AN INTRODUCTION

TO

JURISPRUDENCE

DR. HAMIDUDDIN KHAN

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TO

JURISPRUDENCE

By

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PREFACE TO THE SECOND EDITION

The major change in this edition is a full study of the law of obligation (Chapter 18). The discussions on this subject in the previous edition were brief, which has made an extended treatment very desirable.

The scope of the book remains as before, the sole object being to present, within the bounds of a handy volume, all the principles underlying the subject in a lucid form so as to enable the students to have a comprehensive and clear conception regarding the subject.

The first edition of this book was published towards the end of 1970 by All Pakistan Legal Decisions, Lahore, soon after my departure for U.K. in October, 1970 for higher studies leading to Ph. D. Although all the copies of the first edition were meant for Bangladesh, the publishers with clandestine motive and taking advantage of the then political situation of the country supplied only a few copies which were quite insufficient to meet the demand of our students here.

In order to meet the urgent need of our students who have been pressing me hard since my return from abroad to reprint the book, this edition was rushed through the press and I express my sincere thanks to the publishers whose keen interest and continued vigilance have made publication of this new edition possible.

Dacca,
August, 1973.

The Author.

PREFACE TO THE FIRST EDITION

Jurisprudence is generally regarded as a difficult subject for the reasons that it deals with the abstract, fundamental and general principles of law which serve as a basis for its concrete details. Although there are a good many standard but expensive foreign books on the subject, yet as a teacher on the subject I feel that the necessity of a book of its kind in a simple and easily understandable language has always been keenly felt by our students preparing for their examinations. It is in view of these difficulties and requirements that this short textbook has been compiled in a lucid and narrative form giving all the topics, arranged systematically.

As it is a book primarily intended for students of law, especially for the beginners, all minute details and discussions have been left out and for facility of reading and continuity of discussion I did not quote all the sources. For convenience of study the work has been divided into three main parts and all the important topics into nineteen chapters. The introductory part deals with the nature of Jurisprudence ; second part with the nature, sources and evolution of law ; and the third part with the specific elements of law as well as the law of procedure. In view of the fact that legal maxims provide a useful means for the expression of the leading doctrines of law in brief and intelligible form, a list of more familiar and important of them have been added in the appendix. Some consolidated University questions have also been added at the end for convenience of the students. It is confidently felt that this treatise will go a long way towards meeting the need for an inexpensive book of this nature.

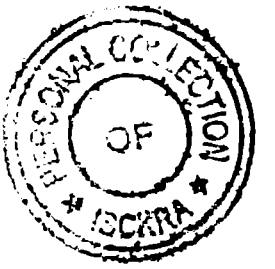
I claim no originality in preparing this book. I have consulted freely the standard books on the subject and made free use of their materials. I take this opportunity to admit my debt to such standard works as "Law in the Making" : Allen ; "Elements of Jurisprudence" : Holland ; "A Textbook of Jurisprudence" : Paton ; "Growth of Law" : Cardozo ; and mainly Salmond's Jurisprudence.

This book was rushed through the press to meet the urgent demand of the students and I express my sincere thanks and regards to my publisher whose keen interest has made this publication possible.

I shall consider my work greatly rewarded if this humble work of mine proves useful to the students.

The Author.

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CHAPTER I

THE NATURE OF JURISPRUDENCE

1. Term Jurisprudence

The term jurisprudence is derived from its Latin equivalent "Jurisprudentia" which means either knowledge of law or skill in the law. In this general sense all law books, which directly or indirectly treat of the science of law, are books of jurisprudence, *e.g.* Medical Jurisprudence, Dental Jurisprudence and Architectural Jurisprudence. But this is not the use to which the term is put in this work. We find the word jurisprudence being used in its etymological sense to describe an exposition of a particular branch of the law. By law in this connection is meant exclusively the Civil Law, the law of the land, as opposed to all other allied subjects to which the name of law has been extended by analogy and merely as an imposing synonym for law, as when we speak of medical jurisprudence and of the law of gravitation.

2. Nature and Value of Jurisprudence

Jurisprudence is the name given to a certain type of investigation. into law, an investigation of an abstract, general and theoretical nature which seeks to lay bare the essential principles of law and legal systems It is a study relating to law, but it differs in kind from other subjects on the legal syllabus. For, the typical subject like contract or tort consists of a body of rules and principles derived from authoritative sources and applied to factual situations in order to solve practical problems. But in jurisprudence we are not concerned to derive rules from authority and apply them to problems ; we are concerned rather to reflect on the nature of legal rules, on the underlying meaning of legal concepts and on the essential features of legal system. Thus, in law we look for the rule relevant to the given situation, but in jurisprudence we ask what it is for a rule in order to be a legal rule, and what

distinguishes law from morality, etiquette and other related phenomena. In this respect, jurisprudence comprises philosophy of law, and is a second order subject whose object is not to discover new rules but to reflect on the rules already known, just as the philosopher of science concerns himself with the scientific law already discovered rather than with the discovery of new law.

The importance of the study of jurisprudence cannot be exaggerated. It is valuable as a substantive part of our knowledge of law which enables us to have clear ideas about the fundamental legal conceptions as well as the social function and the purposes of law.

It is essential for a lawyer in his practical work to have a knowledge of jurisprudence, the aim of which is to formulate the fundamental principles which are adopted by the society to adjust the relation between man and man ; because the knowledge of general ideas and principles lying at the root of all rules of law, which jurisprudence imparts, serves—(1) to train the mind into legal way of thought and (2) afford a key to the solution of many provisions of law which would otherwise appear to be singular and unaccountable. Without such knowledge, no lawyer however practically eminent can really measure the assumptions upon which his subject rests. When no statutory provision nor any precedent is available to decide a particular case, jurisprudence affords a grand help to the lawyers. They can take recourse to the general principles dealt with in jurisprudence which may concern the peculiarities of such a case and decide accordingly.

The basic features of a legal system are chiefly to be found in its authoritative sources; and the investigation of the nature and working of legal authority naturally forms a subject of jurisprudential enquiry. On the other hand, jurisprudence consists of analysis of the legal concepts which are used in the study and practice of ordinary or typical legal subjects concerning different kinds of rights which one person may have against another, and investigates and examines such other legal concepts as "act", "intention", "negligence", "ownership", "possession" and so on. In this respect the jurists appear in the guise of a logician, elucidating synthesis of legal concepts.

Jurisprudence is also a functional study of the concepts which the legal systems develop and of the social interest which the law protects.

For, one task of jurisprudence is to link law with other disciplines and so help to locate it within its wider social context. Thus, in analysing legal concepts, we must try to present them against a background of social developments and changing economic and political attitudes. This kind of inquiry into law is part of the wider problem of investigating the consistency between legal system and the way of life of the society in which it operates.

Although, in general, jurisprudence appears to be a subject without applicability in practice unlike other legal subjects, it has its own intrinsic interest in which it resembles any other subject of serious scholarship. Just as, for example, the mathematician investigates number theory, not with the aim of seeing his findings put to practical use, but by reason of the fascination which it holds for him, so the writer on jurisprudence may well be impelled to his subject by nothing more than its intrinsic interest. The number theory has significance for general mathematical thought, which in turn has implications for science, philosophy, ogic and indeed the whole spectrum of human thought. Similarly, researches into jurisprudence may have repercussions on the whole of legal, political and social thought. And indeed one of the tasks of jurisprudence is to construct and elucidate organising concepts serving to render the complexities of law more manageable and more rational ; and in this way theory can help to improve practice. So, jurisprudence is not without practical value of long-term character.

Finally, jurisprudence has also an educational value, since the logical analysis of legal concepts sharpens the lawyers' own logical technique. In addition, the study of jurisprudence can help conduct the lawyers' occupational vice of formalism, which leads to excessive concentration on legal rules for their own sake and to resulting disregard of the social function of law. This is best remedied by setting the law in its proper context, by considering the needs of society and by taking note of advances in related and relevant disciplines. A proper grasp of the law of contract may well need some understanding of economics and economic theory, a proper grasp of the criminal law some knowledge of criminology and psychiatry, and a proper grasp of law in general some acquaintance with sociology. Thus jurisprudence can teach a lawyer to look, if not forwards, at least sideways and around him, and

to realise that the answers to new legal problems must be found by consideration of present social needs rather than in the distilled wisdom of the past.

Jurisprudence may also, in one sense, be compared to the science of grammar, which is called the formal science of languages. It is seen that languages differ from one another in many respects *viz.* vocabulary, accounts etc., but despite these differences, there are certain thing common in them. For example, the ideas of past, present and future tense are common and so also are the subject and object. Similarly, jurisprudence as a formal science or the science of the first principles of civil law, may also be called the grammar of law, as it deals with the purpose, method and principles common to every system of law at distinct from material science which deals with the rules of different systems. Hence, G. W. Paton remarks "Jurisprudence is a particular method of study, not of the law of one country, but of the general notion of law itself."

3. Science of Jurisprudence

According to Holland, jurisprudence is a science and it is progressive in nature. He defines jurisprudence as the "formal science of positive law". Firstly, it is a science, because it tries to generalise the principles underlying legal rules and it is not a bare collection of rules haphazardly put together.

Secondly, it is a formal science as it deals with the purposes, method, ideals and principles common to every system of law as distinct from a material science which deals with rules of different systems of law. Holland again points out that science of jurisprudence deals with the relationship of mankind which are regarded as having legal consequence but not with the rules which create these relationship. Thus, the essentials of valid marriage have varied in different countries but the legal aspect of marriage and its connection with property and family is more or less the same. The essentials of valid marriage do not fall within the scope of science of jurisprudence though the underlying principles, legal aspects and effects of marriage fall within that scope.

Thirdly, Jurisprudence is a science of positive law. It is positive, because, it deals with the law which is actually imposed by some

political authorities. According to Holland, jurisprudence is a progressive science and its generalisation must keep pace with the movements of the system of actual law. Its broader distinctions, corresponding to deep-seated human characteristics, will no doubt be permanent, but, as time goes on, new distinctions must be constantly developed with a view to the co-ordination of the ever-increasing variety of legal phenomena.

Sir C. K. Allen describes jurisprudence as the scientific synthesis of the essential principles of law. He also holds the same view as that of Holland that jurisprudence is a science as it deals with the essential principles of law systematically arranged.

Prof. Salmond defines jurisprudence in its generic sense as "the Science of Civil Law" and in its specific sense as "the science of the first principles of the Civil Law."

He defines jurisprudence as the science of Civil Law using the term "science" in its widest permissible sense. In its generic sense, 'Science' includes systematised knowledge of any subject of intellectual enquiry. First of all jurisprudence is a Science as it tries to generalise and systematise the principles that underlie legal rules, subject of enquiry being the principles of law. Science may be distinguished from art in this that art is a body of rules for government of action, but science is a body of abstract principles underlying art. An art lays down what is to be done ; science lays down the reason for which it is required to be done.

Secondly, Civil Law is the law of Civitas or State *i.e.* the law of the land ; it does not mean the body of rules administered by civil Court. Hence, in its generic sense jurisprudence means the systematised knowledge of the law of the land.

But from jurisprudence in its generic sense, as including the entire body of the law of the land, Salmond distinguishes jurisprudence in a more specific sense as "the science of the first principles of the Civil Law".

Civil Law is divided into two parts.

The first part consists of the fundamental and general principles which serve as a basis for the Second Part *i.e.* the concrete details of the law. A systematised knowledge of such fundamental principles is called Theoretical or General Jurisprudence, as being concerned with theory

of the law and its fundamental and general principles rather than its practical and concrete details. It is also called the philosophy of law, not in the sense of metaphysics but in the sense of an enquiry into the first principles of any department of thought. Salmond uses the term jurisprudence in this specific sense.

By General Jurisprudence, however, is not meant the study of the legal system in general, but it means the study of the general and fundamental principles of a particular legal system.

The second part of law consists of the concrete details of an actual legal system, which takes into account many things which are the proper subjects of enquiry of the Theoretical Jurisprudence.

4. Schools of Jurisprudence

Jurisprudence has been defined as the science of Civil Law *i.e.* the law of the land and in its specific sense as the theory or philosophy of law. The term 'law' is used to mean the body of rules and principles for the guidance of human conduct, rules and principles in so far as they are recognised and applied by the state in the administration of justice. Now the law of the land may be studied from three different standpoints as under :—

(1) Legal exposition or analytical method of study.
(2) Legal history or historical method of study.
(3) Ethical method of study.

And Jurisprudence has been divided into three branches, which may be distinguished as *Analytical Jurisprudence*, *Historical Jurisprudence* and *Ethical Jurisprudence* according to the methods applied for the study of the law of the land. Analytical Jurisprudence is the general or philosophical part of systematic legal exposition, historical jurisprudence is the general or philosophical part of the legal history, and ethical jurisprudence is the general or philosophical part of the science of legislation.

Analytical Jurisprudence or Legal Exposition—The purpose of analytical jurisprudence is to analyse and dissect the law of the land (*i.e.* the first principle of the law) as it exists at present without reference either to the law, as it was in the past or the law as it should be in the future. The jurists of this school take the law as it is and try to

analyse and explain the fundamental principles of the existing law. They donot take into account the historical origin or development or ethical significance or validity of these fundamental principles. This school takes into consideration only the mature systems of law. It tries to analyse the existing fundamental conceptions of the law and to present them in a systematic form. The purpose of this branch is to set forth the contents of an actual legal system existing at any time.

A book of analytical jurisprudence will deal approximately with the following subjects :—

(1) An analysis of the conception of Civil law ;
(2) An examination of the relation between Civil law and other forms of law ;
(3) An analysis of the conception of State, Sovereignty and administration of justice ;
(4) An examination of the sources of Civil law ;
(5) An analysis of the conceptions of legal rights, wrongs and duties ;
(6) An examination of the theory of legal liability, both Civil and Criminal, and so forth.

ITS ADVANTAGES

(1) It enables the jurists to have a clear idea of fundamental legal conceptions;
(2) It helps the detection of absurdities in legal doctrines.

ITS DISADVANTAGES

(1) It begets in the jurist a fond attachment for his dogmas and inclines him to take them as final who thus becomes blind to their past history and possibilities of future development;
(2) It may result in barren scholasticism ;
(3) It may lead to hasty and imperfect generalisation.

John Austin was the founder of this School. In 1832 he published a work which he entitled "The Province of Jurisprudence determined" and he determined it with great vigour of analysis. After his death he achieved greater fame and became the founder of what was popularly called the analytical school.

This title is rather misleading as it suggests that analysis is the exclusive property of this school instead of being (as it is) the universal method of jurisprudence. The method of analyses is also applied by the jurists of other schools. Analytical school analyses the law as it exists at present without reference to the past and future. Historical school also analyses the law as it was in the past and its origin and development through ages. Ethical Jurisprudence analyses the law and its other elements as well as its relationship with justice from the point of view of its ethical significance and ideal future. So analysis is not the special characteristic of Analytical School but it is the general basis of jurisprudential study of all the schools and as such it is not the prerogative of analytical school or of any particular school of Jurisprudence but a universal method of study of jurisprudence.

Historical Jurisprudence or legal History—That branch of legal philosophy which is termed historical jurisprudence is the general position of legal history. The historical method is applied to study the origin and development of the fundamental principles of law. The object of this branch of study is to enable us to know the manner in which particular legal conception came into being from the historical point of view *e.g.* a study of Roman Law and its influence on the law of the present ; *jus gentium* and its modern equivalent of International Law and so forth. The jurists of this school simply record the changes which have taken place in the development of law. They try to establish a historical connection between the law as it has been and the law as it is and explain the course of development. It deals, in the first place, with the general principles governing the origin and development of law and its influences that affect the law. In the second place, it deals with the origin and development of those legal conceptions and principles which are so essential in their nature as to deserve a place in the philosophy of law *i.e.* the same conceptions and principles which are dealt with in another manner and from another point of view by analytical school. While the analytical school, for example, explains what the fundamental conception of property is, the historical school seeks to discover what the fundamental conception of property was in its origin and how it has come to be what it is.

The purpose of this branch is to expound the historical process by means of which any legal system came to assume its present condition.

In short, historical jurisprudence is the history of the first principle and conceptions of the legal system.

ITS MERITS

(1) It helps the understanding of the nature of legal institutions and explains their anomalies.

(2) It helps to distinguish those parts of the law which correspond to modern ideas from those which are survival of the earlier age.

ITS DEMERITS

(1) It fosters academic discussions at the cost of practical study.

(2) It hinders the grasping of the law of the present time as a whole.

Ethical Jurisprudence—Ethical jurisprudence is concerned not with the system of law as it exists at present nor as it existed at some other time in the past, but the law as it should really be in the future. It deals with the law from the point of view of its ethical significance and adequacy. It is concerned not with the intellectual content of the legal system or with its historical development, but with the purpose for which it exists and the measure and manner in which that purpose is fulfilled.

The jurists of this school examine the ethical significance underlying the fundamental principles of the law. They put stress on the ideal future of law, rather than on its past and present condition. This school considers the law as it ought to be *i.e.* its fitness and unfitness to meet the needs of the society. It estimates the value of the existing law and deduces therefrom what changes therein are desirable.

The purpose of this branch is to set forth not what the law is or has been but what it ought to be. Now the purpose and end of the law being the maintenance of justice within a political community, it is therefore, concerned with the theory of justice in its relation to law. It is the common ground and meeting point of moral and legal philosophy of ethics and jurisprudence.

A study of this branch of jurisprudence *i.e.* a treatise on ethical jurisprudence must consist of the following matters :—

(1) The conception of justice ;

(2) The relation between law and justice ; and

(3) The manner in which the law fulfils its purpose of maintaining justice.

ITS ADVANTAGES

The great merit of this school lies in its regard for the future improvement of legal institutions and in the help it offers to the Legislature.

ITS DISADVANTAGES

It resorts to the dangerous practice of relying on the conscious efforts of theorists for the development of law.

Of all these three branches of Jurisprudence, we are primarily concerned with the first one, namely the analytical jurisprudence. The other two only play a secondary part. In this respect it endeavours to follow the main current of English legal philosophy rather than that which prevails upon the continent of Europe and which, to a large extent, is primarily ethical in its scope and method. But although the essential purpose of this study is an analysis of the first principles of actual legal system, this purpose is not pursued to the total exclusion and neglect of the ethical and historical aspects of the matter. For, the total disregard of the ethical implications of the law would tend to reduce analytical jurisprudence to a system of rather aerial formalism, and the total disregard of the historical origins and development would be inconsistent with the adequate explanation of those principles and conceptions with which it is the business of the science to deal.

The three aspects of the law—dogmatic, historical and ethical—are so involved with each other that the isolated treatment of any one of them is necessarily inadequate. None of these schools is really self-sufficient. Indeed they act and react upon each other. A complete treatise of jurisprudence would deal fully with all the three branches. Hence Prof. Salmond remarks, "the law must be dealt with systematically (*i.e.* analytically) in respect of its contents, historically in respect of the process of its development and critically (ethically) in respect of its conformity with justice and public interests".

5. Sociology of Law or Sociological Jurisprudence

The growth of the literature styled "the sociology of law" or "Sociological Jurisprudence" is comparatively modern, and its distinguishing features are not easy to determine. The term "sociology" was invented at the beginning of the nineteenth Century by the French Philosopher Auguste Comte as a generic name for the social sciences, such as economics, and anthropology. Sociology is, in brief, the study of man in society.

Scope and purpose of Sociological jurisprudence—Among the phenomena and subjects which a sociologist is expected to study one is the law, but he looks at it from a different way as a lawyer would do. The lawyer in his professional capacity is concerned with the rules that men are expected to observe. He is concerned with the rules as such. For example, the lawyer is only interested with the rules and the breaches of such rules. In other words, the lawyer is mostly concerned with the law as it is,while the sociologists think of its effect upon society, to what extent it is being observed and to what extent it is not and the effect upon the society caused by such non-observance and so on. The fundamental tenet of this school is that we cannot understand what a thing is unless we study what it does.

The lawyer is generally not much concerned to know whether and to what extent these rules actually govern the behaviour of ordinary citizen except when he takes part in some action or prosecution. A Textbook of the law of Tort or Contract, for instance, states the rules relating to Torts and Contracts, and does not state how often torts and breaches of contracts are committed.

Whereas the lawyer is concerned with what legally ought to be the behaviour, the sociologist is concerned with what is actually the behaviour of man. When the sociologist turns his attention to law he is concerned with it as a social phenomenon. He is much more interested in actual behaviour than in views as to desirable behaviour, and thus his chief concern is not with the rules themselves but with the extent to which they are observed,the causes of non-observance, the extent to which the rules fulfil their purpose and the human consequences of the working of the legal machinery. This is the way in which the sociologist looks at the subject of law and this type of study is styled as

"Sociology of law" or "legal Sociology". In fact a number of valuable monographs exist upon particular branches of it : Examples are "The Modern Corporation and Private Property" (U. S. A. 1932) by Barle and Means ; "The Economics of Inheritance" (1929) by Wedg-Wood ; "Old Age Pensions" (1941), by Sir Wilson and Mackey and a number of works on divorce, alcoholism, drugs and imprisonment for debt as well as innumerable reports of royal commission, parliamentary committees and other bodies on the working of legal rules preparatory to reforms.

The most important branch of legal sociology is criminology or penology, the study of punishment in relation to crime. It studies the causes of the crime, the behaviour of cirminals, and the effects of different kinds of punishments upon criminals, particularly their effect in diminishing or increasing crime. Until recently Judges and Legislatures had to gauge the effect of punishment. Now exact data are becoming available through the efforts of Criminologist, who use scientific method (case work and statistics) to determine the actual effect of punishment upon the incidence of crime in the community as well as the effect of other methods of dealing with crime. Work of this kind is obviously of the first importance for law reforming which should be based upon an exact knowledge as to how the existing law is working. Every law reformer is necessarily interested in the sociology of law.

But the general work on the sociology of law, for example,—Dean Pound's article "The scope and purpose of Sociological Jurisprudence" and Dr. Timasheff's "Introduction to the Sociology of Law" (1939), do not take one very far. They are largely a review of previous literature or chiefly a somewhat over-refined classification of types of law and society. The conclusion would seem to be that time is not yet ripe for general works on the sociology of law ; what we need are factual works on the various branches of it. The study is not one for which the training of a lawyer is an adequate preparation, for, the research worker must also have, at the least, a knowledge of statistics.

Some writers take "legal Sociology" to mean the study of the infl uences that shape the law, such as, economic conditions and moral ideas. But a study of this would better be called Historical

Jurisprudence or ethical jurisprudence or the science of legislation. The bes representative of this type of writing is "Interpretation of legal History" by Dean Roscoe Pound who is usually credited as being the American leader in the school of Sociological Jurisprudence.

6. English and Foreign Jurisprudence

If an English lawyer, without any knowledge of the terminology of Roman Law, ventures into the region of continental legal philosophy *i.e.* if he comes to the study of a practical law book of France or Germany, he finds himself on ground wholly unfamiliar as if a stranger in a strange land where men speak to him in an unknown tongue. Following are the reasons for this divergence or difference between the juristic thought and literature of England and that of the continental jurisprudence.

(1) The English Jurisprudence is generally analytical and historical, while the continental Jurisprudence is ethical and metaphysical.

(2) In English language the term "law" means only law and nothing else ; but in continental languages it appears to be ambiguous and means not only law but also right and justice. Hence in continental jurisprudence there is no distinction between law, right and justice. But the English jurisprudence maintains this distinction.

(3) Another distinction between English and foreign usage is that the use of the term "jurisprudence" to denote theoretical or general jurisprudence is a peculiarity of English nomenclature. In German literature jurisprudence includes the whole of legal knowledge and is not used in this specific or limited significance.

Dean Roscoe Pound has attributed the difference of approach not only to this linguistic difference but to the absence of University teaching of Anglo-American law in the continental countries.

CHAPTER II

THE GROWTH OR EVOLUTION OF LAW

7. Primitive Community

According to the Jurists of the Historical School, law cannot be understood without an appreciation of the social milieu in which it has developed. In each society, according to them, there is an interaction between the abstract rules and the life of the people. Stamler in his work "Theory of justice" emphasises that "the notion of community is inherent in the nature of law ; law could exist as a theory if Adam were the sole inhabitant of the globe, but law can exist in fact if an actual society exists". The existence of law presupposes a community. The jurists of the Historical School stressed the evolution of law and its intimate connection with the particular characteristic of the people. In a sense all men are children of the age in which they live. As legal evolution is intimately connected with the human evolution a brief anaylsis of the primitive communities would be a useful approach to the matter.

Primitive society was not organised for law and there was no king nor any common power to keep the people in awe. That was a state of nature. Of course, as long as there have been men, there has probably been some form of human society. The state of nature, therefore, is not the absence of society but the absence of a society organised on the basis of coercive power as to constitute a State.

Speculation has invented definite and simple line of human evolution. Thus, it was said that man lived first in Stone Age, then the Bronze Age and finally the Iron Age ; that in marriage promiscuity came first, then polyandry and finally monogamy although all races have not followed exactly the same line of evolution. There seems to be some co-relation between the economic stage which a race has reached and the social institutions which it enjoys but this co-relation is not perfect and, according to few scholars, economic forces may be all important

but are not all controlling and sometimes they fail to explain significant differences between two societies. Sociologists realise that the variation in the cultural lag of different systems can be explained only by an extensive study of each society—the answer cannot be found in economic forces alone, and that the truth will be achieved by showing the inter-relation between each of the forces which create society.

There is, however, some obvious relationship between law and culture of the society, for law is but a result of all the forces that go to make society although there is a time lag between the creation of new material culture (such as the machines of the Industrial Age) and the development of new social method of control by law. Law is the reason and opinion of the society and is created by the society to meet the needs of the society for its orderly existence and it grows with the growth of the society. We may now proceed to discuss some of the most striking features in the evolution of law.

8. Primitive Law

Primitive Law seems to cover communities in the following categories : Lower Hunters, Higher Hunters, Pastoralists, Advanced Pastoralists, First Agricultural grade, Second Agricultural grade and Third Agricultural grade. But the statistical table as to the co-relation between economic stage which a tribe has reached and its culture and legal institution shows that although the use of a regular system of justice increases as the society develops, it is impossible to say that every tribe in the different economic form or cultural grade has reached the same level of development. So there is no close co-relation between the economic form and the legal institution—all that can be said is that most of the tribes that are advanced economically have also correspondingly developed their legal systems. But before a conclusive finding can be advanced, much greater evidence must be discovered.

Before the era of Courts—It was once thought that the primitive native was automatically law-abiding and, therefore, had no need of a system of law. The mores of a tribe were regarded as a confused mass of usage, custom and religion ; it was said that there was no law, no individual property, no real means of enforcing any right which an individual may think that he possessed. The community was kept

together by fear of the unknown, of the strange spirit that may punish man. What has been done once without any evil result may be done again, but to innovate is to risk a supernatural sanction. Hence the native had no desire to break the customs of the community. Every law, therefore, sprang from a religious sanction, the fear of the unknown and of the spirits that dwell everywhere.

But this view needs correction. Because at a very early stage the native distinguishes between a payment which is obligatory and one that is the result of generosity, where there is the germ of law; of course, before the advent of Court, the sphere of law was fairly small. There were few rules concerning property and inheritance on death. There were rules of marriage (sometimes extraordinarily intricate as in the case of Australian aborigines) which lay down the classes within which marriage may take place. Private wrongs were sometimes avenged by the victim ; in other cases compensation was payable, and a few offences were regarded as an outrage on the community as a whole, such as incest, witchcraft and general incompatibility of temperament. A simple economic structure required few rules for its regulation.

Courts—Courts begin to appear usually about the end of the first agricultural grade. Before this, it is rare to find definite institutions for settlement of disputes, though a chief or patriarch may exercise a general control over the community. With the advent of the Court, the sphere of law becomes more definite and the rules gradually more precise. Nevertheless, it is a long and slow evolution before there are institutions with the effective power of the Courts, Legislatures, and the police mechanism of the modern State.

As Courts grow in power the acceptance of compensation is made compulsory, save for certain offences which are regarded not as a mere private wrong but a wrong against the community and deserving of punishment. Thus Criminal law is definitely separated from Civil Law.

At first there is a little notion of legal duty—the concept is rather that of physical liability, and it is the community rather than the individual who is responsible—it is only gradually that an individual's obligation is distinguished from that of the group to which he belongs.

There has been a gradual change from liability of the person to that of the goods which a person possesses. This evolution of the law of execution against property is rather slow—thus in Roman Law the right of *pignoris capio* is at first exercised only to put pressure on the debtor to pay his debt, for there is no right to sell or to use the *res*. When a Court begins to grant execution against property, the tendency is for all the defendants' chattels to be seized, even if only a small sum is owing. Today, now that imprisonment for debt has been so largely restricted, liability is in effect limited to a man's property and future earning power. By the devise of the limited Company a man's loss may be confined to his investment in a particular venture, for the creditor can call on the funds of the Company alone.

Primitive law is not rigid and inelastic nor is it largely concerned with procedural details. It is in the middle period that excessive formality develops. Law begins with a rather vague and elastic rules. When technicalities appear in commercial transactions, in property, or in legal procedure, they mark the end of the period of primitive law. For example, the law of contract begins in a simple way and it is only in the middle period that it becomes technical and relatively fixed. Moreover, some legal systems remain relatively free from technicality even at a late stage of development.

Codes—Codes begin to appear, usually at some period after the third agricultural Grade. Early Codes may be represented by Salic Law, middle Codes extend from the Leges Barbarorum of the reign of Charlemagne to the more developed laws of the Pentateuch and the Twelve Tables ; finally as an example of the late Code we have that of Hammurabi (which incidentally is very early historically, the date being about 1914 B. C.).

Henry Maine emphasized the influence of religion on early Codes. But the Codes of Hummurabi and of Assyrians are predominantly secular in character. It is true that in the Hebrew Pentateuch, in the Hindu Code of Manu, and in the Roman Twelve Tables religious sanctions are to be found. In all probability the Codes did not create much that was new and very largely the result of a consolidation of scattered legislation. The view that all law is based on the work of one Legislature is frequently accepted by primitive people, for example,

Hebrew Law was traced to Moses. But it is inconceivable that such a system was created by one act. The Codes are the result of gradual accretions to a short and primitive statement of the law and occasionally, to remove doubts, an authoritative version with some new matter is published by a law-giver.

The use of writing has been an important influence, for the sphere of law becomes more definite and there springs up a new professional class which is more numerous and more active than those who were the guardians of the oral tradition of the law.

9. Middle law

In this period we notice a gradual growth of rigidity and technicality owing to curious love of formalism, which, it has been suggested, is a relic of traditional ceremonies of religious rituals. The parties desire a religious sanction and some ceremony is considered necessary to create a binding sense of obligation.

When primitive law has been once embodied in a Code, Maine writes, there is an end to its spontaneous development and thereafter, law is brought into harmony with society by three instrumentalities, legal *fiction, equity* and *legislation.* What are Codes are but legislations, and frequently they are mere consolidations of prior legislation.

Fiction—Maine defined the fiction in a broad sense : "any assumption which conceals or affects to conceal the fact that a rule of law has undergone an alteration, its letter remaining unchanged, its operation being modified' (*e.g. Actio Publiciana* of Roman Law). The procedural fictions by which English Courts extended their jurisdiction are well known. But fictions are not confined to the past, for they still have their use today. What is *quasi*-contract is but a legal fiction.

Judges use this method because it is not, as Bentham suggests, a desire to deceive, for the fiction deceives none. Moreover, the legal fiction may prove a very useful agency of development of law. The fiction is the algebra of law and a picturesque form of algebra besides. The first method of bequeathing an estate to one who is not a blood relation may be by adoption, then in the next stage a fictitious adoption may be posed as the legal basis of a will. Legal maxim is also

sometimes called a fiction *e.g.* the dead give seisin to the living. Although not legal principles, in the true sense, these maxims play a real part in organising legal knowledge and the use of each phrases minimizes the burden upon memory and a host of particular examples may be covered by the one generalisation.

Somewhat akin to the maxim is 'dogmatic fiction' which is used to classify law that already exists—this clearly distinguishes it from the function of the 'historical fiction' which is to extend the law by bringing a new case within an old rule. Dogmatic fictions may range from the crude generalisation of early times to such a developed concept as that of corporate personality. Some writers go to the extent of treating all legal concepts as fictions or tools of thought. A materialist approach suggests that everything which does not exist in the physical world is an invention of mind—a fiction.

The fiction serves its purpose, but it has also serious defects. Sometimes sight is lost of the conditions under which the fiction was created and it is used to reach results that were neither contemplated nor desired. Under Scots fiction, wife claims a life interest belonging to her husband after his death although logically she cannot. Secondly, it makes the law cumbrous and difficult to classify—thus an action for the seduction of a minor depends at common law on the fiction of the father's loss of service due to the resulting illness. Historically the action gives compensation only for material loss, but today, if an action does lie, damages may also be given for outrage to the family however.

The House of Lords decided that fiction should not be used beyond its real purpose. Lord Wright considers that the time has now arrived at which the fiction should be abolished and the law placed on the firm ground of a reasonable principle.

Equity—In every system of law there is a conflict between two types of judicial mind—one glories in a strong decision which upholds the logical elegance of the law even at the cost of injustice or inconvenience (*e.g.* common law recognizes only the Trustees and gives no protection to the beneficiaries), the other emphasizes that law exists for man and not man for law and that the rules must be so adopted that

injustice is avoided (*e.g.* Equity Courts *i.e.* Court of Chancery protect the beneficiary as against the Trustee).

If we generalise from English and Roman Law, we may think with Maine of equity as any 'body of rules existing by the side of the Original Civil Law, founded on distinct principles and claiming incidentally to supersede the Civil Law by virtue of a superior sanctity inherent in those principles'. Equity came in England to help the Common law, to do the real justice and not to oppose the law but to fill up the gap or remove the defect in the Common Law. As late as the reign of Henry VII, a Chancellor (Equity Court) could, over the dinner table, suggest to the Common law Judges that, if they set their own house in order, the injunction which they feared would become unnecessary. The increasing technicality of the Common law rendered the existence of the power of the Chancellor a real necessity.

In Rome the work of the praetor in modernizing the law, enforcing the requirement of good faith, emphasising the intention of the parties rather than the form of an agreement is somewhat similar in effect to that of the English Chancellor. Although in other systems we do not find distinctions as clear cut as the English contract of law and equity and the Roman separation of *jus civil* and the praetorian law, in most continental countries the same word is used for law and justice. Equity, so far as it operates at all, is a force working through and not in opposition to the law and the continental lawyer finds it hard to grasp the exact relationship between Equity and the Common Law.

10. Classical law

The classical stage is marked by a sudden flowering of legal genius. The community is well established, but rapid social developments have left the law far behind. The primitive rules, in spite of the use of the fiction and in spite of interpretation to mean that it does not really mean, fails to serve the needs of the period. There is a change that law may become a mere chaos of specified precedents, for, although rules are many, principles are a few. There is need of classification, analysis and synthesis. The dead law of the past must be cut away in order to allow the future growth to be unhampered.



Hence the search for general principles which will explain the actual rules and provide a ground for future development, hence the analysis of the concepts which the law uses in order to achieve clarity. This was the work performed by the Roman jurists of classical era and by the English Judges and writers of the nineteenth century. A law that has a proper theoretical basis is more easily understood, applied and extended than one which lacks such a foundation. Hence the desire for a fully developed theory which can stand as a justification behind particular rules. Developed jurisprudence begins in the classical age.

The textbook shows the desire to organise, classify and search for a ratio legis which will explain and unify law instead of leaving it a mere collection of specific rules. The English law of Tort, for example, was greatly developed through the influence of the writings of Pollock and Salmond. Blackburn, J. explained several isolated rules of strict liability by a new principle which has shown great capacity for development - that he who uses his land in an unnatural or abnormal fashion which casts an excessive risk on his neighbour is strictly liable for any damage caused by the escape of dangerous things from his land. (*Ryland vs. Fletchre* 1866 L R 1 Ex. 265).

The classical period cannot hope to stabilize the law entirely. But if the search for principle has been successful, the law can be adapted and modified to suit new condition. The classical period begins the creation of a developed system which is sufficiently mature to stand the strain of adaptation. This was the secret of the influence of Roman Law upon European legal history. The Roman jurists were not gifted with speculative powers, but they did create a legal scheme of classification and a set of legal terms and concepts which were of great service to races whose native law was less mature. Moreover, the jurists had tested their legal principles, as they developed them, by applying them to hypothetical cases for a convenient intermixture of practical decisions and logical theory. Paradoxically enough had the Digest bear a more perfect production, its influence would have been less. It represented, not a perfect set of rules, but the efforts of the classical jurists to show the reason behind the law. A study of it was an excellent training in legal technique, and the mind thus trained could apply the same method in the development of other system.

11. Post-classical law

In the post-classical period, society becomes more complex and rapid development of the law is inevitable. In Roman post-classical law we find certain definite characteristics. Jolowicz mentions : Firstly, increasing reliance on equity at the expense of legal principle—there is lacking the desire to think out a new principle in place of the old and consequently a tendency to solve the issue merely by relying on phrases. The desire to achieve justice is commendable, but there is too much of a tendency to take the intellectual short cut. Secondly, there is a desire to protect the weak at the expense of the strong, even at the expense of general security and credit. Thirdly, there is the increasing emphasis on intent at the expense of form : an impatience of mere technicality which may defeat the ends of justice. These tendencies are observable to some extent in our modern system of law.

Roman Law, after the post-classical period, received a new lease of life and has left its marks, deep on the modern world. But there is a tendency in mature systemh as economic and social conditions become more complex, to deal with new situaions by statutes designed for a particular mischief only. A flood of such remedies leaves the law in a somewhat incoherent state. It is the task of the lawyer to point out how much the old order has changed and what reforms are necessary to make the body of the law again consistent with itself. It is easy to sneer at the desire for legal elegance, but if a system loses its underlying unity it becomes hard to teach and difficult to apply. Hence in the post-classical period there is a change to lawyers to study the basis of statutory law, as in the classical period attention was concentrated on the basis of case-law. Otherwise law may cease to be a system and become a collection of *ad hoc* rules.

At present the challenge is the stronger because of the influence of new social theories of collectivism and planning. How much of the classical conception of ownership remains, so far as real estate is concerned, in the light of the statutes dealing with town and country planning ? Has the nature of contract insensibly changed ? Is the law of Tort now more concerned with adjusting social risks than awarding damages on a basis of fault ? These questions cannot be answered in a word, but they do demand examination if there is to be

real understanding of the functioning of the law. No jurisprudence can be adequate unless it gives a better understanding of law, its evolution, and its social purpose. Legal purist may label the post-classical eras as degenerate ; but that does not preclude us from studying the real nature of the world in which we live and attempting to make of law a more effective tool to achieve the ends which society demands.

The earlier Soviet jurists attempted to write the epilogue of the story of law based on the German individualist school which argued that the essential purpose of law was the protection of individual rights and to provide the basis for 'Commodity exchange' between equals, and to protect property rights. Pashukanis deduced therefrom firstly, that law being merely the reflection Capitalism, would wither away when, Capitalism was destroyed as its essential *raisond' etre* disappeared : Secondly, that under socialism the whole national economy becomes the private business of the State—in other words, mere administration and not law.

But there was a lack of historical sense in the approach which seems to be more curious at the present when, instead of there being any serious efforts for eliminating the conflicting interest that split up the world, more blocks are coming into existence dividing it into more groups and sub-groups and widening the gaps between them, the West and the East, the Capitalists and the Socialists, the Whites and the non-Whites, getting more and more insurmountable and separating them, from one another. This being the intellectual and material format of the World today, the future which is going to inherit can only fill one with dismay. The way the gaps are increasing and widening indicates an ominous trend which may soon degenerate into a far greater crisis than the world has witnessed.

But law, as a weapon of society, has served many ends and it was ridiculous to suggest that, because individualism disappeared, so would law. Moreover, from a practical point of view, the State cannot survive on a mere theory of administrative discretion—Both the State and the citizen need some elements of predictability and certainty. The substance of law may change, but the need for a core of certainty still exists. The only hypothesis on which we could conceivably imagine the disappearance of the law would be the advent of the millennium.

If every human being were perfect, there would be no need to use the crude compulsions of law to make social life possible. Until then the more we have collectivism the greater the sphere of law. But the human nature being what it is, the sphere of law would never be lesser. Moreover, important as the property element may be, it is not the sole sphere with which law deals. Even if no one covets his neighbour's possession, he may still covet his neighbour's wife. Law may change its function in the socialist State but no community can exist without it.

CHAPTER III

KINDS OF LAW

12. General Law

The term law generally means any rule of action. In the words of Hooker, "We term any kind of rule or canon whereby actions are framed a law". Blackstone says "Law in its most general and comprehensive sense signifies a rule of action, and is applied indiscriminately to all kinds of action—whether animate or inanimate, rational or irrational". Thus we say, the laws of motion, of gravitation or of mechanics, as well as the law of nature and of nations. In its widest sense there are many kinds of law, and Salmond mentions the following as sufficiently important and distinct to deserve separate mention and examination : (1) Imperative law ; (2) Physical or Scientific law ; (3) Natural or Moral law ; (4) Conventional law ; (5) Customary law ; (6) Practical or Technical law ; (7) International Law or the Law of Nations ; (8) Civil Law or the Law of the State.

13. Imperative Law

Imperative law means a precept or a rule of action imposed upon men by some authority which enforces obedience to it. In other words, an imperative law is a command, or a rule in the form of a Command, which is enforced by some superior power. Law is taken here in the sense of Command ; and it is imperative because it must be obeyed. A rule, the observance of which is left to the good pleasure of those for whom it is laid down, is not a law in this sense. Austin says "A law is a command which obliges a person or persons to a course of conduct." According to many eminent jurists Civil law—the law of the State—is nothing more than a particular form of imperative law. They consider that Civil law consists of general commands issued by the State to its subjects, and enforced, if necessary, by the physical force of the State. "The Civil Law" says Hobbes, "are the commands of him who is endued with supreme power in the State

concerning the future actions of the subjects." Man, according to Hobbes, is an altogether selfish animal. He is anything but a social animal ; indeed he finds nothing but grief in the company of his fellows, and lives in a continual fear of danger and violent death. Therefore, man is driven by evident necessity to join some authority however despotic. According to him, law has its source not in custom, not in consent, but in the will and power of him who, in a Commonwealth beareth not the sword in vain. In other words, it is men and arms that are responsible for the maintenance of law and order in the State, and we must obey the law whether it is pleasant or not. Similar opinions have been expressed by Bentham and Austin and accepted by other English writers. This view to a certain extent expresses an important aspect as to the nature of Civil law, though it falls short of an adequate analysis. It rightly emphasises the central fact that the Civil law is based on the will and physical power of the State. To what extent it falls short will be considered when we come to the imperative theory of Civil Law.

Sanction—The insturment of coercion by which any system of imperative law is enforced is called a sanction, and any rule so enforced is said to be sanctioned. Thus physical force in various methods of its application is said to be the sanction app[illegible] the State in the administration of justice. Censure, ridicule and contempt are the sanctions by which society (as oppposed to [illegible]te) enforces rules of positive morality. War is the last and most formidable of the sanctions with which the society of nations (U.N.O.) maintains the law of nations. Threatenings of evils to flow here or hereafter from Divine anger are the sanctions of religion so far as religion assumes the form of a regulative or coercive system of imperative law.

A sanction is not necessarily punishment or penalty. To punish law-breakers is an effective way of maintaining the law, but it is not the only way. The State enforces the law not only by imprisoning the thief but also by depriving him of his plunder and restoring it to the true owner, and each of these applications of the physical force of the State is equally a sanction.

Salmond in his jurisprudence says that every society whether organised or not tends to develop imperative laws formulated by the

governing authority of that community or society for the control of its members in order to secure the purposes for which it exists. Not only States, but also a church, an army, a school, a social club, a Trade Union, a family or any other organised institution tend to develop them. And again—"Just as an individual State develops within itself a system of imperative law imposed by it upon its members, so the society of States develops a system of imperative law for the regulation of the conduct of those States towards each other."

But it is doubtful whether the laws framed by the churches, clubs or even the States with respect to each other approach the strict theory of imperative law. In the first place, membership of a church, club or society of States is purely voluntary. And secondly, any member of such organisation can leave the membership. Neither censure, sense of ridicule or the threat of war can deter any member of such organisation from doing in any way he pleases. Strictly speaking, the laws made by such organisations should come under the category of Conventional Law.

14. Physical or Scientific Law

Physical laws or the laws of science are expressions of the uniformities of nature—general principles expressing the regularity and harmony observable in the activities and operations of the Universe, such as, law of gravitation, the laws of tides, or the laws of Chemical combination. Even the actions of human beings, so far as they are uniform are the subject of law of this description as, for example, when we speak of the law of psychology. These are rules expressing not what men ought to do but what they do. In other words, physical law is an expression of actions as they are, whereas Civil law is an expression of actions as they ought to be.

Physical laws are also and more commonly, called natural laws ; but the latter terms are ambiguous, for they signify also the moral law ; that is to say, the principles of natural right or wrong.

15. Natural or Moral Law

By natural law or moral law is meant the principles of natural right or wrong—the principles of natural justice. Salmond uses the

term justice in its widest sense to include all forms of rightful action. Justice is of two kinds, distinguished as natural and positive. Natural justice is justice as it is in deed and in truth, that is, an ideal form of justice which ought to prevail, although in fact it may not. Positive justice is justice as it is conceived, recognised, expressed and enforced by human society. Hence the term natural law means the aggregate of the rules of morality or natural justice.

This natural law was conceived by the Greeks as a body of imperative rules imposed upon mankind by Nature, the personified Universe. The Stoics, more particularly, thought of Nature or the Universe as a living organism, of which the material world was the body, and of which the Universal Reason was the pervading, animating and governing soul ; and natural law was the rule of conduct laid down by this Universal Reason for the direction of mankind. When the Greek philosophy passed from Athens to Rome it appeared there as *lex naturale* or *jus naturale.*

Natural law has received many other names expressive of its various aspects : (1) It is Divine Law—the command of God imposed upon man ; (2) Natural law is also the Law of Reason, as being established by that Reason by which the world is governed ; and also as being addressed to and perceived by the rational nature of man ; (3) It is also the unwritten law in the sense that it is written not in Statute Book but solely by the fingers of nature in the hearts of men ; (4) It is the Universal Law or Common Law as being of Universal validity, the same in all places and binding on all people and not confined to one particular nation or State ; (4) It is the Eternal Law as having existed from the commencement of the world, (6) Lastly, it is also called the Moral Law—as being the expression of the principles of morality.

The term Natural Law in the above sense has now fallen out of use in England, except outside the circle of those particularly interested in philosophy. We speak of the principle of natural justice or of natural morality but seldom of the law of nature. For this, Salmond says there are at least two reasons. Firstly, the term natural law is now used to signify physical law—the expression of the uniformities of nature. Secondly, the term law as applied to the principles of natural

justice, brings with it certain misleading association—suggestions of Command, imposition and legislation—which are not in harmony with the moral philosophy of the day.

16. Conventional Law

According to Salmond, by conventional law is meant any rule or system of rules agreed upon by persons for regulating their conduct towards each other. Agreement is a law for the parties to it. So, conventional law presupposes an agreement between the parties. Examples are the rules and regulations of a Club or other voluntary society, and the laws of football, cricket, golf or any other game. These are the rules which the players have expressly or tacitly agreed to observe in their conduct of the game.

The most important branch of Conventional law is the law of nations or the public international law which consists of the rules which have been expressly or impliedly agreed upon by States as governing their conduct and relations to each other.

17. Customary Law

According to Salmond, Customary Law is any rule of action which is actually observed by men—any rule which is the expression of some uniformity of voluntary action. Custom is a law for those who observe it—a law or rule which they have set for themselves and to which they voluntarily conform their actions. They are the laws of dress, deportment and etiquette.

The operation of Custom as one of the sources of Civil Law will be considered later. That portion of the Civil Law which has its source in custom is itself called customary law, but it is not in this sense that the term is here used. Customary law in the present sense is not a part of Civil law, but a different kind of law in the generic sense.

18. Practical or technical Law

Practical or technical law consists of rules for the attainment of some practical ends, and which guide us to the fulfilment of our purposes ; which inform us as to what we ought to do, or must do,

in order to attain a certain end. They are those rules which are required by us for the fulfilment of our purpose, such as the laws of health, the laws of musical and poetical composition, the law of style, the law of architecture and the rules for the efficient conduct of any art or business. The laws of a game are of two kinds—some are conventional, being the rules agreed upon by the players ; others are practical or technical, being the rules for successful playing of the game.

19. International Law

International law, or the law of nations, consists of those rules which govern sovereign States in their relations and conduct towards each other. All men agree that such a body of law exists and that States do in fact act in obedience to it ; but there is a difference of opinion over its proper classification. Salmond classifies the various competing theories regarding the essential nature of international law as follows :—

Natural Law Theory—According to some writers International Law is a branch of natural law, namely, the rules of natural Justice as applicable to sovereign States in their relations towards one another.

Customary Law Theory—Others hold the view that International Law is a kind of customary law, namely, the rules actually observed by States in their relation to each other.

Imperative Law Theory—According to this theory, international law is a kind of imperative law, *viz.* the rules enforced upon States by international opinion or by the threat or fear of War.

Conventional Law Theory—Some other writers hold the view that it is a kind of conventional law having its source in international agreement.

It is the last view that has received most support from the Courts of England. Lord Russel of Killowen defined international law as "the aggregate of the rules to which nations have agreed to conform in their conduct towards one another." Lord Chief Justice Coleridge says "The Law of nations is that collection of usages which civilized States have agreed to observe in their dealings with each

other". Lord Esher says "The Authorities seem to me to make it clear that the consent of nations is requisite to make any proposition part of the law of nations". Lord Cockburn says "To be binding the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of Governments, or may be implied from established usage." There is, however, nothing to prevent us from regarding international law as belonging, in part, to each of the four categories mentioned above and it does not seem possible to say that it falls wholly within any one of the categories.

Of the four views, the most plausible is the one that would place international law in the category of conventional law but even this is open to objection. When a new State is recognised by other States, it becomes subject to international law, and there is no necessity for any agreements on its part so to be bound. To say that a State's agreement is 'implied' from the mere fact of its statehood, or of its being recognised, is to introduce a fiction and in effect to abandon the theory of agreement. Even with regard to the long established States like France and Great Britain, it cannot be shown that they have actually agreed through their representatives to all the rules of international law.

In spite of the facts as above, the most popular view is that the law of nations is essentially a species of conventional law and, according to Salmond, it has its source in international agreement and it consists of the rules which the sovereign States have expressly or impliedly agreed to observe in their dealings with each other. Hence it is to be classified as a form, and instead the most important form, of conventional law. This international agreement, which is the source of international law, is of two kinds—(1) express, (2) and implied.

(1) Express agreement is made by treaties and international conventions. International law derived from express agreement is called the "Conventional Law of Nations."

(2) Implied agreement is based on the customs and practices of the States. By observing certain rules in the past, States have impliedly agreed to abide by them in future.

International law derived from implied agreement is called the "Customary Law of Nations".

International law is again divisible into two classes which may be distinguished as follows :—

(*a*) *The Common Law of Nations*—The Common law is that which prevails universally, or at least generally, among all civilised States, being based on their 'unanimous or general agreement, express or implied.'

(*b*) *The Particular Law of Nations*—The particular law is that which is in force solely between two or more States, by virtue of an agreement made between them alone.

20. Civil Law (Corpus juris)

The term Civil Law has many meanings. The Romans used the term *jus civile* (1) in the sense as the law that was applicable only to the Roman Citizen as opposed to the law that was to be applied to the foreigners. It is also used to distinguish the Roman law (*Corpus juris civile*) from Canon law (*Corpus juris canonici*) and other law. It is also used to signify, not the whole law of the land, but only the residue of it after deducting some particular portion having a special title of its own. Thus Civil law is opposed to Criminal Law or to Military Law. But what we mean by Civil Law, is the law of the Civitas or the State, the law of the lawyers and of the law Courts. The name is derived from the *jus civile* of the Romans.

The difficulty and importance of the question as to the true nature of Civil Law deserve a separate and detailed consideration in the following Chapter.

CHAPTER IV

CIVIL LAW

21. Nature of the term 'Law'

There are many uses of the term Law :—

(1) The term 'law' as indicating the law of the land, is sometimes spoken of as positive to denote law made or established by human authority as opposed to natural law which is not created by any human agency and is immutable. It is, however, not possible to confine positive law to the law of the land. All law is positive that is not natural. International law, for example, is a kind of positive law no less than the Civil Law itself, although it is not the law of the land

(2) The term 'law' is used in two senses, which may be conveniently distinguished as the abstract and the concrete. In its abstract application we speak of the 'law of England 'law of libel', 'Criminal law' and so forth. Similarly, we use the phrase 'law and order', 'law and justice', 'Courts of law' etc. In its concrete application, on the other hand, we say that Parliament has enacted or replaced a law. We speak of the bye-laws of a Railway Company, or Municipality. In the *abstract sense* we speak of 'law' or 'the law', which means the entire body of legal principles prevailing in a particular legal system for example, the law of Bangladesh. Law in the abstract is *jus e.g.* the law of Rome is called *jus civile.*

On the other hand, in the concrete sense, we speak of 'a law' or 'laws'. A law means a statute passed by the Legislature of a State. Every act of Parliament is called 'a law' and 'laws' means plurality of 'a law'. Law in the concrete is *lex. Lex*, a statute, is one of the sources of *jus.*

The Generality of Law

The law need not necessarily be general, that is, the rules of conduct addressed to all people in general, but it may also be certain precept addressed to an individual person. An example of a general rule would be the general rule that Judges may grant divorce on specified grounds. This is general as it applies to all married couples and to all acts coming thereunder. An example of a precept concerned with an individual case would be an eighteenth century Private Act of Parliament divorcing a particular married couple, or the former Acts of Attainder whereby individual persons were sentenced to death or otherwise penalised. Similarly, an Act of Parliament, or a judicial decree for a divorce operates in the law but it is not itself a part of the law. Some types of legal pronouncements are intermediate between these two extremes—general or particular. For instance, a rule may be general as to acts though particular as to persons, or it may be general as to persons though particular as to acts ; and other elements of particularity may also be imagined, thus, it may apply to a narrow class of people or within a narrowly defined geographical area, or for a short period of time. Similarly, there are also degrees of generality of law. In the present book the term 'law' is used to cover all rules enforced by the Courts, however, the degree of their generality.

22. The definition of Law

The definition of the word 'Law' is the most discussed question in jurisprudence. It will be remembered that the term 'law' is now being used to mean the Civil Law exclusively. Consequently, it is no objection to the definition that it does not cover international law, for it is not meant to do so.

The term 'law' may be defined from the point of view of the theologian, the historian, the sociologist, the philosopher, the political scientist, or the lawyer. Even within Jurisprudence there are differences of approach. Law may be defined firstly by its basis in nature, reason, religion or ethics ; secondly, by its source, in custom, precedent, or legislation ; thirdly, by its effects on the life of the society ; fourthly, by the method of its formal expression or authoritative

application ; fifthly by the ends that it seeks to achieve. We are, however, concerned with the definition of the Civil law with which ordinary lawyers are professionally concerned.

Salmond defines law as the body of principles recognised and applied by the State in the administration of justice. In other words, the law consists of the rules recognised and acted upon by Courts of justice. It is, therefore, to the Court we should turn to ascertain the true nature of law. Because, all law is not made by Legislature. There are also other sources from where we get laws. For example, the Courts also create a certain form of law, called a precedent or judge made law. All law, whatever may be its source, is recognised and administered by the Courts and negatively no rules are recognised and administered by Courts which are not rules of law. There are other persons or bodies besides the law Court who enforce rules of conduct. For instance, there are the Labour Tribunals appointed under the Trade Disputes Acts. If such a Tribunal lays down a rule which it intends to follow in exercising its discretion, such a rule will come under the category of a 'law'. Similarly, if the Parliament were to pass a rule regulating the conduct of its members, the rule would amount to a law. So long as the Courts recognise and act upon as a rule of law, it is a law.

2.1. The Imperative Theory of Law

The definition and characteristics of Imperative theory of Civil Law, as propounded by Austin, and also known as Austinian theory of law, have been dealt with in Section 13 of Chapter 3.

In this well-known analysis, *Austin* first attempts to define the genus law and then to mark the differentiae which distinguish law as the subject-matter of jurisprudence. Austin defines law as the command of the Sovereign. In the broadest sense in which the term 'law' should be used, it signifies a Command which obliges a person or persons to a course of conduct. Being a Command, it must issue from a determinate person or group of persons with the threat of displeasure if the rule be not obeyed. The person who receives the command must realise that there is a possibility of incurring some evil in the event of disobedience.

Having thus discovered the genus law, Austin distinguishes the species—positive law as he terms it. Positive law is laid down by a political superior for a political inferior. He postulates, firstly, a political society and secondly, a superior in the society, who is politically obeyed by the bulk of the community and who is not in the habit of obedience to any other person or body. The instrument of coercion or the physical force is said to be the sanction applied by the State to command obedience. The sovereign, of course, may consist either of one person or a number of persons.

Holland defines law as the rule of external human behaviour enforced by sovereign political authority. Law deals with only the external behaviour of men and not with the internal motive. It is true, law is more concerned with the social consequences of action than with their effects on the character of the actor. It insists merely on the compliance of conduct with certain standards and seldom worries as to the inner motives of men which is considered by ethics as all important.

The Imperative theory recognises that the Civil law is the product of the State and depends for its existence on the physical force of the State ; where there is no such State which governs a community by the use of physical force, there can be no such thing as Civil Law. So, this theory puts undue emphasis on force totally ignoring the ethical element of justice in the conception of law.

Salmond's criticism of the Imperative theory of Law

According to Salmond the Imperative theory is inadequate and one-sided for the following reasons.

Firstly, the theory has altogether ignored the ethical character of law. It totally ignores the relationship between law and justice. Hence it places undue emphasis and importance to the coercive power or physical force of the State eliminating all other elements from the idea of law. The idea of law is inseparably connected with right and justice. Law and justice together constitute the complete conception of law. Law is not might alone or justice alone but the perfect Union of the two. It is justice speaking to men by the voice of the State. The rules of law may be studied from the following two standpoints :—

(*i*) They are commands issued by the State to its subjects and enforced by physical force of the State ; and

(*ii*) They are also the principles of justice, that is, the right or wrong declared and recognised by the Civil law and enforced by the State in the administration of justice.

Secondly, all legal principles are not commands of the State. Law is a great deal more than Commands. The law includes the whole of the principles accepted and applied in the administration of justice whether they are imperative in nature or not. Hence there are many non-imperative legal principles which create liberties rather than obligations. Some illustrations are :—

Permissive rules—Such as, certain persons are allowed to sit as a juror or assessor to assist the Court, but there is no command here.

Enabling Statutes—These statutes merely permit certain acts which one is otherwise unable to do *e.g.* the law allowing a man to make a will ; it does not force him to do so. How then are they commands ?

Rules of Judicial procedure—There are certain rules of procedure and of judicial construction which cannot be regarded as commands, for example, hearsay is no evidence.

Hence according to Salmond the purely imperative theory of Civil law is inadequate and one-sided. His view is that all the three elements—imperative, non-imperative and the ethical, constitute the true theory of law.

Hence Salmond rejects the purely Austinian theory of law and looks upon law as administered by Court rather than as derived from sovereign.

Objection—To the above view of Salmond the following objections are made by the jurists of the imperative school :—

(*i*) It is remarked that the primary function of the State is the application and enforcement of the law ; hence it is not permissible to say that the law is the body of rules observed in the administration of justice.

(*ii*) It is also maintained that the law is first in the logical order of ideas and administration of justice is the second ;

but this proper order of ideas has been reversed in defining law by reference to the administration of justice.

Salmond's reply to the above objection

According to Salmond the primary function of the State is not the enforcement of the law, but to administer justice, that is, to maintain right, redress wrong and to uphold justice. The adminstration of justice may be defined as the maintenance of right or justice through the agency of the Courts by means of physical force of the State. Hence the administration of justice precedes the law in the logical order of things. Justice is administered according to law. Justice is the ends, law is merely the instrument and the means for achievement of that end. So law must be defined by reference to justice.

Prof. Salmond goes a step further to observe that the administration of justice is perfectly possible without law at all. He has given the following reasons for the above observations :—

(*i*) The first and foremost function of the State is not the enforcement of the law but to administer justice *i.e.* to protect right, redress wrong and to uphold justice. The sole object of the administration of justice is to maintain right or justice through the agency of Courts by means of physical force of the State. Hence the administration of justice precedes the law according to which justice is administered. Justice is the end, law is the means for achievement of that end. Hence administration of justice is possible, though not expedient, without law.

(*ii*) Secondly, in administering justice it is not necessary, however, expedient it may be, that the Courts should act according to law. The Courts, no doubt, act according to predetermined rules and principles called the law ; but there may be a Court which administers justice in such a fashion as it thinks just and proper according to the circumstances of the case regardless of the predetermined general principles of law. Such a Tribunal may not be an efficient or trustworthy tribunal but is perfectly possible one. The Court of Chancery administered

justice in this way when the Court of Common Law failed to do the real justice.

(*iii*) Thirdly, in many cases the Judges have to act according to their own discretion and not according to law when no express provision can be found in the general principles of law. However great the development of law may be, certain amount of justice according to the discretion of the Judge must remain. Total exclusion of judicial discretion by legal principles is not only impossible but also inexpedient. In order to do the real justice the Judge must be given a certain amount of discretion within which he should act. Of course, the degree within which the Judge should exercise his discretion is a question for which no fixed rules can be laid down. Therefore, the existence of law is not essential to the administration of justice.

Historical argument against the Imperative theory of Law

Against this fact of the Imperative theory that Civil Law is the product of the State and depends for its existence upon the coercive power of the State and that where there is no such state which governs a community by the use of physical force, there can be no such thing as State, the following historical argument is advanced.

Maine has pointed out that many rules of conduct, which are enforced like laws, do not proceed from the sovereign. According to him Austin's view is found to be radically false when applied to many non-European Communities. The village customs of the Punjab were laws, because they were customs and not because they were commanded by Ranjit Singh. Hence the Austinian definition of law is inapplicable to more primitive States, specially to oriental States. Early law is not the Command of the State, it has its customs, religion or public opinion. So, according to him "Law is prior to and independent of, political authority and enforcement." It is enforced by the State beacuse it is already law ; it is not law merely because the State enforces it.

But against this historical view on the imperative theory of law, Salmond argues that if there are laws prior to, and independent of,

the State ; they may greatly resemble law and may be historical sources of law ; but they are not themselves law. They are nothing but 'positive morality' and cannot be termed 'Civil Law'. The historical argument, according to Salmond, fails to appreciate the distinction between the formal and material sources of law.

The law derives its sanction and validity from the formal source, that is, the State. Hence there can be no law unless there is an organised political community. Therefore, the law is not prior to or independent of political authority and enforcement by it. The law derives its material contents from the material sources, that is, custom and religion to which the formal source, *i.e.* the State gives the force and status of law.

24. Ethical element of Justice in the conception of Law

Ethics is a study of the supreme good—an attempt to discover those rules which should be followed because they are good in themselves. Law lays down what is convenient for the time and place. The law has been defined as the body of legal principles recognised and applied by the State in the administration of justice. In other words, law has been defined by reference to justice. This element of justice in the definition of law emphasises the idea that law and justice are synonymous terms. Thus we say that Courts of law are also Courts of justice, and the administration of justice is also the enforcement of law. A complete analysis of the idea of law, therefore, involves an analysis of the ethical element of justice involved in it. A question naturally arises as to why law is spoken of in terms of justice.

Any act, which a man performs, is either for obtaining happiness or warding off unhappiness. The highest goal of man in this world is the happiness of all human beings. It is from its effect on human welfare that our action must be judged. This effect is two-fold. An action may be considered either as to its effect on the doer himself, or to its effect on the well-being of mankind at large. Viewed solely with regard to the doer himself, his act is to be judged as being either wise or foolish—wise if it promotes his well-being and happiness, foolish if it diminishes it. Viewed with regard to the general well-being, his act

is to be judged as right or wrong, just or unjust. It is right and just if it promotes the public welfare, wrong and unjust if it diminishes it. In other words, the rule of wisdom instructs a man how he must act in order to promote his own welfare and the rule of justice instructs him how he must act in order to secure and promote the general welfare of mankind. But if the interests of each individual were in all respect identical with the interests of mankind, and if it were possible for each man to seek his own good without thereby interfering with the similar activities of other men, there would be no need or place for the rule of justice, and the rule of practical wisdom and self-interest would serve all purposes. But this is not so. The word is so made that there is no enough goods sufficient for all. So, if every man were allowed to take as much of it as he can get, the stronger and the more favourably placed will have all or most of it while the rest and less fortunate will have less or none. The rule of apportionment is the rule of justice. Justice consists in giving every man what he deserves. The law of justice is, therefore, the promotion of public welfare. The idea underlying every law is not that of command but of advice. The statement that a man ought to take care of his health and to practice temperance means that this is the way of his welfare. That he ought to keep his promises and abstain from violence and fraud means that this is the way of the general welfare. Every law assumes or presupposes a certain end or purpose and lays down the rules of action by which that end or purpose is to be reached. With that end in view, if command is to be added to advice and authority to purpose, the additional element is to be found in some regulative or coercive system of Government such as the administration of justice by the State in support of those rules which are recognised within any society as being the rules of right.

25. The Division of Justice

The term justice, in its widest sense, includes all forms of rightful action. Here the terms right and justice are being used as synonymous. The true nature of justice is that its rule advises a man how he must act in order to secure and promote the general welfare of mankind. Hence all rules of justice exist for the protection of the interests of men against the acts of one another.

Justice is of two kinds :—

(*i*) *Natural or moral justice*—Natural justice means justice in action and truth.

(*ii*) *Legal Justice*—Legal justice means justice which is actually declared and recognized by the Civil law and enforced in the Courts of law. Those portions of natural justice which are maintainable and enforceable by the State are incorporated in the legal rules and are called legal justice.

Natural justice is not, however, an ideal or perfect form of legal justice for the following reasons :—

(*i*) Natural justice is the genus of which legal justice is a species. There is a large number of natural justice which is not fit for enforcement by the State at all, for example, envy no one.

(*ii*) Even if it is fit for enforcement, it is inexpedient to reduce it to rigid rules and hence it is entirely left to the discretion of the Courts.

Natural Justice and Positive Morality

Positive morality consists of those rules of conduct which are approved by the public opinion of the society, and the breach of which is visited by public censure. Positive morality is thus an imperfect attempt to enforce the rule of justice by the sanction of public disapprovation and censure. But natural justice should not be identified with the rules of positive morality. For example, polygamy, or infanticide may be approved by positive morality of a particular community while natural morality may disapprove of both.

Private and Public Justice

Justice may again be divided into Private and Public. The rule of private justice is concerned with the dealings of men with one another privately, that is, without the help of judicial Tribunal ; while the rule of public justice is concerned with the dealing of a judicial tribunal with those who come before it for justice. Public justice, therefore, is that which a plaintiff demands and receives from a judicial tribunal because he has failed to obtain private justice from his opponent on demand. For example, if a creditor gets payment of his debt from his debtor on the stipulated date or thereafter on demand, then he need not go to Court for relief as the debt has been satisfied privately. This is private

justice. On the contrary, in the above case, if the debtor fails or refuses to satisfy the debt on demand, the creditor will go to Court for justice. This is called public justice.

Public justice is of two kinds—Civil and Criminal. Civil justice is remedial —because it gives to the injured party compensation or restitution, while Criminal justice is retributive or punitive—because it gives punishment to the wrongdoer.

26. Justice according to law

In the modern State the administration of justice according to law is commonly taken to imply the recognition of fixed rules. It is, indeed, perfectly possible for the Courts to function without fixed rules at all. However expedient and useful it may be, it is not necessary that the Courts should act according to those fixed and predetermined principles which are called the law. A Tribunal where cases are decided not according to the rigid and artificial rules but according to the conscience of the Judge, which he seems just in the particular case, regardless of the general principles, may not be an efficient or trustworthy Tribunal, but is a perfectly possible one. Such Tribunal is a Court of justice (*e.g.* the Court of Chancery which is not a Court of law (*i.e.* the Court of Common Law).

But it must be remembered that our notion of justice pre-supposes certain fixed rules, and is incompatible with a system of free judicial discretion, and as such, the Judges are appointed to dispense justice according to law and not according to the dictates of their conscience. For instance, if criminal punishment were meted out at the discretion of a Judge, we should not call the result justice, for justice demands that a man should not be punished except for breach of a knowable rule. So, our notion of justice is often dependent upon the establishment of fixed rules. The more complex our civilization becomes, the greater we feel the necessity for its regulation by fixed rules and not according to individual conscience and reason of a Judge. Jeremy Taylor says, "Reason is such a box of quick-silver that it abides nowhere ; it dwells in no settled mansion ; it is like a dove's neck ;.....and if we enquire after the law of nature (*i.e.* the principles of justice) by the rules of our reason, we shall

be as uncertain as the discourses of the people or the dreams of disturbed fancies". In other words our reasons vary so much and change so often that a Tribunal which acts in accordance with its own conscience, not guided by fixed rules, will never attain uniformity and certainty in the administration of justice. Law is the reason and opinion of the community which should not be superseded by individual reason and conscience of a Judge. The law may not always be wise, but in the long run it is found to be wiser than the wisdom of an individual person who administers it. Aristotle says, "To seek to be wiser than the law is the very thing which is, by good law, forbidden".

These are the reasons why in civilized communities fixed rules have grown up and the Judges and Magistrates, entrusted with the duty of maintaining justice, are bound down by such rules.

No one can seriously doubt that it is on the whole expedient that fixed rules should grow up. Yet the elements of evil involved in a strict application of these rules unfettered by any discretion on the part of the Judge are too obvious to escape attention. "Laws are in theory", as Hooker says, "the voices of right reason", they are in theory the utterance of justice speaking to men by the mouth of the State ; but too often in reality, they fall far short of this ideal. Too often they turn judgment to wormwood (*i.e.* the judgment according to fixed rules becomes perverse) and make the judgment a reproach. It is, therefore, thought necessary that although justice according to law presupposes the existence of certain fixed rules, the total exclusion of judicial discretion by legal principles is impossible in any system. The Judge must be given a certain amount of discretion with which he should act. The degree within which the Judge should exercise his discretion is a question for which, as already stated, no fixed rule can be laid down.

27. Chief uses and defects (i.e. advantages and disadvantages) of Law

The chief uses or advantages of law are three in number :—

(1) *Uniformity and Certainty*—The first of the advantages of law is that it imparts uniformity and certainty to the administration of justice. It is vitally important not only that judicial decisions should be just, but also that people should be able, in most matters, to know beforehand the decision to which the Courts of justice will come. This

provision is impossible unless the course of justice is uniform, and the only effectual method of procuring uniformity is the observance of those fixed ru'es which constitute law. It is often more important that a rule should be definite, certain, known and permanent, than that it should be ideally just. The law is certain and predetermined and as such people can know beforehand their respective rights and liabilities and can thus adjust their conduct in their relationship towards each other. The more complex our society and civilization become, the more needful is its regulation by law, and not by individual conscience and reason, which varies from time to time and place to place. Reason varies so much and change so often that uniformity and certainty of law become an impossibility. Jeremy Tailor has rightly compared reason to quick silver and dove's neck which abides nowhere and dwells in no settled mansion.

Equality and impartiality—The law is made for no particular person or for no individual case and so admits no respect of persons, which is incompatible with justice. All are equal in the eye of law irrespective of their ranks and position in the society. It is necessarily impartial. It does not show any particular favour to any man. None can escape from the clutches of law. This principle of equality and impartiality prevents the administration of justice from being corrupted. Given a definite rule of law, a departure from it by a hair breadth is visible to all men ; but within the sphere of individual judgment the differences of honest opinion are so manifold and serious that dishonest opinion can pass in great part unchallenged and undetected. So, the existence of fixed rules is a protection against arbitrary and faulty decisions. Human nature being what it is, the observance of fixed rules protects the administration of justice to a large extent from the disturbing influence of improper motives on the part of those entrusted with judicial functions. The administration of justice according to law is rightly regarded as also one of the first principles of political liberty. Lockey says, "The legislative or supreme authority cannot assume to itself a power to rule by ex-temporary, arbitrary decrees, but is bound to despense justice and to decide the rights of the subject by promulgated standing laws, and known authorised Judges." So, in the words of Lockey: "We are the slaves of

the law that we may be free". Hence law has procured its influence and reputation for all times for its principles of impartiality.

Protection from errors—The law serves to protect the administration of justice from the errors of individual judgment. The establishment of the law is the substitution of the opinion and conscience of the society at large for those of the individual to whom judicial functions are entrusted. The principles of justice are not always clearly legible by the light of nature. Very often problems requiring judicial decision are dark and difficult to grasp, and it requires the guidance of some accepted principle, which, although not always wise are likely to lead to wiser decisions. The law is not always wise, but on the whole and in the long run, it is wiser than those who administer it. Aristotle observes : "To seek to be wiser than the law is the very thing which is by good laws forbidden." The law expresses the will and reason of the body politic, and claims by that title to override the will and reason of the Judges and Magistrates. Hence, the law reflects the opinion and conscience of the whole society and the Judges in giving effect to such opinion and conscience are saved from falling into errors of their individual judgment.

These are the chief advantages to be derived from the exclusion of individual judgment by fixed principles of law. Nevertheless, these benefits are not obtained save at a heavy cost. Salmond observed: "The law is without doubt a remedy for greater evils, yet it brings with it the evils of its own". The evils or defects of law are discussed below.

The defects or diadvantages of law are four :—

Rigidity—The first defect of a legal system is its comparative rigidity. Because of this rigidity law is to be applied without any allowance for special circumstances and without turning to the right hand or to the left. The result of this inflexibility is that, however carefully and cunningly a legal rule may be framed, there will in all probability be some special instances in which it will work hardship and injustice and prove a source of error instead of a guide to truth. So infinitely various are the affairs of man that it is impossible to lay down general principles which will be true and just in every case. So the provisions of law are not exhaustive and there be cases and circumstances which are not covered by its express

provisions. The law being rigid in its application, making no allowance for special circumstances, it causes great hardship and injustice in cases which are not provided for. But, if we are to have general rule at all, we must be content to pay this price.

Conservatism—Analogous to the vice of rigidity is that of conservatism. The former is the failure of the law to conform itself to the requirements of special circumstances and unforseen classes of cases ; the latter is its failure to conform itself to those changes in circumstances and in men's views of truth and justice which are inevitably brought about by the lapse of time. Progressive societies are always in advance of law. In a progressive society the needs of the people may outgrow the provisions of the existing law. The existing body of rules may be found inapplicable to such changed circumstances. That which is true today may become false tomorrow by change of circumstances. In such a case legal development is absolutely necessary and some method is requisite whereby the law, which is by nature stationary, may be kept in harmony with the circumstances and opinions of the time. If the law is to be a living organism, and not a mere petrification, it is necessary to adopt and use with vigilance some effective instrument of legal development. The Judges can do something to mould the law in the course of administering it ; but the most efficient instrument of legal change is direct legislation. But legislation cannot keep pace with the progressive opinion and opinion cannot progress as rapidly as the changing circumstances require. So the evils of legal conservatism remain as it is. However perfect we may make our legislative machinery, the law will lag behind public opinion, and public opinion behind the needs of the time.

Formalism—Another vice of the law is the formalism. By this is meant the tendency to attribute more importance to technical requirements than to substantive rights and wrongs. The formalism of ancient law is too notorious to require illustration. In modern times registration and attestation are examples of formalities.

Needless Complexity—The fourth defect of law is undue and needless complexity. The law becomes more and more complex due to the excessive development of legal system and it becomes

too difficult for people to understand the law without difficulty and the tendency of the lawyer to draw fine distinctions has made it all the more difficult to understand the actual law.

From the foregoing considerations as to the advantages and disadvantages which are inherent in the administration of justice according to law, we must guard against the excessive development of legal system. If the benefits of law are great, the evils of too much law are not small. Salmond observed : "Too much law may be an evil as too little". This may be avoided by reducing the law to a system of moderate size and intelligible simplicity. European countries prove the possiblity of reducing the law in size and increasing its intelligibility. To eradicate such evils much has been done by way of judicial reforms during recent years. In many matters judicial discretion has been freed from the bonds of legal principles. The rules of pleadings have been relaxed, the credibility of witnesses has become a matter of fact, instead of formerly as one of law ; a discretionary power of punishment has been substituted for the terrible legal uniformity which once disgraced the administration of Criminal justice. Moreover, Judges are now given a wide discretion in the matter of costs, in the apportionment of loss between joint and concurrent Tort feasors and in cases of contributory negligence.

In spite of all that is done by way of legal reforms, it will be seen that legal principles are rigid and inflexible and must be followed blindly by the Courts even against their better judgment. There seems to be no reason, however, why in the nature of things, the law should not, to a considerable extent, be flexible instead of being rigid—should not aid, guide and inform judicial discretion instead of excluding it. There is no apparent reason why the law should say to the Judge, "Do this in all cases whether you consider it reasonable or not" instead of "Do this except in those cases in which you consider that there are special reasons for doing otherwise". Such flexible principles are not unknown even at the present day and it seems probable that, in the more perfect system of the future, much law that is now rigid will be made flexible. We have not so far realised to what extent flexible

principles are sufficient to attain all the good purposes of the law while avoiding much of its attendant evil.

28. Authority of Law

The law has been defined as consisting of the rules in accordance with which justice is administered by the judicial tribunals of the State. This brings us to the consideration of the true nature of the duty of the Courts of justice to recognise and apply those principles which constitute the law. To what extent are the Courts under a duty to observe the law in the exercise of their function of administering justice instead of acting in accordance with their own views of right or wrong ? Is it a legal duty or only a moral obligation ? In other words, is the duty of a Court to administer justice according to law, legal or moral ?

All the Judges in general are no doubt under a moral duty to observe the law. This is the business for which they are appointed and they are sworn to administer justice according to law. The observance of this moral duty is secured and enforced by the pressure of public opinion and more especially by the opinion of the Bar which would be quick to notice and to censure any departure by the Bench from the established principles of law. Moreover, the wilful refusal of a Judge to apply the established principles of law would amount to a misconduct in office for which he could be removed by the proper authority.

To this moral duty is also added the legal duty to administer justice according to law, so far as the inferior Courts are concerned, that is, those Courts which are subject to a superior Courts in appellate or superintending jurisdiction. Thus, if the lower Court gives a wrong judgment, it will be reversed and a correct judgment in accordance with law will be substituted by the appellate Court. Similarly, if the lower Court refuses to exercise its lawful jurisdiction or claims to exercise jurisdiction beyond that which is conferred on it by law, superintending or revisional jurisdiction of the higher Court may be invoked to compel observance of the law. Thus, so far as the inferior Courts are concerned, there is not merely a moral but also a legal duty to administer justice according to law.

But in the case of a Supreme Court, that is, the highest Court of justice, which is not subject to any appellate authority, such a legal duty is impossible. There is no other Court in which any such obligation could be recognised or enforced. The duty of the final tribunal, that is, our Supreme Court, to administer justice according to law must be recognised as only a moral duty. If the Supreme Court wilfully misconstrues an Act of Parliament, the interpretation so placed cannot be questioned because there is no other judicial tribunal with jurisdiction and authority to decide to the contrary. Thus the authority of the law in the last resort has its source in the moral obligation of the Judges to observe their judicial oath by administering justice according to law. In other words, law is law not because the Courts are under any legal obligation to observe it but because they do in fact observe it.

29. Territorial Nature of Law

Generally speaking a particular system of law belongs to a defined territory and it applies to all persons and things within that territory. It means that the laws of a particular State are not applicable to persons, things, acts and events beyond that territory. For instance, when we speak of the English Criminal Law, it applies with a few exceptions to all offences committed in England and does not apply to offences committed elsewhere. Similarly, the land law of English Courts applies only to land situated in England and does not apply to land situated elsewhere. This territorial nature of law is merely the recognition by individual States to assert their supremacy over their territories. In many instances, however, different States conclude treatise with each other by which each agrees to recognise the laws promulgated by the other. A person, who had committed a crime in one State and removed himself and property to another State, may be brought back by extradition. Extradition is not practised in Civil cases, but, as a general rule, every State gives a remedy in its own Courts for Civil wrongs wherever they may be committed. If a valid judgment is obtained in a Court of one State, it may generally be enforced through the Courts of another State if the conditions laid down in the law of that State are complied with.

The above proposition that a system of law applies only to persons, things, acts and events within a defined territory is, however, subject to certain qualifications. For example, the English Criminal Law, although it is territorial in the sense that it applies with few exceptions to offences committed in England and not to offences committed elsewhere, there are several offences with which the English Courts will deal, and will apply the English law though committed elsewhere than in England. This extra-territorial jurisdiction extends to crimes such as piracy, treason, murder or bigamy, committed by British subject in any part of the world. Similarly the rule that the land-law of English Courts applies only to land situated in England and not elsewhere, has also its exception. An English Court of Equity will apply certain equitable rules even to land situated abroad. Then again, the law of procedure is hardly in any respect territorial. The English law of procedure is the law of English Courts and is the same for all litigants who appear before those Courts whether they be British subjects or foreigners. Finally a great qualification upon territoriality of law is to be found in every system of law by way of recognition of what is known as conflict of law. If, for example, two persons make a contract in France and one of them sues on it in an English Court, the issue is decided, to meet the ends of justice, by the French law. Thus occasions do arise when rule of foreign systems of law is recognised and applied in English Courts to the exclusion of the general law of England.

From what is stated above it will be seen that although the enforcement of law can be regarded as territorial, the law itself cannot be said to be territorial and it can have no local habitation. Territoriality is not a part of the idea of law and the application of law is limited and determined not by territorial consideration but by reference to the personal qualification of the individuals over whom jurisdiction is exercised—qualifications, such as nationality, race or religion. The truth of the statement can be seen from the fact that in India Hindus are governed by Hindu Law in certain matters while the Mohammedans are governed in such matters by their own personal law. We have also several different systems of law for regulating matters like the devolution of property on

death, and the law applied is the law of personal status and not the law of the land even though the property consisted of land.

30. Law and fact

The task of the Court in actual litigation is to discover the facts of the case, to declare the rule of law that is applicable, and then to make a specific order which is the result of the application of the law to such facts as are considered relevant. The distinction between fact and law is important in pleading and proof, the functions of Judge and Jury, appellate procedure, the theory of precedent, and the doctrine of *res judicata.*

All questions which arise for consideraion and determination in a Court of justice are of two kinds, being either questions of law or questions of fact. In other words, every question which requires an answer in Court of justice is either one of law or one of fact. In a sense this proposition is true, but it requires careful examination, because both the expressions "question of law" and "question of fact" are ambiguous and possess more than one meaning.

Question of law

The term "question of law" is used in three distinct though related senses :—

(*i*) It means, in the first place, a question which the Court is bound to answer in accordnace with a rule of law—a question which has already been authoritatively answered by some rule or principle of law and which the Courts consider to be binding upon them irrespective of their own opinion in the matter. All other questions are questions of fact, using the term fact in its widest sense to include everything that is not law. In this sense every question which has not been pre-determined and authoritatively answered by the law is a question of fact. Thus the question as to what is reasonable and proper punishment for murder is a question of law, individual judicial opinion being exclusively excluded by fixed rule of law (section 302, Penal Code). But what is the proper and reasonable punishment for

theft is (save so far as judicial discretion is limited by the statutory appointment of a fixed maximum under section 379, Penal Code) a question of fact on which the law has nothing to say. Whether a contractor has been guilty of unreasonable delay in building a house is a question of fact; law contains no rule for its determination. But whether the holder of a bill of exchange has been guilty of unreasonable delay in giving notice of dishonour is a question of law to be determined in accordance with certain fixed principles laid down in the Bill of Exchange Act. The question whether a child, accused of crime, has sufficient mental capacity to be criminally responsible for his acts is one of fact, if the child is over seven years (section 82, Penal Code); but one of law if he is under that age (to be answered in the negative, *vide* section 83, Penal Code). The question what is reasonable time under section 56 of the Sales of Goods Act is a question of fact. This means that there is no rule of law laid down for determination of a question of fact.

(*ii*) Secondly, in a different signification, a question of law is a question as to what the law is. Question of law in this sense arises not because the law on that question is silent but on account of the uncertainty and ambiguity of the law. When a question arises in the Court of justice for determination of an ambiguous statute, the question is a question of law, that is, it is a question as to what the true meaning of the law is. Thus an appeal on a question of law means the determination by the Court as to what the true rule of law on the point is. In other words, question of law in this sense is a question which the Court is to decide in order to set at rest all disputes regarding the same in future. If the whole law was definitely ascertained, there would be no question of law in this sense.

(*iii*) The question of law in the third sense arises from the composite character of the typical English Tribunal and

the resulting division of judicial functions between a Judge and a jury until recent years. The general rule is that all questions of law (in both of the foregoing senses) are for the judge, and that all questions of fact (that is to say, all other questions) are for the jury. This rule, however, is subject to numerous and important exceptions. Though questions of law are never left to the jury, very often questions of fact are determined by the Judge himself and not by the Jury. Thus though the interpretation of a document very often, is a question of fact, it nevertheless falls within the province of the Judge to answer it. So the question of reasonable and probable cause for prosecution—which arises in actions for malicious prosecution—is one of fact and yet for the Judge himself, whose duty it is to decide whether there is any sufficient evidence to justify a verdict for the plaintiff in such a suit. By an illogical though convenient usage of speech, any question which is thus within the province of the Judge instead of jury is called a question of law, even though it may be a pure question of fact in the proper sense. It is called a question of law because it is committed to and answered by the authority which normally answers questions of law only.

Hence in matters of questions of law, it is the duty of the Court to ascertain the predetermined rule of law and to decide in accordance with it. For example, in case of a theft, the question whether the act alleged to have been done amounts to theft is a question of law—to be determined by application of the rules which define the nature and scope of the offence of theft.

Question of Fact

Question of fact has been incidentally dealt with in connection with the question of law. In its most general sense it includes all questions which are not questions of law. The term question of fact has also more than one meaning. As the expression 'question of law' has three distinct application, it follows that a corresponding diversity exists in the application of the contrasted term. A

question of fact, therefore, as opposed to a question of law, means either :—

(1) any question which is not predetermined by a rule of law ; or
(2) any question except a question as to what the law is ; or
(3) any question that is to be answered by the jury instead of by the Judge. A jury gives no reasons for its decision on the question of fact and therefore, lays down no principles of law. Therefore, it may be said that the decision of a Jury cannot establish any precedent.

Hence, in matters of questions of fact, it is the duty of the Court to ascertain the truth of the matter by exercising its intellectual judgment on the evidence submitted to it. For example, on the trial of a person accused of theft the question whether he has done the act as alleged against him, is a question of fact, to be determined in accordance with the evidence adduced in the case.

Question of fact as opposed to question of judicial discretion

Salmond uses the term question of fact in a narrower sense in which it does not include all questions that are not questions of law but only some of them. In this sense a question of fact is opposed to a question of judicial discretion.

The sphere of judicial discretion includes all those questions as to what is right, just, equitable and reasonable so far as not predetermined by any authoritative rules of law but have been left out to the discretion of the Court to take a decision as it thinks just and proper. In determining the questions of fact, the Court tries to find out the truth of the matter, while in determining the question of judicial discretion the Court tries to discover the justice of the matter. Thus whether the accused of theft has committed the crime is a question of fact to be ascertained on the evidence adduced ; but whether, if found guilty, he should be punished with fine or with imprisonment is a question of judicial discretion—to be determined in accordance with moral judgment of the Court. Here it is the duty of the Court to exercise its moral judgment in order to ascertain the right and justice of the case.

In the widest sense of the term 'fact' a question whether an act is right or just or reasonable (*i.e.* a question of judicial discretion) is no less a question of fact than the question whether that act has been done, it not being predetermined by any rule of law, but it is not a question of demonstrable fact. The questions of judicial discretion are not the subject of evidence and demonstration to be dealt with by a purely intellectual process, but of argument and are submitted to the reason and conscience of the Court ; it involves an exercise of moral judgment and it is, therefore, differentiated from question of pure fact.

Having regard to the above distinction, all matters and questions which come before a Court of justice are of three kinds :—

(1) Matter and questions of law ; that is, all that are already determined by authorita ive legal principles ;

(2) Matter and questions of judicial discretion—that is to say, all matter and questions as to what is right, just, equitable, reasonable, except so far as pre-determined by law ;

(3) Matter and questions of pure fact—that is to say, all other matters and questions whatever.

In matters of the first kind, the duty of the Court is to ascertain the rule of law and to decide in accordance with it. In matters of the second kind, its duty is to exercise its moral judgment in order to ascertain the right and justice of the case. In matter of the third kind, its duty is to exercise its intellectual judgment on the evidence submitted to it in order to ascertain the truth. On the trial of a person accused of theft, for example, the question whethr the act alleged to have been done amounts to the criminal offence of theft is a question of law to be answered by the application of the rules which determine the scope and nature of the offence of theft and distinguish it from other offences, such as that of obtaining goods by false pretences ; the question whether he has done the act so alleged against him is a question of fact, to be determined in accordance with the evidence ; and the question as to what is the just and reasonable punishment to be imposed upon him for his offence is a question of right or judicial discretion, to be

determined in accordance with the moral judgment of the Court.

Now the same question may be partly one of law and partly one of fact or judicial discretion. The question, for example, whether a partnership exists between *A* and *B* is partly one of fact (*viz.* whether an agreement has been made between them) and partly one of law (*viz.* whether such an agreement is sufficient to constitute the legal relation of partnership). Similar composite questions are innumerable. Secondly, there are many cases in which the freedom of judicial discretion on any point is not wholly taken away by a fixed rule of law but is merely restrained and limited by such a rule, and is left to operate within the restricted sphere so allowed to it. In such a case the question to be determined by the Court is one of law so far as the law goes, and one of fact or judicial discretion as to the rest. The proper penalty for an offence is usually the question of this nature. The law imposes a fixed maxium but leaves the discretion of the Court to operate within the limits so appointed.

Transformation of one question into another

In connection with the question of law and fact, a question arises as to whether one can be transformed into another. The answer will be in the affirmative in this that question of fact in its general sense may be transformed into that of law through judicial interpretation of ambiguous statutory provisions. The existence and development of the legal system represents the transformation, to a greater or less extent, of questions of fact and of judicial discretions into question of law. The process of transformation proceeds chiefly within the sphere of judicial discretion and only to a smaller extent within the sphere of pure fact.

When a particular rule of law becomes uncertain on account of ambiguous statutory provisions which cannot settle the dispute betweeen parties to any case, it goes before the Court for judicial interpretation of the said provision of law. It becomes a question as to what the true law is, which is a question of judicial discretion and not a question of law in the first sense. When the question is authoritatively answered it is no more a question of judicial discretion ; it becomes a question judicially determined and hence

a question of law (*i.e.* a precedent to be followed in similar other cases in future).

In this way new precedents (case-law) are always created by judicial interpretation of the ambiguous statutory provisions. Thus the development of a legal system represents gradual transformation of the question of judicial discretion (a question of fact in the first sense) into question of law.

To a lesser extent even questions of pure fact are similiarly transformed into questions of law through *legal presumptions* and *legal fiction.*

Legal Presumptions (Presumptiones juris)

The law is the theory of things, as received and acted upon within the Courts of justice, and this theory may or may not conform to the reality of things outside. The eye of law does not infallibly see things as they are. Partly by deliberate design and partly by the errors and accidents of historical development, law and fact, legal theory and the truth of things may fail in complete co-incidence. What exists in deed and in truth may not exist in law, and *vice versa.*

This discord between law and fact has given rise to legal presumption whereby one fact is recognised by law as sufficient proof of another fact, whether in truth it is sufficient to support that view or not. A legal presumption is a rule of law by which Judges shall draw a particular inference from particular facts or from particular evidence. Presumptions are either presumption of law or presumption of fact. Presumption of law may again be subdivided into (*i*) rebuttable and (*ii*) conclusive presumption.

Rebuttable presumption means a particular inference drawn by Court from presumptive or conditional proof of a particular fact which amounts to a proof only so long as there exists no other fact amounting to disproof. It is a provisional proof, valid until overthrown by contrary proof. A rebuttable or conditional presumption is the acceptance of a fact by the law as conditional proof, which may be rejected if sufficient evidence is given in contradiction of a particular inference drawn by the Court. Thus a

person not heard of for seven years is presumed to be dead (although actually he may not be so) until the contrary is proved to over-throw the presumption. Similarly an accused person is presumed to be innocent until it is conclusively proved that he is guilty and so on. In case of rebuttable presumption a fact is presumed to be proved so long as the contrary cannot be proved to establish the contrary inference.

On the other hand, by conclusive presumption is meant the acceptance or recognition of a fact by the law as conclusive proof. In this case, on proof of one fact, the Court shall regard the other fact to have been actually proved and shall not admit further evidence to disprove the same. Thus a child born during the continuance of a marriage and within 280 days after its dissolution, unless non-access is proved, shall be conclusively taken to be legitimate.

Legal fiction (Fictio juris)

Another method by which the law on occasion deliberately departs from the truth of things for sufficient or insufficient reasons, is the use of a device known as a legal fiction. This was a device familiar to primitive legal system though mostly fallen out of use in modern law. For example, Roman *responsa prudentium* is an illustration of legal fiction. Roman Law was considerably improved by the use of legal fiction or interpretation of laws by jurisconsults without, in fact, changing the letter of the law. Thus by interpreting the law of sale the Romans developed the law of gift and mortgage and considerable improvement had also been made on the law of property and obligation.

In modern law also an extensive use of legal fictions is found. An important legal fiction recognised by modern system is that of the adoption of children. In Hindu Law an adopted son is regarded as a son born into the family. An adoptive child is a child who is not in fact the child of its adopting parent, but is deemed to be such by a legal fiction, with much the same results in law as if this fictitious parentage was real. So also a child in the mother's womb is regarded as a child born for many pruposes, *e.g.*, to take an estate as a legatee. In English law, the relation

of a master and servant is supposed to be the ground of action for damages when a father brings an action against the seducer of his daughter. In this action the daughter is alleged to be the servant of the plaintiff-father and the cause of action is based upon the consequent loss of service of the daughter.

31. Law and Equity

Until the year 1875, in England, two distinct systems of law were being administered at the same time by different tribunals. These two different systems are called the common law and equity. Common law was the older and it was administered in older Courts, namely, the King's Bench, the Court of Common pleas and the Exchequer. Equity was the more modern body of legal doctrine developed and administered by the Chancellor in the Court of Chancery as supplementary to and corrective of the older law. To a large extent the two systems were identical and harmonious, for it was a maxim of the Chancery that equity follows the law and does not oppose it unless there was some sufficient reason for their rejection or modification. The Judicature Act of 1873 put an end to this distinction between the two by the fusion of these two systems into one single Court called the High Court of Justice.

Although the distinction between Law and Equity has ceased, still there remain some distinctions which require attention. The distinction between legal and equitable ownership and legal and equitable rights and remedies illustrate the distinction between the two systems.

The term equity is used at least in three distinct though related senses :

(1) In the first sense equity is synonymous with natural justice, which means equality—the virtue which gives every man his own.

(2) In the second and legal sense, equity means natural justice, not simply, but in a special aspect, that is to say, natural justice as opposed to the vigours of inflexible rules of common law. The law is not exhaustive and hence there may be cases and circumstances which are not

covered by its provisions. In such cases, the law does not supply any remedy to the aggrieved suitor. In order to give relief to the aggrieved party, it may be necessary to go beyond the law and to administer justice according to the dictates of natural reason. In this sense, equity is opposed to law. This distinction was received in the juridical theory both of Greeks and Romans. Aristotle defines equity as the correction of the law where it is defective on account of its generality and the definition is constantly repeated by later writers. Elsewhere he says : "An arbitrator decides in accordance with equity, a Judge in accordance with law ; and it was for this purpose that arbitration was introduced, namely, that equity might prevail".

(3) In the third sense, equity is no longer opposed to law but a particular kinds of law which was enforced by the Courts of Chancery. Originally, the Court of Chancery administered equity by the application of natural justice and good conscience. Hence equity was not law at all but natural justice in the beginning and the Chancellor administered justice without law. But in course of time the equity changed its nature and meaning and the hands of Chancellor were restrained and he had to administer justice in accordance with the predetermined rules and precedents already established by Equity Court. Hence, equity, as administered in the Court of Chancery, lost its original meaning. As a result, a second system of law developed in England—a system of predetermined rules. The law thus developed was also called equity, because it had its source in equity.

Closely analogous to this equity—law of the English Chancellor—is the *jus praetorium* of the Roman praetor. The praetor, the supreme judicial magistrate of the Roman republic, had much the same power as the Chancellor of supplying and correcting deficiencies and errors of the older law, by recourse to acquitus. Just as the exercise of this power gave rise in England to a body

of Chancery law, standing by the side of the common law, so in Rome a *jus praetorium* grew up distinct from the older *jus civile*. The chief distinction between the Roman and the English cases is that at Rome the two systems of law co-existed in the same Court, the *jus praetorium* practically superseding the *jus civile* so far as inconsistent with it ; whereas in England, law and equity were administered by distinct tribunals. Moreover, although the *jus praetorium* had its source in the acquitus of the praetor, it does not seem that this body of law was ever itself acquitus. This transference of meaning is peculiar to English usage.

32. General Law and Special Law

The whole body of Civil Law may be divided into two parts which may be distinguished as *General Law* and *Special Law*. General Law consists of the general and ordinary law of the land. This is the general law of the whole realm. The latter consists of certain other bodies of legal rules which are so special and exceptional in their nature, source and application that it is convenient to treat them as standing outside the general and ordinary law of the land.

The chief forms of *jus speciale*, namely, Special Law are : (1) Local Law, (2) the Foreign law or Private International Law (conflict of Law) ; (3) Conventional Law ; (4) Autonomic law ; (5) Martial Law ; (6) International Law or Prize Law as administered in Prize Courts.

Local Law—General law is the law of the whole realm and is in force throughout the territory of the State. Standing apart from this there are particular rules of law which are in force in and applicable only to particular parts of the State. Such law is local in its nature and application and is called local law. Local Law is of two kinds : (*a*) Locally enacted law and (*b*) Local Customary law.

Locally enacted law—It has its source in the local legislative authority, as for example, The Bengal Tenancy Act, a locally enacted law, relating to land tenure system of Bengal only. In England, the locally enacted law has its source in the local Legislative authority

of boroughs and other self-governing Communities empowered to govern their own districts by by-laws supplementary to the general law.

Local Customary Law—It has its source in those immemorial customs which prevail in particular parts of the State, such as, mercantile custom of any particular locality of the State having the force of law in derogation of the general law of the land.

All such local laws are parts of the law of the land, but they are not part of the general law of the country.

Foreign Law or Private International Law or Conflict of Laws—Sometimes it becomes necessary for the State Court to take into consideration the foreign law in order to do justice to the parties, that is, to decide the rights and liabilities of the parties to an agreement made in foreign country. For example, two persons enter into a contract in America and one of them sues the other on it in a Bangladesh Court. In such a case justice cannot be done fully unless the case is decided according to the law of the place where the contract had been entered into. So the validity and effect of the contract should be determined by American Law rather than by Bangladesh Law. Thus foreign law is nothing but the body of foreign legal principles recognised and applied by the State Court in the administration of justice. But it is no part of the general law of the land.

Conventional Law—Conventional law has been described in Chapter 3. It may be observed further that the rules laid down in an agreement for the determination of the rights and liabilities of the parties may be regarded as the rules of law which the parties have agreed to substitute or add to the general law. But although conventional law is the true law as between the parties to the agreement, it does not form part of the general law of the land, for this law is not general in its application.

Autonomic Law—By autonomic law is meant that species of law which has its source in various forms of subordinate legislative authority possessed by private persons or bodies of persons. Private bodies such as Railway Companies, Universities, Registered Companies, etc. are entrusted with delegated authority to frame by-laws

for their regulation. The laws so created are called autonomic laws and are recognised as such and enforced by law Courts ; but they cannot be incorporated as the general law of the land.

The distinction between conventional law and autonomic law is shortly this :—

(1) Conventional law has its source in the agreement between two or more parties. But autonomic law has its source in the delegated power of legislation and hence it is independent of any agreement.

(2) Conventional Law has its force and validity in the agreement of the parties who are subject to it. Hence conventional law is binding only on those persons who are parties to the agreement.

Autonomic law is binding on all concerned, whether they have agreed to it or not. Thus a particular law passed by a majority at a Company meeting is binding not only on the majority but also on the dissentient members who form the minority. Therefore, we may say that it is conventional law for the majority and autonomic law for the minority.

Martial Law—Martial Law is that species of law which is observed and applied by Military Tribunals called Courts Martial for the administration of military justice. Courts martial are the Courts of the army.

The term martial law is used in three senses :—

(1) It is sometimes used to denote military law, that is, the Code governing the soldier in war and peace, at home and abroad.

Now Military law may be distinguished from the Martial law in the following respects :—

(*a*) Only Military men are subject to Military law. Martial law governs the soldier as well as the civilian in times of war, rebellion or insurrection.

(*b*) While Military law governs the soldier in times of war or peace, Martial law is applied only in times of rebellion or war.

(*c*) In England, Military law is embodied in a statute to Parliament ; while Martial Law is based on Common Law.

(2) Martial Law means the law by which the Army governs foreign territory in its occupation in time of war.

(3) Martial law means a certain state of relation between the Military and the Civil authorities in times of grave emergency. If the Civil Courts have, on account of hostilities, ceased to function for the time being the maintenance of law and order passes from the Civil authorities to the Military. Salmond is of opinion that even within the country itself the existence of a grave emergency justifies in law the temporary establishment of a Military Government in temporary suspension of ordinary law of the land.

International Law (*or Prize Law*) *as administered in Prize Court*— International law as a species of Conventional law has been dealt with in Chapter 3. But here we want to distinguish it from the general law of the land. Prize law is that portion of international law which is administered in Prize Courts of the State in times of War. It has its source in the agreement of Sovereign States among themselves, and not in the legislative authority of the individual State to which the Prize Courts belong. Prize law is that portion of the law of nations which regulates the practice of the capture of ships and cargoes at Sea in times of War. Prize Courts investigate the legality of all captures of ships and cargoes, and administer justice as between the captors and the persons interested in the property seized. By a rule of international law all the States which desire to exercise this right of capture are under an obligation to establish and maintain within their dominion what are called Prize Courts, whose function is to investigate the legality of all captures of ships and cargoes at Sea. If the seizure is lawful, the property is adjudged as a lawful prize of War ; and if unlawful, orders are made to return the property as the law requires.

It must be understood that a Prize Court is not an international tribunal. It is a Court established by and belonging exclusively to the individual State by which the ships and cargoes have been taken.

Nevertheless the law which is administered by these Tribunals is the law of the nations but this law does not form part of the General law of the land because of its exceptional nature and source.

33. Common Law (jus commune)

The general law of England is itself divided into three parts—statute law, equity and Common law. Statute law is that portion of the law which is derived from legislation including the exercise of subordinate and delegated legislative power by public authorities under the authority of Parliament, as for example, regulation made under a statute. It is enacted or written law (*jus scriptum*) as opposed to unenacted or unwritten law (*jus non scriptum*). Equity, on the other hand, had its origin in the Court of Chancery which has already been considered in section 31 of this Chapter. It is a form of case law having its source in the judicial precedent of that court and of the modern Court by which the legal system of the Court of Chancery is now administered and developed. All the residue of the general law of England, after this excepting statute law and equity, is known as *Common Law*.

Common law is a form of case-law having its source in the judicial decisions of the old Courts of King's Bench, Common Pleas and Exchequer, and of the modern Courts by which the system so established is now administered and developed. It is a rule of law as opposed to a rule established by statute, or as opposed to a rule of equity, or as opposed to a rule of special law in its various forms, as already discussed.

In its historical origin the term common law (*jus commune*) was identical in meaning with the general law as already defined. It was the general law of the land —the *lex terrae* as opposed to special law, *jus special*. By a process of historical development, however, the common law has now become, not the entire general law, but only the residue of that after deducting equity and statute law. It is no longer possible, therefore, to use the expression common law and general law as synonymous. Although equity is now just as much part of the ordinary or general law of England as is the Common law itself and has now become *jus commune* in truth, the legal

nomenclature 'equity'—has remained unchanged and has not acquired a title to that designation—*jus commune i.e.* Common law.

With regard to the relation between statute law and Common law, due to immense development of statute law in modern times and its invasion of almost every portion of the old common law, they (Common law and statute law) must now be regarded as fused into a single system of general law just as in the case of Common law and equity. Indeed a very large portion of the general law has its sole source in statutes, and the residue of the Common law is undergoing a slow transformation into statute law by codification. Although statute law is a part of the general law of the land, it is still distinguished in name from the Common law, just as equity is still distinguished from it.

The expression "Common Law" is also used to mean the whole law of England. It frequently bears this meaning when 'Common Law' is contrasted with a foreign system like Roman Law or French Law. Alternatively, in a context like this, the phrase may, in an extended sense, mean the principles of English law as they have been adopted in the other common law countries, like the United States of America, Canada, Australia, New Zealand and the Irish Republic.

34. Constitutional Law

The Constitution of a modern State is of extraordinary complexity, and it is usual to regard it as divisible into two distinct parts. The first consists of its fundamental or essential elements, the second consists of its secondary elements—the details of State structure and State action. The first, essential and basal portion, is known as the Constitution of the State. The second has no generic title.

Prof. Salmond defines constitutional law as the body of those legal rules and principles which determine the Constitution of the State ; that is, which determine the essential portion of a State's organisation. It is not possible to draw any hard and fast line between the laws which belong to the Constitution proper and the remaining portion of the laws of the State ; neither, therefore, it is possible to draw any such line between Constitutional law and other branches of the legal system. The distinction is one of degree, rather than one of kind,

and is drawn for purposes of practical convenience, rather than in obedience to any logical requirement. The more important, fundamental, and far-reaching any principle or practice is, the more likely it is to be classed as constitutional. Conversely, the more special, detailed and limited in its application, the less likely it is to find a place in any exposition of the law and practice of the Constitution. Thus the organisation and powers of the Supreme Court of Judicature pertain to the Constitutional Law, while it is otherwise with Courts of inferior jurisdiction.

Inasmuch as Constitutional law has been defined as the body of those rules which determine the constitution of a State, a question arises whether constitution of a State can be determined by law at all. There can be no law unless there is already a State whose law it is, and there can be no State without a constitution. The State and its constitution are, therefore, necessarily prior to law. How then does the law determine the Constitution ? Is Constitutional law in reality law at all ? Is not the Constitution a pure matter of fact with which the law has no concern ? The answer is that the Constitution is both a matter of fact (*de facto*) and a matter of law (*de jure*). Constitutional law involves concurrent Constitutional practice. It is merely the reflection within Courts of law, of the external objective of reality of the *de facto* organisation of the State. It is the theory of the Constitution, as received by Courts of justice. It is the Constitution, not as it is in itself, but as it appears when looked at through the eye of law.

The Constitution, as a matter of fact, is logically prior to the constitution as a matter of law. In other words, Constitutional practice is prior to Constitutional law. There may be a State and a constitution without any law, but there can be no law without a State and a Constitution. No Constitution, therefore, can have its source and basis in the law. Unless some form of Constitution has already been established, Constitutional facts will be taken notice of in Courts of justice as Constitutional Law. Constitutional law follows hard upon the heels of Constitutional fact. Courts, Legislature and law had alike their origin in the Constitution ; therefore, the Constitution could not derive its origin from them. Constitution may have an extra-legal or even illegal origin, such as, that of United States of America. Before these

constitutions were established, there was no law in these Colonies save that of England, and it was not by the authority of this law, but in open and forcible defiance of it that these Colonial Communities set up new States and new Constitutions. So also with every Constitution that is altered by way of illegal revolution. Constitutional law, therefore, is the judicial theory, reflection, or image of the Constitution *de facto*, that is to say, of Constitutional practice. Here, as elsewhere, law and fact may be more or less discordant. The Constitution as seen by the eye of law may not agree on all points with the objective reality. Much Constitutional doctrine may be true in law but not in fact, or true in fact but not in law. Power may exist *de jure* but not *de facto*, or *de facto* but not *de jure*. For example, British Crown has no longer any power of refusing its assent to the bill passed by the Parliament and conversely, the control exercised by the House of Commons over the executive is as unknown in law as it is well established in fact.

Although the Constitution *de jure* and the Constitution *de facto* are not necessarily the same, they nevertheless tend towards coincidence. Constitutional law and practice react upon each other, each striving to assimilate the other to itself. The objective facts of State organisation tend to mould legal theory into conformity with themselves.

CHAPTER V

THE ADMINISTRATION OF JUSTICE

35. Necessity of Administration of Justice

It has been said by Jeremy Taylor, "A herd of wolves is quieter and more at one than so many men, unless they all had one reason in them, or have one power over them." Unfortunately they have not one reason in them, each being moved by his own interest and passions ; therefore, the other alternative is the sole resource. According to Hobbes, without "a common power to keep them in awe", it is impossible for men to cohere in any but the most primitive forms of society ; without it, Civilisation is unattainable, injustice is unchecked and triumphant, and the life of men is "solitary, poor, hasty, brutish and short". Man is by nature a fighting animal and force is the *ultima ratio*, not of Kings alone, but of all mankind. However orderly a society may be, and to whatever extent man may appear to obey the law of reason rather than that of force, and to be bound together by the bonds of sympathy rather than by those of physical constraints, the element of force is nonetheless present and operative. It has become partly or wholly latent, but it still exists. We may well believe, indeed, that with the progress of Civilization we shall see the gradual cessation of the actual exercise of force, whether by way of the administration of justice or by way of War. Ultimately there is no substitute for the rule of force administered through the law. Men being what they are, their conflicting interests, real or apparent, draw them in diverse ways ; and their passions prompt them to the maintenance of these interests by all methods possible, notably by that method of private force to which the public force is the only adequate reply.

Public opinion is a valuable and, indeed, indispensable supplement to that of law, but an entirely insufficient substitute for it. The

relation between these two is one of mutual dependence. If the administration of justice requires for its efficiency the support of a healthy national conscience, that conscience is in its turn equally dependent on the protection of law and the public force. The influence of the public censure is least felt by those who need it most. The law of force is appointed not for the just but for the unjust ; while the law of opinion is set rather for the former than for the latter, and may be defied with a large measure of impunity by determined evil-doers.

It is also to be observed that the influence of the national conscience unsupported by that of the national force, would be counteracted by the internal growth of smaller societies or associations possessing separate interests and antagonistic conscience of their own. The social sanction, therefore, is an efficient instrument only so far as it is associated with, and supplemented by the concentrated and irresistible force of the incorporate community. Men being what they are each keen to see his own interests and passions to follow it—society can exist only under the shelter of the State ; and the law and justice of the State is a permanent and necessary condition of peace, order and civilization.

36. Origin of the Administration of Justice

The administration of justice has been defined as the maintenance of rights, suppressions of wrongs and thus upholding justice within a political community by means of physical force of the State. The law and justice of the State is absolutely necessary for peace, order and civilization.

The administration of justice is the modern and civilised substitute for the primitive practices of private vengeance and violent self-help. In the beginning of the society a man redressed his wrongs and avenged himself upon his enemies by his own hand, aided, if need be, by the hands of his friends and kinsmen. The spirit of ancient law was a spirit of revenge, which is best expressed in the Jewish Canon of "an eye for an eye, tooth for a tooth". In those days every man was the judge of his own cause and might was made the sole measure of right.

But at the present day, a man is defended by the sword of the State. In course of time the primitive practices of private vengeance and

violent self-help have been replaced by the administration of justice. We may make use of the contrast, familiar to the philosophy of the 17th and 18th century, between the Civil State and the State of nature. This State of nature is now commonly rejected as one of the fictions which flourished in the era of the social contract. As long as there have been men, there has probably been some form of human society. The State of nature, therefore, is not the absence of society, but the absence of a society politically organised to constitute a State.

One of the most important elements, then, in the transition from the natural to the Civil State is the substitution of the force of the State for that of individuals, as the instrument of redress and punishment of injuries. Private vengeance is transmitted into the administration of criminal justice while Civil Justice takes the place of violent self-help. Nevertheless the substitution was effected only with difficulty and by slow degrees. In the beginning the administration of justice was an optional remedy and not a compulsory substitute for self-help and private vengeance. The parties could accept it or they could favour their crude methods. But later on, with the gradual growth of the power of the Government, the State ventured to suppress this ancient and barbarous system with strong hand and to lay down the peremptory principles and declare that all quarrels shall be brought for settlement to the Courts of law.

37. Civil and Criminal Justice

Administration of justice has already been defined as the maintenance of right within a political community by means of physical force of the State. It involves two parties, namely, (1) a plaintiff or a set of plaintiffs claiming certain rights, and (2) a defendant or a set of defendants, alleged to have committed certain wrong.

Administration of justice is divisible into two parts which are distinguished as (*i*) the administration of Civil Justice and (*ii*) the administration of Criminal Justice.

Civil Justice—A wrong regarded as the subject-matter of Civil proceeding is called a Civil wrong. Civil justice is concerned with the enforcement of rights in Civil proceeding ; where plaintiff claims a right against the defendant, who is alleged to have committed a wrong.

The Court secures this right for the plaintiff by compelling the defendant to perform a duty. Hence administration of Civil Justice is primarily concerned with the plaintiff and remedy of his rights. So, it is remedial in nature.

Criminal Justice—Criminal justice is penal. A wrong regarded as the subject-matter of a Criminal proceeding is called a crime. Criminal justice is concerned with the punishment of the wrong. In a Criminal proceeding the complainant or the prosecutor on the complaint of the complainant, claims no right but makes an allegation against the accused that a wrong has been committed by the latter. Here the Court does not require the accused to perform any duty but punishes him if it is satisfied that an offence has been committed by him. Hence Criminal justice is concerned with the accused and his offence.

Both in Civil and Criminal justice, that is, in both the proceedings—Civil and Criminal, there is a wrong complained of. In Civil proceedings, the wrong complained of is called a civil wrong, while in Criminal proceedings, the wrong complained of is called a crime. When a person has by actual or threatened wrong doing, exposed himself to legal proceedings, it is either Civil or Criminal according to the nature of the proceedings that may follow. So, the distinction between the two is one of procedure.

Some writers are not content with this procedural distinction between crimes and Civil wrongs. They have suggested various other distinctions considering them to be more fundamental than the procedural one : (1) The distinction between a Criminal and Civil proceeding is very often identified with that between public and private wrong. According to Blackstone, crimes are public wrongs and affect the whole community at large and are regarded as offences against the society and as such the criminal proceedings are conducted in the name of the State while the Civil injuries are private wrongs and concern individuals only and the action is brought by the private person injured.

Salmond regards the above view of Blackstone as insufficient for the following reasons :—

(*i*) In the first place, all public wrongs are not Crimes. For example, a refusal to pay taxes is an offence against the State and is dealt with at the suit of the State ; but it is a

Civil wrong for all that—and not a Crime. Secondly, the breach of a Contract made with the State is an offence against the State, but it is no more a Criminal Offence than is the breach of a contract made with private individuals.

(*ii*) On the other hand, all crimes are not public wrongs. Many crimes may be prosecuted at the suit of a private person, yet the proceedings are Criminal in their nature, as for example, Criminal libel ; offences relating to marriage can only be investigated upon a complaint made by some person aggrieved by such offence. Hence the division between public and private wrongs and between crimes and Civil injuries is not co-incident but cross-division.

(2) In an earlier edition, Salmond stated that the difference between the two is that the Civil justice consists of the enforcement of rights, whereas the Criminal justice is concerned with the punishment of wrongs. This statement of Salmond presents an element of truth but it is not the whole truth. Because in the first place, punishment is not always present in Criminal proceedings nor always absent in Civil proceedings. Criminal proceedings for instance, may end in a mere binding over to keep the peace, which is more in the nature of a warning than of a present punishment. On the other hand, in Civil Cases the protection of rights may sometimes be secured through the medium of punishment, as for example, where a defendant is imprisoned to obey an injunction granted against him in a Civil action.

Kenny defines crimes as wrongs whose sanction is punitive, and is in no way remissible by any private person, but is remissible by the Crown alone, if remissible at all.

It may, therefore, be said that the distinction between Civil wrong and crimes relates to the legal consequences of acts. Civil justice is administered according to one set of forms and Criminal justice according to another set. The former is administered in one set of Courts and the latter in a somewhat different set. Civil proceedings, if successful, result in a judgment in favour of the plaintiff which may be for damages, or payment of debt, or penalty (in a penal action), or in an injunction, or decree of specific performance or delivery of possession of land or decree of divorce or in a writ of any

form or in other forms of relief known distinctively as Civil. Criminal proceedings, if successful, result in the punishment of the accused ranging from hanging to a fine or in binding over to keep the peace or even a release with admonition.

38. Civil Justice (Primary and Sanctioning Rights)

Civil justice, as already stated, consists in the enforcement of rights. Rights are enforced through legal proceeding which is called Civil or remedial proceeding, while Criminal justice is done for punishment of wrong through legal proceeding which is criminal or penal in nature. So legal proceedings may be divided into two classes—Civil and Criminal.

We now proceed to the consideration of Civil justice and to an analysis of the various forms assumed by it. The rights enforced in Civil proceeding may be either (1) a primary right or (2) a Sanctioning right.

Primary Right--A primary right may be explained as the bundle of those rights which are, as a matter of fact, the privileges enjoyed by any person. Primary rights do not arise from any wrong. They exist independently of wrongs and do not come into existence on account of the violation of other rights, for example, person's right to liberty, safety and reputation. The enforcement of a primary right is called *Specific enforcement*. A violation of primary rights produces a sanctioning right. Thus the right of a person not to be libelled or assaulted is primary, but his right to obtain pecuniary compensation from one who has already libelled or assaulted him, and thereby violated his primary right, is a sanctioning right.

Sanctioning Right— Sometimes it becomes impossible for the law to enforce a primary right, sometimes it is possible but not expedient. For example, if by negligence I destroy another man's property, his right to this property is necessarily extinct and no longer enforceable. The law, therefore, gives or sanctions, in place thereof, a new right (sanctioning right) to receive from me the pecuniary value of the property that he has lost. If, on the other hand, I break a promise of marriage, it is possible but not expedient that the law should specifically enforce the right and compel me to enter into the marriage and,

instead therefor it enforces a sanctioning right or pecuniary satisfaction for breach of the promise of marriage.

Sanctioning rights come into existence on account of the violation of the other primary rights, and it consists of a claim to receive pecuniary satisfaction from the wrongdoer. They are the result of wrongs. Their object is to remedy injuries and to prevent wrongs. Exapmle is the right of a person to recover damages for the breach of a contract. The enforcement of sanctioning right is called *Sanctional enforcement.*

Sanctioning right is divided into two kinds, by reference to the purpose of the law creating them :

Penalty—It is a right to exact and receive pecuniary penalty from the defendant for the wrong he has committed by violating the plaintiff's right irrespective of any damages caused thereby. This is so where there is no payment of compensation to the person injured but a pecuniary penalty is payable to the State.

Compensation—It is a right to exact and receive pecuniary compensation from the defendant in respect of the damage which the plaintiff has suffered from the defendant's wrong doing. Such compensation may be either restitution or penal redress.

RESTITUTION

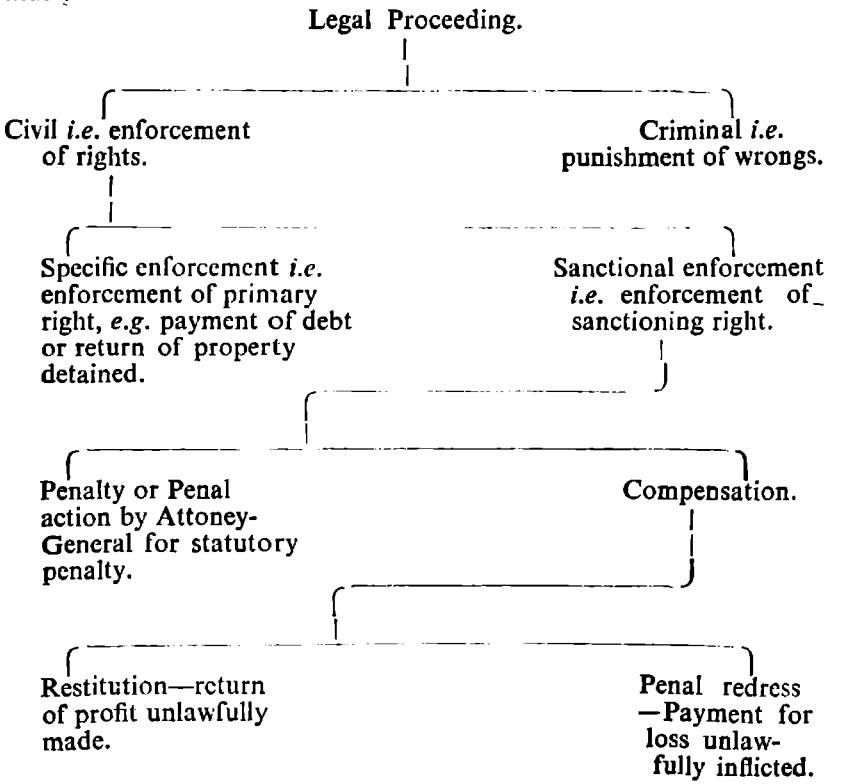
Here the defendant is compelled to give up the pecuniary value of some benefits which he has wrongfully obtained at the cost of the plaintiff, as when he, who has wrongfully taken or detained another's goods, is made to pay him the pecuniary value of them, or when he, who has wrongfully enriched himself of another's expense, is compelled to account to him for all money so obtained.

PENAL REDRESS

In penal redress, however, the law not only compels the wrongdoer to restore back all the benefits which he has derived from his wrong ; but also compels him to pay the amount of the plaintiff's loss which may far exceed the profit which he has himself received. In other words, in penal redress the compensation has a double aspect. From the point of view of the plaintiff it is compensation, and from

the point of view of the defendant it is a penalty imposed upon him for his wrongdoing. Thus, if I burn down my neighbour's house by negligence I must pay him the value of it. As soon as he receives the compensation the wrong is redressed, because he has now the worth of his house. But without deriving any benefit by burning other's house I have become poorer by the value of the house paid by me and to this extent, I have been punished for my negligence.

The foregoing divisions and sub-divisions of the judicial remedies available through legal proceedings may be arranged in a tabular form thus :—



In addition to the above, there are various forms of extra-judicial remedies, sometimes known as self-help. In certain cases it is lawful to redress one's injuries by means of self-help, *e.g.* prevention of trespass, re-entry on land, re-caption of goods, abatement of nuisance and distress damage feasant, which are the subject-matter of Torts.

39. Penal and Remedial Proceedings

Legal proceedings have been divided, in the foregoing table of legal proceedings, into five distinct classes :—

(1) Actions for Specific enforcement	Remedial Proceedings.
(2) Actions for restitution.	
(3) Criminal prosecutions.	Penal Proceedings.
(4) Penalty or penal actions.	
(5) Action for penal redress.	

It must now be observed that the *last three of these* contain a common element which is absent from the others, namely, the idea of punishment. In all these three forms of procedure the ultimate purpose of the law is in whole or in part the punishment of the defendant. This is equally so whether one is imprisoned or compelled to pay a pecuniary penalty or is held liable in damages to the person injured by him. All these proceedings, therefore, are classed together as penal and as the sources of penal liability. The other forms, namely, specific enforcement and restitution, contain no such penal element ; the idea of punishment is entirely foreign to them. They may be classed together as remedial.

It will be noted that all Criminal proceedings are at the same time penal, but that the converse is not true. Some Civil proceedings are penal while others are merely remedial.

A penal proceeding is not necessarily a criminal one. It is a criminal proceeding where there is a criminal prosecution. On the other hand, a penal proceeding is a Civil proceeding. In all these proceedings the ultimate object of the law is the enforcement of plaintiff's rights, whether it is a proceeding for penal redress or for a penal action.

40. Purposes of Criminal justice

The ends or purposes of Criminal justice are four in number, and, in respect of the purposes so served by it, punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative and (4) Retributive.

Deterrent Punishment—Of the four ends of criminal justice, the first (deterrent) is the essential and all-important one, the other three being merely subsidiary. The chief end of the law of crime is to make

the criminal an example and warning to other like minded with him to think about the consequences before making an attempt to commit any crime. Punishment is deterrent in this that it prevents the commission of offences by making all the criminal activities not only injurious to others but also injurious to the doer of them, destroying the conflict of interest between the wrong-doer and the society at large and thereby making every offence, in the words of Locke, "an ill bargain to the offender." The murderers are hanged, because those who are like minded may be put to the fear of like fate. Thus deterrent type of punishment serves as a warning to those who are tempted to commit offences. Men do injustice because they have no sufficient motive to seek justice, which is the good of others rather than that of the doer of it. Punishment as a deterrent prevents the commission of like offences, by changing the motives of the other offenders so that they will fear to do what is wrong. It prevents others from committing like offences.

Preventive punishment—Punishment is, in the second place, preventing or disabling. The secondary purpose of the Criminal justice is to prevent a repetition of wrong by depriving the wrongdoer of the opportunity of repeating or committing any more crime. For example, murderers are hanged, because it is better that such persons should go out of the World, so that they may not commit such crime again. Its primary and general purpose being to deter by fear, its secondary and special purpose is, if possible and expedient, to prevent a repetition of wrongdoing by the disablement of the offender. The most effective mode of disablement is the death penalty, which is confined to the crime of murder, and also to habitual offenders.

Reformative punishment—Punishment is, in the third place, reformative. It consists in identifying crime with disease and consequently, it consists of applying such curative and remedial forms of punishment as will make the criminal cured of this disease. The strong supporters of the purely reformative theory condemn all the severe forms of punishment, such as bodily pain or penalty of death. They advocate imprisonment of a mild character and probation. Hence, punishment as reformative endeavours to reform the character of the offender so that he will desire to do what is right instead of fearing to do what is

wrong. The reformative treatment of the criminals has been attempted in various ways. The juvenile offenders are sent to industrial school and reformatories and others are taught useful crafts to enable them, when out of jail, to earn an honest living.

Comparison between the deterrent and the reformative purposes of punishment—Offences are committed through the influences of motives upon character, and may be prevented either by change of motive or by a change of character. Punishment as deterrent acts in the former method, that is, change of motives ; punishment as reformative acts in the latter, that is, change of character. So, there is a necessary conflict between the deterrent and the reformative theories of punishment, and the system of criminal justices will vary in important respects according as the former or the latter principle prevails in it.

The purely reformative theory admits only such forms of punishment as are subservient to the education and discipline of the criminal, and rejects all those which are profitable only as deterrent or disabling. Death is, in this view, no fitting penalty; we must cure our criminals, not kill them. Flogging and other corporeal punishment are condemned as the relics of barbarism for the reason that they are degrading and brutalising both to those who suffer and to those who inflict them, and so fail in the central purpose of Criminal justice.

Punishment as deterrent serves as a measure to prevent the commission of like offences by changing the motives of the offender, so that he will fear to do what is wrong, while punishment as reformative serves as a measure to prevent the commission of offences by changing or reforming the character of the offender, so that he will desire to do what is right instead of fearing to do what is wrong.

The strong supporters of the purely reformative methods regard crime as a disease and, therefore, to be remedied and not punished. According to them the reformative treatment of the criminal is the only legitimate object of punishment. They say that we must respect the man even in the criminal and to condemn all severe and deterrent form of punishment such as bodily pain or the penalty of death. They advocate imprisonment of mild character and probation.

Now the question of all questions is whether the reformative theory of justice will be adequate in stamping out crimes.

Salmond's view—Salmond raises the following objections against the purely reformative theory :—

(1) If the criminals are sent to prison in order to be there transformed into good citizens by physical, intellectual and moral training, prisons will be turned into comfortable dwelling houses and will no more serve as an effectual deterrent to those who are prepared to commit offences.

(2) Secondly, crime will be a profitable business which will flourish greatly, because many persons will be tempted to commit offences in the hope of being sent to prison to be treated well there.

(3) A further illustration of the divergence between the deterrent and the reformative theories is supplied by the case of incorrigible offenders. It must be admitted that there are men in the world who are incurably bad and are, by some vice of nature, beyond the reach of reformative influences. The deterrent and disabling theories, on the other hand, regard such offenders as being pre-eminently those with whom the criminal law is called upon to deal, so that they may be precluded from further mischief and at the same time serve as a warning to others. They are justly deprived of their liberty and, in extreme cases, of life itself.

It is true that the primary and most important end of Criminal justice must be to deter by fear of punishment, and the general substitution of the reformative for the deterrent principle would lead to disaster. But it may be argued that substitution is possible and desirable in the special case of the abnormal and the degenerate. The purely reformative treatment is now limited to the insane, the very young and the first offenders. The present tendency is to attribute exaggerated importance to the reformative element as a reaction against the former tendency to neglect it altogether. In view of the modern theories and tendencies, we should not insist on the primary importance of the deterrent element alone. The reformative element must not be overlooked, but it must not be allowed to assume undue prominence. In

the case of juvenile offenders the chances of reformation is greater than in the case of habitual offender.

According to Salmond, the application of the purely reformative theory, therefore, would lead to astonishing result and it will be insufficient and inadequate in stamping out crimes. The perfect system of criminal justice is purely based on neither the reformative nor the deterrent principle exclusively, but it is the result of a compromise or perfect combination between the two.

Retributive punishment—The primitive conception of justice was private vengeance. The Jewish principle of, "A tooth for tooth, an eye for an eye" used to be considered as the most fitting form of punishment. Although the primitive method of vengeance has been replaced by the administration of Criminal justice, the emotion and instinct that lay at the root of private vengeance are still in existence in human nature. In all cases of punishment the main object is to gratify the desire of human beings for vengeance, both in their individual and their corporate capacity. Retributive punishment serves as a satisfaction of that emotion of retributive indignation which is stirred up by injustice. It gratifies the instinct of vengeance or retaliation which exists not merely in the individual wronged as well as in the society at large by way of sympathetic extension. Although the system of private vengeance has been suppressed, the emotion and instincts that lay at the bottom of it are still existent in human nature.

Sir James Stiphens says, "The criminal law stands to the passing of revenge in much the same relation as marriage to the sexual appetite."

Retributive punishment can only be justified on the ground that it serves to satisfy that sense of retribution which, in all healthy communities is stirred up when any member acts in such a manner as to be condemned by them to some kind of punishment. Therefore, it should be the primary function of Criminal justice to supply people their legitimate satisfaction.

Prof. Salmond mentions the following views of various jurists in support of the retributive punishment.

(1) The emotion of retributive indignation against injustice is one of the chief constituents of the moral sense of the community and

positive morality is no less dependent on it than on the law itself. It is one of the essential factors for the moral upliftment of the community. It is good, therefore, such instincts and emotions should be encouraged and strengthened by their satisfaction.

(2) Retribution is in itself a right and reasonable thing, and the just reward of inequity or injustice—justice demands that wrong should meet its reward in equivalent suffering. It is right and proper, without regard to ulterior consequences, that evil should be returned for evil, and that as a man deals with others so should he himself be dealt with. So, retribution is an end in itself.

(3) A definite form of the idea of retributive punishment is that of expiation. In this view, crime is done away with, cancelled, blotted out, or expiated, by the suffering of its appointed penalty. The wrong-doer owes a debt to the wronged and to the law that has been violated. To suffer punishment is to pay that debt and thereby the liability of the wrong-doer is extinguished. It has been said by Lilley "The wrong whereby he has transgressed the law of right has incurred a debt. Justice requires that the debt be paid, that the wrong be expiated....This is the first object of punishment to make satisfaction to outraged law". In this sense, crime is done away with or expiated by the suffering of its prescribed punishment. Guilt plus punishment is equal to innocence.

41. Secondary Functions of Courts of Law

The primary function of a Court of law is administration of justice which means the maintenance and enforcement of rights and the punishment and prevention of wrong by means of physical force of the State. It is the forcible protection of rights and suppression of wrongs. Administration of justice, therefore, involves in every case two parties, namely, a plaintiff claiming a right against a defendant committing a Civil wrong, or the prosecutor against the accused committing crime, and a judgment in favour of one or the other. But the functions of a Court of justice also include the fulfilment of other and more or less analogous functions. These secondary functions of Courts of law chiefly fall into the following four groups.

Petition of Right or actions against the State—The Courts of law entertain claims not only against private individuals, but also against the State itself. In England, if a subject is wrongfully dismissed from service, or if he claims a debt due to him from the Crown, or in case of breach of contract by the State, he is at liberty to take proceedings in a Court of law, formerly by a petition of right but now by an ordinary action, for the determination of his rights in the matter. Although such action is tried in ordinary Court like ordinary case between subjects (with some procedural variations) and although the result may be a judgment and decree for damages against the State, this is not the administration of justice properly so called, for the State as a Judge in its own cause cannot exercise restraint or coercive force against itself in execution of the decree in favour of the plaintiff (subjects). But in wider sense such action forms part of the administration of justice.

Under the Constitution of Bangladesh and India a petition may be made to the High Court or Supreme Court for the infringement of the rights guaranteed by the Constitution in the form of Writ for *Habeas Corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, as the case may be.

Declaration of Right—A proceeding for declaration of right takes place when a person requires the help of the Court of law, not because his rights have been violated, but because they are uncertain. In such a case the claimant seeks the assistance of the Court for an authoritative declaration that certain right exists, as for example, declaratory proceedings for declaration of legitimacy and of nullity of a marriage.

Administration of Estates—The third form of Secondary judicial function includes all those cases where the Courts of law undertake the management and the distribution of property of deceased, and also of the minor whose property is vested in the Court of Wards, for example, administration of Trust, realisation and distribution of an insolvent estate.

Title of Right—This class includes all those cases in which judicial decrees are used as the means of creating extinguishing and transferring rights, *e.g.* a decree of divorce or judicial separation, an adjudication

of insolvency, an order appointing or removing trustees etc. In such cases, the decree operates not as the remedy of a wrong, but as the title of a right.

These secondary forms of judicial action are to be classed under the head of the civil administration of justice. Here, as in its other uses, the term civil is merely residuary ; Civil justice is all that is not criminal.

CHAPTER VI

THE SOURCE OF LAW

42. Classification of the Sources of Law

The expression 'sources of law' has several meanings and is a frequent cause of error unless we scrutinize carefully the particular meaning given to it in any particular text,

The determination of the source of law depends upon the particular definition of law, which the society adopts. It law is regarded as being created by the will of the State, then that is the formal source of law. If law is the command of the sovereign, then the sovereign is the formal source. On the other hand, if law is valid because it is the embodiment of natural law or absolute justice, then the source of law is the ideal which we have laid down. If, according to the historical school, law is the product of the inner sense of right, then the sense of right is the source of law. If law is valid because it is the product of custom, then the habits of the people are the source of law. The philosophical school treats, under the heading of the source of law, some of the deepest problems of legal philosophy. Thus, Gurvitch says that the question of the sources of law is only one aspect of the general study of the validity of law,

Prof. Salmond classifies the sources of law firstly into formal and material,

Formal sources—A formal source of law is defined by Salmond in his 9th Edition as that from which a rule of law derives its force and validity. Somewhere within the State there must exist some authoritative person or persons whose commands receive obedience. The commands thus given are called laws. Therefore, the foremost source of authority to issue commands is possessed by this superior person or persons. This is called the formal source of law, The only formal

source of the Civil law is the will and the power of the State as manifested in Statutes and decisions of the Courts of justice.

Material sources—The material sources, on the other hand, are those from which is derived the matter and not the validity of the law. They are the agencies by which the legal rules are created or recognised. They supply the contents of the law. An example of a material source is custom. Customary law has its material source in the usages of those who are subject to it, but it has its formal source in the will of the State, in the same manner and to the same extent as any law passed by the Legislature itself.

The material source may be divided into two classes—(*a*) Legal or authoritative and (*b*) Historical or unauthoritative.

LEGAL SOURCE

Legal sources of law are those sources which are recognised as such by the law itself through the mouth of the Court of law. New legal rules, come into existence through these sources, which are authoritative in nature *e.g.* The Penal Code or the law of Contracts. A legal source is any fact which determines the judicial recognition and acceptance of any new rule as having the force of law.

HISTORICAL SOURCE

The historical sources of law are those sources which are such only in fact and not a source in law, and as such destitute of legal recognition. They influence legal history and not legal theory and do not speak with authority. Examples of historical sources are foreign judgment and writings and opinion of Jurists *e.g.* D.F. Mulla's book on Hindu Law.

Following are the points of distinction between legal and historical sources of law :—

(1) The important distinction which calls for careful consideration is htat the former are capable of recognition : the latter are destitute of legal recognition. In respect of its origin, a legal rule is often of long descent. The immediate source of it may be decision of an English Court of justice. But that Court may have drawn the matter of its decision from the writings of some lawyer, say a French writer

Pothier, who in his turn, may have taken from the compilations of the Emperor Justinian, who may have obtained it from the praetorian edict. In such a case all these things—the decision, the works of Pothier, the *corpus juris* Civile and the edictum perpituum—are the successive material sources. Of them the decision (*i.e.* the precedent) is a legal source both in fact as well as in law and the others are merely its historical sources and as such are sources in fact only but obtain no legal recognition as such. The proposition that much of the law of Rome has become incroporated into the law of England is simply a statement of fact, which has in law no recognition by English Jurisprudence.

(2) Secondly, legal sources are authoritative, the historical sources are unauthoritative. The former are accepted and applied by law Courts as of right for the application of which the Courts are appointed ; the latter have no such claim ; they may influence the course of legal development, but they speak with no authority and are not binding upon the Court of law. Both the Statute Book and the works of Bentham are material sources of law. But what the Statute Book says becomes law forthwith, but what Bentham says, may or may not become law, and if it does, it is by no claim of right, but solely through the good pleasure of the Legislature. Similarly, decisions of English Courts are a legal source and authoritative but those of American Courts are, in England, merely a historical source and unauthoritative.

(3) The legal sources are the only gates through which new principle can find entrance into the law. Historical sources operate only mediately or indirectly. They are merely the various precedent-links in that chain of which the ultimate link must be some legal source to which the rule of law is directly attached.

(4) Legal sources are authoritative and the laws coming into existence through these sources are binding upon Court —it is a statute law or a case-law—but the historical source has no such binding effect and the Court may or

may not accept it, and as such they are not authoritative until they are legalised through the good pleasure of the Legislature or recognised and applied by the Courts.

43. Legal Sources of English Law

Having regard to the general law of England in modern times, the legal sources of English law are really two namely, legislation and precedent. The first one (legislation) consists of enacted law, having its source in legislation, while the other one *i.e.*, precedent consists of case-law having its source in judicial decision. The first one is to be found in the statute book such as Bankruptcy Act, Easements Act etc. while the latter is to be found in the volumes of Law Reports.

Apart from these two sources, having regard not merely to the modern and general law of England, but also to the law in earlier times, and to the various forms of special law which exist side by side with the general law, Courts of law recognise two other legal sources in addition to legislation and precedent. They are custom and convention based on agreement. Customary law is that which is constituted by those customs which fulfil the requirement as laid down by law as a condition precedent to their recognition as obligatory rules of conduct. Conventional law is that which is constituted by agreement as having the force of special law in addition to the general law of the land. By reference to their legal sources, Salmond classifies law into four kinds :—

(1) Enacted law, having its source in legislation.
(2) Case-law, having its source in precedent.
(3) Customary law, having its source in Custom.
(4) Conventional law, having its source in agreement.

In addition to the historical and legal sources of the law, it is necessary to note and distinguish what may be termed as literary source, though this is a continental rather than an English use of the term source. The literary sources are the sources of our knowledge of the law, or rather the original and authoritative sources of such knowledge, as opposed to later commentary or literature.

The sources of Roman law are in this sense the compilations of the Emperor Justinian, as contrasted with the works of commentators. So the sources of English law are the statute book, the reports and the older and authoritative textbooks, such as Littleton. The literature, as opposed to the sources of our law, comprises all modern textbooks and commentaries.

The above legal sources will be considered in the following chapters.

44. Sources of Law and Sources of Right

The sources of law may also serve as a source of rights. By a source or title of rights is meant, some fact which is legally constitutive of rights, that is, a fact by which such right obtains its legal validity. It is the *de facto* antecedent of a legal right just as a source of law is the *de facto* antecedent of a legal principle. An examination of any legal system will show that to a large extent the same classes of facts which operate as sources of law, operate also as sources of rights. The two kinds of sources form intersecting circles. *Some facts create law but not rights ; some create rights but not law, some create both at once.* An Act of Parliament, for example, is a typical source of law, but there are numerous private Acts which are clearly title of legal rights. Such is an Act of divorce, or an Act granting pensions for public services, or an Act of incorporating a Company. So, in the case of precedent, the judicial decision is a source of rights as between the parties to it, though a source of law as regards the world at large. Regarded as creative of rights, it is called judgment, regarded as creative of aw, it is called a precedent. So also immemorial custom occasionally gives rise to rights as well as to law. It creates a right called a prescriptive right to some particular individual, while as a source of law it operates as a Customary law.

45. Ultimate Legal Principles

All legal rules have historical sources. As a matter of fact and history, they have their origin somewhere, though we may not know what it is. Only some of them have legal sources. But in every

legal system there are certain ultimate legal principles from which all others are derived, but which are themselves self-existent. The legal principles, whose operation is ultimate and whose authority is underived, are called ultimate legal principles. The principles, which are derived from the ultimate legal principles, are called derivative (*i.e.* drawn from legal sources). A rule establishing a legal source is called by Kelsen a groundnorm or initial hypothesis.

There must be already in existence some law which establishes legal sources and gives them their authority. The rule that a man may not ride a bicycle on the foot-path may have its source in the bye-laws of a Municipal Council, the rule that these bye-laws have the force of law has its source in an Act of Parliament. But whence comes the rule that *Acts of Parliament* have the force of law ? This is legally ultimate. The source of this ultimate legal principle, that is, the Act of Parliament, is historical and not legal. Similarly the *Constitution* of a country is legally ultimate, its source being historical. The historians of the Constitution know its origin, but lawyers must accept it as self-existent. It is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of. No statute can confer this power upon Parliament, for this would be to assume an Act on the very power that is to be conferred. So, also the rule that *Judicial decisions* (*precedent*) have the force of law is legally ultimate and underived. No statute lays it down. It is certainly recognised by many precedents, but no precedent can confer any authority upon precedent. If, for example, any statute gives statutory recognition to the operation of precedent, then the precedent may be reduced from an ultimate to a derivative source of law.

CHAPTER VII
LEGISLATION

46. Nature of Legislation

Legislation is that source of law which consists in the declaration of legal rules by a competent authority. It is a legal source of law. It creates statute law. Legislation makes its appearance at an advanced stage of civilization and has the tendency to exclude the other sources of law. In modern times, legislation is the principal source of law in all civilised countries.

Besides this strict and most usual application of the term legislation, it is occasionally used in two other senses :

(1) It is sometimes used in a wide sense to include all methods of law-making. In this sense legislation includes all the sources of law. Thus when Judges establish a new principle by means of a judicial decision, they may be said to exercise legislative power and not only judicial power. Salmond is of the opinion that this is not certainly legislation in the true sense of the term. Judges, no doubt, have in certain cases true legislative power—as where they issue rules of Court. But in ordinary cases, the judicial declaration unaccompanied by judicial application of it has no legal authority whatever.

In this wide sense legislation may be direct and indirect. The former is the legislation in narrow sense, *i.e.* making of law by means of the declaration of it. Legislation proper is direct legislation, and all other modes of law-making are indirect legislation. According to Salmond direct legislation is the legislation in the strict sense of the term.

(2) Secondly, the term legislation includes every expression of the will of the legislature whether directed to the making

of law or not. An Act of Parliament may alter the coinage or establish a uniform time throughout the whole realm, or ratify a treaty with a foreign State or declare war or make peace. All these are legislations in a wide sense but they are not certainly the declarations of legal rules or principles with which we are concerned.

Enacted and Unenacted Law—Law that has its source in legislation is called enacted law, law from all other sources being distinguished as unenacted law. Enacted law is often more familiarly known as statute law, but this term although sufficiently correct for most purposes, is defective inasmuch as the word statute does not extend to all modes of legislation but is limited to Act of Parliament. In enacted law, the sovereign power gives not only the force, but also the contents of law. In unenacted law only the force is so given. Blackstone and other writers use the expressions written and unwritten law to indicate the distinction in question.

47. Supreme and Subordinate Legislation

Legislation is of two kinds—(1) Supreme and (2) Subordinate.

(1) Supreme legislation is that which proceeds from the Supreme or Sovereign power in the State, and is, therefore, incapable of being repealed, annulled or controlled by any other legislative authority. The legislation of the Imperial Parliament is supreme according to English law, for according to Blackstone, "What the Parliament doth, no authority upon earth can undo."

In England, the parliament is not only Supreme but legally omnipotent. In view of the doctrine of parliamentary supremacy, an Act of Parliament cannot be held void for unreasonableness or indeed upon any other ground.

Subordinate Legislation—Subordinate Legislation is that which proceeds from any other authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority. All other forms of legislation other than that of the Imperial Parliament recognised by a law of England are subordinate legislations. Subordinate authorities have delegated power to legislate. They may be regarded as

having their origin in a delegation of the power of Parliament to inferior authorities, which, in the exercise of their delegated functions, remains subject to the control of the sovereign legislation.

The chief forms of Subordinate legislation are *five* in number :—

COLONIAL

The power of self-Government entrusted to the colonies and other dependencies of the Crown is subject to the control of the Imperial legislation. The laws passed by these authorities are colonial, which are subject to the control of the Imperial Parliament.

EXECUTIVE

The essential function of the executive is to conduct the administrative departments of the State ; but it combines with this certain subordinate legislative powers, which have been expressly delegated by the Parliament. Statutes, for example, frequently entrust to some departments of the executive Government the duty of supplementng the statutory provisions by the issue of more detailed regulations bearing on the same matter.

JUDICIAL

Certain delegated legislative powers are possessed by the judicature. The superior Courts have the power of making rules for the regulation of their own procedure, *e.g.* Rule of the High Court of Judicature. This is judicial legislation in the true sense of the term differing in this respect from the so-called legislative action of the Courts in creating new law by law of precedent.

MUNICIPAL

Municipal authorities are entrusted by the law with limited and subordinate powers of making special law within their means and under their control. These enactments so authorised are termed bye-laws which may be distinguished as municipal.

AUTONOMOUS

Occasionally the State allows private persons *e.g.* Railway Companies, Registered Companies, Universities and similar other bodies of persons limited legislative authority to make bye-laws for their regulations. These bye-laws are called autonomic, which are recognised and enforced by the law Courts.

These subordinate authorities derive their power from the Supreme Legislature and the laws promulgated by them are valid, if they are not *ultra vires*, that is, made in excess of the powers delegated to them. Their validity is determined by the Court of law. Hence, the Supreme Legislature can repeal or annul any law passed by these subordinate authorities.

48. Relation of legislation to Precedent

The State has, in general, two articulate organs for law-making purposes—(1) Legislation and (2) Judicial Tribunal.

The first organ, Legislature, makes new law and the second, Courts, attests and confirms old law, though, under the cover of so doing, it introduces many new principles.

Legislation is the most important source of law. It has proved more efficient than other forms of developing law and is gradually taking their place. As it is most powerful, so it is the latest of the instruments of legal growth. Hence it has been rightly remarked—"Legislation tends with advancing civilisation to become the newly exclusive source of new law".

The comparative advantages and disadvantages of legislation and case-law are discussed herein below :—

(1) The first virtue of legislation lies in its abrogative power. It cannot only create law but also can alter or abolish an existing law, that is, it can sweep away inconvenient and unjust rules.

Precedent, no doubt, possesses constitutive efficacy *i.e.*, it can enunciate new principles of law and make good or better law. But except in special circumstances, precedent cannot retrace a course once taken. If the Judge is, in one sense, a law-maker, it must be remembered that this power of creation is merely an ability to close such gaps as exist in the legal system. Legislation is, therefore, necessary for legal reforms.

Prof. Salmond, in this connection, makes a general statement, "Precedents are constitutive, not abrogative". But he makes this statement subject to two qualifications :—

(*i*) The superior Courts have the power to alter the existing law by expressly overruling it. The Supreme Courts in Bangladesh can overrule its decisions.

But in legal theory there can be no overruling of precedent by a subsequent decision in view of the fact that prior erroneous decision was not law at the time it was made, the new decision operating retrospectively. Hence Salmond remarks that the overruling of a precedent is not the abolition of an established rule of law, it is an authoritative denial that the supposed rule of law has ever existed.

(*ii*) Secondly, if through some error a decision is contrary to pre-existing law, it nevertheless constitutes a precedent. This is based on the doctrine of *factum valet*,—that is, a thing which ought not to have been done, may never-theless be valid when it is actually done. The decision does not cease to have legal efficiency by virtue of the doctrine of *factum valet*.

(2) The second virtue of legislation is that it allows an advantageous division of labour. It improves efficiency by dividing the function of making the law and of administering it whereas the precedent unites these two functions in the same hand.

(3) Legislation satisfies the requirement of natural justice that law shall be known before they are enforced and thus the people are fore-prepared and fore-warned.

Case-law, on the other hand, is created and declared at one and the same time. Thus a judicial decision very often gives the litigants unexpected surprises. It operates retrospectively and is applied to facts which are prior in date to the law itself. But this is not so in case of enacted law, particularly in case of statutes creating crtminal offences.

(4) Legislation can by way of anticipation make rules for cases that have not as yet arisen, but the precedent must

wait until the actual concrete instance comes before the Court for decision. Thus the precedent is dependent on, and the legislation is independent of, the accidental course of litigation. So far as precedent is concerned, a point of law must remain unsettled until by chance the very point arises for determination.

(5) The case-law has no universal application. The decisions of a Subordinate Court is not binding on the superior Court, but this is not the case with Statutory law. An Act of Parliament is equally binding on the Superior as well as the Subordinate Courts.

(6) Finally, the enacted law is superior in form, complete, certain, systematic, brief and easily accessible to all. On the other hand, case-law is incomplete and unsystematic, and buried from sight and knowledge in the huge and daily growing mass of records of by-gone litigations valuable part of which is to be extracted from the judgment of a particular case which may run into hundreds of pages. Case-law is gold in mine—a few grains of the preciousmetal to the ton of useless matter—while statute law is coin of the realm ready for immediate use.

This very perfection of form, however, brings with it a defect of substance from which case-law is free. Statute law is embodied in an authoritative form of written words, and this literary expression is an essential part of the law itself. Court's duty is, in general, to apply the letter of the law. They are concerned with the spirit and reason *i.e.* the social purpose of it only so far as the spirit and reason have succeeded in finding expression through the let er. Case-law, on the other hand, has no authoritative verbal expression and there is no barrier between the Court of justice and the very spirit and purpose of the law—which they are called upon to administer. Statute law, where the words are clear, is rigid and bound within the limits of authoritative formulae ; case-law, with all its imperfections, has at least this merit that it remains in living

contact with the reason and justice of the matter, and draws from this source a flexibility and a power of growth and adaptation which are too much wanting in the letter of the enacted law.

Where the words of the statute are not clear the Court has to some extent a discretion to interpret the Statute in accordance with its social purpose. But the initial question whether the words of the Statute are clear, and the subsidiary question as to its social purpose, may be quite as difficult as ascertaining the *ratio decidendi* of a case. Thus Statute law is not always superior to case-law in point of clarity, nor yet always inferior to it in point of flexibility.

49. Codification

The whole tendency in modern times is towards the process which, since the days of Bentham, has been known as Codification, that is to say, the reduction of the whole *corpus juris* (civil law), so far as practicable, to the form of enacted law. A general movement towards codification marked the nineteenth century. Since the middle of the 18th century the process has been going on in European Countries and is now all but complete. In this respect England lags far behind the Continent.

As regards the advantages of codification, it is sometimes said that the predominant motive for codification was a desire to render the law certain. But only two types of countries can afford to adopt code successfully : those with well-developed systems where the possibility of further development is remote for the moment and those with undeveloped systems which cannot grapple with new economic problems.

Nevertheless, many codifiers emphasise that one of their aims is to make the law simple and accessible, logically arranged and harmonious, certain and definite. In the first flush of enthusiasm, it was said in France that by Codification all the problems of law would be solved and that every case would be decided by deduction from the provisions of the Code. The advantages of codified law are so great that they outweigh all the defects that are to be found in statute law. Hence the modern tendency towards Codification.

But Codification must not be understood to involve the total abolition of precedent as a source of law. No code can be all-sufficient. Case-law will continue to grow, even when the Codes are complete. The doctrine of the logical plentitude of law is a useful one, but if jurists think that a limited number of sections in a Code include all the law that there is, the problem becomes increasingly difficult as the decades roll by. No draftsman can altogether avoid such flaws as ambiguity, obscurity, or conflict of sections. Even if he could, new problems arise which could not possibly have been foreseen and new social philosophies become popular which are out of keeping with the basis on which the code is built. In the long run, the real test of a Code is the measure of flexibility which it has allowed the law. So, codification means not the total disappearance of case-law, but merely the reversal of this relation between case-law and Statute-law *i.e.* it merely acts as a check whereby the determination of a particular law should not be left to the caprices of Judges. Hence codification means that the substance and body of the law shall be enacted law, and that the case-law shall be incidental and supplementary only. We must understand that a Code, however, skilfully drafted, cannot cover all cases and distinctions and is bound to give rise to the necessity of interpretation and case-law. Again, there is every likelihood that a particular enactment may not fully express the pure intention of the Legislature. In such a case a necessity of recodification of the same enacted law will arise, and the same process will commence over again.

An interesting compromise between case-law and Codification is the American Law Institute's Restatement of American law. Restatement is the form of a Code, but it is not statutory and has no official sanction. Its authority in the Courts of the United States, rests entirely on the eminence of the jurists, who have framed it. Generally speaking, the Restatement, as its name implies, merely declares the existing law, without attempting to suggest or incorporate improvements in it.

50. Interpretation of Enacted law

The characteristic of a statute passed by the Legislature is that it is in the form of a definite and authoritative formula that is

to be applied, whenever any case requiring its application arises. The very words in which a particular enactment is expressed, the *litera scripta*, constitute a part of the law itself. Hence every enacted law requires a judicial interpretation or construction, the object of which is to make definite the meaning of that particular enactment. Such judicial interpretation is not necessary in the other forms of law (except in the case of conventional law, which in this respect, stands on the side of statutory law), because in such case there are no fixed and authoritative expressions. By judicial construction or interpretation is meant the process by which the Courts seek to ascertain the intention of the Legislature.

Interpretation is of two kinds : (1) Grammatical and (2) Logical.

1. GRAMMATICAL INTERPRETATION (LITERA LEGIS)

The general rule for the interpretation of statutelaw is that the words of the law should be taken in their ordinary meaning. The Court must accept the letter of the law presuming that the legislative has said what it meant and meant what it said. This kind of interpretation, according to Salmond, is called grammatical interpretation. It is that kind of interpretation which exclusively determines the letter of the law. It does not look beyond the words that are to be found in the particular enactment. Grammatical interpretation is the sole guide when the language of the statute is clear.

Exceptions—There are two exceptions to the above general rule when the *litera legis* (letter of the law) may be affected. These are :—

(*i*) When the *litera legis* is logically defective.

(*ii*) When it is unreasonable.

LOGICALLY DEFECTIVE LAW

When the letter of the law is logically defective *i.e.* when the language is not clear and complete idea is not expressed, the letter of the law should not be taken as the sole guide but due consideration and weight should be given to the spirit of the law,

These logical defects may be due to the following three reasons :—

AMBIGUITY

When a statute instead of meaning one thing means two or more different things, the Courts can in such a case disregard the meaning of the letter of the law and can ascertain the true intention of the legislative.

INCONSISTENCY

When the different parts of a statute are so repugnant to each other as to destroy each other's effect and significance, the Courts can in such a case correct the letter of the law and can ascertain the intention of the legislature. Again, when a statute is inconsistent with another statute, the latter statute will be deemed to overrule the earlier one.

INCOMPLETENESS

Lastly, the letter of the law may be defective by reason of its incompleteness. It may not be ambiguous or inconsistent, but it may contain some lacuna (omission) which prevents it from expressing any logically complete idea. For example, where there are two alternative cases, the law may make provision for one of them, and remain silent as to the other. The Court may lawfully supply such omission by way of logical interpretation. It must be noted, however, that the omission must be such as to make the statute logically incomplete. If what the Legislature has said is logically complete giving expression to some definite idea,—the Courts have no lawful concern to express anything else in addition to what the Legislature has actually said. It is the duty of the Court, in such cases, to apply the letter of the law and they can add to it or alter it only in so far as to make its application possible and nothing more.

UNREASONABLENESS

When the meaning of the letter of the law (*litera legis*) seems to be unreasonable and it appears that the Legislature could not

have meant what it has said, the letter of the law should not be taken as the sole guide but due consideration and weight should be given to the spirit of the law. In case of a clerical error, the Court must interpret the sentence so as to make sense of it.

2. LOGICAL INTERPRETATION (SENTENTIA LEGIS)

Logical interpretation (*sententia legis*) on the other hand, is that which departs from *litera legis* (letter of the law) and seeks elsewhere for some satisfactory evidence of the true intention of the Legislature in the enactment of a particular Statute.

The duty of the judicature is to try to discover the true intention of the Legislature (*sententia legis*) or to act upon the grammatical construction of the enactment only (*litera legis*). In all ordinary cases the Courts must be content to accept the *litera legis* as the exclusive and conclusive evidence of the *sententia legis*. Judges are not at liberty to add to or modify the letter of the law simply because they have reason to believe that the true intention of the Legislature has not been expressed in that particular letter. In other words, in all ordinary cases grammatical interpretation is the sole form allowable.

But the Courts should adopt the logical interpretation (*sententia legis*) of the Statute by ascertaining the true intention of the Legislature when the grammatical interpretation is not possible, the letter of the law being either (*i*) logically defective due to ambiguity, inconsistency and incompleteness, or (*ii*) Unreasonable.

CHAPTER VIII

PRECEDENT

51. 'Stare Decisis' or the Principles of Judicial Precedent

In order to secure certainty of law, decisions of High Courts and of superior Courts are reported and cited as authority in future cases where an identical question of law comes up for determination. A Court may be bound by the decision of a superior Court in the same way as it is bound by Statute. In England the Courts are imperatively bound by decisions of higher Courts in the same hierarchy, and the House of Lords, the Court of Appeal and the Divisional Court are each bound by their own decisions. Decisions of the Judicial Committee of the Privy Council are absolutely binding on many Courts in the Empire, but the Judicial Committee and many Dominion Courts reserve liberty to overrule their own decisions. Thus the decisions of Courts are as good as statutory law in countries like England and America. This is known as Precedent or Case-law. According to this theory, a Judge does not make law ; he merely declares law. The system of Jurisprudence that we follow and which is based on the principles of law followed in England, is '*stare decisis*' which means to abide by authorities and cases already adjudicated upon. Thus the growth of case-law involves the gradual elimination of judicial liberty. In any system in which precedents are authoritative, the Courts are figuratively said to be engaged in forging fetters for their own feet and that every fresh decision is an additional link, in the chain of the Judge's slavery.

52. The Authority of Precedent

The importance of judicial precedents has always been a distinguishing characteristic of English law. The great body of unwritten law is entirely the product of decided cases which have been preserved

and accumulated in the voluminous Law Reports. In England ever since the reign of Edward the First, at the close of the thirteenth century it has been the custom to follow the decision of a Judge once it has been authoritatively declared previously by the superior Courts. A judicial precedent in England speaks with authority, it is not mere evidence of the law, as in the continental countries, but a source of it, and the Courts are bound to follow it when it is once so established. That is what is meant by the expression, "In England the Bench has always given law to the Bar". Salmond says, "In practice if not in theory the Common law of England has been created by the decision of English Judges.

But the case is otherwise with the Continental Law. In the continental countries of Europe, decisions of Courts have no binding force on a Tribunal. They are not binding even on inferior Courts. The Continental system is founded on the Roman system, which did not attribute any authority to precedent. A book of law reports and a textbook were on the same level. There precedents were not sources of law but were merely evidence of it. The reason is that unlike in England the Roman Bar always gave law to the Bench, for there are no permanent bodies of expert professional Judges as in England.

The *grounds* on which precedents are so authoritatively followed is that it is presumed that a judicial decision is always correct. It is an application of the maxim, '*Res judicata pro vertitite accipitur*' (a judgment must be taken for accepted truth). A matter once formally decided is decided once for all. Even if the decision is not true in fact, it is expedient that it should be held as true nonetheless. Therefore, when a question has once been judicially considered and answered, it must be answered in the same way in all subsequent cases in which the same principle arises again.

53. Original and Declaratory Precedent

Precedent or case-law is a judicial decision. But all judicial decision is not precedent. A judicial decision which contains in itself a principle of law is called precedent. Precedent may be (1) Original and (2) Declaratory.

An *original* precedent is one which contains a new principle of law *i.e.* which creates a new rule for the first time.

A declaratory precedent is one which is merely the application of an already existing rule of law. When a particular rule of law has already been authoritatively determined by the Court and it is to be applied in a subsequent and similar case, it is merely the application of a declaratory precedent, that is, the application of an already existing rule of law.

In the former case it is law of the future because it is now created and applied for the first time, in the latter case, the rule is applied because it is already a rule of law. Though a declaratory precedent is a source of law, it is not a source of new rule of law, whereas an original precedent is a source of a new rule of law. However few they are in number, the original precedents are of greater importance. For, they alone develop the law, the declaratory precedents leave the law as it is.

54. Authoritative and Persuasive Precedent

Precedents may be further divided into two classes, which may be distinguished as (1) Authoritative and (2) Persuasive. These two differ in respect of the kind of influence which they exercise upon the future course of the administration of justice.

Authoritative Precedents—An authoritative precedent is one which is binding upon Judges and which they must follow whether they approve of it or not. It is binding upon them and it excludes their judicial discretion for the future. Authoritative precedents recognised by English law are the decisions of the superior Courts of justice in England. These precedents are legal sources of law. Authoritative precedents may be divided into two classes :—

(*i*) Absolute authoritative or
(*ii*) Conditional authoritative.

(*i*) *Absolute authoritative*—An absolute authoritative precedent is one which is absolutely binding upon Judges and which must be followed by them however unreasonable or erroneous it may be considered to be. In England absolute authority exists in the following cases :—

(*a*) Every Court is absolutely bound by the decisions of all Courts superior to itself.

(*b*) The House of Lords was previously absolutely bound by its own decision. In July 1966, the House of Lords announced that it would no longer consider itself absolutely bound by its own decision.

(*c*) The Court of Appeal is absolutely bound by its own decisions. Similarly, the older Courts of Co-ordinate Authority *e.g.* the Court of Exchequer was bound by its own decisions.

(*d*) A Divisional Court of the High Court is also bound by its own decision.

Conditional Authoritative Precedent—A conditional authoritative precedent is one which possesses merely conditional authority and it may be disregarded by the Judges under certain circumstances, that is, the Courts possess a certain limited power of disregarding it. In all ordinary cases it is binding, but there is one special case in which its authority may be lawfully denied or disregarded (*i.e.* it may be overruled or dissented from). A precedent may be disregarded when it is not merely wrong but it is so clearly and seriously wrong that its reversal is demanded in the interest of justice. Otherwise it must be followed however erroneous the original decision may be. Except in the above four cases of absolute authority of precedent, the authority of precedent is merely conditional.

It must be noticed, however, that the force of a decision depends not merely on the Court by which it was given but also on the Court in which it was cited. Its authority may be absolute in one Court but merely conditional in another. A decision of the Court of Appeal in England is absolutely binding on a Court of first instance, but it is only conditionally binding upon the House of Lords. Here the decision of Dacca High Court (now the Appellate Division of the Supreme Court of Bangladesh) is absolutely binding on any Subordinate Court in Bangladesh but before the independence of Bangladesh it was conditionally binding on any Munsif in West Pakistan.

Absolute and Conditional Authority of Precedent in our Courts—(*i*) Decisions of the Supreme Court and of the former Federal

Court were authoritative and binding on all the High Courts of Pakistan and is now binding on the Supreme Court of Bangladesh.

(*ii*) Decisions of the Privy Council, which used to operate as absolutely authoritative formerly, will henceforth operate as conditional from the time of the jurisdiction of the Privy Council as the final appellate authority was discontinued, and as such it is not binding on our Courts.

(*iii*) Decisions of High Courts are of three kinds ; namely, (*a*) Full Bench decisions *i.e.* decisions of Divisional Court composed of three or more Judges, (*b*) Division Bench decision *i.e.* decision of Division Court of two Judges, and (*c*) Decision of a single Judge.

Now, a Full Bench decision is binding on a Division Bench as well as on a Single Judge of the same High Court even if unreported. Similarly a Division Bench's decision is binding on other Division Benches of the same High Court till it is overruled either by a Full Bench decision or by the Supreme Court. A High Court, however, is not bound by any decision of another High Court, be it a Full Bench decision or a Division Bench decision.

(*iv*) With respect to subordinate Courts, only decisions of High Court to whom they are subordinate and of the Supreme Court are authoritative and binding while the decisions of the other High Courts possess only a persuasive authority.

Following are the circumstances which tend to increase the authority of a precedent :—

(*i*) Unanimity of the Court ; (*ii*) affirmation or approval by other Courts, particularly by a Superior Court ; (*iii*) eminence of the Judge, (*iv*) approval or even absence of criticism by the profession ; (*v*) learned argument, and finally (*vi*) the fact that an Act has since been passed on the same subject-matter without reversing the decision.

55. Circumstances justifying disregard of Precedent

In order that a Court may be justified in disregarding a conditionally authoritative precedent, the following conditions must be

fulfilled, namely, that the decision must in the opinion of the Court in which it is cited, be a wrong decision. A decision becomes wrong in two cases, namely, (*a*) when it is contrary to law, or (*b*) when it is contrary to reason. It is wrong as contrary to law when there is already in existence an established rule of law on that point but the decision fails to conform to it. When the law is already settled, the sole right and duty of the Judge is to apply it. It is wrong as contrary to reason, when there is no settled law to declare and follow and the Courts make law for the occasion. In such circumstances, it is the duty of the Courts to follow reason. If they fail to do so, their decisions are wrong and the principles involved in them are defective. In the above circumstances, disregard of a precedent is justified.

It may, however, be noted that before disregarding a conditionally authoritative precedent a Court should take into consideration the following aspect of the matter.

It is often more important that the law should be certain than that it should be ideally perfect. These two requirements (*i.e.* certainty and perfectness) are to a great extent inconsistent with each other; we must often choose between them. A precedent acquires added force by lapse of time. The longer a precedent has stood the test of time, the greater chance it has to be remembered and followed in future. The precedent, while it stood unreversed, may have been counted upon in numerous cases as definitely establishing the law and many transactions may have been adjusted and rights determined on the strength of the precedent so established. Justice may, therefore, imperatively require that the decision, though found in error, shall nevertheless be followed. Lord Eldon said "It is better the law should be certain, than that every Judge should speculate upon improvements in it." But the defective decision must not, by the lapse of time or otherwise, have acquired such added authority as to give it a permanent recognition notwithstanding the vices of its origin. When the decision is plainly wrong and practical injustice in consequence must flow from it, it becomes necessary to have it corrected either by a Statute or by having it overruled.

56. Effect of disregarding a Precedent

The disregard of a precedent assumes two distinct forms, namely (*i*) The Court to which it is cited may overrule it, or (*ii*) the Court may merely refuse to follow it. Overruling is an act of a Court of superior jurisdiction. A precedent overruled is definitely and formally deprived of all authority. It becomes null and void, like a repealed Statute, and a new principle is authoritatively substituted for the old.

A refusal to follow a precedent, on the other hand, is an act of co-ordinate or concurrent jurisdiction. Two Courts of equal authority have no power to overrule each other's decision. Where a precedent is merely not followed, the result is not that the later authority is substituted for the earlier, but that the two stand side by side as conflicting decisions. The conflict thus produced can only be solved by the act of a higher authority, which will in due time decide between the competing precedents, formally overruling one of them, and sanctioning the other as good law. In the meantime, the matter remains at large and the law uncertain.

When a case is overruled by the superior Court on appeal, not on the point on which the decision has been given in the Court below, but on some other point, the decision, not concerned on appeal, is not perhaps altogether deprived of authority, but it is reduced to the status of a merely persuasive authority.

57. Circumstances destroying the binding force of precedent

The rules of precedent that have hitherto been stated are subject to a number of general exceptions. These exceptions (that is, the circumstances destroying the binding force of precedent), are as follows :—

(1) *Abrogated decision*—A decision ceases to be binding if a Statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher Court. Reversal occurs when the same decision is taken on appeal and is reversed by the appellate Court. Overruling occurs when the higher Court

declares in another case that the precedent case was wrongly decided and so is not to be followed.

Affirmation or reversal on a different ground—It sometime happens that a decision is affirmed or reversed on appeal on a different point. As for example, suppose a case is decided in the High Court on ground A, and then goes on appeal to the Supreme Court, which decides it on ground B, nothing said on ground A. Jessel M.R. in one case said that where the judgment of the lower Court is affirmed on different grounds, it is deprived of all authority, as the conduct of the appellate Court showed that it did not agree with the grounds given below. It is the same with cases reversed on another point. It is submitted that the true view is that a decision, either affirmed or reversed on another point, is deprived of any absolute binding force it might otherwise have had, but it remains an authority which may be followed by any Court that thinks the particular point to have been rightly decided.

Ignorance of Statute—A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of a statute, *i.e.* delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in a leading case of England. Even a lower Court can impugn a precedent on such grounds. It is an example of a decision *per incuriam i.e.* not binding upon Court.

Inconsistency with earlier decision of Higher Court—A precedent loses its binding force if the Court that decided it, overlooked an inconsistent decision of a higher Court. If, for example, a Division Bench of Dacca High Court decides a case in ignorance of a decision of the Full Bench, which went the other way, the decision of the Division Bench is *per incuriam* and is not binding either on itself or on lower Courts. It is the decisions of the Full Bench that is binding.

Inconsistency between earlier decisions of the same rank—A Court is not bound by its own previous decisions that are in conflict with one another. The conflict may arise through inadvertence, because the earlier cases were not cited in the later.

Although the later Court is not bound by the decision so given *per incuriam* this does not mean that it is bound by the first case. Because the rule is that where there are previous inconsistent decisions of its own, the Court is free to follow either.

Precedent sub silentio or not fully argued—A decision passes *sub silentio* when the particular point of law involved in the decision is not perceived by the Court nor present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon, which the Court should not have done without deciding point B in his favour. But point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the case and although had a specific outcome, the decision is not an authority on point B, which is said to pass *sub silentio* as the Court remained silent on the point which is logically involved in the facts and circumstances of the case.

Decisions of equally divided Courts—Where an appellate Court is equally divided the practice is to dismiss the appeal. In such circumstances, the rule adopted in all Courts of England except the House of Lords (where the invariable practice has since been to sit with an uneven number of peers, usually five) is that the decision has only the authority of the Court appealed from, the obvious reason being that there is no majority against the appeal. If the Court is equally divided, the appeal is dismissed, but it is not a decision in favour of the respondent. Because a drawn battle cannot be described a victory.

In our country, if a Division Bench is equally divided, the case is referred to a third Judge for decision and the case is finally decided according to the majority view of the two Judges.

58. The grounds of the authority of Precedent

The grounds on which precedents are so authoritatively followed are the following :—

The Doctrine of Res judicata—It is presumed that a judicial decision is always correct. It is an application of the maxim, *rse*

judicata pro vertitate accipitur (*i.e.* a judgment must be taken for accepted truth). This doctrine of *res judicata* formulates the legal principle that a matter once formally decided is decided once for all. Even if the decision is not true in fact, it is expedient that it should be held as true nonetheless. Therefore, when a question has been judicially considered, heard and finally decided, it must be answered in the same way in all subsequent cases in which the same question arises again. Strict application of this rule checks unnecessary litigation and puts an end to the arbitrary decision on the part of the Judges.

Ratio Decidendi of a Case— A precedent is a judicial decision which contains in itself a principle of law : all judicial decisions are not called precedents. Of the questions that come up for judicial decision in a particular case, some are capable of being answered in the form of a principle—which is of general importance, while the answer to some of them can only be specific and concrete which is of importance only to the parties to the case and to which strangers are not at all interested. The concrete decision binds only the parties to it, but it is the abstract principle alone that has the force of law. The underlying principle of a decision which thus forms its authoritative element is often termed the *ratio decidendi* of a case. What is important in a precedent is not the actual and concrete decision but the underlying principle on which it is grounded.

It is often said by Judges that inasmuch as the matter before them is not covered by authority, they must decide it on principle. The statement implies two things : first, that where there is any authority on the point, *i.e.* if the question is already one of law, the duty of the Judge is simply to follow the decision, and secondly, that if there is no authority, it is the duty, if possible, to decide it upon principle, *i.e.* to formulate some general rule and to act upon it, thereby creating law for the future. Sometimes the Courts have to decide questions which do not admit of being answered either on authority or on principle, and in such cases a specific or individual answer alone is possible, no rule of law being either applied or created.

Obiter or judicial dicta—Although it is the duty of Courts of Justice to decide questions on principle if they can, they must take care in the formulation of principles to limit themselves to the requirements of the case in hand. They must not lay down principles which are not required for the due decision of the particular case or which are wider than is necessary for this purpose. The authoritative judicial principles are those which are relevant in their subject-matter and limited in their scope. All other principles, which are not necessary for disposal of the case, are of merely persuasive efficacy and not authoritative. Such unwarranted and unnecessary observations and principles laid down by the Judge, which go beyond the scope and subject-matter of the case, is known as *obiter dicta* or judicial dicta, which means—things said by the way. They are simply passing remarks made by the Judge and as such are not authoritative but possesses only persuasive efficacy.

Distinguishing Precedents—The question, as to whether a principle laid down by a Court is unduly wide for the decision of the case *i.e.* obiter or not, is to be answered by the Court before whom the decision is cited as precedent. In practice, Courts do not concede to their predecessors the power of laying down very wide rules. So, when any decision is cited as an authority in a particular case and the Judge is of opinion that the case cited before him contains irrelevant matter, he reserves to himself the power to narrow down the rules created by the former decision by introducing into them particular facts of the precedent case that were treated by the earlier Court as irrelevant. This process is known as 'distinguishing' the former case.

59. The Sources of judicial principle

The judicial principles or *ratio decidendi* by which the Courts supplement the existing law, are, in truth, nothing else than the principles of natural justice, practical expediency and common sense. Judges are appointed to administer justice according to law so far as the law extends, but so far as there is no law, according to the principles of natural justice. Where the Civil law is deficient,

the law of nature takes its place, and in so doing puts on its character also. But the rules of natural justice are not always such that any man may know them and the light of nature is often an uncertain guide. So, men differ as to "natural justice", and instead of trusting to their own unguided instincts in formulating the rules of right and reason they seek guidance and assistance from elsewhere *i.e.* the historical sources. In establishing new principles they willingly submit themselves to various persuasive influences. Thus, the persuasive precedents, judicial dicta, opinions of distinguished writers and other forms of ethical or juridical doctrine, which seem good to them, form the source of judicial principles. None of these are binding upon the Judges but these sources are thought to be just and satisfactory, because they find it already embodied in some system of foreign law. Thus, new rules are very often the analogical extension of the old.

This is called the analogy of pre-existing law. The Courts seek as far as possible to make the new law the embodiment and expression of the spirit of the old *ratio juris*, as the Romans called it. At the same time it must be remembered that analogy is lawfully followed as a guide to the rules of natural justice. It has no independent claim to recognition. Wherever justice so requires, it is the duty of the Courts, in making new law, to depart from the *ratio juris*, rather than to servilely follow it.

60. Value of the doctrine of Precedent

The phrase "the doctrine of precedent" has two meanings. In the first, *i.e.* in its loose meaning, the phrase means merely that the precedents are reported, cited and will probably be followed. This was the doctrine that prevailed in England until the nineteenth century, and it is still the only sense in which the doctrine prevails in the Continental Countries like France and Italy. In the second, *i.e.* in the strict meaning, it means that precedents not only have great authority but must be maintained and followed in certain circumstances. This rule developed in the nineteenth century and completed in some respects during the twentieth, which prevails under our system of legal jurisprudence.

The real issue is whether the doctrine of precedent should be maintained in its strict sense or whether we should revert to the loose sense. There is no dissatisfaction with the practice of citing cases and of attaching weight to them ; the dissatisfaction is with the present practice of treating precedents as absolutely binding. In favour of the present practice it may be said that the practice is necessary to secure certainty of law, the predictability of decisions being more important than approximation to an ideal. Against it, it must be stated that Judges sometimes find it impossible to undo the mischief done by a decision which under the circumstances, must be followed even though the Judge feels that it causes great injustice. This is the defect and vice of our system. Against such defects, two arguments may be advanced :—

(1) A very unsatisfactory decision may be reversed for the future by statute. To this it must be pointed out that the pressure of parliamentary time is so great that they find it impossible to devote their attention to such matter. Moreover, experience has shown that when Parliament attempted to rectify errors of the Common law, it has almost always done so, not by clean reversal, but by introducing exceptions to the Common law rule. What is needed is a power in the Judge to set aside their own mistakes.

(2) It may also be pointed out that the Judges do possess the power of setting aside a decision which is wrong. Such a power does exist at the moment in some degree, for a High Court Judge may refuse to follow another High Court Judge, a higher Court may overrule a decision of an inferior Court, and any Court may restrictively distinguish an unjust decision. But the power of restrictive distinguishing is unsatisfactory, because it leaves the distinguished decision standing and although the old rule is not observed, it nevertheless continues to remain. Moreover, the present rules do not always promote certainty of legal administration that is claimed for them, for it depends very much upon the strength of the

particular Judge whether he will restrictively distinguish a decision that is technically binding upon him.

As a compromise between the two opposing views, it is submitted that the strict doctrine should be retained in so far as it binds a Court to follow the decisions of the superior Court, but that Court should cease to be bound by the decisions of the Courts of co-ordinate Jurisdiction.

CHAPTER IX

CUSTOM

61. Importance of Customary Law

Custom is a long and generally observed course of conduct of a number of persons. It is the spontaneous evolution of rules by the popular mind, the existence and general acceptance of which is proved by their customary observance. Prof. Salmond observes—"Custom is the embodiment of those principles which have commended themselves to natural conscience as the principle of truth, justice and public utility." Customs are, therefore, rules of conduct or practices of the people which are generally followed because they are true, just and beneficial to the society.

A custom is formed when a man does a thing in a particular way and his method of doing the thing is imitated by others. But why the first man did that thing in that way nobody can say. When others repeat the same course of action similarly, a habit is formed. This habit of acting in a particular way is a custom. The older a custom grows, the stronger does its force become.

The importance of custom as a source of law has been recognised in almost all systems of law. According to English law a valid custom binds every one who comes within its domain, whether he knows of it or not. In earlier times, it was the long received theory of English law that whatever was not the product of legislation had its source in custom. Although it has now almost ceased to operate as an instrument of development of English law in particular, partly because it has to a large extent been superseded by legislation and precedent and partly because of the limitations imposed by law upon its law-creating efficacy, the identification of the common law with customary law remained the accepted doctrine long after it had ceased to retain the semblance of truth. It is

true that with the advance of civilisation custom has been relegated to a secondary position as a source of law, the legislation, being now the primary source, but still custom is regarded to be one of the legal sources of law.

62. Reasons for acceptance of Customary Law

There is more than one reason for attributing to custom the force of law. The reasons are :—

(1) In the first place, custom is frequently the embodiment of those principles which have commanded themselves to the national conscience as principles of justice and public utility. The fact that any rule has already received the sanction of custom, raises a presumption that it deserves to obtain the sanction of law also.

(2) Secondly, both law and custom are the expressions of the principle of right and justice. Custom is to society what law is to the State. Law embodies the rules of conduct by the power of the State, but custom embodies them as acknowledged and approved not by power of the State, but by the public opinion of the society at large. Hence, it is natural, that when the State first comes into existence and takes its function of administering justice according to law, it should accept as true and valid those principles of right and justice that have already been recognised by public opinion *i.e.* the custom.

(3) In the third place, the law creating efficacy of custom is to be found in the fact that the existence of an established usage is the basis of a rational expectation of its continuance in the future. So, when a custom is once established the general public expect that it should continue to exist in future and many transactions are based thereon. Justice demands that unless there is good reason to the contrary, men's rational expectation shall, so far as possible, be fulfilled rather than frustrated. Even in modern times the Legislature gives express statutory recognition to bodies of local customs.

63. Difference between Law and Custom

A question is often asked as to when does custom become law and, for that matter, as to the distinction between Law and Custom. There is a difference of opinion as to the moment when a custom becomes law.

(1) Austin's opinion is that a custom becomes a law from the moment of its recognition by the State.

(2) Prof. Holland observes that a custom becomes law not from the moment when it is recognised by the State, but retrospectively. It was law as soon as it satisfied certain tests.

(3) Prof. Salmond says that a Custom is law not because it has been recognised by the Courts, but because it will be recognised, in accordance with the fixed rules of law, if occasion arises. Hence the Courts enforce a Custom because they find it a law already in existence.

In this connection it may be urged that though the Courts consider a custom as 'Law' before they enforce it, yet before enforcement the custom might have been a particular kind of law but not 'civil law' at least. The enforcement by the Court stamps the Custom (which might have been a particular kind of law) with the character of 'Civil Law'.

The mark which distinguishes custom in the legal sense from mere convention is the recognition that there is authority behind it. In the modern State, the Custom, if legally recognised, has behind it the Court and an apparatus of coercion. In the primitive communities there was no authority necessarily organised in the institutional sense. Custom in the early stages is somewhat vague —it can be made into an effective rule of law only if the practice is hardened and made definite. This can occur only by the slow work of the Courts, as technical rules are fashioned out of the raw material afforded, or by legislation, since writing inevitably sharpens the vague outlines of Custom.

64. Kinds of Custom

All custom which has the force of law is of two kinds, which are essentially distinct in their mode of operation. These two

kinds of Customs may be conveniently distinguished as legal and conventional.

Legal Custom—A legal custom is one whose legal authority is absolute—one which in itself possesses the force of law. It is operative *per se* as a binding rule of law, independently of any agreement on the part of those subject to it. Legal custom is itself of two kinds—(*a*) Local and (*b*) General.

Local Custom—When a legal custom having the force of law prevails in a particular locality only, it is called local custom. In its narrowest sense the term custom means local custom exclusively. Thus, local custom is in force as a law in some defined locality only, such as borough or county in England, and constitutes a source of law for that place only. Thus, the former custom observed in a particular part of Madras Province, where the daughter's son was declared entitled to succeed to the property of his uncle on his death excluding in that part the right of the son to succeed the father, is a local customary law.

General Custom—The general custom is that which is in force and prevails throughout the country. In order to have the force of law, a general custom must be ancient, immemorial custom of the country. According to earlier theory, the general law of England with the exception of Statute law, was customary law. All the general and immemorial custom of England have been accepted by the Courts of Justice and have, therefore, been transferred into case-law. But according to the modern theory, the general law of England consists of enacted law and case-law. Nevertheless custom did at one time form the sources of general law of the realm. Thus in the law reports of Henry IV, it is said, "The Common law of the realm is the common custom of the realm". But this theory did not express the whole truth. The King's Courts even in earlier days must have imposed upon the realm much that was not customary but what was Civil or Canon Law.

Conventional Custom—A Conventional custom, on the other hand, is conditional on its incorporation in agreement between the parties to be bound by it. In the language of English law, the term custom is more commonly confined to legal custom only,

while conventional custom is distinguished as usage. The distinction so drawn between custom and usage is not universally observed, not even by lawyers.

A conventional custom is legally binding not because of any legal authority possessed by it but because it is necessarily implied. Where two persons enter into an agreement, they do not commonly express in words, whether written or verbal, the whole terms of that agreement ; some of the terms remain implied. The larger part of most contracts is implied rather than expressed. The law, therefore, endeavours to find out the true intentions of the parties with respect to those terms which have not been put on paper. This presumed intention is gathered from two sources—first, from that which is reasonable, and second, from that which is customary. The latter part of the agreement is called conventional custom. It operates only indirectly through the medium of agreements and is legally binding on those persons who come under the contract. Hence its authority depends conditionally on its acceptance between the parties. Where persons enter into a contract in any matter in respect of which there exists some established usage they will be presumed to have intended to contract with reference to that usage in the absence of any express indication to the contrary.

Conventional custom may be of two kinds :—

(*i*) *General*—It is in force as law throughout the realm, *e.g.* mercantile custom regarding negotiable instruments.

(*ii*) *Local*—It is in force as law in a particular locality only, *e.g.* local customs of agriculture and tenancy.

65. Requirement of a valid Custom

In order that a legal or local custom may be valid and operative as a source of law it must conform to the following requirements :—

Reasonableness—A custom must be a reasonable one. It must, to a certain extent, conform to the rules of justice and public utility.

Conformity with Statute Law—A Custom must not be contrary to the Statutory law of the country. It cannot take away the force of a Parliament. Any Custom, which is contrary to the Statute law, is void.

Observance as of right—A custom must refer to legal relations. A mere casual or voluntary practice is not enough. It must be observed as of right. Hence the custom must be accompanied by the conviction, on the part of those who use a custom, that it is obligatory and not merely optional. A merely voluntary practice not conceived of as based on any right or obligation does not amount to a legal custom and cannot operate as a source of law.

Immemorial antiquity—The fourth and the last requirement of a legal custom relates to the length of time during which it has been established. A custom to have the force of law must be immemorial. It must have existed from the time beyond the memory of man. Recent or modern custom is of no value. Custom is immemorial when its origin was so ancient that the beginning of it was beyond human memory.

Sir C. K. Allen seems to make light of the requirements of antiquity, saying "A mere habit, practice or fashion which has existed for a number of years nobody supposes to be *ipso facto* an obligatory Custom, antiquity is the only reliable proof of resistance to the changing conditions of different ages."

The limit of human memory has been arbitrarily fixed by the English law. By a Statute of Westminster passed in 1925 it became settled that the time of human memory reached as far back as the reign of Richard I, and no further. This curious rule of English law is still in force. Hence, if any person disputes the antiquity of a Custom he will have to prove its non-existence at any time between the present day and the time of Richard I, *i.e.* the twelfth Century.

66. Custom and Prescription

The distinction between custom and prescription is, in short, this :—

(1) Custom is a long usage or practice operating as a source of law ; but prescription is a long usage or practice operating as a source of right. That on the death of *A*, an owner, intestate (*i.e.* without executing any will), all his lands in a certain borough descended on his youngest son, is a *Custom* and is a source of special customary law excluding in that locality the common law of

primogeniture. But that *B*, the owner of a certain farm and his redecessors in title have used from time immemorial a way pover the adjoining farm, is a prescription and is the source of prescriptive right of way vested in *B*, an individual person.

(2) Custom concerns a number of persons of a society, but prescription concerns a single individual. Regarded historically, the law of prescription is merely the branch of the law of Custom. Prescription was originally concerned as a personal Custom, *i.e.* a custom limited to a particular person and his predecessors or ancestors in title which was distinguished from local custom which is limited to a number of persons of an individual place. Coke distinguishes between custom and prescription thus : "In the common law, a prescription, which is personal, is, for the most part, applied to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath ; .... And a custom, which is local, is alleged in no person, but laid within some locality or place."

(3) The requisites of a valid prescription were in essence the same as those of a valid custom. Both must be reasonable, immemorial, and consistent with statute law and so on. It was only by the process of gradual differentiation and the later recognition of the other forms of prescription that the difference between the creation of customary law and that of the prescriptive rights, has been brought clearly into view. In the case of custom, for example, the old rule as to time immemorial still subsists, but in the case of prescription it has been superseded to some extent by the fiction of the lost modern grant and to a much greater extent by the Statutory rules, the Prescription Act.

Thus, custom in order to be valid, must be of immemorial antiquity, but a prescriptive right, for instance, right to light, is now finally acquired by enjoyment of twenty years.

CHAPTER X

LEGAL RIGHTS

67. Right, Wrong, Duty

Administration of justice means maintenance of rights, suppression or redress of wrongs and thereby upholding justice by means of the coercive power of the State and the primary duty of the State is to administer justice. Therefore, in dealing with the term 'right', it is absolutely necessary to define the terms 'Wrong and duty'.

WRONG

A wrong means simply a wrongful act which is contrary to the rule of right and justice. A synonym of it is injury in its primary sense of injuria (that which is contrary to *jus*) though in its modern secondary sense it also means harm or damage. Wrongs are divisible into two classes : (1) Legal Wrong and (2) Moral Wrong.

Legal Wrong—A legal wrong means an act which is contrary to the rule of legal justice and a violation of the law *i.e.* an act which is legally wrong. It is an act which is authoritatively determined to be wrong by a rule of law, and is, therefore, treated as a wrong in and for the purpose of administration of justice by the State. For example, non-payment of debts by the debtor legally due to the creditor is a legal wrong.

Moral Wrong—Moral wrong means an act which is contrary to or in violation of the rules of natural justice. For example, disobeying one's superior is a moral wrong.

DUTY

A Duty is an obligatory act, *i. e.* an act the opposite of which would be wrong. The commission of a wrong is a breach of duty, and performance of duty is the avoidance of wrong. It is obligation in its widest sense. So duties and wrongs are correlatives. When the law recognises an act as a duty it commonly enforces

the performance of it or punishes the disregard of it. Duties are of two kinds : (1) Legal duty and (2) Moral duty.

Legal Duty—It is an act required by the rule of legal justice—an act the opposite of which would be a legal wrong *e.g.* the debtor is under a legal duty to pay his debt, which may be legally enforced by the creditor.

Moral Duty—It is an act required by the rule of moral justice —an act the opposite of which would be moral wrong, which cannot be enforced by law, *e.g.* the child is under a moral duty to respect his parents.

These two classes of duties are partly coincident and partly distinct. For example, in England there is a legal duty not to sell or have for sale adulterated milk whether knowingly or otherwise, and without any question of negligence. In so far as the duty is irrespective of knowledge and negligence, it is exclusively a legal duty. On the other hand, there is no legal duty in England to refrain from offensive curiosity about one's neighbours, even if the satisfaction of it does them harm. Here the duty is clearly a moral though not a legal duty. *Finally*, there is both a moral as well as a legal duty not to steal.

When the law recognises an act as a duty, it commonly enforces the performance of it, or punishes the disregard of it. But this sanction of legal force is in exceptional cases absent. A duty is legal because it is legally recognised, not necessarily because it is legally enforced or sanctioned.

RIGHT

Salmond defines right "as an interest recognised and protected by a rule of right". It is an interest, respect for which is a duty, and the violation or disregard of which is a wrong. A more elaborate definition is given by Austin as "a *faculty* which resides in a determinate party or parties by virtue of a given law and which avails against a party or parties other than the party or parties in whom it resides. Rights are either legal or moral.

Legal Rights—It is an interest recognised and protected by the rule of legal justice—an interest the violation of which would be a legal

wrong, *e.g.* the *creditor* has got a legal right to realise his debt from his debtor within the time limited by law. It is a capacity residing in one man of controlling the actions of others with the assent and the assistance of the State. "Rights" says Ihering, "are legally protected interests".

Natural or Moral Rights—It is an interest recognised and protected by a rule of natural or moral justice—an interest the violation of which would be a moral wrong. For example a teacher has a moral right to command obedience from his pupil, but it cannot be legally enforced. A moral right is one man's capacity to influence the acts of another by means not of his own strength but of the opinion of the society. On the other hand, if he has the capacity of influencing the acts of another by means of his own strength, he is said to have a might. Thus a right is moral if it depends upon the force of the public opinion and it is legal if it is supported by the State.

Although a legal right is usually accompanied by the power of instituting legal proceedings for the enforcement of it, this is not invariably the case. For example, there are certain rights which are not enforceable by any legal process *e.g.* debts barred by limitation. They are nevertheless legal rights although unenforceable at law. They are called rights of imperfect obligation. Just as there are imperfect and unenforceable legal duties, so there are imperfect and unenforceable legal rights.

68. Correlation of Rights and duties

There are two different views with regard to the proposition that rights and duties are correlative.

According to Salmond, rights and duties are correlative. There can be no right without a corresponding duty or duty without a corresponding right, any more than there can be a husband without a wife or a father without a child. When *A* has a right against *B*, *B* is under a duty towards *A*. *B*'s duty, therefore, implies a corresponding right. In other words, according to this view, every duty must be a duty towards some person or persons, in whom, therefore, a corresponding right is vested. And conversely, every

right must be a right against some person or persons upon whom, therefore, a corresponding duty is imposed. So, there can be only one idea of duty *i.e.* a duty corresponding to a right. Every right or duty involves a *vinculum juris* or bond of legal obligation, by which two or more persons are bound together. There can, therefore, be no duty unless there is some one to whom it is due, there can be no right unless there is some one from whom it is claimed ; and there can be no wrong unless there is some one who is wronged, that is to say, whose right has been violated.

According to the second and different view held by Austin some duties do not correspond to rights. He divides duties into *relative* and *absolute*, the former being those which have rights corresponding to them, and the latter being those which have none. On this view, duties towards the public at large or towards indeterminate portions of the public have no correlative right ; the duty, for example, to refrain from committing a public nuisance. Austin says, absolute duties are sanctioned criminally, that is, there being no corresponding rights, the violation of such duties results only in criminal prosecution. He classifies absolute duties as being (1) Duties to one-self *i.e.* self-regarding duties not to commit suicide, (2) duties to the community, (3) duties to God or duties not to be cruel to lower animals, and (4) duties to the sovereign, *i.e.* the State.

Prof. Salmond rejects the above view of Austin, for the following reasons that the so-called duties mentioned above are reducible to duties to sovereign, for when a duty towards the public is infringed it is usually redressed by the sovereign. There appears to be not much substances in the two opposite views. Because, in all the cases where there is a duty, it is immaterial whether it is owed to some one or none. The law in any event is clear and enforces the duty, either at the instance of the person whose right is infringed or at the instance of the Advocate-General if the duty owed is to the public. Therefore, the question as to whether there is any absolute duty comes to this—"Can there be relative duties to the sovereign" or "Can the sovereign have *legal rights* ?"

Austin says that as no man can confer a right on himself, in order that a sovereign should have a legal right, there should exist another sovereign to confer it. But there can be no two sovereigns in a State. Therefore, a sovereign cannot have legal rights.

But Salmond, Holland and Pullock hold the contrary view that it is not impossible that a sovereign should confer a right upon himself. When the sovereign declares that he will protect some interest of an individual, he creates a legal right in favour of that individual. So, when he declares that he will protect an interest of his own, he creates a legal right in his own favour. Thus the sovereign has a right to impose tax and to receive payment of taxes already imposed. Hence the conclusion is that there are no absolute duties and that a sovereign can have legal rights, and as such the duties to the sovereign are not absolute but relative *i.e.* corresponding rights are possessed by the State.

Next question that arises for consideration is "Can the sovereign have *legal duties* ?" Here also Austin holds the same view that if the sovereign can be bound by a legal duty, some other sovereign must impose it, which is absurd and concludes that the sovereign cannot be bound by legal duties. But Pullock and Holland hold the contrary view that if the sovereign allows himself to be sued by his subjects and gets judgment against him and compensates the plaintiff, he cannot be said to be not bound by a duty.

But according to Salmond, the right of the subjects to sue the sovereign is an imperfect right because though judgment can be obtained against the sovereign it cannot be enforced as the sovereign cannot apply physical force against himself.

69. The Characteristics of a Legal Right

According to Salmond every right has the following five elements or characteristics :

Subject of Right—A person in whom the right is vested may be distinguished as the subject of right, the owner of right, the person entitled, or the person of inherence.

The subject of the duty—A person against whom the right avails *i.e.* upon whom lies the correlative duty may be distinguished as

the subject of duty, the person bound or as the person of incidence.

An act or omission—The person bound is under an obligation either to do an act or to omit to do an act *i.e.* to refrain from doing an act in favour of the person entitled. This act or forbearance may be termed the content of right.

Thing—The act or omission relates to some *thing*—(in the widest sense of the term), which may be termed the object or subject-matter of the right. There must be something over which the right is exercised *i.e.* the thing to which the act or omission relates.

Title—Every legal right has a title, that is to say, certain facts or events by reason of which the right becomes vested in its owner. Rights are created, transferred or extinguished by facts or events. Hence there must be certain facts or events, by the operation of which the right has become vested in its owner. So facts or events give rise to title.

Thus, suppose, *A* buys a piece of land from *B*, (1) *A* is the *subject or owner of the right* so acquired (2) The *persons bound* by the correlative duty not to interfere with *A*'s right are persons in general and not *B* alone, for a right of this kind is a right *in rem* and avails against the whole world ; (3) The *content* of the right (*i.e.* act or omission) consists in non-interference with the purchaser's exclusive use of the land ; (4) The *thing* or the object or subject-matter of the right is the land purchased ; and (5) finally the *title* of the right is the conveyance (documents of transfer) by which it was acquired from the former owner.

Every right, therefore, involves a three-fold relation in which the owner of it stands—

(1) It is a right against some person or persons ;
(2) It is a right to some act or omission of the person or persons bound ;
(3) It is a right over or to something to which that act or omission relates.

70. Rights by reference to their objects

A right is a legally protected interest and the object of the right is the thing in which the owner has interest. It is the thing

material or immaterial, which the owner desires to keep or to obtain by means of the duty which the law imposes on the other persons. Following are the chief kinds of rights by reference to their objects, as classified by Salmond :—

Rights over material thing—It means rights over tangible or physical objects perceptible by the external organs of sense, such as land, house, book, etc.

Rights over immaterial property—Immaterial property is intangible object not perceptible by the organs of sense. It has got only a notional existence. Examples of these are patent rights, copy rights, trade marks and commercial goodwill. The object of a patent-right is an invention, that is to say, the idea of a new process, instrument or manufacture, and the patentee has right to the exclusive use of this idea. Similarly the object of literary copyright is the form of literary expression produced by the author of a book. In this he has a valuable interest by reason of the disposition of the public to purchase copies of the books and by the Copyright Act this interest has been given the status of a legal right.

Rights in respect of one's own person—A person has a right not to be killed. The object of this right is his own life. Similarly, I have a right not to be injured or assaulted, the object of this right being bodily health and integrity. I have a right not to be imprisoned save in due course of law, the object of this right being my personal liberty—that is to say, my power of going where I will.

The right of reputation—A man has an interest in his reputation *i.e.* in the good opinion that other persons have of him, just as he has an interest in the money in his pocket. Here the object is to have his moral worth in the society respected by every other man.

Rights in respect of domestic relation—Every man has an interest and a right in the society and consequently a right for the security of his family and dependants. Any person who, without just cause interferes with his interests, as by seduction of his wife or daughter or by taking away his child, is guilty of a violation of his rights.

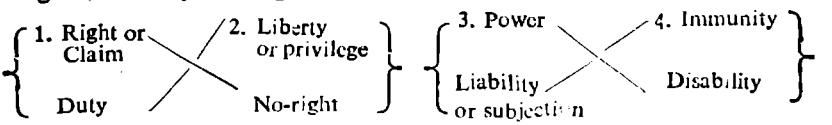
Right to services—These are rights vested in one person to the services of another. Every person has a right, acquired by contract, to receive the services of servant, physician, teacher, workman, artist etc. In all such cases, the object of the right is the skill, knowledge, strength, time and so forth of the person bound by contract. If I hire a physician I obtain thereby a right to the use and benefit of his skill and knowledge, just as, when I hire a horse I acquire a right to the use and benefit of his strength and speed.

Right in respect of others' rights or *Right to a right*—In many cases a right has another right as its subject-matter. These are cases of agreement to enter into sale, lease, mortgage etc. By the sale itself a person acquires the right of ownership ; but by an agreement of sale, he does not acquire the ownership itself, but he gets a right to acquire the right of ownership, that is, a right to compel another to transfer the ownership to him.

71. Legal rights in a wider or generic sense of the term

Hitherto we have discussed legal rights in the strictest and proper sense of the term. It is in this narrowest and specific sense only that we have regarded them as the correlatives of legal duties, and hav defined them as interests which the law protects by imposing duties with respect to them upon other persons.

In its wider and generic sense a legal right may be defined as any advantage or benefit which is in any manner conferred upon a person by a rule of law, whether it corresponds to legal duty or not. Legal rights in this sense are of four kinds *i.e.* the right-duty relationship in its broad sense may be analysed into its four component parts, namely, (1) Claim or Right (in its strict sense), (2) Liberties, (3) Powers and (4) Immunities. Each of these has its correlative, namely, (1) Duties ; (2) No-rights (or absence of right) ; (3) Subjections (or liabilities) and (4) Disabilities. The four pairs of correlatives may be arranged in the following table, the correlatives being obtained by reading downwards.



(The brackets indicate correlatives and the lines opposites)

Legal Rights and duties and correlation between the two have already been discussed in sections 67 and 68.

72. Liberties and No-rights

The term liberty appears to be synonymous with the term *'right'*. Thus we say, I have a right (*i.e.* I am at liberty) to do as I please with my own but that I have no right and I am not at liberty to interfere with what is another's. Similarly I have a right (*i.e.* I am at liberty to express my opinion on public affairs, but I have no right to publish a defamatory or seditious libel. I have a right or I am at liberty to defend myself against violence, but I have no right to take revenge upon him who has injured me.

But really speaking, there is a subtle difference between the two expressions. Both are no doubt legally recognised interests, but they are distinct species of one genus. My legal rights are the *benefits* which I derive from legal duties imposed upon *others*. Legal liberties are the *benefits* (sometimes called licences or *privileges*) which I derive from the absence of legal duties imposed upon myself. Thus legal liberties are advantages or benefits conferred upon a person by law without the imposition of any corresponding duty on him. The law helps the owner to exercise such rights in whatever way he likes provided he does not encroach upon the rights of others. Such liberties may, therefore, be stated to be "Liberties and no Rights".

73. Powers and Subjections or Liabilities

Legal powers are the abilities conferred by law upon a person to determine by his own will the rights and duties of himself or of other persons. A power is not the same thing as a right in the strict sense, nor is it identical with the right of the second class, namely, a liberty. But it is also legally recognised interest or advantage conferred by the law. It resembles liberties and differs from right in the strict sense, inasmuch as it has no duty corresponding to it. Examples of such powers are the following : the right to make a will or to alienate property or to gift or to lease ; a landlord's right of re-entry ; the power to sue and to prosecute, the various powers vested in Judges and other officials for the due fulfilment of their

functions. There are no corresponding duties attached to such rights (*i.e.* powers). Thus my right to make a will corresponds to no duty in any one else. But a power is not strictly identical with the term liberty. Liberty is that which I may do innocently, but my right to make a will does not mean that in doing so I do not wrong. It does not mean that I may make a will innocently, but that I can make a will effectively which will be legally valid. I use my liberties with the permission or without being prevented by law ; I use my power with the help of the law. The Wills Act gives us the power or enables me to make a will.

The correlative of power is a subjection which means that the power is vested in some one else as against the person in subjection or liability. The examples are, the subjection of a tenant to cause the lease determined by re-entry for breach of an express covenant and that of a judgment-debtor to have the execution issued against him. Powers may be of two kinds—Public or Private.

PUBLIC

When the rights are vested in a person as an agent or instrument of the function of the State, it is called public. They comprise the various forms of legislative, judicial and executive authority, such as right to vote, the power to prosecute, the power to make law etc.

PRIVATE

Power is private when the rights are vested in persons to be exercised for their own purposes, and not as agents of the State *e.g.* the capacity to make will ; landlords' right of re-entry and so on.

Public legal power is called authority and the private one is calledcapacity.

Thus, according to Salmond, legal liberties and legal powers have no corresponding duties attached to them. For duty, he says, is an obligatory act. Hence no positive acts are due by anybody to persons possessing legal liberties or legal powers.

74. Immunities and disabilities

The term 'right' is also used in another sense to mean immunity from the legal power of some other person. An immunity is an

exemption from having a legal relation changed by another. The right of a peer to be tried by his peers, for example, is neither a right in the strict sense, nor a liberty, nor a power. It is an exemption from trial by jury—an immunity from the power of the ordinary Criminal Courts. In other words, legal immunity is an exemption from the *power* of another in the same way as liberty is exemption from the *right* of another.

The correlative of immunity is disability otherwise called inability (or no-power). Disability is the absence of power. Thus, the rule that no one can sell things which do not belong to him can be expressed as a disability on the part of persons in general to transfer property that they do not themselves own.

CHAPTER XI

THE KINDS OF LEGAL RIGHTS

75. Perfect and Imperfect Rights

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

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

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

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

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

(1) An imperfect right may be good as a ground of defence, though not as a ground of action. I cannot sue on an informal contract, *i.e.* on an unregistered instrument required by law to be registered, but if money is paid to me or property delivered to me in pursuance of it, I can successfully defend any claim for its recovery.

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

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

76. The legal nature of Rights against the State

Just as private individuals may have claims against each other, a subject may also have claims against the State itself. Salmond says that such rights against the State must necessarily be imperfect, because the State cannot exercise force against itself. The absence of the element of enforcement in the case of rights against the State has led many writers to deny that they are legal rights at all. Austin and Markby hold that a sovereign cannot be bound by a

legal duty. The State cannot be said to issue commands against itself. But Salmond considers that it is not correct to give such a narrow definition to the term 'legal right' as strictly those claims that are legally enforced only, but also to include within the term all those claims which are legally recognised by the State in the administration of justice. All rights against the State are not legal, any more than all rights against private persons are legal, but some of them are, namely, those which can be sued for in the Courts of justice. A contract with State is as much a source of legal rights and obligations as is a contract between two private persons. It is not to the point to say that right against the State are held at the State's good pleasure, and are, therefore, not legal rights at all, for, all other legal rights are in the same position. They are legal rights not because the State is bound to recognise them, but because it does so.

77. Positive and Negative Rights

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

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

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

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

A right *in rem*, sometimes called a real right, corresponds to a duty imposed upon the people in general. A right *in personam*,

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

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

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

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

79. Proprietary and Personal Rights

'Property' is an extraordinarily ambiguous term and the adjective 'proprietary' conveys the same confusion. Salmond however makes the following distinction between proprietary and personal right.

The aggregate of a man's proprietary rights constitutes his estate, his assets and his property in one of the many senses of that most equivocal of legal terms. On the other hand, the sum total of

man's personal rights constitutes his status or personal condition as opposed to his estate. If a person owns land, or chattel or patent rights, or the goodwill of a business, or shares of a company or if debts are owing to him, all these rights form part of his estate. But if he is a free man and a citizen, a husband and a father, the rights which he has as such pertain to his status or standing in the law and constitute personal rights. The term *status*, however, is unfortunately used in a considerable variety of different senses of which the following may be distinguished :—

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

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

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

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

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

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

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

80. Rights in Re-propria and Rights in re-aliena

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

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

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

On the other hand, right in *re-aliena* (which may also be conveniently termed as encumbrances using that term in its widest possible sense) is one which limits or derogates from some more general right belonging to some other person in respect of the same

subject-matter *i.e.* it is a right which a person possesses with respect to the property owned by another. It frequently happens that the right in *re-propria* or the right of ownership vested in one person becomes subject or subordinate to an adverse right vested in another. This adverse right is called the right in *re-aliena* or the encumbrance. It is a right which is detached from the general right belonging to a person and which is vested in another person as independent right, *e.g.* the right of an owner of a piece of land to use a way over the land of his neighbour. The right of the owner over his land is his general right which may be limited by his neighbour's right of way over the land. Such rights in *re-aliena* are called easements or servitudes.

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

A right in *re-aliena* has the following char-acteristics :—

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

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

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

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

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

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

Kinds of Encumbrances

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

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

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

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

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

81. Principal and Accessory Rights

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

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

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

Every right may be affected adversely or beneficially by the existence of other rights. The influence is adverse when one right is limited by another right vested in a different owner (*i.e.* the limited

right of the owner of servient tenament). This gives rise to encumbrance. This influence is beneficial when one right has added to it a supplementary right (say, the right of way) vested in the same owner with respect to the land of a different owner. In this case the absolute right of the owner of a land so augmented by an additional right is called the principal right, while the additional right appertinent to it is called the accessory right. Thus, a servitude is accessory to the ownership of the land for whose benefit it exists.

82. Legal and Equitable Rights

The difference between legal and equitable right is the outcome of the distinction between Law and Equity. The existence of the double system of law in England administered by different Tribunals has led to the existence of a double system of rights, legal rights recognised by the common Law Courts, and equitable right or equities recognised by the Court of Chancery. This distinction between the two rights still exists in spite of the fusion of law and equity by the Judicature Act of 1837. The distinction is still of practical importance which is as follows :—

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

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

CHAPTER XII

OWNERSHIP

83. Definition of ownership

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

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

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

Possession

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

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

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

In the second place, the ownership of a right is opposed to the encumbrance of it. The ownership of a right may be limited or subject to an adverse right vested in a different owner, which is called encumbrance. *A* may be the owner of a property, *B* the lessee of it, *C* the sub-lessee, *D* the first mortgagee of it, and *E* the second mortgagee, and so on. Although encumbrance is opposed to ownership, every encumbrancer is nevertheless himself the owner of the encumbrance. In the above cases, *B* is the owner of the lease, *C* is the owner of the sub-lease and *D* is the owner of the mortgage and so on.

84. Corporeal and Incorporeal ownership

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

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

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

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

A corporeal thing is a material thing and a subject-matter of corporeal ownership and an incorporeal thing is the subject-matter of incorporeal ownership, or rather it is any proprietary right

except the right of full dominion over a material object which is regarded as corporeal ownership.

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

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

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

85. Sole ownership and co-ownership

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

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

Co-ownership assumes two different forms distinguished as (*a*) ownership in common and (*b*) joint ownership. The most important difference between the two relates to the effect of death of one of the co-owners.

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

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

86. Trust and beneficial ownership

Trust property is that which is owned by two persons at the same time. It is created when a property is held by one person not for his own benefit but for the benefit of some one else. The owner of the property is under an obligation and is bound to hold it or use his ownership for the benefit of the other. The former in whom

the property is vested is called the trustee and his ownership is called the trust ownership, the latter for whose benefit the trust is created is called the beneficiary and his ownership is called the beneficial ownership. Although, in law, the trustee is the legal owner, but he has no right to make use of his ownership for his own benefit and his right is nominal rather than real. Thus a trust is a curious instance of duplicate ownership, the trustee being the legal or nominal while the beneficiary being the beneficial owner of the property.

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

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

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

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

87. Legal and equitable ownership

Legal ownership is that which has its origin in the rules of common law, while equitable ownership is that which proceeds from the rules of equity, divergent from the common law. The distinction between legal and equitable ownership is still maintained in spite of the fusion of Common Law and equity by the Judicature Act of 1873. The distinction between legal and equitable ownership is not identical with that as existing between legal and equitable rights mentioned in a previous chapter. The equitable ownership of a legal right is different from legal ownership of an equitable right. For example, when a debt is orally assigned by *A* to *B*, *A* remains the legal owner of it nonetheless, but *B* becomes

the equitable owner of it. But there is only one debt as before, though it has now two owners. So a mortgage is a legal right and the mortgagee owns it legally, but at the same time the mortgagor owns it equitably, because Equity has made the mortgagor the owner of the equity of redemption. Hence, the ownership of the equity of redemption in a legal mortgage is the equitable ownership of a legal right. Similarly, the ownership of an equitable mortgage is a different thing from the equitable ownership of a legal mortgage, because in the former there is only one owner (*i.e.* the mortgagor) whereas in the latter there are two distinct owners, one being the legal and the other equitable owner.

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

88. Vested and Contingent ownership

Vested ownership—Ownership is said to have been vested when the title of the owner with respect to any particular right is perfect and complete and nothing more is required to be done to complete the owner's title. The right is absolutely owned by the owner who has an immediate right of present enjoyment or a present, certain right of future enjoyment. For example, a property is transferred to *A* for life and after his death to *B*. Here *B* has a vested ownership in the property during the lifetime of *A* although the enjoyment is postponed till his death *i.e.* *B* has present certain right of future enjoyment on the death of *A*, and if *B* dies during the lifetime of *A*, the heirs of *B* will get the property. In technical language *B*'s interest is vested in interest, though not

vested in possession ; it becomes vested in possession only on the death of *A*.

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

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

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

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

but may become so in the future ; while ownership subject to a condition subsequent is already vested, but may be divested or destroyed in the future for non-fulfilment of the said conditions.

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

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

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

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

CHAPTER XIII
POSSESSION

89. Introduction

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

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

90. Possession in Fact and in Law

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

91. Corporeal and Incorporeal possession

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

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

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

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

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

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

In the case of corporeal possession, the possession of a material object is essential to constitute possession. In other words, the possession of a material object is the continuing exercise of a claim to the conclusive use of it. Actual use of it, however, is not essential. I may lock my watch in a safe instead of keeping it in my pocket, and though I do not look at it for twenty years, I remain in possession

of it nonetheless. In the case of incorporeal possession, on the contrary, actual continuous use and enjoyment of it is essential, as being the only mode of possession. I can acquire and retain possession of a right of way only through actual and repeated use of it. In the case of incorporeal things continuing non-use of it is inconsistent with possession, though in the case of corporeal things it is consistent with it.

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

92. Two elements in the conception of possession

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

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

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

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

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

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

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

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

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

(1) In *Merry & Green* (7 M & W 623) the plaintiff purchased a bureau at auction, and subsequently discovered money in it, hidden in a secret drawer and belonging to the vendor. The plaintiff, thereupon, appropriated the money ; and it was held

that in doing so, he committed theft, as he obtained possession of the money not when he innocently purchased the bureau, but when he fraudulently abstracted the contents of it.

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

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

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

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

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

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

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

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

93. Relation of possessor to other persons

In order to constitute possession over tangible object, the relation of the possessor to other persons must be such as to warrant a security for their non-interference. I am in possession of a thing when the facts of the case are such as to create a probable expectation that I will not be interfered with. Absolute security is not needed. Any measure of security is sufficient which reasonably satisfies the intention to possess. All that is necessary is that I may count on the continuous enjoyment

of the things without interruption. Such a measuse of security may be derived from the following sources :—

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

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

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

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

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

(*vi*) *Manifestation of intention to possess* (*animus domini*)—If the intention to possess is made clear, the security is greatly increased. This consists of not only manifesting an intention of possession, but also the manifestation of ownership over the thing possessed.

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

94. Relation of the possessor to thing possessed

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

95. Nature of possession

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

(1) In *Bridges* v. *Hawkesworth* (21 Q B 75), a parcel of banknotes was dropped on the floor of the defendants' shop, where they were found by the plaintiff, a customer. It was held that the plaintiff had a good title to them as against the defendant. For, it was the plaintiff and not the defendant, who was the first to acquire possession of them. The defendant had not the *animus*, for he did not know of their existence. There the question decided was one of law.

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

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

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

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

96. Concurrent possession

It is often expressed that two persons cannot be in possession of the same thing at the same time. As a general rule, this is true

because exclusiveness is the essence of true possession, and two hostile claimants cannot both have possession at once. It is a fundamental principle of possession that only one person can be in possession of the same thing at the same time. But claims which are not adverse to each other may co-exist. Thus concurrent or duplicate possession is possible when the claims are not adverse *e.g.* owners in common may both be in possession of the same thing. Following are the cases of duplicate or concurrent possession :—

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

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

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

97. Acquisition of possession

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

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

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

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

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

ACTUAL

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

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

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

CONSTRUCTIVE

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

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

(*b*) The second form of constructive delivery is that which is called *constitum possessorium* (*i.e.* an agreement touching possession).

This is converse of *traditio brevi manu.* It is the transfer of mediate possession while the immediate possession is still in the hand of the Transferor, *e.g. A* purchases goods from *B* and there is an agreement between them that *B* shall hold the goods on behalf of *A*. The goods are construed as delivered to *A*.

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

98. Relation between possession and ownership

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

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

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

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

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

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

99. Possessory Remedies

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

In English law possession is a good title of right against any one who cannot show a better. A wrongful possessor has the right of an owner with respect to all persons except the earlier possessor or the true owner himself. Even a wrongdoer, who is deprived of his

possession, can recover it from any other person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced to restore it to the wrongdoer. He must first give up possession and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law. In old times possession was generally guarded against by means of violent self-help. But the tendency of the modern time is to attain this end by a much more satisfactory and reasonable way. It adjusts the burden of proof of ownership with perfect equity, without recourse to any such anomaly as the protection of the possessor against the owner. This it does by the operation of the three following rules :—

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

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

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

CHAPTER XIV

PERSONS

100. Nature of personality

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

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

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

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

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

The distinction between natural and artificial person is shortly this—

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

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

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

101. Legal person : its creation and extinction.

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

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

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

Extinction—An artificial person comes to an end—

(1) by failure of its component part ;

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

(3) by forfeiture, and

(4) by surrender of privileges

102. Classes of juristic persons

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

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

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

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

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

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

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

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

103. Corporations

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

But it should be noted that a mere association of human beings does not form a Corporation, because a corporation is not merely the sum total of its component members—*i.e.* the shareholders, but something superadded to them—*viz.* the

fictitious or legal personality. Legal personality is not reached until the law recognises the fictitious being which represents the associated individuals. A corporation comes into existence by the personification of the group or series of individuals *i.e.* when the law attributes fictitious personality of the group or series of persons. The fictitious personality is attached to the group collectively but not to the persons individually. Hence the personality of a corporation differs from that of a natural person.

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

A Corporation sole is a series of successive-persons, *e.g.* Sovereigns, the Solicitor-General. the Postmaster-General. The element of legal fiction involved here is that the law assumes that in addition to the natural person who actually occupies that particular official position, there is a mythical being who is, in law, the real occupant of the office, and who never dies or retires. The living official is merely the agent or representative through whom the legal person performs his function. The living officials come and go, but this offspring of the law remains the same for ever. Property owned by a person as a Corporation sole is distinct from that which he owns in his private capacity and will pass on his death, not to his estate but to his successors-in-office. One important result of this is that it enables gifts to be made to the successive holders of an office which has been incorporated. Without such incorporation such a gift

would fail for remoteness. Corporations sole are not a peculiarity of English law. The distinction between the two forms of incorporation is also well-known to foreign jurists.

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

104. The Agents, Beneficiaries and Members of a Corporation

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

not the beneficial ownership of any portion of the company's property, but the benefit of a contract made by the shareholder with the company, under which he is entitled to be paid a share of the profits made by the company, and of the surplus assets on its dissolution. A share in a company is a chose in action (in English Law)—an obligation between the Company and the shareholder.

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

105. The acts and liabilities of a Corporation

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

An important rule in connection with companies incorporated by special Statute and companies incorporated under the general

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

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

A second objection arises from the following considerations. If the limits of the authority of the agents are determined by the law itself, can any act done by the agents, which go beyond the authority conferred upon them, be deemed to be acts of the corporation ? If illegal, it cannot be the act of a corporation within the limit of lawful authority ; and if not within these limits, it cannot

be the act of a corporation. To this objection, Salmond offers two different solutions. He says that in the first place, although a fictitious person cannot do acts which go beyond the scope of his authority, he certainly can fail to do what he has been authorised to do, and can be punished for such omissions. And in the second place, the liability of a corporation for the acts of its agents is a perfectly logical application of the law as to an employer's liability for the acts of his servant. It is a rule of law that the master is liable for all the wrongs committed by his servant in the course of his employment. A master is liable not only for the acts which the master has authorised him to do, but also for the way in which the servant does it. So is the corporation.

106. The uses and purposes of incorporation

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

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

Incorporation is merely a development of the conception of trusteeship. A trustee, in the case of a corporation, is a fictitious being,

as opposed to a trustee in case of an individual trust, who is a real person. As between the real and the fictitious trustee, the latter is preferable, because he never dies.

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

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

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

107. The State as a Corporation

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

108. The Creation and Extinction of Corporation

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

109. The legal status of lower animals

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

A beast is as incapable of legal rights as of legal duties; for its interests receive no recognition from the law. The law is made for men and allows no fellowship or bonds of obligation

between them and the lower animals. A hurt done to the beast may be a wrong to its owner or to the society of mankind, but it is no wrong to the beast. No animal can be the owner of any property, even through the medium of any trustee. If a trust is created for the benefit of a particular animal, it is a trust of imperfect obligation and casts no legal duty on the trustee to execute the trust.

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

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

110. The legal status of dead men

Ordinarily speaking, the personality of a human being may be said to commence on birth and cease to exist at death, and in general the law takes the same view. Dead men are no longer persons in the eye of the law. They have laid down their legal personality with their lives and are now as destitute of legal rights as of liabilities. Although the law does not confer rights

upon the dead, it does to some extent recognise and take account of a person's desires and interests when alive. They are (1) a man's body, (2) his reputation and (3) his estate :

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

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

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

111. The legal status of unborn persons

Though the dead possesses no legal personality, it is otherwise with the unborn. Unlike dead persons, unborn persons do according

to the law possesses a personality. There is nothing in law to prevent a person from owning property before he is born. His ownership is necessarily contingent, indeed, for he may never be born at all. But it is nonetheless a real and present ownership. Thus a person may settle property upon his wife and the children that are to be born of her. Or he may die intestate and his unborn child will inherit his estate. A child in its mother's womb is for many purposes regarded by legal fiction as already born. In the words of Coke : "The law in many cases has consideration of him in respect of the apparent expectation of the birth". Thus, in the law of property, there is a fiction that a child is a person in being for the purposes of (1) acquisition of property by the child itself, or (2) being a life chosen to form part of the period in the rule against perpetuities.

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

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

112. Double capacity and double personality

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

English law recognises many different capacities in which a man may act. Often he has the power to act in an official or representative capacity when he would have no power to do the act in his private capacity or on his own account. But the mere fact that a man has two or more capacities does not give him the power to enter into a legal transaction with himself. For instance, at common law a man could not sue himself or contract with himself or convey property to himself ; and it made no difference that he was acting on each side in a different capacity. So, rigorous was the rule that if the same party appeared on both sides to a contract, even though accompanied by different parties in each case, the contract was void. In many cases this rule worked hardship and its consequences had to be mitigated. For example, where a creditor became his debtor's executor, the rule that he could not sue himself was mitigated by giving him a right of retainer. Now by statute, where a person purports to contract with himself and others, the contract is enforceable as if it had been entered into with the other persons alone. With such small exceptions the rule that a man cannot enter into a legal transaction with himself remains unchanged.

CHAPER XV

TITLE

113. Kinds of title

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

114. Vestitive Facts

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

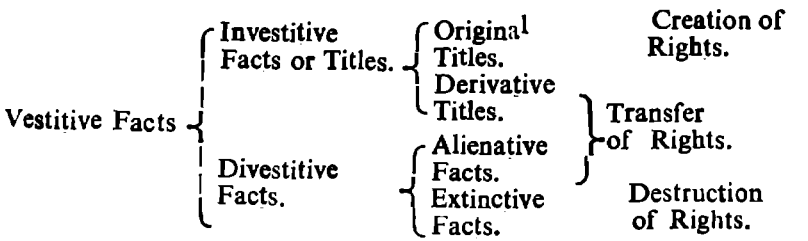
Investitive Facts or Titles—Investitive facts or titles are those by means of which a right comes into existence. A title or investitive

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

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

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

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



Vestitive facts—Whether they create, transfer or extinguish rights—are divisible into two fundamentally distinct classes, according as they operate in pursuance of the will of the persons concerned, or

independently of it. That is to say, the creation, transfer and extinction of rights are either voluntary or involuntary. Vestitive facts may, therefore, be divided into two chief classes according to the source from which they originate. They are (1) acts of the party or acts in the law and (2) acts of the law.

115. Acts in the law

(1) *Acts in the law*—An act of the party, technically known as an act in the law, is an expression of the will or intention of the person concerned directed to the creation, transfer or extinction of a right *e.g.* a contract or a deed or a conveyance or testamentary disposition. Hence an act in the law may be defined as "a manifestation of the will of a private individual directed to the origin, extinction or modification of rights." It is called by the English writer a "Juristic act". It is an act of a private person according to law. Acts in the law are of two kinds :—

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

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

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

116. Agreements

Of all vestitive facts, acts in the law *i.e.* acts of the party, are the most important, and among acts in the law, agreements are entitled to the chief place. The importance of agreement as a vestitive fact lies

in the universality of its operation. There are few rights which cannot be acquired, transferred and extinguished by agreement. Looking from this point of view agreements may be divided into four classess :—

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

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

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

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

117. Valid, void and voidable agreements

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

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

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

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

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

(1) Valid agreements ;
(2) Voidable agreements ;
(3) Void agreements ;

(4) Unenforceable agreement ; that is to say, no action will lie for enforcement of it *e.g.* claim barred by limitation ;

(5) Illegal agreement, *i.e.* agreements which are not only void, but to make such an agreement is an offence *e.g.* a Criminal Conspiracy ;

(6) Rescindable agreements ; agreements which, even if they have been partly performed, a Court will not only absolve the party entitled to rescission from complete discharge, but also restore the parties to their former position ;

(7) Agreement determinable upon a condition subsequent, *e.g.* agreement made void by subsequent impossibility ;

(8) Apparent agreement, *e.g.* where there is no agreement at all, but only an appearance of it *e.g.* where the parties are not speaking of the same thing at all. Thus money paid under them is recoverable as money paid under a mistake of fact.

118. Causes of invalidity of agreement

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

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

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

The following are the purposes of all these formalities ;—

(*i*) It is the evidence of consent,

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

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

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

(*i*) it is forbidden by law, or

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

(*iii*) it is fraudulent ; or

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

(*v*) it is immoral, or

(*vi*) it is opposed to public policy.

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

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

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

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

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

whether his reasons are good or bad. And it is so even though one party is well aware of the error of the other.

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

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

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

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

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

CHAPTER XVI

LIABILITY

119. Nature of Liability

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

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

120. Remedial Liability

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

(1) Duties of imperfect obligation :—

The breach of such duty creates no liability at all and as such gives no cause of action *e.g.* a time-barred debt is no doubt a legal debt, but the payment of it will not be enforced by any Court of law.

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

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

121. Penal liability

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

Punishment, however, is not inflicted upon the wrong-doer merely for doing a wrongful act ; he must have done it with a guilty mind. In other words, two conditions must be satisfied before punishment can

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

122. Acts—Nature of act and its elements

The term act is not capable of being defined with any great precision, since in ordinary language, it is used at different times to point different contrasts. Acts are generally events which are subject to the control of the human will. An act may, however, be resolved into the following successive steps :—

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

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

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

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

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

(3) *Intentional and unintentional acts*—An intentional act is one which is foreseen and desired by the doer ; while an unintentional act is one which is neither foreseen nor desired by the doer. It is unintentional when it is not the result of any determination of the will towards the actual results.

Elements—Every act is made up of three parts :—

(1) Its origin is some mental or bodily activity of the doer *e.g.* a gun is taken up in hand.

(2) Its circumstances *e.g.*, the gun is loaded.

(3) Its consequences *e.g.*, the trigger is pulled and a man is killed.

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

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

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

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

123. Damnum sine injuria

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

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

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

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

124. Mens rea

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

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

(*i*) An act must be done.

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

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

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

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

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

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

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

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

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

125. The Nature of Intention

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

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

Now, what shall be of consequences which, though not desired, are nevertheless known to be certain, and are the inevitable consequences of certain things which are desired. For example, a manufacturer establishes a factory in which he employs many workmen who are daily exposed to the risk of dangerou.

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

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

126. Intention, motive and malice

Intention and motive invariably go together but there is a subtle difference between the two. A wrongful act *i.e.* a crime

is seldom intended or desired and committed for its own sake. The wrong-doer has in view some ulterior object which he desires to obtain, that is, there is some purpose or object which he desires to fulfil by means of his criminal act. Thus, if a thief robs a person, his immediate intention is of course to rob him, but there may also be some purpose behind the act of robbing which may be to buy food with it or to pay a debt. This ulterior intent is called the motive of the act. The immediate act consists of intention.

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

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

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

Malice—Closely connected with the law and theory of intentional wrong-doing is the legal use of the word malice. In a narrow and popular sense, malice means ill-will or spite or malevolence, but its legal significance is much wider. In its legal sense, it means any kind of intent or purpose which the law disapproves. Malice means, in law, wrongful intention or recklessness.

Any act done with one of these mental elements is, in the language of the law, malicious. The equivalent Latin term *malitia* means badness, physical or moral wickedness in disposition or conduct—not exclusively ill-will or malevolence. Hence the malice of English law includes all forms of evil purpose, design, intent or motive.

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

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

127. Relevance and irrelevance of motives

We have already seen in what way and to what extent a man's immediate intent is material in a question of liability.

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

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

Criminal attempts.—Criminal attempts constitute the first of the exceptions to the rule that a person's ulterior intent or motive is irrelevant in law. An attempt to commit an offence is itself a crime and punishable because the attempt reveals the criminal character and guilty mind of the offender and because it may constitute a danger to the social interest concerned. Therefore, the law makes no distinction between a crime and an attempt to commit a crime. Every attempt is an act done with intent to commit the offence so attempted. The act in itself may be innocent, but is deemed to be criminal by reason of the purpose *i.e.* the wrongful motive with which it is done. A criminal attempt bears criminal intent upon its face as it is itself the evidence of criminal intent with which it is done. Thus, to buy or load a gun even with intent to murder is

not an offence. But to lie in wait with a loaded gun is an act which itself proclaims the criminal intention and the guilty mind of the person attempting the act and is, therefore, punishable as an offence. Again, if a man standing by the side of a haystack strikes a match, this act will be quite lawful and innocent if done with the purpose of lighting his pipe, but it will be unlawful and criminal if done with the purpose of setting fire to the haystack. For then it will constitute the crime of attempted arson. The existence of ulterior intent or motive is the essence of an attempt and can render unlawful an otherwise lawful act. Hence motive is relevant in criminal attempt.

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

Malicious prosecution—In Civil (as opposed to criminal) liability motive is very seldom relevant. In almost all cases the law looks to the act alone and makes no inquiries into the motives from which it proceeds. There are, however, certain exceptions even in the Civil law, where motive forms one of the principal ingredients. There are cases where it is thought expedient in the public interest to allow certain specified kinds of harm to be done to individuals, so long as they are done for some good and sufficient reason ; but the ground of this privilege falls away as soon as it is abused for bad ends. In such cases, therefore, malice is an essential element in the cause of action. Examples of wrongs of this class are defamation (in cases of privilege) and malicious prosecution. In these instances the plaintiff must prove malice, because in all of them the defendant's act is one which falls

under the head of *damnum sine injuria* so long, but so long only, as it is done with good intent.

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

128. Jus Necessitatis in relation to wrongs

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

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

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

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

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

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

129. Negligence

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

Negligence is of two kinds—

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

ADVERTENT OR WILFUL NEGLIGENCE

Here the harm is foreseen as possible or probable, but it is not at all willed or intended—*e.g.* a person who does a dangerous act knows fully well that he is exposing others to a serious risk of injury—here he is guilty of wilful negligence—his act is wilful because the harm is foreseen although it was not intended.

INADVERTENT OR SIMPLE NEGLIGENCE

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

130. Duty and Standard of Care

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

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

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

131. Degree of Negligence

English law recognises only one standard of care and, therefore, only one degree of negligence. Whenever a person is under a duty to take care at all, he is bound to take that amount of it which is deemed reasonable under the circumstances ; and the absence of this care is culpable negligence. It is a question of law (*i.e.* it is a question for the Judge to decide) whether in any particular circumstances a duty of care exists. But where a system of law recognises only one standard of care, it does not necessarily follow that it must recognise only one degree of negligence. For since negligence consists in falling below the standard of care recognised by law, the further the defendant falls below this standard, the greater his negligence. There are then degrees of negligence and these could be taken into account by law for both criminal and civil purpose. In crimes of negligence the law could provide that the greater the negligence the greater the punishment. Although English law does not recognise many offences of negligence, but the different gradations of carelessness can be found in the law relating to road traffic. Here a distinction is drawn between ordinary negligence, criminal negligence and gross negligence.

Ordinary negligence is such failure to use care as could render a person civilly but not criminally liable ; criminal negligence is a greater failure and a greater falling below the standard of care and renders a man guilty of driving offence—(and even within this category the law distinguishes between the negligent offence of careless driving and more negligent offence of dangerous driving) ; gross negligence is a yet greater fall below the standard and is such a wholly unreasonable failure to take care as to make the defendant guilty not only of driving offence, but also of manslaughter in the event of his conduct resulting in another person's death.

Roman Law recognises two degrees of negligence *viz.* gross negligence (*culpa lata*) and slight negligence (*culpa levis*). It looked upon gross negligence as equivalent to wrongful intention. On the very face of it, this appears to be a paradox, because intention and negligence are two poles apart. However, if we go deep into the subject, we find that the grossest form of negligence may touch the border-land of design or purpose. For, there must come a point where gross negligence cannot be negligence at all. Its grossness raises a presumption against its reality. If a newborn child is left to die from want of medical attention or nursing, it may be that its death is due to negligence only, but it is more probable that it is due to wrongful purpose, namely, infanticide. Again, in certain cases negligent acts are deemed to be wrongful in intent by the law, *e.g.* the law of homicide (not amounting to murder). An intent to cause grievous bodily harm is imputed as an intent to kill, if death ensues.

132. The subjective and objective theories of Negligence

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

The subjective theory of Negligence—In the subjective sense, negligence signifies a particular state of mind and is opposed to wrongful intention. Prof. Salmond uses the term negligence in this sense. His

view was that a careless person is that person who does not care ; his attitude is essentially one of indifference. Negligence, on this view, essentially consists in the mental attitude of undue indifference with respect to one's conduct and its consequences.

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

The truth contained in the subjective theory is that in certain situations any conclusions as to whether a man had been negligent will depend partly on conclusions as to his state of mind. But to identify negligence with any one state of mind is a confusion and an over simplification. We have seen that negligence consists in the failure to comply with a standard of care and that such failure can result from a variety of factors, including ignorance, inadvertence and even clumsiness. Again, the state of mind is also not conclusive. In certain circumstances it may be held in law that a reasonable man could know things that the defendant did not know, and the defendant will be blamed for not knowing and held liable because he ought to know.

The objective theory of negligence—According to Sir Frederick Pollock negligence is not a subjective, but an objective fact. It is not a particular state of mind or a form of the *mens rea* at all, but a particular kind of conduct. It is a breach of the duty of taking care and to take care means to take precautions against the harmful result of one's actions, and to refrain from unreasonably dangerous kinds of conduct. To drive at night without light is negligence, because, to carry lights is a precaution taken by all reasonable and prudent men for the avoidance of accidents. If the defendant has failed to acheive this standard, it is no defence for him to show that

he was anxious to avoid doing harm and took the utmost care of which he was capable. The same seems to hold good in criminal law. This view obtains powerful support from the law of tort, where it is clearly settled that negligence means a failure to achieve the standard of a reasonable man.

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

133. Negligence and inadvertence

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

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

All negligence is not inadvertent—Negligence does not necessarily consist in thoughtlessness or inadvertence. There may be such a thing

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

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

134. Wrongs of absolute or strict liability

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

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

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

BLACKSTONE'S VIEW

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

SAVIGNY'S VIEW

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

AUSTIN'S VIEW

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

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

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

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

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

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

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

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

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

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

Every act which is not done intentionally is done either accidentally or by mistake. It is done accidentally when it is unintentional in respect of its consequences. It is done by mistake, when it is intentional with respect to its consequences but unintentional with respect to some material circumstances. If I drive a car over a man in the dark because I do not know that he is

on the road, I injure him accidentally ; but if I procure his arrest because I mistake him for some one who is liable to arrest, I injure him not accidentally but by mistake. In the former case I did not intend the harm at all, while in the latter case I fully intended it.

Accident like mistake is either culpable or inevitable. It is culpable when it is due to negligence ; but inevitable when the avoidance of it would have required a degree of care exceeding the standard demanded by the law. Culpable accident is no defence save in those exceptional cases where wrongful intent is the exclusive and necessary ground of liability. But inevitable accident is commonly a good defence both in the Civil and the Criminal Law. There are, however, some exceptions in the Civil law, where even inevitable accident is no ground of defence. There are cases in which the law insists that a person shall do certain things at his own peril, and if any harm is caused, he is liable irrespective of inevitable accidents, because in such a case, there is an absolute duty of insuring safety to others. Certain things are a source of extraordinary risk, and a man who exposes his neighbour to such risk is held answerable or liable to his neighbour as an insurer against consequent mischief. Here the liability cannot be avoided even by proof that utmost diligence and care has been taken. The examples are :—

(1) When damage is done by the escape of dangerous substances, brought or kept by any one upon his land (*e.g.* constructing of a reservoir of water) as held in the famous case of *Raylad* vs. *Fletcher*.

(2) When a man keeps wild beasts.

(3) When a man erects dangerous structures by which passengers in the highway may come to harm.

(4) Every man is absolutely responsible for the trespass of his cattle.

135. Grounds of exemption from liability

There are various conditions which, when present, will prevent an act from being wrongful which, in their absence, could be a

wrong. Under such condition the act is said to be justified or excused. The following are the general grounds of exemption from liability :—

(1) *Inevitable mistake*—That is an accident which could not have been avoided by the use of reasonable care and caution.

(2) Mistake of fact with the exceptions, as discussed in Section 134 (at page 209).

(3) Absence of wrongful intention, and

(4) Absence of culpable negligence.

136. Vicarious liability

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

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

(a) The rational basis for such liability is the evidential difficulty in the way of proving actual authority. It is extremely difficult to prove actual authority and very

easy to disprove it in many cases and hence it is necessary and expedient to establish a conclusive presumption of it.

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

Responsibility of living persons for the act of dead persons— The common law maxim was *actio personails moritor cum persona* : personal liability dies with the person *i.e.* a person cannot be punished in his grave. Therefore, as a general rule, criminal liability extinguishes with the death of the wrong-doer. But this rule of law has to a great extent been abrogated by statutory provisions with regard to penal redress, a civil action. It is now settled that the liability to penal redress must originate in the lifetime of the wrongdoer, but once it has originated it is to continue in spite of the death of the wrong-doer (This is known as the principle of Compensation). Firstly, because when a wrong has been committed, the person wronged should not be deprived of his remedy, that is to say, a valuable right should not become extinct by a mere irrelevant accident such as the death of the offender. There is no sufficient reason why a debt should not survive a deceased person; but the responsibility for assault, defamation and other acts involving compensation should be exempted from liability. And secondly, although punishment cannot be inflicted after death, yet the threat of civil consequences to the successor might serve as a deterrent during his lifetime and this primary object of punishment can be fulfilled by allowing actions against his estate, and no injustice is thereby done to the successors, because the property alone which is bequeathed to them is

made liable for the acts of the deceased and they are not personally liable as in old times.

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

137. Measure of criminal liability

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

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

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

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

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

(*b*) If the punishment varies with the magnitude of the offence the wrong-doer is thereby given a chance to choose less serious crime and to receive lesser form of punishment. To put it negatively, if the punishment for theft and for murder were the same, the offender could naturally choose murder because there would be lesser chance of detection, because dead man tells no tales—and the risk involved is the same.

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

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

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

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

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

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

138. Measure of Civil Liability

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

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

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

CHAPTER XVII

THE LAW OF PROPERTY

139. Meaning of the term property

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

The term property is used in various senses :—

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

(*a*) Proprietary rights *in rem.*

(*b*) Proprietary rights *in personam.*

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

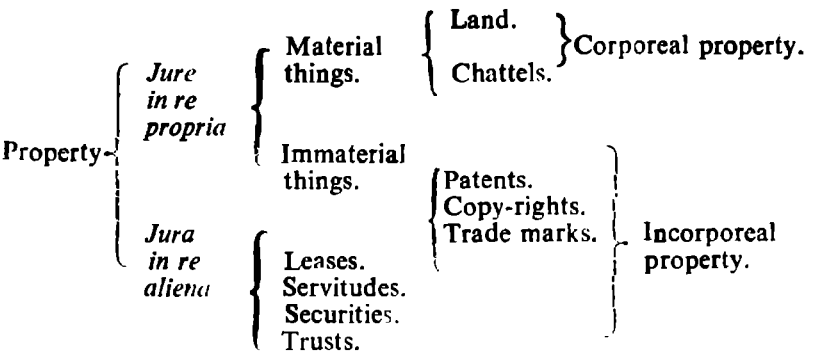
(2) In a narrower sense, property means only proprietary rights whether *in rem* or *in personam*, such as, land, chattels, shares and debts due to one. In this sense, it is opposed to a man's personal rights or status, such as, right to life, liberty or reputation. This is the most frequent application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

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

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

140. Kinds of property

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



141. The ownership of Material things or Corporeal property

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

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

encumbrances of other rights that may be vested in other persons.

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

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

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

142. Movable and Immovable property

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

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

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

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

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

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

(*v*) Lastly, all objects placed by human agency on or under the surface with the intention of permanent enjoyment. For example, buildings, walls and fences. A wall built of stones without mortar or foundations forms part of the land itself. On the other hand, things which are not permanently fixed in the earth or imbedded in the earth are not immovable property. Carpets, tapestries, or ornaments nailed to the floor or walls

of a house are not thereby made part of the house. Money buried in the ground is as much a chattel as money in the owner's pocket.

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

143. Real and personal property

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

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

144. Rights in re propria (proprietary rights) in immaterial things

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

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

The only immaterial things which are recognised by the law as the subject-matter of proprietary rights are the various *immaterial products* of human skill and labour. The immaterial forms of property are of five classes :—

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

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

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

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

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

145. Kinds of jura (rights) in re aliena

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

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

146. Leases

In the wider sense the term lease includes not only a tenancy of land but also all encumbrances of incorporeal property which possess the same nature as a tenancy of land and all kinds of bailment of chattels. A lease, therefore, in this generic sense, is an encumbrance which consists of a right to the possession and use of the property owned by some other persons. It is the outcome of a rightful separation of ownership and possession.

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

is the emphyteusis of Roman law according to which a tenant (lessee) is regarded as an encumbrancer.

147. Servitudes.

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

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

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

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

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

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

Appurtenant—A servitude appurtenant is one which is not merely an encumbrance of one piece of land, but it is also accessory to another

piece of land. It is a right of using one piece of land for the benefit of another, *e.g.* *A*'s right of way from *A*'s house to the high road across *B*'s field. This kind of servitude passes to successive occupiers of both the tenements. The land which is burdened with the servitude is called the survient tenement, and the land which has the benefit of it is called the dominant tenement. In the above illustration *B*'s field is the servient tenement and *A*'s house is the dominant tenement.

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

148. Securities

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

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

Lien— A lien, on the other hand, is an encumbrance given by way of security which has no existence apart from the debt, and could not in any case survive when once the debt is discharged. Lien does not exist apart from the debt, and it is vested in the creditor absolutely and not by way of security, whilst the mortgagee's right is vested conditionally subject to its redemption by the creditor. A mortgage can exist only on immovable property, but a lien can exist both on immovable or movable property. Mortgage is created only by act of the parties, while a lien arises only by operation of law. A lien-holder can satisfy himself by a private sale or by retaining possession of the property, and a lien is possessory and exists so long as the possession lasts.

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

149. Modes of Acquisition : Possession

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

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

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

superior claims of the true owner. Thus, a thing owned by one person and adversely possessed by another, has two owners, the ownership of the one is absolute and perfect, while that of the other is relative and imperfect.

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

150. Prescription

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

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

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

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

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

A PERFECT NEGATIVE PRESCRIPTION

It is the destruction of the right itself, *e.g.* the destruction of the ownership of land through dispossession for twelve years. In this case the person in dispossession not only loses his right of action for the recovery of the land but also he loses the right of ownership itself. His ownership has been extinguished by the operation of the negative prescription. Such negative prescription is said to be perfect.

IMPERFECT NEGATIVE PRESCRIPTION

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

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

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

Prescription is not limited to rights *in rem* (right in respect of a thing). It is found within the sphere of obligations as well ; but posi-

tive prescription is possible only in the case of those rights which admit of possession. Personal rights (rights *in personam*) are commonly extinguished by their exercise, and, therefore, cannot be acquired or possessed by positive prescription. Thus, a creditor loses his right of action after a particular time, but there cannot be any positive prescription created by the extinction of the remedy.

151. Agreement

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

Assignment—By assignment existing rights are transferred from one owner to another. Thus, an assignment of a lease means the transfer by agreement of a subsisting lease-hold right from the assignor to the assignee.

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

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

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

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

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

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

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

152. Inheritance (Intestate Succession)

When a person dies, certain rights, which he possessed while alive, survive him and the rest die with him. Those which survive him are called heritable rights and the latter, uninheritable. The former comprise those with respect to right to things (*in rem*) and the latter with respect to personal rights (*in personam*), such as status, dignity etc. Thus, in respect of the death of the owner, all rights are divisible into two classes—(1) inheritable and (2) uninheritable.

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

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

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

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

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

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

The rights which a dead person leaves behind vest in his representatives. The representative of a dead man (though the property of

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

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

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

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

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

CHAPTER XVIII

THE LAW OF OBLIGATION

154. The Nature of Obligation

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

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

Thirdly or lastly, all obligations pertain to the sphere of proprietory right *i. e.* they pertain to the estate and not the status of a person. They form part of the estate of him who is

entitled to them. Rights which relate to a person's status such as those created by marriage, are not obligations, even though they are rights in personam or a duty which corresponds to such rights.

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

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

Choses in action are, however, opposed to choses in possession though the latter term has since fallen out of use. The true nature of the distinction between the two has been the subject of much discussion. At the present day, if any logical validity at all is to be ascribed to it, it must be with that between the real and personal rights, that is to say, with a common distinction between *dominium* and *obligatio*. A chose in action is a proprietary right in personam. All other proprietary rights are choses in possession. If we regard the matter historically, however, it becomes clear that this is not the original meaning of the distinction. In its origin a chose in possession was a thing or right which was accompanied by possession; while a chose in action was anything or right of which the claimant had no possession, but which he must obtain, if need be, by way of action at law. Money in a man's purse was a thing in possession; money due to him to by a debtor was a thing in

action. This distinction was largely, though not wholly, coincident with that between real and personal rights, for real rights are commonly possessed as well as owned, while personal rights are commonly owned but not possessed. This coincidence, however, was not complete. A chattel, for example, stolen from its owner was reduced, so far as he was concerned, to a thing in action; but a right of ownership was not thereby reduced to a mere *obligatio*.

As the extraordinary importance attributed to the fact of possession, which was the characteristic feature of the early law, diminished, the original significance of the distinction between thing in possession and thing in action was lost sight of, and these terms have gradually acquired a new meaning. Originally shares and annuities would probably have been classed as things in possession, but they are now things in action. Conversely lands and chattels are now things in possession, whether the owner retains possession of them or not. Obligations were always the most important species of things in action, and they are now the only species. Neither the old law nor the new gives any countenance to the suggestion made by some that immaterial property, such as patents, copyrights and trade-marks, should be classed as choses in action.

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

155. Solidary Obligation

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

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

In English law solidary obligations are of three distinct kinds :—

(i) Several, (ii) Joint, and (iii) Joint and Several.

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

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

(b) There are as many distinct debts and causes of action as

there are debtors *i. e.* the sources of obligations are different and distinct in origin. Each debtor is bound to pay the creditor by a distinct and independent obligation.

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

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

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

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

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

(3) Separate judgments obtained in distinct actions against two or more persons liable for the same debt. Two persons jointly and severally liable on the same contract, may be separately sued and judgment may be obtained against each of them. In such a case they are no longer jointly liable at all ; each is now severally liable for the amount of his own judgment ; but these two obligations are solidary, inasmuch as the satisfaction of one will discharge the other.

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

to say, they must have acted together with the same common purpose. If not, they may be liable in *solidium* and severally for the common harm to which their separate acts contribute ; but they are not liable as joint wrong-doers.

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

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

Where, on the contrary solidary obligations are several and not joint, performance by one debtor will release the others, but in all

other respects the different obligations are independent of each other. Thus, examples of joint obligations are the debts of contracts, and all other solidary obligations *ex contractu* which have not been expressly made joint and several by the agreement of the parties.

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

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

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

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

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

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

Question is—on what principle does the law determine the class to which any solidary obligaion belongs ? Salmond says, (i) obligations are several when although they have the same subject-matter, the sources of such obligations are distinct in origin. Examples are as already cited, the liability of a principal debtor and that of his surety, provided that suretyship is subsequent to and independent of the

debt guaranteed ; so is the liability of two or more co-sureties who guarantee the same debt independently of each other. (ii) Obligations are joint, when they have not merely the same subject-matter, but also the same source. Examples are the debts of partners, where the principal debtor and the surety sign a joint bond etc. (iii) Joint and several obligations, in the third place, are those joint obligations in which the law for special purposes chooses to treat them in special respects as if they were several. Like those which are purely and simply joint, they have the same source as well as the same subject-matter; but the law does not regard them consistently as comprising a single **vinculum juris**. Examples are the liabilities of those who jointly commint a tort or a breach of trust, and also all the contractual obligations which are expressly made joint and several by the agreement of the parties.

156. The Source of Obligations : Contractual (Obligations *ex contractu*)

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

Obligations arising from Contracts—The first and most important class of obligations consists of those which are created by contract. We have considered the nature of contract in a former chapter, and there we have seen that a contract is, in general, that kind of agreement which creates rights *in personam* between the parties to it. Now of rights *in personam* obligations are the most numerous and important kind, and of those which are not obligations, comparatively few have their source in the agreement of the parties. The law of contract, therefore, is almost wholly comprised within the law of obligation, and for the practical purpose of legal classifications it may be placed there with sufficient accuracy. The coincidence of obligations arising from contract is not, however logically complete : a promise of marriage, for example, being a contract which falls within the law of status and not within that of obligations. Neglecting, however, this small class of personal contracts, the general theory of contract is simply a

combination of the general theory of agreement with that of obligation, and does not call for any further examination in this place. Salmond has, however, pointed out that the obligations to pay damages for a breach of contract is itself to be classed as contractual, no less than the original obligations to perform the contract.

157. Obligations arising from Tort (*ex delicto*)

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

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

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

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

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

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

(b) The second class of cases is one which involves considerable difficulty, and the law on this point cannot yet be said to have been thoroughly developed. In certain instances a breach of contract made with one person creates liability towards another person, who is no party to the contract. It is a fundamental principle that no person can sue on a contractual obligation, except a party to the contract; nevertheless, it sometimes happens that one person can sue on a delictal obligation for the breach of a contract which was not made with him, but from the breach of which he has suffered unlawful damage. That is to say, a man may take upon himself, by a contract with A, a duty which does not already or otherwise rest upon him, but which, when it has once been undertaken, he cannot break without doing damage to B, a third person, as the law deems actionable. Thus, if X lends his horse to Y, who delivers it to Z, a stable-keeper, to be looked after, and fed, the horse is injured or killed by insufficient feeding, presumably Z is liable for this, not only in contract to Y, but also in tort to X, the owner of the horse.

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

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

158. Obligations arising from Quasi-Contracts

There are certain obligations which are not in reality contractual, but which the law regards as if they were. These obligations are enforced by the law on equitable principles where the circumstances are such that although there is no actual contract between the parties, the law presumes or implies a contract and imposes duties upon the person bound as if a contract had in fact been made. They are contractual by fiction of law, but not in fact. The Romans call them *obligations ex contractu.* English lawyers call them quasi-contracts or implied contracts, or often enough contract simply and without qualification. We are told, for example, that a judgment is a contract, and that a judgment debt is a contractual obligation. "Implied

(contracts)", says Blackstone, "are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform." "Thus it is that every person is bound, and has virtually agreed, to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law". So the same author speaks, much too widely indeed of the "general implication and intendment of the courts of judicature that every man has engaged to perform what his duty or justice requires". Salmond says, "It is a fictitious extension of the sphere of contract to cover obligations which do not in reality fall within it. In other words, *quasi*-contracts are those contracts which are implied by the law.

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

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

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

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

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

159. Innominate Obligations

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

CHAPTER XIX

THE LAW OF PROCEDURE

160. Substantive Law and the Law of procedure

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

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

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

Therefore, according to Salmond, the law of procedure is that branch of law which governs the process of litigation. It is the law of actions or proceedings, using the term actions in a wide sense to include all legal proceedings. Substantive law relates not to the process of litigation but to the definition of the right and of the remedy. It defines the right and the remedy, while the law of procedure defines the modes and conditions

of the application of the one to the other. The substantive law is concerned with the ends of which the administration of justice seeks, whereas the law of procedure deals with the means and instruments by which these means are to be attained. What act constitutes a wrong and whether an offence is punishable with fine or imprisonment are questions of substantive law. What facts constitute proof of a wrong and whether an offence is punishable summarily or only on indictment are questions of procedure.

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

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

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

(3) The Limitation Act is the procedural equivalent of the presumption of rights. The former (Limitation Act) bars the remedy and leaves the imperfect

right subsisting ; the latter leaves no right at all. The former is the operation of time in severing the bond between right and remedy ; the latter is the operation of time in destroying the right. But save in this respect their practical effect in law is the same, although their form is different.

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

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

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

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

Judgment—It is the decision itself.

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

161. Definition and classification of evidence

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

is a chain of evidence, *A* being evidence of *B*, *B* of *C*, *C* of *D*, and so on, each intermediate fact is evidential in respect of all that follow it and principal in respect of all that precede it.

Various Kinds of Evidence :

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

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

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

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

Direct evidence is commonly considered to excel the other in probative force. This, however, is not necessarily the case, witnesses may lie, and it is usually more defficult to

fabricate a convincing chain of circumstantial evidence than to utter a direct lie. Circumstantial evidence of innocence may well prevail over direct evidence of guilt; and circumstantial evidence of guilt may be indefinitely stronger than direct evidence of innocence.

162. The valuation of evidence : Probative force of evidence

The law of evidence comprises two parts :

(1) The probative force of evidence, and

(2) The production of evidence.

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

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

CONCLUSIVE PRESUMPTION OR PROOF

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

a fact as conclusive proof of its existence or non-existence, it is said to constitute a conclusive presumption.

REBUTTABLE OR CONDITIONAL PRESUMPTION OR PROOF

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

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

INSUFFICIENT EVIDENCE

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

EXCLUSIVE EVIDENCE

These are certain rules of evidence which declare that certain evidence regarding certain facts shall be given in a particular manner only, none other being admissible. In this

case, the law lays down a mode of proof and disallows any other method of proof. For example, a document must be proved by at least one of the attesting witnesses and if no witness is produced at all, the document cannot be said to be proved. Similarly, a written contract can be proved in no other way than by the production of the writing itself, whenever its production is possible. A contract for sale of land cannot be proved except by the production of the document itself and that too is not admissible if it is not registered in case the value of the property affected by it exceeds a hundred Taka and so on.

NO EVIDENCE *i.e.* FACTS WHICH ARE NOT EVIDENCE

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

163. The production of evidence

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

The production of evidence is determined by certain rules. This rules determine, among other things, what evidence should be excluded on the grounds of public policy, what

evidence is irrelevant and so on. Considerations of expense, delay, vexation, and the public interest require much evidence to be excluded which is of undoubted evidential value. For example, a public official cannot be compelled to give evidence as to affairs of the state, nor is a legal adviser compellable to disclose communications made to him by or on behalf of his client.

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

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

APPENDIX

THE MAXIMS OF THE LAW

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

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

(1) *Actus non facit reum nisi mens sit rea*

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

(2) *De minimis non curat lex*

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

(3) *Cogitationis poenam nemo patitur*

The thought and intents of men are not punishable, the law takes notice only of the overt and external act. In exceptional



cases, however, the opposite maxim is applicable—*voluntas reputatur profacto*—The law takes the will for the deed.

(4) *In jure non remota cousa and proxima spectatur*

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

(5) *Impossibilium nulla obligatio est*

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

(6) *In pari causa potior est conditio possidentis*

Possession and ownership are presumed by law to be coincident. Every man may, therefore, keep what he has got, until and unless some one else can prove that he himself has a better title to it.

(7) *Invito beneficium non datur*

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

(8) *Nemo teneture se ipsum accusare*

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

(9) *Nemo dat qui non habet*

No man can give better title than that which he himself has. (For the exception to this maxim, *see* Agreement at page 328).

(10) *Nulla poena sine lege*

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

(11) *Qui facit per alium, facit per se*

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

(12) *Qui prior est tempor potior est jure*

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

(13) *Respondeat superior*

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

(14) *Res judicata pro vertitate accipitur*

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

(15) *Superficies solo cedit*

Whatever is attached to the land forms part of it.

(16) *Ubi jus ibi remedium*

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

(17) *Volenti non fit injuria*

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

(18) *Summum jus summa injuria*

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