Chapter Sixteen

Title

Definition and Nature of Title

THE TERM "title" is derived from the term Titulus of Roman law and *Titre* of French law. According to Salmond, title is the fifth element of a legal right. To quote him: "Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner". However, Holland does not include title as an element of a legal right. A tendency is to be noticed towards the identification of title with right. According to Lord Blackburn: "The first question which arises is whether on these facts the plaintiff had any title in the ship...No title in the ship was conveyed." Austin does not approve of the use of title for right. His contention is that title is not the right itself but merely an element of right. While title indicates the idea of an investitive fact, right is a power, faculty or capacity conferred on a person and is founded in the title. The party entitled is invested with right by the investitive fact.

Legal rights are created by title. A person has a right to a thing because he has a title to that thing. According to Justice Holmes: "Every right is a consequence attached by the law to one or more facts which the law defines and wherever the law gives anyone special right, not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true to him." It is these special facts which constitute the title. Title means any fact which creates a right or duty. According to Salmond: "*The title is the de facto antecedent of which the right is the de jure consequent.* If the law confers a right upon one man which it does not confer upon another, the reason is that certain facts are true of him which are not true of the other and these facts are the title of the right". A person may acquire right on account of his birth or he may acquire the same by personal efforts later

on but in both cases title is essential. Title is the root from which the rights proceed.

Holland does not approve of the use of the term title as it does not indicate the facts which transfer or extinguish rights. To quote him: "A fact giving rise to a right has long been described as a title, but no such well-worn equivalent can be found for a fact through which a right is transferred or for one by which a right is extinguished."

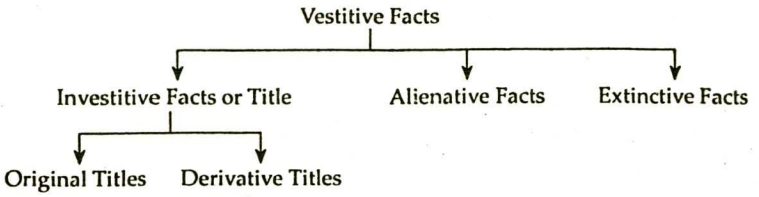
Bentham also objects to the use of the term title and suggests the term "dispositive facts". He divides the dispositive facts into three parts: investitive facts, divestitive facts and translative facts. He redivides the investitive facts into collative facts and impositive facts.

Classification of Titles

Titles are also called investitive facts or facts as a result of which a right comes to be vested in its owner. Salmond divides the vestitive facts into two parts, *viz.*, investitive facts or titles and divestitive facts. *Investitive facts* or titles are further divided into original titles and derivative titles. *Divestitive facts* are divided into alienative facts and extinctive facts. Vestitive facts are those which have relation to right. They relate to the creation, extinction and transfer of rights. Investitive facts create rights and divestitive facts destroy them. A right may be created *de novo* and it may have no previous existence. Such a right is called an *original title.* Examples of original title are my catching a fish from the river, my writing a new book, my invention of a new machine, *etc.* If a right is created by the transfer of an existing right, it is called a *derivative title.* If I buy fish from a fisherman who has caught the same from a river, my title is a derivative one. If the author of a book assigns the copyright of his book to another person, the latter acquires a derivative title.

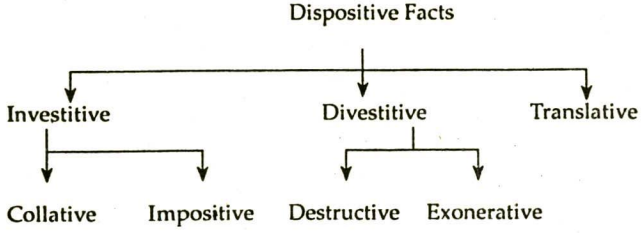
The facts of which the legal result is to destroy rights are called extinctive divestitive facts. The facts of which the legal result is to transfer rights from the owner are called alienative divestitive facts.

It is to be noted that in the case of a transfer of a right, the same facts are derivative investitive facts and alienative divestitive facts. If I sell my fish to *X*, it is derivative title so far as *X* is concerned and alienative divestitive fact so far as I am concerned. The main features of vestitive facts are that they either create a right, or extinguish it or transfer it from one person to another. The following table illustrates the classification of titles given by Salmond:



A reference has already been made to the classification of Bentham According to him, dispositive facts can be divided into three parts, *viz.*, investitive facts, divestitive facts and translative facts. Translative facts refer to the transferring of rights and duties. Investitive facts are divided into two parts: collative and impositive facts. Collative facts confer rights and impositive facts impose duties. Divestitive facts are sub-divided into destructive and exonerative facts. Destructive divestitive facts end rights and exonerative divestitive facts release persons from duties.

Bentham's classification can be illustrated by the following diagram:



According to another classification, vestitive facts operate in pursuance of a human will or independently of the same. They are divided into two categories: acts of the law and acts in the law. Acts in the law are further divided into unilateral acts and bilateral acts. Unilateral acts are either subject to dissent or independent of the same. Bilateral acts or agreements are of four kinds, *viz.*, contracts, grants, assignments and releases. Contracts and grants are either creative or extinctive. Those are also valid or invalid.

Act in the Law

"Acts in the law are really the acts of the parties performed voluntarily. These facts create, transfer and extinguish rights. They express the will of the parties. Acts in the law are of two kinds: unilateral and bilateral acts. Unilateral acts are those in which the will of only one party is effective or operative. The transaction is perfectly valid even without the consent of the parties who are going to be affected. Examples of

unilateral acts are a testamentary disposition, the exercise of a power of appointment, the avoidance of a voidable contract *etc.* The exercise by a mortgagee of his right of sale is unilateral. It is effective whether the mortgagor gives his consent or not. The same is the case with a will. The consent of the persons in whose favour the will is executed is not necessary.

Bilateral acts require the consenting will of two or more distinct persons or parties. Examples of bilateral acts or agreements are contracts, mortgages, leases, grants *etc.* It is to be observed that the same act in law may be unilateral with regard to some parties and bilateral with regard to others. If *A* entrusts property to *B* in trust for *C*, the conveyance is bilateral so far as *A* and *B* are concerned and unilateral so far as *C* is concerned. It is possible that C may not have any knowledge of the conveyance.

Importance of Agreements

Great importance is attached to agreements between the parties. That is partly due to the fact that agreements are evidence of right and justice and the parties adjust their rights and liabilities by their own free consent. Moreover, agreements create rights and duties. As legislation is the public declaration of the rights and duties of the subjects, likewise an agreement is a private declaration of the rights and duties of the parties concerned. Ordinarily, agreements are enforced by the courts. An agreement constitutes the best evidence of justice between the parties and should be enforced. It is proper to fulfil the expectations of the parties based on their mutual consent if the same is not opposed to the idea of natural justice.

Kinds of Agreements

There are three kinds of agreements. Some of them create rights, some transfer them and the others extinguish them.

(1) The agreements which create rights are of two kinds; contracts and grants. Contracts create rights and obligations among the parties in *personam*. A contract creates a legal tie of a personal right and that lie binds the parties. According to Salmond, contracts are bilateral but there are some unilateral contracts as well. Contracts are unilateral when a promise is made by one party and accepted by the other. Grants are agreements by which rights other than contractual rights are created.

(2) Agreements which transfer rights are called assignments.

(3) There are agreements which extinguish rights and those are known as releases.

An agreement may be *valid* or *invalid*. A valid agreement is one which is enforced by the courts of law of the country. It is in accordance with the true intention of the parties. Invalid agreements are those which have some defect in them and that defect prevents them from being fully operative. Invalid agreements are of two kinds, *viz., void* and *voidable*. Void agreements are those which are not recognised at all by law. The will of the parties does not matter in such cases. A voidable agreement is one which by reason of some defect in its origin is liable to lose its effect at the option of one or more parties. A voidable agreement is not *null* and *void* from the very beginning. However, it can be challenged by a party concerned and in that case it becomes void from the date on which it was entered into. The effect of nullification is retrospective and not prospective. Voidable agreements occur in the case of coercion, fraud or misrepresentation. A voidable contract lies midway between a valid and a void contract.

Validity of Agreements

(1) Salmond points out many defects which make an agreement invalid. Incapacity of the parties may render an agreement invalid. In the eye of law, certain persons are not competent to enter into contracts and consequently contracts by them are invalid. This is so in the case of minors and lunatics.

(2) There are certain agreements which require certain legal formalities to be fulfilled and if those formalities are not fulfilled, the agreement becomes invalid. The want of a written agreement, the non-registration of an agreement or the omission of the signatures of the parties, may make an agreement invalid. The formalities are imposed by law with a view to prove satisfactorily the consent of the parties to the terms and to distinguish the actual agreement from the negotiations leading to it.

(3) Some agreements are declared to be invalid by law. Such agreements are immoral or against public policy. Examples of such agreements are wagering contracts or agreements in restraint of trade.

(4) An agreement may become invalid on account of some error or mistake. A mistake may be either essential or unessential. In the case of an essential mistake, the parties do not in reality mean the same thing and do not agree to anything. If *X* agrees to sell land to *Y* and while *X* is thinking of one piece of land, *Y* thinks of another piece of land, the agreement becomes invalid on account of an essential mistake. In the case of an unessential mistake, it does not relate to the nature or contents of the agreements, but only to some external circumstances which induced one party to give his consent and which does not make the agreement invalid. It is the duty of the buyer to beware and if he

has failed to do so, he cannot be allowed to take advantage of his own mistake.

(5) An agreement also becomes invalid if the consent of any of the parties is obtained by means of compulsion, undue influence or coercion. Only that agreement is valid which has been entered into with the consent of the parties.

(6) If there is a want of consideration in a particular agreement, that agreement becomes invalid. Law requires that if an agreement is to be valid, it must be for a valuable consideration. The consideration must be valuable although it may not be adequate. Even the inadequacy of consideration is taken into account to find out whether the consent of the promisor was freely given or not. According to Section 25 of the Indian Contract Act, an agreement without consideration is void. However, there are certain exceptions to the general rule.

Modes of Acquiring Possession

There are two modes of acquiring possession. Possession may be acquired by taking the thing with the requisite *animus*. Such taking may be wrongful as when a thief steals a watch. Another method of acquiring possession is by delivery. Delivery is the voluntary relinquishment of possession by one person in favour of another. Delivery is actual when the union of *corpus* and *animus* in the possessor is brought about for the first time as a result of the delivery by the previous possessor. Delivery is said to be constructive when there is no physical dealing with the thing but by a mere change in *animus* possession is secured. When *X* sells and hands over a book to *Y* or lends to *Y*, there is an actual delivery of it. The delivery of the key to a warehouse is actual delivery of the goods contained in it as the key gives access to the goods. *X* sells his house to *Y* and continues in possession agreeing to vacate the house whenever required by *Y*. Here *Y* has secured mediate possession by constructive delivery. *X* sells to *Y* land which is in the possession of a tenant *Z*. The tenant attorns to *Y* and acknowledges him as his landlord. In this case, *Y* secures mediate possession by constructive delivery.

Modes of Acquiring Ownership

There are many modes of acquiring ownership. On the principle of *occupatio*, a person may become the owner of a *res nullius* by taking possession of it. The thing concerned did not belong to anybody. However, in modern times, things without owners are rare.

Ownership may be acquired by long possession or prescription. By positive prescription, the lapse of time confers a title on the person who had enjoyed the right for the prescriptive period. The enjoyment

of a right of way over the land of another for twenty years confers a prescriptive right of way on the person who has enjoyed the right for the prescriptive period. In India, the holder of a promissory note payable on demand cannot enforce it if three years have elapsed from the day when money became payable thereunder. This is known as negative, imperfect prescription or limitation of actions. The lapse of time may not only bar the remedy but extinguish the right itself. This is called perfect negative prescription. In limitation of actions, the barred right subsists for certain purposes. A barred debt cannot be enforced in a court of law but it can serve as a consideration for a promissory note. In perfect negative prescription, the right itself is extinguished. The lapse of time may not only bar the remedy and extinguish the right of the original holder but even transfer that right to the opposing claimant who is in enjoyment of the right. A trespasser who is in possession of the land of *X* for twelve years, gets a title to the land by prescription while *X* loses his title to the property. This kind of prescription is called translative, acquisitive or positive prescription as the right of the late owner is thereby transferred to the adverse possessor.

Many reasons are given in favour of the law of prescription. One reason is public policy. The reason given by Justinian was "the inexpediency of following ownership to be long unascertained". To secure quiet and repose in community, it is necessary that title to property and matters of right in general should not be in a state of doubt and suspense. By directing that the possession of property or enjoyment of a right for a definite length of time confers a good title, uncertainty in regard to ownership is avoided. Another reason given is that by limitation or negative prescription controversies are limited to a fixed period. The lapse of time creates difficulties in regard to the proof of the case by the parties. The death of parties and witnesses, the loss or destruction of documents and the fading of memory in course of time make it necessary that some time limit must be fixed for instituting legal actions. In the words of Lord Plunkett, Lord Chancellor of Ireland: "Time holds in one hand a scythe and an hourglass in the other. The scythe mows down the evidence of our rights; the hourglass measures the period which renders that evidence superfluous". The law of limitation and prescription repairs the injuries caused by time and ensures justice by supplying the deficiency of proof. Another justification is that occasional injustice is justified on the theory of laches. It is true that sometimes usurpers acquire property and debtors escape payment of their debts. In this way as honest party may suffer loss but individual loss is justified on the ground that a party who does not assert his claim with promptitude has no right to ask for the help of the

state to enforce his right. The law acts upon the maxim that "the law assists the vigilant, not those who sleep over their rights".

SUGGESTED READINGS

Austin	:	*Jurisprudence.*
Holmes	:	*The Common Law.*
Paton	:	*Jurisprudence.*
Pollock	:	*First Book of Jurisprudence.*
Salmond	:	*Jurisprudence.*

CHAPTER SEVENTEEN

LIABILITY

Definition and Nature

ACCORDING to Salmond: "Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong." According to Markby: "The word liability is used to describe the condition of a person who has a duty to perform." Liability implies the state of a person who has violated the right or acted contrary to duty. However, Austin prefers to use the term 'imputability' to "liability". To quote him: "Those certain forbearances, commissions or acts, together with such of their consequences, as it was the purpose of the duties to avert, are imputable to the persons who have forborne, omitted or acted. Or the plight or predicament of the persons who have forborne, omitted or acted, is styled imputability." The liability of a person consists in those things which he must do or suffer. It is the ultimatum of the law and has its source in the supreme will of the State. A person has a choice in fulfilling his duty and his liability arises independently of his choice. It cannot be evaded at all. Liability arises from a wrong or the breach of a duty.

Kinds of Liability

Liabilities can be of many kinds. Those are civil and criminal liability, remedial and penal liability, vicarious liability and absolute or strict liability.

Civil Liability

Civil liability is the enforcement of the right of the plaintiff against the defendant in civil proceedings. *Criminal liability* is the liability to be punished in a criminal proceeding. A civil liability gives rise to civil proceedings whose purpose is the enforcement of certain rights claimed by the plaintiff against the defendant. Examples of civil proceedings are an action for recovery of a debt, restoration of property,

the specific performance of a contract, recovery of damages, the issuing of an injunction against the threatened injury, *etc.* It is possible that the same wrong may give rise to both civil and criminal proceedings. This is so in cases of assault, defamation, theft and malicious injury to property. In such cases, the criminal proceedings are not alternative proceedings but concurrent proceedings. Those are independent of the civil proceedings. The wrongdoer may be punished by imprisonment. He may be ordered to pay compensation to the injured party. The outcome of proceedings in civil and criminal liability is generally different. In the case of civil proceedings, the remedy is in the form of damages, a judgment for the payment of a debt, an injunction, specific performance, delivery of possession of property, a decree of divorce, *etc.* The redress for criminal liability is in the form of punishment which may be in the form of imprisonment, fine or death. In certain cases, the remedy for both civil and criminal liability may be the same, *viz.*, the payment of money. In certain cases, imprisonment may be awarded for both civil and criminal liability. Even in a civil case, if a party dares to defy an injunction, he can be imprisoned. Civil liability is measured by the magnitude of the wrong done but while measuring criminal liability we take into consideration the motive, intention, character of the offender and the magnitude of the offence.

Remedial Liability

According to this theory, if a duty is created by law, the latter should see to it that the same is performed. The force of law can be used to compel a person to do what he ought to do under the law of the country. If an injury is caused by the violation of a right, the same can be remedied by compelling the person bound to comply with it. There is no idea of punishment in the theory of remedial liability. However, there are *three exceptions* to the general rule that a man must be forced to do by the force of law what he is bound to do by a rule of law. The first exception is in the case of an imperfect obligation or duty. The breach of an imperfect duty does not give rise to a cause of action. A time-barred debt creates an imperfect duty and, the same cannot be enforced by any court of law. The second exception is in those cases where duties are impossible of specific enforcement. Once a libel or defamation has been committed, its specific enforcement is not possible. Once the mischief has been done, it cannot be undone. The only things that can be done is to make provision against the future. The third exception is in those cases where the specific enforcement of the duty is inexpedient or inadvisable. Law does not enforce the specific performance of a promise of marriage but is prepared to award damages.

Penal Liability

The theory of penal liability is concerned with the punishment of wrong. Punishment is of four kinds *viz.*, deterrent, preventive, retributive and reformative. The chief object of punishment is deterrence. A penal liability can arise either from a criminal or from a civil wrong. There are three aspects of penal liability and those are the conditions, incidence and the measure of penal liability. As regards the conditions of penal liability, it is expressed in the maxim *actus non facit reum, nisi mens sit rea.* This means that the act does not constitute a guilt unless it is done with a guilty intention. Two things are required to be considered in this connection and those are the act and the *mens rea* or the guilty mind of the doer of the act. *Mens rea* requires the consideration of intention and negligence. The act is called the material condition of penal liability and the *mens rea* is called the formal condition of penal liability.

The law deems a person a fit subject for penal discipline when he has committed a prohibited or prescribed act with a guilty mind. An act does not become wrongful unless followed by a guilty mind. There must be two conditions before fixing penal liability. The first condition is the *actus reus* or prescribed act. Salmond calls it the physical or material condition of liability. If there is no act, there can be no punishment. To quote Justice Bryan: "The thought of man cannot be tried, for the devil itself knoweth not the thought of man." Kenny gives the following example: "A man takes an umbrella from a stand at his club with intent to steal it, but finds it is his own." He has committed no offence. The second condition of penal liability is *mens rea* or guilty mind. An act is punishable only if it is done intentionally or negligently. Intention and negligence are the alternative forms in which *mens rea* can exhibit itself. To quote Austin: "Intention or negligence is an essentially component part of injury or wrong, of guilt or imputability, of breach or violation of duty or obligation. Intention or negligence is a necessary condition precedent to the existence of that plight or predicament which is styled guilt or imputability." A person is liable to be punished if he does a wrongful act intentionally or negligently. If a wrongful act is done intentionally, penal action will serve as a deterrent for the future. If it is done negligently or carelessly, punishment will make the offender more vigilant and circumspect in future. Punishment is justified only when the doer of a pernicious act exhibits a state of mind that renders punishment effective. In the case of wrongs of absolute liability, a person is punished even without *mens rea.*

An attempt to commit a crime can itself be an offence. A criminal attempt is an act done with the intent of committing a crime. The act

already done may be innocent but it becomes punishable because it is done with a guilty mind and is an overt act towards the offence intended. An attempt is made punishable because it creates social alarm which itself is an injury, and the moral guilt of the offender is no less than if he had succeeded in committing the crime. Between preparation and attempt, there is no sharp line of distinction and the question whether it is one or the other depends upon the circumstance of each case.

Where the law presumes that there can be no will at all, no penal liability can be imposed. Children under the age of seven are regarded by law as incapable of having *mens rea*. The same applies to an insane person. In both cases, penal liability cannot be imposed. When the will is not directed to the deed, there can be no liability. This state of mind usually arises from mistake. Mistake to be admitted as a ground of exemption from liability has to satisfy three conditions. The mistake must be such that if the supposed circumstances were real, they would have prevented any guilt from attaching to the person in doing what he did. The mistake should be reasonable. It should relate to a matter of fact and not of law.

Vicarious Liability

Ordinarily, only that person is liable for a wrong which he has committed himself. However, there are certain cases where one person is made liable for the wrongs committed by another. Such cases are examples of vicarious liability.

Criminal liability is never vicarious except in very special circumstances. However, civil law recognises vicarious liability in two classes of cases. A master is responsible for the acts of his servants done in the course of their employment. Likewise, legal representatives are liable for the acts of dead men whom they represent.

As regards the liability of a master for the acts of his servants, it is based on the legal presumption that all acts done by his servants in and about his master's business are done by the express or implied authority of the master. Under the circumstances, the acts of the servant are the acts of the master for which he can be justly held responsible Salmond points out that there are two justifications for the principle of vicarious liability. It is very difficult to prove actual authority and very easy to disprove it in all cases. There are many difficulties in the way of proving the actual authority which is necessary to establish a conclusive presumption of it. Moreover, while employers are usually financially capable of putting up with the burden of civil liability, that is not the case with their servants. If a servant commits any wrong and a suit is filed against him for damages the injured party can never

be sure of realizing the damages even if a decree is passed in favour of it. That is due to the financial resources of the servants in general. However, if a decree is secured against the employer, there are better chances of recovering the amount on account of the larger resources of the employer.

The common law maxim was that a man cannot be punished in his grave. Under the circumstances, it was held that all actions for penal redress must be brought against the living offender and must die with him. However, the old rule has been superseded. At present the representatives of a dead man. This is possible only in civil cases, but in criminal cases, criminal liability dies with the wrongdoer himself.

Vicarious liability is not common in criminal law. A person cannot be punished for a crime committed by another. He may be punished as an abettor of a crime committed by another but in that case he is punished for his own act of abetment and not for the criminal act itself. Section 155 of the Indian Penal Code provides that whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was Likely to be committed or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

Under certain Acts, even corporations are held liable under criminal law. The only acts of which the law takes cognisance as the acts of the corporation are those that are connected with the purposes for which the corporation was created. The only acts that can be ascribed to the corporation are those which it is permissible for the corporation to do as being *intra vires* of its memorandum of association. In *Stevens* v. *Midland Counties Railway Company*, Baron Alderson expressed the view that as a corporation has no mind, it cannot be held liable in any civil action in which malice is a necessary ingredient. In *Abrath* v. *North Eastern Railway Company*, Lord Bramwell observed that as a corporation cannot have any motive or malice, an action for malicious prosecution cannot be maintained against a company. The number of corporations has increased tremendously and under the new situation, corporations cannot be absolved of criminal liability for the offences committed by them or their agents. The view of Salmond is that corporations can be made liable on the principle of vicarious responsibility. That principle

makes a master responsible for the acts of his servants done in the course of their employment. Corporations are persons in the eye of law and the principle of vicarious responsibility can be extended to them and they can be held liable for the wrongs committed by their agents in the course of their employment. In *Citizens Life Assurance Company* v. *Brown, Lindley, J.* held that if a libel is published by the servant of a company in the course of his employment, the company can be made liable for it on the principle of agency. To quote him: "If it is once granted that corporations are for certain purposes to be regarded as persons, i.e., as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals." It is generally agreed that corporations are vicariously liable for the acts of their agents done in the course of their employment even if express malice cannot be proved in the corporation itself.

As the law stands now, a corporation can be indicted for having committed an offence. The present position is the result of many stages. To begin with, when a crime was committed by the orders of a corporation, criminal proceedings could be taken only against the separate members in their personal capacities and the corporation itself was held immune from criminal liability. Later on, an indictment against a corporation was made in the case of offences of non-feasance. That was due to the fact that omission or non-feasance could not be imputable to any individual agent but solely to the corporation itself. Still later on, indictments were made even for misfeasance.

There is no difficulty in indicting a corporation but there may be difficulty in punishing it. A corporation has no soul to be damned. There is a limit to the range of criminal sanctions that can be imposed in case of a corporation. That limit is that a corporation can be prosecuted only for those offences which can be punished by fines inflicted on the corporation. If the orders of a corporation have resulted in serious offences which cannot be punished adequately by fines or penalties, the particular members of the corporation responsible for them should be individually indicted in their own name and punished in their own persons. The acts, whether tortious or criminal, for which corporate property becomes liable, are the acts of the directors or agents of the corporation. When a corporation is made liable for those acts, the property of the corporation or its shareholders is made liable for those acts. The view of Salmond is that the directors of a corporation are only the agents or servants of the shareholders and there is no violation of natural justice by making the corporate property liable for the acts of the directors of the corporation.

The Indian Penal Code (Amendment) Bill had also proposed some liability for corporations.

Absolute or Strict Liability

Both in civil and criminal law, *mens rea* or guilty mind is considered necessary to hold a person responsible. However, there are some exceptions to the general rule. In those cases, a person is held responsible irrespective of the existence of either wrongful intent or negligence. Such cases are known as the wrongs of absolute liability. In such cases, a person is punished for committing wrongs even if he has no guilty mind. The law does not enquire whether the guilty person has committed the wrong intentionally, negligently or innocently. It merely presumes the presence of the formal conditions of liability. There are many reasons why provision is made for absolute liability but the most important reason is that it is difficult to secure adequate proof of the intention or the negligence of the offender.

The most important *wrongs of absolute liability* fall into three categories, *viz.*, mistakes of law, mistakes of fact and accidents.

(1) Absolute responsibility in the case of a *mistake of law* is based on the legal maxim that ignorance of law is no excuse (*ignorantia juris neminem excusat*). Even if a person commits an offence on account of a mistake of law, that is no excuse in the eye of law. He is liable to be punished although he had no guilty mind at the time of committing the offence. There are many reasons why a mistake of law is not considered as an excuse for committing the offence. Law is the embodiment of common sense and natural justice and hence must be obeyed. Law both can and should be limited in extent. According to Salmond: "The law is in legal theory definite and knowable; it is the duty of every man to know that part of it which concerns him; therefore, innocent and inevitable ignorance of the law is impossible. Men are conclusively presumed to know the law, and are dealt with as if they did know it, because, in general, they can and ought to know it." According to Austin: "The reason for the rule in question would seem to be this. It not frequently happens that the party is ignorant of the law, and that his ignorance of the law is inevitable. But if ignorance of law were a ground of exemption, the administration of justice would be arrested. For, in almost every case, ignorance of law would be alleged. And for the purpose of determining the reality and ascertaining the cause of the ignorance, the courts were compelled to enter upon questions of fact, inscrutable and interminable. That the party shall be presumed peremptory cognizance of the law, or (changing the shape of the expression) that his ignorance shall not exempt him, seems to

be a rule so necessary that law would become ineffectual if it were not applied by the courts generally."

However, there are certain *exceptions* to the general rule that the *ignorance of law is no excuse.* The above principle applies only to the general laws and not to any special law. Ignorance of a, special law is excusable. No person can be held guilty for the violation of the foreign law of any country. It also does not apply to the rules of equity as developed in England.

(2) In criminal cases, *a mistake of fact* is a good defence against absolute liability. However, in the case of civil law, a mistake of fact involves absolute liability. According to Salmond: "It is the general principle of law that he who intentionally or semi-intentionally interferes with the person, property, reputation or other rightful interests of another, does so at his peril, and will not be heard to allege that he believed in good faith and on reasonable grounds in the existence of some circumstances which justified his act. If I trespass upon another man's land, it is no defence to me that I believed it on good grounds to be my own."

(3) *Inevitable accident* is commonly regarded as a ground of exemption from liability in civil and criminal cases. An accident is either culpable or inevitable. It is *culpable* when it if due to negligence. It is *inevitable* when its avoidance requires a degree of care exceeding the standard demanded by law. There is one important exception to the above rule in civil law. There are cases in which law provides that a man shall act at his peril and shall take his chance if an accident happens. If a person keeps wild beasts, lights a fire, constructs a reservoir of water, accumulates upon its land any substance which can do damage to his neighbours if it escapes or erects dangerous structures by which passengers on the highway can be harmed, he does all these things at his peril and has to pay damages to the injured parties. In the case of *Rylands* v. *Fletcher,* it was held: "If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbours, he is responsible. If it does escape, and causes damage, he is responsible, however careful he may have been and whatever precaution he may have taken to prevent damage."

General Conditions of Liability

Certain general conditions must be satisfied before liability can arise. Those conditions are the act, omission or forbearance contrary to law on the part of the person liable which causes injury, *mens rea* or guilty mind or the breach of strict duty on the part of the wrongdoer and the consequences which may take the form of damage or harm to the injured person.

Act

An act has been defined as a muscular contraction but such a definition is not suitable for penal liability, A muscular contraction may be due to a disease and there can be no penal liability for the same.

According to Salmond, "an act is any event subject to human control". According to Austin, an act is a bodily movement caused by volition which is a movement of the human will. According to Holland, an act is a determination of will which produces an affect in the sensible world.

Acts can be classified variously. An internal act is an act of the mind and an external act is an act of the body. An external act always involves an internal act but an internal act does not necessarily involve an external act. Internal and external acts are also known as inward and outward acts. According to Holland, mere determinations of the will are inward acts. Determination of will which produces an effect on the world of senses is called an outward act. Jurisprudence is concerned only with outward acts.

Acts may be positive or negative. A positive act is one in which something is actually done. A negative act is one where something is refrained from being done. Positive acts are acts of commission and negative acts are called forbearances.

An act may be intentional or unintentional. An intentional act is one whose result is foreseen and desired by the doer. An unintentional act is one whose result is not foreseen or desired. In both these cases, the act may be external or internal or positive or negative. An act is not necessarily confined to intentional acts. It may also be unintentional.

Examples may be given to illustrate the above categories of acts. If a person shoots a bird, his act is positive and intentional. *X* has an intention of killing *Y*. It is an internal act. If he buys a pistol with that intention, his act is both positive and intentional. *X* owes money to *Y* and does not pay the same in spite of demand. The act of *X* is negative and intentional. I am invited to a dinner. If I do not go to the dinner intentionally, my act is negative and intentional. If I miss the dinner because I forgot all about it, my act is negative and unintentional.

Factors of an act: According to Salmond, every act is made of *three parts viz.*, the mental and bodily activity of the doer, the circumstances and the consequences. If a person is murdered, many things are done before the murder takes place. First of all comes the idea in the mind of the murderer to murder a person. Then he has to plan as to how the murder is to be committed. The pistol has to be brought or somehow secured. The same is the case with cartridges. Then the occasion has to be found for shooting the person. The person must be shot at the place

where the shot is likely to be fatal. There are some writers who take into account only the immediate consequences of the act and not the incidental ones. According to Austin: "The bodily movements which immediately follow our desire of them are the only acts strictly and properly so-called." However, such a view is not accepted as being illogical. An act must include not only the physical movements but also the circumstances and results of the act. According to Holland, the essential elements of an act are an exertion of the will, an accompanying state of consciousness and manifestation of the will.

Juristic acts: According to Holland, a juristic act is "a manifestation of the will of private individual directed to the origin, termination or alteration of rights". According to another definition, a juristic act is "an act the intention of which is directed to the production of a legal result'

acts: Wrongful acts are those which are considered to be mischievous in the eye of law. Wrongful acts are of two kinds. There are wrongful acts which are actionable *per se* without proof of actual damage. There are others where actual damage has to be proved before the offender can be punished. Examples of such wrongful acts are slander, negligent driving, etc.

Damnum sine injuria: There can be cases in which damage is caused but no injury is recognized in the eye of law. All wrongs are mischievous acts but all mischievous acts are not wrongs. The immunity from liability is due to the fact that while some harm is done to an individual, a greater good is done to society at large. This is so in the case of competition in trade or business. It is possible that a particular businessman may be completely ruined on account of competition but he cannot go to court of law and demand damages. Fair competition does not create any liability. Sometimes, the offence committed is so trivial, indefinite and difficult to prove, that it is not considered desirable to take action against the offender. It is difficult for law to measure the amount of mental pain or anxiety suffered by a particular person. There is also no liability if a person drains the well of a neighbour by digging another well on his land. Likewise, if a person steals a few grains of wheat, law does not take notice of it.

Injuria sine damnum: There are cases which are actionable even if there is no proof of actual damage. This happens when a legal right is violated. It is not considered necessary to prove I that actual damage has been suffered by the plaintiff. In the case of *Ashby* v. *White*, the plaintiff was a qualified voter for a parliamentary seat. He was not allowed to vote by the returning officer. However, the person for whom he wanted to vote, was duly elected to Parliament. In spite of that, the

plaintiff filed a suit against he returning officer. The suit was decreed in his favour on the ground that refusal to record the vote of the plaintiff caused an injury to the plaintiff in the eye of law.

Circumstances of the act

It is necessary to take into consideration the time and place of the commission of the act. It is important to know as to where the act was commenced and where the same was completed. These facts help to determine the jurisdiction of the court which has to try the offence.

Mens rea (guilty mind)

A fundamental principle of criminal law is that a mere act does not constitute a crime. It requires a guilty mind or *mens rea* behind it. This principle is based on the maxim *actus non facit reum, nisi mens sit rea,* which means that an act docs not make guilty unless there is a guilty mind. Two conditions must be satisfied before a criminal liability can be imposed. The first condition is a physical condition which means the existence of an unlawful act. The second condition is the *mens rea* or the guilty mind. Unless and until both conditions are present at the same time, no criminal liability arises. A guilty mind must consist of either intention or negligence. Very often, even knowledge of the consequences will be considered as a part of the guilty mind because the mental condition of an individual can be ascertained only through his conduct and it is rather difficult to ascertain whether it is done intentionally or with the knowledge of the consequences. The guilty mind does not depend generally on the nature or motive behind the act. Guilt has to be in the immediate intent or negligence. *Mens rea* must extend to the three parts of an act *viz.*, the physical doing or not doing, the circumstances and the consequences. If *mens rea* does not extend to any part of the act, there should be no guilty mind behind the act. The act of shooting involves all the three factors. There is physical doing or omitting to do. A person is in the range of the revolver and the revolver is also loaded. As regards the consequences, the trigger falls, the bullet is discharged and it enters the body of the victim.

Where the law prohibits an act, it prohibits it in respect of its origin, its circumstances and its consequences. Out of the numerous circumstances and the endless chain of consequences, law selects some as material and they alone constitute the wrongful act, the rest being irrelevant. In the case of the offence of theft, time of the day when it is committed is irrelevant, whereas in the case of the offence of housebreaking, the hour during which it is committed becomes relevant in assessing the magnitude of the liability of the offender. Section 456 of the Indian Penal Code considers housebreaking by night as an aggra-

vated offence, whereas mere housebreaking not at night as a lesser offence.

In *Nathulal* v. *State of Madhya Pradesh*, the Supreme Court of India has observed that *mens rea* is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of *mens rea*, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded *mens rea*. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. *Mens rea* by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The nature of the *mens rea* that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof. An offence under Section 7 of the Essential Commodities Act, 1955 for breach of Section 3 of the Madhya Pradesh Food-grains Dealers Licensing Order, 1958 necessarily involves a guilty mind as an ingredient of the offence. Considering the scope of the Act, it would be legitimate to hold that an offence under Section 7 of the Act is committed by a person if he intentionally contravenes any order made under Section 3 of the Act. The object of the Act will be best served and innocent persons will also be protected from harassment if Section 7 is so construed.[1]

In *Srinivas Mall Bairoliya* v. *Emperor*, the Privy Council held that it is of the utmost importance for the protection of the liberty of the subject that the court should always bear in mind that unless the statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of the crime, an accused should not be found guilty of an offence against the criminal law unless he has got a guilty mind. Offences under Rule 81(2) of the Defence of India Rules, 1939 dealing with the vicarious liability of master for servant's crime are not within the limited and exceptional class of offences which can be held to be committed without a guilty mind. Offences which are within that class are usually of a comparatively minor character and a person who was morally innocent of the blame cannot be held vicariously liable for a servant's crime involving contravention of Rule 81(2) and so punishable with imprisonment for a term which may extend to three years.[2]

[1] AIR 1966 SC 43.

[2] AIR 1947 PC 135.

The view of Sir J. Stephens is that the doctrine of *nuns rea* is misleading. It originated when criminal law practically dealt with offences which were not defined. This law gave them certain names such as murder, burglary, rape and left any person who was interested in the matter to find out what those terms meant. Such a person found that the crime consisted not merely in doing a particular act such as killing a man or taking away the purse of another person but doing it with a particular knowledge or purpose. This principle of mental condition is generalised by the term *mens rea.* However, we have today come a long way from that stage and each crime has a precise definition. Hence, at a stage of criminal law where every offence has been well defined, the general doctrine of *mens rea* is misleading and unnecessary.

The doctrine of *mens rea* does not find any place in Indian Penal Code. To quote J.D. Mayne, the author of *Criminal Law in India*: "Every offence is defined and the definition states not only what the accused must have done, but the state of his mind with regard to the act when he was doing it." For example, theft must be committed dishonestly. Cheating must be committed fraudulently. Murder must be committed either intentionally or knowingly. There is no room for the general doctrine *of mens rea* in the Indian Penal Code. Each definition of the offence is self-sufficient. All that the prosecution has to do in India is to prove chat a particular act committed by the accused answers the various ingredients of the offence in the particular section of the Indian Penal Code.

Persons who are permanently or temporarily incapable of a guilty mind are not considered liable for their acts. In the case of drunkenness and insanity, the offender is considered to be incapable of forming the necessary intention which constitutes a crime. Likewise, nothing is an offence which is done by a child under 7 years of age under the Indian Penal Code. In the case of a child between 7 and 12, he is considered liable only if he has attained a sufficient maturity of understanding and can judge the nature and consequences of his actions.

However, in certain circumstances, law does not take into consideration *mens rea* at all. An offender is held liable independently of any wrongful intention or culpable negligence. Such wrongs are called the wrongs of absolute liability or strict liability and they are exceptions to the doctrine of *mens rea.* The number of wrongs of absolute liability is increasing every day. The tendency is to impose responsibility for loss or damage whether the wrongdoer has a guilty mind or not. The rule of absolute Viability is of very wide application.

Mens rea when not essential.—There are many exceptional cases where *mens rea* is not required in criminal law.

(1) Where a statute imposes liability, the presence or absence of a guilty mind is irrelevant. Many laws passed in the interest of public safety and social welfare impose absolute liability. This is so in matters concerning public health, food, drugs etc. There is absolute liability in the licensing of shops, hotels, restaurants and chemists' establishments. The same is true of cases under the Motor Vehicles Act and the Arms Act. Although strict liability is imposed in these cases, courts are expected to protect, as far as possible, the liberty of the subjects and to satisfy themselves that a particular statute clearly imposes absolute liability.

(2) Another exception is where it is difficult to prove *mens rea* and penalties are petty fines. A statute may do away with the necessity of *mens rea* on the basis of expediency. In such petty cases, speedy disposal of cases is necessary and the proving of *mens rea* is not easy. An accused may be fined even without any proof of *mens rea.*

(3) Another exception to the doctrine of *mens rea* is in cases of public nuisance. In the interest of public safety, strict liability must be imposed. Whether a person causes public nuisance with a guilty mind or without a guilty mind, he must be punishable.

(4) Another exception to the doctrine of *mens rea* is to be found in those cases which are criminal in form but are in fact only a summary mode of enforcing a civil right. According to Lord Waston: "The law of England does not take into account motive constituting an element of civil wrong. Any invasion of the civil rights of another person is itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, insofar as these are injuries to the person whose right is infringed whether the motive which prompted it be good, bad or indifferent." Lord Macnaughten writes: "It is the act, not the motive for the act, that must be regarded. Much more harm than good would be done by encouraging or permitting inquiries into motives when the immediate act alleged to have caused the loss for which redress is sought is in itself innocent or neutral in character and one which anybody may do or leave undone without fear of legal consequences. Such an inquisition would, I think, be intolerable." Lord Herschell observes: "It is certainly a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motives which dictated it." In the case of *Bradford* v. *Pickles,* it was held that "no use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or malicious."

Exceptions.—There are certain *exceptions to the general rule* that wrongful motive is immaterial in a civil wrong and those are malicious prosecution, injurious falsehood, defamation on a privileged occasion and

conspiracy. The term malicious ordinarily means ill will or spite, but in the eye of law it implies a wrongful intention and wrongful motive. A malicious wrong is either intentional or wrong done with a wrongful motive. Malicious prosecution means a prosecution based on a wrongful motive. If a person is to be held guilty of malicious prosecution, it must be proved that he had ulterior intent of a wrongful nature. Motive is also relevant in certain cases of defamation. If the defendant takes up the plea of privilege in a defamation case, he can succeed only if he proves that he had no bad motive.

In certain offences, a particular motive is prescribed as an ingredient of the offence. In those cases, motive also becomes relevant, for example, a person enters the property of another person with the motive of annoying or intimidating any occupant of that property, it amounts to criminal trespass. However, if he enters the property without any such motive, there is no criminal trespass but only a civil trespass for which remedy is only damages.

While deciding the sentence to be imposed upon an accused person, the court takes into consideration the motive with which the offence was committed. If a father steals a loaf of bread to feed his child, he is shown leniency at the time of punishment. However, if he removes the ornaments of a child, he is punished severely. It is obvious that the motive with which the offence is committed is relevant in certain cases.

Another exception to the doctrine of *mens rea* is related to the maxim "ignorance of the law is no excuse". If a person violates a law without the knowledge of the law, it cannot be said that he has intentionally violated the law, though he has committed an act which is prohibited by law. In such cases, the fact that he was not aware of the rule of law and hence did not intend to violate it, is no defence and he would be liable as if he was aware of the law. Blackstone writes: "A mistake in point of law which every person of discretion not only may, but is bound and presumed to know is, in criminal cases, no sort of defence." The reason is that a man could have known the law if he had taken care to do so. Moreover, law is mainly based on logic, principles of natural justice and conscience. Even where law is complicated, legal advice can be taken from those who are competent to give.

Transferred malice.—There is a principle of criminal law that no act is intended unless all the three aspects of the act are intended. An exception to this principle is the doctrine of transferred malice or transmigration of malice. If a person intends to cause the death of *R*, and in his attempt to cause the death of *R*, he kills *S*, he would be guilty of having committed the murder of *S* though he did not intend to kill him. The general intention to kill is transferred or is transmigrated to

the intention of killing this particular person. Section 301 of the Indian Penal Code provides that if a person by doing anything which he intends or knows to be likely to cause death commits culpable homicide by causing death of any person whose death he neither intends nor knows himself likely to cause the death caused by him, he shall make him liable as if he had caused the death of the person whose death he intended or knew himself likely to cause.

Presumption of Innocence.—What this rule means is that everyone is presumed to be innocent till he is proved to be guilty. A person who is accused of a crime is not bound to make any statement or offer any explanation of the circumstances which throw suspicion on him. He stands before the court as an innocent person till he is proved to be guilty. It is the duty of the prosecution to prove that he is guilty. He need not do anything but stand by and see what case has been made out against him. It is the duty of the prosecution to prove the guilt beyond reasonable doubt without any help from the accused.

However, if the defence of the accused is that he falls within one or more of the General Exceptions of the Indian Penal Code, the burden of proof is on him to prove that his case is covered by such exception or exceptions. After the prosecution proves that the death of *A* was caused by a bullet from a gun in *the* hand of *B*, it is open to *B* to prove that he was acting in self-defence. It is the duty of the defence counsel to show that when the bullet went off, *B* was merely acting in self-defence.

The doctrine of presumption of innocence has undergone considerable modification. There are various statutes which negative the presumption of innocence. The Prohibition Acts, the Weights and Measures Act, the Prevention of Adulteration of Food Act etc. restrict the application of the doctrine of presumption of innocence to a considerable degree. Under those Acts, it is not necessary for the prosecution to prove that the accused is guilty beyond reasonable doubt. Once the prosecution makes out a *prima facie* case, the burden is on the accused to prove that he is innocent.

Under the Indian Penal Code, there are certain offences relating to trade mark, property mark and currency notes where the burden of proof or innocence is shifted on the accused, in particular, in the following cases:

(1) Section 486 provides that any person selling goods marked with counterfeit trade mark or property mark shall be punished unless he proves that he acted innocently and had also taken all reasonable precautions.

(2) Section 487 lays down that any person making a false mark upon any receptacle containing goods shall be punished unless he proves that he acted without intent to defraud.

(3) Section 488 provides any person using such false mark shall be punished unless he proves that he acted with out the intent to defraud.

(4) Section 489-E lays down that any person making or using documents resembling currency notes or bank notes shall be punished and if his name appears on such documents, it shall be presumed that he made the document until the contrary is proved.

Stages in the Commission of a Crime

The commission of every offence has four stages *viz.*, intention to commit it, preparation for its commission, attempt to commit it and its commission.

Intention.—As regards the intention to commit, it does not constitute an offence if it is not followed by an act. The will is not to be taken for the deed unless there is some external act which shows that progress has been made in that direction or towards maturing and effecting it. For example, *R* comes to know that *S* intends to shoot *T* "the next day in *X* Square at 8 p.m. *R* informs the police about it. The following day *S* is arrested in *X* Square a few minutes before 8 p.m. On his search, he is found in possession of a fully loaded revolver. In this case, *S* had not committed any offence (assuming that he had a valid licence for the revolver). He had so far merely intended to shoot *T*.

Preparation.—Preparation consists in devising means for the commission of an offence. Section 511 of the Indian Penal Code does not punish acts done in the mere stage of preparation. Mere preparation is punishable only when the preparation is to wage war against the State (Section 152) or to commit dacoity (Section 399). Before a person passes beyond the stage of preparation and reaches a point where he commits an offence, he may give up the idea of committing the crime. In that case, he is not punishable under the Indian Penal Code. Law allows a *locus penitentiae* and will not hold that a person has attempted to commit a crime until he has passed the stage of preparation. A person who contemplates murder buys a pistol and takes a railway ticket to the place where he expects to find his victim. As he has not gone beyond the stage of preparation, he is not guilty of any offence.

Attempt.—As regards attempt, it is the direct movement towards the commission after preparations are made. For the offence of attempt, there must be an act done with the intention of committing an offence. An attempt can only be manifested by acts which would end in the

consummation of the offence but for the intervention of circumstances independent of the will of the party. An attempt is possible even when the offence attempted cannot be committed. For example, a person intending to pick the pocket of another thrusts his hand into the pocket, but finds it empty.

If the attempt to commit a crime is successful, the crime itself is committed. Where attempt is not followed by the intended consequences, Section 511 of the Indian Penal Code applies. A person intends to set a rick of corn on fire. He takes out a cigarette, lights it and blows out the match. The act of lighting a match was a direct overt act converting preparation into attempt. The man had committed an offence of attempt to set fire to the rick.

There is an important difference between preparation to commit an offence and attempt to commit an offence. Preparation consists in devising or arranging the means or measures necessary for the commission of an offence. Attempt is the direct movement towards the commission after the preparations are made. R may purchase and load a gun with the declared intention to shoot his neighbour. However, until some movement is made to use the weapon upon the person of his intended victim, there is only preparation and not an attempt.

An attempt is made punishable because every attempt, whether it fails or succeeds, must create alarm which itself is an injury. The moral guilt of the offender is the same as if it had succeeded. Moral guilt must be united to injury in order to justify punishment.

Commission of crime.—The last stage in the commission of a crime is that it is successfully committed and the consequences of the crime materialise.

Jus Necessitatis

Necessitas non habet legem means that necessity knows no law. The meaning of this maxim is that if an act is done under dire necessity in circumstances where no fear of punishment would deter the person from so acting, he would not be punished severely. Where circumstances so warrant, he ought not to be punished at all. In such cases, law should take into consideration not the immediate intent but the ulterior intent which means the motive with which the act was done. Punishment has a deterrent effect when the wrongdoer has a choice, but if he is under the compelling influence of a motive which is of such strength that it overcomes any fear that can be inspired by deterrent punishment, then punishment becomes futile. Where threats are necessarily ineffective, they should not be made. If such threats are given effect to, it would be infliction of fruitless and uncompensated evil. Hobbes writes: "If a man by the terror of present death be compelled to do a fact against the

law, he is totally excused because no law can oblige a man to abandon his own preservation."

The common illustration of the right of necessity is the case of two shipwrecked drowning men clinging to a plank that will not support more than one of them. If one of them pushes the other off the plank to save himself from drowning the question would be whether the person who pushed the other would be justified in doing so? Though he intentionally pushed the other man away, will the motive of self-reservation absolve him from penal liability? According to the doctrine *of jus necessitatis* the person would not be liable.

Another familiar case of necessity is that in which shipwrecked sailors are driven to choose between death by starvation on the one side and murder and cannibalism on the other. A third case is that of a crime committed under the pressure of illegal threats of death or grievous bodily harm. In such cases, morality demands that no punishment be administered. It seems morally unjust to punish a man for doing something which he or any ordinary man could not morally resist doing, even given the countervailing motive of the maximum punishment reasonable for the offence.

Where necessity involves a choice of some value higher than the value of obedience to the letter of the law, it is always a legal defence. However, where the issue is merely one of futility of punishment, evidential difficulties prevent any but the most limited scope being permitted to the *jus necessitatis*. While in few cases necessity is admitted as a ground of excuse, as for example in treason, it is in most cases regarded as relevant to the measure rather than to the existence of liability. It is acknowledged as reason for the reduction of penalty, even to a nominal amount, but not for its total remission. Homicide in the blind fury of irresistible passion is not innocent, but neither is it murder. It is reduced to the lower level of manslaughter, Shipwrecked sailors who kill and eat their comrades to save their own lives are in law guilty of murder itself, but the clemency of the Crown will commute the sentence to a short term of imprisonment.

The leading case on the subject is that of *R.* v. *Dudley*[3]. It was held in that case that a man who in order to save his life from starvation, kills another for the purpose of feeding on his flesh is guilty of murder, although at the time of the act he is in such circumstances that there is no other chance of preserving his life. Three shipwrecked sailors in a boat were without food for seven days and two of them killed the third, a boy, and fed on his flesh under such circumstances that there appeared to the accused every probability that unless they fed upon the boy or

[3] (1984) 14 QBD 273.

one of them, they would die of starvation. In the circumstances, the court held that they were guilty of murder. Though the court convicted the accused of murder and sentenced him to death, pardon was recommended and granted. In English criminal jurisprudence, *jus necessitatis* may be relevant for assessing the measure of liability but it is not a ground for releasing a person from all penal liability. Both English criminal law and the Indian Penal Code do not accept the doctrine of *jus necessitatis* as well as the doctrine of self-preservation.

Intention

The *mens rea* which is essential to constitute a liability takes two distinct form *viz.*, wrongful intention and culpable negligence. According to Salmond, intention is "the purpose or design with which an act is done. It is the fore-knowledge of the act, coupled with the desire of it, such fore-knowledge and desire being the cause of the act." According to Paton, a wrong is intentional only where the particular consequences which result from the act are foreseen an desired. Knowledge and desire are the necessary constituents of intention. According to Justice Holmes: "Intent will be found to resolve itself into two things; foresight that certain consequences will follow from an act and the wish for those consequences working as a motive which induces the act."

Intention does not necessarily involve expectation. The consequences desired may not be expected. I may intend certain consequences which are absolutely improbable. Likewise, expectation does not amount to intention. A surgeon may know that his patient was likely to die in the course of operation but he intends the recovery of his patient and not his death. Intention implies full advertence in the mind of the person to his conduct. An intention can only be inferred from the conduct of the doer. There is no other better method to do so. According to Brain, G.J.: "It is common knowledge that the thought of man shall not be tried, for the Devil himself knoweth not the thought of man." According to Bowen, L.J.: "The state of man's mind is as much a fact as the state of his digestion."

The doer of an act is imputed the desire as to its inevitable consequences although those may not be present in his mind. A person causes grievous hurt to another with no intent to kill him. However, if the person dies, the offender is guilty of murder. Intention excludes negligence as negligence refers to unintended consequences of action. Generally, intention and knowledge go together. If a person intends a result, he knows that the result will follow the act. When he knows that a particular result will follow, he intends that result. However, this is not always the case. A General may order his troops to run in front of a firing machine-gun and capture the same, but he does not desire or

intend their death. X shoots at Y who is actually out of the range of his gun. The intention to kill is there but there is the knowledge that Y will not be killed as he is out of the range of the gun.

An *intention differs from motive.* An act may be done with one immediate intent and another ulterior intent. The *ulterior intent is called motive. A* kills *B* to rob him of his luggage. The immediate intent is to kill *B* and the motive is to rob him. Sometimes the immediate intent may be bad but the ulterior intent may be good. In spite of that, the act will be a wrongful one. Likewise motive may be bad but the act may not be wrongful. This is so if a person opens a shop in competition against another and is prepared to sell his goods at a cheaper rate with a view to ruin the other. Where a person saves a drowning man, the intention of the person is to save him, but his motive may be to have him arrested under a warrant. Motive is said to be the ulterior intent.

Malice.—Malice implies wrongful intention. An act is done maliciously if it is done with a bad intention or a bad motive. Malice includes immediate and ulterior intention. Malicious prosecution implies a prosecution which is inspired by motive not approved of by law. It is only in exceptional cases that malice is considered to be relevant in determining the question of legal liability.

Negligence.—According to Salmond, negligence is "the state of mind of undue indifference towards one's conduct and its consequences". According to Willes, neglience is "the absence of such care as it was the duty of the defendant to use". According to Austin, negligence is the breach by omission of a positive duty. In his definition of negligence, Holland includes all those shades of inadvertence which result in injury to others but there is a total absence of responsible consciousness on the part of the doer. Negligence can consist either *in faciendo or in non faciendo;* being either non-performance or inadequate performance of a legal duty. According to Clark: "Negligence is the omission to take such care under the circumstances it is the legal duty of a person to take. It is in no sense a positive idea and has nothing to do with a state of mind." According to another writer, "negligence is the absence of care according to circumstances". It has been held in a case that "negligence is the omitting to do something that a reasonable man would do or the doing of something which a reasonable man would not do". Negligence is the breach of a legal duty to take care. It is carelessness in a matter in which carefulness is made obligatory by law. Negligence essentially consists in the mental attitude of undue indifference with respect to one's conduct and its consequences. Negligence is nothing short of extreme carelessness. Carelessness excludes wrongful intention. A thing which is intended cannot be attributed to carelessness.

Carelessness or negligence does not necessarily consist in thoughtlessness or inadvertence. It is true that it is the commonest form of negligence but it is not the only form. There can be a form of negligence in which there is no thoughtlessness or inadvertence. The essential of negligence is not inadvertence but indifference. A careless person is a person who does not care. To quote Salmond: "This term has two uses; for, it signifies sometimes a particular state of mind and at other times conduct resulting therefrom. The former is the subjective and the latter objective sense. In the former sense, negligence is opposed to wrongful intention; in the latter, it is opposed not to wrongful intention but to intentional wrongdoing."

Salmond uses the term negligence only in the subjective sense. According to him, negligence is essentially a state of mind. Negligence has a wider significance than inadvertence and thoughtlessness.

Negligence is of two kinds, according as it is accompanied by inadvertence or not. *Advertent negligence* is commonly called wilful negligence or recklessness. *Inadvertent negligence* can be called simple negligence. In the case of advertent negligence, the harm done is foreseen as probable but it is not willed. In the case of inadvertent negligence, the harm done is neither foreseen nor willed. *In* either case, carelessness or indifference as to the consequences is present. In the case of advertent negligence, the indifference does not prevent the consequences from being foreseen but in the case of inadvertent negligence the indifference does prevent the consequences from being foreseen.

According to some critics, negligence is not carelessness or indifference in all cases. However, the reply is that this view is not sound. In all cases which apparently show that there exists negligence without indifference, a careful examination discloses the presence of indifference. A drunkard is walking along the road and he breaks a shop window as he knocks against the same. The drunkard has to pay damages on account of negligence. It is true that the drunkard was taking all precautions to avoid any mishap, but he was liable for the loss as he was indifferent when he got himself drunk and started walking in the street in a state of drunkenness. He ought to have remained sober, *X* was an inefficient physician. In spite of all his devotion and care, he could not save the life of the patient on account of his inefficiency. He was held liable for damages for negligence. It is true that he was very careful in his work but he ought not to have undertaken the same as he was unfit to do so.

Negligence and Inadvertence.—A distinction is also made between gross negligence and slight negligence. Gross negligence implies a higher degree of negligence than that of the latter. There is no such

distinction in English Law. Negligence is called wilful if it is advertent. It is also called recklessness. In this kind of negligence, the harm done is foreseen as possible or probable but it is not willed. In the case of an inadvertent negligence, the harm is neither foreseen nor willed.

According to some jurists, all negligence consists in inadvertence. An act is done negligently when the doer did not know that the act was wrong but could have found out if he had tried to do so. Two objections are raised by Salmond against this view. According to him, all negligence is not inadvertent. Even if a thing is known to be wrong, I may do the same with the hope that it will not result in wrong. I may have no intention that it should result in wrong. I may drive fast through a crowded street hoping that it will not result in any accident. Likewise all inadvertence is not negligence. I may not appreciate the consequences of my actions and that way I may not be negligent. I become negligent only if I become indifferent to results. I am not negligent if I take full care which can reasonably be expected under the circumstances. A man driving a car is negligent as he does not take care to remain sober.

Negligence and Intention.—According to Salmond, both intention and negligence are subjective. Both of them arise out of a state of mind. Intention is a mental element and the same is the case with negligence.

However, in the case of intention, the consequences of the act are both known and desired by the doer. In the case of negligence, the consequences of a negligent act are neither desired nor willed whether they are known or not. In the case of intention, it is presumed by law that the doer intends the natural consequences of his act. Intentional wrong is punished as the injury is willed or desired. A negligent wrong is punished as the prevention of the injury is not sufficiently desired. The wrongdoer is liable because he is careless or indifferent. *X* fires at *T* and kills him. The wrong is intentional as the death was desired. *X* fires in the direction of a crowd believing that the shot will not go as far as *Y*. Anyhow, *Y* is killed by his shot. *X* is guilty of negligence.

Culpable Negligence.—Carelessness becomes culpable when law imposes a duty of being careful. Criminal liability for negligence exists only in very exceptional cases. However, civil liability for negligence exists in most cases. There are certain exceptions to the above rules. A false statement is not a civil wrong if the person who made the statement honestly believed the same to be true. It is immaterial that he was careless in seeking the truth. An animal or a thing is borrowed gratuitously and if any damage is done to the borrower on account of dangerous defect in the animal, the borrower is entitled to recover the damages if he is not duly informed of the defects. While measuring

the degree of carelessness, two things are taken into consideration and those are the degree of the seriousness of the consequences possible and the extent to which those consequences were probable.

Duty of care.—A reference can be made to some cases to have a clear idea of the duty of care involved in the term negligence. In the case of *Donoghue* v. *Stevenson*, a manufacturer of ginger beer sold to a retailer ginger beer in an opaque bottle. The bottle contained the decomposed remains of a dead snail. However, that fact was not known to the manufacturer. The ginger beer was bought by a customer from the retailer and he poured some of it into a tumbler for a lady friend who drank it and became very ill. It was held that the manufacturer owed a duty to take care that the bottle did not contain any noxious matter and he was liable if the duty was broken. In another case, the defendants manufactured pants which contained some chemical that gave the plaintiff a skin disease when he wore them. It was held that the defendants were liable to the ultimate purchaser.

Standard of care.—According to Salmond, English Law recognises only one standard of care and only one degree of negligence. Whenever a person is under a duty to take any care at all, he is bound to take that amount of it which is considered reasonable under the circumstances and the absence of which is culpable negligence. Many attempts have been made to establish two or even three standards of care and degrees of negligence. Some writers distinguish between gross negligence and slight negligence. There are others who distinguish between gross, ordinary or slight negligence. These distinctions are based partly on Roman law and partly on a misunderstanding of Roman law. The distinctions are hopelessly indeterminate and impracticable. Salmond does not approve of those distinctions and contends that there is no reason or justice or expediency for doing so. To quote him, "The single standard of English Law is sufficient for all cases. Why should any man be required to show more care than is reasonable under the circumstances or excused if he shows less?"

It is possible to adopt either of the two standards of care want of which amounts to negligence. Those *two standards* are the *highest degree of care of which human nature is capable and the amount of care which would be reasonable in the circumstances of the particular case.* The first standard is rejected and the second standard is accepted in actual practice. Law requires not what is possible but what is reasonable under the circumstances. Law does not require the greatest possible care in every case as all persons do not possess the highest degree of intelligence. Likewise, the standard of care required is not the care that can be exercised by the ordinary man or the average man. In some cases the standard

adopted has been lower than the amount of care which a man of average prudence exercises. The standard of care is not the amount of care which the individual concerned would be capable of exercising in the circumstances or the amount of care which at the utmost it is possible for him to exercise.

Theoretically, negligence is the omitting of that which a reasonable man would do or the doing of that which a reasonable man would not do. However, in actual practice it is hard to define or discover that reasonable man or lay down any rule defining the amount of care necessary in any particular case. In the case of England, that amount of care is reasonable in the circumstances of a particular case which a jury of 82 men or the judge thinks ought to have been observed in that case. The standard of care cannot be predetermined. It is a variable thing which varies from case to case and time to time.

While determining the amount of care necessary in any particular case, two factors must be taken into consideration. Those are the magnitude of risk to which others are exposed by the act and the amount of benefit to be derived from the act. If the driver of a car drives it at the speed of 40 miles an hour in the city, he is considered to be guilty of negligence. The danger of accidents arising out of high speed in city is much greater than the benefit derived by the car-owner. However, if a train is run at the speed of 50 miles an hour and accidents take place from time to time, it is not considered to be negligence as the benefits enjoyed by the public on account of high speed are much greater than the risk of accidents. In the case of an architect, a physician or a surgeon, he is not required to exercise the skill of an ordinary man or an average man. He must possess special skill before he takes up work. If he starts his work without acquiring the necessary skill required by law, he is liable to be held guilty for negligence.

Theories of Negligence.—There are many theories of negligence expounded by various jurists.

(1) According to Austin, negligence consists essentially in *inadvertence.* It consists in a failure to be alert, circumspect or vigilant. A negligent wrongdoer is one who does not know that his act is wrong but who would have known it if he had not been mentally indolent. According to Salmond, this theory is inadequate. All negligence is not inadvertence. There is such a thing as advertent negligence is not inadvertence. There is such a thing as advertent negligence in which the wrongdoer knows perfectly well the true nature, circumstances and probable consequences of his act. He foresees those consequences and yet does not intend them. His mental attitude is not one of intention but of negligence. Moreover, all inadvertence is not negligence. A fail-

ure on the part of a person to appreciate the nature of an act and foresee its consequences, is not culpable in itself. There is no justification for liability unless it is shown that there was carelessness in the sense of undue indifference. He who is ignorant or forgetful is not negligent. The signalman who sleeps at his post is negligent not because he falls asleep, but because he is not sufficiently anxious to remain awake. If his sleep is due to illness or excessive labour, he is free from blame. *The essence of negligence is not inadvertence but carelessness* which may or may not result in *inadvertence.* The advocates of the theory point out that there are in reality three forms of *mens rea* and not two and those are intention, recklessness and negligence. In the case of intention, the consequences are foreseen but not intended. In the case of negligence, the consequences are neither foreseen nor intended. However, law brackets together recklessness and negligence under the head of negligence as both of them are the outcome of carelessness.

(2) According to Holland, negligence is of two kinds, gross negligence and simple negligence. However, this view is an old one and not recognised by English Law.

(3) Sir John Salmond has propounded the *subjective theory of negligence.* According to him, negligence is purely subjective. It is something which is purely internal to the individual concerned. It relates to his state of mind. It is a mental condition. It is an attitude of indifference to the consequences of the act. Negligence is culpable carelessness. Although negligence is not the same in culpable carelessness. Although negligence is not the same thing as thoughtlessness or inadvertence, it is nevertheless essentially an attitude of indifference. Negligence consists in the mental attitude of undue indifference with respect to one's conduct and its consequences. According to Winfield: 'As a mental element in tortious liability, negligence usually signifies total inadvertence of the defendant to his conduct and for its consequences. In exceptional cases, there may be full advertence to both conduct and its consequences. But in any event, there is no desire for the consequences, and this is the touchstone for distinguishing negligence from intention."

According to the *objective theory of negligence,* negligence is not a subjective fact. It is not a particular state of mind but a particular kind of conduct. It is a breach of the duty of taking care against the harmful results of one's actions, and to refrain from unreasonably dangerous kinds of conduct. To drive at night without lights is negligence because all reasonable and prudent men carry lights with a view to avoid accidents. To take care is not a mental attitude or a state of mind.

According to the objective theory, negligence is an external fact and not a state of mind. It is a conduct resulting in the breach of duty to take care. According to Clark and Lindsell: "Negligence consists in the omission *to* take such care as under the circumstances it is the legal duty of a person to take." Negligence lies in pursuing a course of conduct different from that of a reasonable and prudent person.

According to Pollock: "Negligence is the contrary of diligence and no one describes diligence as a state of mind." Negligence is the breach of the duty of taking care against the harmful results of one's actions and to refrain from unreasonable dangerous kind of conduct.

In the law of torts, negligence consists in the failure to take such care as would be taken by a reasonably prudent man. It is a conduct which falls short of an external standard and is an objective one.

Salmond criticizes the objective theory of negligence and points out that negligent conduct differs from negligence. Negligent conduct is a course of action which is the result of negligence. It is an objective fact which results from a state of mind. Moreover, all negligence is followed by a failure to take reasonable precautions. However, the converse is not true. The failure to take precautions is not always due to negligence. It may be due to accident or intention. From the purely objective point of view, it is not possible to decide whether an act was intentional, negligent or accidental. We have to take into consideration the state of mind as well.

Neither the objective theory nor the subjective theory is correct. Negligence is both subjective and objective. The two theories can be reconciled. They emphasize different aspects of negligence. As contrasted with wrongful intention, negligence is subjective. As contrasted with inevitable accident, negligence is objective. If the intention is not relevant, the only thing to be considered is whether the doer took the amount of care required by law or not. The answer depends upon external facts which are independent of the state of mind. According to Keeton: "The law takes no heed of man's mind, except insofar as it expresses itself in material acts, and it is only when negligence (considered from the subjective standpoint) has resulted in acts occasioning damage, that the law takes notice of it."

Austin makes a distinction between negligence, heedlessness and rashness. Negligence is the state of mind of the person who inadvertently omits an act and breaks a positive duty. To quote Austin: "The party who is guilty of temerity or rashness, like the party who is guilty of heedlessness, does an act and breaks a positive duty. But the party who is guilty of heedlessness thinks not of the probable mischief. The party who is guilty of rashness thinks of the probable mischief but in

consequence of a missupposition begotten of insufficient advertence, he assumes that the mischief will not ensue in the given instance." In the case of heedlessness, the person concerned docs not bother about the possible consequences. In the case of rashness, he knows the consequences but foolishly thinks that they will not occur as a result of his act. In the case of recklessness, he knows the consequences but does not care whether they result from his act or not.

Sir John Salmond does not accept the view of Austin. He points out that there may be advertent or wilful negligence as where a person sees the consequences of his act and in spite of that recklessly does it without intending those consequences. Austin calls it rashness but Salmond calls it negligence. Inadvertence or want of foresight may proceed from ignorance in spite of a genuine and anxious effort to attain knowledge.

In Roman law, there were different degrees of negligence. *Culpa levis in abstracto* was failure to show *exact diligentia* or the care which a *bonus pater familias* would show in that particular transaction. This kind of care was required of a person when a contract was concluded for his benefit or for the mutual benefit of both parties or when he voluntarily undertook a trust. *Culpa levis concreto* was a failure by a person to take that care which he was accustomed to show in his own affairs. Such a person has to show ordinary diligence. Persons were liable for this kind of negligence where both parties had a common interest. *Culpa lata* or egregious fault was a failure to show any reasonable care at all. It amounted almost to wrongful intention.

The English Law does not recognise different degrees of negligence. So far as civil law is concerned, there is only one standard of care and that is of a reasonable and prudent man in the situation actually considered. In criminal law, degrees of negligence are recognised. In *Andrews v. Director of Public Prosecutions*, Lord Atkin observed: "The principle to be observed in cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough; for purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established. Probably of all epithets that can be applied 'reckless' most nearly covers the case. It is difficult to visualise a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter."[4]

[4] (1937) AC 576 HL

Contributory Negligence.—Contributory negligence is negligence in not avoiding the consequences arising from the negligence of some other person, when means and opportunity are afforded to do so. It is the non-exercise by the plaintiff of such ordinary care, diligence and skill as would have avoided the consequences of the negligence of the defendant. The doctrine of contributory negligence "rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by its own carelessness served the casual connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury". The law takes into consideration an act or conduct of the party injured or wronged which may have immediately contributed to that result. One who has by his own negligence contributed to the injury of which he complains cannot maintain an action against another in respect of it. He is considered to be the author of his own wrong in the eye of law. According to Lord Halsbury, the doctrine of contributory negligence is merely a special application of the maxim that *where both parties are equally to blame, neither can hold the other liable.*

Measure of Penal Liability

According to Salmond, three elements should be taken into consideration in determining the measure of criminal liability and those are the motive of the offence, the magnitude of the offence and the character of the offender.

(1) As regards *motive of offence,* other things being equal, the greater the temptation to commit the crime, the greater should be the punishment. The object of punishment is to suppress those motives which lead to crimes. The stronger these motives are, the severer must be the punishment in the case. If the profit to be gained from the act is great, the punishment should also be severe proportionately. However, there is an exception to the general rule. Certain offences may be committed on account of urgent necessity or other exceptional circumstances. If a person is forced to steal to feed his starving children, the law generally takes this fact into consideration to lessen the punishment.

(2) Other things being equal, the greater *the magnitude of the offence,* the greater should be its punishment. Such a consideration may seem to be irrelevant. It may be contended that punishment should be measured solely by profit derived by the offender and not by the evils caused to other persons. If two crimes are equal in point of motive, they should be equal in point of punishment. However, this is not the case in actual practice and this is due to two causes. The greater the mischief of any offence, the greater is the punishment which it is profitable to inflict with the hope of preventing it. It is worthwhile to hang any number

of murderers in order to deter one murderer and save one innocent person. However, it is not worthwhile to hang one person and stop all petty thefts. Another reason why different punishments are given for different kinds of offences is that such a system induces persons to commit the least serious offences. If punishment for burglary were to be the same as that for murder, the burglar would not stop at a lesser crime. There will be a temptation to commit offences of a very serious nature as punishment is the same in both cases. If an attempt is punished in the same way as a completed offence, the offender would not atop at the attempt but would like to complete the act as well.

(3) The *character of the offender* should also be taken into consideration while determining the measure of criminal liability. The worse the character or disposition of the offender, the more serious should be the punishment. The fact which indicates depravity of disposition is a circumstance of aggravation. It calls for a penalty in excess of that which would otherwise be appropriate to the offence. The law imposes upon habitual offenders penalties which bear no relation to the magnitude of the offence. A punishment which is suitable to a normal man will be absolutely inadequate in the case of a hardened criminal. Experience shows that the badness of disposition is commonly accompanied by a deficiency of sensibility. If a person is of a depraved character, he loses all sense of shame. The most degraded criminals are said to exhibit insensibility even to physical pain. Many murderers of the worst type show indifference to death itself. In cases short of capital offences, it is desirable to punish more severely the more corrupt.

The Indian Penal Code provides that a previous convict should be awarded an enhanced period of imprisonment. The first offenders are usually let off or treated very leniently. Sometimes the offenders are let off on probation of good conduct on account of their age, character, antecedents or physical or mental condition of the accused and the circumstances in which the offence was committed.

Measure of Civil Liability

In the case of a civil wrong, motive is irrelevant. It is only the magnitude of the offence that determines civil liability. The liability of the offender is not measured by the consequences which he meant to ensue, but by the evil which he succeeded in doing. The liability consists of the compulsory compensation to be given to the injured person and that is to be considered as a punishment for the offence. In penal redress, compensation in money is given to the injured person and punishment is imposed upon the offender. A rational system of law must combine the advantages of penal redress with a coordinate system of

criminal liability. The reason is that penal redress alone is not considered to be sufficient.

Crime and Tort

It is difficult to draw a clear-cut distinction between a crime and a tort. A tort today may be a crime tomorrow and *vice versa*. However, it is desirable to distinguish between the two terms.

According to Blackstone, torts are private wrongs and involve "infringement of the civil rights which belong to individuals considered merely as individuals". On the other hand, crimes are public wrongs and involve "a violation of the duties due to the whole community". Thus, the distinction between the two lies in the nature of offence. If the offence is serious, it is to be treated as a crime, and if it is not, it is to be treated as a tort.

Austin does not accept the view of Blackstone. He points out that some wrongs are both crimes and torts. For example, an assault or a malicious prosecution may be a tort as well as a crime. All public wrongs are not crimes. It is a public duty to pay tax to the state but a refusal to do so is not a crime. All crimes may not be public wrongs. The theft of a chair is a crime but it cannot be said that the public is affected thereby. The view of Austin is that the distinction between a crime and a tort is purely procedural. If the wrong is a crime, "the sanction is enforced at the discretion of the sovereign". In the case of a tort, "the sanction is enforced at the discretion of the party whose right has been violated". In the case of crime, the machinery of law is set in motion by the State. In the case of a tort, the machinery is set in motion by the individual concerned. In the case of a crime, the State launches the prosecution and it can also withdraw the same. In the case of a tort, a suit for damages is brought by the party concerned. If he gets a decree in his favour, the State cannot interfere and lessen the amount. The State also cannot force a private individual to withdraw the suit filed by him against the wrongdoer.

The view of Salmond is that the views of both Blackstone and Austin are not correct. He points out that criminal proceedings can be started in many cases even by a private individual. A criminal complaint can be filed even by the injured party. The view of Salmond is that the distinction between a crime and a tort is based on the nature of the remedy applied. In the case of a crime, the object of the legal proceedings is the punishment of the offender. However, that object is the payment of damages in the case of tort. The view of Salmond has been accepted by the courts in England and a reference may be made to the

case of *Clifford and O'Sullivan*[5]. In that case, Lord Cave observed: "To be a criminal matter it must involve the consideration of some charge of crime, that is to say, of an offence against the public law; and that charge must have been preferred before some court of judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence."

The distinguishing mark of a crime is that it involves liability to punishment. However, it is contended that the view of Salmond does not contain the whole truth. In criminal cases, the court can and sometimes does order payment of compensation to the injured party. In the case of tort, exemplary damages are sometimes awarded as punishment to the wrongdoer. Prof. Allen maintains that although punishment is a distinguishing mark of crime, it dose not explain the nature of crime itself. To quote Allen: "It is not enough to know that crime is punishable wrong, the problem is why it is punishable." Allen is in favour of the view of Blackstone. Grime is a crime because it is wrongdoing.and in serious degree threatens the well-being of society.

It is to be observed that there is some truth in all the views mentioned above. A crime has been defined as a breach of public duty, the sanction of which is punishment exigible or remissible at the discretion of the sovereign acting according to law. A tort is defined as a breach of duty affecting private individuals not arising out of trust or contract, the sanction of which is compensation exigible or remissible at the discretion of the party whose right has been infringed.

In *Halsbury's Laws of England,* crime is defined in these words: "A crime is an unlawful act or default which is an offence against the public and renders the person guilty of the act or default liable to legal punishment. While a crime is often also an injury to private person, who has a remedy in a civil action, it is an act or default contrary to the order, peace and well-being of society that a crime is punishable by the State."

Exemptions from Criminal Liability

The general rule is that a person is liable for any crime committed by him- However, there are certain exceptions to this general rule. The general rule does not apply in the case of a mistake of fact. If a person does something under a mistake without intending to do which he actually does, he is not criminally liable for his action. A police constable goes to arrest *A* but actually he arrests *B* thinking *B* to be *A*. In this case, the police constable is not guilty of any crime because there was no guilty mind when he arrested *B*. However, it must be noted that the

[5] (1921) 2 AC 570.

mistake must be reasonable, and there should be no liability for the act actually done under a mistake. In the case of *Tolson*, a woman married another person under a *bona fide* belief that her husband had died in a shipwreck. Later on, it was found that he had actually survived the shipwreck. The woman was prosecuted for bigamy. However, she was acquitted.

Another exception is that a person is not held guilty when he does something under circumstances in which he is absolutely helpless. This is called the principle of *jus necessitatis*. An example was given by Bacon to illustrate this. Two shipwrecked sailors caught hold of a single plank which could carry only one of them. It was under those circumstances that one sailor pushed the other into the sea. The sailor who was saved, was prosecuted. It was held that he was not guilty on account of the circumstances in which he was placed. Likewise, if a person kills another person in self-defence he also does not commit any offence. However, it is to be noted that there are certain limitations on the principle *of jus necessitatis*. In *R* v. *Dudley*, two shipwrecked sailors ate a boy who was in their company in order to save themselves from starvation. They were prosecuted for murder. They took up the plea of *jus necessitatis*. It was held that the plea *of jus necessitatis* was not available to them. However, as the situation in which they were placed was an abnormal one, a recommendation was made to the Crown for mercy and their punishment was reduced to six months imprisonments

Another exception is in the case of infants when children under the age of 8 are exempted from criminal liability. It is presumed that children of tender age have no guilty mind.

Another exception is in the case of inevitable accident which cannot be averted by taking reasonable care. There is no intention because the consequences are not desired in the case of an accident. However, this principle is not absolute. It was held in the case of *Rylands* v. *Fletcher* that if a person keeps admittedly dangerous property on his premises and harm is caused by its escape, that person is liable for the injury caused. The plea of inevitable accident is not available.

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Chapter Eighteen

Law of Property

Meaning of Property

THE TERM property is not a term of art. It has been used in a variety of senses.

(1) In its widest sense, property includes all the legal rights of a person of whatever description. The property of a man is all that is his in law. Such a usage of the term is common in old books although it is becoming out of fashion in modern times. According to Blackstone: "The inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior." According to Hobbes: Of things held in propriety, those that are dearest to man are his own life and limbs; and in the next degree, in most men, those that concern conjugal affection and after them riches and means of living." According to Locke: "Every man has a property in his own person." Every individual has a right to preserve "his property, that is, his wife, liberty and estate".

(2) In a narrower sense, property includes the proprietary rights of a person and not his personal rights. Proprietary rights constitute his estate or property and personal rights constitute his status or personal condition. In this sense, the land, chattels, shares and debts due to a person are his property but not his life or liberty or reputation. This is the most usual sense in which the term is used in modern times but the other uses also have an equal authority.

(3) In another sense, the term property includes only those rights which are both proprietary and real. The law of property is the law of proprietary rights *in rem*. In this sense, a freehold or leasehold estate in land or patent or copyright is property and not a debt or the benefit of a contract.

(4) In the narrowest use of the term, property includes nothing more than corporeal property or the right of ownership in material things. According to Ahrens, property is "a material object subject to the immediate power of a person".

(5) According to Austin, the term property is sometimes used to denote the greatest right of enjoyment known to the law excluding servitudes. Sometimes, life interests are described as property. Even servitudes are described as property in the sense that there is a legal title to them. Sometimes, property means the whole of the assets of a man including both the rights *in rem* and rights *in personam*.

In modern times, intellectual or intangible property has become very important. Instances of such property are copyrights, trade marks, property in designs and patents. According to Erie J.: "The notion that noting is property which cannot be earmarked and recovered in detenu or trover, may be true in an early stage of society when property is in its simplest form and the remedies for the violation of it are also simple, but it is not true in a more civilized state when the relations of life and the interests arising therefrom are complicated."

Kinds of Property

Property is essentially of two kinds: corporeal and incorporeal. Corporeal property can be further divided into movable and immovable property and real and personal property. Incorporeal property is of two kinds: rights *in re propria* and rights *in re aliena* or encumbrances.

Corporeal Property

Corporeal property is also called tangible property because it has a tangible existence in the world. It relates to material things. The right of ownership of a material thing is the general, permanent and inheritable right of user of the thing. Ownership of land and chattel consists in the sum-total of the rights of user.

(*a*) Corporeal property is of two kinds, *movable* and *immovable*. Land is immovable property and chattels are movable property. According to Salmond, an immovable piece of land has many elements. It is a determinate portion of the surface of the earth. It includes the ground beneath the surface down to the centre of the world. It also includes the column of space above the surface *ad infinitum*. According to Coke: "The earth hath in law a great extent upwards, not only of water as hath been said but of air and all other things even up to heaven." According to the German Civil Code, the owner of land owns the space above it. He has no right to prohibit acts so remote from the surface that they do not affect his interests in any way. The right of free and harmless passage at a reasonable height over land is secured and governed by the

Air Navigation Act, 1920. It also includes objects which are on or under the surface in its natural state, *e.g.*, minerals and natural vegetation. All these are a part of the land although they are not physically attached to it. Land also includes all objects placed by human agency on or under the surface with the intention of permanent annexation. Examples are buildings, doors, fences etc.

According to the General Clauses Act of 1897: "Immovable property includes land, benefits arising out of land and things attached to the earth or permanently fastened to anything attached to the earth." According to the Indian Registration Act: "Immovable property includes land, building, hereditary allowance, rights of way, lights, ferries, fisheries or any other benefit to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth but not standing timber, growing crops or grass." The Indian Transfer of Property Act excludes standing timber, growing crops and grass from the definition of immovable property.

Movable property includes all corporeal property which is not immovable.

(b) Real and Personal Property: The distinction between real and personal property is closely connected with but not identical with the distinction between movable and immovable property. The connection is, however, historical and not logical. Real property means all rights over land recognized by law. Personal property means all other proprietary rights whether they are rights *in rem* or rights *in personam*. According to Salmond: "Real property and immovable property form intersecting circles which are very nearly though not quite coincident. The law of real property is almost equivalent to the law of land, while the law of personal property is all but identical with the law of movables. The partial failure of coincidence is due not to any logical distinction but to the accidental course of legal development; and to this extent the distinction between real and personal property is purely arbitrary and possesses no scientific basis. Real property comprises of rights over land, with such advantages and exceptions as the law has seen fit to establish. All other proprietary rights, whether *in rem or in personam*, pertain to the law of personal property."

Incorporeal Property

Incorporeal property is intangible property. It is also called intellectual or conventional property. It includes all those valuable interests which are protected by law. The recognition and protection of incorporeal property has been secured in recent times. Formerly, property in the form of land alone was considered to be all important. In modern times a lot of property of the country is to be found in the form of the

shares of limited companies. Millions of persons in every country possess such property.

(a) Rights in re propria: Incorporeal property is of two kinds *viz.*, rights *in re propria* and rights *in re aliena*. Rights *in re propria* are those rights of ownership in one's own property as are not exercised over material objects. Generally, the law of property deals with material objects. However, in some cases, ownership of some non-material things produced by human skill and labour is recognized as property. The most important of such rights are patents, literary copyright, artistic copyright, musical and dramatic copyright, commercial goodwill, trade marks and trade names.

(i) The subject-matter of a patent is the new idea or particular process of manufacture produced or discovered by human skill and labour. Patents become commercially valuable as a monopoly of exploitation is given to the patentee. Law takes action against those who infringe in any way the patents.

(ii) Literary copyright is possessed by the author of books. No person is allowed to print it and if he does so, he is liable to be punished. Literary copyright is a great boon to the writers of the world. It is this right which enables them to earn their livelihood and also make provision for their successor. The copyright exists not only during the lifetime of the author and the co-author, but even after their death.

(iii) In the case of artistic copyright, the subject-matters are the particular designs or forms. The artist alone has the exclusive use of design or form. Such a copyright exists in the case of drawing, painting, photography, etc.

(iv) Musical and dramatic copyright consists in musical and dramatic works. The composer, musician and the dramatist have the exclusive right to the use of their things. Any unauthorised performance or representation is liable to be punished with imprisonment or fine or both.

(v) The goodwill of a company is a valuable right acquired by a person by his labour and skill exercised for a considerable period. Very often, the sale of goodwill brings a lot of money to its owner.

(vi) Trade names and trade marks are also the property of persons who own them. They protect the public from cheaters. They guarantee a particular quality of goods.

(vii) Holland adds a new type of intangible property to the list. To quote him: "With such intangible property should probably also be classified those royal privileges subsisting in the hands of a subject

which are known in English Law as franchises, such as right to have a fair or market, a forest, free warren or free fishery."

(b) Rights in re aliena: Rights *in re aliena* are known by the name of encumbrances. They are rights *in rem* over *ares* owned by another. Such rights run with the *res* encumbered. They bind the *res* in whosoever hands it may pass. Encumbrances are the rights of particular user as distinguished from ownership which is right of general user. Encumbrances prevent the owner from exercising some definite rights with regard to his property. The main kinds of encumbrances are leases, servitudes, securities and trusts.

(i) Leases:—A lease is an encumbrance giving a right lo the possession and use of the property of another person. It is the transfer of a right to enjoy certain property. It is either for a certain period or in perpetuity. It is an agreement by which the owner of the property or the lessor transfers his right of possession to the lessee. It is not an absolute transfer of all rights in the property. It is merely a partial transfer. What is transferred is merely the right of possession and the use of property. It separates ownership from property.

Ordinarily, a lease is with respect to land. However, every right that can be possessed can be made the subject of a lease. Thus there can be the lease of copyright, a patent, right of way, right to receive interest on government promissory notes, etc.

(ii) Servitudes:—A servitude is "that form of encumbrance which consists in a right to the limited use of a piece of land without possession of it". According to Paton, the holder of a servitude has a right *in rem* which gives him the power either to put a *res* belonging to another to a certain class of definitely limited uses or else to prevent the owner of the *res* from putting it to a certain class of definitely determined uses. There is no possession in a case of a servitude and this distinguishes it from a lease. If I secure exclusive possession of a piece of land without getting its ownership, I acquire a lease. If I acquire the right to use that land in some definite way without getting either its ownership or possession, I acquire only a servitude. Generally, servitudes exist with respect to land only. Examples of servitudes are the right of way across the land of somebody, the right of light and air, the right of view of prospect, the right of the public to pass across a land, right of pasturage, right of recreation on a piece of land, right of fishing, public right of navigation *etc.*

Kinds of servitudes:—Servitudes have been classified in many ways. Some classify them as praedial and personal and positive and negative. A *praedial* or *real* or *appurtenant servitude* is that which is enjoyed by the owner for the time being of land or a house over another piece of land.

The land at the house is called the dominant tenement and other piece of land is called the servient tenement. Such a servitude is a right of using one property for the benefit of another property. It is necessary to the dominant property. The servitude passes with the transfer of the dominant tenement. That is why it is called "appurtenant to the dominant tenement". A real servitude cannot be separated from the dominant tenement. Examples of such servitudes are the right of way, right of support of a building by the adjoining soil, right of access of light from the windows, etc.

A *personal servitude* is one which is vested in an individual because of his personality. Such a right is not attached to any particular tenement. An example of such a servitude is the right of fishing by one person in the pond of another person.

A. positive servitude is one which entitles the owner to do something. An example of such servitude is the right to walk across the land of another person. A negative servitude entitles the owner to prevent the servient owner from doing something. The servient owner can be prevented from building his house higher than that of the dominant owner. He can be prevented from obstructing the view, prospect, light or air which is enjoyed by the dominant owner. A positive servitude entitles the owner to do something and the *negative servitude* entitles him to prevent another from doing something. A positive servitude can be lost by non-user but that cannot be the case with a negative servitude. The latter can be lost only if the servient owner infringes the servitude and the dominant owner submits to the same.

Sir John Salmond classifies servitudes as appurtenant and in gross, and public and private. Appurtenant servitudes are enjoyed by the owner for the time being of land or a house over other piece of land. *Servitudes in gross* are those which are not appurtenant or accessory to any particular land or building. Examples of such servitudes are the public right of navigation or fishing, public right of way or the right of pasturage. *Private servitudes* are possessed by certain individuals and *public servitudes* vest in the public at large. Examples of private servitudes are the right to light, the right of way, the right of fishing, etc., possessed by *one* individual. Examples of public servitudes are the right of the public to pass through a particular field or a house.

Reference may be made to what are called *easements*. In a sense, an easement is the same thing as a servitude. However, servitudes can be divided into easements and *profits a prendre*. Easements include only the private and appurtenant servitudes. An example of an easement is the right of way. *Profits a prendre* includes only the right to derive

certain profits from the servient tenement. An example of such a servitude is the right to graze cattle or the right to fish in a pond.

(iii) Securities:—According to Lord Wrenbury: "A security is a possession such that the grantee or holder of the security holds as against the grantor a right to resort to some property or some fund for the satisfaction of some demand, after whose satisfaction the balance of the property or fund belongs to the grantor. There are two owners and the right of the one has precedence over the right of the other." According to Salmond: "A security is *a. jus in re aliena*, the purpose of which is to ensure or facilitate the fulfilment or enjoyment of some other right (usually though not necessarily a debt) vested in the same person." *A security differs from a surety.* In the case of security, a particular *res* is charged with the debt. In the case of surely, the surety is under an obligation to pay the debt of another if the latter fails to pay the debt of another.

Mortgage and Lien:—According to Salmond, securities are of *two kinds: mortgages* and *liens*. A *mortgage* is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced by way of loan. A lien is the right to hold the property of another person as a security for the performance of an obligation. In the case of a mortgage, the ownership is transferred to the mortgagee, but in the case of lien it remains with the owner. In the case of a mortgage, the mortgagor has the equity of redemption. He can get back the property by paying back the money. Both the mortgagor and the mortgagee possess limited rights in the property. In the case of lien, ownership remains with the debtor but the creditor is given possession of the thing and he is allowed to keep the same till his claim is satisfied. A lien is a security and an accessory right but a mortgage is an independent or principal right. The right of lien vests absolutely in the lienee. The right of mortgage is more than a security and vests conditionally and not absolutely. As a lien is attached to the debt, it automatically comes to an end on the extinction of the debt. A mortgage is an independent right and can survive even after the extinction of the debt. There is no transfer of a right in the case of a lien but there is a transfer of a right in the case of a mortgage. Any valuable transferable right can be mortgaged. A lien is created by way of encumbrance only but a mortgage is created either by transfer or by encumbrance. In the case of a lien, the debtor has the full legal and equitable ownership. The creditor has only rights and powers like sale, possession etc., which can safeguard his interest. Where a mortgage is created by the transfer of the right of the debtor to the creditor, the debtor is the beneficial or equitable owner. On the payment of the debt, the mortgagee becomes a mere trustee.

Kinds of Liens:—Liens are of many kinds: possessory lien, right of distress or seizure, power of sale, power of forfeiture and charge. A possessory lien consists in the right to retain possession of chattels or other property of the debtor. The right of distress or seizure consists in the right to take possession of the property of the debtor, with or without a power of sale. Power of sale is a form of security which is seldom found in isolation but is usually incidental to the right of possession conferred by one or other of the two preceding forms of lien. In the case of power of forfeiture, a power is vested in the creditor to forfeit the right encumbered. Examples of such a lien are the right of re-entry of landlord, the power of the vendor to forfeit earnest money paid by a prospective purchaser, etc. A charge consists in the right of a creditor to receive payment out of some specific fund or out of the proceeds of specific property.

(iv) Trust:—A trust is an obligation annexed to the ownership of property. It arises out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another, or of another and the owner. The persons for whose interest trusts are created are infants, lunatics, unborn persons, etc. According to Paton: "The trust has served in many fields. Firstly, it has been used by associations as a means whereby the group property can be applied to the desired purposes. Secondly, the problem of endowments and of gifts for charitable and religious purposes is made easy, for the property may be vested in trustees for such purposes as the settler desires. Thirdly, the trust has been of great social importance in making possible a facile settlement of family property; the young have been protected from their inexperience; a married woman, through the help of equity, secured a certain measure of economic independence in spite of the common law rule which then vested her chattels in her husband."

Modes of Acquisition of Property

Salmond refers to four modes of acquisition of property and those are possession, prescription, agreement and inheritance.

As regards *possession*, it is the objective realization of ownership. The possession of a material object *is* a title to its ownership. The *de facto* relation between person and thing brings the *de jure* relation along with it. He who claims a piece of land as his own and has also the possession of the same, makes it good in law also by way of ownership. If a person is in possession of a thing, he cannot be ousted except by one who is the true owner. Even the true owner cannot do so forcibly. He has also to seek the help of law to vindicate his own right. According to Salmond, a thing owned by one person and adversely possessed by another has two owners and those are the absolute owner and the pos-

sessory owner. If a possessory owner is deprived of its possession by a person who is other than the true owner, he has the right to recover possession of the same. If property belongs to nobody, the person who captures it and possesses it has a good title against the whole world. In this way, the birds of the air and the fish of the sea are the property of that person who first catches them.

According to Salmond: "*Prescription* may be defined as the effect of lapse of time creating and destroying rights; it is the operation of time as a vestitive fact." Prescriptions are of two kinds, positive or acquisitive prescription and negative or extinctive prescription. Positive prescription means the creation of a right by the lapse of time. Negative prescription is the destruction of a right by the lapse of time. Lapse of time has two opposite effects. In the case of positive prescription, it is a title of right. In the case of negative prescription, it is a divestitive fact. Long possession creates rights and long want of possession destroys them. If I possess an easement for 20 years without owning it, I begin at the end of that period to own and possess it. Likewise if I own land for 12 years without possessing it, I cease on the termination of that period either to own or to possess it. The two forms of prescription may coincide so that what one man loses another man gains.

According to Salmond: "The rational basis of prescription is to be found in the presumption of coincidence *of* possession and ownership, of fact and of right. Owners are usually possessors and possessors are usually owners. Fact and right are normally coincident; therefore, the former is evidence of the latter. That a thing is possessed *de facto* is evidence that it is owned *de jure*. That it is not possessed raises a presumption that it is not owned either. Want of possession is evidence of want of title. The longer the possession or want of possession has continued, the greater is its evidential value." Again, "the tooth of time may eat away all other proofs of title. Documents are lost, memory fails, witnesses die. But as these become of no avail, an efficient substitute is in the same measure provided by the probative force of long possession. So also with long want of possession as evidence of want of title; as the years pass, the evidence in favour of the title fades, while the presumption against it grows ever stronger."

Prescription is not limited to rights *in rem*. It is found within the sphere of obligations and of property. Positive prescription is possible only in the case of rights which admit of possession. Most rights of this nature are rights *in rem*. Rights *in personam* are commonly extinguished by their exercise and cannot be possessed or acquired by prescription. Negative prescription is common to the law of property and obligations. Most obligations are destroyed by the lapse of time.

Their ownership cannot be accompanied by their possession. There is nothing to save them from the destructive influence of delay in their enforcement.

Negative prescription may be perfect or imperfect. Perfect prescription is the destruction of the principal right itself. Imperfect prescription is merely the destruction of the accessory right of action. The principal right continues to remain in existence. An example of a perfect prescription is the destruction of ownership of land through dispossession for 12 years. An example of an imperfect prescription is in the case of an owner of chattel who has been out of possession of it for six years. He loses his right or action for its recovery although he continues to be its owner. If the period of limitation passes, the creditor cannot seek the help of law to recover the debt.

(3) Another method of acquiring property is by means of an *agreement*. According to Paton, an agreement is the expression by two or more persons communicated each to the other of a common intention to affect the legal relations between them. An agreement is the result of a bilateral act. It may be in the nature of assignment or a grant. An assignment transfers existing rights from one owner to another. A grant connotes the assurance or transfer of the ownership of property as distinguished from the delivery or transfer of property itself. Agreements arc either formal or informal. There are some agreements which require registration and attestation of the deed. There are others which are verbal and informal. In the case of Rome, an alienation *inter vivos* (during lifetime) required not only the agreement of the parties but also the delivery of possession.

There is a general rule that *the title of the transferee by agreement cannot be better than that of the transferor.* This is due to the fact that no man can transfer a better title than what he himself possesses. However, there are *two exceptions* to this general rule. The transferee gets a good title from a trustee who fraudulently sells the trust property, provided the transferee purchases it for value and without notice of the equitable claim of the beneficiary. The second exception is where the possession of a thing is in one man and the ownership of it is in another, the possessor can transfer in certain cases a better title on the assumption that the possessor is the owner, provided the transferee obtains it in good faith believing him to be the owner. The possessor of a negotiable instrument may have no title to it but he can give a good title to anyone who takes it from him for value and in good faith. Likewise, mercantile agents in possession of the goods can transfer good title, whether they are authorised to sell them or not.

(4) Another method of acquiring property is by means of *inheritance*. When a person dies, certain rights survive him and pass on to his heirs and successors. There are others which die with him. Those rights which survive him are called heritable or inheritable rights. Those rights which do not survive him are called uninheritable rights. Proprietary rights are inheritable as they possess value. Personal rights are not inheritable as they constitute merely his status. However, there are certain exceptions to the general rule. Personal rights may not die in the case of hereditary titles. Proprietary rights may be uninheritable in the case of a lease for the life of the lessee only or in the case of joint ownership.

Succession to the property of a person may be either testate or intestate. It may be by means of a will or without a will. If there is a will, succession takes place according to the terms of the will. If there is no will, succession takes place by the operation of law. If there are no heirs at all, the property goes to the State.

There are three limitations on the power of a person to dispose of his property by means of a will. Those are the limitation of time, limitation of amount and the limitation of purpose.

As regards the limitation of time, a will that controls the devolution of the estate in property is void. According to the Indian law, property cannot be tied up longer for a life in being and 18 years after. The testator must so order the destination of his property that within a certain period the whole of it becomes vested absolutely in some one or more persons, free from all testamentary conditions and restrictions. As regards the limitation of amount, a testator can deal only with a certain portion of his estate and the rest of it has to be allotted by law to the members of his family. According to Mohammedan law, no Muslim can bequeath more than one-third of the surplus of his estate after providing for his funeral expenses and payment of debt unless the heirs consent to the same. In the case of Hindu law, the testator can dispose of only his self-acquired property and not the ancestral property. As regards the limitation of purpose, the testator cannot dispose of his property in a way which is against the interests of humanity. He cannot will that his property shall lie waste. He cannot will that all his money will be buried along with his dead body. He cannot will that all his money should be deposited in the seabed.

Theories of Property

According to Hobson: "From the earliest times, the existence and sense of property, the exclusive acquisition and use of material objects that are scarce and desirable, have been important actors in the life of man. Such ownership or property has been desired and striven for, partly

for pleasurable consumption, partly as a means to further acquisition of consumable goods, but also for power over human beings and for the prestige that attaches to ownership and power." Many theories have been put forward to explain the origin of property and its justification.

(1) According to the *natural law theory,* property is based on the principle of natural reason derived from the nature of things. Property was acquired by occupation of an ownerless object and as a result of individual labour. Grotius, Pufendrof, Locke and Blackstone are the great supporters of the theory. According to Grotius, all things originally were without an owner and whosoever captured them or occupied them, became their owners. According to Pufendrof, originally, all things belonged to the people as a whole. There was no individual ownership. By means of an agreement or a pact, private ownership was established. According to Blackstone: "By the law of nature and reason, he who first began to use a thing acquired therein a kind of transient property that lasted so long as he was using it and no longer; or to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. But when mankind increased in number, craft and ambition, it became necessary to entertain conceptions of more permanent dominion and to appropriate to individuals, not the immediate use only but the very substance of the thing to be used. The theory of occupancy is the ground and foundation of all property or of holding those things in severally which by the law of nature, unqualified by that of society, were common to all mankind."

(2) The *metaphysical theory* was propounded by writers like Kant and Hegel. According to Kant: "A thing is rightfully mine when I am so connected with it that anyone who uses it without my consent does me an injury. But to justify the Jaw of property, we must go beyond cases of possession where there is an actual physical relation to the object and interference therewith is an aggression upon personality." According to Hegel, property is the objective manifestation of the personality of an individual. To quote him: "Property makes objective my personal individual will." Property is the object on which a person has the liberty to direct his will,

(3) According to the *historical theory,* private property had a slow and steady growth. It has grown out of collective group or joint property. There were many stages in the growth of individual property. The first stage was that of natural possession which existed independently of the law or the State. The second stage was the juristic possession. Juristic possession was a conception both of fact and law. The last stage

of development was that of ownership. It is purely a legal conception having its origin in law. The owner is guaranteed by law the exclusive control and enjoyment of the thing owned by him. According to Sir Henry Maine: "Private property in the shape in which we know it was chiefly formed by the gradual disentanglement of the separate rights of individual from the blended rights of the community." Again, "for many years past, there has been sufficient evidence to warrant the assertion that the oldest discoverable forms of property in land were forms of collective property and to justify the conjecture that private property had grown through a series of changes, out of collective property or ownership in common." Again, "property originally belonged not to individuals, not even to isolated families, but to larger societies composed on the patriarchal mode." It was later on that family property disintegrated and individual rights of property came into existence. According to Dean Roscoe Pound, the earliest form of property was group property. It was later on that families were partitioned and individual property came into existence. Similar views are held by Miraglia, the Italian jurist.

(4) Spencer was the propounder of the *positive theory.* He based his theory on the fundamental law of equal freedom. Property is the result of individual labour. No man has a moral right to property which he has not acquired by his personal effort.

(5) According to the *psychological theory,* property came into existence on account of the acquisitive instinct of man. Every individual desires to own things and that brings into existence property. According to Bentham: "Property is nothing more than the basis of a certain expectation of deriving hereafter certain advantages by a thing by reason of the relation in which we stand towards it. There is no image, no visible lineament which can portray the relation that constitutes property. It belongs not to physics but to metaphysics. It is altogether a conception of mind." Again, "to hold the object in one's hand, to keep it, to manufacture it, to work it up into something else, to make use of it, all or any of these physical circumstances failed to assist in conveying the idea of property. A piece of cloth actually in the Indies may belong to me, but the coat which I have too may not belong to me. The very food which has mingled with my body may be property of another to whom I must account for the price. The conception of property consists in a fixed and settled expectation; in the pursuance of my capacity to derive from the object, hereafter, certain advantages of a character dependent upon the nature of the case". According to Dean Pound: "Moreover, whatever we do, we must take account of the instinct of acquisitiveness and of individual claims grounded thereon."

(6) According to the *sociological theory*, property should not be considered in terms of private rights but should be considered in terms of social functions. Property is an institution which secures a maximum of interests and satisfies the maximum of wants. According to Jenks: "The unrestricted right to use, neglect or misuse his property can no longer be granted to any individual and the rights of property should be made conformable to rules of equity and reason." According to Laski: "Property is a social fact like any other and it is the character of social facts to alter. It has assumed the most varied aspects and it is capable of yet further changes."

(7) Property and law were born together and would die together. Before the laws, property did not exist; take away the laws and property will be no more. That which in a state of nature is no more than a thread becomes, when society is constituted, veritable cable." According to Rousseau: "It was to convert possession into property and usurpation into a right that law and State were founded. The first man who enclosed a piece of land and said? This is mine', was a real founder of civil society." Again, "the law of property is the systematic expression of the degree and forms of control, use and enjoyment of things by persons that are recognised and protected by law." Thus, property was the creation of the State.

SUGGESTED READINGS

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Chapter Nineteen

The Law of Obligations

Definition of Obligation

According to Sir John Salmond: "An obligation, therefore, may be defined as a proprietary right *in personam* or a duty which corresponds to such a right." Obligations are merely one class of duties, namely, those which are the correlatives of rights *in personam*. An obligation is the *vinculum juris*, or bond of legal necessity, which binds together two or more determinate individuals. It includes 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. The term obligation is the name not only of a duty but also of a correlative right. Looked at from the point of view of the person entitled, an obligation is a right. Looked at from the point of view of the person bound, it is a duty. Moreover, all obligations pertain to the sphere of proprietary rights. They form a part of the estate of the person who is entitled to them.

According to Paton, an obligation is that part of the law which creates rights *in personam*. According to Kant, an obligation is "the possession of the will of another as a means of determining it through my own, in accordance with the law of freedom, to a definite act". According to Savigny, an obligation is "the control over another person, yet not over this person in all respects (in which case his personality would be desired), but over single acts of his which must be conceived of subtracted from his free will and subjected to our will".

According to Holland: "An obligation, as its etymology denotes, is a tie whereby one person is bound to perform some act for the benefit of another. In some cases, the two parties agree thus to be bound together; in other cases, they are bound without their consent. In every case, it is the law that ties the knot and its untying, *solutio*, is competent only to the same authority."

Chose in Action

A technical synonym for an obligation is a chose in action or a thing in action. A chose in action means a proprietary right *in personam*. An example of a chose in action is a debt or a claim for damages for a tort.

Chose in Possession

Choses in action are opposed to choses in possession. In its origin, a chose in possession was anything or right which was accompanied by possession and a chose in action was anything or right of which the claimant has no possession but which he must obtain, if need be, by way of an action at law. Money in the purse of a person is a thing in his possession. Money which is due to a creditor by a debtor is a thing in action.

According to Dias and Hughes: "Choses in action have been defined as all 'personal rights of property which can only be claimed or enforced by action and not by taking physical 'possession', in short, they are rights *in personam* which are 'proprietary'. Choses in possession mean things capable of physical possession and delivery, *i.e.*, tangible objects."[1]

Solidary Obligations

The normal type of obligation is that in which there is one creditor and one debtor. However, it often happens that there are two or more creditors entitled to the same obligation, or two or more debtors under the same liability. The case of two or more creditors does not require special consideration. However, the case of two or more debtors calls for special notice.

Examples of solidary obligations are debts owing by a firm of partners, debts owing by a principal debtor and guaranteed by one or more sureties and the liability of two or more persons who together commit a tort. In all these cases, each debtor is liable for the whole amount due. The creditor is not obliged to divide his claim into as many different parts as there are debtors. He may exact the whole sum from one and leave him to recover from his co-debtors, if possible and permissible, a just proportion of the amount so paid. *A* debt of Rs 1000 owing by two partners, *X* and *Y*, is not equivalent to one debt of Rs 500 owing by *X* and Rs 500 owing by *Y*. It is a single debt of Rs 1000 owing by each of them, in such fashion that each of them may be compelled to pay the whole of it, but when it is once paid by either of them, both of them are discharged from the debt.

[1] p. 221, *Jurisprudence*.

Obligations of this description may be called solidary since each of the debtors is bound in *solidum* instead of *pro parte,* which means for the whole and not for a proportionate part. According to Salmond, a solidary obligation may be defined as one in which two or more debtors owe the same thing to the same creditor.

Three Kinds of Solidary Obligations

In English Law, solidary obligations are of three distinct kinds. They are several, joint and joint and several.

(1) Solidary obligations are *several* when, although the thing owed is the same in each case, there are as many distinct obligations and causes of action as there are debtors. Each debtor is bound to the creditor by a distinct and independent *vinculum juris,* the only connection between them being that in each case the subject-matter of the obligation is the same with the result that performance by one of the debtors discharges all others.

(2) Solidary obligations are *joint* when though there are two or more debtors, there is only one debt or other cause of action, as well as only one thing owed. The *vinculum juris* is single, though it binds several debtors to the same creditor. The chief effect of this unity of the obligation is that all the debtors are discharged by anything which discharges any one of them. When the *vinculum juris* has once been severed as to any of them, it is severed as to all.

(3) Certain solidary obligations are both *joint and several.* They stand halfway between several and joint obligations. They are the product of a compromise between two competing principles. For some purposes, the law treats them as joint and for other purposes as several. For some purposes, there is in the eye of law only one single obligation and cause of action, while for other purposes the law consents to recognise as many distinct obligations and causes of action as there are debtors.

Under Section 43 of the Indian Contract Act, the liability is joint and several unless there is an agreement to the contrary. The result is that if a promise is made by *A, B* and *C* to *X, X* may sue, at his option, *A* only, or *B* only, *or C* only, or any two or all three of them. In case the entire promise is performed by, say, *A* alone, he can claim to be reimbursed by *B* and *C* for their proportionate shares.

When *A* has received a loan from *C* under a promissory note executed by him on a particular date and at a subsequent date *B* guarantees the same debt of *A* by executing a surety bond, the liability of both *A* and *B* is several. If *A* and *B* execute the same bond on the same date and *A* receives the loan, *B* being only a surety, the liability is one of joint solidary obligation. The obligation of partners in a firm is a joint

solidary obligation. The liability of independent wrongdoers causing the same damage is several solidary obligation. Separate judgments obtained in distinct actions against two or more persons for the same debt are instances of several solidary obligations. Two persons jointly and severally liable on the same contract may be separately sued and judgment may be obtained against each of them. They are no longer jointly liable, but severally liable for the same obligation.

The question arises as to how it is to be determined as to which of the three solidary obligations a case belongs. According to Salmond, generally, such obligations are several when, although they have the same subject-matter, they have different sources. They are several in their nature if they are distinct in their origin. They are joint when they have not merely the same subject-matter, but the same source. Joint and several obligations are those joint obligations which the law, for several reasons, chooses to treat 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*.

The following are examples of solidary obligations which are several in their nature:

(1) The liability of a principal debtor and that of his surety provided the contract of suretyship is subsequent to, or otherwise independent of, the creation of the debt so guaranteed. If the two debts have the same origin, 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, or joint and several debtors by joining in a single contract of guarantee.

(3) Separate judgments obtained in 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 judgments may be obtained against each of them. In such a case, they are no longer jointly liable at all and each is severally liable for the amount of his own judgment. These two obligations are solidary as the satisfaction of one will discharge the other.

(4) The liability of independent wrongdoers whose acts cause the same damage. This is a somewhat rare case but is perfectly possible. Two persons are not joint wrongdoers simply because they both act wrongfully and their acts unite to cause a single mischievous result. They must have committed a joint

act. They must have acted with some common purpose. If not, they may be liable in *solidum* and severally for the common harm to which their separate acts contribute; but they are not liable as joint wrongdoers. The house of the plaintiff was injured by the subsidence of its foundations which resulted from excavations negligently made by *A*, taken in conjunction with the negligence of *B*, a water company, in leaving a water- main insufficiently stopped. It was held that inasmuch as their acts were quite independent of each other, *A* and *B* were not joint wrongdoers and could not be joined in the same action. The liability of the parties was solidary, but not joint. So also the 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 any one of them will discharge the others.

Examples of joint obligation are debts of partners and all other solidary obligations which have not been expressly made joint and several by the agreement of the parties. Examples of joint and several obligations are the liabilities of those who commit a tort or perhaps a breach of trust and also all contractual obligations which are expressly made joint and several by the agreement of the parties.

Sources of Obligations (Kinds of Obligations)

If we classify obligations from the point of view of sources, we have four such kinds of obligations, *viz.*, contractual obligations, delictal obligations, *quasi*-contractual obligations and innominate obligations.

(1) *Obligations arising from contracts; Contractual obligations are* those which are created by contracts or agreements. These obligations create rights in *personam* between the parties. The rights so created are generally proprietary rights. Sometimes, a contract creates rights which are not proprietary though they are *in personam.* An example of such an obligation is a promise of marriage. At the beginning, the idea of an obligation was strictly personal. Under the common law, choses in action were not assignable. Later on, negotiable instruments came to be assigned. The Judicature Act of 1873 made all debts and legal choses in action assignable at law. There are still certain rights which cannot be transferred and those are the assignment of a mere right to sue for damages in tort or a right to personal services without the consent of the person bound.

(2) *Obligations arising from torts: Delictal obligations* arise from torts. According to Salmond: "A tort may be defined as a civil wrong for which the remedy is an action for damages and which is not solely the breach of contract or the breach of trust or other merely equitable obligations." Delictal obligations are those in which a sum of money is to be paid as compensation for a tort. A tort has a penal element and a remedial element and the same act maybe a crime and a tort. However, *a tort is distinguishable from crimes and civil wrongs* in certain respects. A tort is a civil wrong as distinguished from a crime and the sanction is remissible by the injured person. A tort is a special kind of civil wrong and the proper remedy for it is damages and not civil remedies like injunction, specific performance, restitution of property, payment of a liquidated sum of money by way of penalty or otherwise, etc. No civil wrong is a tort if it is exclusively breach of contract. The *liability for a breach of contract* and *liability for torts* are governed by different principles. However, the same act may be both a tort and a breach of contract. This happens in two cases. In the first case, a man may undertake by contract the performance of a duty which lies in him already, independently of any contract. He who refuses to return a borrowed chattel commits a breach of contract and also a tort. In the second case, a liability in tort arises out of a breach of contract in favour of one who is not a party to the contract. *X* lends some chattel to *Y* who hands them over to *Z* for safekeeping. *Z* agrees to do so. The chattel is destroyed, *Z* is liable for the breach of contract to *Y* and in tort to *X*. A tort differs in origin from the breach of trust or other equitable obligations as the former was recognized by common law and the latter only by the Chancery. Even now the distinction is maintained as the principles are not the same in both cases.

A *distinction* may be made between a *contractual obligation* and a *delictal obligation* or tort. A contract is based on consent but a tort is inflicted against or without consent. Privity between the parties is implied in a contract but that is not so in the case of a tort. In a contract, the right or duty arises from an agreement between the parties. The duty in a contract cannot be enforced by a third party but only by the parties to the contract. In the case of tort, there is a breach of general law and consequently anybody suffering from the acts of another can file a suit. A breach of a contract is a violation of a right *in personam*. A tort is mostly a violation of a right *in rem*. There is no place for motive in a breach of contract but motive is taken into consideration in a tort. If there is a breach of contract, damages are in the nature of compensation. In the case of a tort, damages may be exemplary or vindictive in the case of malice or fraud. The measure of damages can be fixed according to the terms of the contract between the parties but in the case

of tort, it is not possible to fix the damages with precision. Originally, a tort was recognised in common law but a breach of contract was recognised only by the Court of Chancery.

(3) *Obligations arising from quasi-contracts*: *Quasi*-contractual obligations (obligations *quasi ex contractu)* are such as are regarded by law as contractual though they are not so in fact. These obligations are called by Salmond by the name of *"contracts implied in law"*. There are cases in which law departs from the actual facts and implies a contract by *fiction*. A *quasi*-contractual obligation is something the effect of which resembles the effect of a contract. However, it is to be observed that all implied contracts are not *quasi*-contracts. An implied contract may be either "implied in law" or "implied in fact". Although the former is not a true contract, law regards the obligation as if it were in the nature of a contract. The latter is a true contract and is based on the agreement between the parties. A *quasi*-contractual obligation arises where the law fictitiously attaches a contract. A money decree creates an obligation which is not contractual. There is no agreement to pay. However, the law presumes that there is a duty to pay and also promise to pay. This is a *quasi*-contractual obligation. If I enter a train, it implies that I agree to pay the railway fare. My obligation is truly a contractual one.

Most of the *quasi*-contractual obligations fall under two heads. All debts are deemed in theory of common law to be contractual in origin although they may not be so in actual fact. Examples are a judgment debt, money got by fraud or paid under mistake, etc. A judgment creates a debt which is non-contractual. However, law treats it as falling within the sphere of a contract. According to Blackstone: "Whatever, therefore, the laws order anyone to pay, that becomes instantly a debt which he hath beforehand contracted to discharge." According to Lord Esher: "The liability of the defendant arises upon the implied contract to pay the amount of the judgment."

In certain torts, the plaintiff has the choice to treat the obligation which is really a tort as if it were contractual. If *A* wrongfully sells the goods of *B*, *B* can sue *A* for damages in tort. However, *B* may elect to waive the tort and sue *A* instead on a fictitious contract. *B* can demand from *A* the payment of money received by him as if he were the agent of *B*. Here, the law presumes the contract and an implied term to pay. In the same way, if *A* obtains money from *B* by deceitful means, *B* can sue *A* either in tort for damages for the deceit or on a fictitious contract for the return of the money. *X* may take the goods of *Y* on loan and then sell them. *X* is liable in tort but *Y* can waive that remedy and sue *X* for the price of the goods as if *X* had sold them as the agent of *Y*. Sections 68 to 72 of the Indian Contract Act deal specifically with *quasi-*

contracts which are not founded on actual promises but where the law presumes a contract between the parties.

There are many *reasons* which have been responsible for the recognition of fiction in quasi-contractual obligations.

(*i*) The first reason is that the classification of obligations into contractual and delictal obligations is not exhaustive. Although the remedy of contractual obligations is liquidated damages and of delictal obligations is uncertain damages, yet this cannot be the basis of distinction. In certain torts, damages may be liquidated. This is so in the case of the price of goods wrongfully sold.

(*ii*) The second cause is the desire to supply a theoretical basis for new forms of obligations as established by judicial decision. Legal fictions are of use in assisting the development of law. It is easier for the courts to maintain that a man is bound to pay because he has promised to do so than to lay down for the first time the principle that he is bound to pay whether he has promised to do so or not.

(*iii*) Another cause is the desire of the plaintiffs to obtain the benefit of the superior efficiency of contractual remedies. In the old days of formalism, it was better to sue on a contract than on any other ground. The contractual remedy was better than others. It was better than trespass and other delictal remedies. It did not die with the person of the wrongdoer but was available even against his executors. No wonder, the plaintiffs were allowed to allege fictitious contracts and sue on them.

Any rational system of law is free to get rid of the conception of *quasi*-contractual obligations. No useful purpose is served by it at the present day. However, it is still a part of the law of England.

(4) *Innominate obligations: Innominate obligations* are all those obligations which are other than those falling under the heads of contractual obligations, delictal obligations and *quasi*-contractual obligations. Examples of such obligations are the obligations of trustees towards their beneficiaries and other similar equitable obligations.

SUGGESTED READINGS

Dias and Hughes	:	*Jurisprudence.*
Paton	:	*Jurisprudence.*
Salmond	:	*Jurisprudence.*

Chapter Twenty

The Law of Procedure

Law of Procedure and Substantive Law

ACCORDING TO Sir John Salmond: "The law of procedure may be defined as that branch of the law which governs the process of litigation." It is the law of actions and includes all legal proceedings whether civil or criminal. All the residue is substantive law. It relates not to the process of litigation but to its purpose and subject-matter. Substantive law is concerned with the ends which the administration of justice seeks. Procedural law deals with the means and instruments by which those ends can be achieved. It regulates the conduct and relations of courts and litigants in respect of the litigation itself. Substantive law determines their conduct and relations in respect of the matters litigated. Procedural law regulates the conduct of affairs in the course of judicial proceedings. Substantive law regulates the affairs controlled by such proceedings. What facts constitute a wrong is determined by substantive law. What facts constitute proof of a wrong is a question of procedure. The first relates to the subject-matter of litigation and the second relates to the process merely. Whether an offence is punishable by fine or by imprisonment is a question of substantive law. Whether an offence is punishable summarily or only on indictment is a question of procedure. The abolition of capital punishment is an alteration of the substantive law. The abolition of imprisonment for debt is merely an alteration in the law of procedure. The reason is that punishment is one of the ends of the administration of justice but imprisonment for debt is merely an instrument to enforce payment. Substantive law relates to matters outside the courts but procedural law deals with matters inside courts.

It has rightly been pointed out that *"the law of procedure is not the same thing as the law of remedies"*. The distinction that substantive law defines rights and procedural law determines remedies is not a right one.

The reason is that there are many rights which belong to the sphere of procedure. Examples are a right of appeal, a right to give evidence on one's own behalf, a right to interrogate the other party, etc. Moreover, rules of defining the remedy may be as such a part of substantive law as those defining the right itself. No one can call the abolition of capital punishment a change in the law of criminal procedure. The substantive part of criminal law deals not only with crimes but also with punishments. Likewise, in civil law, the rules regarding the measure of damages pertain to substantive law. The rules determining the classes of agreements which can be specifically enforced are substantive law in the same way as those rules which determine the agreements which can be enforced at all. To quote Salmond: "To define procedure as concerned not with rights, but with remedies, is to confound the remedy with the process by which it is made available." The real distinction between substantive law and procedural law is that one relates to the definition of rights and remedies and the other to the process of litigation.

According to Salmond, *the difference between substantive law and procedural law is one of form and not of substance.* A rule belonging to one class may, by a changed form, pass over into the other without materially affecting the practical issue. In legal history, such changes are frequent. Salmond refers to *three classes* of such cases:

(*a*) As regards the first class, an exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. The rule of evidence is that a contract can be proved only by a writing. This corresponds to a rule of substantive law that a contract is void unless it is reduced to writing. In one case, the writing is the exclusive evidence of title. In the other case, the writing is a part of the title itself. For most purposes, the distinction is one of form and not of substance.

(*b*) As regards the second class, 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 substantive law. Procedural law says that a child under the age of 8 cannot have a criminal intention and substantive law exempts such a child from punishment. It is a conclusive presumption of law that the acts of a servant are done with the authority of his master. This is a rule of procedure. However, there is also the substantive law which makes the employer liable for the acts of his employees. Originally, a bond was considered as a conclusive proof of the existence of the debt. At present, it is considered to be creative of a debt. Thus, it has passed from the domain of procedure into that of substantive law,

(*c*) The limitation of actions is the procedural equivalent of the prescription of rights. The legal procedure destroys the bond between right and remedy and substantive law destroys the right itself. The legal procedure leaves an imperfect right subsisting. Substantive law leaves no right at all. However, their practical effect is the same in both cases although the forms are different.

According to Pollock: "The most important branches of the law of procedure are the rules of pleading and the rules of evidence. It is obvious that, if litigation is to be concluded at all, a court of justice must have some kind of rule or usage for bringing the dispute to one point or some certain points, and for keeping the discussion of contested matters of fact within reasonable bounds. Rules of pleading are those which the parties must follow in informing the court of the question before it for decision, and in any case of difficulty enabling the court to define the question or questions. Rules of evidence are those by which the proof of disputed facts is governed and limited. In English practice the sharp distinction between the office of the court as judge of the law and the jury as judge of the fact has had a profound effect in shaping and elaborating both classes of rules. Indeed, it may be said to have created our peculiar law of evidence, for where a judge deals freely with both law and facts, as in the old Court of Chancery and its successor the Chancery Division, no need is felt, except as to definite requirements of form, for laying down hard and fast rules outside the general tradition of judicial discretion. Pleading, down to our own days, was a highly artificial system of which one object, sought by advocates for both good and bad reasons, was to obtain clear decisions of the court on points of law disengaged from contest on the facts. In the matter of evidence it was the interest of the court, the profession, and the public alike to keep the jury within the bounds of the law as laid down to them by the judge, to prevent them from being influenced by the mere gossip, and to guard the independence of witnesses while providing effectual means for testing their credibility. These objects were not attained in either case without drawbacks. Rules intended only for guidance were handled as if they were ends in themselves, and used as mere counters in the game of skill between advocates. The intricacies of pleading became a scandāl, and mischief of the like sort, though comparatively slight, left its mark on the rules of evidence also. Pleading has now been reduced to the simplest forms yet not always to very simple practice—in England and many other English-speaking jurisdictions; but our law of evidence, in the opinion of those who have studied it most, is still too complicated."[1]

[1] *Jurisprudence and Legal Essays*, pp. 43-44.

Elements of Judicial Procedure

The normal elements of judicial procedure are five in number, *viz.*, summons, pleading, proof, judgment and execution. The object of the summons is to secure for all parties interested an opportunity of presenting themselves before the court and making their case heard. Pleadings bring to light the matters in issue between the parties. In civil law, proceedings consist of the plaint, written statement and the replication. In criminal law, the proceedings include the complaint and the written statement, if any. Proof is the process by which the parties supply the court with the data necessary for the decision of the case. A judgment is a decision of the court. It may be in the form of a decree or an order. Execution is the process by which the court enforces a decree. It is the act of completing or carrying into effect the judgment. In the stage of execution, any property can be attached or sold. The debtor can be arrested and put in prison. A receiver can be put in charge of property.

Definition of Evidence

According to Salmond, evidence may be defined as any fact which possesses probative force. One fact is evidence of another when the existence of the former creates a reasonable belief in the existence of the other. The quality by virtue of which it has such an effect is called probative force.

According to Phipson: "Evidence, as the term is used in judicial proceedings, means the facts, testimony and documents which may be legally received in order to prove or disprove the fact under enquiry."

According to Taylor, evidence includes "all the legal means exclusive of mere argument, which tend to prove or disprove any fact, the truth of which is submitted to judicial investigation".

According to Section 3 of the Indian Evidence Act, evidence means and includes all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry and all documents produced for the inspection of the court.

The terms evidence and proof are not synonymous. Proof is the effect of evidence. Proof consists of that fact which either immediately or mediately tends to convince the mind of the truth or falsehood of a fact. Proof is the effect of evidence and evidence is the medium of proof. Evidence is the foundation of proof in the same way as a house is built out of bricks and mortar. All evidence is not proof.

Kinds of Evidence

(1) Evidence is of many kinds. It may be judicial or extra-judicial. *Judicial evidence* is that which is produced before the court. It consists of all facts which are actually brought to the knowledge and observation of the court. *Extra-judicial evidence* is that which does not come directly under judicial cognizance. However, it is an important intermediate link between judicial evidence and the fact requiring proof. Judicial evidence includes all evidences given by witnesses in the court, all documents produced in the court and all things personally examined by the court. Extra-judicial evidence includes all evidential facts which are known to the court only by way of inference from some form of judicial evidence. Testimony is extra-judicial when it is judicially known only through the relation of a witness who heard it. If a confession of a guilt is made to a court of law, it is judicial evidence. Such a confession is extra-judicial if it is made somewhere else but is proved before a court of law by some form of judicial evidence. If a document is actually produced in the court, it is judicial evidence. If a document is known to the court only through a copy or the report of a witness who has read it, it is extra-judicial evidence. In every case, some judicial evidence is absolutely essential but extra-judicial evidence may be there or may not be there. When extra-judicial evidence is present, it forms an intermediate link between the principal fact on the one hand and judicial evidence on the other. Judicial evidence requires mere production and extra-judicial evidence stands itself in need of proof.

(2) Evidence may be *personal* or *real.* Personal evidence is also called testimony and includes all kinds of statements regarded as possessed of probative force. Personal evidence is the most important form of evidence. It may be oral or written and judicial or extra-judicial. Real evidence includes the residue of evidential fact. Anything which is believed for any other reason than that someone has said so, is believed on real evidence. Real evidence may be judicial or extra-judicial. According to Bentham, real evidence denotes "all evidence of which any object belonging to the class of things as the source, persons being included in respect of such properties as belong to them in common with things". In this sense, real evidence may be immediate or reported.

(3) Evidence may be *primary* or *secondary.* Primary evidence is immediate evidence of the principal fact. A document is the primary evidence of its contents. Secondary evidence is such that a more immediate evidence than it exists. A copy of a document or oral evidence is secondary evidence of the contents of the document. Secondary evidence should not be allowed when primary evidence is available as it is inferior to primary evidence.

(4) Evidence may be *direct* or *circumstantial.* Direct evidence is testimony relating immediately to the principal fact. All other evidence is circumstantial. Direct evidence is the testimony of a witness relating to the precise point in issue. It is evidence of a fact perceived by a witness with his own senses. If *A* says that he saw *B* committing the murder, the evidence of *A* is direct evidence. Circumstantial evidence is that evidence which relates to a series of facts other than the fact in issue but which are closely connected with that fact in such a way that it leads to some definite conclusion. According to Keeton, circumstantial evidence is the evidence of facts other than those of which proof is required, but from the existence of which proof of desired facts can necessarily be inferred. *X* states that he saw *Y* leaving the place where *Z* was murdered and that *Y* had a blood-stained dagger in his hand. The evidence of *X* is circumstantial evidence. Law requires that circumstantial evidence should be used with caution.

(5) Original evidence is that which possesses an independent probative force of its own. The witness states what he has seen or heard with his own eyes or ears. Hearsay evidence is not based on the personal knowledge of the witness. He makes the statement on the basis of the statement of another person. Two factors have to be taken into consideration in this connection. The person giving the evidence may be suppressing facts. It is also possible that the person who originally made the statement may not have been honest. Ordinarily, hearsay evidence is not accepted. However, there can be certain exceptions to the general rule.

Production of evidence

The law of evidence is concerned with the production of evidence and its valuation. As regards the production of evidence, many rules have been laid down for the production of documents and the examination of witnesses. The object of these rules is to avoid unnecessary expense, delay and vexation. Considerations of public policy also play their part. There are certain witnesses who cannot be forced to disclose facts which are known to them and which are material to the point in issue. A reference to the Indian Evidence Act shows that a judge or a magistrate cannot be forced to answer any question regarding his own conduct except under the special orders of a superior court. Communications during marriage are also privileged. Neither the husband nor the wife can be compelled to disclose any communication made to him or her during marriage. The unpublished records of the State are also privileged. They cannot be produced by any person except with the permission of the head of the department concerned. Likewise, the official communications are also privileged. If the public interests so

demand, no public officer can be compelled to disclose communications made in official confidence. No magistrate or police officer can be compelled to disclose the source of his information regarding an evidence. Professional communications are also privileged. No lawyer can be forced to disclose the communications between him and his client. However, this can be done with the consent of the client. No accused person can be compelled to answer any question which is likely to incriminate him. Even if a confession is to be made by an accused person, that must be done absolutely voluntarily. There should be no inducement, threat or promise. Any violation of this rule makes a confession useless in the eye of law. Witnesses are called upon to take an oath before making their statements. The object of the oath is to find out the truth. However, in modern times, the sanctity of oath has been completely lost and the whole affair has become mechanical. Any party to litigation which puts trust in an oath is bound to come to grief.

Probative value of evidence

When all the evidence has been produced, the same has to be evaluated. Many rules have been laid down to weigh the value of the evidence produced in the court.

(1) *Conclusive proof* consists of facts which have such probative force that they cannot be contradicted. When one fact is declared by law to be the conclusive proof of another fact, the court shall on proof of one fact, regard the other as proved. It shall not allow evidence to be produced for the purpose of disproving it. Conclusive presumptions are inferences which must be drawn and cannot be allowed to be overruled by any evidence howsoever strong it may be. Section 112 of the Indian Evidence Act provides that if a child is born during wedlock or within 280 days after the dissolution of marriage between the mother and the father, the mother remaining unmarried, it shall be conclusive proof of the legitimacy of the child. Likewise, Section 80 of the Indian Penal Code provides that a child under the age of 7 is presumed by law to be incapable of committing any offence.

(2) *Presumptive proof* means such proof which may be considered sufficient if there is no other proved fact to the contrary. In such a case, a rebuttable presumption is raised. The presumption can be proved to be wrong by contrary evidence. Unlike conclusive proof, the court allows contrary evidence to be led to disprove the presumption.

(3) If law prescribes a certain amount of evidence to be absolutely necessary and the evidence produced does not come up to the necessary standard, the evidence is considered to be insufficient. The courts are not allowed to act upon such evidence. According to English Law, the evidence of one witness is not sufficient to hold a person guilty of

the offence of treason. There is no such express rule of law on this point in India. A will requires to be attested by two witnesses and if a will has been attested only by one witness, no court will take cognizance of it.

(4) In the case of *exclusive evidence,* certain facts alone are recognised as being the only evidence of certain other facts. No other evidence is permitted by law. The execution of a will can be proved only by the testimony of one attesting witness. However, the case is otherwise if the attesting witnesses are dead. If a contract, grant or assignment is reduced to writing or is required by law to be made in writing, in that case only the writing itself is admissible to prove the contract, assignment or grant. It is a case of exclusive evidence.

(5) There are certain facts which have absolutely no probative force at all. They can neither be produced in the court not acted upon. No court can take cognizance of such non-essential facts. For example, hearsay evidence is no evidence and is ordinarily excluded. Likewise, the bad character of the accused is ordinarily irrelevant in criminal proceedings. It becomes relevant only if evidence has been given to show that he possesses a good character.

SUGGESTED READINGS

Diamond	:	*Primitive Law.*
Jackson	:	*Machinery of Justice in England.*
Mullins, C	:	*In Quest of Justice.*
Paton	:	*Jurisprudence.*

LEGAL THEORY