senses of that most equivocal of legal terms. On the other hand, the sum total of man's personal rights constitutes his status or personal condition as opposed to his estate. If a person owns land, or chattel or patent rights, or the goodwill of a business, or shares of a company or if debts are owing to him, all these rights form part of his estate. But if he is a free man and a citizen, a husband and a father, the rights which he has as such pertain to his status or standing in the law and constitute personal rights. The term status, however, is unfortunately used in a considerable variety of different senses of which the following may be distinguished :

(a) *Legal condition of any kind whether personal or proprietary*—This is the most comprehensive of general use of the term. A man's status in this sense includes his whole position in the law—the sum total of his legal rights, duties, liabilities or other legal relations, whether proprietary or personal. Thus, we may speak of the status of a land-owner, of a trustee, of an executor, of a solicitor and so on. Hence the other specific meaning of the term—

(b) Personal legal condition, that is to say, a man's legal condition, only so far his personal rights and burdens are concerned to the exclusion of the proprietary relations. It is in this sense that the term has hitherto been used. Paton, therefore, defines personal rights as only the residuary rights which remain after proprietary rights have been subtracted.

Thus, we speak of the status of a free man, of a citizen, of a husband, of a father, and that of an alien, lunatic, infant and so on, but not of a land-owner or a trustee.

(c) *Personal capacities and incapacitites, as opposed to the other elements*—The status in this sense would include the rules as to the contractual capacities or incapacities of a married woman, but not to the personal rights or duties between she and her husband.

(d) *Compulsory as opposed to conventional personal condition*—Here status means personal condition imposed upon man by law without his consent as opposed to the

condition acquired for himself by agreement. The position of a slave is a matter of status but that of a free servant is a matter of contract. Marriage creates a status, for although it is entered into by way of consent, it cannot be dissolved in that way.

Salmond concludes that the essential nature of the distinction between the right in rem and in personam lies in the fact that proprietary rights are valuable and personal rights are not. The former are those which are worth in money, the latter are those that are worth none. The former are the elements of a man's wealth; the latter are merely elements in his well-being. On this point, Paton observes that value is a difficult term to define unless we adopt the test of exchange value, and we have seen that not all proprietary rights can be exchanged, and that value cannot be precisely applied. A man's right to his reputation may be very valuable, the loss of reputation may mean loss of livelihood and the right to physical integrity is a personal one. Yet health is a valuable asset in the sense that economic welfare may depend on it.

84. Rights in re-propria and rights in re-aliena

A right in re-propria is a general right which a person has got over the subject-matter of the right and which the possessor can exercise without any interference by another. This general right constitutes the ownership. The fullest conception of the right in re-propria consists of the following four rights :

(1) Right to use a thing.
(2) Right to exclude others from using it.
(3) Right to dispose of it.
(4) Right to destroy the thing.

According to Austin, "absolute ownership is a right over a determinate thing, indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration".

On the other hand, right in re-aliena (which may also be conveniently termed as encumbrances using that term in its widest possible sense) is one which limits or deregates from some more general right belonging to some other person in respect of the same subject-matter i.e. it is a right which a person possesses with respect to the property owned by another. It frequently happens that the right in re-propria or the right of ownership vested in one person becomes subject or subordinate to an adverse right vested in another. This adverse right is called the right in re-aliena or the encumbrance. It is a right which is detached from the general right

belonging to a person and which is vested in another person as independent right, e. g. the right of an owner of a piece of land to use a way over the land of his neighbour. The right of the owner over his land is his general right which may be limited by his neighbour's right of way over the land. Such rights in re-aliena are called easements or servitudes.

A right in re-aliena may be positive, such as a right of way over the neighbour's field, or negative such as prohibiting his neighbour from building in such a manner as to obstruct light and air to his house.

A right in re-aliena has the following characteristics :

(1) A right subject to an encumbrance is called a servient right, while the right with respect to which the encumbrance exists, i. e. the encumbrance itself, is called the dominant right.

(2) One encumbrance may be subject to another encumbrance e. g. a lease may create a sub-lease.

(3) Alienation or change of ownership does not affect an encumbrance.

(4) Personal rights may be encumbrances of other right e. g. there may be lien over a chattel belonging to the owner.

(5) Real rights may be encumbrances of other rights e. g. a lease or a mortgage or an easement over property.

(6) Personal as well as real rights may themselves be encumbered.

Kinds of Encumbrances

The chief classes of encumbrances are four in number, namely, Leases, Servitudes, Securities and Trusts. They have been considered at length in a later chapter. In the meantime, the nature of these encumbrances have been indicated in brief.

Lease—A lease is the encumbrance of property vested in one man by a right to the possession and use of it vested in another.

Servitude—It is a right to the limited use of a piece of land unaccompanied either by the ownership or by the possession of it, for example, a right of way, a right to the passage of light or water across the adjoining land.

Security—It is an encumbrance vested in a creditor over the property of his debtor, for the purpose of securing the recovery of the debt or a right, for example, to retain possession of a chattel until the debt is paid.

Trust—It is an encumbrance in which the ownership of property is limited by an equitable obligation to deal with it for the benefit of someone else. The owner of the encumbered property is the trustee, the owner of the encumbrance is the beneficiary.

85. Principal and Accessory Rights

The relation between principal and accessory right is the reverse of that existing between servient and dominant rights. The distinction between the two kinds of rights may be explained by an example.

The owner of a farm Whiteacre has a right of way over the neighbouring farm—Blackacre. Here Whiteacre is the dominant tenement and the Blackacre is the servant tenement, and the right of way of the owner of the dominant tenement over the servient tenement is called the dominant right, while the limited right of the owner of the servient tenement over his farm 'Blackacre', which is subject to the right of way vested in another, is called servient right.

Now, the owner of Whiteacre has not only the absolute right to enjoy the fruits of Whiteacre, but also the additional right with respect to Blackacre, i. e. the right of way over it. This additional accrued right with respect to Blackacre is called the accessory right, and his absolute right over Whiteacre for whose benefit the additional right has accrued is called the principal right.

Every right may be affected adversely or beneficially by the existence of other rights. The influence is adverse when one right is limited by another right vested in a different owner (i. e. the limited right of the owner of servient tenement). This gives rise to encumbrance. This influence is beneficial when one right has added to it a supplementary right (say, the right of way) vested in the same owner with respect to the land of a different owner. In this case, the absolute right of the owner of a land so augmented by an additional right is called the principle right, while the additional right appertained to it is called the accessory right. Thus, a servitude is accessory to the ownership of the land for whose benefit it exists.

86. Legal and Equitable Rights

The difference between legal and equitable right is the outcome of the distinction between Law and Equity. The existence of the double system of law in England administered by different Tribunals has led to the existence of a double system of rights, legal rights recognised by the Common Law Courts, and equitable right or equities recognised by the Court of Chancery. This distinction

between the two rights still exists in spite of the fusion of law and equity by the Judicature Act of 1837. The distinction is still of practical importance which is as follows :

(1) The method of their creation and disposition are different. A legal mortgage of land must be created by deed but an equitable mortgage may be created either by a written agreement or by deposit of mere title deeds.

(2) Equitable rights have a more precarious existence than legal rights. Where two inconsistent legal rights are in competition i. e. the same is adversely claimed by two different persons, the first one in time prevails. The same is the case when two inconsistent equitable right are in competition. But in the case of conflict between a legal and an equitable right, the legal right will prevail over the equitable one even though the equitable right had been created first, provided the owner of the legal right had acquired it for value and without notice of the equitable right. For example, as between a prior equitable mortgage and subsequent legal mortgage the preference will be given to the latter. This is based on maxim "Where there are equal equities, the law will prevail".

CHAPTER XII

OWNERSHIP

87. Definition of Ownership

Ownership is a general right over a particular thing. It has been defined by Austin as "a right over a determinate thing, indefinite in point of user, unrestricted in point of duration".

Prof. Salmond defines ownership in its most general and comprehensive sense as a relation between a person and any right that is vested in him. That which a man owns in this sense is in all cases a right, that is, the subject-matter of ownership in this sense extends to all classes of rights, whether proprietary or personal, right in rem or in personam, in re-propria or in re-aliena, and it applies not only to right in the strict sense, but also to liberties, power and immunities. Thus, I own a debt, a mortgage, a right of way over neighbour's land, a patent, a copyright, a power of appointment, as well as a house, in other words, ownership consists of a bundle of rights. The sum total of all rights vested in a person includes all those things, which are owned by any particular individual—whether animate or inanimate. That which a man owns is in all cases a right, and every right is owned. Thus, to own a piece of land means in truth to own a particular kind of right, namely, the right to exclusive use and enjoyment of that land.

In this generic sense, ownership is opposed to two other possible relations between a person and a right i. e. possession and encumbrance.

Possession

(1) A man may possess a right without owning it as where a wrongful occupant of a land makes use of a right of way or other easement appurtenant to it.

(2) A man may own a right without possessing it as where a man has let out his house on rent to appurtenant.

(3) Finally, ownership and possession may be united in one and the same person, as where the owner is himself in possession of his house, the de jure and de facto relations being co-existent and coincident.

In the second place, the ownership of a right is opposed to the encumbrance of it. The ownership of a right may be limited or subject to an adverse right vested in a different owner, which is called encumbrance. A may be the owner of a property, B the lessee of it, C the sub-lessee, D the first mortgagee of it, and E the

second mortgagee, and so on. Although encumbrance is opposed to ownership, every encumbrance is nevertheless himself the owner of the encumbrance. In the above cases, B is the owner of the lease, C is the owner of the sub-lease and D is the owner of the mortgage and so on.

88. Corporeal and Incorporeal Ownership

The distinction between corporeal and incorporeal ownership is the outcome of the distinction between corporeal and incorporeal things. The term thing—Res—however, is used in three distinct senses by legal writers :

(1) In its first and simplest application, it means merely a material object, regarded as the subject-matter of a right, e. g. land, house, book, coins, etc. which may be perceived by the senses.

(2) In the second and wider sense, the term thing includes every subject-matter of a right, whether material or not. In this sense, things are either material or immaterial, e. g. land and chattels as well as man's life, reputation, health and liberty.

(3) In the third application, the term thing means whatever a man owns as a part of his estate or property i. e an easement right. Things, therefore, as objects of ownership are of two kinds—Corporeal and Incorporeal.

A corporeal thing is a material thing and a subject-matter of corporeal ownership and an incorporeal thing is the subject-matter of incorporeal ownership, or rather it is any proprietary right except the right of full dominion over a material object which is regarded as corporeal ownership.

Therefore, corporeal ownership means ownership over things which can be perceived by the external organs of senses, e. g. the owner of a house owns a corporeal thing. Incorporeal things are those that cannot be perceived by the sense, e. g. a debt, a patent and so on, e. g. the owner of a patent owns an incorporeal thing. But this distinction between corporeal and incorporeal ownership is only the mode of expressing ownership, because in all cases, ownership is a right and not an object. We usually speak of acquiring and transferring land, but strictly speaking, it is an acquisition and transfer of the rights in land. We nevertheless speak of ownership of a material object as corporeal ownership and that of an immaterial or incorporeal thing as incorporeal ownership in a narrow sense.

But the use of the word corporeal ownership in its corporeal sense is not always possible. I may own material coins i.e. money in my pocket, but as to the money which is due to me, I own not the money but the right to it. In such a case, it is difficult to draw any accurate line of demarcation between corporeal and incorporeal ownership. So, in order not to create confusion, Salmond says that the ownership of a material thing means the jus in re-propria in respect of that thing. On the other hand, a right in respect of other's land i. e. a right of way, is called jus in re-aliena, which is always incorpreal even though the object of the right is a corporeal thing.

In its full and normal compass, corporeal ownership is the absolute right in its entirety of the lawful uses of a corporeal thing which may, however, be limited or eaten up by the dominant right vested in the encumbrances who are owner of their respective encumbrances, such as, leases, mortgages, servitude, etc, which form an example of duplicate ownership. We find such duplicate ownership, in co-ownership and in trust and beneficial ownership.

89. Sole Ownership and Co-ownership

Sole Ownership—Sole ownership means ownership of one person only. When a right is owned by one person only at a time, it is called sole ownership.

Co-ownership—It may often happen that a right is vested in more than one person at one and the same time. This is called co-ownership. For example, partners of all the properties which constitute the partnership assets. The right owned by co-owners is not divided between them, each owning a separate part. The right is undivided unity, which is vested at the same time in more than one person. If two partners have at their bank a credit balance of Taka 100, there is one debt of Taka 100 owing by the bank to them at once and not two separate debts of Taka 50 due to each of them individually. Each partner is entitled to the whole sum, just as each would owe to the bank the whole of the bank's overdraft. As soon as each of the two co-owners begins to own a part instead of the whole, the co-ownership is dissolved into sole ownership by the process known as partition. So. co-ownership arises when the same right is owned by two or more persons at the same time. Each is the owner of the whole of the right and not of part of it as partners,. Thus, the right owned by co-owners is an undivided unity.

Co-ownership assumes two different forms distinguished as—

(a) ownership in common and (b) joint ownership. The most important difference between the two relates to the effect of death of one of the co-owners.

Ownership in common—In this case the right of a deceased co-owner passes to his heirs or administrators and not to the surviving co-owners.

Joint ownership—The most important incident of joint ownership is survivorship. If a joint owner dies, his interest passes to the surviving owners and not to his heirs or legal representatives.

90. Trust and beneficial ownership

Trust property is that which is owned by two persons at the same time. It is created when a property is held by one person not for his own benefit but for the benefit of someone else. The owner of the property is under an obligation and is bound to hold it or use his ownership for the benefit of the other. The former in whom the property is vested is called the trustee and his ownership is called the trust ownership, the latter for whose benefit the trust is created is called the beneficiary and his ownership is called the beneficial ownership. Although, in law, the trustee is the legal owner, but he has no right to make use of his ownership for his own benefit and his right is nominal rather than real. Thus, a trust is a curious instance of duplicate ownership, the trustee being the legal or nominal while the beneficiary being the beneficial owner of the property.

As between the trustee and the beneficiary the property belongs to the latter, but as between the trustee and the third persons, the fiction prevails and the trustee is regarded as the owner.

Trust ownership and beneficial ownership are independent of each other. Either of them may be transferred, while the other remains unaffected Similarly, either kind of ownership may be independently encumbered.

The purpose of trusteeship is that it is created in order to protect the rights of those persons who are incapable of protecting their interests themselves. Such persons are :

(1) Infants, lunatics and disqualified proprietors.
(2) Unborn persons.
(3) Large number of persons commonly interested in a matter.
(4) Persons having conflicting interests in the same property.

91. Legal and equitable ownership

Legal ownership is that which has its origin in the rules of common law, while equitable ownership is that which proceeds from the rules of equity, divergent from the common law. The

distinction between legal and equitable ownership is still maintained in spite of the fusion of Common Law and Equity by the Judicature Act of 1873. The distinction between legal and equitable ownership is not identical with that as existing between legal and equitable rights mentioned in a previous chapter. The equitable ownership of a legal right is different from legal ownership of an equitable right. For example, when a debt is orally assigned by A to B. A remains the legal owner of it nonetheless, but B becomes the equitable owner of it. But there is only one debt as before, though it has now two owners. So a mortgage is a legal right and the mortgagee owns it legally, but at the same time the mortgagor owns it equitably, because Equity has made the mortgagor the owner of the equity of redemption. Hence, the ownership of the equity of redemption in a legal mortgage is the equitable ownership of a legal right. Similarly, the ownership of an equitable mortgage is a different thing from the equitable ownership of a legal mortgage, because in the former there is only one owner (i. e. the mortgagor) whereas in the latter there are two distinct owners, one being the legal and the other equitable owner.

Further, the distinction between legal and equitable ownership is not equivalent to that between trust and beneficial ownership. It is true that in a trust and beneficial ownership, all the elements of a legal and beneficial ownership are present. A trustee is generally the legal owner and a beneficiary the equitable owner. But this is not always true. A trustee may be an equitable owner. An equitable owner (i. e. the beneficiary) might himself be trustee for another person. Thus, when the equity of redemption in a legal mortgage is settled upon trust, neither the trustee nor the beneficiary possesses anything more than equitable ownership. The legal ownership remains outstanding with the mortgagee.

92. Vested and Contingent ownership

Vested ownership—Ownership is said to have been vested when the title of the owner with respect to any particular right is perfect and complete and nothing more is required to be done to complete the owner's title. The right is absolutely owned by the owner who has an immediate right of present enjoyment or a present, certain right of future enjoyment. For example, a property is transferred to A for life and after his death to B. Here B has a vested ownership in the property during the lifetime of A although

the enjoyment is postponed till his death i. e. B has present certain right of future enjoyment on the death of A, and if B dies during the lifetime of A, the heirs of B will get the property. In technical language B's interest is vested interest, though not vested in possession; it becomes vested in possession only on the death of A

Contingent ownership—Ownership is contingent when the owner's title to any right is yet imperfect and incomplete but is capable of becoming perfect on the fulfillment of some condition, i. e. some further event is necessary to complete or make it perfect. Ownership is contingent when by virtue of a right, which is owned and vested, a further right will be owned and vested on the happening of some future event which may or may not occur. For example, a property is transferred to A for life and after his death to B if he is then alive, but if B is then dead to C. Here both B and C have both contingent ownership in the property. Ownership of B is conditional to his surviving A, while that of C is conditional to the death of B during the lifetime of A and also to his surviving A.

Similarly, if property is left to A for life, remainder to B if he attains the age of twenty-one at the time of A's death, B has two conditions to fulfill before the right is vested in him. Because, here B should not only have been alive at the time of A's death but also should have attained the age of twenty one. This is what is called the rule of 'double possibility'.

It is to be noticed that the contingent ownership of a right is something more than a simple chance or possibility of becoming the owner of it. It is more than a mere spes acquisitions. I have no contingent ownership of a piece of land merely because I may buy it if I so wish or its owner may leave it to me by his will. Contingent ownership is based not upon the mere possibility of future acquisition but upon the present existence of an inchoate or incomplete title.

The conditions on which contingent ownership depends are termed conditions precedent to distinguish them from another kind known as conditions subsequent. A condition precedent is one by the fulfillment of which an inchoate title is completed. In this case, I acquire absolutely what I have already acquired conditionally. But ownership subject to a condition subsequent is not contingent but vested. Contingent ownership is that which is not yet vested but may become so in the future; while ownership subject to a condition

subsequent is already vested, but may be divested or destroyed in the future for non-fulfillment of the said conditions.

The distinction between the two kinds of ownership is shortly this :

(1) A vested ownership does not depend upon the fulfillment of any condition; it creates an immediate right (i. e. the vested interest) though the enjoyment (i. e. the vested in possession) may be postponed to a future date. But a contingent ownership is solely dependent upon the fulfillment of the incumbent condition so that in case of non-fulfillment of the condition the ownership may fall through.

(2) A vested ownership is transferable as well as heritable. But a contingent ownership is inalienable and non-transferable.

(3) A vested ownership is not defeated by the death of the owner before he obtains possession. If the vested owner dies before actual enjoyment, the ownership with pass on to his heirs. But a contingent ownership fails if the owner dies before the happening of the specified event. A contingent ownership may, however, ripen into a vested ownership on the fulfillment of the contingency.

CHAPTER XIII

POSSESSION

93. Introduction

Since the time of Roman Lawyers, who brought their usual acumen to the analysis of the essential nature of possession, the problem has formed the subject of voluminous literature, for, its practical importance is not less than its difficulty.

Salmond says that in the whole range of legal theory there is no conception more difficult to understand than that of possession. Because, the legal consequences which flow from the acquisition and loss of possession are many and serious. Possession, for example, is evidence of ownership; the possessor of a thing is presumed to be the owner of it, and may put all other claimants to proof of their title. Long possession is a sufficient title even to property which originally belonged to another. The transfer of possession is one of the chief methods of transferring ownership. The first possession of a thing which as yet belongs to none is a good title of right. Even is respect of property already owned, the wrongful possession of it is a good title for the wrongdoer, as against all the world except the true owner. Possession is also of such efficacy that a possessor may in many cases confer a good title on another, even though he has none himself, as when I obtain a bank note from a thief, or goods from a factor who disposes of them in fraud of his principal. Moreover, in English law possession is a good title of right against anyone who cannot show a better. Many legal systems treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession. Even the true owner, who forcibly takes his own, may be forced to restore it to the wrongdoer and then proceed in due course of law for the recovery of the thing on the ground of his ownership. These are some of the results which the law attributes to possession, rightful or wrongful, which are sufficient to show the importance of the conception of possession, and the necessity of an adequate analysis of its essential nature.

94. Possession if Fact and in Law

The law is the theory of things, as received and acted upon within the Courts of justice, and this theory may or may not conform to the reality of things outside. The eye of law does not infallibly see things as they are. Partly by deliberate designs and

partly by the errors and accidents of historical developments, law and fact, legal theory and the truth of things, may fail in complete coincidence. With regard to possession also there is the possibility of more or less serious divergences between legal principles and the truth of things and between the law and the fact of possession, partly intentional and avowed, partly accidental and unavowed. So, not everything which is recognised as possession by the law needs be such in truth and in fact. And conversely, the law, by reasons, good or bad, may be moved to exclude from the limits of the conception facts which rightly fall within them. There are three possible cases in this respect. First, possession may and usually does exist both in fact and in law. The law recognises as possession all that is so in fact and nothing that is not so in fact unless there is some special reason to the contrary. Secondly, possession may exist in fact but not in law. e. g. possession by a servant of his master's property, is for some purposes not recognises as such by the law and he is then said to have detention or custody rather than possession. Thirdly, possession may exist in law but not in fact; that is to say, for some special reasons the law attributes the results of possession to someone who as a matter of fact does not possess. The possession thus fictitiously attributed to him is termed as constructive. The Roman lawyers distinguished possession in fact as possession naturalis, and possession in law as possessio civilis. In consequence of this divergence, partly intentional and avowed, and partly accidental and unavowed, between the law and the fact of possession, it is impossible to formulate any abstract theory which might completely harmonise with the detailed rules to be found in any concrete body of rules and with the different aspects of the concept of possession.

95. Corporeal and Incorporeal possession

As in the case of ownership so also in the case of possession a distinction is to be drawn between corporeal and incorporeal possession.

Corporeal possession is the possession of a material object, e. g. a house, a farm, a piece of money. It is the continuing exercise of a claim to the exclusive use of a tangible material object. Thus, corporeal possession is a continuing relation between a person and a material object. But incorporeal possession is the possession or continuing exercise of a claim to anything other than a tangible material thing, e. g. a way over another man's land, a right to light, a title of rank, an office of profit, and such like. All these may be possessed as well as owned. The possessor may or may not be the

owner of them and the owner of them may or may not be in possession of them, Incorporeal possession includes—

(a) Possession of intellectual or immaterial objects which have got only notional existence i. e. some interest or advantage unconnected with the use of material objects. Such as, goodwill, trade mark, a patent, or an office of profit; or

(b) Possession of encumbrances, i. e. non-exclusive use of material object, such as right of way, right to light, etc.

Incorporeal possession is usually called or generally known as the possession of a right. Hence, it may be defined as the continuing exercise of a right and corporeal possession is distinguished from it as the possession of thing.

As in the case of corporeal possession, so also in the case of incorporeal possession, the two elements viz, animus (mental element i. e. intention to possess a thing), and corpus (physical or objective element) are necessary, that is, actual continuous use and enjoyment is essential. In essence, therefore, the two forms of possession are identical. Hence, possession in its full compass, including both corporeal and incorporeal, may be defined as the continuing exercise of any claim or right.

In the case of corporeal possession, the possession of a material object is essential to constitute possession. In other words, the possession of a material object is the continuing exercise of a claim to the conclusive use of it. Actual use of it, however, is not essential. I may lock my watch in a safe instead of keeping it in my pocket, and though I do not look at it for twenty years. I remain in possession of it nonetheless. In the case of incorporeal possession, on the contrary, actual continuous use and enjoyment of it is essential, as being the only mode of possession. I can acquire and retain possession of a right of way only through actual and repeated use of it. In the case of incorporeal things continuing non-use of it is inconsistent with possession, though in the case of corporeal things it is consistent with it.

Some writers are of opinion that genuine possession is always corporeal, and incorporeal possession is quasi-possession—something which is less than possession. So, a doubt arises as to whether incorporeal possession is possession at all. To meet the difficulty. Salmond uses the term 'possession' in a wider sense as to include both corporeal and incorporeal possession. He observes. "The two forms do in truth belong to a single genus. The true idea of pos session is wider than that of corporeal possession, just as the idea of ownership is wider than that of corporeal ownership".

96. Two elements in the conception possession

According to English law, possession involves two distinct elements, one of which is called the mental or subjective element, the other is called the physical or objective element. These two elements were distinguished by Roman lawyers as animus possidendi (i. e. intention to possess) and corpus of possession (physical power). "Neither of these", says Salmond, "is sufficient by itself; possession begins only with their union, and lasts only till one or the other disappears".

First element, namely, animus possidendi—The first conception of possession, namely, the animus possidendi consists in the intention of a person to possess or appropriate for himself the exclusive use of the thing possessed. Mere possession without the intention to claim possession over it is ineffective. A person does not possess a field because he is walking over it unless he has the intention of excluding others from using it. I may be alone in a room with money lying on the table that does not belong to me. I have absolute physical power to appropriate it but I have no possession of it because I have no intention to possess it.

As to the nature of animus possidendi, Salmond makes the following observations :

(1) The intention to possess a thing need not necessarily be a claim of right. It may consciously be wrongful. The thief has possession of it no less than that of the real owner. The possessor of a thing is not he who has, or believes that he has, a right to it, but he who intends to act as if he has such a right.

(2) The claim of the possessor must be exclusive, but this power of exclusion need not be absolute. Thus, I may possess my land notwithstanding the fact that some other person, or even the public at large, possess a right of way over it. I intend to exclude all alien interference except such as justified by the limited and special right of easement vested in others.

(3) The animus possidendi need not amount to a claim or intent to use it as owner, Thus, a tenant, a borrower or a pledge may have possession no less real than the owner himself.

(4) The animus possidendi need not be a claim on one's own behalf. I may possess a thing either on my own account or on account of another. A servant, a trustee or an agent may have true possession, though he claims exclusive use of the thing on behalf of another than himself.

(5) The animus possidendi need not be specific but may be general. Thus, I possess all the books in my library, though I may have forgotten the existence of many of them. That is to say, animus does not necessarily involve the continuous and present knowledge of the thing possessed.

It might be thought in this connection that when a person is in possession of a receptacle, such as a box, bag, cabinet or envelope, his possession of the receptacle automatically gives him possession of the contents. This is not, however, always so, at any rate for the purpose of the law of larceny (theft) as inferred from the following decided English cases :

(1) In Merry & Green (7 M & W 623), the plaintiff purchased a bureau at auction, and subsequently discovered money in it, hidden in a secret drawer and belonging to the vendor. The plaintiff, thereupon, appropriated the money; and it was held that in doing so, he committed theft, as he obtained possession of the money not when he innocently purchased the bureau, but when he fraudulently abstracted the contents of it.

(2) In Cartwright v. Green (7 R R 99), a bureau was delivered for the purposes of repairs to a carpenter, who discovered in a secret drawer money which he converted to his own use. It was held that he committed theft by wrongfully taking the money in his possession.

(3) In R. v. Hudson (1943 K B 448), the prisoner received a letter that was intended for someone else. He kept it for some days and then, on opening of it found inside a cheque which he appropriated to his own use. The Court of Criminal Appeal held that he was guilty of theft.

Second element, namely, corpus of possession—To constitute possession, the animus i. e the intention to possess is not in itself sufficient, it must be accompanied by the physical ability to obtain and retain possession, which is called corpus of possession. Corpus involves the realisation of two things :

(a) In relation to the other persons there should exist the present exclusion of all alien interference, and

(b) In relation to the thing possessed there should exist some sort of security that no one will interfere with my enjoyment of thing possessed.

These two elements of the corpus of possession are stated by Salmond under two headings :

(1) Relation of the possessor to other persons, and

(2) The relation of the possessor to the thing possessed.

97. Relation of Possessor to other persons

In order to constitute possession over tangible object, the relation of the possessor to other persons must be such as to warrant a security for their non-interference. I am in possession of a thing when the facts of the case are such as to create a probable expectation that I will not be interfered with. Absolute security is not needed. Any measure of security is sufficient which reasonably satisfies the intention to possess. All that is necessary is that I may count on the continuous enjoyment of the things without interruption. Such a measure of security may be derived from the following sources :

(i) *Physical strength of the possessor*—This includes the power to exclude all alien interference, if need be, by physical force. Thus, if I own a purse of money and lock it up in my safe. I certainly have possession of it. This physical power constitutes an effective guarantee of enjoyment.

(ii) *Personal presence of the possessor*—The physical power of the possessor may, in many cases, be absent, but still the very presence of the possessor is sufficient to constitute possession. Thus, a little child has no physical power as against a strong man, yet it possesses the money in its hand. A dying man may acquire or retain possession by his personal presence, but certainly not by any physical power left in him.

(iii) *Secrecy*—If a person wants to keep a thing safe from interference by others, he may hide it. He will thereby gain reasonable guarantee of enjoyment and possession of the thing and just as effectually as the strong man fully armed.

(iv) *Custom*—Usage or custom secures a guarantee against interference, because the habit or tendency of mankind is to observe or acquiesce in the established usage, e. g. previous occupation of land, if not proved to be disturbed, is the evidence of present possession.

(v) *Respect for rightful claim*—People posses greater regard for rightful claims than wrongful ones. Hence a general belief in the rightfulness of possession will increase its security.

(vi) *Manifestation of intention to possess (animus domini)*—If the intention to possess is made clear, the security is greatly increased. This consists of not only manifesting an

intention of possession, but also the manifestation of ownership over the thing possessed.

(vii) *The protection afforded by the possession of other thing*— Thus, the possession of a house may confer the possession of all the things inside the house. The possession of a box or packet may bring with it the possession of its contents.

98. Relation of possessor to the thing possessed

The second element of the corpus of possession is the relation of the possessor to the thing possessed namely, that the claim must not only be recognised by other persons, but also the claim must be realised by the possession of the thing itself. There must be no barrier between the person who claims possession and the thing possessed to prevent his claim to the use of it, e. g. if I desire to catch fish, I have no possession of them till I have them securely in my net or my line. Again possession once gained may be lost by the loss of my power to use that thing, e. g. when the bird in my cage has flown away or when I have dropped my jewel box in the sea. But so long as my expectation of its enjoyment is reasonable, it amounts to present possession. Thus, my cow or my dog may have lost its way, but it will probably return. I may have mislaid a book in the house, but if I search hard for it, it will be found. These things, therefore, I still possess though I cannot lay my hand on them at will.

99. Nature of possession

According to the English law, animus (intention) and corpus (physical power) are the two elements which constitute possession. Actual physical detention of the thing is unnecessary, e. g. when a person goes out for a walk, he does not cease to possess the furniture in his house. Neither need the power of exclusion be actual; a child has no actual power of excluding an adult from seizing the doll in her hand, but this does not prevent her from possessing it. We must say that the nature of possession is not strictly a question of fact, nor one of law, but a question of wired law and fact. We propose to give here extracts of some of the English cases on the point.

(1) *In Bridges v. Hawkesworth* (21 Q B 75), a parcel of bank notes was dropped on the floor of the defendant's shop, where they were found by the plaintiff, a customer. It was held that the plaintiff had a good title to them as against the defendant. For, it was the plaintiff and not the defendant, who was the first to acquire possession of them. The

defendant has not the animus, for he did not know of their existence. There the question decided was one of law.

(2) *In T. V. Moor* (1861 L & C I), a bank note was dropped in the shop of the prisoner, who on discovering it, picked it up and converted it to his own use, well knowing that the owner could be found. It was held that he was rightly convicted of larceny (theft), from which it follows that he was not in possession of the note until he actually discovered it.

(3) *In Elwis v, Brigg Gas Co.* (33 Ch. D 562), the defendant-Company took a lease of land from the plaintiff for erecting gas work, and in the process of excavation found a prehistoric boat six feet below the surface. It was held that the boat belonged to the landlord and not to the tenant who discovered it. According to the opinion of the Chatty, J,. it was immaterial that the landlord was not aware of the existence of the boat, all the same he was the first to possess it.

(4) *Similarly, in South Staffordshire Water Co. V.* Sharmen, the defendant was employed by the plaintiff-Company to clear a pond upon their land and in doing so he found certain gold rings at the bottom of it. It was held that the Company was in possession of these things and that the defendant, therefore, acquired no right to them.

Thus, whether the possession of one thing will bring with it the possession of another that is thus connected with it, depends, upon the circumstances of the particular case. A chattel may be upon my land, yet I have no possession of it unless the animus and corpus both exist. I may have no animus as when by neighbour's sheep, with or without my knowledge, stray into my land. There may be no corpus, as when I lose a jewel in my garden, and cannot find it again. There may neither be corpus nor animus as when unknown to me there is a jar of coins buried somewhere upon my estate.

100. Concurrent possession

It is often expressed that two persons cannot be in possession of the same thing at the same time. As a general rule, this is true because exclusiveness is the essence of true possession, and two hostile claimants cannot both have possession at once. It is a fundamental principle of possession that only one person can be in possession of the same thing at the same time. But claims which are not adverse to each other may co-exist. Thus, concurrent or

duplicate possession is possible when the claims are not adverse, e. g. owners in common may both be in possession of the same thing. Following are the cases of duplicate or concurrent possession :

Mediate and immediate possession—Mediate and immediate possession co-exist in respect of the same thing, e. g. a landlord by letting a house to a tenant may retain mediate possession while the immediate possession is vested in the tenant. One person may possess a thing for and on account of another. In such cases, the former is in possession of the thing on another's behalf. The possession thus held by one man through a tenant, servant, licensee, etc. is called mediate, while that is acquired or retained directly and personally may be distinguished as direct or immediate possession. If I myself go and purchase a book, I acquire immediate possession of it; but if I send my servant to buy it for me, I acquire a mediate possession of it through him until the book is in my hand when it becomes immediate.

Joint possession—Two or more persons may possess the same thing in common, as they may own it in common, e. g. possession by the owners in common of the undivided joint family property.

Corporeal and Incorporeal possession—Corporeal or incorporeal possession may co-exist in respect of the same thing. Thus, A may possess the land while B may possess a right of way over it at the same time.

101. Acquisition of Possession

The component elements necessary to constitute possession are animus times corpus. Possession is acquired when these two elements come into co-existence and the right of possession ceases with the loss of either of the elements. There are two modes of acquisition of corporeal possession namely, (1) Taking and (2) Delivery.

Taking—Taking is the acquisition of possession without the consent of the previous owner and the thing taken may or may not have been in possession of the previous owner. Taking may be of two kinds :

(i) *Rightful*—When there is no previous possessor of a thing, taking possession of it is wrongful.

(ii) *Wrongful*—When there is a previous possessor of a thing, taking possession of it (without consent) is wrongful.

Delivery—Delivery, on the other hand, is the acquisition of possession with the consent of the previous owner. It is of two kinds being distinguished as (i) actual and (ii) constructive delivery.

Actual

Actual delivery is the transfer of immediate possession. It is of two kinds :

(a) Where mediate possession is not retained by the transferor i. e. both mediate and immediate possession are delivered to the transferee, e. g. sale.

(b) Where mediate possession is retained by the transferor only the immediate possession is delivered to the transferee, e. g. loan of a furniture.

Constructive

Constructive delivery, on the other hand, is all that which is not actual. It arises in those cases where the law construes that there has been a delivery of possession though there is no actual delivery. It is of three kinds :

(a) The first form of constructive possession is that which the Roman lawyers termed as traditio brev manu; for which Salmond finds no English equivalent. It consists of the surrender of mediate possession of a thing to one who is already in immediate possession of the same, e. g. A lends a watch to B and afterwards (while B still retains it) sells the same to B. No fresh delivery is necessary.

(b) The second form of constructive delivery is that which is called constitum possessorium (i.e. an agreement touching possession). This is converse of traditio brevi manu. It is the transfer of mediate possession while the immediate possession is still in the hand of the transferor, e. g. A purchases goods from B and there is an agreement between them that B shall hold the goods on behalf of A. The goods are construed as delivered to A.

(c) The third form of constructive delivery is that which is known as attornment. This is the transfer of mediate possession while the immediate possession is in the hands of third person, e. g. X has kept his goods in the warehouse of Y and then sells them to B. Thereafter. Y agrees to hold the goods on behalf of B and not for X. Y retains the immediate possession while the mediate possession has been transferred to B.

102. Relation between possession and ownership

"Possession", says Ihering, "is the objective realisation of ownership". Possession is in fact what ownership is in right. Historically the conception of possession is anterior to that of ownership.

Possession is the de facto exercise of a claim, ownership is the de jure recognition of it. A thing is owned by one when his claim is maintained by the will of the State as expressed in the law, it is possessed by him when his claim is maintained by his own self-assertive will. Ownership is the guarantee of law, possession is the guarantee of facts. Possession, therefore, is the de facto counterpart of ownership.

Possession is the external form in which rightful claims normally manifest themselves. Ownership tries to realise itself in possession and possession endeavours to justify itself as ownership The law of prescription determines the process by which, through the influence of time, possession without title ripens into ownership, and ownership without possession withers away and dies. The two things tend mutually to coincide. The separation of these two conceptions is an exceptional incident, due to accident, wrong or the special nature of claims in question.

Generally, ownership and possession have the same subject-matter. Whatever may by owned may also be possessed, and whatever may be possessed may also be owned. To this general statement there are two exceptions :

(1) There are certain claims which may be realised and exercised in fact without receiving any recognition or protection from law, there being no right vested either in the claimant or anyone else. For example, men might possess copyright, trade marks and other forms of monopoly, even though the law erfuses to defend those interests as legal rights. Claims to them may only be realised de facto.

(2) Conversely, there are many rights which can be owned but are not capable of being possessed. These rights are transitory which do not admit of continuing exercise nor of possession either. A creditor, for example, does not possess the debt that is due to him, but he owns the right to the debt which is transitory, because this right, when exercised, is wholly fulfilled or destroyed. It is for this reason that personal rights do not admit of possession. There are, however, certain obligations which admit of possession provided that they are of such a nature as to involve a series of repeated acts of performance. Thus, I may possess a right of way through repeated acts of use just as I may

possess a right of light or support through continuous enjoyment. Thus, repeated exercise of right in this respect is equivalent to continued exercise.

103. Possessory Remedies

Possessory remedies are those legal remedies which are available for the protection of possession even against ownership, while those available for the protection of ownership itself may be distinguished as proprietary.

In English law, possession is a good title of right against any one who cannot show a better. A wrongful possessor has the right of an owner with respect to all persons except the earlier possessor or the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it from any other person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced to restore it to the wrongdoer. He must first give up possession and then proceed on due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law. In old times, possession was generally guarded against by means of violent self-help. But the tendency of the modern time is to attain this end by a much more satisfactory and reasonable way. It adjusts the burden of proof of ownership with perfect equity, without recourse to any such anomaly as the protection of the possessor against the owner. This it does by the operation of the three following rules :

(1) Prior possession is prima facie proof of title. Even in the ordinary proprietary action a claimant need do nothing more than prove that he had an older possession than that of the defendant, for the law will presume from the prior possession a better title. The maxim is, qui prior est tempore potior est jure (where two rights are in conflict, the earlier one prevails).

(2) A defendani is always at liberty to rebut this presumption by proving that the better title is in himself,

(3) A defendant will not be permitted to set up the defence jus tertii, as it is called, that is to say, he will not be heard to allege as against the plaintiff's claim, that neither the plaintiff nor he himself but some third person is the true owner.

CHAPTER XIV

PERSONS

104. Nature of personality

So far as legal theory is concerned, a person is any being whom the law regards as capable or rights or duties. Any person that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance and this is the exclusive point of view from which personality receives legal recognition's.

Salmond says that personality is a wider and vaguer term than humanity. In the law, there may be men who are not persons slaves, for example, are destitute of legal personality in any system which regards them as incapable of rights or liabilities. Like cattle they are things and the objects of rights; not persons and the subjects of rights. Conversely, there are , in the law, persons who are not men. A joint stock company or a municipal corporation is a person in legal contemplation. So, also, in Hindu Law, idols are legal persons which has been recognised by the Privy Council in the case of Pramatha Nath Mullick v. Pradyumno Kumar Mullick (1925) L R 52 IA 245. It is true that they are only fictitious, not real persons but they are not men at all, either fictitious or real.

Hence in legal theory, whatever is capable of rights and duties is a person. Persons so defined are of two kinds. distinguishable as (1) natural and (2) legal.

Natural person—A natural person is a living human being who is recognised by the state as capable of rights or duties, that is to say, a person who has got a Status. A natural person must be (1) a living human being and (2) he must be recognised by the State as a person, that is to say, he must not be a slave or must not have suffered civil death.

Legal or artificial or juristic person—An artificial or legal person is such a group of human beings or a mass of property, as is, in the eye of law, capable of rights and duties. A legal person is any subject-matter or beings, real or imaginary, other than a human being to which the law attributes personality by was of fiction.

The distinction between natural and artificial person is shortly this—

(1) The existence of artificial person is dependent on law, while the existence of natural person is independent of law.

(2) The duration of existence of artificial person is often much longer than the natural period of human life.

(3) Natural person acts for himself; while artificial person can act only through authorised agent.

105. Legal person : its creation and extinction's.

A legal person is any subject-matter other than a human being to which the law attributes personality. Therefore, legal persons are creatures of the law owing their very existence to the law alone. The law, in creating legal persons, always does so by personifying some real thing. Such a person has to this extent a real existence, and it is his personality alone that is fictitious. The thing personified may be termed the corpus or the body of legal person so created, it is the body into which the law infuses the animus of a fictitious personality.

Although every legal personality involves personification the converse is not true. In popular language, for the sake of simplicity of thought and speech, a subject matter is sometimes described as a person even though the law will not treat it as a legal person. We speak, for instance, of the estate of a deceased person as if it were itself a person. We say that it owes debts or has debts owing to it. Similarly, we speak of a firm, a club, a jury, a Bench of judges, a public meeting, etc. as distinct persons. The law, however, recognises no legal personality in such cases. Legal personality is not reached until the law itself invests a particular fictitious being with legal right.

Creation—An artificial person is created by the law giving to a group of persons or mass of property the character of a legal person. The legal character is conferred when the said group or mass satisfies certain legal provisions. Hence, they are created (1) by charter granted by the executive authority, and/or (2) by special law.

Extinction—An artificial person comes to an end—

(1) by failure of its component part;

(2) by judicial proceedings leading up to the winding up of a company;

(3) by forfeiture, and

(4) by surrender of privileges.

106. Classes of juristic persons

Legal persons, being arbitrary creations of the law, may be of as many kinds as the law pleases. English law recognises only three classes of legal persons—(1) Corporations, (2) Trade Unions and (3) Friendly Societies :

(1) *Corporations*—A corporation is a group or series of persons which by a legal fiction is regarded and treated as a real person. The creation and extinction of a corporation is determined by law.

(2) *Trade Union*—A Trade Union is an association of workmen or employers for the purpose, among other things, of collective bargaining; in England, it has been accorded legal personality by judicial decision.

(3) *A friendly society*—It is a voluntary association formed for the purpose of raising, by the subscription of the members, funds out of which advances may be made for the natural relief and the maintenance of the members and their families in sickness, infancy, old age, or infirmity.

But in other systems of Jurisprudence their are several distinct varieties of legal persons of which three may be selected for special mention :

(1) *Corporations*—The first class of legal persons consists of Corporations as already defined, namely, those which are constituted by the personification of groups or series of individuals. The individuals forming the corpus of the legal person are called its members. We shall consider this form of legal personality more particularly in the sequel.

(2) *Institutions*—The second class is that in which the law attributes fictitious personality not to the group or series of persons connected with it but to the institution itself, such as Hospital, Library, College, Church, University and regards them as persons. But in English law, the legal personality is attributed to the group of persons connected with it, namely, the Chancellor, Vice-Chancellor, Fellows and Graduates, etc.

(3) *Funds*—The third kind of legal person is that in which the law attributes fictitious personality to some fund or property devoted to special use, such as, a trust estate, a charitable fund, the property of a dead man or of bankrupt. But in English law, the legal personality is attributed not to the fund or the estate but to the body of persons who administer it, namely, the receiver, board of trustees, etc.

107. Corporations

A corporation is a group or series of persons which is invested by law with a personality, that is, by a legal fiction the group or series of persons is regarded and treated as a real person. The creation and extinction of corporation is determined by law. The individuals who thus form the corpus of the legal person are called its members.

But it should be noted that a mere association of human beings does not form a corporation, because a corporation is not merely the sum total of its component members—i. e. the shareholders, but something superseded to them—viz. the fictitious or legal personality. Legal personality is not reached until the law recognises the fictitious being which represents the associated individuals. A corporation comes into existence by the personification of group or series of individuals i. e. when the law attributes fictitious personality of the group or series of persons. The fictitious personality is attached to the group collectively but not to the persons individually. Hence, the personality of a corporation differs from that of a natural person.

According to English system, corporations are of two kinds, distinguished as corporations aggregate and corporations sole. A corporation aggregate is an incorporated group of existing persons which has several members at a time, e. g. a registered company consisting of all the shareholders, a municipal corporation consisting of all the inhabitants of the place, such a corporation is, in law, something different from its members. The property of the company is not the property of the shareholders. A shareholder may enter into a contract with the company, for the two persons are entirely distinct from each other. Therefore, it is perfectly possible that a corporation may survive its last member and can exist without any member.

A corporation sole is a series of successive-persons, e. g. Sovereigns, the Solicitor-General, the Postmaster-General. The element of legal fiction involved here is that the law assumes that in addition to the natural person who actually occupies that particular official position, there is a mythical being who is, in law, the real occupant of the office, and who never dies or retires. The living official is merely the agent or representative through whom the legal person performs his function. The living officials come and go, but this offspring of the law remains the same for ever. Property owned by a person as a corporation sole is distinct from that which he owns in his private capacity and will pass on his death, not to his

estate but to his successors-in-office. One important result of this is that it enables gifts to be made to the successive holders of an office which has been incorporated. Without such incorporation such a gift would fail for remoteness, Corporations sole are not a peculiarity of English law. The distinction between the two forms of incorporation is also well known to foreign jurists.

In all these respects a corporation is essentially different from an unincorporated Partnership Firm. A firm is not a person in the eye of law. It is nothing else than the sum of the individual members. There is no legal entity, standing over against the partners, as a company stands over against its shareholders. The property and debts of the firm are nothing else than those of the existing partners. There can be no firm which consists of one partner only, but a company may consist of one member, that is, who manages, the whole show, and the others in name only.

108. The Agents, Beneficiaries and Members of a corporation

A corporation, having neither soul nor body, cannot act save through the agency of some representative in the world of real men. For the same reason, it can have no interest, save those which are attributed to it as a trustee for or otherwise on behalf of actual human beings. Whatever a company is reputed to do, in law, is done, in fact by the directors or the shareholders as its agents and representatives, Whatever interests, rights or property it possesses in law are, in fact, those of its shareholders and are held by it for their benefit. Every legal person, therefore, has corresponding to it, in the world of natural persons, certain agents or representatives by whom it acts and certain beneficiaries on whose behalf it exists and fulfills its functions. Its representatives may or may not be different persons from its beneficiaries, for these two capacities may or may not be united in the same individuals. The shareholders of a company are not merely the persons for whose benefit it exists; they are also those by whom it acts. In the case of corporation established for charitable purposes, it is otherwise, for the beneficiaries may have no share whatever in the management of its affairs. The relation between a corporation and its beneficiaries may or may not amount to a trust in the proper sense of the term. A share in a company is not the beneficial ownership of any portion of the company's property, but the benefit of a contract made by the shareholder with the company, under which he is entitled to be paid a share of the profits made by the company, and of the surplus assets on its dissolution. A share in a company is a chose in action

(in English Law)—an obligation between the company and the shareholder.

It is worth notice that some or all of the members of a corporation may be corporations themselves. There is nothing to prevent the shares of a company from being held by other companies. In this case the idea of incorporation is duplicate and the law creates a legal person by the personification of a group of persons who themselves possess a merely legal personality.

109. The acts and liabilities of a corporation

When one person acts through an agent, the authority of the agent is determined by the will and consent of the principal. But that is not so in the case of a corporation. It is for the law to determine not only as to who shall be an agent for a corporation, but also the law determines within what limits the authority of the agent should be exercised. A legal person is as incapable of conferring authority upon an agent to act on its behalf as of doing the act in person. The authority of the agents and representatives of a corporation is, therefore, conferred, limited and determined not by the will of the principal, but either (1) by the wills of some human beings, who are for this purpose identified in law with the corporation or (2) by the law itself. A good illustration of (1) is afforded by companies incorporated under the Companies Act. The first director may be appointed by or in accordance with the Articles of Association, drawn up by the promoter of the company, or they may be appointed at a meeting of the shareholders. But thereafter the first directors are themselves regarded for many purposes as the alter ego of the company and their wills are, within the limits of the rules of law, regarded as the wills of the company.

An important rule in connection with companies incorporated by special statute and companies incorporated under the general provisions of the Companies Act is that their powers are restricted by law in a way that the powers of a human being are not. Thus, a company incorporated by special statute is limited to the power conferred by the statute. In case of a company registered under the Companies Act, the Memorandum of Association must set forth the purposes for which it is established, and even the unanimous consent of the whole body of shareholders cannot effectively enable the company to act beyond the limits so marked out for its activity. Any act which lies beyond these legally appointed limits will not be imputed to the corporation, even though it is done is its name and on its behalf. An act which goes beyond authority so conferred is called ultra vires of the corporation and such act is null and void.

It is well settled by the law of England that a corporation may be held liable for wrongful acts and this liability extends even to those cases in which malice, fraud and other wrongful motive from the special ingredient. The liability on the part of corporations is extended to criminal liability too, and is also punished by way of a fine or forfeiture of property as any private individual. That being so, the question arises, whether it is natural justice to punish a corporate body for the acts of its agent when the ultimate result of such punishment is bound to fall on the shoulders of the beneficiaries. To punish a corporation is nothing more than to punish the innocent beneficiaries for no fault of theirs. To this objection Salmond says that although the representatives of a corporation are, in form and theory, the agents of that fictitious person, yet, in substance and fact, they are agents of the beneficiaries. Just as the principal is held liable for the acts of the agents, so also in the case of a corporation. Thus a company is justly held liable for the acts of the directors.

A second objection arises from the following considerations. If the limits of the authority of the agents are determined by the law itself, can any act done by the agents, which go beyond the authority conferred upon them, be deemed to be the acts of the corporation? If illegal, it cannot be the act of a corporation within the limit of lawful authority; and if not within these limits, it cannot be the act of a corporation. To this objection, Salmond offers two different solutions. He says that in the first place, although a fictitious person cannot do acts which go beyond the scope of his authority, he certainly can fail to do what he has been authorised to do, and can be punished for such omissions. And in the second place, the liability of a corporation for the acts of its agents is a perfectly logical application of the law as to an employer's liability for the acts of his servant. It is a rule of law that the master is liable for all the wrongs committed by his servant in the course of his employment. A master is liable not only for the acts which the master has authorised him to do, but also for the way in which the servant does it. So is the corporation.

110. The uses and purposes of incorporation

Among the various reasons for admitting the fictitious extension of personality, we may distinguish one as of general and fundamental importance, namely, the difficulty which the law finds in dealing with the common interests vested in a large number of

individuals and with a common action in the management and protection of such interests. What we are familiar with is individual ownership. If two persons carry on a partnership or own and manage property in common, complications arise, with which the law can deal without calling in the aid of fresh conceptions. But if there are multitude of such ownership the law finds it impossible to deal without the aid of fictitious conceptions to overcome these difficulties, and the law aims to introduce as far as possible some instrument for the realisation of its purpose of recognising the rights of all the persons. There are two devices for the purpose, namely, trusteeship and incorporation.

Trusteeship is generally used as a mode of overcoming the difficulties created by the incapacity, uncertainty and multiplicity of the persons to whom the property belongs. In such cases, the property by law is deemed to be vested not in the virtual owners (beneficiaries), but in one or more determinate individuals of full capacity, who hold it for the benefit of those persons for whom it is meant.

Incorporation is merely a development of the conception of trusteeship. A trustee, in the case of a corporation, is a fictitious being, as opposed to a trustee in case of an individual trust, who is a real person. As between the real and the fictitious trustee, the latter is preferable, because he never dies.

And secondly, incorporation enables traders to join together and form one company with a limited liability. As the law stands, if any one ventures into any particular trade, he has got to bear the whole loss, it his venture results in any loss. Such risk is avoided by incorporation. If the business is successful, the gains made by the company will be held on behalf of the members, and if unsuccessful, the losses must be borne by the company itself. For, the debts of a corporation are not the debts of the members themselves. The only risks run by the members is the amount that they have contributed towards the share capital. The introduction of incorporation has been a great boon to commerce and manufactures, because it has enabled us to undertake big schemes and to venture upon unthought of adventures.

Thirdly, as the property is vested in the corporation, it is not necessary that it should be transferred to a new member on his inclusion in order to give such member the benefit thereof.

It may be said that but for the creation of such artificial persons the prosperity of the world would not have been possible.

111. The State as a Corporation

Of all forms of artificial persons, the greatest is the State. It owns wealth and performs many important functions. But according to the law of England, the State is not a corporation. The State owns no property, is capable of no acts, and has no rights nor liabilities imputed to it by the law. The explanation for all this is to be found in the Monarchial form of Government. The real personality of the King has rendered any incorporation of the State as superfluous. Public property in the eye of the law belongs to the King. Whatever is done by the State is in law done by the King and so on. In modern times, it has become usual to speak of the Crown rather than of the King. But this reference to the Crown is only a figure of speech, because the Crown is not by itself a person in the eye of the law.

112. The creation and extinction of Corporation

The birth and death of legal persons are determined not by nature, but by the law. They come into existence at the will of the law, and they endure during its good pleasure. In England, corporations may be established by Royal Charter, by statute, by immemorial custom, and, in recent years, by agreement of their members expressed in statutory forms and subject to statutory provisions and limitations. They are in their own nature capable of indefinite duration, this being indeed one of their chief virtues as compared with humanity, but they are not incapable of destruction. Its life can be brought to an end by the same authority by whom it came into being or by the members or by the Court. The extinction of a body corporate is called its dissolution—the severing of that legal bond by which its members are knit together into a unity. It must be noted that it is perfectly possible for a corporation to continue to live, although the last of its members is dead. In the case of a corporation sole the person is merely dormant, and not extinct, during the interval between two successive occupants of the office.

113. The legal status of lower animals

The only natural persons are human beings. Beasts are things and not persons, either natural or legal. They may be objects of legal rights and duties but never the subject of them. Beasts, like men, are capable of acts and possess interests. Yet their acts are neither lawful nor unlawful, they are not recognised by the law, as the appropriate subject-matter either of permission or of prohibition. No animal can be the owner of property. The rule that a trespassing

beast may be distrained damage pheasant and kept until its owner or someone else pays compensation, does not, however, in the modern law, involve any legal recognition of the personality of the animal.

A beast is as incapable of legal rights as of legal duties; for its interests receive no recognition from the law. The law is made for men and allows no fellowship or bonds of obligation between them and the lower animals. A hurt done to the beast may be a wrong to its owner or to the society of mankind, but it is no wrong to the beast. No animal can be the owner of any property, even through the medium of any trustee. If a trust is created for the benefit of a particular animal, it is a trust of imperfect obligation and casts no legal duty on the trustee to execute the trust.

There are, however, two cases in which beasts may be said to possess certain legal rights : (1) In the first place, cruelty to animals is a criminal offence, but that is not so much on account of the love for the beasts, but on account of the repugnant feelings produced to the society by such cruelty. (2) Secondly, a trust for the benefit of a particular class of animals, as opposed to one for an individual animal (say my favourite dog), is valid and enforceable as a public and charitable trust, e. g. a provision for the establishment and maintenance of a home for stray dogs or broken-down horses. Such trusts correspond not to private trusts but to public rights vested in the community at large,—for the community is interested in the well-being even to the deaf and dumb animals—which belong to it.

But these instances form no real exception. For, these duties towards animals are conceived by the law not as a duty towards the beasts, but as duties towards society itself. The animals are owned by the society and hence the society has got an interest for their protection. Therefore, these duties do not correspond to private rights vested in the animals, but to public rights vested in the whole community.

114. The legal status of dead men

Ordinarily speaking, the personality of a human being may be said to commence on birth and cease to exist at death, and in general the law takes the same view. Dead men are no longer persons in the eye of the law. They have laid down their legal personality with their lives and are now as destitute of legal rights as of liabilities. Although the law does not confer rights upon the dead, it does to some extent recognise and make account of a person's desires and interests when alive. They are—(1) a man's body, (2) his reputation and (3) his estate :

(1) According to law, a corpse is the property of no one. It cannot be disposed of by will and no wrongful dealing with it can amount to theft. Again any testamentary directions of a person as to the disposal of his body after his death are destitute of legal effects. Similarly a permanent trust for the maintenance of his tomb is illegal and void. However, the criminal law secures decent burial for all dead men, and the violation or desecration of a grave is an offence under the Penal Code of India, Pakistan and Bangladesh as well as of England. Every person dying in England has a right to Christian burial. "Whether is ground consecrated or unconsecrated, indignities offered to human remains improperly and indecently disinterring them, are the grounds of an indictment" as decided in an English case [Foster vs. Dodd (1867), 3 Q B 77].

(2) The reputation of the dead receives some degree of protection from the criminal law. Under the Bangladesh Penal Code, it may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person, if living, and is intended to be hurtful to the feelings of his family or other near relations. According to English law, a libel upon a dead man will be punished as a misdemeanour but only when its publication is in truth an attack upon the interests of living persons. The right so attacked and so defended is in reality not that of the dead, but that of his living descendants.

(3) By far the most important matter in which the desires of dead men are allowed by the law to regulate the actions of the living is that of testamentary succession. For many years after a man is dead his hand may continue to regulate and determine the disposition and enjoyment of the property which he owned while living.

115. The legal status of unborn persons

Though the dead possesses no legal personality, it is otherwise with the unborn, Unlike dead persons, unborn persons do, according to the law, possesses a personality. There is nothing in law to prevent a person from owning property before he is born. His ownership is necessarily contingent, indeed, for he may never be born at all. But it is nonetheless a real and present ownership. Thus, a person may settle property upon his wife and the children

that are to be born of her. Or he may die intestate and his unborn child will inherit his estate. A child in its mother's womb is for many purposes regarded by legal fiction as already born. In the words of Coke : "The law in many cases has consideration of him in respect of the apparent expectation of the birth". Thus, in the law of property, there is a fiction that a child is a person in being for the purposes of (1) acquisition of property by the child itself, or (2) being a life chosen to form part of the period in the rule against perpetuities.

To a certain extent unborn persons may possess personal interests. It has been held that a posthumous child is entitled to compensation under Lord Campbell's Act for the death of its father. Willful or negligent injury inflicted on a child in the womb, by reason of which it dies after it was born alive, amounts to murder or manslaughter. A pregnant woman condemned to death is respited as of right, until she has been delivered of her child.

The rights of an unborn person, whether proprietary or personal, are all contingent on his birth as a living human being. The legal personality attributed to him by way of anticipation falls away ab initio if he never takes his place among the living. Abortion and child destruction are crimes, but such acts do not amount to murder or manslaughter unless the child is born alive. A posthumous child may inherit, but if he dies in the womb or is still-born, his inheritance fails to take effect, and no one can claim through him, though it would be otherwise if he lived for an hour after his birth. Finally, though the law imputes no rights to persons not yet even conceived, it may protect their interests. If some of the beneficiaries of a trust are unborn persons, the trust cannot be varied without obtaining the Court's consent on their behalf.

116. Double capacity and double personality

Sometimes a single human being may hold two capacities to possess legal rights. He is one man but two persons. In such a case the law attributes to him double personality. As for example, a trustee is two persons in the eye of law. In the right of his beneficiary he is one person and in his own right he is another.

English law recognises many different capacities in which a man may act. Often he has the power to act in an official or representative capacity when he would have no power to do the act in his private capacity or on his own account. But the mere fact that a man has two or more capacities does not give him the power to enter into a legal transaction with himself. For instance, at common

law a man could not sue himself or contract with himself or convey property to himself; and it made no difference that he was acting on each side in a different capacity. So, rigorous was the rule that if the same party appeared on both sides to a contract, even though accompanied by different parties in each case, the contract was void. In many cases this rule worked hardship and its consequences had to be mitigated. For example, where a creditor became his debtor's executor, the rule that he could not sue himself was mitigated by giving him a right of retainer. Now by statute, where a person purports to contract with himself and others, the contract is enforceable as if it had been entered into with the other persons alone. With such small exceptions the rule that a man cannot enter into a legal transaction with himself remains unchanged.

CHAPTER XV

TITLE

117. Kinds of title

We have seen in a former chapter that every right (using the term in the widest sense) involves title or source from which it is derived. The title is the de facto antecedent of which the right is the de jure consequence. Titles are, therefore, facts or events by the operation of which the right becomes vested in its owner. Titles are of two kinds, being either original or derivative. The former are those which create a right de novo; the latter are those which transfer an already existing right to a new owner. The catching of fish is the original title of the right of ownership, whereas the purchase of them is derivative title. The right acquired by the fisherman is newly created, because it did not formerly exist in any one. But that which is acquired by the purchaser is in legal theory identical with that which is lost by the vendor. It is an old right transferred, not a new right created. Yet in each case the fact which vests the right is equally a title in the sense as already explained. That is to say, whether a right is inborn or acquired, a title is equally requisite.

118. Vestitive Facts

A vestitive fact is one which determines, positively or negatively, the vesting of a right in the owner. It is one which either creates, transfers or destroys rights. Some rights the law confers upon man by birth e. g. right to life, liberty and reputation. The other rights he must acquire for himself. But in both the cases there is a source from which the right emanates. The generic term "vestitive facts" is sometimes used to denote the creation, transfer or extinction of such rights. The vestitive facts may be either, (i) investitive facts or titles, or (ii) divestitive facts.

Investitive Facts or Titles—Investitive facts or titles are those by means of which a right comes into existence. A title or investitive fact is the de facto antecedent of which the right is the de jure consequence. In other words, every right involves a source or a title from which it is derived. Titles are of two kinds, being either original or derivative. Original titles are those which create a right for the first time e. g. when a person captures a wild animal belonging to none. Derivative titles are those which transfer an already existing right to a new owner e. g. A sells a piece of land to B. Here B derives the rights of the former owner of the land by derivative tittle.

Divestitive Facts—Divestitive facts are those through which right terminates. It destroys (cause the loss of) rights e. g. the sale of a property terminates the right of its owners. Divestitive facts may be of two kinds, viz. alienative i.e. the transfer of rights or extinctive i.e. destruction of rights. The payment of a debt by a debtor to a creditor is an example of extinctive fact. Here the creditor's right is divested as well as extinguished by the payment of the debts.

But the derivative titles and alienative facts are merely the same facts looked from a different point of view. The transfer of a right means the acquisition of that right by the transferee. It becomes a vestitive fact in the transferee, and a divestitive fact in the transferor. In other words, the transfer of a right is an event which has a double aspect. It is the acquisition of a right by the transferee and the loss of it by the transferor. The purchase is a derivative title but the sale is an alienative fact. Yet they are two different sides of the same event.

The above distinctions and divisions are exhibited in the following table :

Vestitive Facts	Investitive Facts or Titles.	Original Titles.	Creation of Rights.
		Derivative Titles.	Transfer of Rights.
	Divestitive Facts.	Alienative Facts.	Transfer of Rights.
		Extinctive Facts.	Destruction of Rights.

Vestitive Facts—Whether they create, transfer or extinguish rights are divisible into two fundamentally distinct classes, according as they operate in pursuance of the will of the persons concerned, or independently of it. That is to say, the creation, transfer and extinction of rights are either voluntary or involuntary. Vestitive facts may, therefore, be divided into two chief classes according to the source from which they originate. They are (1) acts of the party or acts in the law and (2) acts of the law.

119. Acts in the Law

(1) Acts in the Law—An act of the party, technically known as an act in the law, is an expression of the will or intention of the person concerned directed to the creation, transfer or extinction of a

right e. g. a contract or a deed or a conveyance or testamentary disposition. Hence an act in the law may be defined as "a manifestation of the will of a private individual directed to the origin, extinction or modification of rights". It is called by the English writer a "Juristic act". It is an act of a private person according to law. Acts in the law are of two kinds :

Unilateral (One-sided)—In this case, there is only one party whose will is effective e. g., a testamentary disposition, the exercise of a power of appointment, the avoidance of a voidable contract and so on.

Bilateral (two-sided)—A bilateral act is one which involves the consenting wills of two or more distinct person e. g. a contract, a mortgage, etc.

Acts of the Law—An act of the law, on the other hand, is the creation, transfer or extinction of a right by the operation of the law itself, independently of any consent thereto on the part of the person concerned i.e where the facts arise independent of the will of the parties e. g. intestate succession, in which case the law itself will dispose of the estate of a person dying intestate i. e. intestate succession. Similarly, if a decree is passed against me by a competent court, or if I am adjudged an insolvent, my goods will be taken into execution by the judgment creditor in the first case, or my property will vest with the official assignee, in the second case, whether I will it or not.

120. Agreements

Of all vestitive facts, acts in the law i. e. acts of the party, are the most important, and among acts in the law, agreements are entitled to the chief place. The importance of agreement as a vestitive fact lies in the universality of its operation. There are few rights which cannot be acquired, transferred and extinguished by agreement. Looking from this point of view agreements may be divided into four classes :

Contracts—A contract is an agreement which creates a personal obligation, a right in personam, between the parties to the agreement, and which is enforceable by law.

Grants—A grant is an agreement which creates a right of any other kind e. g. grants of leases, easements, etc.

Assignment—An assignment is an agreement for transferring a right, e. g. assignment of life estate, Insurance policy, etc.

Releases—A release is an agreement for extinguishing right e. g. an agreement by a creditor releasing the debtor from the liability to pay his debt.

121. Valid, Void and Voidable Agreements

From the point of view of legal efficacy, agreement may be considered to be of three kinds :

Valid—A valid agreement creates in favour of one party a legal obligation binding upon the other. It is an agreement which is fully operative and is in agreement with the true intention of the parties.

Void—A void agreement is one to which the law refuse to give recognition as the expressed will of the parties. A void agreement is no agreement at all e. g. an agreement made under a mistake.

Voidable—A voidable agreement stands midway between the two. It is not a nullity, but its operation is conditional and not absolute. A voidable agreement is one which can be avoided or set aside at the option of one of the parties to the contract. That is to say, it is void or valid at the election of the parties to it. Thus, a void agreement is a nullity from the very beginning; but a voidable agreement is presumed to be valid unless and until it is avoided. Void and voidable agreements are classed together as invalid.

As far as the English law is concerned, the following is a complete classification of agreement :

(1) Valid agreements;
(2) Voidable agreements;
(3) Void agreements;
(4) Unenforceable agreement; that is to say, no action will lie for enforcement of it e. g. claim barred by limitation;
(5) Illegal agreements, i. e agreements which are not only void, but to make such an agreement is an offence e. g. a Criminal Conspiracy;
(6) Rescindable agreements; agreements which, even if they have been partly performed, a court will not only absolve the party entitled to rescission from complete discharge, but also restore the parties to their former position;
(7) Agreement determinable upon a condition subsequent, e. g. agreement made void by subsequent impossibility;
(8) Apparent agreement, e. g where there is no agreement at all, but only an appearance of it e. g. where the parties are not speaking of the same thing at all. Thus money paid under them is recoverable as money paid under a mistake of fact.

122. Causes of invalidity of Agreement

The chief causes of invalidity of agreements are six in number. They are as follows :

(1) *Incapacity*—Certain classes of persons are considered by law to be incapable from entering into a contract, such as minors, lunatics.

(2) *Informality or want of formality*—Certain formalities must be observed for the validity of some agreements. Registration and attestation are the most important forms. In the absence of these formalities the agreements are held to be of no account, e. g. if a mortgage deed is not properly attested and registered it can not be taken into account at all.

The following are the purposes of all these formalities :

(i) It is evidence of consent,

(ii) It facilitates the proof of what has occurred,

(iii) It prevents the bargain from being rashly struck.

Illegality—Where the agreement is for the performance of a thing which is forbidden by the law, e. g. an agreement by way of wager, it becomes invalid (i. e. illegal). An agreement becomes invalid if—

(i) it is forbidden by law; or

(ii) it is of such a nature that, if permitted, it would defeat the provision of any law; or

(iii) it is fraudulent; or

(iv) it involves or implies an injury to the person or property of another; or

(v) it is immoral; or

(vi) it is opposed to public policy.

Error or mistake—Error or mistake, as a ground of invalidity of contract, is of two kinds—essential and unessential. Essential error is of such a nature as to prevent the existence of any real consent, and therefore, of any real agreement. If A agrees to sell land to B, but A is thinking of one piece of land, and B of another, the agreement is wholly void, as there is in truth no agreement at all, but only the external semblance of one. In order to render the contract invalid, the mistake must be essential and must satisfy all the following conditions :

(i) The mistake must be mutual—i. e. both the parties must have been under a mistake.

(ii) t must be a mistake of fact and not of law. This is based on the maxim—ignorance of law is no excuse.

(iii) The fact, of which the mistake is made, must be essential to the agreement.

Unessential error, on the other hand, is that which does not relate to the nature or contents of the agreement, but only to some external circumstances, serving as an inducement, which led to the making of it, as when A agrees to buy B's horse because he believes it to be sound, whereas it is really unsound. This is not essential error, for there is a true consensus, as the parties have agreed to the same thing in the same sense, though one of them would not have made the agreement had he not been under a mistake. The general rule is that unessential error has no effect on the validity of an agreement. Neither party is in any was concerned in law with the reasons which induced the other to give his consent. That which a man consents to he must abide by, whether his reasons are good or bad. And it is so even though one party is well aware of the error of the other.

This rule, however, is subject to an important exception, for even unessential error will in general make an agreement voidable at the option of the mistaken party, if it has been caused by the misrepresentation of the other party. He who is merely mistaken is nonetheless bound by his agreement; but he who is misled has a right to rescind the agreement so procured.

Coercion—Where the consent to the agreement is obtained by any form of compulsion or undue influence, it becomes the product of coercion and not a free agreement. The consent of the parties must be freely given, in order to render an agreement valid. Fraud, undue influence and coercion, on the part of either party, vitiate the contract and render it voidable at the option of the other party. To prove such undue influence, it must be established—

(i) that a party was in a position to determine the will of the other party;

(ii) that he has used that position to obtain an unfair advantage for himself.

Want of Consideration—A consideration in its widest sense is the reason, motive or inducement which causes a person to bind himself by an agreement. Such consideration must be real though not adequate. It must have some value in the eye of law. It must not be illegal nor it should be past. The law considers that an agreement which is not caused by any inducement or consideration is destitute of legal effect.

CHAPTER XVI

LIABILITY

123. Nature of Liability

When any person commits a wrong, he is said to be liable or responsible for it. Liability or responsibility is the vinculum juris, i. e. the bond of legal necessity that exists between the wrong-doer and the remedy of the wrong. A man's liability consists in those things which he must do or suffer because he has failed in doing what he ought to have done. Liability has its source in the supreme will of the State.

Liability may be, in the first place, either civil or criminal, and in the second place, either remedial or penal, the nature of which has already been sufficiently considered in a previous chapter on the Administration of Justice. In the case of civil or remedial liability, the direct purpose of the law is the enforcement of a right vested in the plaintiff in civil proceedings. In the case of criminal or penal liability, the purpose of the law, direct or ulterior, is the punishment of the wrong-doer in criminal proceedings. The liability of a borrower to repay the money is remedial, that of the publisher of a libel to be imprisoned or to pay damages to the person injured by him, is penal. All criminal liability is penal. Civil liability, on the other hand, is sometimes penal and sometimes remedial.

124. Remedial Liability

Remedial liability is that in which the sole intention of the law is the enforcement of the plaintiffs right and the idea of punishment is entirely absent. Thus the liability of the borrower to repay the money lent is remedial. The existence of a remedial liability depends upon the existence of a legal duty binding upon the defendant and unfulfilled by him. Whenever the law creates a duty, it should enforce the specific fulfillment of it. So, what a man is bound to do by a rule of law, he is made to do so, by the force of law. But to this general principle there are three exceptions. These are :

(1) Duties of imperfect obligation :
The breach of such duty creates no liability at all and as such gives no cause of action e. g. a time-barred debt is no doubt a legal debt, but the payment of it will not be enforced by any court of law.

(2) Where the specific enforcement or fulfillment of a duty is not possible due to the breach of it. There are duties which

cannot be specifically enforced when once they are broken. Such duty is by its very nature incapable of specific enforcement e. g. it is the duty of every person to refrain from doing anything that is likely to injure the reputation of others. But when a libel has already been published the wrong-doer cannot be made to undo what he has already done. Wrongs of this kind cannot be remedial; they can only be punished.

(3) Where the specific performance of the duty is possible but in—expedient, and the law considers that the award of compensation will meet the requirements of the law. There are duties, the specific enforcement of which the law can, but will not enforce, because it is either inadvisable or in—expedient to do so. Thus the law will refuse to enforce specific performance of a promise of marriage or the breach of contract of service on the ground of public policy. In such cases the law provides pecuniary compensation.

125. Penal Liability

Penal liability is that in which the sole intention of the law is the punishment of the wrong-doer. Here the idea of punishment is predominant. The primary purpose of punishment is that it should be deterrent. Where the law finds it impossible or inexpedient to enforce a duty specifically, it fulfills its purpose by inflicting punishment on the wrong-doer. The liability of a wrong-doer in such cases is called penal liability.

Punishment, however, is not inflicted upon the wrong-doer merely for doing a wrongful act; he must have done it with a guilty mind. In other words, two conditions must be satisfied before punishment can be inflicted upon a person; viz, (i) that he has committed a breach of his duty, and (ii) that it would have been possible for him to know that he was committing a wrong if he had exercised due diligence. In other words, a person is penally liable only for those wrongful acts which he does either willfully or negligently. These two conditions of penal liability are sufficiently indicated by the maxim—actus non facit reum, nisi mens sit rea, i. e. the act alone does not amount to guilt, it must be accompanied by guilty mind.

126. Acts—Nature of act and its elements

The term act is not capable of being defined with any great precision, since in ordinary language, it is used at different times to point different contrasts. Acts are generally events which are subject

to the control of the human will. An act may, however, be resolved into the following successive steps :

(1) Weighing the consequence in mind,
(2) Making a decision i. e. will,
(3) Bodily movement,

Will is the mental decision which is preceded by the weighing of the consequences and is succeeded by a bodily movement; or in other words, it is the choice of an act after consideration of its consequences.

Classifications—Acts, so defined, may be divided into the following classes :

(1) Positive and negative acts—The former are acts of commission and the latter are acts of omission or forbearance. A wrong-doer either does that which he ought not to do, or omits to do that which he ought to do.

(2) Internal and external acts—The former are the acts of the mind and the latter are the acts of the body. To think is an internal act, to speak is an external act. Every external act involves an internal act, but the converse is not always true.

(3) Intentional and unintentional acts—An intentional act is one which is foreseen and desired by the doer, while an unintentional act is one which is neither foreseen not desired by the doer. It is unintentional when it is not the result of any determination of the will towards the actual results.

Elements—Every act is made up of three parts :

(1) Its origin is some mental or bodily activity of the doer e. g. a gun is taken up in hand.
(2) Its circumstances e. g., the gum is loaded.
(3) Its consequences e. g., the trigger is pulled and a man is killed.

Two classes of wrongful acts—Every wrong is an act which is mischievous in the eye of law, because of its harmful consequences. These consequences are of two kinds—actual or anticipated. In other words, an act may be mischievous in two ways—either in its actual results or in its tendencies. The first consists of those acts which actually result in harmful consequences, the second consist of those acts which may not end in harmful consequences, but which the law regards as mischievous. Considered in respect of those consequences, wrongful acts are, therefore, of two kinds ;

(1) In the first case, there is no wrong or cause of action without proof of actual damage and actual damage is essential to the cause of action. They are actionable only on proof of actual damage. Slander, for example, is in general not actionable without proof of some loss sustained by the plaintiff.

(2) In the second case, it is sufficient to prove the act itself even though no harm has followed it. They are actionable per se (without proof of actual damage) e. g. trespass, libel breach of contract, etc. for, in law, they are acts of mischievous tendencies and, as such, are actionable without any proof of actual harm resulting therefrom.

With respect to this distinction between wrongs which do and those which do not require proof of actual damage, it is to be noticed that civil liability belongs to the former and criminal wrongs commonly belong to the latter class. So, if by negligent driving I expose others to the risk of being run over, I am not deemed guilty of any civil wrong until an accident actually happens. But criminal liability is sufficiently established by proof of some act which is deemed dangerous in its tendencies even though the issue is, in fact, harmless.

127. Damnum sine injuria

All wrongs are mischievous in the eye of law, but the converse is not always true. There are many acts which though harmful are not wrongful or, in other words, all mischief's are not wrongful. Such acts may result in serious injury, but no action will lie for the injury thus caused. Because such acts do not cause what is called legal damage, that is, the injury caused is no injury in the eye of the law. The law will allow the doer of such act knowingly to inflict harm on another and will not hold him liable for it. Harm of this kind is called damnum sine injuria. Salmond divides such cases of damnum sine injuria into two classes :

(1) Where the harm done to the individual is a gain to the society, e. g. competition in trade; or excavation on one's land in such a manner as to withdraw the support required by the building on the adjoining property owned by other.

(2) The second class of damnum sine injuria includes all those cases in which although real harm is done to the community, yet it is so trivial or so difficult to prove that it is considered by law inadvisable or inexpedient to attempt its prevention by the law. The mischief is of such a nature that the legal remedy would be worse than the disease.

In may, however, be pointed out that only in the sphere of criminal law certain acts are made crimes, all other harmful kinds of conduct of trivial nature belonging to the damnum sine injuria. It is disputed whether a similar principle holds true of tort, or whether there is a general theory of tortious liability for harmful acts.

128. Mens rea

The general condition of penal liability is based on the maxim *actus non facit reum, nisi mens sit rea*—*i. e.* the act itself creates no guilt in the absence of a guilty mind. This is generally known as the doctrine of mens rea or the guilty mind. Penal liability is commonly based on the co-existence of two conditions. These are ;

(1) *Material condition*—That is, the doing of some overt act by the person to be held liable. This material condition implies two requisites:

(i) An act must be done.

(ii) The act must be done by the person to be held liable.

(2) *Formal condition*—That is, the mens rea or the guilty mind with which the act is done. An enquiry must be made into the mental attitude of the doer of the act before the law can rightly punish the act, that is, a person is responsible not for his acts in themselves but for his acts coupled with mens rea or guilty mind. This mens rea or guilty mind may assume one of tow forms—wrongful intention and culpable negligence. The act must be done either with (i) wrongful intention i. e. intentionally or without just cause or excuse, or (ii) with culpable negligence or carelessness on the part of the wrong-doer. Hence, wrongful intent and culpable negligence are the two alternative forms of mens rea one or the other of which is commonly required by law as a condition of liability.

A person is, therefore, liable when he intentionally commits a wrong; he is also liable when he does the wrongful act negligently, because he did not take sufficient care to avoid it. Such punishment will make him to be careful in future. A man intends the consequences, when he foresees or desires them; he is guilty of negligence when he does not desire the consequences and does not act in order to produce them, but is nevertheless indifferent or careless whether they happen or not. But if the act is neither intentional nor negligent. i. e. not only did he not intend it, but did his best to avoid it, no purpose will be served by punishing him.

Thus, a person is liable of he acts (1) with wrongful intent or (2) with culpable negligence. So the wrong-doer's conduct must be voluntary i. e. either willful or careless (negligent). These two mental conditions are grouped together under the term mens rea.

Yet there are exceptional cases which the law regards as so serious and harmful that it thinks fit to punish the wrong-doer even in the absence of any intention or negligence—when the law takes into account only the material condition and disregard the formal condition of liability. Wrongs which are thus independent of mens rea are distinguished as wrongs of strict or absolute liability.

From what has been stated above, we may state that in respect of the requirements of mens rea, wrongs may be divided into three classes :

Intentional or wilful wrongs—Here mens rea amounts to an evil intention, or design or knowledge of the wrongfulness of the acts.

Wrongs of negligence—Here mens rea assumes the form of mere carelessness. It is the absence of such care as it was the duty of the wrong-doer to use.

Wrongs of strict or absolute liability—Here mens rea is not required at all. These are the acts for which a man is responsible irrespective of the existences of either wrongful intention or culpable negligence. Thus they are the exceptions to doctrine of mens rea, which is not recognised as a necessary condition of responsibility.

129. The Nature of Intention

Salmond defines 'intention' as the conscious purpose or design with which an act is done. It is the foreknowledge of the act coupled with the desire of it. An act may be intentional when it exists in idea before it is realised into a fact, or wholly unintentional when it did not exist in idea before it became realised in fact, or partly intentional. e. g. if throw stones, I may intend to break a window but not to do personal harm to any, yet, in the result, I may do both these things.

Intention does not necessarily involve expectation, e. g. if I fire at a man a mile away. I may not expect to hit him, but at the same time, I intend to shoot him. Conversely, expectation does not in itself amount to intention, e. g. an operating surgeon may well know beforehand that his patient will probable die of operation. Yet, he does not intend the fatal consequences which he expects. He intends the recovery which he hopes for but does not expect.

Now, what shall be of consequences which, though not desired, are nevertheless known to be certain, and are the inevitable consequences of certain things which are desired. For example, a manufacturer establishes a factory in which he employs many workmen who are daily exposed to the risk of dangerous machinery or processes. He knows with certainty that from time to time fatal accident will, notwithstanding all precautions, occur to the workmen so employed. Does he then intend their deaths? Again, a Military Commander orders his troops into action, well knowing that many of them will lose their lives. Does he intentionally cause their deaths? Salmond says that these questions are to be answered in the negative. Such consequences, though foreseen as certain, are not desired and, therefore, not intended. It is not possible to define the term 'intent' as to include both the consequences which, though probable, are not desired and which, though improbable, are desired.

Again, I may desire and intend a particular result, but the result may be quite the different from what I had intended it to be. Thus he who does grievous hurt to another, though with no intent to kill him, is guilty of murder if death ensues. Therefore, it is sometimes said that a person is presumed in law to intend the natural of necessary results of his actions. This maxim, if strictly applied, would take away from its scope the difference between intentional and negligent wrong-doing. But criminal liability will not exempt a person from the liability for the consequences of his wrong-doing, for no person who knows that certain results will flow from his illegal acts, will be suffered to say that he did not intend them. In other words, in criminal law the intention that is material is usually the general intention to commit a crime and not the specific intention. Thus, if A shoots B intending to kill him, but the shot actually kills C, this is held to be the murder of C, and A will not be permitted to say that he did not intend to murder C, So also, if A throws stone at one window and breaks another, it has been held to be malicious damage to the window actually broken.

130. Intention, Motive and Malice

Intention and motive invariably go together but there is a subtle difference between the two. A wrongful act i. e. a crime is seldom intended or desired and committed for its own sake. The wrong-doer has in view some ulterior object which he desires to obtain, that is, there is some purpose or object which he desires to fulfill by means of his criminal act. Thus, if a thief robs a person, his

immediate intention is of course to rob him, but there may also be some purpose behind the act of robbing which may be to buy food with it or to pay a debt. This ulterior intent is called the motive of the act. The immediate act consists of intention.

Secondly, a man's motive for an act consists in a desire for something which will confer a real or imagined benefit of some kind on the actor himself, whereas his intention need not relate some personal interests of this kind. The point of asking what a man intends is to discover what he is trying to achieve. The point of asking for his motive is to find out what personal advantage he is seeking to gain, and a motiveless act is one aimed at no such personal advantage.

The objective of one wrongful act may be the commission of another. I may make a die with intent to coin bad money; I may coin bad money with intent to utter it; I may utter it with intent to defraud. Each of these acts is or may be a distinct criminal offence, and the intention of any one of them is immediate with respect to that act itself, but ulterior with respect to all that go before it in the series.

Again, a person's ulterior intent may be complex instead of simple; he may act from two or more current motives instead of from one only. Thus, he may institute a prosecution partly from a desire to see justice done, but partly also from ill-will towards the defendant.

Malice—Closely connected with the law and theory of intentional wrong-doing is the legal use of the word malice. In a narrow and popular sense, malice means ill-will or spite or malevolence, but its legal significance is much wider. In its legal sense, it means any kind of intent or purpose which the law disapproves. Malice means, in law, wrongful intention or recklessness. Any act done with one of these elements is, in the language of the law, malicious. The equivalent Latin term malitia means badness, physical or moral wickedness in disposition or conduct—not exclusively ill-will or malevolence. Hence the malice of English law includes all forms of evil purpose, design, intent or motive.

We have seen in a previous chapter the distinction between the immediate intention with which an act is done and its ulterior purpose or motive. The term malice is applied in law to both these. An act done with a bad intention or bad motive is said to have been done maliciously. But it may also mean either of the two. For

example, in the phrases 'malicious homicide' and 'malicious injury' to property, 'malicious, is merely a collective term for intention and recklessness without any reference to motive. Similarly, I burn down a house maliciously if I burn it on purpose or realising the possibility that what I do will set it on fire. There is here no reference to any ulterior purpose or motive. But, on the other hand, malicious prosecution does not mean any intentional prosecution; it means, more narrowly, a prosecution, inspired by some motive of which the law disapproves. A prosecution is malicious, if, for example, its ulterior intent is the extortion of money from the accused. So, also, with the malice which is needed to make a man liable for defamation on a privileged occasion. I do not utter defamatory statements maliciously simple because I utter them intentionally. Malice in common acceptation means ill-will against a person; but in its legal sense, it means a wrongful act done intentionally, without just cause or excuse.

Save in exceptional cases, malice in the sense of improper motive, is entirely irrelevant for determining the question of legal liability. The law in general asks merely what the defendant has done and not why he did it.

131. Relevance and Irrelevance of Motives

We have already seen in what way and to what extent a man's immediate intent is material in a question of liability. Intention and negligence are the two alternative conditions of penal liability. We have now to consider the relevance or materiality not of the immediate but of the ulterior intent. To what extent does the law take into account the motives of a wrong-doer? To what extent will it enouire, not merely what the defendant has done, but why he has done it? To what extent is malice, in the sense of improper motive, an element in legal wrong-doing?

As a general rule, a person's motive is immaterial in determining the question of legal liability. An act otherwise lawful does not become unlawful because it is done with a bad motive or conversely, an act otherwise unlawful cannot be excused on the ground that it was done with the best of motives. In other words, the law will judge a person by what he does and not the reasons good or bad, which caused him to do it. An act prima facie lawful is not unlawful and actionable on account of the motives which dictated it. An illustration of this irrelevance of motives is the right of a land-owner to do harm to adjoining proprietors in certain defined ways by acts done on his own land. But there are three

exceptions to the above general rule as to the irrelevance of motives. Thus, motive is essential and relevant in the following cases ;

Criminal attempts—Criminal attempts constitute the first of the exceptions to the rule that a person's ulterior intent or motive is irrelevant in law. An attempt to commit an offence is itself a crime and punishable because the attempt reveals the criminal character and guilty mind of the offender and because it may constitute a danger to the social interest concerned. Therefore, the law makes no distinction between a crime and an attempt to commit a crime. Every attempt is an act done with intent to commit the offence so attempted. The act in itself may be innocent, but is deemed to be criminal by reason of the purpose i. e. the wrongful motive with which it is done. A criminal attempt bears criminal intent upon its face as it is itself the evidence of criminal intent with which it is done. Thus, to buy or load a gun even with intent to murder is not an offence. But to lie in wait with a loaded gunman act which itself proclaims the criminal intention and the guilty mind of the person attempting the act and is, therefor, punishable as an offence. Again, if a man standing by the side of a haystack strikes a match, this act will be quite lawful and innocent if done with the purpose of lighting his pipe, but it will be unlawful and criminal if done with the purpose of setting fire to the haystack. For then it will constitute the crime of attempted arson. The existence of ulterior intent or motive is the essence of an attempt and can render unlawful an otherwise lawful act. Hence motive is relevant in criminal attempt.

Cases in which particular intent forms part of the definition of a criminal offence—A second exception to the irrelevance of motive comprises all those cases in which a particular intent forms part of the definition of criminal offence. For example, the offence of burglary consists in breaking and entering a dwelling house by night with intent to commit a felony or theft therein. So, forgery consists in making a false document with intent to defraud. In all such instances, the motive is the source, in whole or part, of the mischievous tendency of the act and is, therefore, material in law.

Malicious prosecution—In civil (as opposed to criminal) liability motive is very seldom relevant. In almost all cases the law looks to the act alone and makes no inquiries into the motives from which it proceeds. There are, however, certain exceptions even in the civil law, where motive forms one of the principal ingredients. There are cases where it is thought expedient in the public interest to allow certain specified kinds of harm to be done to individuals, so long as

they are done for some good and sufficient reason; but the ground of this privilege falls away as soon as it is abused for bad ends. In such cases, therefore, malice is an essential element in the cause of action. Examples of wrongs of this class are defamation (in cases of privilege) and malicious prosecution. In these instances the plaintiff must prove malice, because in all of them the defendant's act is one which falls under the head of damnum sine injuria so long, but so long only, as it is done with good intent.

A prosecution is malicious when it is inspired by some motive of which the law disapproves. Malicious prosecution does not mean intentional prosecution. In order to succeed in such a case the plaintiff must prove that the defendant acted with a malicious intention i. e. with a wrongful motive or ulterior wrongful intent. Thus malice or improper motive is the gist of the action of malicious prosecution and is, therefore, relevant in such a case. Malicious prosecution is one of those few wrongs where improper or wrongful motive is essential to constitute liability.

132. Jus Necessitatis in relation to wrongs

So far as the abstract theory of responsibility is concerned, an act, which is necessary, is not wrongful, even though done with full and deliberate intention. This is a special case in which motive operates as a ground of excuse. This is the case of jus necessitatis. It is a familiar proverb that necessity knows no law ; Necessitas non habet legem. In such cases, although the element of intention is present, mens rea or guilty mind is presumed to be absent, for necessity knows no law.

Necessity, however, does not mean inevitability i. e an act which can in no possible manner be avoided. An act which is necessary is one where the actor could have chosen otherwise, but he had highly compelling reasons for the choice he made. In a situation of so-called necessity, the law itself permits a departure from its own principles. For example, it would be lawful in an emergency to damage the property of another in order to save life.

The common illustration of this right of necessity where punishment would be ineffective is the case of two drowning men clinging to a plank that will not support more than one of them. This, in the opinion of Sir John Stephen, is not a crime. Salmond gives the illustration of another familiar case of necessity in which ship-wrecked sailors are driven to choose death by starvation of the one side and murder and cannibalism on the other. It is the right of the stronger to use his strength for his own preservation. A third

case is that of a crime committed under the pressure of illegal threat of death or grievous bodily harm. In this connection. Hobbes observes—"If a man by the terror of present death be compelled to do an act against the law, he is totally excused, because no law can oblige a man to abandon his own preservation". But the English courts in the famous case of Dudley have held that no necessity will justify what would otherwise be murder, although it is acknowledged as a reason for the reduction of the penalty. Ship-wrecked sailors who kill and eat their comrades to save their own lives are in law guilty of murder itself; but the elemency of the Crown will commute the sentence to a short term of imprisonment. Thus, jus necessitatis is a special case in which intention is present but the mens rea is absent. The effect of jus necessitatis is two-fold :

(1) It is admitted and recognised as a ground of excuse in some cases.

(2) In other cases it reduces the seriousness and gravity of the crime as stated above.

133. Negligence

Negligence is culpable carelessness. "It is" says Willes, J. "the absence of such care as it was the duty of the defendant to use". It excludes wrongful intention. Thus, if I do harm but thoughtlessly believing that there was no danger, I am guilty of negligence. But carelessness or negligence does not necessarily consists in thoughtlessness or inadvertence. Thus, if I drive furiously down a crowded street, I may be fully conscious of the serious risk to which I expose other persons. I may not intend to injure any of them, but knowingly and intentionally expose them to the danger and if a fatal accident happens, I am liable, at the most, not for wilful but for negligent homicide. So, when I consciously expose another to the risk of wrongful harm but without any wish to harm him and harm actually ensues, it is not wilful since it was not desired, nor inadvertent since it was foreseen as possible or probable, but nevertheless negligent. 'Negligence', says Salmond, 'consists in the mental attitude of undue indifference with respect to one's conduct and its consequence.

Negligence is of two kinds :

(1) advertent and (2) inadvertent or simple negligence.

Advertent or Willful Negligence

Here the harm is foreseen as possible or probable, but it is not at all willed or intended—e. g. a person who does a dangerous act knows fully well that he is exposing others to a serious risk of

injury—here he is guilty of wilful negligence—his act is wilful because the harm is foreseen although it was not intended.

Inadvertent or Simple Negligence

Here the barm is neither foreseen nor willed. Thus a physician who treats a patient improperly through ignorance or forgetfulness is guilty of simple negligence; but if he does the same in order to save himself from troubles, or by way of scientific experiment with full knowledge of the dangers involved, his negligence is wilful. Similarly, a drunken man is liable for negligence, if he stumbles as he walks along the street and breaks a shop window although he may have been exceedingly anxious to walk straight and to avoid any such accident, because if he had been careful while getting drunk the accident would not have happened. Again, a physician may devote to the treatment and cure of his patient with care far in excess of that which another skilful physician would consider unnecessary, yet if his treatment is wrong, he is guilty of negligence because he was careless in taking work calling for greater skill than he possessed.

134. Duty and Standard of Care

Carelessness is not made a ground of liability except in those cases in which the law has imposed a duty of carefulness. In all other cases, complete indifference as to the interest of others is allowable. No general principles can be laid down, however, with regard to the existence of this duty, for this is a matter which depends upon the facts of each case. Speaking generally, in the criminal law the liability for negligence is quite exceptional. In the civil law, on the other hand, an act which would be a civil wrong, if done intentionally, is also a civil wrong if done negligently. In other words, negligence is culpable or not culpable, as the law thinks fit to provide.

Standard of care—The degree of carelessness varies directly with the risk to which other persons are exposed by the act in question. The law does not demand the highest degree of care of which human nature is capable. The law demands not that which is possible but that which is reasonable in view of the magnitude of the risk. It is of course dangerous to drive a car in a crowded street. Yet it is expedient in the interest of the public that such activities should go on and men be exposed to the risk incidental to such activities. It is a question of law whether in any particular circumstance a duty of care exists.

"Negligence" it has been said, "is the omitting to do an act which a reasonable man would do, or the doing of something which a reasonable man would not do". What amounts to reasonable care depends entirely upon the circumstances of the particular case. The care taken by the prudent man has always been the rule.

135. Degree of Negligence

English law recognises only one standard of care and, therefore, only one degree of negligence. Whenever a person is under a duty to take care at all, he is bound to take that amount of it which is deemed reasonable under the circumstances; and the absence of this care is culpable negligence. It is a question of law (i. e. it is a question for the Judge to decide) whether in any particular circumstances a duty of care exists. But where a system of law recognises only one standared of care, it does not necessarily follow that it must recognise only one degree of negligence. For since negligence consists in falling bellow the standard of care recognised by law, the further the defendant falls below this standard, the greater his negligence. There are then degrees of negligence and these could be taken into account by law for both criminal and civil purpose. In crimes of negligence the law could provide that greater the negligence the greater the punishment. Although English law does not recognise many offences of negligence, but the different gradations of carelessness can be found in the law relating to read traffic. Here a distinction is drawn between ordinary negligence, criminal negligence and gross negligence. Ordinary negligence is such failure to use care as could render a person civilly but not criminally liable; criminal negligence is a greater failure and a greater falling below the Standard of care and renders a man guilty of driving offence—(and even within this category the law distinguishes between the negligent offence of careless driving and more negligent offence of dangerous driving); gross negligence is a yet greater fall below the standard and is such a wholly unreasonable failure to take care as to make the defendant guilty not only of driving offence, but also of manslaughter in the event of his conduct resulting in another person's death.

Roman law recognises two degrees of negligence viz. gross negligence (culpa lata) and slight negligence (culpa levis). It looked upon gross negligence as equivalent to wrongful intention. On the very face of it, this appears to be a paradox, because intention and negligence are two poles apart. However, if we go deep into the subject, we find that the grossest form of negligence may touch the border-land of design or purpose. For, there must come a point

where gross negligence cannot be negligence at all. Its grossness raises a presumption against its reality. If a newborn child is left to die from want of medical attention or nursing, it may be that its death is due to negligence only, but it is more probable that it is due to wrongful purpose, namely, infanticide. Again, in certain cases negligent acts are deemed to be wrongful in intent by the law, e. g. the law of homicide (not amounting to murder). An intent to cause grievous bodily harm is imputed as an intent to kill, if death ensues.

136. The Subjective and Objective Theories of Negligence

There are two rival theories of the meaning of the term negligence. According to one, negligence is a state of mind; according to the other, it is not a state of mind but merely a type of conduct. The opposing views may conveniently be distinguished as the subjective and objective theories of negligence. The former view was adopted by Sir John Salmond, the other by Sir Frederick Pollock.

The subjective theory of negligence—In the subjective sense, negligence signifies a particular state of mind and is opposed to wrongful intention. Prof, Salmond used the term negligence in this sense. His view was that a careless person is that person who does not care; his attitude is essentially one or indifference. Negligence, on this view, essentially consists in the mental attitude of undue indifference with respect to one's conduct and its consequences.

The subjective theory has the merit of making clear the distinction between intention and negligence. The wilful wrong-doer desires the harmful consequences and, therefore, does the act in order that they may ensue. The negligent wrong-doer does not desire the harmful consequences but in many cases is careless and indifferent whether they ensue or not and, therefore, does the act notwithstanding the risk that they may ensue. The wilful wrong-doer is liable because he desires to do the harm; the negligent wrong-doer is liable because he does not sufficiently desire to avoid it.

The truth contained in the subjective theory is that in certain situations any conclusion as to whether a man had been negligent will depend partly on conclusions as to his state of mind. But to identify negligence with any one state of mind is a confusion and an over simplification. We have seen that negligence consists in the failure to comply with a standard of care and that such failure can

result from a variety of factors, including ignorance, inadvertence and even clumsiness. Again, the state of mind is also not conclusive. In certain circumstances it may be held in law that a reasonable man could know things that the defendant did not know, and the defendant will be blamed for not knowing and held liable because he ought to know.

The objective theory of negligence—According to Sit Frederick Pollock, negligence is not a subjective, but an objective fact. It is not a particular state of mind or a form of mens rea at all, but a particular kind of conduct. It is a breach of the duty of taking care and to take care means to take precautions against the harmful result of one's actions, and to refrain from unreasonably dangerous kinds of conduct. To drive at night without light is negligence, because, to carry lights is a precaution taken by all reasonable and prudent men for the avoidance of accidents. If the defendant has failed to achieve this standard, it is no defence for him to show that he was anxious to avoid doing harm and took the utmost care of which he was capable. The same seems to hold good in criminal law. This view obtains powerful support from the law of tort, where it is clearly settled that negligence means a failure to achieve the standard of a reasonable man.

It is, however, possible to reconcile both these two theories of negligence. In criminal law a sharp distinction is drawn between intentionally causing harm and negligently causing harm, and in deciding whether the accused is guilty of either, we must have regard to his knowledge, aims, motives and so on, Cases of apparent negligence may, upon examination of the party's state of mind, turn our to be cases of wrongful intention. A trap door may be left unbolted, in order that one's enemy may fall through it and so die, Poison may be left unlabelled, with intent that someone may drink it by mistake. A father who neglects to provide medicine for his sick child may be guilty of wilful, murder, rather than of mere negligence. In none of these cases, nor, indeed in many others, can we distinguish between intentional and negligent wrongdoing, save by looking into the mind of the offender and observing his subjective attitude towards his act and its consequences. Externally and objectively the two classes of offences are indistinguishable. In the objective sense, Prof. Salmond uses the term 'negligent conduct' and not merely negligence. Thus negligence is either state of the mind or a conduct resulting from such mental state.

137. Negligence and Inadvertence

According to Austin, negligence, signifies a particular state of mind of one who inadvertently omits an act and breaks a positive duty. Hence negligence consists essentially in inadvertence, that is, in failure to be alert, circumspect or vigilant. It is the omission of an act and the violation of a positive duty. The act is omitted because the agent does not advert to it.

Prof. Salmond raises the following criticism to the above Austinian theory of negligence :

All negligence is not inadvertent—Negligence does not necessarily consist in thoughtlessness or inadvertence. There may be such a thing as advertent negligence or wilful negligence—where the wrong-doer foresees the harm as possible or probable but does not will or intend it at all. At first sight the term wilful negligence appears to be self contradictory, but really it is not so. A person who drives his car furiously down a crowded road (say Nawabpur Road, Dhaka) knows fully well that he is exposing others to danger but he does not intend harm to anybody. Here he is guilty of wilful negligence—it is wilful because the harm is foreseen, although it is not intended.

All inadvertence is not negligence—Inadvertence may be caused by many causes, such as mistake, accident, deliberate intention and carelessness. But it is not negligence unless it is caused by carelessness. The essence of negligence is not inadvertence but carelessness.

138. Wrongs of Absolute or Strict Liability

A person is liable if he acts with wrongful intent or with culpable negligence. These two mental conditions are grouped together under the term mens rea. Wrongs of absolute or strict liability are those wrongs for which a person is made responsible irrespective of the existence of either wrongful intention or negligence. They form exceptions to the maxim, Actus non facit reum nisi mens sit rea i. e. the act alone does not make the doer of it guilty unless it is done with a guilty mind. The chief instances of this kind of liability fall under three classes:

(1) Mistake of law, (2) Mistake of fact, and (3) Accident.

Mistake of law—Ignorance of law is no excuse for breaking it. The maxim to this effect is *ignorantia juris neminem excusat.* The rule is absolute and the presumption is irrebuttable. The reason for this rigorous principle are variously stated thus :

Black stone's View

The law is definite and knowable. Every citizen ought to know the law under which he lives and by which his actions are governed. Therefore, innocent ignorance of law is impossible. It is the duty of every man to know that part of the law which concerns him.

Savigny's View

The law is in most cases derived from the rules of natural justice. Therefore, although a man may be ignorant that he is breaking the law, he knows very well that he is acting unjustly and dishonestly and thereby violating a right. So, if the law refuses to recognise his ignorance as an excuse, he has little ground of complaint.

Austin's View

It is extremely difficult to enquire whether the party did actually know the law. Hence, if ignorance of law were admitted as a ground of exemption, the court would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impossible.

According to Salmond none the above reasons sufficiently justifies the rule. He criticises the above view thus :

(1) There is no doubt that all these considerations are substantial, but they do not afford a sufficient justification for the strict application of this principle;

(ii) That the law is knowable by all who want to know, is more an ideal than an actual fact;

(iii) That it is impossible to distinguish between wilful and negligent ignorance of law is by no means wholly true; and

(iv) That the law is based on principles of natural justice is far from truth, Hence Salmond remarks that the rule, however, is restricted to matters of general law and not matters of private right.

Mistake of fact—Ignorance of law is not an excuse but ignorance of fact is often so. Inevitable ignorance of fact affords a good defence. Mistake of fact is an excuse unless it is the result of carelessness or negligence. Hence ignorance of fact is a defence to criminal liability, when the act is clearly wrong in itself or when the act is absolutely prohibited, presence or absence of knowledge being immaterial.

The general rule of English law is that mistake of fact is an excuse within the sphere of criminal law, while in civil law the

responsibility is commonly absolute in this respect. Thus, so far as civil liability is concerned, it is the general principle of law that he who intentionally interferes with the person, reputation, property or other rightful interests of another, does so, at his peril, and will not be he permitted to plead that he believed in good faith and on reasonable grounds the existence of some circumstances which justified his acts. If I trespass on another man's land, it is no defence to me that I believed it on good grounds to be my own. If, intending to arrest A, I arrest B by mistake instead, I am civilly liable to him, notwithstanding the greatest care taken by me to ascertain his identity. If I falsely but innocently make a defamatory statement about another, I am liable to him, however, careful I may have been to ascertain the truth. In civil law, therefore, mistake of fact, can hardly be regarded as a ground of legal excuse.

In the criminal law, however, the matter is otherwise. Absolute criminal liability for a mistake of fact is quite exceptional. An instance of it is the liability of him who abducts a girl under the age of legal consent; inevitable mistake as to her age is no defence; he must take the risk.

Accident—Inevitable accident is commonly recognised as a good ground of exemption from liability both in civil and criminal law. Inevitable accident is that which could not possibly be prevented by the exercise of ordinary care, caution and skill. It does not however mean absolutely inevitable, but means "not avoidable by any such precaution as a reasonable man doing such an act then and there could be expected to take".

Every act which is not done intentionally is done either accidentally or by mistake. It is done accidentally when it is unintentional in respect of its consequences. It is done by mistake, when it is intentional with respect to its consequences but unintentional with respect to some material circumstances. If I drive a car over a man in the dark because I do not know that he is on the road, I injure him accidentally; but if I procure his arrest because I mistake him for someone who is liable to arrest, I injure him not accidentally but by mistake. In the former case I did not intend the harm at all, while in the latter case I fully intended it.

Accident like mistake is either culpable or inevitable. It is culpable when it is due to negligence; but inevitable when the avoidance of it would have required a degree of care exceeding the standard demanded by the law. Culpable accident is no defence save in those exceptional cases where wrongful intent is the exclusive and necessary ground of liability. But inevitable accident

is commonly a good defence both in the civil and the criminal law. There are, however, some exceptions in the civil law, where even inevitable accident is no ground of defence. There are cases in which the law insists that a person shall do certain things at his own peril, and if any harm is caused, he is liable irrespective of inevitable accidents, because in such a case, there is an absolute duty of insuring safety to others. Certain things are a source of extraordinary risk, and a man who exposes his neighbour to such risk is held answerable or liable to his neighbour as an insurer against consequent mischief. Here the liability cannot be avoided even by proof that utmost diligence and care has been taken. The examples are :

(1) When damage is done by the escape of dangerous substances, brought or kept by anyone upon his land (e. g. constructing of a reservoir of water) as held in the famous case of Raylad vs. Fletcher.
(2) When a man keeps wild beasts.
(3) When a man erects dangerous structures by which passengers in the highway may come to harm.
(4) Every man is absolutely responsible for the trespass of his cattle.

139. Grounds of Exemption from Liability

There are various conditions which, when present, will prevent an act from being wrongful which, in their absence, could be a wrong, Under such condition the act is said to be justified or excused. The following are the general grounds of exemption from liability:

(1) *Inevitable mistake*—That is an accident which could not have been avoided by the use of reasonable care and caution.
(2) *Mistake of facts*—Mistake of fact with the exceptions, as discussed in Section 138 (at page 224).
(3) Absence of wrongful intention, and
(4) Absence of culpable negligence.

140. Vicarious Liability

As a general rule, a man is liable for his own wrongful act, but there are certain exceptional cases which both ancient and modern law imposes on him vicarious liability for the acts of others though he had no part in those acts. In these cases one person is held liable for the wrong done by another. Criminal liability, however, is never vicarious. Modern civil law recognises vicarious liability in two classes of cases as follows:

The master's liability for the acts of the servant while acting in the course of his employment—A master is liable for the wrongful acts or omissions committed by his servant in the course of his employment, whether the wrong be committed negligently, want only, or even wilfully and though no express command of the master is proved. All acts done by a servant in the course of his employment are presumed to have been done by his master's express or implied authority and are, therefore, regarded as the acts of his master for which he is rightly held responsible. The maxim is qui facit per alium facit per se. i. e., he who does an act through another is deemed to do it himself. The reasons for this liability are as follows:

(a) The rational basis for such liability is the evidential difficulty in the way of proving actual authority. It is extremely difficult to prove actual authority and very easy to disprove it in many cases and hence it is necessary and expedient to establish a conclusive presumption of it.

(b) A further reason is that generally, employers are, while their servants are not, financially capable of bearing the burden of civil liability. A person who is capable of making compensation for the results of his wrongful activities, should not be allowed to escape from the duty of doing so be delegating the exercise of those activities to his servants or agents from whom no compensation can be obtained.

Responsibility of living persons for the act of dead persons—The common law maxim was *actio personalis moritor cum persona;* personal liability dies with the person i. e. a person cannot be punished in his grave. Therefore, as a general rule, criminal liability extinguishes with the death of the wrong-doer. But this rule of law has to a great extent been abrogated by statutory provisions with regard to penal redress, a civil action. It is now settled that the liability to penal redress must originate in the lifetime of the wrong-doer, but once it has originated it is to continue in spite of the death of the wrong-doer (This is known as the principle of compensation.) Firstly, because when a wrong has been committed, the person wronged should not be deprived of his remedy, that is to say, a valuable right should not become extinct by a mere irrelevant accident such as the death of the offender. There is no sufficient reason why a debt should not survive a deceased person; but the responsibility for assault, defamation and other acts involving compensation should be exempted from liability. And secondly,

although punishment cannot be inflicted after death, yet the threat of civil consequences to the successor might serve as a deterrent during his lifetime and this primary object of punishment can be fulfilled by allowing actions against his estate, and no injustice is thereby done to the successors, because the property alone which is bequeathed to them is made liable for the acts of the deceased and they are not personally liable as in old times.

It is to be noted that punishment is effective not when it is committed, but at the time it is threatened. A threat of evil to be inflicted upon the descendants of a man at the expense of his estate will certainly operate as a deterrent influence on him.

141. Measure of Criminal Liability

In every crime there are three elements which must be taken into consideration for the appropriate measure of punishment. These are (i) the motive to the commission of the offence, (ii) the magnitude of the offence, and (iii) the character of the offender.

Motive of the offence—The object of punishment is to counteract the natural motives for the commission of the crime. So, other things being equal, the stronger the natural motive to commit an offence, the greater should be the punishment, or, in other words, the greater the impulse or temptation to commit a crime the greater should be the punishment.

But in exceptional cases extreme temptation under compelling circumstances may form a ground for mitigating punishment, e.g. a person who steals in order to feed his hungry children, he having no other means to satisfy their hunger. Sometimes offences are committed merely through the influence of bad company or society and not through the strength of bad motives. In such cases, the above principle or fundamental rule should not be strictly followed.

Magnitude of the offence—Other things being equal, the greater the offence, that is to say, the greater the evil consequences of the offence, the greater should be the punishment. As to why punishment should be measured by the evil caused to other persons and not solely by the profit derived by the offender, Salmond gives the following reasons :

(a) It is profitable and likely to be more effective to employ proportionately greater punishment with the hope of preventing greater mischief.

(b) If the punishment varies with the magnitude of the offence the wrong-doer is thereby given a chance to choose less serious crime and to receive lesser form of punishment. To

put it negatively, if the punishment for theft and for murder were the same, the offender could naturally choose murder because there would be lesser chance of detection, because dead man tells no tales— and the risk involved is the same.

Character of the offender—The worse the character or the disposition of the offender the more severe is the punishment which he deserves. In the matter of punishment, one of the most important factors that should be taken into consideration is the repetition of the crime by one who has already been punished for similar offence previously committed by him. The law rightly imposes upon habitual offenders penalties which are disproportionate to the magnitude of the offence. Again, greater the depravity of the character of the offender, the greater should be the penalty inflicted. To kill a child in order to facilitate a robbery is a proof of extraordinary depravity of human mind, which offers greater punishment. Any fact which indicates depravity of disposition is a circumstance of aggravation and, therefore, calls for enhanced punishment. Such facts are :

(1) *Repetition of the crime*—A punishment generally adopted for normal man is not appropriate for habitual offenders.

(2) *Wilful offences*—These offences are punished with greater severity than those which are caused by mere negligence.

(3) *Offences contrary to natura affection*—To kill one's father is viewed with greater abhorrence and, therefore, punished with great severity.

(4) *Mischief disproportionate to profit*—To kill a man for pick-pocketing is a proof of extraordinary depravity of disposition and, therefore, punished with great severity.

(5) *Decrease or deficiency of sensibility*—Punishment must increase as sensibility diminishes. The more depraved the offender the greater should be the punishment.

142. Measure of Civil Liability

The characteristic of civil liability is that it is measured exclusively by the magnitude of the offence, that is to say, the amount of loss inflicted by in irrespective of the character of the offender, or of the motive for the offence. This liability consists of the compulsory compensation to the person injured as an instrument of punishment of the offender. This form of punishment is called penal redress.

As an instrument of punishment penal redress has merits as well as demerits. But in the whole, this form of redress possesses greater advantages than imprisonment, because the redress is both the gain for him who has been wronged, as well as punishment to him who has committed the wrong. Moreover, this form of remedy affords greater interests to the person wronged, an interest which is almost absent in the case of criminal law.

But penal redress taken by itself falls short of the requirements of a rational scheme of punishment. Therefore, in all developed bodies of law, its operation is supplemented and deficiencies made good by a co-ordinate system of criminal liability. An equitable combination of the two (civil and criminal) offers a very efficient instrument for the maintenance of justice.
