CHAPTER XVII

THE LAW OF PROPERTY

143. Meaning of the term Property

The substantive Civil Law, as opposed to the law of procedure, is divisible into three great departments, namely, the law of property, the law of obligation, and the law of status.

The term property is used in various senses :

(1) In its most comprehensive sense, the term property includes all those things whether animate or inanimate which belong to a person. Whatever a person possesses in law in his property. In this widest sense, property includes all the legal rights owned by a person. In this sense a person's life, liberty, reputation and estate constitute his property. Property, therefore, includes :

(a) Proprietary rights in rem.

(b) Proprietary rights in personam.

(c) Personal rights i. e. non-proprietary rights whether in rem or in personam. But this wide meaning of the term property has become obsolete.

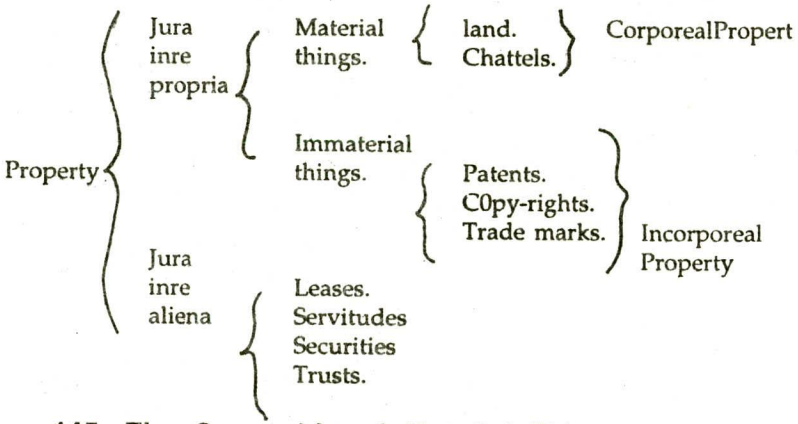
(2) In a narrower sense, property means only proprietary rights whether in rem or in personam, such as, land, chattels, shares and debts due to one. In this sense, it is opposed to a man's personal rights or status, such as right to life, liberty or reputation. This is the most frequent application of the term property which we use.

(3) In the third sense i. e. in a still narrower sense, property means not even all proprietary as well as real i. e. only proprietary rights, but only those which are proprietary right in rem. That part of the law which deals with the proprietary rights in rem (things) is the law of property, and that part of the law of property which deals with the proprietary rights in rem (things) is the law of property, and that part of the law of property which deals with the propriotary rights in personam (personal rights) is the law of obligations.

(4) In its narrowest sense—the term property means only the tangible or material object owned by a person i. e. the right of ownership in material object or corporeal property.

144. Kinds of Property

All property is either corporeal or incorporeal. Corporeal property is the right over material things. Incorporeal property is other proprietary rights in rem. Incorporeal property is, in itself, of two kinds viz. (i) jura in re aliena or encumbrances, whether over material or immaterial things (e. g. leases, mortgages and servitude's) and (ii) jura in re propria (proprietary rights) over immaterial things (e. g. patents, copyrights and trade-marks). The resulting three-fold division of property appears in the following table :



145. The Ownership of Material Things or Corporeal Property

The right of ownership in material things or tangible objects is called Corporeal property. A material thing is a tangible object having physical existence. The following requisites must be present in order to constitute a person and owner of tangible objects :

(i) In the first place, the right must be a right to the general or aggregate use of the thing. Absolute or unlimited use is not necessary. The limits that may be imposed upon a man's unfettered use of the thing are two in number ; (a) Natural limit—Which exists in the interests of the public, or of his neighbours, (b) Restrictions arising from the effect of encumbrances of other rights that may be vested in other persons.

(ii) In the second place, the right of ownership must be permanent right. The right must exist so long as the material thing, which is the subject-matter of the right, is in existence.

(iii) And lastly, the right must be a heritable right.

Hence Prof, Salmond defines the right of ownership in a material thing as the general, permanent and heritable right to the use of that thing.

146. Movable and Immovable property

Among material things the most important distinctions is that between movables and immovables, or, to use terms more familiar in English law, between chattels and land.

Considered in its legal aspect, immovable property consists of the following elements :

(i) A definite portion of earth's surface.

(ii) The ground beneath the surface down to the centre of the earth.

(iii) Possibly, the column of space above the surface ad infinitum (in England, it is now expressly provided by statute that the flight of an aeroplane at a reasonable height above the ground is not actionable).

(iv) All objects, which are on or under the surface in its natural state; for example, minerals and vegetation which form part of the land, though they in no way physically attached to it. So also, stones lying loose on the surface as well as stones in the quarry.

(v) Lastly, all objects placed by human agency on or under the surface with the intention of permanent enjoyment. For example, buildings, walls and fences. A wall built of stones without mortar or foundations forms part of the land itself. On the other hand, things which are not permanently fixed in the earth or imbedded in the earth are not immovable property. Carpets, tapestries, or ornaments nailed to the floor or walls of a house are not thereby made part of the house. Money buried in the ground is as much a chattel as money in the owner's pocket.

Strictly speaking, the distinction between movable and immovable property is applicable to material objects only. Yet the law has made an attempt to apply it to rights also. Every right over immovable property is itself immovable. Rights over movable property or which have no material object at all (such as copy-right) are considered by the law as movable.

147. Real and Personal Property

Derived from and closely connected with the distinction between immovable and movable property is that between real and personal property. The law of real property is almost equivalent to the law relating to land, while the law of personal property is almost identical with the law of movable property. Real property comprises all rights over land with such additions and exceptions as the law has been fit to establish. All other proprietary rights, whether in rem or in personam pertain to the law of personal property. By real property in meant immovable property, such as, land. By personal property is meant movable property as well as certain personal rights or status, such as right to liberty, right to reputation.

The distinction between real and personal property is historical and not logical. These two terms were taken by Bracton and other English lawyers from Roman Law, namely the Roman distinction between real and personal actions (actions in rem and actions in personam). Real property was such property that could be recovered by a real action which was meant an action for the recovery of freehold land (as opposed to leasehold interests i. e. estates held from some freeholder on a long lease). Leasehold interests were called personal property and the actions for the recovery of such interests were called personal action. The real property Legislation of 1922-1925 reduced the inconveniences arising from these distinctions by assimilating as far as possible the distinction between real and personal property in England.

148. Rights in re Propria (Proprietary Rights) in Immaterial Things.

The subject-matter of right to property is either a material or an immaterial thing or object. Material things are physical object, such as land, chattels, Immaterial things are anything else which may be the subject-matter of a right; they are notional things or abstract rights.

Incorporeal property is of two kinds, viz. rights in re propria (proprietary rights) over immaterial things, and rights in re aliena (encumbrances) whether over material or immaterial things. Rights in re aliena are rights over the property belonging to others, such as leases, servitudes, securities and trusts (to be dealt with in the subsequent sections).

The only immaterial things which are recognised by the law as the subject-matter of proprietary rights are the various immaterial

products of human skill and labour. The immaterial forms of property are of five classes :

(1) *Patent right*—The subject-matter of patent-right is an invention. A person is allowed by law to enjoy the profit from a thing which he has invented.

(2) *Literary copy-right*—The author of a book is entitled to protection against illegal copying of the book by others.

(3) *Artistic copy-right*—The author of an artistic design, such as painting, photography, is entitled to protection against illegal copying of the same by others.

(4) *Musical and Dramatic copy-right*—The immaterial product of the skill of the musician or the play-wright is the subject-matter of a proprietary right of exclusive use and is protected against infringement by any unauthorised performance of representation.

(5) *Commercial good-will, trade-marks and trade-names*—These are also the subject-matter of a proprietary right of exclusive use. If a person establishes a business by his skill and labour, he acquires thereby an interest in the good-will of that business. Similar is the case with regard to trade-marks and trade-names.

149. Kinds of jura (rights) in re aliena

It frequently happens that the right in re propria or the right of ownership vested in one person becomes subject to an adverse right vested in another person. 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 exists in another person as independent right e. g. the right of the landowner over his land is his general right, and this right may be limited by his neighbour's right of way over the land.

Thus jura in re aliena are the encumbrances to which the proprietary rights or the rights in re propria may be subject. These are rights over the property belonging to others. These encumbrances (jura in re aliena) are of four kinds : (1) Leases, (2) Servitudes, (3) Securities, and (4) Trust. The nature of trust having already been sufficiently examined in connection with ownership, it is necessary here to consider the other three types only.

150. Leases

In the wider sense the term lease includes not only a tenancy of land but also all encumbrances of incorporeal property which possess the same nature as a tenancy of land and all kinds of

bailment of chattels. A lease, therefore, in this generic sense, is an encumbrance which consists of a right to the possession and use of the property owned by some other persons. It is the outcome of a rightful separation of ownership and possession.

We usually speak of the ownership of land; but strictly speaking, it should be the ownership of the right in the land. In the same manner. we say that land is leased instead of saying that the right in the land are leased thus identifying the material object with the right itself. The lessor of the land is one who owns the land but who has transferred it to another. The lessee of land is one who rightfully possesses it but does not own it. Encumbrance by way of lease, however, is not confined to the right of ownership of a material object. The owner of a patent or copyright may grant a lease of it for a term of years entitling the lessee to the exercise and use of the right but not the ownership of it. An example of a lease in perpetuity is the emphyteusis of Roman law according to which a tenant (lessee) is regarded as an encumbrancer.

151. Servitudes

A servitude is that form of encumbrance which consists in the limited use of a piece of land without the possession of it, for example, a right of way over it, a right to depasture cattle upon it, or a right to derive support from it for the foundations of an adjoining building.

It is an essential characteristic of a servitude that it does not involve the possession of the land over which it exists. This is the difference between a servitude and a lease. A lease of land is the rightful possession and use without the ownership of it, while a servitude over land is the rightful use without either ownership or the possession of it. There are two distinct methods by which rights over the property of another may be acquired, firstly, by agreement for the exclusive possession over a definite strip of land as in the case of lease, or for the sole purpose of a passage over the particular strip without an exclusive possession or occupation of it as in the case of a servitude.

Servitudes are of two kinds, which may be distinguished as private or public.

A private servitude is one which is vested in a determinate individual or individuals. For example, a right of way, a right to light, or to support vested in the owner of one piece of land over the land of a neighbouring owner, or a right granted to one person of fishing in the water of another, or of mining in another's land.

A public servitude is one vested in the public at large or in some class of indeterminate individuals, for example, the right of the public to a highway over private land, and right of the public to navigate a river which belongs to private individuals.

According to the English law, servitudes are further distinguishable as being either appurtenant or in gross.

Appurtenant—A servitude appurtenant is one which is not merely an encumbrance of one piece of land, but it is also accessory to another piece of land, it is a right of using one piece of land for the benefit of another, e. g. A's right of way from A's house to the high road across B's field. This kind of servitude passes to successive occupiers of both the tenements. The land which is burdened with the servitude is called the survient tenement, and the land which has the benefit of it is called the dominant tenement. In the above illustration B's field is the servient tenement and A's house is the dominant tenement.

Gross—A servitude is said to be in gross when it is not so attached and accessory to any dominant tenement for whose benefit it exists, e. g. a public right of way over a place of land is not attached to the benefit of any other piece of land. Similarly, a private right of fishing, pasturage or mining.

152. Securities

A security is a jus in re aliena i. e., an encumbrance the purpose of which is to ensure the fulfillment of some other right vested in the same person,—e. g. a mortgage is a security for the repayment of the debt secured. Thus, it is an encumbrance vested in a creditor over the property of his debtor for the recovery of the debt. Securities are of two kinds, which may be distinguished as mortgages and liens.

Mortgage—Mortgage is the transfer of an interest in immovable property for the purpose of securing the payments of debts, and the right which is conferred upon the creditor by way of security is in its nature capable of surviving the debt.

Lien—A lien, on the other hand, is an encumbrance given by way of security which has no existence apart from the debt, and could not in any case survive when once the debt is discharged. Lien does not exist apart from the debt, and it is vested in the creditor absolutely and not by way of security, whilst the mortgagee's right is vested conditionally subject to its redemption by the creditor. A mortgage can exist only on immovable property, but a lien can exist both on immovable or, movable property.

Mortgage is created only by act of the parties while a lien arises only by operation of law. A lien-holder can satisfy himself by a private sale or by retaining possession of the property, and a lien is possessory and exists so long as the possession lasts.

In modern times, a third kind of security has been developed, which does not come in the category of either mortgage or lien. This kinds of security, known as a 'floating' (and not fixed) charge upon some property, becomes a fixed charge upon the happening of some future event. This kind of security is to be found mostly in company matters, If a floating charge is created upon the assets of a company such charge remains dormant and survives till the company is wound up.

153. Modes of Acquisition of Possession

The legal modes of acquiring property (proprietary right in rem) are four in number : Possession, Prescription, Agreement and Inheritance.

Possession—Possession of a material object is prima facie the ownership of it, that is, possession of a thing is recognised as a ground of title to the ownership of it. In other words, the person who claims a chattel or a piece of land as his own, makes good his claim in fact by way of possession, and makes it good in law also by way of ownership. There is, however, an important distinction between the two, for the thing possessed may or may not have already belonged to some other person.

If, at the time of acquisition, the thing had not already belonged to any one else, the acquirer gets not only the possession of the thing but also ownership over it. The fish of the sea and the birds of the air belong, by an absolute title, to him who first succeeds in obtaining possession of them. This mode of acquisition is known in Roman law as occupitio. On the other hand, if the thing of which possession is taken is already the property of another, the title acquired by possession is good against all the third persons, but not so as against the true owner. Except with respect to the rights of the original proprietor, my right to the watch in my pocket is much the same, whether I bought it honestly, or found it on the road, or extracted it from the pocket of someone else. Because, if it is stolen from me the law will help me for the recovery of it. I can sell it, lend it or bequeath it, Whoever acquires it from me, however, acquires nothing more than my limited and imperfect title to it, and holds it subject to the superior claims of the true owner. Thus, a thing owned by one person and adversely possessed by another,

has two owners, the ownership of the one is absolute and perfect, while that of the other is relative and imperfect.

Possession, even when consciously wrongful, confers a better title of right against any who cannot show a better. If a possessory owner is wrongfully deprived of the thing by a person other than the true owner, he has a right of suit and can recover it. The defendant will not be allowed to set up the defence of jus tertii, that is to say, he will not be permitted to allege that, as against the plaintiff's claim, neither the plaintiff nor he (the defendant) but some third person is the true owner.

154. Prescription

Prescription may be defined as the effect of lapse of time in creation of destroying rights. It is the operation of time as a vestitive fact. It is of two kinds, namely, (i) Positive or acquisitive prescription and (ii) negative or extinctive prescription.

Positive or Acquisitive prescription—It means acquiring a right by long possession of it. Hence it operates as the creation of a right by the lapse of time. If I use a right, say a right of way, without interruption for twenty years. I myself become the owner of the right of way by uninterrupted user. This is positive or acquisitive prescription.

Negative or Extinctive prescription—The effect of this is to destroy a right already vested in one person. Hence it operates as the destruction of right by the lapse of time. If I do not sue my debtor for three years, after my debt became first due, my right to sue is destroyed. This is negative or extinctive prescription.

Lapse of time, therefore, has two opposite effects. In positive prescription it creates a title of right, but in a negative prescription it is a divestitive fact which causes a loss of right. Whether it shall operate in one way or the other, depends upon whether it is accompanied by possession or not. If the fact of possession is destroyed, the right growing out of it withers and dies in course of time; it the fact of possession is present, the right will in the fulness of time proceed from it.

Negative *prescription* is divided into two kinds which may be distinguished as (a) perfect and (b) imperfect.

A Perfect Negative Prescription

It is the destruction of the right itself, e. g. the destruction of the ownership of land through dispossession for twelve years. In this case the person in dispossession not only loses his right of action for the recovery of the land but also he loses the right of ownership

itself. His ownership has been extinguished by the operation of the negative prescription. Such negative prescription is said to be perfect.

Imperfect Negative Prescription

It is the destruction of the accessory right of action only, the principal right remaining in existence. In other words, the right in this case, is merely reduced from a perfect and enforceable right to one which is imperfect and unenforceable. For example, a creditor, in case of a promissory note, loses his right of action for the debt after three years, but the debt itself is not extinguished, it continues to be due and owing although it is not enforceable by law.

This form of negative prescription is known as the limitation of actions. Limitation bars the remedy but does not extinguish the right. Thus, if the creditor succeeds in getting payment made by the debtor even after the expiry of three years, the debtor is not entitled to get refund of such payment.

As to the reason underlying recognition of prescription as a title of right it is to be found in the coincidence of possession and ownership of fact and of right. Owners are usually possessors and possessors are usually owners, and, therefore, the former is the evidence of the latter. That I have occupied land for a day raises a slight presumption that I am the owner of it, but if I continue to occupy it for twenty years, the presumption becomes infinitely greater. The same is the case with the loss of possession; as the years pass away the evidence in favour of the title fades, while the presumption against it grows stronger. The law is provided for the vigilant, and not for those who slumber and sleep; he who neglects his rights will lose them.

Prescription is not limited to rights in rem (right in respect of a thing). It is found within the sphere of obligations as well; but positive prescription is possible only in the case of those rights which admit of possession. Personal rights (rights in personam) are commonly extinguished by their exercise, and, therefore, cannot be acquired or possessed by positive prescription. Thus, a creditor loses his right of action after a particular time, but there cannot be any positive prescription created by the extinction of the remedy.

155. Agreement

As a title of proprietary rights over things (rights in rem) agreement is of two kinds, namely, assignment and grant.

Assignment—By assignment existing rights are transferred from one owner to another. Thus, an assignment of a lease means

the transfers by agreement of a subsisting lease-hold right from the assignor to the assignee.

Grant—By grant new rights are created by way of encumbrances upon the existence of rights of the grantor; as for example, the grant for a lease of land. In this case, the land was not subject to any encumbrance of the same kind before the creation of the lease. Here ownership i. e. the right to use is granted for the first time to the lessee.

Agreement may be either formal e. g. deeds attested and registered, or informal- i. e. verbal.

It is a leading principle of law that no person can transfer to another a title better than what he himself possesses (namo dat qui non habet). There are, however, two exceptions to this ancient general principle:

(a) Those due to the separation of legal ownership from equitable one;

Thus, if a trustee in fraud of his trust, sells trust property, the transferee gets a good title provided the person gives value for what he gets, and had at the time of purchase no knowledge of the trust. This rule is known as the equitable doctrine of purchase for value without notice. Similarly a bona fide purchaser for consideration from a benamdar acquires a good title though the seller had not.

(b) Those due to separation of ownership from possession:

The possessor in certain cases can give a better title to one who deals with him in good faith believing him to be the owner. The most notable case is that of negotiable instruments. The possessor of a bank-note may have no title to it; he may have found it or stolen it, but he can give a good title to any one who takes it from him for value in good faith. Similarly, mercantile agents in possession of goods belonging to their principal can effectively transfer the ownership of them, whether they are authorised to do that or not.

156. Inheritance (Intestate Succession)

When a person dies, certain rights, which he possessed while alive, survive him and the rest die with him. Those which survive him are called heritable rights and the latter, uninheritable. The former comprise those with respect to right to things (in rem) and the latter with respect to personal rights (in personam), such as status, dignity, etc. This, in respect of the death of the owner, all rights are divisible into two classes-(i) inheritable and (ii) uninheritable.

Inheritable—All proprietary rights are inheritable. On the death of the owner such rights must vest in someone. But to this rule there are certain exceptions. These are :

(a) *Joint ownership*—On the death of one of the joint owners his rights pass to the survivors and not to his legal representatives. Hence such rights are not heritable.

(b) *Leases*—A lease may terminate on the death of a particular person.

(c) *Action for tort*—Rights of action for a tort die with the death of the person wronged.

Uninheritable—Personal rights, such as status, dignity are uninheritable. But in exceptional cases personal rights do survive, such as, in the case of hereditary nobility, e.g. hereditary Lords of British Parliament.

157. Limitation of testamentary disposition of property—(will)

The rights which a dead person leaves behind vest in his representative. The representative of a dead man (though the property of the deceased is vested in him) is not necessarily the beneficial owner of it. He holds it on behalf of two classes of persons to none of which classes he necessarily belongs. These are the creditors and the beneficiaries of the estate. Just as many rights belonging to a person survive him, so do his liabilities; and these inheritable obligations (liabilities) pass to his representatives which must be satisfied by them. However, being merely the representative of the deceased, his responsibility is limited only by the amount of the property which he has inherited from the deceased.

A man while yet alive has the right to determine the disposition, after he is dead, of the property which he leaves behind him. But the power of a dead man to determine the disposition of his property after he is dead is limited by three kinds of restrictions, which are meant for the benefit of the living. These restrictions imposed upon the powers of testamentary disposition of property are as follows:

(1) Limitation of amount—In most legal systems, a testator can deal with a certain proportion of his estate only, the residue being allotted by the law to those to whom he owes a duty of support, such as his wife and children. Thus, in Mohammedan Law a will is valid to the extent of one-third of the property.

(2) Limitation of time—The testamentary direction must be fulfilled within a limited period, that is, such direction must not offend the rule against perpetuity. Hence a testator must so order the disposition of his property that within a particulur time prescribed by the law the whole of it shall become absolutely vested in some person or persons free from all the testamentary restrictions and conditions.

(3) Limitation of purpose—The power of testamentary disposition of property is to be used for the benefit of other persons who survive the testator. No person can validly direct that his property shall lie waste, or that his money shall be buried with him or thrown in the sea. He must leave the property in such a manner as it would be of some benefit to the living.

CHAPTER XVIII

THE LAW OR OBLIGATION

158. The Nature of Obligation

Obligation in its popular sense is merely a synonym for duty. But its legal sense, derived from Roman law, differs from this in several respects. In the first place, obligations are merely one class of duties, namely, those duties which are the correlatives of rights in personam, for example, the duty of a debtor to pay to his creditor. Here the right of the creditor to receive money is available against a determinate or particular person, the debtor, who owes the money to him (the right in personam). An obligation is the vinculum juris, or the bond of legal necessity which binds together two or more determinate individuals. It includes, for example, the duty to pay a debt, to perform a contract, or to pay damages for a tort, but not the duty to refrain from interference with the person, property or reputation of others.

Secondly, the term obligation is in law the name, not merely of the duty, but also of the correlative right. If denotes the legal relation or vinculum juris in its entirety, including the right of one party, no less than the liability of the other. Looked at from the point of view of the person entitled (i. e. the owner or subject of the right), an obligation is the right e. g. the right of the creditor to receive money from the debtor, looked at from the point of view of the person bound (i. e. the subject of duty), it is a duty e. g. duty of the debtor to pay to his creditor. We may say either that the creditor acquires, owns or transfers an obligation, or that the debtor has incurred or been released from one.

Thirdly or lastly, all obligations pertain to the sphere of proprietary right i. e. they pertain to the estate and not the status of a person. They form part of the estate of him who is entitled to them. Rights which relate to a person's status such as those created by marriage, are not obligations, even though they are rights in personam or a duty which corresponds to such right.

The person entitled to the benefit of an obligatio (obligation) was in Roman law termed as creditor, while he who was bound by it was called debtor. We may use the corresponding English terms creditor and debtor in an equally wide sense and speak of every obligation, of whatever nature, as vested in or belonging to a creditor and availing against a debtor. There is, of course, a narrower sense, in which the terms are applicable only to those

obligations which constitute debts, that is to say, obligation to pay a definite or a liquidated sum of money.

A technical synonym for obligatior is 'chose in action' or 'thing in action'. A 'chose in action' means, in our modern use of it, a valuable personal right, i. e. a proprietary right in personam, for example, a debt, a share in a joint-stock company, money in the public funds, or a claim for damage for a tort and so on. So non-proprietary right in personam, such as that which arises from a contract to marry, is no more a 'chose in action' in English law than it is an obligatio in Roman law.

Choses in action are, however, opposed to choses in possession though the latter term has since fallen out of use. The true nature of the distinction between the two has been the subject of much discussion. At the present day, if any logical validity at all is to be ascribed to it, it must be with that between the real and personal rights, that is to say, with a common distinction between dominiupn and obligatio. A 'chose in action' is a proprietary right in personam. All other proprietary rights are choses in possession. If we regard the matter historically, however, it becomes clear that this is not the original meaning of the distinction. In its origin a chose in possession was a thing or right which was accompanied by possession; while a chose in action was anything or right of which the claimant had no possession, but which he must obtain, if need be, by way of action at law. Money in a man's purse was a thing in possession; money due to him by a debtor was a thing in action. This distinction was largely, though not wholly, coincident which that between real and personal rights, for real rights are commonly possessed as well as owned, while personal rights are commonly owned but not possessed. This coincidence, however, was not complete. A chattel, for example, stolen from its owner was reduced, so far as he was concerned, to a thing in action; but a right of ownership was not thereby reduced to a mere obligatio.

As the extraordinary importance attributed to the fact of possession, which was the characteristic feature of the early law, diminished, the original significance of the distinction between thing in possession and thing in action was lost sight of, and these terms have gradually acquired a new meaning. Originally shares and annuities would probably have been classed as things in possession, but they are now things in action. Conversely lands and chattels are now things in possession, whether the owner retains possession of them or not. Obligations were always the most important species of things in action, and they are now the only

species. Neither the old law nor the new gives any countenance to the suggestion made by some that immaterial property, such as patents, copyrights and trade-marks, should be classed as choses in action.

According to the laws of India. Pakistan and Bangladesh, however, a chose in action is called an actionable claim, a claim which can only be enforced by an action at law and not by physical possession.

159. Solidary Obligation

The normal type of obligation is that in which there is one creditor and one debtor. It often happens, however, that there are two or more creditors entitled to the same obligation and two or more debtors under the same liability. The case of two or more creditors gives rise to little difficulty because in most respects it is merely a particular instance of co-ownership, the co-owners holding either jointly or in common according to circumstances. The case of two or more debtors, however, is of some theoretical interest and calls for special notice.

There are obligations in which two or more debtors owe the same thing to the same creditor. Obligations of this kind are called soldiary obligations since, in the language of Roman law, each of the debtors is bound in solidium instead of pro parte, that is to say, for the whole debt and not for a proportionate part of it. For example, if debts are due by afirm of partners, or by two or more persons jointly or by one principal debtor and guaranteed by one or more sureties, and if two or more persons together commit a tort and thereby incur a liability to pay compensation, the creditor is not obliged to divide his debts into as many different parts as there are partners or debtors. He may exact the whole sum from one partner or from one debtor and leave that one to recover from his co-debtors, if possible and permissible, a just portion of the amount so paid. A debt of $ 100 owing by two partners, A and B, is not equivalent to the debt of $ 50 owing by A and another of the same amount owing by B. It is a single debt of $ 100 owing by each of them, in such a fashion that each of them may be compelled to pay whole of it, but that when it is once paid by either of them, both are discharged from it. Thus, a solidary obligation may be defined as an obligation in which two or more persons owe the same thing to the same creditor.

In English law, solidary obligations are of three distinct kinds :
(i) Several (ii) Joint, and (iii) Joint and Several.

Several—Solidary obligations are several, when, although the thing owed is the same in each case, there're as many distinct debts as there are debtors. Each debtor is bound to the creditor by a distinct and independent obligation (vinculum juris) the only connection between them being that in each case the subject matter of the obligation is the same, so that performance by one of the debtors necessarily discharges all the others also. Solidary obligations are called several when the following conditions are fulfilled :

(a) The debt or the thing owed is the same.

(b) There are as many distinct debts and causes of action as there are debtors i. e. sources of obligations are different and distinct in origin. Each debtor is bound to pay the creditor by a distinct and independent obligation.

(c) Performance or payment by one of the debtors necessarily discharges all the others also.

(d) Release of one of the debtors by the creditor otherwise than by payment does not operate as discharge of others also.

Following are the examples of solidary obligations which are several in their nature :

(1) The liability of a principal debtor and that of his surety, provided that the contract of surety ship is subsequent to, or otherwise independent of the creation of the debt so guaranteed. But if the two debts have the same origin, or where the principal debtor and the surety sign a joint bond, the case is one of joint obligation.

(2) The liability of two or more co-sureties who guarantee the same debt independently of each other. They may make themselves joint and several debtors, on the other hand by joining a single contract of guarantee.

(3) Separate judgments obtained it distinct actions against two or more persons liable for the same debt. Two persons jointly and severally liable on the same contract, may be separately sued and judgment may be obtained against each of them. In such a case they are not longer jointly liable at all ; each in now severally liable for the amount of his own judgment; but these two obligations are solidary, inasmuch as the satisfaction of one will discharge the other..

(4) The liability of independent wrong-doers whose acts cause the same damage. This is a somewhat rare case, but is perfectly possible. Two persons are not joint wrong-doers simply because

they both act wrongfully and their acts unite to cause a single mischievous result. They must have committed the joint act; that is to say, they must have acted together with the same common purpose. If not, they may be liable in solidium and severally for the common harm to which their separate acts contribute; but they are not liable as joint wrong-doers.

In Thompson vs. The London County Council (1899) 1 Q. B. 840, the plaintiff's house was injured by subsidence of its foundations, this subsidence resulting from excavations negligently made by A, taken in conjunctions with the negligence of B, a water company, in leaving a water main insufficiently stopped. It was held that A and B inasmuch as their acts were quite independent of each other, were not joint wrong-doers, and could not be joined in the same action. It was said by Lord Justice Collins : "The damage is one, but the causes of action which have led to that damage are two, committed by two distinct personalities". The liability of the parties was solidary but not joint. So also successive acts of wrongful conversion may be committed by two or more persons in respect of the same chattel. Each is liable in the action of trover to the owner of the chattel for its full value. But they are liable severally and not jointly. The owner may sue each of them in different actions, though payment of the value by one of them will discharge the others.

Joint—Solidary obligations are joint, on the other hand, when, though there are two or more debtors there is only one debt or cause of action as well as only one thing owed. The obligation is single though it binds several debtors to the same creditor. The chief effect of this unity is that all the debtors are discharged by anything which discharges any one of them and release of one of the debtors by the creditor otherwise than by payment operates as discharge of others also. When the vinculum juris (obligation) has once been severed as to any of them, it is severed as to all. Examples are the debts of partners; where the principal debtor and the surety sign a joint bond.

Where, on the contrary, solidary obligations are several and not joint, performance by one debtor will release the others, but in all other respects the different obligations are independent of each other. Thus, examples of joint obligations are the debts of contracts, and all other solidary obligations ex contractu which have not been expressly made joint and several by the agreement of the parties.

Joint and Several—The third species of solidary obligations consists of those which are both joint and several. As the name implies, they stand midway between the two which have already been discussed. For some purposes there is, in the eye of law, only one single obligation and cause of action, while for the other purposes the law consents to recognise as many distinct obligations and causes of action as there are debtors. They are the product of a compromise between the other two competing principles. For some purposes the law treats them as joint and for the rest as several. Solidary obligations are called joint and several when the following conditions are fulfilled :

(a) The debt or the thing owed is the same.

(b) The cause of action or the source is the same. The obligation arises out of the same transaction and is indivisible.

(c) Performance or payment by one of the debtors discharges all the others.

(d) Release of one of the debtors by the creditor otherwise than by payment does not operate as discharge of others.

Examples are the liabilities of those who jointly commit a tort or (perhaps) a breach of trust, and also all the contractual obligations, which are expressly made joint and several by the agreement of the parties.

Question is on what principle does the law determine the class to which any solidary obligation belongs? Salmond says, (i) obligations are several when although they have the same subject-matter, the sources of, such obligations are distinct in origin. Examples are as already cited, the liablility of a principal debtor and that of his surety, provided that surety ship is subsequent to and independent of the debt guaranteed; so is the liability of two or more co-sureties who guarantee the same debt independently of each other, (ii) Obligations are joint, when they have not merely the same subject-matter, but also the same source. Examples are the debts of partners, where the principal debtor and the surety sign a joint bond, etc. (iii) Joint and several obligations, in the third place, are those joint obligations in which the law for special purposes chooses to treat them in special respects as if they were several. Like those which are purely and simply joint, they have the same source as well as the same subject-matter; but the law does not regard them consistently as comprising a single vinculum juris. Examples are the liabilities of those who jointly commit a tort or a breach of trust, and also all the contractual obligations which are expressly made joint and several by the agreement of the parties.

160. The Source of Obligations : Contractual (Obligations ex contractu)

Obligations, considered in respect of their sources, as recognised by the English law, are divisible into four classes namely, (1) Contractual (obligations ex contractu), (2) Delictal (obligations ex delicto), (3) Quasi contractual (obligation quasi ex contractu) and (4) Innominate.

Obligations arising from Contracts—The first and most important class of obligations consists of those which are created by contract. We have considered the nature of contract in a former chapter, and there we have seen that a contract is, in general, that kind of agreement which creates rights in personam between the parties to it. Now, of rights in personam obligations are the most numerous and important kind, and of those which are not obligations, comparatively few have their source in the agreement of the parties. The law of contract, therefore, is almost wholly comprised within the law of obligation, and for the practical purpose of legal classification it may be placed there with sufficient accuracy. The coincidence of obligations arising from contract is not, however logically complete : a promise of marriage, for example, being a contract which falls within the law of status and not within that of obligations. Neglecting, however, this small class of personal contracts, the general theory of contract is simply a combination of the general theory of agreement with that of obligation, and does not call for any further examination in this place. Salmond has, however, pointed out that the obligations to pay damages for a breach of contract is itself to be classed as contractual, no less than the original obligations to perform the contract.

161. Obligations arising from Tort (ex delicto)

The second class of obligations consists of those which may be termed delictal, or, in the language of Roman law, obligations ex delicto. By an obligation of this kind is meant the duty of making pecuniary satisfaction for that species of wrong which is known in the English law as a tort.

Salmond defines tort as a "civil wrong', for which the remedy is an action for damages, and which is not solely the breach of a contract or the breach of a trust or any other merely equitable obligation". According to him, this definition contains four essential elements, as there are four kinds of wrongs excluded by this definition from the sphere or tort, namely :

(1) A tort is a civil wrong (Crimes are wrongs no doubt, but they are not in themselves tort). But there is nothing to prevent the same from being both a tort and a crime at once.

(2) Although a civil wrong is not a tort, but a tort is a particular kind of civil wrong. A tort is only that kind of civil wrong the appropriate remedy for which is an action for damages. There are, however, other forms of civil remedies besides an action for damages, such as, injunctions, specific performance, specific restitution of property and the payment of liquidated sums of money by way of penalty or otherwise. If the remedy of damages in not available, but some other remedy only is, the wrong though a civil one, is not a tort. The obstruction to a public highway, for example, is to be classed as a civil injury, inasmuch as it may give rise to civil proceedings instituted by the Attorney General for an injunction; but although a civil injury. It is not a tort, save in those exceptional instances in which, by reason of special damages suffered by an individual, it gives rise to an action for damages at his suit.

(3) No civil wrong is a tort, if it is exclusively the breach of a contract. The law of contract stands by itself, as a separate department of our legal system, over against the law of tort; and to a large extent liablility for breaches of contract and liability for tort are governed by different principle. But the same act may at the same time belong to both the classes, and this is so in at least two classes of cases :

(a) The first and the simplest of these is that in which a man undertakes by contract the performance of a duty which lies on him already, independently of any contract. Thus, he who refuses to return a borrowed chattel commits both a breach of contract, and also the tort known as conversion : a breach of contract, because he promised expressly or impliedly to return the chattel; but not merely a breach of contract and therefore also a tort, because he would have been equally liable for detaining another man's property, even if he had made no such contract at all.

(b) The second class of cases is one which involves considerable difficulty, and the law on this point cannot yet be said to have been thoroughly developed. In certain instances a breach of contract made with one person creates liability towards another person, who is no party to the contract. It is a fundamental principle that no person can sue on a contractual obligation, except a party to the contract; nevertheless, it sometimes happens that one person can sue on a delictal obligation for the breach of a contract which was

not made with him but from the breach of which he has suffered unlawful damage. That is to say, a man may take upon himself, by a contract with A, a duty which does not already or otherwise rest upon him, but which when it has once been undertaken, he cannot break without doing damage to B, a third person, as the law deems actionable. Thus, if X lends his horse to Y, who delivers it to Z, a stable-keeper, to be looked after, and fed, the horse is injured or killed by insufficient feeding, presumably Z is liable for this, not only in contract to Y, but also in tort to X, the owner of the horse.

It is true that apart from his contract with Y, Z was under no obligation to feed the animal; apart from the contract this was a mere omission to do an act which he is not bound to do. Yet having taken this duty upon himself, he has already put himself in such a situation that he cannot break the duty without inflicting on the owner of the horse a damage of a kind which the law deems wrongful. The omission to feed the horse, although a breach of contract, is not exclusively such, and is therefore a tort, inasmuch as it can be sued on by a person who is not a party to the contract.

(4) The fourth and the last class of wrongs, which are not torts, consists of breaches of trust or any other equitable obligation recognised. The original reason for their exclusion and separate classification is the historical fact that the law of trust and equitable obligation originated and developed in England in the Courts of Chancery, while the law of tort grew up in the Courts of Common Law. But even now, although the same courts administer both law and equity, it is still necessary to treat breaches of trust as a form of wrong distinct from torts, and to deal with them along with the law of trust itself, just as breaches of contract are dealt with along with the law of contract. Thus torts, contracts and trusts developed separately and the principles of liability in each case are entirely different, and as such, they must be retained as distinct departments of the law.

162. Obligations arising from Quasi-Contracts

There are certain obligations which are not in reality contractual, but which the law regards as if they were. These obligations are enforced by the law on equitable principles where the circumstances are such that although there is no actual contract between the parties, the law presumes or implies a contract and imposes duties upon the person bound as if a contract had in fact been made. They are contractual by fiction of law, but not in fact. The Romans call them obligations ex contractu. English lawyers call

them quasi-contracts or implied contracts, or often enough contract simply and without qualification. We are told, for example, that a judgment is a contract, and that a judgment debt is a contractual obligation. "Implied (contracts)", says Black stone, "are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform." "Thus it is that every person is bound, and has virtually agreed, to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law". So the same author speaks, much too widely indeed of the "general implication and intendment of the courts of judicature that every man has engaged to perform what his duty or justice requires". Salmond says, "It is a fictitious extension of the sphere of contract to cover obligations which do not in reality fall within it" In other words, quasi-contracts are those contracts which are implied by the law.

From a quasi-contract, or contract implied by law, we must distinguish carefully a contract implied in fact. The latter is a true contract, though its existence is only inferred from the conduct of the parties, instead of being expressed. Thus, when I enter an omnibus, I impliedly, yet actually agree to pay the usual fare. A contract implied by law (quasi-contract), on the other hand, is merely fictitious, for the parties have not agreed at all either expressly or tacitly.

The quasi-contractual obligations known to English law fall, for the most part, into two classes of cases. These two classes are :

(1) According to the theory of common law, all debts are deemed to be contractual in origin. A judgment in a money suit creates a debt which is non-contractual; so also the receipt of money paid by mistake or obtained by fraud. Nevertheless, in the eye of common law, they fall within the sphere of contract. Thus, in the eye of law, a judgment creates a debt (although it is non-contractual), for the law conclusively presumes that every person who owes a debt, has promised to pay it. Hence a judgment debtor (i. e. the party against whom the judgment is passed) is in legal theory liable ex contractu to satisfy the judgment.

(2) The second class of quasi-contracts includes all those cases in which a person injured by a tort is allowed by the law to waive his tort, and sue in contract instead. In other words, there are certain obligations which are in truth delictal and not contractual, but which may at the option of the plaintiff be treated as contractual if

he so pleases. Thus, if a person obtains money from me by fraudulent misrepresentation, I may sue him either in tort for the damages for the deceit, or on a fictitious contract for the return of money.

163. Innominate Obligations

The foregoing classification of obligation as either contractual, delictal, or quasi-contractual is not exhaustive, for it is based on no logical scheme of division, but proceeds by simple enumeration only. Therefore, it is necessary to recognise a residuary class which may be termed as innominate, as having no comprehensive and distinct title. Included in this class are the obligations of trustees towards their beneficiaries, a species indeed, which would be sufficiently important and distinct to be classed separately as co-ordinate with the others which have been named and discussed, were it not for the fact that trusts have been more appropriately treated in another branch of the law, namely, in that of property.

CHAPTER XIX

THE LAW OF PROCEDURE

164. Substantive Law and the Law of Procedure

Salmond says that it is not possible to state with precision the exact nature of the distinction between the substantive law and the law of procedure. Administration of justice in its typical form consists in the application of remedies to the violation of rights; hence it may be suggested that substantive law is that which defines the rights, while the procedural law defines the remedies. But according to him this is an erroneous explanation for two reasons. These reasons are :

(1) Firstly, there are many rights which belong to the sphere of procedure—e. g., right to appeal, right to give evidence on one's behalf.

(2) In the second place, rules defining the remedy may be as much part of the substantive law as there are those which define the right themselves. The substantive part of criminal law deals not with the crime alone, but with punishments also. Similarly, in the civil law, rules as to the measure of damages pertain to the substantive law. Hence, to define procedure with remedies and rights with substantive law is to confound the remedy with the process by which it is made available.

Therefore, according to Salmond, the law of procedure is that branch of law which governs the process of litigation. It is the law of actions or proceedings, using the term actions in a wide sense to include all legal proceedings. Substantive law relates not to the process of litigation but to the definition of the right and of the remedy. It defines the right and the remedy, while the law of procedure defines the modes and conditions of the application of the one to the other. The substantive law is concerned with the ends of which the administration of justice seeks, whereas the law of procedure deals with the means and instruments by which these means are to be attained. What act constitutes a wrong and whether an offence is punishable with fine or imprisonment are questions of substantive law. What facts constitute proof of a wrong and whether an offence is punishable summarily or only on indictment are questions of procedure.

There are, however, many rules of procedure, which in their practical operation, wholly or substantially correspond, and are virtually equivalent, to the rule or substantive law. These are :

(1) The rule of evidence that a contract can be proved only by a writing, corresponds to a rule of substantive law that a contract is void unless reduced to writing. So, an exclusive evidential fact is equivalent to a constituent element in the title of the right to be proved.

(2) A conclusive evidential fact is equivalent to, and tends to take the place of, the fact proved by it. All conclusive presumptions pertain in form to procedure, but in effect to the substantive law. That a child under the age of eight years in incapable of criminal intention is a rule of evidence, but differs only in form from the substantive rule that no child under that age is punishable for a crime. That the acts of a servant done about his master's business are done with his master;s authority is a conclusive presumption of law, and pertains to procedure, but it is a fore-runner of, and equivalent to modern English substantive law of employer's liability.

(3) The Limitation Act is the procedural equivalent of the presumption of rights. The former (Limitation Act) bars the remedy and leaves the imperfect right subsisting; the latter leaves no right at all. The former is the operation of time in severing the bond between right and remedy; the latter is the operation of time in destroying the right. But save in this respect their practical effect in law is the same, although their form is different.

The normal elements of judicial procedure are five in number, that is to say, judicial procedure involves the following five stages :

Summons—The object of this is to secure for all parties interested an opportunity of presenting themselves before the Court and making their case heard by the Court.

Pleading—It formulates for the use of the Court and of the parties those questions of fact or of law which are in issue.

Proof or evidence—It is the process by which the parties supply the Court with the data necessary for the decision of those questions.

Judgment—It is the decision itself.

Execution—It is the last step in the proceeding and is the use of the physical or coercive force of the state in the maintenance of the judgment by way of enforcement of the right and redress of the wrong done.

165. Definition and Elassification of Evidence

One fact is evidence of another when the existence of the former creates a reasonable belief in the existence of the latter. The quality by virtue of which it has such an effect may be called probative force, and, therefore, Salmond defines evidence as any fact which possesses probative force. Probative force may be of any degree or intensity. When it is great enough to form a rational basis for the inference that the fact so evidenced really exists, the evidence possessing it is said to constitute proof. When one fact is said to be the evidence of another, the former is called evidential fact, and the latter principal fact. Where, as is often the case, there is a chain of evidence. A being evidence of B. B of C. C. of D. and so on, each intermediate fact is evidential in respect of all that follow it and principle in respect of all that precede it.

Various Kinds of Evidence :

Judicial or Extra-judicial—Judicial evidence is that which is produced before the Court. In comprises all the testimony given by witnesses in the Court, all the documents produced in Court and things personally examined by the Court for the purpose of proof. For example, a confession or admission of guilt made before a Tribunal is judicial evidence. Extra judicial evidence is that which does not come directly under judicial cognizance, and includes all evidential facts which are known to the Court only by way of inference from some form of judicial evidence. For example, a confession or admission made before a village headman is an extra-judicial evidence. Thus, any inference drawn by the Court as to the existence of a fact from any other source i. e when it is judicially known only through the relation of a witness who heard it, is extra-judicial evidence. A document is judicial, if produced before the Court, and extra-judicial if made known to the Court through a copy or through the report of a person who had read it.

Real and personal evidence—Personal evidence is otherwise known as testimony. It includes all kinds of statements made by person, which are regarded as possessed of probative force. This is by far the most important form of evidence. Such testimony may be either verbal or written, judicial or extra-judicial. Real evidence, on the other hand, includes all the residue of evidential fact, such as documents of title. Anything which is believed for any other reason than that someone has said so, is believed as real evidence. This too, is either judicial or extra-judicial, though here also there is a tendency to restrict the term to the former use.

Primary and secondary—Primary evidence is evidence which the law requires that it should be given in its original form; secondary evidence is that which may be given in the absence of the former. Primary evidence of the contents of a written document means the production in Court of the document itself for the inspection of the Court. Secondary evidence is the production of a Copy of the original document or oral testimony as to the contents of the original document. The evidence of A that he saw B assault C is primary evidence. But that D had told him (A) of having send B assault C is secondary evidence, Subject to certain exceptions, the Court will receive no evidence which is not primary evidence. Because, other things being equal, the longer any chain of evidence the less its probative force, for with each successive inference the risk of error grows.

Direct or Circumstantial evidence—Direct evidence is testimony relating immediately to the principal fact, all other evidence is circumstantial. This is a distinction important in popular opinion rather than in legal theory. In the former case, the only inference required is one from testimony to the truth of it. It the latter, the inference is of a different nature, and is generally not single but composed of successive steps. Thus if A says that he saw B shoot C, or confession of B that he is guilty, constitute direct evidence that B shot C. If we believe the truth of the testimony or the confession, the matter is concluded and no further process of proof or inference is required. On the other hand, if A says that he saw B coming out of C's house with pistol in his hand, and that inside the house he found C shot dead, A's evidence is merely circumstantial evidence of the fact that B killed C, for even if we believe this testimony, it does not follow without a further inference, and therefore, a further risk or error, that B is guilty.

Direct evidence is commonly considered to excel the other in probative force, This, however, is not necessarily the case, witnesses may lie, and it is usually more difficult to fabricate a convincing chain of circumstantial evidence than to utter a direct lie. Circumstantial evidence of innocence may well prevail over direct evidence of guilt; and circumstantial evidence of guilt may be indefinitely stronger than direct evidence of innocence.

166. The Valuation of Evidence : Probative Force of Evidence

The law of evidence comprises two parts :

(1) The probative force of evidence, and

(2) The production of evidence.

The first of these consists of rules for the measurement or determination of the probative force of evidence. The second consists of rules for production of evidence. The first deals with the effect of evidence, when produced, the second with the manner in which it is to be produced. The first is concerned with evidence in all its forms, whether judicial or extra-judicial; the second is concerned with judicial evidence alone. The two departments are intimately connected, for it is impossible to formulate rules for the production of evidence without reference and relation to the effect of it when produced. Nevertheless, the two are distinct in theory and distinguishable in practice and they are dealt with in their order.

Rules for determining probative force of evidence—In the administration of justice, certain right rules have been established for determining what evidence can be received and what weight should be attached to certain forms of evidence. Such rules may be divided into five classes. These are :

Conclusive Presumption or Proof

By conclusive proof is meant a fact possessing probative force of such strength as not to admit of effective contradiction. In this case, on the proof of fact the law recognises a state of things to exist and does not allow any evidence to rebut or disprove such state of things. When the law accepts a fact as conclusive proof of its existence or non-existence, it is said to constitute a conclusive presumption.

Rebuttable or Conditional Presumption or Proof

The presumptive or conditional proof. on the other hand, is a fact which amounts to proof, and on the proof of such a fact the law recognises the existence of certain state of things, but only so long as there exists no other fact amounting to disprove. It is a provisional proof, valid until overthrown by contrary proof. For example, a person proved to have been unheard of for seven years by those who would naturally have heard of him if he had been alive, is presumed to be dead. But the law allow this presumption to be rebutted by the proof of the contrary fact that the person is alive.

Thus, in the case of a presumptive proof, the Court will permit contrary evidence to disprove a fact while in conclusive presumption, it will under no circumstances allow contrary evidence to be produced. A child born during the continuance of a valid marriage and within 280 days from its dissolution is conclusive proof of its legitimacy, and on the proof of this fact, the Court will, under no circumstances admit any other evidence being adduced to the contrary.

Insufficient Evidence

In the third place, the law contains rules declaring that certain evidence is insufficient and that its probative force falls short of that required by law for the proof of a fact. In this case, the Court does not act upon such a meager evidence. An example is the rule of English law that in certain kinds of treason the testimony of one witness is insufficient and the English law of the general principles, familiar in legal history, is that two witnesses are necessary for proof.

Exclusive Evidence

These are certain rules of evidence which declare that certain evidences regarding certain facts shall be given in a particular manner only, none other being admissible. In this case, the law lays down a mode of proof and disallows any other method of proof. For example, a document must be proved by at least one of the attesting witnesses and if no witness is produced at all, the document cannot be said to be proved. Similarly, a written contract can be proved in no other way than by the production of the writing itself, whenever its production is possible. A contract for sale of land cannot be proved except by the production of the document itself and that too is not admissible if it is not registered in case the value of the property affected by it exceeds a hundred Taka and so on.

No Evidence i. e. Facts which Are Not Evidence

Lastly, there are rules declaring that certain are not evidence as they are destitute of probative force, at all. These constitute no evidence of the matter sought to be established. Such facts are not to be produced to the Court and if produced, no weight is to be attributed to them. For example hearsay is no evidence and the Court will not attach any value to such evidence if adduced.

167. The Production of Evidence

The second part of the law of evidence consists of rules regulating its production. It deals with the process of adducing evidence, and not with the effect of it when adduced. It comprises every rule relating to evidence, except those which amount to legal determination of probative force. It is concerned, for example, with the manner in which witnesses are to be examined and cross-examined, not with the weight to be attributed to their testimony. In particular, it includes several important rules of exclusion based on grounds independent of any estimate of the probative force of the evidence so excluded.

The production of evidence is determined by certain rules. This rules determine, among other things, what evidence should be excluded on the grounds of public policy, what evidence is irrelevant and so on. Considerations of expense, delay, vexation, and the public interest require much evidence to be excluded which is of undoubted evidential value. For example, a public official cannot be commpelled to give evidence as to affairs of the state, nor is a legal adviser compellable to disclose communications made to him by or on behalf of his client.

One of the most curious and interesting examples of all these interesting rules of exclusion of evidence is the maxim—Nemo tenetur se ipsum accusare, that is, no man, not even the accused himself, can be compelled to answer any question which may tend to prove him guilty of a crime. A person may make a confession as to the commission of a crime, but if it is tainted by any form of compulsion, it will not be admitted as evidence.

Moreover, in the matter of production of evidence, the formality or the ceremony of oath is to be observed by the witnesses.

APPENDIX

THE MAXIMS OF THE LAW

Legal maxims are the proverbs of the law. They have the same merits and defects as other proverbs, being brief and pithy statements of partial truths. They express general principles without the necessary qualifications and exceptions and cannot always be taken as trustworthy guides to the law. Yet these established formulae provide useful means for the expression of leading doctrines of the law in a form which is at the same time brief and intelligible. They constitute a species of legal shorthand, useful to the lawyers but dangerous to anyone else; for they can be read only in the light of expert knowledge of the relevant law.

The language of legal maxims is Latin, for they are derived from the Roman Civil Law, either literally or by adaptation and most of them which are not found in the Roman sources are the invention of the medieval jurists. The following is a list of some of the most familiar and important of them, together with their meanings.

(1) Actus non facit reum nist mens sit rea

The act alone does not make the doer of it guilty, unless it is done with a guilty mind. This maxim pertains to the theory of criminal liability and states that the presence of either wrongful intention or of culpable negligence is a necessary condition of criminal liability.

(2) De minimis non curat lex

The law does not take accounts of trifles. This is a maxim which relates to the ideal rather than to the actual law.

(3) Cogitation's poenam nemo patitur

The thought and intents of mena are not punishable, the law takes notice only of the overt and external act. In exceptional case, however, the opposite maxim is applicable—*voluntas reputatur profacto*—The law takes the will for the deed.

(4) In jure non remota and proxima spectatur.

A wrong-doer is not responsible for all the harmful consequences of his unlawful act. Liability exists only when the casual connection is regarded by the law as sufficiently direct. All other damage is said to be too remote.

(5) Impossibilium mulla obligatio est

Impossibility is an excuse for the non-performance of an obligation—a rule of limited application.

(6) In pari catisa potior est conditio possidents

Possession and ownership are presumed by law to be coincident. Every man may, therefore, keep what he has got, until

and unless someone else can prove that he himself has a better title to it.

(7) Invito beneficium no datur

The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it.

(8) Nemo teneture se ipsum accusare

The law compels no man to be his own accuser or to give any testimony against himself, a principle now limited to the Criminal law.

(9) Nemo dat qui non habet

No man can give better title than that which he himself has. (For the exception to this maxim, see Agreement at page 140).

(10) Nulla poena since lege

There must be no punishment except in accordance with law. Penal Law must not be retrospective.

(11) Qui facit per alium, facit per se

He who does a thing by the instrumentality of another is considered as if he had acted in his own person.

(12) Qui prior est tempor potior est jure

Where two rights or title conflict, the earlier prevails, unless there is some reason for preferring the latter.

(13) Respondeat superior

Every master must answer for the defaults of his servant as for his own.

(14) Res jv licata pro vertiate acciyitur

A judicial decision is conclusive evidence inter parties of the matter decided.

(15) Superficies solo cedit

Whatever is attached to the land forms part of it.

(16) Ubi jus ibi remedium

Where there is a right, there is a remedy. Wherever there is right there should also be an action for its enforcement. That is to say, the substantive law should determine the scope of the law of procedure and not vice versa.

(17) Volenti non fit injuria

No man who consents to a things and suffers thereafter will complain of it as an injury. He cannot waive his right and then complain of its infringement.

(18) Summum jus sunma infuria

The vigour of the law, untempered by equity, is not justice but the denial of it.

Synopsis of important topics and questions

Chapter I The Nature of Jurisprudence.

01. Define 'Jurisprudence' and discuss its different meanings in English, French and German jurisprudence.
02. Assess the value and importance of the study of Jurisprudence.
03. Discuss Jurisprudence as a science of civil law (law of the land) as distinguished from material science.
04. Explain the statement—"Jurisprudence links law with other disciplines and so help law to locate it within its wider social context" as to the relation of Jurisprudence with other social sciences.
05. Distinguish between legal theory and Jurisprudence explaining the concept of law and its practical significance.
06. Account for the different approaches by various schools of thought about the boundaries of Jurisprudence.

Chapter II The Nature and Sources of Law

07. Enumerate the main schools of Jurisprudence explaining the difference in approach that characterise them.
08. Classify Jurisprudence according to Salmond and explain the statement "Analysis is not the prerogative of Analytical School of Jurisprudence."

A Natural Law Theory

09. Explain the concept of Natural Law as distinguished from positive law, and discuss its changing concept during Ancient, Medieval and Modern ages developing new ideas in UK. USA. and this sub-continent.
10. Discuss the formative influence of natural law on the modern law and legal development through judicial legislation.
11. Discuss how far natural law principles of justice, equity and good conscience offer guidance to law-makers.

B. Legal Positivism

12. Analytical School: Discuss the objective theory of legal positivism as opposed to the concept of natural law as a subjective system of norm.
13. Explain Austin's (1990-1859) Imperative theory of law as command of the sovereign and Bentham's (1748-1832) who laid the foundation of positivism in modern sense of the term as on active reformer through legislation aiming at "greatest happiness of the greatest number based on utilitarian individualism."

14. Compare Austin and Bentham; who is the real father of English Jurisprudence and why Bentham is called the Newton of legal and moral world. Discuss Bentham's originality regarding elements of sovereignty, command, sanction, and structure of law.
15. Discuss the problem of 's' and 'ought' in the definition of law and Jurisprudential implications of this rigid separation.

C. Pure Theory of Law

16. Explain Kelsen's (1911) pure theory of law (Vienna School of thought) rejecting natural law and his Grundnorm theory of normative science. Discuss the implications of his pure theory.
17. Distinguish between public law and private law with comment on the suggestion of modern jurists including Kelsen that the distinction is practically useless.

D. Historical School

18. Discuss Savigny's (1803) reaction against rationalism and the principles of natural law and his theory of evolution of law by slow process like language and his idea of inner sense of right of the people as the source of law.
19. Explain Savigny's exposition of " Volksgiest as a source of law, which prevented effective legislation in Germany.
20. "Law grows with the growth, strengthens with the strength of people and finally dies away as a nation loses its nationality." Justify this remark of Savigny with reference to Historical School.
21. Why Savingy is called by some as Darwinian before Darwin and sociologist before sociologists?
22. Discuss Henry Maine's (1822-1888) contribution by way of historical comparative method of study recognising, unlike Savigny, legislation as a potent source of law, which was called by Friedman as "Philosophical Historicism, and later development by other English historians like Hegel, Kuhier, Spengler and others.

E. Sociological School

23. Discuss French philosopher Auguste Comte's (1798-1857) view of Sociology and the American leader Dean Roscoe Pound's modern view of Sociology in relation to law and his approach to law different from lawyers.
24. Explain Criminology and Penalogy as branches of legal Sociology; compare Jurisprudence and Sociology.

25. Explain 'Social Engineering' as a source of law according to Roscoe Pound, as against Austin's imperative theory and Kelsen's Grundnorm theory.
26. Discuss how the confusion caused by the distinction between Sociological Jurisprudence and sociology of law led to prefer the name of Functional School by Dean Pound.

F. The Functional School

27. "Dean Pound's Functional School is really another name of Sociological School which considers society in action or law in action which sees law functioning within society. According to this school, source of law is the functioning institutions.
28. Compare between Functional and Historical School.

G. The Realist School

29. Explain the realist school, better known as the left wing of the Functional School. This school studies law in its actual working and effects through the medium of court and is a branch of sociological approaches.
30. Austin's positivism looks law as the command of the sovereign. How the realist sovereign differs from Austin's sovereign? How the realist movement contributed to Jurisprudence? (Realism takes law as a means to social end and implies a concept of society which changes faster then the law).
31. "The Realist school attempts to rationalise and modernise law and appears as another avatar of sociological Jurisprudence" (Allen) Explain.

G. Hindu, Muslim And Western Jurisprudence

32. "The concept of Sharia is the central core of Islamic law; a divine law contained in the Revealed book the "holy Quran". How subsequent interpretional differences gave rise to different schools of Muslim law.
33. Discuss the later development of Muslim law by Islamic and Western jurists and its growing importance as universal character.
34. Explain Neo-Ijtihad and its role in developing Islamic law in the modern world'
35. What is the basis of Hindu and Muslim law? Compare and contrast the similarities and dissimilarities between modern Jurisprudence on the one hand and Muslim and Hindu Jurisprudence on the other.

Chapter III The kinds of law

36. Define 'law' and discuss its advantages and disadvantages. Distinguish between (a) law and equity; (b) Common law and Statutes (c) Military law and Martial Law' and (d) general law and special law stating the chief forms of the latter.
37. What is meant by private international law or Foreign law or conflict of law? What is Prize law as administered by Prize Court?
38. Discuss the characteristics of different kinds of law. Distinguish between Imperative law and Natural law. What other names have been given to natural law and why?
39. Distinguish between Conventional law and automatic law. Is international law a kind of Conventional Law? Discuss Holland's view that 'international law is the vanisting point of Jurisprudence'.
40. How far does the theory of imperative law reflect the true nature of law?. If law is the command of the sovereign, what is meant by 'command' and 'sovereign'?

Chapter IV Civil Law

41. Discuss the purpose of law. What is meant by 'Justice according to law' and what are its advantages and disadvantages? Distinguish between (a) Natural justice and positive morality, and (b) private and public justice.
42. Distinguish between legal justice and moral justice. When these two coincide and when they diverge?
43. According to Saimond "Legal justice and natural justice represents intersecting circles, justice may be legal but not natural, and natural but not legal, or both legal and natural" Explain.
44. Discuss the degrees of judicial discretion within which judge should act, Is total exclusion of discretion disirable?
45. Discuss (a) question of law, (b) question of fact and (c) question of judicial discretion. Can one be transformed into another? If so, how?
46. Explain the terms 'legal presumption' and 'legal fiction' and the legal implications with illustrations.

Chapter V The administration of justice

47. What is meant by Administration of justice? Make a comparative study of civil and criminal justice.
48. Explain Primary and Sanctioning rights in civil justice.

49. What are the purposes of criminal justice and what are the different forms of punishment?
50. Are you in favour of retaining death sentence in your law? Give reasons.
51. Discuss the Primary and Secondary functions of the courts of law.
52. Do you agree that a perfect system of criminal justice cannot be based solely on the reformative principle? Give reasons.

Chapter VI the Sources of Law

53. What is meant by the term "sources of law". Enumerate different sources of law and state why some are treated as binding and others not;
54. Explain the various senses in which the expression sources of law is used; Draw a distinction between (1) formal and material sources and (2) legal and historical sources with examples.
55. What are the legal sources of English law? Explain sources of law and sources of right; what is meant by ultimate legal principles?

Chapter VII Legislation

56. Explain the term 'legislation'. Distinguish between Supreme and Subordinate legislation and state the importance and chief forms of the latter;
57. Discuss the doctrine of delegated legislation. How far subordinate or delegated legislation contributes to the growth of law? What are the safeguards against any abuses of such legislation?
58. What is meant by the doctrine of ultra vires? Discuss the advantages and disadvantages of legislation, and Judge-made law.
59. What is meant by the phrase "Judge-made law? Do Judges really make law? If so, how?
60. State the merits and demerits of Codification; "The inn that sheltered the travaller is not journey's end. The law like traveller must be ready for tomorrow" (Cardozo). Explain the statement.
61. What are the advantages of codification and usefulness of case law made by interpretation of statutory provision? Discuss the method of interpretation of statute by Courts.
62. Distinguish between Grammatical and logical interpretation; Discuss—"All the processes of interpretation involves a united

amount of judicial law-making". and explain the nature of restriction; if any, on judicial law-making.

Chapter VIII Precedent

63. Explain what is meant by Stare Decisis or the principles of judicial precedent or case law. Distinguish between (1) authoritative and persuasive precedent; and (2) Original and declaratory precedent.
64. Do you think that the doctrine of judicial precedent hinders the independent will of a judge? If so, to what extent?
65. Discuss circumstances which justify disregard of precedent and the effect of such disregard. Distinguish between overruling a decision and refusing to follow it; which court can do either.
66. What are the grounds of authority of precedent and the circumstances destroying its binding force.
67. Sources of judicial principle or Ratio Decidendi of a case and obiter or judicial dicta; Discuss the merit and demerits of legislation and precedent as instruments of legal growth and reforms.

Chapter IX Custom

68. Assess the importance of Customary law and state the reasons for its acceptance as a legal source of law. How does if differ from law?
69. When does custom assume the force of law? Discuss different kinds of custom and requirements of a valid custom.
70. "Customary law contains the grounds of its validity in itself. It is law by virtue of its own nature as an expression of general conscience of right" Explain. When custom will lose this inherent rights.
71. Allen says, "while custom expresses relation between man and man, legislation expresses relation between man and state". Explain the difference. Distinguish between custom and prescription.

Chapter X Legal Concept
Legal Rights

72. What is meant by right? State the main characteristics of a legal right; Explain the meaning of (a) Wrong; (b) Duties; and (c) Right;
73. Discuss the meaning of right and other vicarious meaning thereof, namely, (1) Right in the strict sense, (2) power; (3) liberties and (4) immunities with examples and give the

correlative to each meaning stating the advantages of meanings.

74. Analyse the terms "Right and "Duty". Are they correlative? Can there be any absolute duty; or relative duty to the sovereign or can the sovereign have Legal rights;

Chapter XI Kinds of Legal rights

75. Enumerate the various kinds of legal rights; Explain and illustrate (a) Perfect and Imperfect Rights; (b) Positive and Negative Rights; (c) Rights in Rem and Rights in Personam; (d) Proprietory and Personal Right; (e) Rights in Pre Propria (general rights) and Rights in re-alina (encumbrances); (f) Principal and Accessory Rights; and (g) Legal and Equitable Rights.

Chapter XII Ownership

76. Ownership has been defined by Austin as a right over a determinate thing. indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration". Comment.
77. What are the essential elements of ownership? Why and how long possession gives rise to ownership?
78. Describe the various kinds of ownership. Distinguish between (i) Legal ownership 'and' equitable ownership; (2) 'Joint ownership' and 'ownership in common'. and (3) The ownership of rights' and 'the right of ownership.'

Chapter XIII Possession

79. Discuss the concept of possession and illustrate your answer with examples; Discuss the statement "In the whole range of legal theory there is no conception more difficult than that of possession" (Salmond);
80. Explain the statement that the concept of possession is the most difficult of all the theories of law; Discuss the consequences which flow from the acquisition and loss of possession;
81. Distinguish between ownership and possession and reconcile the statement that in English law "Possession is a good title of right against any one who cannot show better";
82. Explain how adverse possession ripens into ownership. Discuss different kinds of possession; what is meant by possessory remedies?
83. Explain the nature of personality and distinguish between a natural and an artificial person.

Chapter XIV Persons

84. 'A legal person is any subject matter other than a human being to which the law attributes personality (Salmond). Explain and illustrate the statement. Discuss the creation and extinction of a legal person.
85. Discuss the nature and classification of Juristic persons. Explain the acts and liabilities of a Corporation. What is the fundamental difference between corporate Sole and corporation aggregate.
86. Discuss the purposes of incorporation and distinguish between agents, beneficiaries and members of a corporation. On what principles a corporation incurs civil and criminal liability for the acts of its agents?
87. Explain and illustrate the legal status of (a) lower animals (b) dead men. (c) urborn persons. Explain double capacity and double personality.

Chapter XV Title

88. What is meant by title as a source of right? Distinguish between original title and derivative title. Distinguish between 'facts' events' and 'acts' as understood in jurisprudence.
89. Define and illustrate vestitive. "investitive and "Divestitive" facts.
90. Distinguish between 'acts in the law' and 'acts of the law' as vestitive facts and state the place of agreements therein. What are the causes of invalidity of agreement.

Chapter XVI Liability

91. Explain the nature of liability? What principles are followed in ascertaining criminal liability and tortious liability? Distinguish between remedial liability and penal liability.
92. Discuss the rule "actus non facit reum nisi mens sit rea". and explain with illustration the exception if any to the rules. Explain two forms of mens rea (guilty mind) as applied in criminal liability (in the form of intention) and in tortious liability (in the form of carelessness or negligence). Explain the wrongs of strict or absolute liability.
93. Define intention. To what extent a man's immediate intention is material to civil and criminal liability? Distinguish between intentional and unintentional acts.
94. What is motive? To what extent in law a main motive is relevant in civil and criminal liability? A person's ulterior intent or motive is irrelevant in law" (Salmond). Discuss.

95. Analyse the concept of negligence and specify its degrees. How far is negligence a factor of legal liability? Discuss the subjective and objective theories of negligence. Can these two theories be neconciled? What is contributory negligence? To what extent can it be pleaded as a defence in an action for damages for negligence?
96. Write a short note on "Jus Necessities. How far is it true that necessity knows no law?
97. Explain the doctrine of vicarious liability. What is the appropriate measure of criminal liability and civil liability and what are the grounds of exception from liability?

Chapter XVII The Law of Property

98. Explain the meaning of the term 'property'. What are the different kinds of property? Distinguish between corporeal property and incorporeal property.
99. Explain (1) jure re aliena (or encumbrances) and jure in repropria (proprietory rights) with examples.
100. Define and classify encumbrances and explain fully the nature and essential characterestics of a "Servitude". What are the different modes of acquisition of property?

Chapter XVIII The Law of Obligation

101. Explain the nature of obligation and discuss its different kinds with examples.
102. Describe the different sources of obligation. Explain and illustrate solidary obligation.

Chapter XIX The Law of Procedure

103. What is the law of procedure? Distinguish between substantive law and adjective law. State the importance of procedural law in our legal system.

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