CHAPTER XI

OWNERSHIP

DEFINITION

Ownership is the *relation between a person and any right that is vested in him*. That which a man owns is, in *all* cases, a *right*. When one speaks of the ownership of a material object, this is merely a convenient and conventional figure of speech. To own a piece of land means, in law, to own a particular kind of *right* in that land.

According to *Salmond*, "ownership denotes the *relation* between a *person* and an *object* forming the subject-matter of his ownership. It consists in a complex of rights, all of which are rights *in rem*, being good against all the world, and *not* merely against persons".

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

Ownership is thus the sum-total of the rights of possession, disposition and destruction. According to *Holland*, it is a plenary control over an object.

Under the French Code, "ownership" means and involves the right of the owner to enjoy and do away with his things in the most absolute manner, that is, just as he pleases, subject however to all laws and regulations.

THE *ESSENTIALS* (OR *CHARACTERISTICS* OR *INCIDENTS*) OF OWNERSHIP

The *six* essential *characteristics* or *incidents* of ownership can be summed up as follows :

(1) The owner has a *right to possess* the thing which he owns. It is immaterial whether he has actual possession of it or not, as long as he has a *right* to such possession. Thus, if *A's* car is stolen by *B*, the latter has possession of the car, but *A* remains the owner, with an immediate right to possession. Similarly, if *A* lends this car to *B* on hire, *A* has neither possession of the car, nor the immediate right to possess it. However, *A* is still the owner, for he retains a *reversionary* interest in the car, *i.e.*, a right to repossess the car on the termination of the period of hire.

Write a short note on : Characteristics of ownership.
P.U. Apr. 96

(2) Generally, the owner has the *right to use and enjoy* the thing owned. Although this is commonly called a *right* to possess and use such thing, as *Salmond* points out, these rights are, in fact, *liberties*. The owner has actually a *liberty* to use the things, *i.e.*, he is under no duty *not* to use it, whereas others are under a duty *not* to use it or otherwise interfere with it.

(3) Thirdly, the owner has the *right to exhaust* the thing while using it, if the nature of the thing owned is such.

Write a short note on : Incidents of ownership.
B.U. Oct. 98

Define "ownership". What are the legal incidents of ownership ?
B.U. Oct. 97
Apr. 99

What are the legal incidents of ownership.
P.U. Apr. 97
Oct. 97

Define ownership. State and explain the attributes and characteristics of ownership with the help of suitable illustrations.
P.U. Oct. 95

(4) Generally, the owner has the *right to destroy or alienate* the thing he owns. Thus, a man can effectively dispose of his property by a conveyance during his life-time *or* by will after his death. This is a general right, though in some cases, such a right may be restricted by law.

A person who is *not* the owner *cannot* normally transfer the right of *ownership,* even though he may have *possession* of the thing in question, for the law acts on the maxim *nemo dat quod non habet* (he who has not can give not). However, there are well-recognised exceptions to this rule to be found in the Indian Contract Act and in the Sale of Goods Act.

(5) Another important characteristic of ownership is that it is *indeterminate in duration.* Those who are *not* owners may be entitled to possess or use a thing, but the period for which they are so entitled is of a limited duration. In the case of an owner, it is of an indeterminate duration.

Thus, the interest of a *bailee* or a *lessee* comes to an end when the period of hire or of the lease comes to a close. But the owner's interest is perpetual, and does *not* terminate even with the owner's death, because in that case, the property will go to his legatee or heir or next-of-kin.

(6) Lastly, ownership has a *residuary character.* It is possible that an owner has parted with several rights in respect of the thing owned. Nevertheless, he continues to be the owner of the thing in view of the residuary character of ownership. For example, if an owner gives a lease of his property to *A* and an easement to *B,* his ownership of the land now consists of the residual rights, *i.e.,* the rights which remain when the lesser rights (*i.e.* the lease and the easement) have been taken away.

Ownership and possession

Ownership, as a legal concept, has to be distinguished from the concept of *possession.* Possession is the *de facto* relation of continuing exercise and enjoyment, whereas ownership is the *de jure* relation between a person and a right. One may possess a thing without owning it, and he may own it without possessing it. Sometimes, he may both own and possess it. Thus, in the example given earlier (of the stolen car) though possession of this car is with the thief or the hirer (as the case may be), the ownership remains with the owner of the car.

(The *distinction* between *ownership* and possession is discussed in greater detail in the *next Chapter.*)

Ownership and encumbrance

The right of ownership of property is also distinct from an *encumbrance* on such property. A legal right is vested in the owner, whereas some right which is adverse, dominated and limiting in respect of the right of ownership, is vested in the encumbrancer. *A* may have the right of ownership of a land. *B,* having the right of way over it, is an encumbrancer; but at the same time, the encumbrancer himself is the *owner of the encumbrance.*

Encumbrance is what limits a right, though it is, by itself, also a right. It is the dominant right or a limiting right possessed by the encumbrancer over the property of someone else. If *A* is the owner of a building, and if *B* has

a right of way over the land surrounding the building, and if this land belongs to *A*, then *B's* right of way limits the right of *A* to the ownership of the land.

According to *Salmond*, an encumbrance, *i.e.*, a right in *re aliena*, is one which limits or derogates from a more general right belonging to some other person in respect of the same subject-matter. It frequently happens that a right vested in one person becomes the subject of subordination to an adverse right vested in another person. It follows that the owner is thus limited in the enjoyment and disposition of the property owned by him.

A right subject to an encumbrance is known as *servient*, while the encumbrance is designated as *dominant*. These expressions are derived from the Roman Law. Further, it is essential to an encumbrance that it should run with the right encumberred by it, *i.e.*, the dominant and servient rights are thus necessarily *concurrent*. The chief classes of encumbrances are *leases, servitudes, securities* and *trusts*.

THE SUBJECT-MATTER OF OWNERSHIP

Define ownership. What is the subject matter of ownership ?
B.U. Apr. 98

The *primary subject-matter of ownership* consists of material objects, like land and chattels. However, a man's wealth may also consist of other things, as for example, interests in the land of other people, debts due to him by his debtors, shares in the companies, patents, copyrights etc. Thus, *X* may have the right to walk over *A's* land, *or* the right to catch fish in *B's* pond, *or* a debt of Rs. 10,000 owing from *C*, shares in D & Company Ltd., various patents, copyrights, and so on. Yet, none of these is a physical or material *thing;* they are in fact nothing other than *rights*. *Salmond* is of the view that true subject-matter of ownership has to be a *right* in all cases, because it would be a logical absurdity if the subject-matter of the ownership was sometimes a material object and at other times a right.

There is much support to be found for *Salmond's* view in English Law. Nevertheless, if the term is used as *always* applying to a right, it would *not* be in keeping with law and legal usage, because it is normal and natural to talk of owning things such as land and chattels. Further, since owning a chattel normally means having certain rights in respect of such chattels, to describe this as owning rights in respect of the chattels would lead to a rather complicated conclusion, that owner would be said to have *rights to rights in respect of such chattels*. Further, normally, a man is said to *have a* right, and not to *own* a right. A man does not *own* a right to his reputation; that is a right which he *has*.

It is, therefore, preferable to speak both of owning *things* in the sense of material objects, and also of owning *rights*. Precisely what "thing" can form the subject-matter of ownership would depend on the rules of each system of law. Broadly speaking, under most systems of law, certain things qualify as capable of being owned, but as not in fact being owned, as for example, islands outside the territory of any State and wild animals in the jungle. Other things, by nature, are incapable of being owned, as for example, living persons, corpses (other than anatomical specimens), the air and the sea, the sun, the moon, the star *etc.*

However, as *Salmond* points out, although these things are in principle incapable of ownership, there is nothing in law or logic to warrant such a proposition. Thus, if English Law were to permit slavery, living persons could be owned. Likewise, it is equally possible to conceive that the law may also provide that the air and the sea might be owned, sold, bought, rented, and so on.

It is also to be noted that where a thing is capable of being owned, the methods of acquiring ownership over such a thing will vary from one legal system to another. As *Salmond* points out, basically, one can acquire ownership in *two ways*,— by operation of law, *or* by reason of some act or event. As regards the *first*, the laws of intestacy and bankruptcy afford good examples, because they operate to vest one man's property in another. As to the *second*, this may consist in cases of original acquisition (*i.e.*, taking a thing for the first time) or in derivative acquisition, which consists in taking the thing from one person, either with or without his consent, and vesting it in another.

INCORPOREAL AND CORPOREAL OWNERSHIP

Ownership, as discussed above, is used *in the wider sense* of the term. It is also known as *incorporeal ownership*. But the term 'ownership' is used *in a narrower sense* in which it means *the ownership of material things*. This is known as *corporeal ownership*. (See the further discussion below.)

THE RIGHT OF OWNERSHIP AND THE OWNERSHIP OF A RIGHT DISTINGUISHED

The corporeal ownership is the right to the entirety of the lawful uses of a corporeal thing. In this sense, the corporeal ownership or the right of ownership is *not* so much one right, as *a bundle of rights, liberties, powers and immunities*. According to *Pollock*, "Ownership may be described as the entirety of the powers of use and disposal allowed by law." On the other hand, the ownership of a right describes the jural relation that exists between a person and a right. In this sense, it denotes that he is neither a possessor nor an encumbrancer, but the owner of the right. This must be distinguished from the right of ownership, as the right of ownership is the complex pattern of the bundle of rights, liberties, powers and immunities. In the case of ownership of a right, it only suggests that there is a particular legal relationship between a person and a right. It may also be noted that the ownership of a right is also known as *incorporeal ownership*.

In English law, the interest which is by way of a perpetual ownership is called a *fee simple*, in which ownership passes to the heirs by devolution. But a life-interest (which comes to an end with the demise of the owner) or an interest for a specified number of years is *not* considered to be a right of ownership, because it is *not* perpetual.

KINDS OF OWNERSHIP

Ownership is of the following *six kinds* :

1. Corporeal and incorporeal

Corporeal ownership is the ownership of a *material object*. It is thus a

right of ownership in some corporeal property, immovable or movable. Immovable property would include land and buildings and also things attached to the land. Movable property would include things *not* attached to the land and chattels of all kinds.

Define ownership. Explain the various kinds of ownership.
P.U. Apr. 95

Incorporeal ownership is the ownership of a *right*. Examples of incorporeal property are copyright, patents, trade-marks, goodwill *etc.* Often, it happens that the value of incorporeal property is far higher than that of a corporeal property. Thus, the value of the goodwill of a business may be far higher than that of the actual property involved in such business.

The Bombay High Court has *held* that, under the Transfer of Property Act, in the absence of a contract to the contrary, a lessee may, even after the lease is terminated, remove all things which he has attached to the earth, which would include structures or buildings put up by him on the leased land. In such cases, the lessee would remain the owner of the building put up by him on the land of the lessor. Thus, the owner of the land does *not* become the owner of the building, and the maxim, *quicquid plantatur solo, solo cedit* (whatever is planted or affixed to the soil belongs thereto) does *not apply*. Thus, there can be *two distinct ownerships*, one of the *land* and the other of the *building*. *(Lala Laxmipat Singhania* v. *Sapat Textile Products Ltd.*, 52 B.L.R. 688)

2. Trust and beneficial ownership

Write a short note on : Trust and beneficial ownership.
B.U. Oct. 96
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Trust-ownership is an instance of *duplicate ownership*. Trust property is that which is owned by *two* persons at the same time, *the relation between the two owners being such that one of them is under an obligation to use his ownership for the benefit of the other*. The former is called the *trustee, and his* ownership is *trust-ownership;* the latter is called the *beneficiary*, and his ownership is *beneficial ownership*. The ownership of the trustee is *in fact*, nominal, *not* real. *In law,* however, the trustee *represents* his beneficiary.

Thus, if property is given to *A* on trust for *B*, *A* would be the *trustee,* and *B* would be the *beneficiary* or *cestui que trust. A* would be the legal owner of the property, and *B* the *beneficial owner. A* would be under an obligation to use property *only* for the benefit of *B*.

Nature of the right of the trustee and beneficiary in the trust property. — The trustee is destitute of any right of beneficial enjoyment of the trust property. His ownership, therefore, is a matter of *form* rather than of *substance,* and *nominal* rather than *real*. In legal theory, however, he is *not* a mere *agent,* but *an owner*. He is a person to whom the property of someone else is fictitiously attributed by the law, to the extent that the rights and powers thus vested in a nominal owner are to be used by him only on behalf, and for the benefit, of the real owner. As between the trustee and the *beneficiary,* the property belongs to the latter, and *not* to the former. But as between the trustee and *third persons,* the fiction prevails, and the trustee is deemed to be the *legal owner* of such property. The trustee is clothed with the rights of his beneficiary, and is so enabled to represent him in dealings with the world at large.

'Trust' and 'bailment'

According to *Maitland*, there are *two tests* which bring out the distinction between a trust and a bailment — one afforded by the *law of sale* and the other by the *criminal law*.

1. If a *trustee* sells trust property in breach of a trust, a *bona fide* purchaser for value without notice of the trust takes a *good title* from the trustee. But, if a *bailee* makes an unauthorised sale of the goods, a *bona fide* purchaser for value without notice of the bailor's rights gets *no title* to the goods, for the bailee from whom he has purchased was not the owner of the goods, and the common law rule is that a vendor *cannot* give a better title than he himself possessed.
2. Secondly, if the bailee converts the goods to his own use, *he is guilty of larceny* (*i.e.*, theft), for the goods do *not* belong to him *as owner*. But if the trustee misappropriates the trust property, he was guilty of no crime at common law, for a man cannot steal what he both owns and possesses. Now by Statute, however, he is liable criminally, — but still *not* for larceny.

'Trust' and 'executorship'

The position of an executor resembles that of the trustee in so far as the executor (after the debts have been paid off) is the full owner of the goods, but at the same time, he is bound to use his rights in a particular way, *e.g.*, to convey the surplus of the assets to those entitled to the deceased's property.

Nevertheless, an executor or administrator, as such, is *not* a trustee for the legatee or next-of-kin, though he may, under certain circumstances, *become* a trustee for them, and in a given case, it may be hard to decide whether a man has been merely an executor (or administrator) or has also been a trustee. The question is of much practical importance because the Statutes of Limitation draw a *distinction* between an action by a legatee against an executor and an action by a *cestui que trust* (beneficiary) against his trustee. While an action by a *legatee* against an *executor* to recover a legacy is barred after a lapse of 12 years, a trustee *cannot* plead the Statutes of Limitation in defence at all in certain cases, namely, — (i) where he has been guilty of fraud, and (ii) where the action is to recover trust property retained by the trustee or converted to his own use. It is to be noted that if an executor makes himself an express trustee of legacy within the meaning of the Trust Act, his position will be the same as that of a trustee.

'Trust' and 'contract'

A trust differs from a contract, in that in the case of a contract, a person who is *not* a party to a contract which purports to confer a benefit upon him, *cannot* (subject to certain exceptions) enforce the contract; in the case of a trust, this rule has no application. The beneficiary has always been the person to whom Equity has given the remedy for breach of trust, though he is no party to its creation.

A *trust* can be distinguished from a *contract* on the following *six* fundamental grounds :

1. Historically, contracts were enforceable in Common Law, while trusts fell under the exclusive jurisdiction of the Court of Chancery, for Courts of law refused to recognise them. Again, equity did not, and could not, enforce the trust as an agreement, but as a matter of confidence.
2. Though the commonest origin of the trust in an agreement between two persons, a trust may be, and is sometimes, created by a perfectly *unilateral act,* as when a man becomes bound by a trust by his own declaration or conduct, while the beneficiary knows nothing about it.
3. Even when the trust is created by a bilateral act, no formal offer or acceptance between the parties is necessary, as in a contract. The rule is that though nobody can be compelled to undertake a trust, the trustee's acceptance is *presumed* unless he disclaims, either by conduct, or by deed, or otherwise.
4. The rule that a stranger to a contract acquires neither rights nor liabilities under it has no application to trusts. In a trust, the equitable remedy is given *not* to the trustor as such, but to the beneficiary (*cestui que trust*) who is no party to the contract.
5. Again, though equity refuses to enforce an agreement to create a trust at the instance of a person who has given no consideration (just as common law refuses to enforce an agreement without consideration), yet the consideration required in the two cases is *not* the same. Thus, for instance, the issues of a prospective marriage are treated in equity as within the marriage consideration, although in the common law sense, they are *not* parties to the consideration.
6. While a contract creates a mere right *in personam,* available against the promisor, the right of a *cestui que trust* resembles a right *in rem,* inasmuch as it is enforceable against all third parties, *except* a *bona fide* purchaser for value.

'Trust' and 'agency'

Trust resembles an agency in that *both* a *trustee* and an *agent* administer property on behalf of another, and neither is the beneficial owner of such property. But there are the following *five* essential differences between the two :

1. At law, the trustee is the owner of the property he administers, but the agent is, in no way, the *owner* of the property which actually belongs to the principal. As a result, the agent *cannot,* outside the sphere of his authority, pass a legal title to a third person, even if he is a *bona fide* purchaser for value without notice, to any greater extent than any other wrong-doer could do. On the other hand, a *bona fide* purchaser of the legal estate for value, without notice of the trust from a trustee, obtains a valid title against the whole world.
2. The trustee, being the legal owner, is *personally liable* on all

contracts entered into by him in reference to the trust. But if the agent enters into a contract *as agent*, the contract is with the principal, and the agent is generally *not* personally liable.

3. The authority of the agent to deal with the property is purely a matter of delegation from the person whose agent he is and for whose benefit he acts. But the authority of the trustee is derived from the trust-deed or other instrument or transaction giving rise to the trust, and the wishes of the beneficiary may have nothing to do with it.
4. Again, though there is an analogy of *the cestui que trust's* right to follow the trust property in the hands of the trustee with the right of the principal to follow the property in the hands of the agent in case of its unauthorised use, still the right of the principal is *not* based, in any way, upon the existence of the trust relation. In such cases, equity gives relief only because the law recognises such a right,—equity merely 'follows the law'.
5. A trust arises when a person receives or holds property in such circumstances that, by the rule of equity, he ought to employ it for the benefit of some person or object other than his own. Agency arises from an express or implied *contract* to act for some other person, and property may *not* be involved at all.

'Trust' and 'mortgage'

As regards the distinction between a *trust* and a *mortgage*, the following *two points* may be noted :

1. Though the relation of a mortgagor and morgagee is purely contractual, it has some analogy to the fiduciary relation (*i.e.*, trust relationship), in so far as the mortgagor has, *in equity*, a beneficial interest in the property (*viz.*, the equity of redemption) though, at *law*, the mortgagee has an absolute estate after the time fixed for redemption has passed. The mortgagee, however, is *not* a trustee for the mortgagor. He does *not* hold the legal estate for the *benefit* of the mortgagor, as a trustee does for the *cestui que trust*. Further, the morgagee has, not only the legal interest in the property mortgaged, but also a *beneficial* interest in it adverse to the mortgagor's, which he can enforce by a suit against the mortgagor.
2. As *Ashburner* points out, the morgagee becomes a trustee only after he has been paid. In equity, his right in the property does *not* go beyond what is necessary to secure repayment of the money due to him. Thus, (a) if the mortgagor (or some person entitled to redeem) has paid the mortgagee his principal, interest and costs, the mortgagee (if he still holds the property) becomes a trustee of the mortgaged property for the person making the payment; and (b) if he has sold the mortgaged property and reimbursed himself his money out of the proceeds of sale, he becomes a trustee of the surplus proceeds (if any) for the person entitled to the equity of redemption. *(In Re Bell,* (1886) 34 Ch. D. 462)

3. 'Vested' and 'Contingent' ownership

Explain the idea of ownership. Discuss vested and contingent ownership. B.U. Nov. 95

Ownership is either *vested or contingent*. It is *vested when* the owner's *title* is already *perfect;* it is *contingent* when his title is *imperfect,* but is *capable* of being perfect *on the fulfilment of some condition.* In the former case, he owns the right *absolutely;* in the latter, he owns it only *conditionally.*

Thus, if *A* gives a gift of his car to his son, *B,* the latter will have a vested interest in the car. However, if *A* gifts the car to *B,* provided he marries a particular girl, *X, B's* interest is merely *contingent;* his interest is conditional on an event which may or may not happen. If *B* marries *X,* his interest becomes *vested.*

Vested interest

Write a short on : Vested and contingent ownership. B.U. Apr. 98

An interest is said to be vested, when it is *not* subject to any condition precedent, *or* when it is to take effect on the happening of an event which is *certain.* A person takes a vested interest in property when he acquires a proprietary right in it, but the right of enjoyment is only defferred till a future event happens, which event is certain to happen. Thus, if a Hindu widow adopts a son, but there is an agreement postponing the son's *estate* during the life-time of the widow, the interest created in favour of the adopted son is a vested right; it does *not* depend upon any condition precedent (*e.g.,* the performance of an act); it is to take effect on the happening of an event which is certain (*viz.,* the widow's death); the adopted son has a present proprietary right in the estate, the right of possession and enjoyment being deferred; therefore, he *can* transfer the property even during the widow's life-time.

What is vested ownership ? Distinguish between ownership vested in possession and vested in interest. When is a vested ownership destroyed ? B.U. June 96

Similarly, where under a deed of gift, a donee is *not* to take possession of the gifted property until after the death of the donor and his wife, the donee is given a vested interest, subject only to the life-interest of the donor and his wife; and the donee can transfer the property during the life-time of the donor or of his wife.

So also, where under a compromise decree, it was settled that *A* was to hold an estate till his death, after which it was to go to *B,* it was *held* that the interest acquired by *B* under a decree was a *vested interest,* because the interest which was created in favour of *B* was bound to take effect from the death of *A,* which was *a certain event. (Sundar Bibi* v. *Rajendra,* 47 All. 496)

Similarly, a transfer of a property in favour of a person simply confers a vested interest with an immediate right to the possession and enjoyment of the property. And such a vested interest is *not* defeated by the death of the transferee even before getting possession of the property, because, in that case, it would go as a vested interest, thus regarded as a property which is *divisible, transferable* and *heritable. (Elokasee* v. *Darponarain,* 5 Cal. 59)

It will be seen that in a vested interest, the interest is complete, but on the happening of a specified event, it may be divested. The true criterion is the certainty or uncertainty of the event on the happening of which the gift is to take effect. Where the event is *certain,* though future, and the payment or enjoyment is postponed by reason of the circumstances connected with

the estate or for the convenience of the estate, as for instance, where there are prior life or other estates or interests, the ulterior interest to take effect after them will be *vested*. Thus, under a gift by a testator to *A* at the demise of the testator's wife, *A*'s interest vests at the testator's death.

It may also be noted that, where, on a transfer of property, an interest therein is created for the benefit of an *unborn* person, he acquires upon his *birth, a vested interest* in such property.

Contingent interest

Where on a transfer of property, an interest therein is created in favour of a person to take effect only on the *happening or not happening*, of a specified uncertain event (*i.e.*, an event which *may* or *may not* happen)—such a person acquires thereby a *contingent interest* in the property.

Such interest becomes a *vested interest* on the *happening* of the event, or when the happening of the event becomes *impossible*, as the case may be.

A contingent interest is one in which neither any proprietary interest nor a right of enjoyment is given at present, but both depend upon uncertain events.

Thus, where an estate is bequeathed to *A* until he shall marry, and after that event, to *B*, *B's* interest in the bequest is *contingent*, because it depends upon a condition precedent *viz.*, the marriage of *A*, an event which *may* or *may not* happen. *B* has, at present, no proprietary interest in the estate, and he *cannot* alienate it. But as soon as *A* marries, the contingent interest of *B* becomes a *vested interest*, because of the happening of the event (*A*'s marriage) on which it was so long contingent. In a contingent interest, the transfer is *not* complete, until the specified event happens or does not happen.

If *A* declares in his deed of gift that *B* is to get the property at his marriage, *B's* marriage is a future event which may or may not happen; such an interest, the vesting of which depends on the happening or non-happening of a contingent future event, is a *contingent interest*. A *contingent interest* becomes vested when the condition that gives it the contingent character is fulfilled, *or* in other words, when the contingency happens or its happening becomes impossible, as the case may be.

Its characteristics.—The following are *three main features* of a contingent interest :

1. A contingent interest is solely dependent upon the fulfilment of a condition, so that in case of non-fulfilment of the condition, the interest may fall through.
2. If the transferee dies before obtaining possession, the *contingent interest* fails, and the property then reverts to the transferor.
3. It is neither transferable nor heritable.

Difference between vested and contingent interest.—There are *five points of distinction* between a vested and a contingent interest, which can be summarized in a tabular form thus :

VESTED INTEREST	CONTINGENT INTEREST
1. *Definition* Where, on a transfer of property, an interest therein is created in favour a person —	
(i) without specifying the time when it is to take effect; *or* (ii) specifying that it is to take effect *forthwith; or* (ii) on the happening of an event which must happen, such interest is *vested.*	(i) to take effect only on the happening of a specified *uncertain event; or* (ii) if a specified uncertain event shall *not happen,* — such person thereby acquires a *contingent* interest in the property.
2. *Fulfilment of condition*—	
A vested interest does *not* depend upon the fulfilment of any condition; it creates *an immediate* right, though the *enjoyment* may be postponed to a future date.	A contingent interest is solely dependent upon the fulfilment of the condition, so that if the condition is *not* fulfilled, the interest may *fall through.*
3. *Effect of transferee's death*—	
A vested interest is *not* defeated by the death of transferee before he obtains possession.	A contingent interest *cannot* take effect in the event of transferee's death *before* the fulfilment of the condition.
4. *Whether transferable and heritable*—	
(a) A vested interest is *both* transferable as well as heritable.	(a) A contingent interest is *neither* transferable *nor* heritable.
(b) If the transferee of a vested interest dies *before* actual enjoyment, *it passes* on to his heirs.	(b) If the transferee of a contingent interest dies before actual enjoyment, the interest does *not* pass on to his heirs, because such an interest is *inalienable* and *incapable of descending to his heirs.*
5. *Present right of enjoyment*—	
In a vested interest, there is a *present immediate* right, even when its *enjoyment* is postponed.	In a contingent interest, there is no present right; there is a *mere promise* for giving such right, and

such promise may be nullified by the *failure* of the condition.

Condition precedent and condition subsequent

Write a note on: Condition precedent and condition subsequent. B.U. Apr. 99

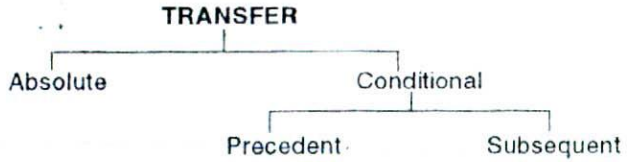
A condition is a provision which makes the existence of a right dependent on the happening or a non-happening of a thing. Conditions are of *three kinds, viz.,* (i) conditions precedent, (ii) conditions subsequent, and (iii) conditional limitations.

A *condition precedent* is one which delays the vesting of a right until the happening of an event. Thus, a gift of a house may be made to *A, provided* he passes the law examination. Till *A* passes the exam, the gift does *not* take effect.

A *condition subsequent,* also called a condition of defeasance, is one which destroys or divests the right upon the happening of an event. Thus, a gift of a house may be made to *A, with a condition* that if he divorces his wife, the house is to revert to the donor. In such a case, the gift of the house takes effect immediately, and if subsequently *A* divorces his wife, the house will revert to the owner.

A *conditional limitation* is a combination of a condition precedent and a condition subsequent; it is one containing a condition which (i) divests an estate that has vested, and (ii) vests it in another person. As regards the prior interest, it is a condition subsequent; but as regards the ulterior interest, it is a condition precedent. Thus, a gift of a house may be made to *A, with a condition* that if he divorces his wife, the house is to go to *B.* It will be seen that as far as *A* is concerned, this is a *condition subsequent, i.e.,* he gets the house immediately, subject to be divested if he divorces his wife. However, as far as *B* is concerned, this is *condition precedent,* because until *A* divorces his wife, the house will *not* vest in him.

This can also be expressed as under :



As seen above, when an interest is created on a transfer of property and is made to depend on a condition, the transfer is said to be a *conditional transfer.* When the interest is made to accrue on the *fulfilment* of the contingency, the condition is said to be a *condition precedent;* but if it is provided that the interest already created is to cease to exist or is to *pass* on to another on the happening of the condition *superadded,* it is called a *condition subsequent.*

So, there are two kinds of conditional transfers : (1) In one, the condition on which the transfer depends is a *condition precedent;* (2) In the other, it is *condition subsequent.* Thus, to take further examples, if a gift is made to *A* on condition she marries *B,* this is a condition *precedent,* as the condition has to be fulfilled *before* the transfer can take effect. Again, a

property is transferred to *A*, but if A digs any excavation so as to diminish the value of the property or to affect the buildings adjoining the property, he will forfeit his interest. This is a *condition subsequent* as the transfer takes *effect before A* can be *divested* of his interest because of the breach of the condition.

Characteristics of a condition precedent.—These are *four*, namely :

1. A condition *precedent* is one which *must* happen before the estate can vest.
2. Where the condition is precedent, the estate is *not* in the grantee until the condition is performed.
3. In the case of a condition precedent being or becoming impossible to be performed or being immoral or opposed to public policy, the estate will *not* vest, and the transfer will be void.
4. A condition precedent is deemed to be fulfilled if it is *substantially complied with.*

Characteristics of a condition subsequent.—There are also *four*, namely :

1. A condition subsequent is one by the happening of which an existing estate will be defeated.
2. Where the condition is subsequent, the estate immediately vests in the grantee, and remains in him till the condition is broken.
3. In the case of an impossible, unlawful or immoral condition subsequent, the estate becomes absolute, and the condition is to be ignored. Thus, where a gift was made with a condition superadded that the donee should marry a particular person on or before he attained the age of 21, and the person named died before she attained that age, it was *held* that the fulfilment of the condition subsequent having become impossible, the estate became absolute. A gift to which an immoral condition is subsequently attached remains a good gift, though the condition is void.
4. A condition subsequent has to be *strictly complied with.*

DIFFERENCE BETWEEN

Condition precedent	Condition subsequent
1. As to vesting of estate—	
(a) *Precedes* the vesting, *i.e.*, the condition comes *before* the creation of the interest.	(a) *Following* the vesting, *i.e.*, the interest is created *before* the condition can operate and divest it.
(b) Vesting of estate is *postponed* till the performance of the condition.	(b) Vesting is *complete* and not postponed.
(c) Interest once vested can never be divested by reason of non-fulfilment of the condition.	(c) Interest, even though vested, is *liable* to be divested by reason of the non-fulfilment of the condition.

(d) Estate is *not* in the grantee until the condition is performed.	(d) Estate *immediately* vests in the grantee and remains in him till the condition is broken.

2. Where the condition is (i) impossible of performance, *or* (ii) immoral, *or* (iii) opposed to public policy—

Transfer will be *void*.	Transfer becomes *absolute* and the condition will be *ignored*.

3. *Validity of condition*—

Must be valid in law.	Need *not* be so, invalidity of the condition being *ignored*.

4. Applicability of the doctrine of *cy-pres*—

It is fulfilled if it is *substantially* complied with (*i.e.*, the doctrine of *cy-pres* applies).	Must be *strictly* fulfilled (*i.e.*, the *cy-pres* doctrine does *not* apply).

Legal and equitable ownership

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

Explain fully the concept of ownership, and distinguish between legal and equitable ownership.

Thus, that ownership which is recognised by the *law* is legal ownership, whereas that ownership recognised by *equity* is called equitable ownership. In many cases, it is seen that *equity* recognises ownership where *law* does not, owing to some *legal defect* in such ownership. Thus, *A*, the owner of shares in a company, transfers these shares to *B*, who pays him the amount of the consideration. However, a proper transfer deed, as required by the rules of the company, is not executed, as a result of which the company refuses to recognise *B* as the holder of those shares. In such a case, the *law* may give no relief to *B*, as the legal requirements of transfer have *not* been complied with. However, *equity* may step in to provide that though *A* is still the legal owner of the shares, he holds them as a *trustee* for *B*, and must give *B* all the dividends and the other amounts realised on account of the shares.

It is also to be remembered that whereas legal rights may be enforced *in rem*, equitable rights are enforced *in personam*, because *equity acts in personam*.

The distinction between legal and equitable estates has little importance in Indian Law, where such distinction is *not* recognised. Thus, under the Indian Trust Act, the *trustee* is the legal owner of the trust property and the beneficiary has no direct interest in the trust property itself. Rather, he has a right against the trustees to compel them to carry out the trust contained in the relevant Trust Deed.

5. Sole ownership and co-ownership

Ordinarily, a right is owned by *one* person only at a time; but *duplicate* ownership is also possible. *Two or more* persons may have the *same* right vested in them. This may happen in several ways, but the simplest case is that of *co-ownership*. The right is an *undivided* unity. Co-ownership may be dissolved into sole ownership of parts (of the whole) by the process known as *partition*.

Write a short note on : Co-ownership. B.U. Apr. 97

Sole ownership means an exclusive ownership of an individual as against the whole world. The right arises in case of a right of ownership. But in case of the ownership of a right, sole ownership may be the ownership of a bare right or a limited right, *i.e.*, a limited right of an encumbrance against the right of someone else. In sole or exclusive ownership, one person alone is the owner, but in case of co-ownership, or concurrent ownership, two or more persons have interest in the same property or thing. Co-ownership is also called duplicate ownership. In case of co-ownership, there is a common subject-matter, a common right and two or more persons sharing the same right.

Write a short note on : Co-ownership and sole ownership. B.U. Oct. 99

A very common example of co-owners is *partners*, who are the co-owners of the goods that constitute their stock in-trade, of the lease of the premises where they conduct their business, and of the debts which their customers owe to them. It would *not* be correct to say that the property owned by them is divided between them, each of them owning a separate part of such property. Thus, if two partners have Rs. 10,000 in the Bank Account of their partnership, it means that there is one debt of Rs. 10,000 owing by the Bank to both of them, and *not* two separate debts of Rs. 5,000 (or in any other proportion) due to each of them individually.

6. Co-ownership and joint ownership

Co-ownership may assume different forms. Its two chief kinds in English law are distinguished as *ownership in common* and *joint ownership*. The most important difference between these relates to the effect of *death* of one of the co-owners. In *ownership in common*, the right of a dead man *descends to his* successors like any other inheritable right. But on the death of one of two *joint* owners, his ownership *dies* with him, and the *survivor* becomes the *sole* owner by virtue of his right of survivorship or *jus accrescendi*.

There are thus two principal kinds of co-ownership, *viz.*, (1) ownership in common and (2) joint ownership. In the first type, on the death of co-owner, his heirs get his share in the co-ownership. But in the case of a joint ownership, the heirs of a deceased joint owner can have no share whatsoever in the right of the deceased in the joint ownership, because with his death, his ownership expires, and the surviving joint owner or owners get *all* that the deceased had in that joint ownership. The right of the survivor or survivors to take away the interests of the deceased joint owner is called *jus accrescendi, i.e.*, the right of survivorship.

Thus, if property belongs to *A* and *B* in equal shares, and if it is a case of ownership in common, on the death of *A*, half the property will pass to the heirs of *A*, the other half remaining with *B*. However, if in the same

case, *A* and *B* were joint owners, *B* would be entitled to the *whole* property, and the heirs of *A* would get nothing.

Another point of distinction between owners in common and joint owners is that joint owners have a possession *per mie et per tout. i.e.*, per parcel and per the whole. It follows therefore, that joint owners take the entire property as also by moieties. In the case of an ownership in common, the co-owners possess the property *per mie* but not *per tout, i.e.*, per parcel and *not* per the whole. Each owner in common is interested in a *part* or in a *share*, but *not* in the *whole*.

Duplicate ownership

The term "duplicate ownership" is sometimes used in cases where two or more persons have an interest in the same property or thing. The best example is that of a *trust*, where the legal owner (*i. e.* the trustee) and the beneficial owner (*i. e.* the beneficiary) *both* have an interest in the same subject-matter (*i. e.* the trust property). (Trusts have been discussed earlier in this Chapter.)

Other examples of duplicate ownership are *co-ownership* and a *mortgage*. When a mortgage or other encumbrance is created, *both* the owner (*i. e.* the mortgagor) and the person in whose favour such interest is created (*i. e.* the mortgagee) have certain interests in the *same* property. (All this has been discussed earlier.)

Right of ownership and Right of possession

A right of ownership is a right of dominion over the property, so as to include the available rights attached to ownership. The right to possess the property in a *de jure* capacity, the right to use the property, to alienate, or even to destroy such property, are all rights of *ownership* which may *not* be present at the same time. But a right to *possession* may give the right to possess the property, but *not* to waste or destroy or alienate the same. In case of the right to ownership, the relation of the owner to the property is *de jure* relationship, but in the case of right of possession, the relation of the possessor to the property possessed by him is only *de facto* possession. If *A* is the owner of a house, his relation to the property is *de jure* relationship. But when he lets it out to *B*, the latter has *de facto* possession of that house.

Possession is the external realisation of ownership, and it is only by possession that a person can establish his right over the property. While ownership is a right, the right of ownership is a mere fact of possession. Possession is *de facto* manifestation or enjoyment of the property. Ownership is the *de jure* right itself. In the words of *Salmond*, "A thing is owned by me when my claim to it is maintained by the will of the States as expressed in the law; it is possessed by me, when my claim to it is maintained by my own self-assertive will. Ownership is the *guarantee* of the law, possession the guarantee *of the facts ..... Possession is the de facto counterpart of ownership.*" According to *Dr. Sethna*, "Just as the soul is to the body, ownership is to possession; or just as the body is requisite for the manifestation of the soul, possession, that is, something external or formal, is useful for the manifestation of the right of ownership."

CHAPTER XII

POSSESSION

DEFINITION

"Few relationships are as vital to man as that of possession, and we may expect any system of law, however primitive, to provide rules for its protection. Human life and human society, as we know them, would be impossible without the use and consumption of material things. We need food to eat, clothes to wear and tools to use, in order to win a living from our environment. But to eat food, we must first get hold of it, to wear clothes, we must have them, and to use tools, we must possess them. Possession of material things then is essential to life; it is the most basic relationship between men and things".— *Salmond.*

Discuss the concept of possession, and state fully the legal consequences of possession.
B.U. Nov. 95

However, mere acquisition of possession would *not* be enough. Society must also provide a climate of respect for individual possession. Thus, if a man could never be sure that the food in his plate, the coat on his back and the tool in his hand will *not* be snatched away by his neighbour, life in such a society would become difficult. It is for this reason that law *must* provide for the safeguarding of possession.

"But the concept of possession is as difficult to define as it is essential to protect". (*Salmond*) It should, therefore, be noted, at the very outset, that the word *possession* has many meanings, depending upon the context in which it is used, and that it would, therefore, be futile to search for *the proper meaning.* Thus, *A* might *possess* a car, *B* might *possess* a right to sue for that car, — whilst *C* might just *possess* an excellent sense of humour. However, the lawyer is concerned with the meaning of the term as used in legal parlance. In this sense, the possessing of a material object can be said to be the *continuing exercise of a claim to the exclusive use of such object.*

Paton rightly points out that, in English law, one can clearly see a struggle between *convenience* and *theory.* Theory seeks to discover an underlying thread, one unitary concept in the interests of consistency and harmony. On the other hand, judges feel reluctant to lay down any general principles and seek to dispose of particular cases so as to render justice in every case. One thing, the learned author says, is clear, and it is that "English law has never worked out a completely logical and exhaustive definition of possession".

ITS ESSENTIALS

Possession involves *two distinct elements,* one of which is *mental or subjective,* the other, *physical* or *objective.* These were distinguished by the Roman lawyers as *animus* and *corpus.* The subjective element is more particularly called *animus possidendi,* or *animus domini.* "Neither of these",

observes *Salmond*, "is sufficient by itself. Possession begins only with their union, and lasts only until one or the other of them disappears".

1. Animus possidendi

Animus possidendi or the subjective element *is the intent to appropriate to oneself, the exclusive use of the thing possessed.* It is an exclusive claim to a material object. It is the intention of using the thing oneself and of excluding the interference of other persons.

MENTAL ATTITUDE OF THE POSSESSOR

To constitute the *animus possidendi*, there must be an intention to possess, and the nature of the intention is governed by the following rules :

(a) The *animus* need *not* necessarily be in the nature *of a claim of right.* It may be consciously wrongful. *Even a thief has possession* which is no less real than that of a true owner.

(b) The claim of the possessor must be one of *exclusive possession,* involving an intent to exclude other persons from the use of the thing possessed.

(c) The exclusion need *not* be *absolute.*

(d) The *animus possidendi* need *not* be a claim *on ones own behalf;* one may possess a thing either on his own account *or* on account of another.

(e) The *animus possidendi* need *not be specific;* it may be *general. X* may intend to possess *all* the books on his book-shelf, though he might have forgotten the existence of some of the books on the shelf. This *general intention* to possess *all* the books in the bookshelf is sufficient *animus* for *X* possessing *every* book on the shelf.

2. Corpus

To constitute possession, the *animus domini* is *not* in itself sufficient; it must be embodied in a *corpus. Corpus is the effective realisation in fact of the claim of the possessor.* Effective realisation means that the fact must amount to the actual present *exclusion of all alien interference* with the thing possessed, together with a reasonable and sufficient *security* of the exclusive use of it *in the future.*

Corpus possessionis

The *corpus* of possession can be discussed :

(i) in relation of the *possessor* to other persons; *and*

(ii) in relation of the possessor to the thing possessed.

RELATION OF THE POSSESSOR TO OTHER PERSONS

So far as others are concerned, a person is in possession of a thing when he can be under a reasonable expectation that he will *not* be interfered with in the use of the thing. He must have some sort of security. "A thing is possessed, when it stands with respect to other persons in such a possession with the possessor, having a reasonable confidence that his

claim to it will be respected, is content to leave where it is". (*Salmond*)

Such security may be derived from any of the following sources :

(i) The physical power of the possession.

(ii) The personal presence of the possessor.

(iii) By a person being able to hide a thing and keeping it in secrecy, so that he avoids the interference of others.

(iv) A person may also enjoy such security by the fact that the members of the society have developed a respect for rightful claims.

(v) A person might enjoy security and protection by the possession of other things. For example, if one possesses the key of a house, by virtue of that possession, protection is afforded to the house and also to other things contained in the house.

RELATION OF THE POSSESSOR TO THE THING POSSESSED

The second element for the purpose of possession is that the relation between the possessor and the thing possessed is such as to admit of his making use of the thing as he likes, consistent with the nature of the thing. There must be no barrier between him and it, inconsistent with the nature of the claim he makes to it.

Thus, in one case, a parcel of bank-notes was dropped on the floor of *A's* shop, where they were found by *B*, a customer. Can *A* claim the notes ? Here, *A* had no possession in law of those bank-notes. Possession requires the concurrence of *two elements*, *animus* or the intention of the possessor with respect to the thing possessed, and *corpus* or the external facts in which this intention is realised, embodied or fulfilled. Neither of these is sufficient *by itself*. A mere *intention* to appropriate a thing will *not* amount to the possession of that thing. Possession begins only with the union of these two elements. In this case, *A* did *not* have the necessary animus, for he did not know of the existence of the parcel at all, although he might have had the corpus, it having been dropped in his shop. [See *Bridges* v. *Hawkesworth*, 21 L.J.Q.B. 75.]

Legal consequences of possession

The following are the legal consequences which flow from the acquisition and loss of possession :

1. Possession is *prima facie* evidence *of title* of ownership.
2. Long *adverse* possession confers title even to property which originally belonged to another.
3. Transfer of possession is one of the chief modes of transferring ownership.
4. The first possession of a thing which as yet belongs to no one (*res nullius*) is a *good title of right.*
5. Even in respect of property already owned, the wrongful possession of such property is a good title for the wrong-doer, as against all the world *except the true owner.*
6. Possession is of such efficacy that a possessor may, in some cases, confer a good title on another, even though he has none himself. (Such

cases constitute the exceptions to the rule contained in the maxim, *nemo dat quod non habet, i.e.*, he who has not can give not.)

KINDS OF POSSESSION

Possession can be classified under the following *four heads* :

1. Corporeal and incorporeal

Corporeal possession is the possession of a *material* object. *Incorporeal* possession is the possession of anything *other than a material* object. In the case of corporeal possession, the actual use or *corpus possessionis* is *not essential*. In the case of *incorporeal* possession, *actual continuous use and enjoyment is essential*, it being the *only* possible mode of exercise.

According to *Savigny*, the essence of possession is to be found in the *physical power of exclusion*. The *corpus possessionis* required at the commencement is the present or actual physical power of *using* the thing oneself, *and of excluding all other persons from the use of it*. Thus, according to *Savigny*, to *acquire* possession of a horse, one must take him by the bridle or ride upon him or have him in one's *immediate presence*, so that one can *prevent* all other persons from interfering; but no such immediate physical relation is necessary to *retain* the possession so acquired.

Salmond criticises the above view on the following *two* grounds :

(a) *Firstly*, he says that, *even at the commencement, a possessor need have no physical power of excluding other persons*. The true test, according to *Salmond*, is *not* the physical power of *preventing* interference, but the *improbability of any interference, from whatever source this improbability arises*.

(b) *Secondly*, the theory of *Savigny* is inapplicable to the possession of *incorporeal things*. Here, there is neither *exclusion*, nor even the *power* of exclusion.

The distinction between corporeal and incorporeal possession has often been criticised on the ground that it is really doubtful whether there can ever be such a thing as *possession* of incorporeal objects. How can one have an actual or physical hold over a thing in the case of incorporeal objects ? It is, therefore, said that an incorporeal right *cannot be possessed*, though it can be *owned*, and that what goes by the name of incorporeal possession is actually *quasi-possession*.

2. Mediate and immediate

Write a short note on : Mediate and immediate possession.
B.U. Apr. 95
P.U. Oct. 99

Again, possession, may be *mediate* or *immediate*. By immediate possession, is meant the direct or the primary possession by a person over a particular object which he acquires or gets directly or personally. It implies necessarily a direct and actual hold over the *corpus* of the thing. It also implies that there is no other intermediary to hold the thing. The mere fact that *X* has a car and that he keeps it in his possession is sufficient to constitute his immediate possession in this sense. But whenever some property or thing is found in the possession of one person on behalf of another, such possession is called immediate possession, as for instance,

the possession of a bailee or a custodian, and the person on whose behalf the thing is possessed is called a mediate possessor. So, if *X* leaves his car with the driver, the driver's possession will be *immediate* possession, whereas that of *X* would be *mediate*.

Distinguish between mediate and immediate possession.
B.U. Oct. 97

Kinds of mediate possession

Mediate possession is of *three* kinds :

(a) The *first* is that which one acquires through an agent or *servant*; that is to say, through some one *who holds solely on one's account, and claims no interest of his own.*

(b) The *second* kind of mediate possession is that in which the direct possession is with a person who hold the thing possessed, both on his own account, *and also* on someone else's account, but who also recognises the owner's superior right to obtain from him the direct possession whenever the latter chooses to demand it. This is the case of a borrower, hirer or tenant-at-will.

(c) The *third* form of mediate possession is the case in which the immediate possession is with a person *who claims it for him until some time has elapsed or some condition has been fufilled.* Securities are instances of this type of mediate possession.

Define possession. Distinguish between mediate and immediate possession. State & illustrate the various kinds of mediate possession.
B.U. Oct. 98

3. Concurrent

As a general proposition of civil law, it is true to say that two persons *cannot* be in possession of the same thing at the same time, for two adverse claims of exclusive use *cannot* both be effectually realised at the same time. But claims which are not adverse, and which are not, therefore, naturally destructive, admit of concurrent or duplicate realisation. Hence, there are several cases of *duplicate possession* :

1. Mediate and immediate possession co-exist, for there are two persons who possess the same article, one of them being in the immediate possession and the other mediate, *i.e.*, not a present or immediate physical hold over the thing, for instance, a servant or an agent may possess a thing on behalf of the master.
2. Two or more persons may possess the same thing in common, just as they may own it in common.
3. Corporeal and incorporeal possession may co-exist in respect of the same material object, just as corporeal and incorporeal ownership may. Thus, *A* may possess a piece of land, while *B* may have a right to pass over that same land. *A's* claim of exclusive use is not absolute, but general.

4. Possession in fact and in law

Possession may *be* factual (*de facto*) or legal (*de jure*). If *X* owns a house, he has *de jure* possession, because he has a legal right to possess the house. Further, if he lets it out to *Y*, his possession is also *de jure*, as the latter is also legally entitled to use the house. However, if a trespasser goes and occupies *X's* house, his possession will *not* be legal possession, although it will be factual (*de facto*) possession.

What is possession in fact ? Distinguish it from possession in law.
B.U. Apr. 97
Apr. 99

Possession in fact, *possessio naturalis*, and possession in law, *possessio civilis*, are *not always identical*. There are *three possible cases* in this respect :

(a) Possession may, and usually does, exist, *both in fact* and *in law*. Thus, when a man has a watch on his wrist, his possession of the watch is *both in fact and in law*.

Define and discuss the concept of possession in fact.
B.U. Oct. 96
Apr. 98

(b) Possession may exist in *fact*, but *not* in *law*. Thus, when a man goes to a shop to buy a watch, whilst he is examining a watch in his hand, or trying it out on his wrist, he has possession thereof in fact, – but *not* in law. Likewise, a diner at a restaurant has possession in fact of the plates, cups, cutlery *etc.* (whilst he is dining); however, he does *not* have possession thereof in law. However, a servant's possession of his master's property is, *for some* purposes, *not recognised* as such by the law, and he is then said to have *detention* or *custody*, rather than possession.

(c) Possession may exist *in law, and not in fact*. This is what English jurists, including Salmond, call *constructive possession*. Thus, *X* may keep his jewellery in a locked box and leave the box with *Y*, retaining its key with himself. In such a case, *X* is said to have *constructive possession* of the jewellery.

Write a short note on : Possession in law.
B.U. Oct. 96

Possession in fact

A legal system may not make any distinction between possession in *law* and possession in *fact*. In such a case, possession would mean actual control over a thing. But such identification is not always practicable. The concept of possession in law is more refined than the concept of possession in fact.

Possession in fact would mean actual control. *Actual control* is the relationship between a person and a thing. As seen above, actual control would be the result of :

(a) The relation of the possessor to other person;

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

Possession in law

Notwithstanding the logical and clear analysis of *Salmond*, the Editor of *Salmond's Jurisprudence* is of the view that a terse definition of possession to apply to all instances of legal possession is impossible. According to him, the basic concept is that of factual possession, (*i.e.*, possession in fact), but this core of the definition is refined by extensions or restrictions in order to include the right to possession in law.

Naturally, the definition of possession has to be in relation to the purpose for which it is defined. The definition of possession may be relevant in the law of larceny (theft), law of bailment, law of possessory remedies etc. Therefore, *a consistent theory of possession is not possible*. One can only conclude that *possession in fact may be absolute, but possession in law is relative*.

5. Adverse possession

Adverse possession is where one person in possession claims exclusive right to the land of another who is *not* in possession. Thus, if *X* is openly in possession of *Y's* land for an unbroken period of twelve years or more, he can claim a title to the land by *adverse possession*. *Y's* legal right of ownership to the land is destroyed by *X's* adverse possession.

The above is also an illustration of the maxim *"Possession is nine points of law"*. Here, *X's* adverse possession for twelve years gave him ownership, being a recognised evidence of *X's* right over the property.

MODES OF ACQUIRING POSSESSION

Discuss the various modes of acquisition of possession. Why is protection extended to possession
P.U. Oct. 95

There are *two* modes of acquiring possession, namely, *taking and delivery*.

1. Taking

Taking is the *acquisition of possession without the consent of the previous possessor*. Such taking may be either *rightful or wrongful*.

2. Delivery

Write a short note on Modes of acquisition of possession.
B.U. June 96
Oct. 99

Delivery is the *acquisition of possession with the consent and co-operation of the previous possessor*. It may be *actual* or *constructive*.

(a) *Actual delivery* is the transfer of *immediate possession*. It is of *two* kinds, according as the *mediate possession* is or is not retained by the transferor.

Write a short note on Modes of acquisition of property.
P.U. Oct. 95

(b) *Constructive delivery* is that which is *not actual*. It is of *three kinds*. The *first* consists in the surrender of the mediate possession of a thing to him who is *already* in immediate possession of it. Thus, a friend, who has borrowed a book from *A* has only the *immediate* possession of such book, the *mediate* possession being with *A*. If later on, *A* wants to present that book to him, *A* need not first take back the book from him and then give him full possession by actual delivery. *A* can effectually transfer the property in the book by merely *surrendering* to *him by A's mediate possession*, i.e., by asking him, while it is still retained by him, to keep it for himself. This is known as *traditio brevi manu*.

The *second* consists of the transfer of mediate possession, while the immediate possession remains in the transferor.

The *third* is known as *attornment*. This is the transfer of mediate possession, while the immediate possession remains outstanding in some third person.

'Possession' and 'Ownership' distinguished

"Possession", says *Ihering*, *"is the objective realisation of ownership"*. It is in *fact* what ownership is in *right*. Possession, whether of a thing, an interest, or a right, is the *de facto exercise* of a claim, whereas ownership is the *de jure recognition* of such a claim. Ownership is the *guarantee of the law*, possession is the *guarantee of the fact*. Possession, therefore, is the *de facto* counterpart of ownership. It is the *external form* in which rightful claims normally manifest themselves.

By ownership in law, is meant the right of an individual or a body corporate or incorporate to possess a thing to the exclusive use of it, to alienate it, and even to destroy it, in such a manner that he does *not* disturb the rights of other people. Ownership, in the strict sense of the term, may be defined as a right to the enjoyment of the uses of the subject-matter, with a right to deal with the same in the manner stated above.

Distinguish between possession and ownership.
P.U. Apr. 97

It is *not necessary* that the owner of the corpus should enjoy *all* the rights or uses at the same time. If *A* is the owner of a motor-car, he can either use it *or* he can lock it up in the garage, *or* he may use it every day or sparingly *or* he may exclude strangers or outsiders from using it; he can gift it away to any one, or even lawfully destroy it, if he so desires. In short, he has exclusive dominion over his motor-car. Such a right is against the whole world, and nobody can disturb him in the peaceful enjoyment of the thing owned by him.

Distinguish between possession & ownership, and bring out the juristic importance of possession.
P.U. Oct. 96

Similarly, in case of incorporeal rights, such as a copy-right, trade-mark or patent, one is fully entitled to the use of all these incorporeal rights to the exclusion of all others. One's right to the ownership or anything that one possesses means the duty of all others to abstain from either trespassing or committing waste or mischief, in such a manner as to disturb him in the enjoyment of his right of ownership.

What do you understand by "possession" ? How is it different from ownership ?
P.U. Apr. 98

Ownership, in its wider sense, has been defined by *Austin* as a right *"indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration"*. According to him, the right of alienation of property is a necessary incident to the right of ownership, but it must be noted that today, there are many restrictions with regard to the alienation of property.

According to *Pollock*, "Ownership may be described as the entirety of the powers of use and disposal allowed by law..... The owner of a thing is *not necessarily* the person who, at any given time, has the whole power *or* use and disposal; very often, there is no such person. We must look for the person having *the residue* of all such power, when we have accounted for every detached and limited portion of it; and he will be the owner, even if the immediate power or control and user is elsewhere". In its widest sense, *Salmond* describes ownership as "the *relation* between a person and any right that is vested in him".

Possession is the external relation of ownership, and to a very great extent, is a valuable piece of evidence to show the existence of ownership. Possession may be described as the right of ownership, that is, as something *factual*. Possession, therefore, is the *de facto* manifestation or enjoyment of the right of ownership. *Ownership is the de jure right, of which possession is the de facto manifestation.* According to *Salmond*, "A thing is *owned* by me when my claim to it is maintained by the will of the State as expressed in the law; it is *possessed* by me, when my claim to it is maintained by my own self-assertive will. Ownership is the guarantee of the *law;* possession is the guarantee of the *facts*..... *Possession is the de facto counterpart of ownership"*.

POSSESSORY REMEDIES

Possessory remedies are those *legal remedies which exist for the protection of possession even against ownership*, whereas *proprietary remedies* are those which are available for the protection of ownership itself.

In many legal systems, possession is a provisional or temporary title, even against the true owner himself. A wrongful possessor, who is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession. Even the true owner, who retakes his own, must first restore possession to the wrong-doer, and then proceed in due course of law on the ground of ownership. As stated earlier, adverse possession for 12 years or more results in ownership in the eyes of law. It is therefore, sometimes, said that *possession is nine points of the law*

Why Possessory Remedies are recognised

"Possession is nine points of law". Discuss.
B.U. Apr. 95

What is possession ? Evaluate the significance of possession and possessory remedies.
P.U. Apr. 95

The concept of possession is of far-reaching importance in view of the fact that legal consequences flowing from the acquisition or loss of possession are quite grave. Possession often amounts to *evidence of ownership*. Thus, a finder of goods becomes the owner thereof as against the whole world, *except* the true owner, by virtue of the fact of possession. Likewise, by adverse possession for *twelve years or more*, a person becomes the legal owner of the property possessed, and the right of the original owner is extinguished by perfect negative prescription.

Savigny points out that the protection of possession is of considerable advantage for protecting citizens and their property, and for the maintenance of public peace. The protection of possession is absolutely necessary to prevent forcible interruption and trespasses on the right of property and possession thereof.

As observed by the Court of Exchequer in *Rogers* v. *Spence* (13 M & W 581), "These rights of action are given in respect of the immediate and prevent violation of the rights of property. They are an extension of the protection which the law throws around the person".

Why are possessory remedies recognised by the law ?
B.U. Oct. 97
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The following are the *three main reasons* for providing possessory remedies :

(i) The *evils of violent self-help* are deemed so serious that it must be discouraged by taking away all advantages which any one derives from it. He who helps himself by force must restore it, even to a thief. The law gives him a remedy, and with it he must be content.

(ii) The *second reason* providing possessory remedies is to be found in the serious imperfection of early proprietary remedies. In older legal systems, it was extremely cumbersome to prove one's ownership to recover the property on the ground of the title. Quite often, small technicalities would defeat one's title to property.

(iii) The *third reason* for providing possessory remedies is that it is always more difficult to prove ownership than to prove possession. Therefore, it is considered unjust that a man should be allowed by violence to transfer the heavy burden of proof from his own shoulder to that of his opponent. Everyone should bear his own burden. He who takes a

thing by force must restore it to him from whom he has taken it; let him then prove, if he can, that he is the owner.

POSSESSORY REMEDIES AND ENGLISH LAW (The Doctrine of *jus tertii*)

Under English law, no possessory remedies are granted; yet it has been possible for English law to attain the same aim as that of the possessory remedies by providing the following *three rules* :

(i) Prior possession is *prima facie* proof of title. He who is in possession first in time has a better title than the one who has no possession.

(ii) A defendant is always at liberty to rebut this presumption that the better title is in himself.

(iii) A defendant who has violated the possession of the plaintiff is *not* allowed to set up the defence of *jus tertii.* Under the defence of *jus tertii,* one pleads that though neither the plaintiff nor he has the title, *some third person* is the true owner and the plaintiff is not. This defence will *not* be a valid defence under English law, as prior possession is always a *prima facie* proof of title. Thus, if *A* is in possession of a car which is stolen by *B,* it is not open to *B* to tell the Court that although he himself (*B*) is not the rightful owner of the car, nor is *A,* because the car actually belongs to a third person, *C.*

Though the title of a third person is not a good defence, under exceptional circumstances, English law does consider *jus tertii,* as a good defence. These circumstances are the following :

(a) When the defendant defends the action on behalf of and by the authority of true owner;

(b) When he committed the act complained of by the authority of the true owner; and

(c) When he has already made satisfaction to the true owner by returning the property to him.

ADVERSE POSSESSION

Adverse possession means the possession of a person whereby he claims an exclusive right to the land of another person. Thus, if *X* has openly enjoyed an unbroken possession of *Y's* land for a continuous period of twelve years or more, *X* gets a good title to *Y's* land. In such a case, the true owner's title is extinguished by the possessor, who has exercised adverse possession for the required period of time.

Title by adverse possession is an instance of a title by *perfect negative prescription.* Just as positive prescription creates a right, negative prescription destroys a legal right. In other words, a legal right is completely destroyed by negative prescription.

CASES

The following English cases on *possession* will serve to clarify and exemplify the concepts discussed above.

Cartwright v. *Green* (Desk repair case, (1802), 8 Ves. 405). — In this case, a desk was given for repairs to a carpenter. The carpenter discovered some money in a secret drawer, which he kept for himself. It was *held* that he was guilty of larceny. It follows that the carpenter did *not* obtain possession of the *money* when he obtained possession of the *desk*, but only at the time he discovered it and formed the intention to convert the money.

R. v. *Husdon* (Mistaken cheque case, (1943) K.B. 458. — By a mistake of a Government Department, *X* was posted a letter containing a cheque intended for *Y*. *X* appropriated the cheque to his own use, and the Court *held* that he was guilty of larceny. Although *X* came into possession of the letter innocently, the Court observed that he did *not* acquire possession of the cheque until he became aware of its existence.

Hibbert v. *McKlernarn* (Golf Ball Case, (1948) 2 K.B. 142. — Here, a person took golf balls abandoned by the original owners while he was trespassing on the ground of the Golf Club. It was *held* that he should be convicted, because when he took the golf balls, they were in the possession of the Club, and it was immaterial that noboy knew where they were lying, *or* how many balls were lying abandoned in the Club premises.

Bridges v. *Hawkesworth* (Case of lost notes, (1851), 21 L.J.Q.B. 73). — In this case, *X* found a parcel of notes on the floor of *Y's* shop. It was *held* that *X* had a better title to them as against *Y*, as he was the first to acquire possession. *Y* had not previously acquired possession, because he did *not* know of the existence of the notes till *X* found them.

South Staffordshire Water Company v. *Sharman* (Gold rings case, (1896) 2 Q. B. 44). — Sharman was given the job of cleaning out a pool belonging to a water company and he found some gold rings in the mud at the bottom of the pool. It was *held* that the water company was first in possession of the rings, and that therefore, Sharman had *not* acquired any possessory title to the rings.

Armory v. *Dalamirie* (Chimney Cleaner's case, (1722) I Strage 505). — In this case, the plaintiff, a chimney cleaner, found a jewel while cleaning a chimney, and he took it to a goldsmith in order to ascertain its value. The goldsmith refused to return it to him, and it was *held* that plaintiff had a better title to the jewel as against the goldsmith.

Reg. v. *Riley* (Lamb case, (1853) Dears, 149). — Here, a person drove off with a lamb not belonging to him, along with his own lamb without knowing that he was doing so. After he discovered his mistake, he sold off the lamb with his own. The Court *held* that he was guilty of larceny.

CHAPTER XIII

TITLES

Distinguish between original and derivative title.
B.U. June 96

Write a short note on : Facts establishing title.
P.U. Apr. 95

Every right involves a *title* or *source* from which it is derived. *The title is the de facto antecedent, of which the right is the de jure consequent.*

Now, titles are of *two kinds : original* or *derivative. Original titles* are those that create a right *de novo* (*i.e.*, for the first time), whereas *derivative titles* are those that transfer an existing right to a new owner. Thus, a fisherman catching fish is an instance of an *original title* of the right of ownership, as before him, the right did *not* exist in anyone else. However, when the fisherman sells such fish, the buyer acquires a *derivative title.* In legal theory, no new right is created. That right which is acquired by the purchaser is identical to the one lost by the fisherman, the vendor.

Facts establishing title are of *three kinds* : 1. Vestitive, 2. Investitive, and 3. Divestitive.

1. VESTITIVE FACTS

Definition

A *vestitive fact* is one which determines positively or negatively, the *vesting* of a right in its owner. It is one which either *creates* or *destroys* or *transfers rights*. If *A* gifts a house to *B*, *A's* right to ownership in the house is *divested*, which right then *vests* in *B*. These two are thus what *Salmond* calls *vestitive facts*, although *Bentham* prefers the term *dispositive facts*.

Kinds of vestitive facts

Discuss the different classes of vestitive facts, and show how they correspond to the chief events in the life-history of a right.

Vestitive facts are divisible into fundamentally distinct classes, according as they operate *in pursuance of the will of the* persons concerned, or *independently* of it. In other words, the creation, transfer and extinction of rights are either *voluntary* or *involuntary*.

Acts *in* the law

What is vestitive fact ? Discuss fully the various kinds of acts in the law.
B.U. Oct. 96

An act of a party, technically known as *act in the law*, is any expression of the will or intention of the person concerned directed to the creation, transfer or extinction, of a right, such as a contract or a deed of conveyance. Such an act is also called an *act juridique* (a *juristic act*).

In fact, there is a close connection between an *act in the law* and a *legal power*. Every act in the law is the exercise of a legal power, and the exercise of any legal power is an act in the law.

Discuss fully the concept of vestitive facts.
B.U. Apr. 97
Apr. 99

According to *Holland*, an "act in the law" is an act, the intention of which is directed to the production of a legal result. In his view, it is "a manifestation of the will of a private individual directed to the origin, termination or alteration of rights".

Acts *in* the law are of *two kinds*, which may be distinguished as *unilateral* and *bilateral*. In the former, there is only *one* party whose will is

effective, *e.g.*, a testamentary disposition, the exercise of a power of appointment, the avoidance of a voidable contract etc. A *bilateral* act involves the consenting will of *two or more distinct persons*, as for example, a contract, a conveyance, a mortgage etc. Bilateral acts in the law are also called *agreements*.

Define restitive facts. State and explain the various kinds of restitive facts.
B.U. Oct. 98

Acts *of* the law

An *act of the law*, on the other hand, is the creation, extinction, or transfer of a right *by the operation of the law itself*, independently of any *consent* thereto on the part of the person concerned, as for example, the devolution of the property of a person dying intestate, *i.e.*, without making a will. Similarly, if a decree is passed against *X* by a competent Court, or if *X* is adjudged an insolvent, his goods will be taken in execution by the judgment-creditor in the first case, or will vest in the official assignee in the second case, *whether X likes it or not.*

"The title is the de facto antecedent of which the right is the de jure consequent". Explain fully.
B.U. June 96
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Paton's view

According to the eminent jurist, *Paton*, a *juristic act* is a voluntary manifestation of the will of a person, and this is sometimes described as *act in the law, i.e.*, an act done within the legal frame-work. However, the law may sometimes also bind a person against his will. Thus, there is a duty towards the world at large, *not* to defame or assault others, and so on. Such instances are sometimes classified under the head "*acts of the law*", to contrast this term with juristic acts, which are acts *in* the law.

Analyse fully the concepts of Acts in the law and Acts of the law.
B.U. Apr. 97

2. INVESTITIVE FACTS (TITLES)

Every right involves a *title* or *source* from which it is derived. Thus, according to *Salmond, "the title is the de facto antecedent of which the right is the de jure consequent.* In other words, every right involves a title or source from which it is derived.

Write a short note on : Titles.
P.U. Oct. 98
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The terms used by *Salmond* in the above statement can be clarified as follows : *"Antecedent"* is one which comes prior in time, whereas *"consequent"* is that which follows something. *i.e.*, the result. The term *"de facto"* means *actual* or *real*, whereas the expression *de jure* means *"in law"*. The statement thus means that a title is the actual or real past, as a result of which a legal right has come into existence.

To take an analogy, it is well-known that *crime* has to precede *punishment*. Thus, it can be said that crime is the *de facto* antecedent of which punishment is the *de jure* consequent. In other words, crime has to come prior in time to punishment, and punishment *cannot* come into the picture *unless* a crime has been committed *prior* thereto.

Going back to *Salmond's* statement, one can say that a sale-deed under which *X* purchases a house is the actual thing which gives him a *title* to that house. Thereafter, he gets a *right* to own and possess the house, to keep intruders away *etc.* Thus, *X's title was the de facto antecedent of which his right is the de jure consequent.*

Thus, an investitive fact is one which shows how the right in question came to be created or vested. Thus, a right may be vested in *X* by the law,

as for example, when he enjoyed such right because he is a Judge of a High Court or a Member of Parliament. Again, it may vest in him by the will of the parties to a contract. Thus, *X* may be given certain rights over *Y's* property under an agreement between *X* and *Y*. In the former case, *i.e.*, when the right is conferred by the State, the investitive fact is also called a *privilege,* whereas in two latter cases, the term *title* is more familiarly used.

3. DIVESTITIVE FACTS

Just as facts *create* rights, so do they also *take* them away. *Divestitive facts* are those which either *destroy* rights or *transfer* them to someone else.

Kinds of divestitive facts

Distinguish between original and derivative title.
B.U. June 96

Divestitive facts are of *two kinds, viz., extinctive and alienative.* They are *extinctive* when they *divest* a right by completely *destroying* it. The surrender of a lease to the lessor, for example, divests the right of the lessee, by destroying the lease, and therefore, it is an extinctive fact.

Divestitive facts are *alienative* when they divest an owner of his right by *transferring* it to somebody else. Thus, if the above lessee had, instead of surrendering the lease, transferred it to a sub-lessee, such a transfer would have been an alienative fact. It may be noted that vestitive and divestitive facts are the opposite of each other. If *X* sells a book to *Y*, the right is *divested* from *X* and is *vested* in *Y*.

An *original title* is one in which a right is created *de novo*, *i.e.*, for the first time. A *derivative title* is one in which there is some transfer of an original right, so that its owner gets divested the moment the transferee gets the rights. It means that the transferee derives his title from a derivative title. Thus, if *A* builds a house himself, he acquires an *original* title to it, but if he purchases a house from someone else, his title is *derivative*.

Derivative titles are *alienative* or *extinctive*. Thus, if a person *alienates* his property by sale, then, the one who purchases that property gets a derivative title by reason of such sale. But in case of a debt, if the debtor pays up the debt, the creditor's right against him is *extinguished* by such payment. It means that the right which the creditor had has now been extinguished as a result of the debtor performing his legal duty.

CHAPTER XIV

PRINCIPLES OF LIABILITY

THE NATURE AND KINDS OF LIABILITY

Liability means and signifies *responsibility* for an act or omission. Thus, he who commits a wrong is said to be *liable* for it. Liability, in the words of *Salmond,* is the bond of necessity that exists between the *wrong-doer* and the *remedy* for the wrong. This *remedy* may be either civil or criminal, and thus, liability may be *civil liability* or *criminal liability.* (This distinction has already been discussed.) In cases of *civil liability,* the party who is wronged is entitled to the redress allowed by law, whereas in cases of *criminal liability,* the wrong-doer is made to undergo the penalty prescribed for the wrong.

THEORY OF REMEDIAL LIABILITY

Whenever the law creates a duty, it also seeks to enforce the fulfilment of such a duty. Therefore, the law imposes remedial liability on him who fails to perform such a duty. But there are some exceptional circumstances when law might accept *the right* of the plaintiff, and yet it may *not enforce it.* They are mainly the following :

(i) *Duties of imperfect obligation.* — In such cases, the law *recognises* the right, but does *not enforce* it. For example, the liability of a debtor in the case of a time-barred debt is *recognised* by law, but it does *not enforce,* through its Courts, the claim of the creditor *after* the time has lapsed. Thus, *X* borrows Rs. 500 from *Y,* and fails to return the amount. *Y* does *not* take any action in the matter for a long time, and then when the period prescribed for limitation of suits has expired, files a suit against *X.* In such a case, the Court will *not* afford any remedy to *Y,* and will *not* proceed with the suit as it has become *time-barred.* However, this does *not* mean that the Court denies the fact that *X* owes Rs. 500 to *Y.* It may accept the fact, but at the same time, point out that no remedy is available, as the law helps only those who are diligent, and *not* those who slumber and sleep over their rights.

(ii) *Duty incapable of specific performance due to its intrinsic nature.* — In this case, the nature of the duty or the corresponding right is such that it *cannot* be specifically enforced. For example, everyone has a right to his fair name and reputation, and therefore, there is a corresponding duty imposed on others *not* to violate such right to reputation; but when once such right is violated, it *cannot* be specifically enforced. At best, some compensation can be given to the injured person.

However, this does *not* apply to what are known as continuing wrongs, *e.g.,* nuisance; in such cases, the Court may order the wrong-doer to desist from continuing with the nuisance.

(iii) *Specific performance inexpedient.*— There are some duties, the specific performance of which law might find inexpedient to enforce. Thus, if Mr. *X* promises to marry Miss *Y*, and then, on second thought, feels that Miss *Z* would be a better (and perhaps, even prettier) choice, the law will *not* interfere to compel *X* to marry *Y*. At the most, *X* may be made to pay damages for breach of his promise to *Y*.

PENAL LIABILITY. — Penal liability, as observed above, has, as its main purpose, either directly or indirectly, to punish a wrong-doer. Penal liability arises when the following *two conditions* are satisfied, namely, when a *guilty mind* accompanies a *wrongful act*.

Guilty Mind

Write a short note on : Mens rea.
P.U. Apr. 95

The fundamental principle of penal liability is that the act alone does not amount to crime. It must be accompanied by a guilty mind. *Actus non facit reum nisi mens sit rea.* Therefore, if a person must be held accountable at criminal *law, he must have done some act, and he must have done such act with a guilty mind (mens rea).* No person can be punished *merely because* his act had led to some mischievous result. The law must inquire into the mental attitude of the doer.

Though this is the general principle of penal liability, there may be some *exceptional* cases, when the law might impose absolute or strict liability, as in the case of liabilities created by some special statutes. For example, under some licensing Acts, or under statutes dealing with offences against public health, such strict or absolute liability may be imposed. In those circumstances, the mere act itself becomes punishable. Thus, if *X* parks his car just under the shade of a 'No parking' board, he will *not* be heard to say he was honestly and sincerely not aware of the existence of the board, and that therefore, though his act was wrong at law, he did *not* have a guilty mind.

Act

Penal liability resolves itself into *two* aspects : The *act* and the *nature of the mind behind an act*. The concept of an *act needs* some careful consideration. An act is an event which is subject to the control of the human will.

(1) *Firstly,* the act may be either *positive or negative.* A wrong-doer either does that which he *ought not to do, or* omits to do that which he *ought to do.*

(2) *Secondly,* an act may either be *internal* or *external.* The former are the acts of the mind while the latter are the acts of the body. To think is an internal act, to speak is an external act. Every external act usually involves an internal act, which is related to it, but the converse is *not always true.*

(3) *Thirdly,* an act may be *intentional or unintentional. An act is said to be intended or intentional when it is the outcome of a determination of the person's will directed to that end. In such cases, the act is foreseen and desired by the doer.* It is *unintentional* when it is *not*

the result of any determination of the will and when it is *not* desired. Whether it is an intentional or unintentional act, it may be internal or it may be external and it may be positive or negative.

Three aspects of an act

Every act is made up of *three distinct factors* :

(i) Its *origin* in some mental or bodily activity.

(ii) Its *circumstances.*

(iii) Its *consequences.*

For example, the act of shooting involves *all* these *three* factors. There is physical doing or omitting to do. *Secondly,* a person is in the range of the revolver and also the revolver is loaded. *Thirdly,* the consequences, *i.e.,* the trigger falls, the bullet is discharged and the bullet enters the body of the victim.

Where the law prohibits an act, it prohibits an act in respect of its origin, its circumstances, *and* its consequences. Circumstances and consequences may be relevant or irrelevant. Out of the numerous circumstances and the endless chain of consequences, the law selects some as material, and they alone constitute the wrongful act; the rest are irrelevant. For example, in the case of the offence of theft, during what hour of the day it is committed is irrelevant, whereas in the case of the offence of house-breaking, the hour during which it is committed becomes relevant in assessing magnitude of the liability of the offender. Sec. 456 of the Indian Penal Code considers house-breaking by night as an aggravated offence, attracting a greater punishment, whereas mere house-breaking (*i.e.,* during the day-time) is a lesser offence.

TWO KINDS OF WRONGFUL ACTS

Every wrong is an act which is mischievous in the eyes of the law. An act may be mischievous either in its actual results *or* in its tendencies. The law might punish an act because the act accomplishes certain harm. The law might also punish, in some cases, certain acts, as those acts involve a mischievous tendency. In the case of wrongs of the *first kind, actual* damage *must be* proved. In the case of wrongs of the *second kind, no damage need* be proved. For example, in the case of malicious prosecution, damage must be proved, whereas in the case of libel, no damage need be proved.

Criminal wrongs belong to the wrongs of the *first* kind. In this case, proof of actual damage is *not necessary.* Criminal liability is established by proof of some act which the law considers dangerous in its tendencies; but in the case of civil liability, proof the actual damage is generally necessary, though in some cases, the Civil Courts expose the wrong-doer to liability even without proof of actual damage.

Damnum Sine Injuria

In legal theory, all wrongs are mischievous acts, but all mischievous acts are *not* wrongs. All damage done is *not* wrongful. Such wrongs where

damage is done without injury are called as *"Damnum Sine Injuria." Cases of Damnum Sine Injuria* might fall under *two categories. Firstly,* the harm may be done to an individual; yet because it is *not* against the society at large, the law might *not* consider it as a wrong. For example, competition in trade might cause damage to some traders, yet as it is believed that competition in general will benefit the society at large, it is *not* considered to be a wrong.

Secondly, "Damnum Sine Injuria" might include such cases, where though some harm is done to the community, yet it might *not* be a wrong as the harm done is *trivial or difficult to prove,* or the law considers it inexpedient to attempt the prevention of such acts. For example, Sec. 95 of the Indian Penal Code lays down that an act is *not* an offence if the harm resulting from such act is so slight that no person of ordinary sense and temper would complain of it. *(De minimis non curat lex).* Thus, in one's anxiety to board a crowded train, one may deem it expedient to give a slight push to the man in front; yet, no lawyer in his proper senses would advise the man so pushed to sue the other for *assault or battery.*

CHAPTER XV

INTENTION AND NEGLIGENCE

1. INTENTION

The Nature of Intention

As seen in the last Chapter, a very important ingredient of criminal liability is that the wrong-doer must have a *guilty mind*. The term 'guilty mind' is very general, but in jurisprudence, it is understood in a technical sense. The *guilty mind* that constitutes a condition of liability might be *intention, negligence* or sometimes even *knowledge*, which almost indicates intention; but one does *not* mean that there should be any general kind of guilty mind which does *not* come under either intention, negligence or knowledge.

Intention is the purpose or design with which an act is done. It is the fore-knowledge of the act, coupled with the desire to do it, such fore-knowledge and desire being the cause of the act. Intention may *not* necessarily involve expectation. Intention is the foresight of a desired issue, however improbable, *not the foresight of an undesired issue, however probable*. If *X* fires a rifle in the direction of a man at a great distance, *X* might very well know that the chances of hitting him are very dim. *X* may even *expect* to miss him; yet *X intends* to hit him if he *desires* to do so. In the same way, expectation also does *not* amount to intention. A doctor operating on a patient might *expect* that the operation might result in the death of the patient; yet he does not *intend* the death of the patient. He intends, in fact, to cure the patient by such operation. Very often, one may intend a thing, *not* for its own sake, *but* as a means to an end.

Distinction between *knowledge* and *intention*

Knowledge is the awareness, foresight or even the expectation of the consequence of an act, whereas *intention* is such foresight coupled with desire. When the knowledge is so strong that any person with common sense would consider the result to be the inevitable consequence of the act of the wrong-doer, the law implies desire, and such mental condition will be considered to be intention constructively by law. This is also known as *constructive dolus* (intention). The main difference between knowledge and intention is that in the case of intention, the consequence is desired, whereas in the case of knowledge, the consequence may *not* be desired.

Motive

An intention is the immediate desire and fore-knowledge behind an act. Such desire might be a means for another desire. Such ulterior mental condition is known as the *motive* of the act.

For example, *A* intentionally shoots at *B*, and kills him. He has done *B*

to death with the motive of removing a political rival. In this case, the act of shooting was done with an intention, and such intention was the result of the desire of the wrong-doer to remove his political rival. The *immediate mental condition*, that is, killing the man is called *intention*, and the *ulterior desire*, to remove the rival is called the *motive*. In the case of every wrongful act, these *two questions* might arise: — *Firstly*, whether the act was done intentionally or accidentally? *Secondly*, if the act was done intentionally, why was it done ? The *first* question refers to the *intention* of the man, and the *second* refers to his *motive*.

Relevance of motive and intention in criminal law

Generally in English law, and particularly in criminal law, intention is often the *sole condition for liability*. The general rule is that the *motive* of the wrong-doer is *irrelevant*, whereas his *intention* alone is *relevant*.

A legal act done with a malicious motive will *not* make the act illegal. Conversely, an illegal act done with howsoever good a motive, is *not* tolerated by law. In law, motive rarely plays any part; intention is what the law always looks to. A distinction, therefore, exists and must be made between a man's motive and his intention. The law takes into account only a man's *intention*, and *not* his *motive*. Motive is directed to the ultimate end, good or bad, which a person hopes to secure; his intention is concerned with the immediate effects of his acts. Thus, *A* may poison *B*, a man suffering from an incurable disease, his sole motive being to free *B* from further suffering. Here, the law will consider only the *intention* of *A* in administering the poison (to secure the death of *B*), and *not* the *motive*, however humanitarian such motive might be.

In judging a man's criminality, regard must be had to his primary and immediate intention, and *not* his secondary or remote intention, if intention it may be called — for in reality, it is the motive which the law ignores. A person may act from a laudable motive, but if he intentionally causes wrongful loss, his crime is complete, irrespective of his motive. Where, for instance, a Hindu, acting under a strong religious impulse, seized some cows which a Mohammedan was taking to kill, his motive from the standpoint of a Hindu was virtuous, but his intention being to deprive the lawful owner of the possession of his property, and the means employed being unlawful, he was *held* guilty of theft.

Motive, when relevant

To this general principle that intention alone is relevant, and motive is irrelevant, there are *three important exceptions* :

(1) The first exception is *criminal attempts*. In such cases, as the act in itself has *not* taken place, to assess the liability of the wrong-doer, it becomes necessary to examine the ulterior intent or the motive with which such an attempt was made. For example, one might strike a matchstick with the intention of setting fire to a hay stack, and thus cause wrongful loss to the owner. When the matchstick is struck and when it is taken near the hay stack, if he is prevented from setting fire. To assess whether he is a wrong-doer or not, it

would be necessary to examine his motive. His intentionally striking a match in itself is no wrongful act, as that could have been for a number of reasons, as for instance, for lighting his cigarette. But, if such intentional striking of the match was done with the ulterior intent of setting fire to the hay stack, then it becomes an attempt to commit criminal mischief. Thus, it is the *motive* that makes the act wrongful, though the act in itself could *not* be wrongful.

(2) The second exception consists of those cases in which a *particular intent* forms a part of a *definition* of criminal offence. For example, house-trespass in order to commit an offence punishable with death, is an offence punishable by the Indian Penal Code. In this case, the *motive* with which the house-trespass was committed becomes relevant. Another example is the case of the offence of forgery. The offence comprises of *two* main ingredients. Firstly, making any false document, and secondly, the intent to cause damage or injury to the public or to any person. In the case of making the false document, making the false document is intentional, whereas the ulterior intent of intentionally making a false document is the motive which becomes a relevant ingredient of the offence of forgery.

(3) *Jus necessitatis*. — Though the doctrine that necessity knows no law is *not* recognised as a ground for exempting a person, yet the doctrine is relevant for assessing the measure of liability. (The doctrine is discussed at length later in this Chapter.)

[**Note** : *In civil liability*, motive or the ulterior intent is very seldom relevant, but there are some exceptional cases where motive might become relevant, as in the case of malicious prosecution.]

Four stages in the commission of a crime

Every commission of a crime has the following *four stages* :

(1) *Intention* to commit it.

(2) *Preparation* for its commission.

(3) *Attempt* to commit it.

(4) Its *commission*.

Intention. — Mere intention to commit a crime, *not* followed by an act, does *not* constitute an offence. *The will is not to be taken for the deed, unless* there be some external act which shows that progress has been made in that direction or towards maturing and effecting it. Thus, *B* comes to know that *A* intends to shoot *C* the next day in the market square at 8 p.m. *B* thereupon informs the police about it. The following day, *A* is arrested in the market square a few minutes before 8 p.m. and on his being searched, is found in possession of a loaded revolver. Here, *A* has *not* committed any offence (assuming that he had a valid licence for the revolver). He had, so far, merely *intended* to shoot *C*.

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, however,

punishable when the preparation is to wage war against the State (S. 152), or to commit dacoity (S. 399).

Now, before a person passes beyond the stage of preparation, and reaches a point at which an act is done toward the commission of an offence, he may give up the idea of committing the crime. In that case, he is *not* punishable under the Penal Code, *except* in the two cases mentioned above. In other words, the *law* allows a *locus poenitentiae,* and will *not* hold that a person has attempted to commit a crime, until he has passed beyond the stage of preparation. Thus, *M* who contemplates murder, buys a pistol and takes a railway ticket to the place where he expects to find his victim. He has *not* gone beyond the stage of preparation, and therefore, is *not guilty* of any offence.

Attempt. — An attempt is the direct movement towards the commission of the act *after* the preparations are made. To constitute the offence of attempt, there must be an act done with the intention of committing an offence, and for the purpose of committing the offence, and it must be done in furtherance of the commission of the offence. An attempt can only be manifested by acts which would end in the consumation 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, as when a person, intending to pick another's pocket, thrusts his hand into the pocket, but, to his utter surprise, finds it empty.

If the attempt to commit a crime is successful, then the crime itself is committed; but where the attempt is *not* followed by the intended consequences, S. 511 of the I.P.C. applies. Thus, *A* stoops down behind a rick of corn and lights a match intending to set the rick on fire, but discovering that he is being watched, he just sits down, takes out a cigarette, lights it and blows out the match. Here, the act of lighting a match was a direct overt act converting preparation into attempt. *A* has committed an offence of attempt to set fire to the corn.

The following are instances of attempts to commit murder :

(i) *A,* with the intention of causing the death of a child of tender years, exposes it in a desert. *A* has committed the offence of attempting to murder, though the death of the child does *not* ensue.

(ii) *A,* intending to murder *Z,* buys a gun and loads it. *A* has *not yet* committed the offence. *A* fires the gun at *Z.* He has committed an offence, *even if* the bullet does *not* hit *Z.*

(iii) *A,* intending to murder *Z* by poison, purchases poison and mixes the same with food which remains in *A's* keeping; *A* has *not* yet committed an offence. *A* places the food on *Z's* table or delivers it to Z's servants to place on Z's table. *A* has *now* committed an offence.

Difference between 'preparation' and 'attempt'

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 the offence. *Attempt* is the direct movement towards the commission after the preparations are made. To illustrate, *A* may purchase and load a gun, with the declared intention of shooting his neighbour; but 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, although it fails or succeeds, must create alarm, which of itself, is an injury and 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, but as the injury is not as great as if the act had been committed, only half the punishment is to be awarded under Sec. 511 of the I.P.C.

Commission

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

MALICE

The word "malice" is used in *two different senses* :

(1) In its *ordinary* sense, it means *ill-will, spite, hatred* or *evil motive.* Such malice is called *express* malice or *actual* malice or *malice in fact.*

(2) *Legal* malice or *malice in law* means a *wrongful act* done *intentionally* without just cause or excuse.

(1) Malice in fact (express malice)

Except in cases of torts of (i) malicious prosecution, (ii) defamation on a privileged occasion, (iii) injurious falsehood, and (iv) conspiracy,-malice *in fact is irrelevant.* A *lawful* act does *not* become unlawful *merely* because *it* is done *with a bad motive or malice;* nor is a good motive a *justification* for an act which is otherwise *illegal.* "Where a man has a *right* to do an act, it is *not* possible to make his exercise of such right actionable, by alleging or proving that his *motive* in the exercise was *spite* or *malice* in the popular sense". (*Bowen J.*)

It is only in the four cases mentioned above that the Court will accept proof of *actual malice.* These cases apart, malice, as the term is used in common parlance, is *irrelevant* in the Law of Torts.

Mayor of Bradford v. *Pickels,* (1895) A. C. 587. — In this case, the defendant sank a well on his land, and thereby cut off the underground water from his neighbour, the plaintiff. The plaintiff's well, in consequence, was dried up. In a suit by the plaintiff, it was *held* that the defendant was *not liable, however, improper and malicious his motive might be.* It is *not* unlawful for landowner to dig a well on his own ground, thus drying up his neighbour's, even though his motive in so doing was not to benefit himself but to *injure* his neighbour. A malicious motive *per se* does not amount to an *injuria* or *legal wrong.*

(2) Malice in law (implied malice)

As stated above, malice in law (also called *implied malice*) means a

wrongful act done intentionally without just cause or excuse. Such malice is implied in every case where a person has inflicted injury upon another *in contravention of the law* without just cause or excuse. A man may therefore be guilty of malice in law, even though he acts *ignorantly* or *even with a good motive*.

Quina v. *Leathem*, (1901) A. C. 495. — *A*, without just cause or excuse, induced *B's* workmen to discontinue their work in breach of their contract with *B*. *A* did this prompted by a good motive to do good both to *B* and *B's* workmen. It was *held* that nonetheless *A* was *liable*, inasmuch as the procurement of a breach of contract without just cause was a *tort* and, as such, actionable.

Jus Necessitatis

Necessitatis non habet legem, i.e., 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 should *not* be punished severely. On the contrary, where circumstances so warrant, he ought *not* to be punished *at all*. In such cases, the law might take into consideration *not* the *immediate intent, but* the *ulterior intent, i.e.*, the motive with which such act was committed.

Another argument in favour of recognising this defence to crime is that *punishment* has a *deterrent effect* when the wrong-doer has a *choice*. If the wrong-doer has been under the compelling influence of a motive which is of such exceeding strength that it overcomes any fear that can be inspired by deterrent punishment, then punishment might be 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* observes that "if a man, by the terror of the person's death, be compelled to do an act against the law, he is totally excused, because no law can oblige a man to abandon his own preservation".

For example, where two shipwrecked persons are clinging to a plank, which *cannot* bear the weight of both 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 put the other man away, would the motive of self-preservation absolve the wrong-doer from penal liability ? Following a strict application of the doctrine of *Jus Necessitatis*, the person would *not* be liable.

Limitations of the Doctrine

However, in its practical application, this doctrine may *not* minimise difficulties if the motive of temptation, compelling or otherwise, could be a defence to a crime. It is almost a common fact that *all* crimes have tempting motives behind them. The fear of punishment is necessary precisely to counteract the motive of temptation. Does one argue that when the temptation is greatest, and when the fear of law has to be equally great, then the law should withdraw and yield to temptation ? Therefore, English criminal law, as well as the Indian Penal Code, do *not* accept this doctrine

as well as the doctrine of self-preservation, which could absolve a person of a serious crime like murder.

For example, in *Dudley and Stephens*, (1884) 14 Q. B. D. 173, it was *held* that if a man kills another person with the object of surviving by eating his flesh, when the alternative was certain death by starvation, he could *not* be absolved of the guilt of murder on the basis of *Jus Necessitatis. Probably English Law would consider it only as a mitigating circumstances in assessing the measures of liability.* For that matter, in the above case, though the Court convicted the accused of murder and sentenced him to death, pardon was recommended and granted. But, in principle, in English criminal jurisprudence, *Jus Necessitatis, though relevant for assessing the measure of liability, would not be a ground for releasing a person from all penal liability.*

In the leading English case on the subject, *Dudley & Stephens* (referred to above), 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 themselves, they would die of starvation. In the circumstances, the Court *held* that they were *guilty of murder.*

But take a case like this, *A* and *B* swimming in the sea after a shipwreck got hold of a plank not large enough to support both; *A* pushes off *B*, who is drowned. This, in the opinion of *Sir James Stephens*, is *not* a crime, as *A* thereby does *B no direct bodily harm*, but leaves him to his chance of finding another plank.

Mens Rea

As seen above, the act alone 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.* The doctrine requires that a guilty mind should be associated with the act. The guilty mind must consist of either *intention* or *negligence.* But it might also be added that, very often, even *knowledge* of the consequences will be considered as a part of the guilty mind, because the mental condition of any individual can be ascertained only through his conduct, and it is often 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 of the motive behind the act. Guilt, if any, has to be the immediate intent or negligence. It may further be noted that such *Mens Rea* must extend to all the three parts of the act :

(a) the physical doing or not doing;
(b) the circumstances; *and*
(c) the consequences.

If *Mens Rea* does *not* extend to any part of the act, then there will be no guilty mind behind the act.

Criticism of the Doctrine

Sir Stephens has been rather critical of the doctrine of *Mens Rea.* In

his opinion, this doctrine is misleading. According to him, the doctrine originated when criminal law practically dealt with no offences which were defined. The law gave them certain names, such as murder, burglary, or rape, and left any person who was interested in the matter to find out what these terms meant. Such persons 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 the mental condition was generalised by the term *Mens Rea*. Therefore, *Sir Stephens* thought that at a stage of criminal law where every offence has been well-defined, the general doctrine of *Mens Rea* would be misleading and unnecessary.

Application of the Doctrine to the Indian Penal Code

Whatever the position in English law may be, with reference to the Indian Penal Code, such a maxim is wholly out of place. As *J. D. Mayne*, the learned author of *Criminal Law in India*, has pointed out, "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*. Thus, 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 that a particular act committed by the accused answers the various ingredients of the offence defined in a particular section of the Indian Penal Code.

Mens Rea when not essential

Besides the practical value of the doctrine of *mens rea* being limited in modern developed criminal law, there are *some special circumstances* under which law imposes a strict liability, and such cases may be treated as *exceptions* to the *doctrine of mens rea*.

The following are the *five* exceptional cases where *mens rea* is *not* required in criminal law.

(i) Where a *statute* imposes strict liability, the presence or absence of a guilty mind is irrelevant. Numerous modern legislations in the interest of public safety and social welfare impose such strict liability. In matters concerning public health, food, drugs etc., such strict liability is imposed, *e.g.*, under The Motor Vehicles Act, The Arms Act, in licensing of shops, hotels, restaurants and chemists' establishments. Though in these cases, a strict liability is imposed, the Courts are expected, as far as possible, to protect the liberty of the subject and to satisfy themselves that a particular statute *clearly imposes absolute liability*.

This view of the Privy Council in *Srinivas Mall Bairoliya* v. *Emperor*, (1947) 49 Bom. L.R. 688 (P.C.) was relied upon by the Bombay High Court in *Emperor* v. *Isak Solomon Macmull*. In these two cases, it was stated that it was *not* in every case of absolute prohibition that the question of *mens rea* could arise. It was only in a limited and exceptional class of offences that liability could be imposed without the guilty mind, and according to the Privy Council, such offences must be of a comparatively minor character.

(ii) The *second case* where a guilty mind need *not* be proved is where it would be difficult to prove *mens rea*, provided that the penalties are petty fines; — where a statute has done away with the necessity of *mens rea* on the basis of expediency, strict liability in criminal law may be imposed. Here, in such petty cases, where *speedy disposal* of cases becomes necessary and where the *proving* of *mens rea is not easy*, the accused may be fined even without any proof of *mens rea*.

(iii) The *third exception* to the doctrine of *mens rea* is in the case of *public nuisance*. The justification of this exception is the same as in the case of the first exception. In the interest of public safety, strict liability must be imposed and if one causes public nuisance, whether with a guilty mind or without a guilty mind, it must be punishable.

(iv) The *fourth exception* to the doctrine of *mens rea* is in those cases which are criminal in form, but in fact are *only a summary mode of enforcing a civil right*.

(v) *Another exception* that might be mentioned is the maxim '*Ignorance of law is no excuse*'. If a person were to violate a law without the knowledge of the law, it *cannot* be said that he has intentionally violated the law, though he has intentionally committed an act which is prohibited by the law. In such cases, the fact that he was not aware of the rule of law, and that he did not intend to violate it, is no defence, and he would be liable before the law *as if* he was aware of the rules of law.

Doctrine of Transferred Malice (Generic Intention)

This doctrine lays down that, in criminal law, what is to be considered, as a rule, is the *generic*, and *not* the *specific*, intention. Thus, if *A*, intending to cause the death of *B*, fires at him, but kills *C* instead, he can be said to have committed the murder of *C*. Here, the *generic* intention was to kill a human being, while the *specific* intention was to kill a particular individual, *B*. The generic intention has been carried out, though the specific intention has *not* been effectuated. In these circumstances, the law holds *A* guilty of *C's* murder, as the law looks merely at the generic (or general) intention of *A*. However, if *A* intends to kill a tiger, and instead kills *B*, there is no question of holding him guilty of *B's* murder, as the injury intended was of one kind and the one inflicted was of a different kind, as *A* had no intention of killing *any* human being.

This doctrine is also referred to as that of *transmigration of malice*. Thus, if *A* without any reason or excuse, fires into a crowd of persons and kill one of them, he is guilty of murder, – although he may *not* have *intended* to kill that particular individual who received the mortal shot. This is again an example of the doctrine of *transmigration of malice*.

Problem : *X* mixes poison with some sweets and leaves it at a place where his enemy *Y* is to pass by, with the intention that *Y* may eat them and die. However, it so happens that his friend, *Z*, passes by, sees the sweets and eats them, as a result of which *Z* dies. Is *X* guilty of murder of his friend *Z* ?

Ans. — *Yes*, because, though *X* had a specific intention to kill *Y*, his generic intention was to kill a man, and it is this generic intention that the law takes into consideration.

(S. 301 of the Indian Penal Code also deals with the doctrine of generic intention.)

Presumption of Innocence

The rule that everyone is presumed to be innocent till he is proved to be guilty is sometimes spoken of as if it was peculiar to the administration of criminal law. What this rule actually means is that a person who is accused of a crime is *not* bound to make any statement or to offer any explanation of circumstances which throw suspicion on him. He stands before the Court as an innocent man *till* he is proved to be guilty. It is the business of the prosecution to prove him guilty, and he need do nothing but stand by and see what case has been made out against him. The prosecution is bound to prove the guilt beyond reasonable doubt, without any help from the accused.

However, if it is the defence of the accused 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. Thus, after the prosecution proves that *A's* death was caused by a bullet from a gun in *B's* hand, it is open to *B* to prove that he was acting in self-defence. The onus is on the Defence Counsel to show that when the bullet went off, *B* was merely acting in self-defence.

Presumption of innocence in Modern Criminal Law

The doctrine of presumption of innocence is the outcome of a particular valued political philosophy in which individual liberty was valued very highly. The believers in this philosophy thought that *it is better that nine guilty men escape, rather than one innocent person be hanged.*

But of late, with modern emphasis on social welfare rather than the abstract principle of the individual liberty, this doctrine of presumption of innocence has undergone considerable modification. There are various statutes negativing the presumption of innocence. For example, Prohibition Acts, the Weights and Measures Act, the Prevention of Adulteration of Food Act etc., restrict the application of this doctrine of presumption of innocence to a considerable extent. Under these Acts, it is *not necessary* for the prosecution to prove that the accused is guilty beyond reasonable doubt. On the other hand, once the prosecution makes out a *prima facie* case, the burden will be on the accused to prove that he is innocent.

Presumption of innocence negatived in some offences under the Indian Penal Code

It may be interesting to note that under the Indian Penal Code also, there are certain offences relating to trade-mark, property-mark and currency notes, where the burden of proof of innocence is shifted on the accused in particular, in the following cases :

(i) Any person selling goods marked with counterfeit trade-mark or property-mark is punishable, – unless *he proves* that he acted innocently and that he had taken all reasonable precautions : S. 486.

(ii) Any person making a false mark upon any receptacle containing goods is punishable, – unless *he proves* that he acted without intent to defraud : S. 487.

(iii) Any person using such false mark is punishable, – unless *he proves* that he acted without the intent to defraud : S. 488.

(iv) Any person making or using of documents resembling currency notes or bank-notes is punishable and if his name appears on such documents, it shall be presumed that he made the document, until the contrary is proved : S. 489E.

The measure of criminal liability

What is meant by liability ? How does tortious liability differ from criminal liability ? P.U. Apr. 98

After discussing the condition of criminal liability and also the incidence of criminal liability, the various elements which must be taken into account in determining the appropriate *measures of punishment* may now be discussed. These factors will be taken into consideration, *not* to ascertain the existence of liability, *but* only to assess the measure of punishment. Generally speaking, *three elements* are taken into account to determine the appropriate measure of punishment :

(i) *The motive of the offence.* — Other things being equal, the greater the temptation to commit a crime, the greater should be the punishment. The *main object of punishment* is to deter a probable wrong-doer from committing an offence, by advancing the threat of punishment and thus neutralising his natural motive. The stronger the natural motives are, the greater has to be threat. If the motives are *not* strong, as for instance, when there has been sudden and grave provocation, then naturally, the punishment also has to be milder in measure.

(ii) *The magnitude of the offence.* — Other things being equal, the greater the evil consequences of the crime, the greater should be its punishment.

Some might argue that this consideration is irrelevant. Punishment should be measured by the profit derived by the offender, and *not* by the evil caused to other person. Therefore, it can be argued that motive alone should be the measure of punishment, and *not* the magnitude of the crime.

Explain the concept of liability and its kinds. Do you think that the concept of tortious liability has undergone a change ? Explain. P.U. Oct. 98

But *Salmond* points out *two reasons* for taking the magnitude of the offence into consideration for assessing the measure of criminal liability :

(a) The greater the motive of any offence, the greater is the punishment which it is profitable to inflict with the hope of preventing it. If theft and murder were committed with the same motive, and if the punishment given to them were the same, the preventive strength of the punishment in the case of murder would be weaker.

(b) The *second reason* is that where there are alternatives to an offender to commit offences of smaller or greater magnitude, if the punishment happened to be the same for both of them, there is greater likelihood of his committing the offence of greater magnitude. For example, if a man has opportunity of either causing simple hurt or grievous hurt, and if the punishment for both of them was

the same, it is more likely that he would cause grievous hurt rather than simple hurt. The fear of greater punishment might prevent him from committing the offence of a greater magnitude.

(iii) *Character of the offender.* — The worse the character of the offender, the more severe should be the punishment. In case of habitual offenders and hardened criminals, the deterrent effect of law would have diminished, whereas in the case of first offenders and people of good character who have unfortunately deviated into crime, the punishment has greater deterrent effect; therefore, a smaller measure of it would be sufficient. Juvenlie offenders and first offenders may thus be treated leniently by law. He who kills a man merely to facilitate him in picking the victim's pocket, deserves to be treated without mercy, whereas he who commits homicide in retaliation for some intolerable insult or injury inflicted on him by the victim, deserves much lesser punishment.

2. NEGLIGENCE

Definition

Negligence essentially consists in *the mental attitude of undue indifference with respect to one's conduct and its consequences.*

The term "*negligence*" has been defined by *Baron Alderson* as the *omission* to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would *do, or doing* something which a prudent and reasonable man would *not* do. In other words negligence may exist in *non-feasance* or *mis-feasance.*

In all cases of negligence, one can trace (i) a duty to take care, *and* (ii) a breach of such a duty. Such a duty may exist as a *general duty* under the law, *or* as *a special duty* under a contract between two or more persons. Thus, the concepts of *negligence* and *duty* are co-relative. Negligence arises only when there exists a corresponding duty to take care.

Austin defines negligence thus — "In cases of negligence, the party performs *not* an act to which he obliged, — he breaks a positive duty". Actionable negligence consists in the neglect of the use of the ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.

"It is the duty of a man not to do that which will injure the house of another to which he is near. If a man is driving on Salisbury plain, and no other person is near him, he is at liberty to drive as fast and as he pleases. But if he sees another carriage coming near to him, immediately a duty arises *not* to drive in such a way as is likely to cause an injury to that other carriage".

Temulji v. *The Bombay Tramway Co.,* (1911) 13 Bom L.R. 345. — The plaintiff, in attempting to board a tram-car of the defendant company, which was in motion, set his foot on the foot-board but failed to get a firm grip of the hand-bar; and before he could raise himself into the car he slipped and fell and had his toes injured by the wheels of the car. It was *held* that the plaintiff was *not* entitled to recover damages, as he himself was negligent in trying to get into the car while it was in motion.

Manchester etc. v. *Markland,* (1936) A. C. 360. — The corporation's service water pipe in a road burst, and caused a pool of water to form in the road. The water lay unheeded for three days. On the third day, a frost occurred, the water froze and on the ice so formed, a motor-car skidded and knocked down and injured the plaintiff. The corporation was *not* informed until after this accident that the service pipe had burst.

It was *held* that the corporation was *liable in damages* for negligence, in *not* having taken prompt steps to attend to the leak and so to prevent the road from being dangerous to the traffic.

Austin v. *Great Western Railway,* (1867) 2 Q. B. 442. — *A,* carrying in her arms *B,* her son over three years old and consequently liable to pay half fare, took a ticket for herself, but *not* for *B.* Due to the negligence of the Railway Company, an accident occurred, and *B* was injured. When *A* took her ticket, no enquiry had been made by the servants of the Railway Company as to *B's* age, and there was no intention on *A's* part to defraud the Railway Company. *B* brought a suit for damages against the Railway Company.

It was *held* that any passenger who has been injured by the negligence of the company can sue it in tort if it has invited or knowingly permitted him to enter the train, *whether or not* there is also a contract for carriage between him and the company. Thus, *B* is entitled to recover damages from the Railway Company, for he had been accepted as a passenger.

Standard or degree of care. — The standard by which one has to determine whether a person has been guilty of negligence is the *conduct of a prudent man* in the particular situation. The prudent man is the man who has acquired the skill to do the act under which he undertakes. If a man has *not* acquired the skill to do a particular act he undertakes, then he is imprudent, *however careful he may* be and, however great skill in other things.

The *degree of care* which a man is required to use in a particular situation varies with the obviousness of the risk. If the danger of doing injury to the property of another by the pursuance of a certain line of conduct is great, more care is necessary. If the danger is slight, only a slight amount of care is required. Thus, persons who profess to have special skill or who have voluntarily undertaken a higher degree of duty are bound to exercise more care than an ordinary prudent man.

Dickson v. *Reuters* (1877) 3 C.P.D. 1. — *A* sent a telegram to *B* for the shipment of certain goods. The telegraph company by mistake delivered the telegram to *C. C* acting on the telegram sent the goods to *A. A* refused to accept the goods stating that he had ordered the goods not from *C,* but from *B. C* sued the telegraph company for damages for the loss suffered by him.

The Court *held* that *C* has no cause of action against the company, for the company did not owe any duty of care to *C,* and no legal right of *C* could, therefore, be said to have been ignored.

Sorabji v. *Jamshedji,* (1913) 15 Bom. L.R. 959. — The defendant was driving a party, including the plaintiff, in his motor-car from Deolali to

Igatpuri. The road passed a level crossing. A train was timed to pass the crossing about the time. The defendant, who was driving the car at an excessive speed, got on the level crossing but failed to take the sharp right-hand turn after the crossing. The car left the road just beyond the crossing, jumped down the embankment which was ten feet high and fell into the paddy field below. The occupants of the car, with the exception of the defendant, were thrown out with much violence, and the plaintiff received such grave injuries as rendered him a cripple for the rest of his life. The plaintiff sued to recover damages caused to him by the defendant's negligence. It was *held* that the defendant was grossly and culpably negligent, and that he was liable in damages.

Kinds of Negligence

Negligence can be :

1. Advertent or inadvertent.
2. Gross or slight.
3. Wilful or simple.

1. Advertent or inadvertent

Negligence is of two kinds, *advertent* or *inadvertent*. *Advertent* negligence is commonly termed '*wilful negligence*' or '*recklessness*'. *Inadvertent* negligence may be distinguished as '*simple*' negligence. In the former, the harm done is *foreseen* as *probable*, but it is *not willed*. In the latter, it is *neither foreseen nor willed*. In each case, carelessness, that is, *indifference to consequences*, is present, but in the former case, this indifference does not, while in the latter it does, prevent those consequences from being foreseen.

2. Gross or slight

Some jurists attempt to make a distinction between *gross negligence* and *slight negligence*, implying by the former, a *higher* degree of negligence than that of the latter. No such distinction exists in English law.

3. Wilful or simple

Classifying negligence into *wilful* or *simple* is a rather artificial distinction, and wilful negligence corresponds to *advertent* negligence discussed above, while simple negligence is almost synonymous with *inadvertent* negligence mentioned above.

Theories of Negligence

Two theories of negligence are advocated by jurists :

1. *The subjective theory, and*
2. *The objective theory.*

Attempts have also been made by certain jurists to combine both these theories, as is discussed later.

1. Subjective theory

According to *Salmond*, "Negligence essentially consists in *the mental attitude of undue indifference* with respect to one conduct and its consequences". This is called the *subjective theory of negligence*, and according to this theory, negligence is a *state of mind*

2. Objective theory

According to the other theory, which has been advocated by *Pollock*, "Negligence is the contrary of diligence, and no one describes it as the state of mind". According to this theory, negligence is *not* a particular state of mind or a form of *mens rea* at all, but a particular *standard of conduct. It is a breach of duty of not taking care, and to take care means to take precautions against the harmful results of one's action* and to refrain from *unreasonably dangerous kinds of act.* To drive at night without lights is negligence, because having lights is the conduct of precaution adopted by all prudent men. He who drives without lights in the night has failed in that conduct. Likewise, an inefficient surgeon, however careful he may be subjectively, is negligent, if he does not attain a reasonable standard of conduct required in his profession. To ascertain whether he is negligent or not, one does *not go* to the *state of his mind, but* to the *standard of his conduct.* Similarly, when a railway employee sleeps, and thereby becomes responsible for an accident, he has failed to perform a particular standard of conduct. When he is sleeping, he has no state of mind that can be associated with the accident.

Thus, according to this school of thought, negligence is *objective.* It is to be found in the *standard of the conduct,* and *not in the state of the mind.*

Salmond tried to meet both these illustrations in the light of the subjective theory. The negligent state of the mind of the surgeon, (in the example given above), according to *Salmond,* existed *not* at the time of carrying on the operation, but at the time when he entered into the profession of the surgeon without an appropriate equipment. Similarly, the negligent state of the mind of the railway employee existed, not at the time the accident took place, but at the time he decided to sleep.

Reconciliation of the two theories

Glanville Williams, the former Editor of *Salmond's* work, thinks that these two theories are *not irreconciliable;* rather, they are two aspects of the same problem. According to *Glanville Williams,* negligence might be subjective when a particular consequence is to be distinguished from the intended consequence or the negligent consequence. In this case, the relevant question is whether the wrong-doer intended the consequence, *or* he was just indifferent to the consequence. On the other hand, when it is to be ascertained whether the consequence is accidental or negligent, then the relevant question is whether the wrong-doer exhibited the standard conduct *or* whether he failed to do so. If he exhibited standard diligence, then the consequence is accidental; otherwise it is negligent. Thus, according to him, negligence can be *both subjective and objective.*

Mind-behaviour theory

In this connection, one may also note the opinion of another learned author, *Dr. M. J. Sethna,* who expounds a very interesting theory. He develops what he calls a *mind-behaviour theory of negligence.* By talking a *synthetic approach* to the question of negligence, the learned author

maintains that "*negligence really is a faulty behaviour arising out of a lethargy of the mind or out of faulty thinking. It is both subjective and objective.* It is objective, because it is something in the nature of the external behaviour, and subjective, because it arises from mental lethargy". According to him, one should *not* have compartmental theories of negligence — subjective, objective etc. He calls his theory the mind-behaviour theory of negligence, — the theory of *subjective-objective synthesis.*

Dr. Sethna seeks to elucidate his synthetic theory with an example. Suppose *A* is driving a car and wishes, at the same time, to talk to *B* who is sitting beside him. Here, in doing so, if he also turns his head towards *B*, there is likelihood of an accident, and in this case, *A's behaviour* is faulty. But what is this faulty behaviour due to ? It caused really by *mental lethargy.* Thus, the Objective Theory gives only partial truth. The same may be said about the Subjective Theory. The complete truth is to be found in a synthesis of the two.

WRONGS OF ABSOLUTE LIABILITY

Write a short note on : Theory of strict liability. P.U. Apr. 97

Wrongs of absolute liability are those wrongs to which the law attaches a kind of liability which is somewhat peculiar in that a person becomes liable *without there being any fault on his part.* This is called *absolute liability. Here, the wrong arises from the breach of an absolute duty.* And an *absolute duty may* be defined as "a duty which renders a man liable *without any fault of his, and irrespective* of any consideration of *intention or negligence* on his part". It is absolute, meaning thereby that it is *not necessary* for the injured party to prove any *intention or negligence* on the part of the injuring party, and no amount of care and caution expended by the latter to prevent the damage done to the former will *excuse* him.

The following *four classes of torts* can be classified as wrongs of absolute (or strict) liability :

1. Cases relating to escape of dangerous *things.*
2. Cases relating to escape of *animals.*
3. Cases relating to the use of things in their nature *specially dangerous,* – such as fire, loaded fire arms, explosives, poisonous drugs etc.
4. Cases relating to dangerous *premises.*

(For a detailed discussion of these four types of cases, a reference may be made to any book on the Law of Torts.)

Definition

The requirement of *mens rea* is general throughout the civil and criminal law, but there are numerous exceptions to the rule. The acts for which a man is responsible *irrespective of the existence of either wrongful intent or negligence* are described by *the name of wrongs of absolute liability.* They are the exceptions to the rule, *actus non facit reum, nisi mens sit rea.* A man will be punished for committing these wrongs *even if he did not have a guilty mind.* The law will *not* inquire whether he did them *intentionally, negligently or innocently;* it will presume the presence of the formal condition of liability.

The considerations on which such wrongs of absolute liability are based are numerous, but the most important of these is the difficulty involved from the angle of the law of evidence, in procuring adequate proof of intention or negligence.

Instances

The chief instances of wrongs of absolute liability fall into *three* divisions—

1. Mistake of law
2. Mistake of fact
3. Inevitable accident.

1. Mistake of law

Ignorantia juris non excusat is a maxim recognised by almost every legal system. *Ignorance of the law is no excuse.* When a person has committed a wrong, the law will *not* hear him say that he did *not* have a guilty mind, and that but for his ignorance of law, he would not have done it.

2. Mistake of fact

Write a short note on : Mistake of law and mistake of fact.
P.U. Apr. 97

Although a mistake of law is no cause, a mistake of *fact* is a good defence to excuse a person from liability. Thus, if *A* walks away with *B's* umbrella (which resembles his own) thinking that it is his own, he will *not* be guilty of theft. So, wherever a motive is an essential ingredient of wrong, a mistake of fact is good excuse. *Ignorantia facit excusat.*

A mistake of *foreign law* is treated on the same footing as a *mistake of fact*, and will, therefore, afford a good defence.

In *Basely* v. *Clarkson,* (1682) 3 Lev. 37, there was an action for breaking a close and cutting the grass therein and carrying it away. The defendant disclaimed any title in the plaintiff's close, but said that he too had a close adjoining and that in mowing his own land, he *involuntarily and by mistake,* mowed some grass growing upon the plaintiff's land (intending to cut only the grass upon his own land.) The Court *held* that the defendant was liable, for the act was a voluntary one, though mistaken, and the knowledge and intention with which it was done *could not be ascertained or pleaded in defence.*

Similarly, in *Consolidated Company* v. *Curits & Son,* (1892) 1 Q. B. 495, the owner of certain household furniture assigned it by a bill of sale to the plaintiff. Subsequently, the assignor employed the defendants, a firm of auctioneers, to sell it by auction at his residence. The defendants, who had no notice of the bill of sale, accordingly sold the furniture and delivered it to the purchasers. The defendants pleaded that they had acted *under a mistake* as to the true ownership of the property. The Court, however, *held* that the mistake of fact was no excuse for interfering with the plaintiff's property, and the defendants were *liable* for the value of the property so wrongfully sold and delivered.

3. Inevitable accident

Inevitable accident is commonly recognised as a ground of exemption from liability, *both* in *civil* and *criminal law*.

An inevitable accident is that which could *not* possibly be prevented by the exercise of ordinary care, caution and skill. It thus means an accident which is physically unavoidable. If in the doing of a lawful act, a casualty (which is purely accidental) arises, no action can be taken for the injury resulting therefrom. As was said in an English case, "People must guard against *reasonable probabilities*, but they are *not* bound to guard against *fantastic possibilities*".

Homes v. *Mather*, (1857) L.R. 10 Ex. 261. — The defendant's horses, while being driven by his servant in the public highway, ran away by the barking of a dog, and became so unmanageable that the servant could *not* stop them, but tried to guide them as best as he could. At last, he failed to turn them clear round a sharp corner, and they struck the balcony of the plaintiff's house. The plaintiff, who was standing on the balcony, was injured. It was *held* that no action was maintainable by the plaintiff, for the servant had done his best under the circumstances.

Brown v. *Kendall*, (1850) Cus. 292. — In this case, the plaintiff's and the defendant's dogs were fighting. The defendant was beating them in order to separate them, and the plaintiff was looking on. In so doing, the defendant accidentally hit the plaintiff's eye, inflicting upon him a severe injury. While giving judgment in favour of the defendant, the Court observed, "If in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom".

Nitro-Glycerine Case, (1872) 15 Wallace, 524. — The defendants, who were carriers, received a wooden case for transmission, without being informed of the nature of the contents. The contents were found to be leaking, and the defendants thereupon took the case to their office for examination. While the case was being opened, the nitro-glycerine exploded and the building was damaged. In an action by owner against his lessees, the carriers, it was *held* to be a case of *sheer accident*, and that the defendants were *not in fault*, as they were not bound to know the nature of the contents, unless their appearance excited suspicion. In this case, it was observed : "No one is responsible for injuries resulting from unavoidable accident whilst engaged in a lawful business. The measure of care against accident which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use, if his own interests were to be affected and the whole risk were his own".

Fardon v. *Harcourt*, (1932) 48 T.L.R. 215. — The defendant parked his saloon motor-car in a street and left his dog inside. The dog had always been quiet and docile. As the plaintiff was walking past the car, the dog, which had been barking and jumping about in the car, smashed a glass panel, and a splinter entered the plaintiff's left eye, which had to be removed. In an action for damages, it was *held* that the plaintiff could *not*

recover, as a motor-car with a dog in it was *not* a thing dangerous in itself, and as the accident was so unlikely, there was no negligence in not taking precautions against it.

Stanely v. *Powell,* (1891) 1 Q. B. 86. — The defendant, who was one of a shooting party, fired at a pheasant. One of the pellets from his gun glanced off the bough of a tree, and accidentally wounded the plaintiff, who was engaged in carrying cartridges and game for the party. It was *held* that the defendant was *not liable*. The *ratio decidendi* in this case has been criticised as erroneous, though the decision itself can also be supported on the grounds of *volenti non fit injuria*.

Inevitable accident, however, is *not* a good defence when a man brings or keeps on his land, things which by their very nature are dangerous, *e.g.*, wild beasts, excessive water etc. When a *natural* use is made of land, a man will be responsible only for his negligent acts. However, for a *non-natural* use, the person is responsible for all harm caused to others, whether he was negligent or not. Thus, if a person breeds wild animals like tigers and lions in his compound, he will be responsible for the injury caused by their escape into his neighbour's land, – even if such escape is *not* due to his negligence.

Rylands v. *Fletcher.* — The most important case on the point is that of *Rylands* v. *Fletcher,* (1863) L.R. 3, H.L. 330. In this case, Fletcher was working in a coal mine under a lease. On the neighbouring land, Rylands desired to erect a reservoir for storing water, and for this purpose, he employed a competent independent contractor whose workmen, while excavating the soil, discovered some disused shafts and passages communicating with old workings and the mine in adjoining land. The shafts and passages had been filled with loose earth and rubbish. The contractor did *not* take the trouble to pack these shafts and passages with earth, so as to bear the pressure of water in the reservoir when filled. Shortly after the construction of the reservoir, even when it was partly filled with water, the vertical shafts gave way and burst downwards. The consequence was that the water flooded the old passages and also the plaintiff's mine, so that the mine could not be worked. The plaintiff sued for damages. No negligence on the part of the defendant was proved. The only question was whether the defendant would be liable for the negligence of the independent contractor who was admittedly a competent engineer. In the circumstances, the Court *held* that the question of negligence was quite immaterial. *The defendant, in bringing water into the reservoir, was bound to keep it there at his peril, and was therefore liable.*

The Rule in *Rylands* v. *Fletcher* can be stated as follows : "If a person brings or accumulates on his land anything which, if it should escape, may cause, damage to his neighbours, *he does so at his own peril.* If it does escape and cause damage, he is responsible, *however careful he may have been, and whatever precaution he may have taken to prevent the damage*".

In such a case, the duty is *not* merely the general *negative* duty to *refrain* from active injury, but a *positive* duty to *guard and protect one's neighbours*, lest they suffer harm by reason of dangerous things artificially brought on one's land, and the duty is absolute, because *it is independent of any negligence on the part of the defendant or his servants.*

DOCTRINE OF VICARIOUS LIABILITY

Definition

Normally, the person who is liable for a wrong is *he who does it.* When one man is made answerable for the *acts of another, it is* an instance of *vicarious liability.*

The principle of vicarious liability is almost foreign to the present notions of justice. At the present day, *responsibility is never vicarious*, except in very special circumstances. Modern *civil law*, however, recognises such liability in *two* chief classes of cases :

1. *Masters* are responsible for the acts of their *servants* done in the course of their employment.
2. *Living representatives* are liable, to a certain extent, for the acts of the deceased whom they represent.

1. Master's liability for the acts of his servants

'Vicarious liability' means liability which is incurred *for, or instead of,* another. Every person is responsible for his *own* acts. But, there are circumstances where liability attaches to him for the wrongs committed *by another.* The most common instance is the liability of the *master* for wrongs committed by his *servant.* In these cases, liability is *joint as well as several.* The wrong-doer himself is liable, whether he is a servant or an agent, as much as his principal.

A *servant* is a person who voluntarily agrees, whether for wages or not, to subject himself at all times during the period of service of the lawful orders and directions of another in respect of certain work to be done. A *master* is the person who is legally entitled to give such orders and to have them obeyed. The relation of master and servant exists only between persons of whom one has the order and control of the work done by the other.

There are *three main reasons* why a master is held liable for his servant's wrongful acts :

(a) *Qui facit per alium facit per se*

This maxim means that he who does an act through another is deemed in law to do it himself. Thus, a person who puts another in his place to do certain acts for him, is answerable for the wrongs of the person so entrusted in doing that authorized act or in the manner of doing such an act. From this, it also follows that the master will *not* be responsible for unauthorized acts and acts which arise from the whims or caprice of the servant.

(b) *Respondeat superior*

The master is answerable for every wrong of the servant in the course of the employment, and no express authority of master need be proved. This principle is based on the fact that in many cases, it would be very difficult to prove the express authority of the master.

(c) *Financial considerations*

Another reason for making the master liable for the acts of servants is that the master will be in a better financial position to bear the brunt of the damages awarded by the Court to the injured party than his poor servant. If the rule were otherwise, everyone could escape financial liability by employing servants (who would naturally not be rich enough to pay the damages awarded by the Court), and the aggrieved parties would never be able to recover compensation.

2. Responsibility of living representatives for the acts of the dead

The common law maxim was *Actio personalis moritur cum persona;* a man cannot be punished in his grave. It was held, therefore, that *all actions for penal redress* must be brought against the living offender, and *must die with him.* This old rule has been, to a great extent, abrogated by law. *Criminal* responsibilities, however, *die with the wrong-doer* even today.

Actio personalis moritur cum persona. — At Common Law, if an injury was done either to the person or property of another, for which *damages only* could be recovered in satisfaction, the action died with the person to whom, or by whom, the wrong was done. This was embodied in the maxim *Actio personalis moritur cum persona* (a personal right of action dies with the person.) A personal action did *not* survive on the death, either of the person who sustained *or* of the person who committed, the wrong. The Law Reform (Miscellaneous Provisions) Act, 1934 has however, virtually *abolished* this maxim.

At Common Law, in the case of the death of the person wronged, his executors or administrators could *not* maintain an action for —

(i) *personal* wrongs committed during his life-time, such as assault, libel, false imprisonment, negligence *not* causing his death, seduction; or

(ii) *trespass to his goods* and chattels; or

(iii) *damages for his death.*

Vicarious liability in Criminal law

The doctrine of vicarious liability, though widely applicable in civil law, is *not,* as a rule, applicable in criminal law. The fundamental principle of criminal law is that each man is responsible for his own act. One must not have done an act, but he must also have a guilty mind to be responsible in criminal law. If the master does not have the guilty mind generally the law does *not* attribute the guilty mind of the servant to the master. However, there are some exceptions to this general rule that there exists no vicarious liability in criminal law.

(i) In many cases, the owner of a piece of property is bound to take sufficient care and ensure that it does not harm others. In such cases, the owner *cannot* shirk off his responsibility by proving that he himself was not responsible or negligent, as for example, when he had appointed a competent manager to look after the property. Similarly, an editor of a newspaper will *not* be heard to say that he was *not* aware of a libel which his staff had printed in the newspaper.

(ii) Under the Licensing Acts, licences are issued to specific individuals on account of their ability or standing. They *cannot*, therefore, escape liability by delegating the control or management of the licensed business to others.

(iii) Under Sections 154 and 155 of the Indian Penal Code, the owner of land is liable to a penalty in certain cases where the breach of duty is actually committed by his agent or manager.

(iv) Under Section 34 of the Indian Penal Code, where a criminal act is done by several persons in furtherance of the common intention of all, *each of such persons* is liable for that act in the same manner *as if* it was done by him alone.

CHAPTER XVI

THE LAW OF OBLIGATIONS

"OBLIGATION" DEFINED

According to *Holland*, an obligation is a tie, whereby one person is bound to perform some act for the benefit of another. *Salmond* defines it as "a proprietary right *in personam* or a duty which corresponds to such a right". *Paton* also describes it as that part of the law which creates rights *in personam*. Thus, an obligation is a duty co-relative of a right *in personam*. *Holland* regards an obligation as a tie whereby one person is bound to perform some act for the benefit of another.

An obligation may be regarded *both* as a *right and as a duty*. It is a *right* from the point of view of the person entitled to it, whereas it is *duty* from the point of view of the person who is bound to respect the right of fulfil the duty.

Chose (thing) in action

Write a short note on : Obligation.
P.U. Apr. 98

A *chose in action* (or an actionable claim) is a kind of obligation. It is a right which can be enforced by legal action in a Court of Law.

The Transfer of Property Act defines an *actionable claim* as "a claim to any debt, other than a debt secured by a mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property, *not* in the possession, actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent."

Equitable choses in action are those that were originally enforced by Courts of Equity in England, *e.g.*, beneficial interest in a partnership or a trust fund.

Legal choses in action are those that are enforced by a Court of Law, *e.g.*, insurance policies, bills of exchange, promissory notes etc.

Chose (thing) in possession

Discuss fully the concept of obligation. State and illustrate one of the sources of the obligation.
B.U. June 96

The term *chose in possession* has now almost become obsolete. Choses in possession are opposed to choses in action. As seen above, a chose in action is a proprietary right *in personam*. All other proprietary rights are choses in possession. Thus, money in a man's wallet is a chose in possession; that which was lent to his friend, and is *not* yet returned, is a chose in action. It will be noticed that this distinction between chose in action and chose in possession is based mainly on the distinction between real and personal rights.

KINDS OF OBLIGATIONS *(SOURCES OF OBLIGATIONS)*

Classed in respect of their *sources* or modes of origin, the *obligations* recognised by English Law are *divisible into four classes*. These four classes may also be said to be the *sources of obligations*.

1. Contractual

A contract is an agreement which creates rights *in personam* between the *parties* to it. Contractual obligations are thus those which are created by agreements, which create rights *in personam* between the parties. The rights so created are *generally* proprietary in nature, but *sometimes* they are *not*, as for instance, in the case of a promise to marry.

2. Delictal

By this is meant the duty of making *pecuniary satisfaction* for civil wrongs known as *torts*.

A tortious obligation is a *liability to pay pecuniary damages* for a *civil* wrong, which in English law is confined to those specific wrongs for which the remedy is an *action for damages*, and does *not* include a mere breach of contract, or of a trust or other merely equitable obligation.

3. Quasi-contractual

There are certain obligations which are *not* in truth contractual, but which the law treats *as if they were so*.

Meritorious and Official Obligations

What is obligation ? What are the sources of obligations ?
B.U. Nov. 95

By a *meritorious obligation* is meant the services rendered voluntarily by a person to some property or business or thing for the benefit of the owner, and even without the consent of the owner, who was *not* present at the time when such a voluntary obligation was made and to give his consent to the same. In spite of this, the volunteer who rendered meritorious obligation is entitled to a compensation for the work done or the services rendered by him.

Define obligation, and explain the various kinds of obligations. What are its sources ?
P.U. Oct. 98

If *A*, by mistake leaves goods at the door of *X*, and *X* takes the goods and appropriates them, *X* would be liable to pay a reasonable compensation equivalent to the value of the goods appropriated by him. Similarly, a trader who supplies necessaries to a minor or a lunatic, is entitled to recover a reasonable value of the necessaries supplied by him from the property of such minor or lunatic. So also, a finder of goods can recover, from the true owner, compensation for all the expenses properly and reasonably incurred by him, not only in keeping the goods in a proper condition, but also in finding the true owner. All these are instances of *meritorious obligations*.

Write a short note on : Kinds of obligations.
P.U. Oct. 95
Oct. 96

By an *official obligation*, is meant an obligation or services rendered by public servants, such as Police Officers, members of the Fire Brigade, Inspectors of the Public Health Department and other servants who are bound to help the members of the public who need their help genuinely on certain occasions. Such obligations arise by virtue of their office and are, therefore, called official obligations. These obligations are *in personam*, because they only apply to some particular office or officers.

Write a short note on : Obligations arising out of quasi-contracts.
B.U. Nov. 95

Implied or Quasi-contracts

Contractual obligations are generally voluntarily created; but there are some obligations which are *not contractual* but which are treated as such by law, that is to say, there is no contract in fact, but there is one in the

contemplation of law. Such contracts are called *quasi-contracts* or *implied contracts or constructive contracts*. Thus, if *A* pays a sum of money to *B*, believing him to be his creditor, when, as a matter of fact, he was *not*, he is bound to return the money to *A*, on the assumption that the above sum was given to him by way of a loan.

Such relationships create what are called *quasi-contracts*. *Quasi-contracts* are exceptional kinds of contracts by which one party is bound to pay money in consideration of something done or suffered by the other party; but they are *not* founded on *actual* promises. They arise when one party has so conducted himself that the law says that he must be *deemed* bound as if he made a promise, though in fact he has not. *Quasi-contracts* are, therefore, obligations which though not contracts technically, give rise to *relations which resemble those created by contracts*. Quasi-contracts are based on *the doctrine of unjust enrichment*.

The following five types of quasi-contracts are recognized by the Indian Contract Act :

1. *Claim for necessaries supplied to person incapable of contracting, or on his account*

If a person, incapable of entering into a contract, or any one whom *he* is *legally* bound to support, is supplied by *another* person with *necessaries* suited to his condition in life,—the person who has furnished such supplies is entitled to be *reimbursed* from the property of such incapable person.

Thus, *A* supplies *B*, a lunatic, with necessaries suitable to his condition in life. *A* is entitled to be reimbursed from *B's* property.

A supplies the wife and children of *B*, a lunatic, with necessaries suitable to their condition in life. *A* is entitled to be reimbursed from *B's* property.

2. *Reimbursement of person paying money due by another in payment of which he is interested*

A person who is *interested* in the payment of money which another is *bound by law* to pay, and who therefore pays it, is entitled to be reimbursed by the other.

3. *Obligation of person enjoying benefit of non-gratuitous act*

Where a person *lawfully* does anything for another person, or delivers anything to him, *not* intending to do so *gratuitously*, and such other person enjoys the *benefit* thereof,—the latter is *bound* to make *compensation* to the former in respect of, or to *restore*, the thing so done or delivered.

Thus *A*, a tradesman, leaves goods at *B's* house by mistake. *B* treats the goods as his own. He is bound to pay *A* for them. But, if *A* saves *B's* property from fire, *A* is *not* entitled to compensation from *B*, if the circumstances show that he intended to act gratuitously.

4. *Liability of person to whom money is paid, or thing delivered, by mistake or under coercion*

A person to whom money has been paid, or anything delivered, by *mistake* or under *coercion*, must *repay* or *return* it.

5. *Rights and liabilities of a finder of goods*

A finder of goods is treated, in the eyes of law, as a *bailee* in respect of those goods, and certain rights and liabilities flow from this legal fiction.

4. Innominate.

This class of obligations comprehends all those which are *not* included in the *first three classes*, and are so called because they have no comprehensive or distinctive title. Within this class are included the obligations of trustees towards their beneficiaries.

SOLIDARY OBLIGATIONS

Write a short note on : Solidary obligation.

B.U. Apr. 99
P.U. Apr. 99

The normal type of obligation is that in which there is *one* creditor and *one* debtor. It often happens, however, that there are *two* or *more creditors*, entitled to the same obligation, or *two or more debtors* under the *same* liability. Such an obligation is known as 'solidary'.

Thus, if a debt of Rs. 1,000 is owed by two partners, *A* and *B*, to *X*, it does *not* mean that one debt of Rs. 500 is owed by *A* to *X*, and another of the same amount by *B* to *X*. It is a single debt of Rs. 1,000 owing by each of them to *X*. If either *A* or *B* pays *X* the whole of it, both are discharged from the liability. Likewise, in such cases, the creditor can recover *the full amount* from *only one of the debtors*, and leave that debtor to recover contribution from his co-debtor.

Obligations of this kind are called *solidary*, because, in the language of Roman Law, each of the debtors is bound, *in solidum, i.e.*, the *whole debt*, and *not pro parte, i.e.*, only for a proportionate part of such debt. A solidary obligation, therefore, may be defined as one in which two or more debtors owe the same thing to the same creditor.

Solidary obligations are of *three* kinds—*(a)* Several; *(b)* Joint and *(c)* Joint and Several.

(a) Several

Define obligation. Explain fully the concept of solidary obligations.

B.U. Oct. 98

In case of several solidary obligations, there are as many distinct obligations as there are debtors. Thus, there is a distinct legal tie *(vinculum legis)* in case of each of the debtors, and each debtor is liable for the *full* amount of the debt.

(b) Joint

When there is a single *vinculum legis* in respect of the entire debt, there is a joint solidary obligation. Here, there are two or more debtors, but only one cause of action.

Discuss the nature and sources of obligations. What are solidary obligations ?

B.U. Apr. 95

(c) Joint and Several

In the case of joint and several solidary obligations, each debtor is separately liable for the full debt, *and* all the debtors are also jointly liable for the full debt.

Under the Indian Contract Act, in the case of joint promisors, 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.

In such cases, if the creditor discharges any one of the debtors, the other debtors are *not discharged* automatically. (For details, see the Indian Contract Act, 1872.)

Joint tort-feasors (*i. e.* persons who jointly commit a tort) are likewise liable, jointly and severally, to pay damages under the law of torts.

CHAPTER XVII

THE LAW OF PERSONS

DEFINITION

"A *person* is any being whom the law regards as capable of rights or duties."—*(Salmond)*

In law, there may be men who are not *"persons"*. Thus, for instance, formerly, slaves were destitute of legal personality in a system which regarded them as incapable of rights or liabilities. Like cattle, they were looked upon as *things* and the *objects* of rights, not *persons* and the *subject* of any rights. Conversely, there are in law *persons who are not men or women*. A joint-stock company, for example, is a distinct person in the eyes of law, though *not* a human being.

Under the Indian Penal Code, the word 'person' includes any company or association, or body of persons, whether incorporated or *not*.

What is the legal meaning of a "person" ?
P.U. Oct. 97

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

KINDS OF PERSONS

Persons are of two kinds—*Natural* and *Legal*.

1. Natural

A *natural person* is a being, to whom the law attributes personality in accordance with reality and truth. Natural persons are human beings, and consequently persons in *fact* as well as in *law*.

2. Legal

"A legal person is any subject-matter other than a human being to which the law attributes personality."—*(Salmond)*. A legal person is thus any being, real or imaginary, to whom the law attributes personality by way of a legal fiction where there is none in fact. They are persons in law, but *not* in fact. They are also described as *fictitious*, *juristic* or *artificial* persons, as for instance, a company.

The extension of the conception of personality beyond the class of human beings is one of the most noteworthy feats of legal imagination. Personification conduces so greatly to simplicity of thought and speech, that its aid is invariably accepted, and the thing personified is called the *corpus animus* of a fictitious personality.

Although it is true to a great extent that legal personality involves personification, the converse is not true. Personification is a mere artifice of

speech, whereas legal personality is a definite legal conception. In common parlance, one speaks of the estate of a deceased as if it were a person; it owes debts and is a creditor, but the law does *not* recognise legal personality in such a case. The rights and liabilities devolve upon the heirs and executors, and *not* upon the estate. In other cases, a group of persons is personified as a single person, even though the law recognises no body corporate, *e.g.*, a firm is a collection of the individuals who have formed it; this is a personification, but there is no personality. One talks of the judges as the Court, of the jurors as the jury, yet the jury is *not* a corporation, though personified for the sake of convenience. Legal persons, being the arbitrary creations, of the law, may be of as many kinds as the law pleases, *e.g.*, Corporations are undoubtedly legal persons, and registered trade unions and friendly societies are also legal persons, though *not* regarded as corporations.

Kinds of legal persons

Legal personality is divided into *three varieties*, by reference to the different kinds of things which the law selects for personification :

1. *Corporation* : The first class consists of corporations. *A corporation is a group or series of persons which, by a legal fiction, is regarded and treated as a person.*
2. *Institution* : The second class is that in which the object selected for personification is *not* a *group* or *series of persons*, but an *institution*, for example, a church or university.
3. *Fund or Estate* : The third class is where the *corpus* is some fund or estate devoted to special uses—a charitable fund, for example, *or* a trust estate.

CORPORATION

Definition

A corporation is a group or series of persons which, by a legal fiction, is regarded and treated as a person.

Kinds of Corporation

Corporations are of two kinds : *Corporations aggregate* and *corporation sole*.

(a) Corporation aggregate

Write a short note on : Corporation sole and corporation aggregate.
B.U. Oct. 96

It is *a group of co-existing* persons. *Corporations aggregate* have *several* members at a time. Examples are a *registered company*, consisting of all the shareholders, and a *municipal corporation*, consisting of the inhabitants of a borough. Such a corporation, *e.g.*, a company, is in law something different from its members. The property of the company is *not* the property of the shareholders. The debts and liabilities of the company are *not* attributed in law to its members. A shareholder may enter into a contract with the company, for the two persons are entirely distinct from each other.

(b) Corporation sole

A corporation sole consists of an incorporated *series* of *successive* persons. *Corporation* sole has only *one* member at a time. Examples are the Sovereign, the Postmaster-General, the Solicitor to the Treasury, the Secretary of State for War, the Attorney-General of India, the Advocate-General of Maharashtra, and so on.

Define person. What are the objects selected by the law for incorporation ? B.U. Apr. 99

In the case of a corporation sole, the element of legal fiction involved is that the law assumes that, in addition to the *natural person* administering *for the time being* the duties and affairs of the office, there is a *mythical* being who is, in law, the *real* occupant of the office and who *never dies or retires.* The living official is merely an *agent or representative* through whom this legal person performs his functions. The human official comes and goes, but this offspring of the law remains forever.

The uses and advantages of incorporation

By incorporation is meant a group or series of persons to be treated as a person by legal fiction, as for instance, a company. This has the following advantages :

What are the uses and purposes of incorporation ? B.U. Apr. 95, Nov. 95, June 96, Oct. 97, Apr. 98, Oct. 99

(1) When a large number of individuals have a common interest vested in them, and therefore, have to act in common in the *management and protection* of such interest, incorporation serves a useful purpose. It would be impossible for the *large multitude* of individuals, probably scattered over vast distances, to act in a concerted manner in the *management of their common interest.* In such circumstances, incorporation, by attributing a personality by legal fiction to the multitude, enables the fictitious personality of the corporation to act promptly and decisively in the best interests of the management and protection of the common interest. A modern commercial venture, with the aid of the capital of large number of people, would be impossible but for the device of incorporation.

(2) *Independent corporate existence* is one of the most important advantages of incorporation. Unlike a partnership, which has no existence apart from its partners, a company is a *distinct legal person* in the eyes of law. By incorporation, a company is vested with a distinct corporate personality, which is distinct from the members who compose it. A well-known illustration of this legal principle is the decision of the House of Lords in *Salomon* v. *Salomon Co. Ltd.,* (1877 Appeal cases, 22).

"Personality of a corporation whether sole or aggregate is quite distinct from that of its members". Discuss. B.U. Apr. 97

(3) Similarly, if a series of persons, not all existing at the same time, but having successive existence one after the other, have a common interest, and if there need be the *continuity of management* and *protection of interest,* incorporation becomes a useful device.

Perpetual succession is thus another advantage of incorporation. Members may come and members may go, but the Company goes on forever.

(4) Another advantage of incorporation is that this device is used to enable traders to trade with limited liability; but for incorporation, those who participate in a commercial adventure would be personally liable to an unlimited extent. In modern times, where people invest their money, without being able to exercise effective control and management over the commer-

What is a legal person ? Is a corporation a person distinct from its members? How ?
B.U. Oct. 98

cial adventures, the risk they would be assuming would be enormous. The device of incorporation enables them to invest their money in a commercial adventure without taking any risk greater than the investment they have made.

(5) Yet another advantage is that a company, being a legal person, is capable of owning, enjoying and disposing of property in its own name. The shareholders are *not* the private and joint owners of the company's property.

Thus, incorporation helps the property of the company to be clearly distinguished from the property of its members (shareholders). In a partnership, on the other hand, the distinction between the joint property of the firm and the private property of its partners is often not so clear and distinct.

(6) The *freely transferable nature of the shares* of a company is yet another advantage of incorporation. A shareholder (except a shareholder in a private company) can sell his shares in the market and get back his investment without going to the company to withdraw his money.

(7) Lastly, a body corporate *can sue, and be sued, in its own name.*

Acts and liabilities of a Corporation

A legal person is incapable of conferring authority upon an agent to act on its behalf. The authority of the agents and representatives of a corporation is therefore conferred, limited and determined, *not* by the *consent* of the *principal, but by the law itself.* It is the law that determines who shall act for a corporation and within what limits his activity must be confined.

Write a short note on : Liabilities of a corporation.
P.U. Oct. 95

A corporation *cannot* be sued, *unless (i)* the act done *was within the scope of the agent* employed by it; and *(ii) the act done was within the purpose of the incorporation.* The same principles which govern the *vicarious liability* of a *principal* for the torts of his *agents,* or of a *master* for torts of his *servants,* govern the liability of a *corporation* for the torts of its *agents* and *officials.*

When is a corporation liable in law for its acts ?
B.U. Oct. 97

But a corporation can sue and be sued, for *(i)* defamation, *(ii)* deceit, and *(iii)* malicious prosecution. When the suit is against the corporation for any of these torts, the plaintiff, in addition to the necessary ingredients, must prove that the *servant* or *agent* was acting *in the course of the employment* and the act complained of was done by him *in the course of the employment,* and for the *benefit* of the corporation and *within the scope of his authority.* If the act is *ultra vires,* the corporation is *not liable.*

Explain the civil and criminal liability of a corporation for the acts of its agents.
B.U. Oct. 96

A corporation *cannot* maintain an action for *personal wrongs,* for by their very nature, such injuries *cannot* be inflicted on a corporation.

A corporation may sue for a libel or any other wrong affecting property or business. It *cannot* maintain an action for a personal wrong, *e.g.,* libel charging the corporation with corruption, for it is only individuals, and *not* the corporation in its corporate capacity, who can be guilty of such an offence.

A corporation is liable for *torts* committed by its *agents* or *servants* to the *same* extent as a *principal* is liable for the torts of his *agent* or an

employer for the torts of his *servant, provided* the tort is committed *in the course of doing an act* which is *within* the scope of the powers of the corporation. It may thus be liable for assault, false imprisonment, trespass, conversion, libel or negligence. It was thought *at one time* that a corporation could *not* be held liable for wrongs involving malice or fraud, on the ground that to support an action for such a wrong, it must be shown that the wrong-doer was actuated by a motive in his mind and that "a corporation has no mind". But it is *now settled* that a corporation is liable for wrongs even of malice and fraud. A corporation, therefore, may be sued for *malicious prosecution* or for *deceit.*

When is a corporation liable for the following acts of its agent :
(a) Tortious act
(b) Breach of contract
(c) Crime.
B.U. Oct. 98

In connection with the topic of corporations in India, an *idol* of a Hindu temple stands in the *same* position as a corporation. So also does a *mosque.* They are recognised as *juristic persons* capable of owning property. An idol can, therefore, be sued in respect of tort committed by its *shebait, manager or trustee.*

A corporation, however, will *not* be liable if the act of its servants is *not authorised* by the articles of its incorporation.

The leading case on the subject is *Poulton* v. *London and S. W. Rly. Co.* - In that case, a station-master, in the employ of the defendant company, arrested the plaintiff for refusing to pay the freight for a horse that had been carried on the defendant's railway. The railway company had authority, under an Act of Parliament, to arrest a person who did not pay *his* fare, but none to arrest a person for non-payment for the carriage of *goods.* It was *held* that the railway company was *not liable.* The company, having no power itself to arrest for such non-payment, it could *not* give the station-master any power to do the act. The plaintiff's remedy for the illegal arrest in such a case would be against the station-master only.

Define a legal person. Discuss the nature of liability of a corporation for the acts of its agents and representatives.
B.U. Apr. 95

Unincorporated associations. — An unincorporated association of persons has no legal entity and *cannot* sue or be sued as such. Thus no action will lie against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of any trade union or its members as a body, in respect of any tortious act alleged to have been committed by or on behalf of the trade union in any Court : S. 4, Trade Disputes Act, 1906. The provision confers immunity on Trade Unions in respect of any tort, whether connected with a trade dispute or not, but the individual tortfeasors remain personally liable. It is to be noted, however, that immunity does *not* extend to any act done in contemplation or furtherance of any illegal strike or lock-out : S. 1, Trade Disputes and Trade Unions Act, 1927.

Creation and extinction of Corporation

The birth and death of legal person are determined, *not* by *nature,* but by *law.* They come into existence at the will of the *law* and they endure during its pleasure. They are, in their own nature, capable of indefinite duration, but they are *not* capable of destruction. The extinction of a body corporate is called its *dissolution.*

What are the theories of corporated personality ? Which theory, according to you, explains it properly ? Give reasons.
P.U. Apr. 99

Theories of Corporation

There are *two* theories regarding the legal personality of a corporation : 1. The *fictitious* theory, and 2. The *realistic* theory.

1. 'Fictitious'

According to this theory, a corporation is a group of persons which, by a legal fiction, is *regarded, and has treated itself, as a person.* The personality of a corporation is *fictitious* being which is quite distinct from, and stands over, its corpus, namely, shareholders or members. The fictitious being is without a soul or body, *not visible,* save to the eye of law, as in the case of a company.

2. 'Realistic'

According to the *realistic theory,* a corporation is nothing more, in law or in fact, than the aggregate of its members conceived as a unity, and this organisation of human beings is a *real person* possessed of a real will of its own and capable of actions and of responsibility. The realistic theory maintains that the corporation has a real psychic personality *recognized,* and *not created,* by law.

What do you understand by the term "legal personality" ? What are its theories ?
P.U. Oct. 98

The reconciliation of the Fictitious Theory and the Realistic Theory of the personality of the Corporation

Though of these two theories, the fictitious theory of the corporation is more acceptable, yet there are some judicial decisions which hold to the contrary. For example, in *R.* v. *I.C.R. Houlegh,* it was *held* that a limited company can commit an offence such as the offence of conspiracy to defraud, in spite of the fact that it can form its intention only through its human agents. The implication of this decision is that a corporation, though it has no mind or will of its own, can be guilty of an offence involving *mens rea,* but at the same time, such *mens rea* can be entertained by the company only through its human agents. This result can be achieved by the application of the *Doctrine of Lifting the Corporate Veil.*

In conclusion, one might agree with *Dr. Sethna* and say that the personality of the corporation is neither truly real nor truly fictitious, it is *quasi-real or quasi-fictitious.*

State as a corporation or legal person

Man is a social and community-building animal, and he has given expression to many aspects of this human characteristic by setting up various associations. Perhaps, from the human point of view, of all the forms of human society, the greatest is the State. A modern State today performs multifarious activities, which would cover up the entire life of an individual. In the words of *Edmund Burke,* it is a partnership in every art, and a partnership in all science and a partnership in every virtue. The question is, whether the State is endowed with a real personality and are the members who owe allegiance to it entitled to the protection of the State ?

In England, the State is an organised society, but it is, in no way, a person or a body corporate. It owns no property, is capable of no acts, and

has no rights nor any liabilities imputed to it by the law. *In India*, on the other hand, the State being the ultimate sovereign through its electorate, the legal opinion is in favour of considering the State as a corporate body consisting of three distinct departments, the legislature, the executive and the judiciary.

In the same manner, the question is whether the Commonwealth is a body politic and corporate, and is it endowed with personality ? With regard to England, one knows that the King is, in law, no mere mortal man. He has a double capacity — *not only* a natural person *but also* a body politic, *i.e.*, a corporation sole. The King is merely the outward visible wearer of the Crown, merely the living representative and agent of the invisible and underlying *persona ficta* in whom are vested the powers and prerogatives of the Government by the law of the realm. It is, therefore, quite proper to speak of the *Crown*, rather than of the *King*. Therefore, the Empire as a whole could *not* be recognised as a personality corporate under law, so also, the constituent self-governing States would *not* be considered as corporate bodies.

DOUBLE CAPACITY AND DOUBLE PERSONALITY

According to English Law, a man may have different capacities. For example, he may have power to do an act in an *official or representative capacity, or* he may have power to do an act in his *private capacity* or on his own account. Thus, if a person is acting as a trustee, he may at times have the capacity to act as the trustee, and at other times, the capacity to act on his own account.

But double capacity must not be mistaken for double personality. Double capacity *does not* connote double personality. English common law did *not* recognise double personality of the individual. Under common law, one could *not* sue himself; one could *not* contract with himself, but of late, some exceptions have been introduced by statute whereby a man may be able to convey property to himself, as in the case of creation of a trust. It must be noted that such cases of *double personality are exceptional,* and the main *principle is that a person cannot enter into a legal transaction with himself.* That means English law generally *does not recognise double personality, though it recognises double capacity.*

LEGAL STATUS OF ANIMALS, UNBORN PERSONS AND DEAD MAN

1. Lower animals

Discuss the legal status of lower animals, dead men, and unborn persons.
B.U. Nov. 95
P.U. Oct. 97

In law, the lower animals are *not regarded as persons*, but are regarded as *things*. They have no natural or legal rights. According to *Salmond*, they are merely things — often the *objects* of legal rights and duties, but *never* the *subjects* of such rights and duties.

It is true that in archaic codes, animals were punished with death if they were guilty of homicide. Thus, *Dr. Havelock Ellis* gives the instance of the *trial of cock for witchcraft.* (Incidentally, the unfortunate cock was found guilty, and condemned to death.) In ancient Hindu Jurisprudence also, the

killing or molestation of harmless animals like bulls, cows, oxen, swans, squirrels and pigeons was made punishable with *fine*.

To-day, however, an animal *cannot* be punished, although certain laws allow an animal to be shot if it is absolutely dangerous. So also, even under modern law, a trespassing beast may be *distrained damage feasant*, and kept until its owner or someone else interested in the beast pays compensation. Thus, in India, under the Cattle Trespass Act, the occupier of land, over which another's cattle have trespassed, can have such cattle sent to the public cattle pound.

Write a short note on : The legal status of lower animals.
B.U. Oct. 98
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A beast, therefore, is incapable of possessing legal rights as also legal duties, and no legal system in the world recognises its rights. No animal can be the owner of any property, even through the medium of a human trustee, though a person may make a valid bequest to trustees in favour of a particular animal like a dog, a parrot or a cat. But, such a bequest must be in the nature of a charitable and *not* a private bequest, and is valid only if it does *not* offend against the rule of perpetuity. A bequest in favour of a particular animal is *void*, if perpetual, because only a charitable bequest may be made in perpetuity. Thus, "The Beaumont Animal Benevolent Society", a charitable institution for promoting such activities such as opposing all cruel sports involving pursuit of animals like deer, stag, fox, rabbits, birds, fish etc., was *held* to be *void*, because it was created in perpetuity and was a private trust. (*Grove* v. *Lawrence*, 1929 1 Ch. 557)

But in another case, where a testator gave £ 50 per annum to trustees for the maintenance of his favourite mare, to last until the mare's death, it was *held* to be a *valid* bequest. (*Pettingall* v. *Pettingall*, 11 L.J. Ch. 176)

A charitable trust is for the advancement of human beings. So, a trust for the benefit of animals generally *or* a class of animals is *void*, if it is to last for perpetuity. But a trust created for the welfare of cats and kittens needing care and attention was *held* to be *valid*, for it was meant to develop the emotions and the finer sense of *human nature*, of which care of old and sick animals was a manifestation. Similarly, a trust for the welfare of animals such as cows, buffaloes *etc.*, is a good charitable trust, in so far as it leads to the advancement of religion.

There are *two cases* in which beasts may be thought to possess legal rights. *In the first place*, cruelty to animals is a criminal offence; *secondly*, a trust for the benefit of particular classes of animals, as opposed to one in favour of individual animals, is *valid* and enforceable as a public and charitable trust. For example, a provision can be made for the establishment and maintenance of a home for stray dogs or broken-down horses.

Write a short note on : The legal status of unborn persons.
B.U. Apr. 95
June 96
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2. Unborn persons

An unborn person has a *contingent* or a *qualified* kind of legal personality. There is nothing in law to prevent a man from owning property before he is born. His ownership is necessarily *contingent*, for he may never be born at all, but it is nonetheless a *real* and *present* ownership. Though it is possible to settle property on an unborn person, yet certain restrictions are placed on the vesting of property in favour of unborn persons, so that property may not be too long withdrawn from the uses of living men for generation to come.

In this connection, it may be noted that a child in its mother's womb is, for certain purposes, regarded, by a legal fiction, as already born. In the law of property, there is a fiction that a child *en ventre sa mere* is a person in being for the purpose of (1) the acquisition of property by the child itself, *or* (2) being a life chosen to form part of the period in the rule against perpetuities.

The recognition of the legal personality of a child in the womb of the mother is illustrated in the rule of procedure, which lays down that a pregnant woman condemned to death *cannot* be executed until she has delivered her child. So also, the Criminal Law protects the unborn child by declaring *abortion* to be a criminal offence. (However, the Indian law on this point has recently been relaxed). Similarly, it has been *held* that a posthumous child is entitled to compensation for the death of his father. (*George and Richard*, (1871) L.R. 3 Ad. and ECC. 446)

In another English case, it was, however, *held* that a Railway Company was *not liable* on a claim made by an infant against the Company for damages for injuries sustained by her due to a collision on the railway line caused by the negligence of the servants of the Railway Company, while she was *en ventre sa mere*, on the ground that the Railway Company was under no duty to take care of a child whose existence it was *not* aware of. (*Walker* v. *The Great Northern Rly. of Ireland* — 1890 28 L. R. Ire. 69)

It should be noted that the personality of an unborn person *is contingent on his birth*, and if he dies in the womb or is still-born, no right will be deemed to have been vested in such child. If, however, the child is born alive and survives, even for a very short time, he will acquire the property given to him, and his heirs can claim it after his death.

Discuss the legal status of dead men and unborn persons.
P.U. Oct. 96

3. Dead men

In law, dead men are *'things'* and *not 'persons'*. They have no rights and no interests. A dead man's corpse is *not 'property'* in the eyes of the law. It *cannot* be disposed of by will or by any other instrument. Thus, a permanent trust for the maintenance of a man's *tomb* is *illegal* and *void*. If a testator leaves in his will a direction that a certain part of his property shall be utilised for the maintenance of his tomb, such a direction is *void* and of no effect.

Write a short note on : Legal status of dead men.
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Though the dead have no rights, the criminal law regards a libel upon the dead as a crime, but that too only when its publication is in truth an attack upon the interests of living persons. Offering indignity to a human corpse is, likewise, an offence.

As regards a dead man's *reputation*, the same is protected to a limited extent. It is a general rule that with regard to deceased persons, one must not speak anything but good : *De mortuis nul nisi bonum*. If, therefore, some person speaks evil of the deceased person, his relatives can have a very limited protection under law for such a defamation. The law does *not* protect the deceased person or his reputation, in so far as he has no rights or dealing with this world, — but the interests of the relatives of the deceased person are taken into account by law. Under section 499 of the Indian Penal Code, it may amount to defamation to impute anything to a deceased person, *if* the imputation would harm the reputation of that

person, if living, *and* is intended to be hurtful to the feelings of his family or other near relatives. So, it is only for the protection of the members of the family of the deceased person that the law provides such a remedy.

Under ancient Roman Law also, any insult to the body of the deceased at the time of the funeral gave a right to the heirs of the deceased to sue for the injury. So also, *under French law,* the relatives for the defamed deceased can successfully sue for damages, if they can prove that some injury (even moral injury) resulted from the defamation.

Moreover, the law of succession permits the desires of the dead to regulate the actions of the living. For years after a man is dead, his hand may continue to regulate and determine the enjoyment of the property which he owned while he was alive.

In law, a deceased human being is *not* regarded as a legal person, because with his death, his personality comes to an end. Whatever he has left behind to be distributed as gifts or given in charity are respected by law, and enforced according to his wishes laid down in his will. The law protects his body after death, as also his reputation and the property left behind by him.

A deceased person's corpse is supposed to be a thing belonging to nobody and *cannot* be the object of a theft, though it is a criminal offence to offer indignity to a corpse or to a grave-yard. With the leaving of the soul, the personality of the individual vanishes, and the body becomes a mere thing, though religious susceptibilities of the deceased himself and the members of his family may consider it a sacred object around which ceremonies are to be performed.

In *Williams* v. *Williams* (1882-20 Ch. D. 659), it was laid down that a person cannot, during his life-time make a will disposing of his body, *e.g.,* giving his brain to the museum or giving any part of his body to the medical college. To-day however, the trend is changing, and it would be perfectly legal to, say, donate one's eyes after death.

A person, can by his will or otherwise, make a valid trust for the repair of all the graves in a grave-yard, because that would amount to a public or charitable trust. But one *cannot* make a trust for perpetual repair of one's own grave or the graves of his ascendants and descendants, because such a trust would be a private trust and would infringe the rule against perpetuity. Even if a bequest is for the benefit of one's soul or the souls of one's ancestors or descendants, then such a bequest is to be regarded as a public or charitable bequest, because it is likely to advance the cause of religion by attracting other persons who are strangers to that particular place on the day or days on which such ceremonies are performed. If such ceremonies are to be performed for the benefit of the priest, then such a bequest can also be perpetual.

It has been *held* in *Jamshedji* v. *Soonabai* (33 Bom. 122) that *muktad* ceremonies of the Parsees tend to advance the religion of the followers of the Prophet Zoroaster, and that therefore, trusts and bequests for the purpose of such ceremonies are *valid.* Similarly, in the *Advocate-General* v. *Yusufali,* (24 Bom. L.R. 1060) it was *held* that a gift for the perpetual upkeep of the tomb of St. Chandabhai was a charitable gift, and therefore *valid,* even though perpetual.

CHAPTER XVIII

THE LAW OF PROPERTY

1. GENERAL

'Property' defined

The whole of the substantive civil law can be divided into *three main parts* : the law *of property,* the law of *obligations,* and the law of *status.* This Chapter deals with the first main division, *viz.*, the law of property. The term *property* is applied to a number of different concepts, of which the most important are :

What is meant by property ? What are its theories ?
P.U. Oct. 99

1. *All legal rights* : It includes a person's *legal rights of whatever description.* A man's property is *all* that is his, in law. This ordinarily implies complete ownership of all things - material as well as incorporeal.
2. *Proprietary rights* : This is a narrow use of the term, and in this sense, it includes, *not* all of a person's rights *but* only his *proprietary,* as distinguished from his *personal,* rights. Used in this sense, the term covers a man's lands, chattels, debts and shares, but *not* his *liberty* or his *reputation.*
3. *Proprietary rights in rem* : This is an even narrower sense in which the term is used, and it covers *not even* all proprietary rights, *but only* those that are proprietary rights *in rem,* excluding totally all proprietary rights *in personam.* Thus, in this sense, whereas a patent or a copyright is property, a debt or the benefit of a contract is *not.*

Write a short note on : Property.
P.U. Apr. 98
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4. *Corporeal property* : This is the narrowest use of the term, and includes only corporeal property, *i.e.,* the right of ownership in a material object, like a house or a car, or that object itself. *Bentham* prefers to use the *term property* in this sense.

What is "property" ? What are the various kinds of property a man can own ?
B.U. Oct. 97
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KINDS OF PROPERTY

1. Corporeal and incorporeal

All property is either *corporeal or incorporeal.* Corporeal property (*res corporalis*) is the right of ownership in *material* things; incorporeal property (*res incorporalis*) is any other proprietary right *in rem* in an *abstract* form of property, *e.g.,* a patent right or right of way. Corporeal property is always *visible* and *tangible;* incorporeal property is *not.* If *X* mortgages his house to *Y,* he has a right to get the house back when he has paid off his debt. The right of redemption is incorporeal (it cannot be seen or felt), but the house itself which *X* has mortgaged is corporeal. Both are valuable, inasmuch as they are *legal rights* — recognised and enforced by law.

2. Movable and Immovable *(Bona Mobilia & Bona Immobilia)*

Among *material* things, an important distinction is that between *movables* and *immovables,* or to use terms more familiar in English law, between *chattels* and *land.*

"Immovable property" includes land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth — section 3(25), *General Clauses Act,* 1897.

The term is also defined in the Indian Registration Act thus — "Immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefits to arise out of land and things attached to the earth or permanently fastened to anything which is attached to the earth, *but not* standing timber, growing crops, or grass.

Write a short note on : Land. B.U. Apr. 97

The following are judicially recognised as immovable property : (a) Right of way: (b) Right to collect rents of immovable property; (c) Right to collect dues from a fair on a piece of land; (d) A right of ferry; (e) Office of hereditary priest of a temple; (f) A right to officiate as a priest at funeral ceremonies of Hindus; (g) A Hindu widow's life interest in the income of her husband's immovable property; (h) A mortgagor's right to redeem the mortgage; (i) A *hat* (market); (j) Right to possession and management of *Saranjam*; (k) Right to levy rate or cess on all exports and imports; (l) Right to the assessment payable on a sub-tenure; (m) The interest of a mortgagee in immovable property; (n) Right of fishery; (o) Right to collect *lac* from trees; (p) A factory; (q) Annual allownace or *varshasans* charged on immovable property; (r) A mortgage-debt etc.

The following are not immovable property : (a) A Right of worship; (b) Right of a puchaser to have the lands registered in his name; (c) Royalty; (d) A machinery which is *not* permanently attached to the earth and which can be shifted from one place to another; (e) A decree for sale of immovable property on a mortgage; (f) A right to recover maintenance *allowance,* even though charged on immovable property; (g) Government Promissory notes; (h) Standing timber; (i) Growing crops; (j) Grass etc.

3. Real and personal property

Closely connected with the distinction between movable and immovable property is the classification recognized by English law of *real* and *personal* property. *Real* property corresponds to immovable property, whereas *personal* property corresponds to movables. This classification is thus *not* very much different from the one seen above, and is due mainly to the course of legal development in England.

4. Proprietary rights in intangible things

There are many intangible things which can be owned by human beings. Abstract rights are of various kinds. Thus, *A's* right to pass through *B's* garden *or* to graze his cattle in *B's* field are rights, though invisible. These are intangible rights. They *cannot* be seen, touched or felt, as is the case with tangible things, like a car or a horse.

Now, many intangible things are the product of human skill and labour

and the law recognises them. These are of *five chief kinds* :

(i) *Patents.*— The subject-matter of a patent right is an *invention.*

Patent right. — Patent right is a privilege granted by the State to the *first inventor* of any new product or invention, that he and his licensees have the sole right of making and selling such product or invention during a particular period of time.

This branch of law has been codified, and the rights of a person who is responsible for a new invention are protected by the Patents and Designs Act, both in English and in Indian Law.

A person who has registered a patent gets the exclusive right to make, use, or sell the patented invention for a period of *fourteen years.* Any person who, whether with or without the knowledge of the existence of the patent right, infringes the same, may be restrained by injunction, and if he knowingly infringes the patent, he will also be liable for damages.

(ii) *Literary Copyright.* — The subject-matter of this right is the *literary expression of facts or thoughts.*

(iii) *Artistic Copyright.* — Artistic design in all its various forms, such as drawing, painting, sculpture and photography is the subject-matter of a right of exclusive use, analogous to literary copyright.

(iv) *Musical* and *dramatic* copyright.

Copyright — Copyright is the sole exclusive liberty of printing or otherwise multiplying copies of any book. This right now exists under Copyright Acts. A copyright exists in books, letters, lectures, dramatic works, musical works, and works of art.

(v) *Commercial goodwill.* — This includes *trade-marks* and *trade-names.*

5. Right *in re aliena* (Encumbrances)

A right in *re aliena or an encumbrabce* is one which *limits or derogates* from some more general right belonging to some *other* person in respect of the *same* subject-matter. The chief classes of encumbrances are *four* in number, namely.— (1) *Leases,* (2) *Servitudes,* (3) *Securities,* and (4) *Trusts.* (This has been fully discussed later in this Chapter.)

2. MODES OF ACQUIRING PROPERTY

Of the various existing modes of acquiring property, the following *four* are of primary importance : 1. *Possession;* 2. *Prescription;* 3. *Agreement;* and 4. *Inheritance.*

1. Possession

By possessing a material object, the owner may acquire a legal title to it in *two ways,* by occupation *or* by possessory ownership.

Define "property" and discuss the various modes of its acquisition. P.U. Oct. 96

(a) By occupation

When property, of which possession is taken by the claimant, *does not as yet belong to any one else (res nullius* as the Romans said), the possessor acquires a title good against all the world. This mode of acquisition is known in Roman law as occupation or *occupatio.*

What are the various meanings of the term "property" ? What are the modes of acquisition of property ?
B.U. Oct. 91
Apr. 95

Res nullius means things belonging to none, and things that *cannot* be possessed *exclusively* by anybody, *e.g.*, fishes in the sea. *Res nullius* belongs, by absolute title, to him who first obtains possession of it. *Res nullius* are things *capable* of ownership, but so far, unappropriated, such as undiscovered land, precious stones burried under ground, treasure trove etc. Things were also termed *res nullius* if their owners relinquished possession of them with the *intention* of *abandoning* all *ownership* therof, *e.g.*, enemy property captured in war.

Occupatio is the taking possession of a *res nullius* with a *view to owning it*. Ownership could be acquired, for example, over wild animals (when captured), the property of enemies taken in war, and treasure troves.

Wild animals in *enclosure* belong to the owner of the enclosure, *e.g.*, monkeys. But once they gain their *liberty*, they can be acquired by *occupatio*. Animals and birds which disappear *only to return*, such as deer, hens and fowl *cannot* be acquired by *occupatio* and they belong to the owner. The same is the case with domestic animals, e.g. dogs or cats.

Write a short note on : Modes of acquisition of property.
B.U. Oct. 92
Nov. 95

Thus, *A* had a swarm of bees. The swarm remained the property of *A*, so long as they continued their habit of returning to his hive. But having ceased this habit, and settled on a tree of *S*, the bees, which are by nature wild are deemed to have regained their natural freedom. They have escaped from the sight of *A* or, even if they are still in his view, it is hard for him to follow them up. The swarm of bees, therefore, becomes the property of him who first hives them, and in this case, the bees belong to *S*, so long as they continue the habit of returning to the tree of *S*.

Wild animals were *res nullius*, and thus could become, by *occupatio*, the property of the *first* person who took or caught them. A wild animal remained the property of the taker so long as he guarded it and kept it in. Once it escaped, it was deemed to regain its natural freedom and become the property of any one who first seized it. When a man wounded a wild beast, it did *not* become his until he actually took it; if another happened to take it first, that other became owner, although he had not struck the blow.

Likewise, an island which springs up in the sea is deemed to be the property of no one *(res nullius)*. It becomes the property of the first occupier.

Things *wilfully* abandoned are called *derelicts*. These can be acquired by *occupatio*. Things *negligently* left or abandoned on account of necessity (*e.g.*, jettison) always remain the property of the owner. It is theft if a person takes them having reason to know whose they are.

(b) By possessory ownership

Write a short note on : Possessory ownership.
B.U. Oct. 97
Oct. 99

When the thing, of which possession is taken, is *already* the property of someone, the title acquired by possession is good against all *third* persons, but is of *no validity* at all against the *true owner*. This is known as acquiring property by possessory ownership. Thus, *A* is in possession of *B's* book, rightly or wrongly. As against *B*, *A* has neither a right nor a title. If, therefore, *B* claims the book, *A* has no answer to *B's* claim. But as against all other persons, *A* has a good title. It will *not* lie in the mouth of others to say that *A* got possession of it wrongfully. In other words, the defence of *just tertii* will *not* be allowed.

The *underlying reason* behind the doctrine of possessory ownership is quite evident. If this doctrine did *not* exist, force and fraud would be able to determine all cases of disputes as to possession, where both the parties to the dispute could *not* show an unimpeachable title (of ownership) in respect of the disputed property.

2. Prescription

Write a short note on : Prescription.
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The second mode of acquiring rights is by *prescription*. Prescription may be defined as *the effect of lapse of time in creating and destroying rights. It is the operation of time as a vestitive fact.*

Section 26 of the Limitation Act lays down the law as to acquisition of easements by prescription. The section can be analysed as follows :

1. Where the access and use of light or air to and for any building have been enjoyed- (i) peaceably, (ii) as an easement, (iii) as of right, (iv) without interruption, and (v) for 20 years (or, in the case of Government property, for 60 years) —

and

2. Where any way of watercourse, or the use of any water or any other easement (whether affirmative or negative) has been enjoyed — (i) peaceably, (ii) *openly*, (iii) *by a person claiming title thereto*, (iv) as an easement, (v) as of right, (vi) without interruption, and (vii) for 20 years (or, in the case of government property, for 60 years) —

Discuss fully the concept of prescription.
B.U. Apr. 98

the right to such access and use of light or air, ways, watercourse, use of water, or other easement shall be *absolute* and *indefeasible*.

The above period of 20 years (*or* 60 years, as the case may be), should be a period ending within *two years* just preceding the institution of the suit in which the claim to which such period relates is contested.

As stated above, such a right should be enjoyed for the prescribed period, *without interruption*. S. 26 of the Limitation Act clarifies that nothing is an interruption —

(i) *unless* there is an actual discontinuance of the possession or enjoyment, by reason of an obstruction by the act of some person other than the claimant, *and*

(ii) *unless* such obstruction is submitted to or acquiesced in for *one year* after the claimant has notice thereof and of the person making or authorising the same to be made.

Illustrations. — (a) A suit is brought in 1911 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto, as an easement and as of right without interruption from 1st January 1890 to 1st January 1910. The plaintiff is entitled to judgment.

(b) In a like suit, the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff, on one occasion during the twenty years, had asked his leave to enjoy the right. The suit will be dismissed.

Positive and negative prescription

Prescription is of *two kinds : viz.*, (i) positive or acquisitive, and (ii) negative or extinctive. The former is the *creation* of a right, whereas the latter is the *destruction* of one, by the lapse of time. In other words, long *possession creates* rights and long *want* of possession *destroys* them.

Acquisitive and extinctive prescription

The extinctive aspect of prescription, that is, prescription as extinguishing a right, has been seen above. But, prescription has also an acquisitve aspect, which must also be considered. It may also *create* rights, that is to say, by long enjoyment of a thing, one may get an absolute right and title to it. The same period of time which *extinguishes* one person's right may *create* rights in favour of another person; rather, the operation of prescription is to transfer the rights of the former in favour of the latter.

Basis of prescription

The laws of limitation and prescription are based upon the principles that the law aids the diligent and *not* the indolent, that a man who has negligently slept over his rights for an undue length of time will *not* be allowed to litigate in respect of them, and that a person who (without any fraud or breach of trust) has been in the enjoyment of property, or of a right, or of an immunity, for a period of time which the law has prescribed, will be allowed to enjoy that property, right or immunity in peace and quiet even *thereafter*, and will *not* be harassed by unexpected litigation cropping up at *distant dates*, or exposed to *stale* demands, perhaps when *witnesses* of the fact are *dead* or the *evidence* of the title lost.

"All statutes of limitation or prescription", said Lord *St. Leonards*, "have for their *object* the prevention of the rearing up of claims at great distance of time when evidences are lost, and in all well-regulated countries, the quietening of profession is held an important point of policy." These laws have also variously spoken of as "*statutes of repose*" and as "*statutes of peace*", because by their operation, they *lay at rest* claims and demands which might otherwise have disturbed the peace of the community by giving rise to quarrels and litigation. Their operaion in this respect is well expressed by *Lord Plunkett* in the following words : "Time holds in one hand a scythe; in the other an hour-glass. The scythe *mows* down the evidence of our rights, the hour-glass *measures* the period which renders the evidence superfluous."

The doctrines of limitation and prescription are founded on consideration of *public policy* and *expediency*. To secure the quiet and repose of the community, it is necessary that the title to property, and matters of right in general, should *not* be in a state of *constant* uncertainty, doubt and suspense. The old maxim of law in *interest reipunlicase us sit finis litium*. The interest of the State requires that a time-limit should be prescribed for litigation. Another consideration is that a party who is insensible to the value of civil remedies and who does *not* assert his own claim with promptitude, has little or no right to acquire the aid of the State in enforcing it :

Vigilantibus non dormientibus jura subveniunt. The law assists the vigilant, and *not* those who sleep over their rights.

The *object of the Legislature* in passing statutes of limitation is to quiet long possession and to extinguish stale demands. A ground of *defence cannot,* however, be stale or barred by limitation, and it would therefore be open to a defendant to put forward any defence, though such defence as a claim made by him may be barred on the date it is put forward. The statutes of limitation are statutes of repose. At the same time, they are a means of ensuring private justice, suppressing fraud and perjury, quickening diligence and preventing oppression.

Macaulay, in a debate in the House of Commons, vividly described what the consequences to society would be if there were no laws of limitation or prescription. "Suppose," he said, "you had no statute of limitations, so that any man amongst us might be liable to be sued on a bill of exchange accepted by his grandfather in 1760; or suppose you imagine the case of a man in possession of an estate, occupying a manor-house which has been held by his grandfather and his great grandfather before his being turned out of that possession because some old will or deed made in the time of Charles I had been discovered in some forgotten *chest or cranny* — should we not exclaim that it would be better to live under the rule of a Turkish *Pasha,* and should we not all feel that the enforcement of an absolute right was nothing less than an infliction of the foulest of wrongs ? Should we not feel that this extreme rigour of law without a limit of time, would be nothing less than a grave, systematic and methodical robbery ?"

Custom and prescription distinguished

Write a short note on : Custom and prescription.
P.U. Apr. 97

Custom is a long practice operating as a source of *law,* while *prescription* is a long practice operating as a source of *rights.* Historically, the law of prescription is merely a branch of the law of custom. A prescription was originally conceived as a *personal* custom, *i.e.,* a custom limited to a particular person and his ancestors in title. It is to be distinguished from *local custom,* which is *not* limited to an individual person, but limited to a particular place. Prescription is a right acquired by the use for a particular period of time, *e.g.,* by use of a path, bridge, well, or any other property, the user acquires a right if he constantly uses it for a period of twenty years or more. Similarly, the right to light, right to air, are rights which can be acquired by user for twenty years or more.

For a very long time, prescription and custom were regarded as similar, and were essentially governed by similar rules of law. The requisites of a valid prescription were in a sense the same as those of valid custom. The requisites are (1) immemorial antiquity, (2) reasonableness, and (3) consistency with statutory enactment. It was only by a slow process of differentiation that the requisites of prescription came to be narrowed down and the requisite, *viz.,* immemorial antiquity ceased to have validity for a prescriptive right. Law has now laid down different requirements and rules for the creation of prescriptive rights. The right is acquired by the unbroken

enjoyment over a passage of a time, *viz.*, for 20 years or more. A user during this period becomes at common law is still possible if the statutory rules are of no assistance.

3. Agreement

The third method by which proprietary rights are acquired is by *agreement.* Agreements are of *two* kinds : *assignment* and *grant.* By the former, existing rights are *transferred* from *one* owner to *another,* by the latter, *new* rights are created by way of *encumbrance* upon the *existing* right of the grantor.

Nemo dat quod non habet

The general rule is that the seller *cannot* give to the buyer of goods a better title to those goods than he himself has. This is expressed by the maxim *"nemo dat quod non habet"* (No one can give who possesses not.) In other words, the general rule is that the buyer *cannot* acquire a better title to the goods than the seller has. So, if a person acquires possession of property by theft, and sells it to another, the buyer acquires no title, though he may have acted honestly, and may have paid value for the goods; and the real owner of the goods is entitled to recover possession of the goods without paying anything to the buyer. It is well-established that a thief has no title, and he can therefore, confer none, even on an innocent buyer. This may cause hardship to the innocent buyer, but the rule is deemed necessary in the larger interests of society and for security of property.

But to the rule that a seller of goods cannot give to the buyer a better title than he himself has over them, there are the following *exceptions* :

Exception 1 — Title by estoppel. — The exception to the general rule that a person cannot pass a better title than he has, occurs in case where the owner of the goods is, by his conduct, precluded or *estopped* from denying the seller's authority to sell. So, where the owner, by his words or conduct, causes the buyer to believe that the seller was the owner of the goods *or* had the owner's authority to sell them, and induces him to buy them in that belief, he *cannot* afterwards set up the seller's want of title or authority to sell.

Exception 2 — Sale by a mercantile agent. — Where a mercantile agent is, with the consent of the owner, in possession of the goods, or of a document of title to the goods, any sale made by him in the ordinary course of business is binding on the owner, *provided that* the buyer acts in good faith and has *not,* at the time of the contract of sale, notice that the seller has no authority to sell.

Thus, where a blank transfer form and a share certificate of a company are delivered by a registered shareholder of the share to his broker for sale in the market, and the broker sells the same as the agent of the registered holder to a *bona fide* purchaser for value, the purchaser gets a good title to the share and can insert his own name in the transfer form and procure himself to be registered as the owner.

Exception 3 — Sale by one of joint owners. — If one of several joint owners of goods has the sole possession of such goods with the permission of the other co-owners, the property in goods is transferred to any person who buys them from such a joint owner in good faith, and has *not*, at the time of the contract of the sale, notice that the seller has no authority to sell.

When *A* and *B* are joint owners of certain goods, and *B* allows *A* to remain in exclusive possession of the goods, *A* can make a valid sale of them to any one who buys them in good faith.

Exception 4 — Sale by a person in possession under a voidable contract. — When the seller of goods has obtained possession thereof under a voidable contract, but the contract has *not* been rescinded at the time of the sale, the buyer acquires a good title to the goods, *provided* he buys them in good faith and without notice of the seller's defect of title.

Exception 5 — Sale by a seller in possession after sale. — Where a person, having sold goods, continues to be, or is in possession of goods (or of a document of title to the goods), the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods (or documents of title to the goods) under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

Thus, *A* sells goods to *B*, who for his own convenience, leaves the goods with *A*. Later, *A* fraudulently sells the goods to *C*, who buys them in good faith and without notice of the sale to *B*. In these circumstances, *C* gets a *good title* to the goods. The delivery of the goods by *A* to *C* has the same effect as if *A* was expressly authorised by *B* to deliver the goods to *C*.

Exception 6 — Sale by a buyer in possession after the contract of sale.— Where a person having bought, or agreed to buy the goods, obtains, with the consent of the seller, possession of the goods (or documents of title to the goods), the delivery or transfer by that person or by a mercantile agent acting for him, of the goods (or documents of title to the goods) under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has effect as if such lien or other right did *not* exist.

Inheritance

The last method of acquiring proprietary rights is by inheritance.

In respect of the death of their owner, all rights are divisible into two classes, being either *inheritable* or *uninheritable*. A right is *inheritable*, if it *survives* the owner; *uninheritable*, if it *dies* with him. *Proprietary* rights are usually *inheritable*, *whilst personal* rights are *not*, save in exceptional cases.

3. ENCUMBRANCE

Definition

A *jus re aliena or encumbrance* is a right which *limits* or *derogates* from some more general right belonging to some other person in respect of the subject-matter.

Kinds of encumbrances

The following are the *four* main kinds of encumbrances : Leases, Servitudes, Securities and Trusts.

1. Lease

Write a short note on : Lease. B.U. Oct. 97

A *lease* is the encumbrance of property vested in *one* by a right to the *possession* and *use* of it vested in *another*. A lease is that form of encumbrance which consists in a right to the possession and use of property owned by some other person. It is the outcome of the rightful *separation of ownership and possession*. Thus, *X* is the owner of a house, and he leases it out to *Y*. What in effect takes place is that *X's* ownership is detached from his possession. For all purposes, *X* is the owner, but he does *not* have its possession. *Y* has possession of the house, and yet he is *not* its owner.

A lease of immovable property is a transfer of a right to enjoy such property for a certain time (express or implied), or in perpetuity, in consideration of (i) a price paid or promised, or (ii) of money, (iii) a share in crops, (iv) service or, (v) any other thing of value, to be rendered, periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

The 'price' is called the *premium*, and the money, share of produce or service rendered is called the *rent*, the transferor is called the *lessor* and the transferee is called the *lessee*.

The essential elements of a lease are :

1. The *lessor*. — He must be competent to contract *and* he must have title or authority.
2. The *lessee*. — He also must be competent to contract at the date of execution of the lease. A sale or a mortgage to a minor is valid. But a *lease to a minor is void*, as a lease is to be executed both by the lessor and the lessee.
3. *Subject-matter of the lease*, which must be immovable property.
4. Transfer of a right to *enjoy* such property.
5. *Duration* of the lease. — A lease must be made for a certain time, express or implied, or in perpetuity.
6. *Consideration*, which may be premium *plus* rent, or premium alone, or rent alone. *Premium* is the price paid or promised in consideration of a transfer by way of lease. Any payment by the lessee that is part of the consideration of the lease is *rent*.
7. The lessee must accept the transfer.
8. It must be made by a registered instrument in certain cases.

2. Servitude

Write a short note on : Servitude.
B.U. Oct. 97
Apr. 98

A *servitude* is the form of encumbrance which consists of a right to the *limited* use of a piece of land *without* the *possession* of such land, as for instance, a right of *way* over it.

A *servitude*, therefore, is a right to the *limited* use of a *piece of land, unaccompanied either* by the ownership or by the possession of such land, as for example, a right of way, or a right to the passage of light or water across adjoining land.

Dominium or ownership is the term employed to denote comprehensively all possible rights in a thing — the sum total of rights known to a man. The rights of ownership may be separated into as many fragments as the owner chooses. Some rights may be given to some, and other rights to some other persons. Fragments of ownership, detached from the rest of ownership, and vested and enjoyed by *persons other than the owner of the thing itself*, are called *servitudes*. They are limited and defined rights over a *thing belonging to another.* Hence the term, *jura in re aliena.*

From this definition of servitude, it follows that no one can have a servitude over his *own thing*. Servitude is then merged in ownership. Hence the maxim *nulli res a sua servit*. Servitude is not the *thing* itself, but a *right*. It is, therefore, incorporeal. Servitudes are either *private* or *public*.

Full ownership (*dominium)* consists of mainly of *three* parts— *Jus utendi,* the right to *use, jus fruendi,* the right to *enjoy its fruits* and *jus abutendi,* the right to *destroy* it. These rights of ownership can be separated. Some may remain with the owner, and some of them may be with others. *Fragments of ownership detached from ownership and vested and enjoyed by persons other than the owner of the thing, are called servitudes.*

Kinds of servitudes

(a) *Servitudes appurtenant. — A servitude appurtenant* is one which is *not merely* an encumbrance of one piece of land, but is also *accessory to another. It is a right to use one piece of land for the benefit of another,*- as in the case of a right of support for a building. The land which is *burdened* with such servitude is called the *servient tenement*, that which has the benefit of it is called with *dominant tenement*. A servitude runs with each of the tenements in the hands of successive owners and occupiers.

(b) *Servitudes in gross. — A servitude in gross* is one which is *not* so attached and accessory to any dominant tenement for whose benefit it exists; a public right of way or of navigation are examples of this kind of servitude.

Lease and servitude distinguished. — It is an essential characteristic of a servitude that it does *not involve the possession of the land over which it exists*. This is the difference between a servitude and a lease. A lease of land is the rightful *possession and use without the ownership of it,* while a servitude over land is the rightful use without either the ownership or possession of such land.

3. Security

Write a short note on : Security.
B.U. Oct. 98

A *security* is an encumbrance vested in a *creditor* over the property of his *debtor* for the purpose of *securing the recovery of the debt,* a right for example, to retain possession of a chattel until the debt is paid. Security on immovable property is called a 'mortgage'; one created on, movable property is called a 'pledge'.

(a) Mortgage

Where immovable property is secured to another for consideration, the transaction is a mortgage. It becomes a *pledge* if the property is *movable.* Thus, if *A* gives *B* his house worth Rs. 40,000 as security for a loan of Rs. 30,000 advanced by *B* to *A,* the transaction is a mortgage. The property will revert to *A* if and when *A* repays the loan, *i.e.,* when the mortgage is *redeemed* by *A.* To put it in legal parlance, —

What is security? Distinguish between lien and mortgage.
B.U. Oct. 99

A 'mortgage' is the transfer of an interest in *specific immovable property* for the purpose of securing —

(a) the payment of *money* advanced or to *be* advanced by way of loan, *or*

(b) an existing or future *debt, or*

(c) the performance of an engagement which may give rise to a *pecuniary* liability.

The transferor is called the *mortgagor;* the transferee is called the *mortgagee,* the principal money and interest of which payment is secured for the time being is called the *mortgage money;* and the *instrument* (if any) by which the transfer is effected is called a *mortgage-deed.* (It may be noted that the words 'mortgagors' and 'mortgagees' include persons deriving title from them respectively.)

There are *six kinds* of mortgages. They are :

1. Simple mortgage.
2. Mortgage by conditional sale.
3. Usufructuary mortgage.
4. English mortgage.
5. Mortgage by deposit of title-deeds (also called an equitable mortgage).
6. Anomalous mortgage. (This is one which does not fall within any of the other five categories.)

(b) Lien

Lien is a right of one man to *retain that which is in his possession but belonging* to another, until *certain demands in respect* of the person in possession *are satisfied.* Thus, a finder of goods has a right to retain the goods against the owner till he receives from the owner compensation for the trouble and expenses incurred by him, and also any specific reward which the owner may have offered for the return of such goods. The finder is said to have a 'lien' upon the goods found. Lien is the right to 'retain'

possession of goods; and hence, it can be exercised only so long as the person claiming lien is in possession. Lien is also lost by satisfaction of the debt, or by a contract inconsistent with its existence. Lien is a mere right of retention, and does *not* include a right of sale.

A lien can only arise in one of three ways — (i) by statute, (ii) by express or implied contract, and (iii) by the general course of dealing in the trade in which such lien is claimed.

Liens are of two kinds : General and particular. A general lien is the right to retain the property of another for a *general balance of accounts.* General lien is available only to bankers, factors, wharfingers, attorneys-at-law and policy-brokers. A *particular* lien, which is available to *all* bailees, is a right to retain the property of another for a charge on account of labour employed or expenses bestowed upon the identical property detained.

A lien may come to an end (i) by satisfaction of the debt; (ii) by abandonment of the possession of the thing bailed; or (iii) by a contract inconsistent with its existence.

Possessory lien consists in the *right to retain possession* of chattels or other property of the debtor. Examples are pledges of chattels, and the liens of inn-keepers, and vendors of goods.

Agent's lien. — In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or immovable, of the principal, received by him, until the amount due to himself for commission, disbursement and services in respect of the same has been paid or accounted for to him. This lien is *particular.* It entitles an agent to retain goods, papers etc., which are received by him as agent and in the course of that agency relating to which he is entitled to his commission. Again the property on which he claims his lien must *not* have been received by him by a wrongful act. This lien of the agent is, as a general rule, lost by his parting with the possession. But where possession is obtained from the agent by fraud, or is obtained unlawfully and without his consent, his lien is *not* affected by loss of possession. An agent's lien is extinguished by his entering into an agreement, or acting in any character, inconsistent with its continuance, and, may be waived by conduct indicating an intention to abandon it.

Unpaid vendor's lien. — The unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following *three* cases, namely :

(i) where the goods have been sold without any stipulation as to credit; *or*

(ii) where the goods have been sold on credit, but the term of credit has expired; *or*

(iii) where the buyer becomes insolvent.

The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or the buyer.

Difference between :

Mortgage	Lien
(1) It is an *independent* and principal right, and *not* a mere security.	(1) It is only a *security* for a debt; *i.e.*, a right to *retain possession* of a chattel until payment or right to *receive payment* out of a certain fund.
(2) Right of mortgage is vested in him *conditionally* and by way of security only.	(2) Right of the person who exercises a lien is vested in him *absolutely*, and *not* merely as security.
(3) It is created either by *transfer* or by *encumbrance*.	(3) It is created by way of *encumbrance only*.
(4) Right of *redemption* is an infallible test of a mortgage.	(4) There is nothing to *'redeem'*. It is merely the *shadow* of the debt cast on the property.
(5) Encumbrance is created independently of the debt.	(5) Its duration is *dependent* on and *coincident* with the debt secured, *e.g.*, pledge, vendor's lien.
(6) In a mortgage by way of transfer, the debtor is the *beneficial or equitable* owner. The right to reconveyance is more than a *personal* right of the debtor.	(6) A lien leaves the full legal and *equitable ownership* in the debtor, but vests in the creditor such rights and powers (*e.g.*, sale, possession etc.) as are required according to the nature of the subject-matter, to give the creditor sufficient protection.
(7) There is a *double ownership* of the mortgaged property, the mortgagee being merely a *trustee* for the morgagor on the extinction of the debt.	(7) Lien lapses *ipso jure* with the discharge of the debt secured.

(c) Pledge

The bailement of goods as *security for payment of a debt or performance of a promise* is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee". Where a person pledges goods in which he has only a *limited* interest, the pledge is valid to the extent of that interest.

The essential element of a valid pledge is the *actual or constructive delivery* of the goods pledged. There can be no valid pledge of goods unless *delivery* takes place. It is, however, sufficient if the delivery takes place within a reasonable time of the lender's advance being made.

A pledge can be made of *movables* alone. *A transfer of possession* is necessary to constitute a complete pledge. It must be juridical possession.

Mere *physical* possession is *not sufficient*. The bailee under a contract of pledge does *not* become owner but, as having possession and right to possess, he is said to have a *special property*.

Difference between *'Pledge' and 'Lien'*.— (i) Lien gives a right to possession until the claim is satisfied. Pledge is a bailment of goods as *security* for a debt or for performance of a promise. (ii) Lien is *not* sufficient to warrant a sale. Pledge gives the *right to sell* without agreement after default. (iii) Lien is a right which arises out of seller's *possession*, and is lost with the loss of possession, while pledge is not necessarily lost by the return of the goods to the owner. (iv) Lien is a creation of *law* independent of the contract, pledge is a creation of *contract* only.

4. Trusts

A trust is an encumbrance in which the ownership of property is limited. The owner can deal with it only *for the benefit of someone else*. The legal owner of the encumbered *property* is the *trustee*, but he is bound to use the property *for*, and *on behalf of*, another person, called the *beneficiary*.

CHAPTER XIX

THE LAW OF PROCEDURE

SUBSTANTIVE AND PROCEDURAL LAW

Statute law is either *substantive* or *procedural.* Ordinarily, the former confers rights, and the latter deals mainly with procedure. Thus, it can be said that in the field of criminal law, the Indian Penal Code is a *substantive* enactment, whereas the Criminal Procedure Code is mainly *procedural.*

Distinction between substantive and procedural law

1. 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, using the term 'action' in a wide sense to include all legal proceedings, civil or criminal. All the residue is substantive law, and relates, *not* to the process of litigation, *but* to its purpose and subject-matter.
2. Substantive law is concerned with the *ends* which the administration of justice seeks; procedural law deals with the *means* and instruments by which these ends are to be attained.
3. Procedural law regulates the conduct and relations of Courts and litigants in respect of the litigation itself; substantive law, on the other hand, determines their conduct and relations in respect of the matters litigated.

Write a short note on : Law of procedure.
P.U. Oct. 98

The distinction between substantive law on the one side and procedural law on the other is a very narrow one. But for the purpose of jurisprudence, a distinction is made particularly from the point of view of administration of justice, which consists in the application of remedies to the violation of the rights of the citizens. Substantive law is that which defines the rights of the citizens, while the procedural law lays down remedies for the breach of these rights.

But this application of the distinction between a law and remedy is inadmissible because there are many rights which belong to the sphere of procedure, *e.g.,* a right to appeal, a right to give evidence, a right to interrogate the other party etc. Secondly, rules which define remedies are substantially part of the substantive law, as those which define the right itself. The suggestion to abolish capital punishment is in no way a suggestion to change the law in the criminal procedure. In the Penal Code of any country, the substantive part of the Code deals not with crimes alone but with punishment also. Similarly, in civil law, the rules as regards the measure of damages pertain to the substantive law of the land.

Thus, broadly, speaking, civil law is either *substantive or procedural.* However, this is *not* a water-tight distinction. Thus, Company Law, which is mainly a substantive law, also contains a lot of procedure, *e.g.,* the procedure of forming companies, procedure for reducing, increasing or re-

organising share capital, the procedure for transferring shares, for holding meetings, for passing resolutions, sending notices etc. On the other hand, the Criminal Procedure Code is principally a procedural enactment. Yet it contains several substantive provisions, *e.g.*, the right to maintenance of a wife, the right to appeal, the right of Habeas Corpus etc.

Where procedural law differs from the substantive law, the latter will prevail over the former, because the procedural law deals with the *form*, and *not* with the *substance* or the *spirit* of the law. The law Courts will always maintain the true spirit behind the law, and in many cases, the Courts may even go beyond the procedural law. *There can be no estoppel against the statute*, and the rule of estoppel *cannot* be allowed to prevail over the substantive provisions of the substantive law.

KINDS OF EVIDENCE

1. Judicial and extra-judicial

(a) Judicial evidence is that which is produced before the Court, *e.g.*, facts brought to the personal knowledge and observation of the tribunals. Extra-judicial evidence is that which does *not* come directly under judicial cognizance. It is an intermediate link between judicial evidence and the fact requiring proof.

(b) Judicial evidence includes testimony of witnesses, documents produced, and all things personally examined by the Court. Extra-judicial evidence includes all evidential facts known to the Court only by way of inference from judicial evidence, *e.g.*, testimony known through a witness who heard it, a copy of a document or a report of a witness who read it, and so on.

(c) Judicial evidence requires production only; extra-judicial evidence stands itself in need of proof.

2. Personal and real

Personal evidence, which is otherwise termed *"testimony"*, includes all statements verbal or *written*, *judicial* or *extra-judicial*, so far as they are possessed of probative force. *Real evidence*, on the other hand, includes all the *residue* of evidential facts. Anything which is believed for any other reason than that someone has said so, is believed on real evidence.

3. Primary and secondary

Primary evidence is evidence viewed in comparison with any available and less immediate instrument of proof. *Secondary evidence* is that which is compared with any available and more immediate instrument of proof. Thus, *A* stabs *B*. *B's* statement that *A* stabbed *B* is *direct and primary evidence*. But, *C's* statement that *C* heard *B* complain about the stabbing is *secondary evidence*.

4. Direct and circumstantial evidence

Direct evidence is testimony relating immediately to the principal fact. All other evidence is circumstantial. In the first case, inference is to be drawn from testimony to the truth of fact. In the second case, inferences are drawn in successive steps.

Thus, if *X* saw *A* killing *B*, this would constitute direct evidence. However, if *B* was found dead and killed by a knife, the facts that the knife belonged to *A*, that *A* was the only person seen in the vicinity, and further that *A* was *B's* enemy and had threatened to kill him, would all fall under circumstantial evidence.

VALUATION OF EVIDENCE

The probative force of evidence or the value of evidence lies in several factors. The demeanour of a witness in the box, the test of cross-examination and the manner in which the witnesses are in a position to answer volleys of questions fired by the lawyers, the discrepancies noticeable in the evidence of the witnesses and whether such discrepancies are material or otherwise, the corroboration of evidence, the conclusive character of inferences that could be drawn from circumstantial evidence, the effect made on the jury and the judicial discretion used by the Courts in coming to its own conclusion—all these important and vital points which govern the *reliability* and *value* of evidence.

Salmond has divided the rules relating to valuation of evidence declaring certain facts which are relevant, as follows :

1. Conclusive proof : that is, conclusive presumption.
2. Presumptive proof : that is, rebuttable presumption.
3. Insufficient evidence : namely, that which does *not* amount to a proof, raises no presumption and is inconclusive or conditional.
4. Exclusive evidence : that is, certain facts which, in respect of the matter in issue possess only probative force and nothing else.
5. No evidence : that is, facts are devoid of any evidential value.

KINDS OF PRESUMPTIONS

Presumptions are mainly of two kinds : *Conclusive* or *rebuttaable*. (These have already been discussed earlier.)